

Storm and Havoc: Religious Exemptions and the Rule of Law

*Léonid SIROTA**

Tempête et chaos : exemptions religieuses et primauté du droit

Tempestad y caos : exenciones religiosas y la primacía del derecho

Tempestade e destruição : exceções religiosas e o Estado de Direito

风暴与破坏：宗教豁免与法治

Résumé

L'octroi d'exemptions à des lois d'application générale à des membres de groupes religieux suscite la controverse. C'est le cas parce que, entre autres, une exemption semble élever ceux qui en bénéficient au-dessus des lois ordinaires et leur permettre de faire la loi eux-mêmes. Le présent article étudie le fondement théorique de telles affirmations : le conflit entre les exemptions religieuses et l'idéal de la primauté du droit, dont les élaborations influentes soulignent l'importance de la généralité du droit. L'article considère les divers sens de la généralité du droit et explique les raisons pour lesquelles les exemptions religieuses sont problématiques dans l'optique de la primauté du

Abstract

Exemptions from laws of general application for members of religious groups are controversial. One reason for this is an exemption seems to elevate those to whom it is granted above the ordinary law, and to make them a law unto themselves. This article examines the theoretical foundation for such claims: the conflict between religious exemptions and the ideal of the Rule of Law, influential accounts of which emphasize the requirement of legal generality. It inquires into the different meanings of legal generality and explains why religious exemptions are problematic from a Rule of Law perspective. It scrutinizes the usual defences of religious exemptions and points out

* B.C.L./LL.B. (Hons.) (McGill), LL.M. (N.Y.U.), J.S.D. Candidate (N.Y.U.). I am grateful to Robert Howse, Sean M. Kelly, Simon Murray, Jeremy Waldron, Michael Young, and an anonymous reviewer for reading and commenting on previous versions of this article; any remaining errors or omissions are, of course, my own.

droit. Il examine les défenses courantes des exemptions religieuses et en souligne les faiblesses. Cependant, il soutient que, parce que la liberté religieuse, que les exemptions aident à assurer, et la primauté du droit elle-même ont le même fondement philosophique, soit la dignité de la personne comme agent moral autonome, la relation entre les exemptions religieuses et la primauté du droit n'en est pas une de pur antagonisme. La tension qu'exposent les critiques des exemptions religieuses est réelle, mais certaines de ces exemptions devraient, néanmoins, être accordées. L'article esquisse un cadre pour décider quelles exemptions religieuses devraient être accordées et se conclut sur des remarques concernant les institutions qui peuvent être chargées de prendre la décision d'accorder ou non une telle exemption.

Resumen

La concesión de exenciones a la aplicación de las leyes a miembros de grupos religiosos suscita controversia. Una de las razones de esta controversia parece ser porque dichas exenciones dan la impresión de elevar por encima de las leyes ordinarias a los que gozan de estos privilegios y así permitirles que dicten la ley. El artículo estudia el fundamento teórico de tales afirmaciones: el conflicto entre las exenciones religiosas y el ideal de la primacía del derecho, cuyas elaboraciones subrayan la importancia de la aplicación general del derecho. El artículo tiene en cuenta la diversidad de sentidos que se le ha dado al concepto de la aplicación general del derecho y explica las razones por las cuales las exenciones religiosas son problemáticas en la óptica de la primacía del derecho. Se examina igual-

their weaknesses. Nevertheless, it argues that because religious freedom, which exemptions help secure, and the Rule of Law are based on the same philosophical foundation, the dignity of the person as an autonomous moral agent, the relationship between religious exemptions and the Rule of Law is not purely antagonistic. The tension which the critics of exemptions expose is real, but some religious exemptions ought to be granted. The article outlines a framework for deciding when religious exemptions should be granted and when denied, and concludes with some observations on the institutions that can be entrusted with deciding whether to grant an exemption.

Resumo

A concessão de exceções às leis de aplicação geral aos membros de grupos religiosos suscita controvérsias. Isto acontece porque, entre outros, uma exceção parece colocar seus beneficiários acima das leis gerais, permitindo lhes legislar em causa própria. O presente artigo estuda o fundamento teórico de tais afirmações: o conflito entre exceções religiosas e o ideal do Estado de Direito, o qual ressalta a importância da generalidade do direito. O artigo leva em consideração os múltiplos sentidos da generalidade do direito e explica as razões pelas quais as exceções religiosas são problemáticas na ótica do Estado de Direito. Ele examina as defesas atuais da exceções religiosas e ressalta seus pontos fracos. Entretanto, o artigo sustenta que, como a liberdade religiosa, que as exceções ajudam a assegurar, e o

mente las posiciones de los defensores de las exenciones religiosas y se subrayan las debilidades. Sin embargo, se sostiene que, debido a que tanto la libertad religiosa, a la que las exenciones tienden a proteger, como la primacía del derecho tienen el mismo fundamento filosófico, es decir la dignidad de la persona como agente moral autónomo, por ende, la relación entre las exenciones religiosas y la primacía del derecho no es de antagonismo puro. La tensión de la que hablan los críticos de las exenciones religiosas es verdadera, pero algunas de estas exenciones deberían, sin embargo, ser concedidas. El artículo esboza un marco para decidir cuales exenciones religiosas deberían ser concedidas y se concluye con observaciones que conciernen a las instituciones que estarían encargadas de tomar la decisión de conceder o no tal exención.

Estado de Direito têm o mesmo fundamento filosófico, ou seja a dignidade da pessoa como um agente moral autónomo, a relação entre as exceções religiosas e o Estado de Direito não é puramente antagonica. A tensão, exposta pelos críticos das exceções religiosas, é real, mas algumas dessas exceções deveriam, contudo, ser concedidas. O artigo propõe um quadro de análise a fim de decidir quais exceções religiosas deveriam ser concedidas e conclui com considerações sobre as instituições que podem se encarregar de tomar a decisão de conceder ou não tais exceções.

摘要

对宗教团体成员的法律豁免存在争议。原因之一：豁免使得被豁免的人凌驾于法律之上，进而被豁免的人自我立法。本文考察这种观点的理论基础：宗教豁免和法治理想之间的冲突，因为有影响力的观点强调法律的普遍性。本文探究法律普遍性的不同涵义，解释为什么宗教豁免从法治的角度尚存疑问。本文还分析支持宗教豁免的理由，并指出这些理由的弱点。然而，本文认为，宗教豁免有助于保护宗教自由，宗教豁免和法治基于相同的哲学基础，即作为一个独立的道德主体的人的尊严。因此，宗教豁免和法治并不完全对立。对宗教豁免的批评是真实存在的，但某些宗教豁免应该承认。本文粗略地提出了一个理论框架，用于决定何种宗教豁免应该予以承认；并且，本文最后还讨论了哪些机关有权决定是否承认宗教豁免。



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The desideratum that laws be general, albeit expressed with varying degrees of strength, is a staple of various accounts of the Rule of Law¹. One of its best-known formulations belongs to A.V. Dicey, who meant by “the rule of law [...] not only that [...] no man is above the law, but [...] that [...] every man [...] is subject to the ordinary law of the realm”². Dicey was most concerned with legal privileges for the government and its officials, but his ideal of “legal equality”³ naturally implies also that no class of private citizens ought to bear burdens or enjoy privileges not imposed or conferred upon others.

However, a law that is on its face the same for all citizens may in fact impose unique burdens on some of them. Those disproportionately affected by the law are likely to demand an exemption from its application. This demand can be addressed to the legislature which is considering adopting (or amending) the law, an agency responsible for its administration, or a court charged with its enforcement.

Whatever the forum and the circumstances in which a demand is made, it conflicts with the ideal of the Rule of Law. (One may argue that if the exemption is provided legislatively, it is not really problematic. But although legislation inevitably makes distinctions between classes of persons, a statute riddled with exemptions is still troubling if one is serious about “legal equality.”) However, because the realization of the ideal of the Rule of Law is a matter of degree, and is in any event “just one of the virtues which a legal system may possess and by which it is to be judged”⁴, it may yield to other ideals that we hold dear. The questions, in each case, are whether the other ideal invoked in that case is sufficiently important to warrant a departure from the strict requirements of the Rule of Law, and whether the departure that it demands is not so serious as to undermine the Rule of Law to an unacceptable degree.

The question this article sets out to explore is whether religious freedom is one such ideal. In other words, can the claim that conforming to a

¹ I capitalize the term “Rule of Law” so as clearly to distinguish it from the phrase “(a) rule of law.”

² Albert Venn DICEY, *Introduction to the Study of the Law of the Constitution*, 8th ed., London, MacMillan, 1915, p. 189.

³ *Id.*

⁴ Joseph RAZ, “The Rule of Law and its Virtue”, (1977) 93 *L.Q. Rev.* 195, 196.

general law would be an insufferable burden on one's freedom of religion justify the creation, whether by legislatures, agencies, or courts, of an exemption from that general law in favor of the claimant? Today this issue is perhaps most salient in the context of the larger debate on the role of religion in a democratic, pluralist polity⁵. Yet the fear that religious observance, rooted as it is in strong feelings and commitments, will lead to disrespect for the law and perhaps even a general state of lawlessness is not new. Even supporters of religious freedom have long noted it, as appears from the admixture of trepidation and exhilaration in Lord Acton's description of "the equal claim of every man to be unhindered by man in the fulfillment of duty to God [as] a doctrine laden with storm and havoc [...] and the indestructible soul of the revolution"⁶.

The article will proceed as follows. Part I will introduce the problem of exemption, and the difficulty it presents for the Rule of Law. Part II will introduce, more specifically, an objection to the granting of exemptions on the basis of religion. Part III will critically survey the justifications on which defenders of religious exemptions tend to rely. Part IV will step back from the issue of religious *exemption* to consider the reasons for protecting religious *freedom* in general. Part V will return to the issue of exemption, reconstructing a defense for religious exemptions on the basis of the general rationale for protecting religious freedom established in the previous part. Part VI will outline some limits to the granting of exemptions. Finally, Part VII will turn to the question of the best forum for granting religious exemptions.

Before proceeding further, it is useful to say a few words on the ambit and limitations of this article. First, while it will rely on Canadian and American case law for examples of factual situations and of reasoning, it does not attempt to describe with any degree of comprehensiveness the state of the law on the issues with which it is concerned in any jurisdiction.

⁵ See e.g.: Charles TAYLOR, "How to Define Secularism", online: <http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_067143.pdf> (accessed May 4, 2013), for a thoughtful overview of this debate.

⁶ John Emerich Edward ACTON, *Lectures on Modern History*, London, MacMillan, 1906, p. 10 and 11.

The essay is theoretical in approach and not tied to a specific constitutional arrangement or text.

Second, because the article is concerned with the tension between claims of religious freedom and the exigencies of the Rule of Law, it deals exclusively with the public sphere. It is not concerned with demands for religious accommodation made of private parties (or indeed public institutions in private law relationships, for example in the employment context). There is, however, an overlap between the issues that arise in these two types of situations. In particular, the very notion of religion and the nature of religious belief are the same whether they must be dealt with in a public or a private context.

Third, the article is only concerned with conflict between generally valid legislation and religious belief, rather than with cases where the law in question is on its face contrary to religious freedom, whether because it is specifically designed to prohibit some religious observances or because it amounts to an endorsement by the state of a particular religious creed. In such a case it would be futile to speak of exemptions. Freedom of religion could only be preserved by not adopting such a law, repealing it or, if judicial review of legislation is possible, striking it down. None of these solutions is problematic from a Rule of Law perspective.

Fourth, the article focuses on legislation that regulates conduct rather than on provision of public services, broadly understood. It is concerned with situations where the state requires persons to do or not to do something which their religious beliefs prohibits them from doing or demands that they do. Provision of services or even of legal powers raises important issues, still more fraught than regulation of conduct. For example, must the state provide prayer rooms in public facilities? Offer biology classes that do not mention evolution in public schools? Recognize the validity of arbitral decisions grounded in religious law? In resolving these issues, concerns over the Rule of Law are entangled with those over positive rights, and the citizen's right to practice his or her religion is intertwined with the liberal state's duty not to endorse a set of beliefs held by only some of its citizens. This article will not consider these issues because they deserve a fuller study than it is possible to undertake here, not because they are uninteresting.

I. Exemption and the Rule of Law

Generality of the law is usually said to be part of the political ideal of the Rule of Law⁷. But it is possible to use this notion of generality in two senses. One, which Lon Fuller used, is simply the existence of general rules to guide the conduct of the subjects of a legal system⁸. The second is the Diceyan ideal of “legal equality” – the principle that the law ought to be the same for all, doing no one any special favor⁹. This latter concept of generality is more demanding than the former; Fuller thought it part of the “external” rather than “internal” morality of law¹⁰, and it is certainly possible for rules of a legal system to be general in the Fullerian but not in the Diceyan sense. But the possibility that unfair or discriminatory laws that single out some citizens will be passed under the form of general rules is seen as a limit on the value of the Rule of law¹¹.

Religious – and other – exemptions from general rules conflict with the ideal of generality understood in either of these two ways. They both undermine the law as a system of rules and are at odds with the ideal of legal equality. I will deal with the tension between exemptions and the generality of the law in the narrow, Fullerian, sense in this Part, and with the conflict with Diceyan legal equality in the next.

Most obviously, exemptions are problematic from the point of view of Fullerian generality when they are granted in particular cases as a result of a judge’s exercise of discretion or “equity”¹². Even genuinely general laws can impose disproportionate hardships on those subject to them. Aristotle

⁷ In this article, I am only referring to “formal” understandings of the Rule of Law, not substantive ones which include the protection of human rights. However, adopting an understanding of the Rule of Law which incorporates human rights as part of the ideal, rather than a (sometimes) competing political value does not make the conflict I describe go away; it merely becomes one between two facets of the same ideal rather than between distinct values.

⁸ See: Lon L. FULLER, *The Morality of Law*, Revised Edition, New Haven, Yale University Press, 1969, p. 34, 39 and 46-49.

⁹ See: A.V. DICEY, *supra*, note 2, p. 189.

¹⁰ L.L. FULLER, *supra*, note 8, p. 47.

¹¹ J. RAZ, *supra*, note 4, 196.

¹² Following Aristotle, I am using “equity” in non-technical sense, which ought not to be confused with the body of rules developed by the Court of Chancery. These rules became general and stable, and thus quite law-like.

observed that “law is in all cases universal, and on some subjects it is not possible to speak universally with correctness. In those cases where it is necessary to speak universally, but impossible to do so correctly, the law takes the most general case though it is well aware of the incorrectness of it”¹³. And when the law is applied to those cases, it is best to exercise “equity” – “a correction of law wherever it is defective owing to its universality”¹⁴.

The problem with generality in such cases is that the decision will not be according to law at all. Although the judge deciding a case in equity ought to try to apply to it the rule which the law itself would have provided had it anticipated the case¹⁵, he or she can do no more than guess, and ultimately, the decision is still the judge’s own, rather than dictated by the law. Legislators can remedy this difficulty by providing in advance for the exemptions which they can anticipate some citizens will request. But, as Aristotle noted, there is a limit to legislative foresight, so that this solution is at best a partial one.

And there is a subtler way in which exemptions run against even the Fullerian notion of legal generality, which cannot be addressed by writing exemptions into legislative texts. The very existence of exemptions can undermine the efficacy of legal rules, either by contributing to a sense of lawlessness among the people¹⁶, or by punching the existing rules so full of holes as to make them ineffective. An exemption means that the law will not be enforced according to its purported terms for those who come within the exemption’s scope. The more numerous the exemption’s beneficiaries are, the stronger the basis for a conclusion that the law was intended systematically to be disregarded. As Fuller observes, if the rule-maker “habitually disregards his own rules, he may find his system of law disintegrating, and without any open revolt, it may cease to produce for him

¹³ ARISTOTLE, *Nicomachean Ethics*, R.W. Browne, transl., London, George Bell and Sons, 1875, p. 145.

¹⁴ *Id.*, at p. 146.

¹⁵ *Id.*

¹⁶ See e.g.: PLATO, “Crito” in *The Dialogues of Plato*, Henry Cary, transl., London, George Bell & Sons, 1888, p. 31, at p. 40-44, where Socrates imagines the Laws of Athens worrying about being overthrown if even a single man, albeit a well-known one, escapes their (unjust) application.

what he sought to obtain from it”¹⁷. If this happens, general laws, although still on the books, will lose their usefulness as behaviour-guiding devices.

This worry seems to have motivated the opinion of the Supreme Court of the United States, unanimous on this point, in *Reynolds v. United States*¹⁸, denying a religious exemption to a Mormon accused of polygamy. According to Chief Justice Waite, to allow a man to continue his practices contrary to law because of his religious belief “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances”¹⁹. This last sentence, however, is somewhat of an exaggeration.

In fact, it will not always be true that the government of laws would always be fatally undermined by religious (or other) exemptions. Jeremy Waldron describes this issue as that of “room for exemption”²⁰. Suppose that we are inclined, having considered the balance between the claims of equity and the desire to decide cases according to law, to grant an exemption. Can the law – the legal system as a whole or, less dramatically but no less importantly, the particular regulatory scheme at issue – retain its character of general rule if we do so?

This problem can be particularly acute in the modern state, because of the breadth of its regulatory activities. The case of *Alberta v. Hutterian Brethren of Wilson Colony*²¹ is illustrative. The Hutterian Brethren are a

¹⁷ L.L. FULLER, *supra*, note 8, p. 48: note that this passage, drawn from Fuller’s discussion of “The Generality of Law” (p. 46-49), obviously connects this part of the Rule of Law ideal to the desideratum of “congruence between the rules as announced and their actual administration” (*id.*, p. 39).

¹⁸ 98 U.S. 145 (1878).

¹⁹ *Id.*, 166-167. Justice Scalia quoted this passage in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), even as he departed somewhat from the logic of the *Reynolds* decision, which held all action, even religiously motivated, to be subject to the government’s regulation (see: *Reynolds v. United States*, *supra*, note 18, 164), whereas in *Smith*, Justice Scalia acknowledged “that a State would be ‘prohibiting the free exercise [of religion]’ if it sought to ban ... acts or abstentions only when they are engaged in for religious reasons, or *only* because of the religious belief that they display.” (*Employment Division, Department of Human Resources of Oregon v. Smith*, *id.*, 877; emphasis added).

²⁰ Jeremy WALDRON, “One Law for All? The Logic of Cultural Accommodation”, (2002) 59 *Wash. & Lee L. Rev.* 3, 18.

²¹ [2009] 2 S.C.R. 567.

religious group, living in rural Alberta, maintaining a communal way of life, and trying to be self-sufficient. They do, however, have various commercial dealings with the outside world, and in order to carry out these activities, some members of the community need to have driving licenses. The province of Alberta requires that every driver's license bear a picture of its holder, but the Brethren's interpretation of the Second Commandment prohibits them from having their pictures taken with their consent. For many years, the province accommodated them by issuing special picture-less licenses. It put an end to this accommodation in 2003, as part of a programme to eliminate identity theft and fraud by means of facial recognition software and a data bank in which information about all driver's license holders would be stored. The Brethren turned to the courts to force the province to continue issuing them picture-less licenses. Writing for the majority in the Supreme Court of Canada, Chief Justice Beverley McLachlin observed that:

“Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs [...] to the overall detriment of the community.”²²

The Court rejected the Brethren's application, with three judges dissenting.

One point of disagreement between the majority and the dissenters, which relates to the issue of the “room for exemption,” was how far the object of the regulatory scheme must be carried out²³. The picture require-

²² *Id.*, para. 36.

²³ The majority and the dissenters also disagreed about the proper way of analyzing the case under s. 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 whether the “minimal impairment” or the “balancing of beneficial and deleterious effects” stages of the analysis had to do most of the work. On this point, see: José WOEHLING, “Quand la Cour suprême s’applique à restreindre la portée de la liberté de religion: l’arrêt *Alberta v. Hutterian Brethren of Wilson colony* (2009)”, (2011) 45 *R.J.T.* 7; Sara WEINRIB, “An Exemption for Sincere Believers: The Challenge of *Alberta v. Hutterian Brethren of Wilson Colony*”, (2011) 57 *McGill L.J.* 719. While this disagreement was significant for the outcome, or the justification of the outcome, in *Hutterian Brethren*, as Woehrling and Weinrib show, it is less significant for my present purpose, which is simply to present the issue of the “room for exemption,” regardless of whether it arises in judicial

ment was intended to counter identity theft. But was it necessary “to reduce that risk as much as possible”²⁴, as the Chief Justice put it, or was some lesser alternative – reducing identity theft, albeit not quite as much as a picture requirement – acceptable? In other words, the issue was how much the legislative scheme could be compromised before becoming ineffective and meaningless. This is a crucial question because, as Justice Abella pointed out in her dissent, “[i]t is not difficult for the state to argue that only the measure it has chosen will maximize the attainment of the objective and that all other alternatives are substandard or less effective”²⁵, defeating peremptorily any demands for an exemption. The more ambitious the legislative objective, and the more fully it must be realized, the less room for exemption there will be.

On the other hand, if courts, or indeed legislators, conclude that there is room for exemption in a regulatory scheme, some citizens are likely to argue that this is a sign that the regulatory scheme is in fact unnecessary; the state simply should not engage in regulation in this area²⁶. This argument is most potent with respect to (what is perceived to be) paternalistic legislation, such as the criminalization of drugs which some religious groups consider necessary to their worship, whether marijuana for Rastafarians, peyote for some American Indians, or wine for Catholics. Conversely, the argument goes, when the state does choose to regulate, it ought to regulate for all, without exception. If drugs really are a public danger, then they should be prohibited, period.

Brian Barry takes that position in his book *Culture and Equality*, arguing that instead of enacting general laws with exemptions for religious groups, legislatures should try – where this is possible – “to work out some less restrictive alternative form of the law that would adequately meet the objectives of the original one while offering the members of the religious

analysis under the *Charter* or some other rights-protecting document, or in the deliberations of a legislature.

²⁴ *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 21, para. 59.

²⁵ *Id.*, para. 147; see also para. 197 (Lebel J., dissenting).

²⁶ One might note that in a minimal state, there will of course be fewer occasions for conflict between the state’s norms and religious belief, and that deregulation – the more the merrier – is a solution to the Rule of Law difficulty I want to explore in this essay. But however sympathetic one is personally to this line of thought, a minimal state is not in the offing, and this solution is too unrealistic to detain us.

[...] minority whatever is most important to them”²⁷. A restrictive general law with an exemption for a religious group is a facile solution which results in the “invidiousness of having different rules for different people in the same society”²⁸.

But, while this argument points to the issue of legal equality, to which I will next turn, it is not persuasive if taken as based on the issue of room for exemption. First, as Waldron points out, demands for exemption do not always aim to avoid regulation in favour of a “regime of cheerful anarchy or individual liberty”²⁹. Those who make such demands might, on the contrary, seek to follow their own norms, which may be no less demanding than, though incompatible with, those imposed by the state³⁰. And second, in some cases, it may be possible to show that the exemption at issue can safely be granted to the claimants, due to their peculiar circumstances, even though it could not be granted to all without compromising the integrity of the regulatory scheme³¹. The applicants in *Hutterian Brethren* attempted to do just that, arguing that the regulatory scheme put in place by the province would not be seriously undermined by the exemption they requested, since few people would ask to avail themselves of it³². As the Supreme Court of the United States has pointed out, “[i]f I make an exception for you, I’ll have to make one for everybody, so no exceptions” is “the classic rejoinder of bureaucrats throughout history”³³. It is not always a good argument. For instance, whatever the problems with the enforcement of Prohibition in the United States were, they were not created by the use of sacramental wine by Catholic priests.

²⁷ Brian BARRY, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Cambridge, Harvard University Press, 2001, p. 39.

²⁸ *Id.*

²⁹ J. WALDRON, *supra*, note 20, 15.

³⁰ Waldron’s example is the slaughter of animals, which for observant Jews and Muslims is strictly regulated by religious norms, which they will seek to follow in preference to those imposed by the state: see *id.*, 15 and 16.

³¹ See e.g.: *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-431 (2006) (emphasizing the importance – in that case, in light of a specific statutory scheme – of deciding whether the exemption could be granted *to the specific claimant*).

³² See: *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 21, para. 59.

³³ *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, *supra*, note 31, 436; while the Court did not pause to notice this, its reasoning applies with equal force to bureaucrats who wear robes and render decisions such as *Reynolds v. United States*, *supra*, note 18 and *Employment Division, Department of Human Resources of Oregon v. Smith*, *supra*, note 19.

II. The Fairness Objection

If there is room for exemption in a regulatory scheme, the next question is who – if anyone – must benefit from the exemption. The claim of the person or group seeking the exemption on religious grounds will meet with what Waldron calls the “fairness objection”³⁴ – why should *that person or group* be exempt from a duty incumbent on everyone? This objection, which can be leveled against exemptions provided by legislation as well as those ordered by courts, highlights the tension between the demands for exemptions and the Rule of Law ideal of generality in the more demanding sense of legal equality.

If the Rule of Law requires that the law be the same for all, why should there be exceptions for anyone? And even if exceptions there should be, is religion a valid ground on which to decide in whose favor the exceptions should be made? Is it not discriminatory to – apparently – favour people on the basis of their religion? Thus in the British Columbia case of *R. v. Warman*, a man accused of riding a motorcycle without a helmet argued that a regulation allowing Sikhs wearing a turban to do just that amounted to discrimination against him³⁵.

One possible response to this objection is to say that the law already makes all kinds of exemptions in favour of various groups or persons³⁶. The judge in *Warman* used such an argument, holding that:

“Although most legislation is of general application, some legislation does for specific reasons occasionally contain exemptions for certain groups. [...] [S]uch exemptions cannot lead to a person falling outside the exempt group successfully arguing that the exemption discriminates against him or her.”³⁷

In effect, this is a rejection of formal “legal equality” as ideal of any weight in our political morality.

This rejection is unwarranted. Even if we accept that substantive, rather than formal, equality is the more important political value, and that formal equality must sometimes be compromised to achieve the substan-

³⁴ See: J. WALDRON, *supra*, note 20, 18-21.

³⁵ *R. v. Warman*, 2001 BCSC 1771.

³⁶ See: Kent GREENAWALT, “The Rule of Law and the Exemption Strategy”, (2009) 30 *Cardozo L. Rev.* 1513, 1521 making this argument.

³⁷ *R. v. Warman*, *supra*, note 35, para. 8.

tive sort, formal differences of treatment will often be a first warning sign of substantive inequality³⁸. Thus the assertion that the presence of an exemption in the law cannot ground a claim that the law in question is discriminatory will not always be true. For example, a provision in a taxing statute exempting the members of the legislature who passed it from having to pay the tax would be highly objectionable, and we could conceivably call it discriminatory.

Douglas Laycock is right to argue that:

“Exemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion [because] such a discriminatory pattern of exemptions shows that the legislature’s goals do not require universal application, and that the legislature values the exempted secular activities more highly than [...] religious activities.”³⁹

But arguably the existence of other exemptions is itself at odds with the ideal of the Rule of Law, and does not demonstrate the acceptability of, much less the need for, religious exemptions. And of course, there are many laws that are quite general and from which there are no exemptions; it might be more difficult to justify carving out exemptions out of these laws than adding one more exemption to laws from which there are many already. More importantly, if the law is littered with non-religious exemptions, the proper response, from the Rule of Law perspective, seems to be to abolish these, rather than to add yet another category, further compromising legal equality.

Before undertaking such a cleanup of our statute books, we might pause to note that there are different kinds of exemptions. Thus Kent Greenawalt writes that exemptions “might be based on someone’s status, activity, or belief”⁴⁰. He does not, however, explain the distinction between status- and activity-based exemptions. As for exemption based on belief,

³⁸ See e.g.: *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 61-64 holding that the first step in a substantive equality analysis is to determine whether a law creates a “distinction,” most obviously by singling out a group for facially differential treatment, though possibly also due to disproportionate effects on a group of a formally neutral rule.

³⁹ Douglas LAYCOCK, “The Remnants of Free Exercise”, 1990 *Sup. Ct. Rev.* 1, 50.

⁴⁰ K. GREENAWALT, *supra*, note 36, 1521.

they seem to have to do with states of mind, for example the intent or negligence of a person engaged in an activity which, depending on the person's state of mind might be classified as criminal or innocent, tortious or lawful. Greenawalt's point is that since exemptions are such a habitual feature of our legal landscape, we should not make too much of those that concern religion. But as explained above, this conclusion is not obviously the right one.

I would suggest that there is indeed a useful distinction to be made between at least two sorts of exemptions, those linked to status being much more troubling than those linked to activities. Exemptions based on special activities the exempt person is engaged in – for example an exemption from liability in negligence for a rescuer, or an exemption from speed limits for police officers chasing a suspect⁴¹ – are not problematic insofar as there are sound policy reasons behind them. These exemptions protect actions, not persons, because these actions have some special social value⁴². But other exemptions are linked to the status of their beneficiaries, and these are more likely to ring alarm bells; the tax exemption for legislators that we have imagined is of this sort. Such exemptions protect persons, without any link to any socially valuable actions they might be engaged in, and offend our notions of legal equality⁴³.

Where does religion fit in this scheme? It is tempting to answer that religion is similar to status; belonging to a particular religion is much like belonging to a particular race or gender, a more or less immutable and morally indifferent personal characteristic. And it is certainly possible to imagine some religious exemptions that would seem unfair in the same

⁴¹ Note that Greenawalt describes exemptions for police officers from the usual prohibitions on the use of force as being based on status: see *id.*, 1522. I think this description is misleading. Police officers can only avail themselves of these exemptions insofar as they are carrying out their policing duty. A policeman is no more entitled to beat his spouse, be cruel to his cat, or defraud the taxman than any other person – such entitlements would indeed be exemptions based on status rather than activity. Nor is he allowed to break speed limits on his commute to work – only when the activity he is engaged in makes such violations of generally applicable rules necessary.

⁴² In economic terms, we might say that such actions create positive externalities, and the exemption is a way in which the society absorbs (part of) the attendant cost of these actions, which it would be unfair or inefficient to impose on the person carrying out the action.

⁴³ In economic terms, we might speak of subsidies or even rents that the exempt persons manage to extract from society.

way as status-based exemptions are; a provision saying that the members of a specific sect are to pay no income tax is no less offensive than a similar provision benefitting legislators. But not all – perhaps not many – claims for religious exemptions are of this nature. Religion does not only help define what a person *is*; it helps dictate what the person *believes* and *does*. Whether some religious exemptions can be defended against the fairness objection will then turn on justifying the claim that these exemptions are, in some ways, different from those based on status (whether they are akin to those based on activity or belong a category of their own, which we might call belief-based exemptions, though using this notion rather differently from Greenawalt).

III. Justifying Religious Exemptions

A. Policy Justifications

The first kind of justification that can be advanced in support of religious exemptions is that their recognition is a good policy, desirable or necessary to realize a goal valued in society, such as equality, pluralism, or multiculturalism⁴⁴. Richard Posner and Michael McConnell suggest another explanation for why a majority might prefer to grant religious exemptions, which is perhaps the more interesting for being less high-minded and more self-interested. Taking an economic approach the question of religious freedom generally and exemptions specifically, they treat religions (and the organized structures associated with them) as suppliers in a variety of markets. They observe that:

“Religious institutions provide many things: instruction about universal and transcendental truths; opportunities for ritual and worship; guidance about how to lead an ethical and satisfying life; care for the poor, the sick, the

⁴⁴ Such a goal can even be enshrined in a constitution, as is the case with multiculturalism in Canada: see *Canadian Charter of Rights and Freedoms*, s. 27, *supra*, note 23, or in a quasi-constitutional instrument. However, constitutional protection is not, in itself, an independent policy justification for exemptions; rather, it is only a reflection of a prior judgment, whether based on policy or on principle. Furthermore, (quasi-) constitutional provisions tend to be very general, and not to dispose of the actual issue whether or not exemptions ought to be granted. Interpretations of equality, and even multiculturalism, protections that reject exemptions are, in my view, mistaken, but not unreasonable, and there are good arguments in their favour, which this article addresses.

orphaned, and the alien; facilities for promoting fellowship and a sense of community.”⁴⁵

Laws that affect religious beliefs and institutions act as barriers to new suppliers’ entry in these markets or to the existing suppliers’ ability to remain in business. Exemptions, on the other hand, “reduce the cost of practicing such faiths and by doing so tend to increase the variety of faiths, which in turn enables more people to find a set of religious practices and beliefs they can share”⁴⁶. In other words, exemptions are a sort of deregulation which increases consumer choice and welfare. Yet another possibility to consider with respect to some (though by no means all) exemptions is that the grudging compliance of a believer who is forced to obey a law against the demands of his conscience may be useless, perhaps even harmful. A pacifist forced to serve in the armed forces is unlikely to make a good soldier, and the military is probably better off replacing him with a person who does not feel the same reluctance to do the duty imposed on him.

Whichever version one prefers, a justification rooted in the idea that religious exemptions are socially valuable is attractive because it appeals to the preferences or even self-interest of a majority of citizens. It ought thus to appeal to legislators, who could advance the interests of their constituents by making religious exemptions a feature of the legislation they enact. This might be done in a piecemeal fashion (for example by adding a Sabbatarian exemption to a law providing for a common day of rest for retail commerce⁴⁷) or comprehensively, as the U.S. Congress attempted to do with the *Religious Freedom Restoration Act*⁴⁸ “imposing, as a matter of statutory law, strict scrutiny of all laws substantially burdening free exercise”⁴⁹.

⁴⁵ Richard POSNER and Michael W. McCONNELL, “An Economic Approach to Issues of Religious Freedom”, (1989) 56 *U. Chi. L. Rev.* 1, 4 and 5.

⁴⁶ *Id.*, 55.

⁴⁷ As in the Ontario statute at issue in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

⁴⁸ Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. § 2000bb (1994), also known as “RFRA”.

⁴⁹ Michael C. DORF, “God and Man in the Yale Dormitories”, (1998) 84 *Va. L. Rev.* 843, 850; note that in this case the exemption requirement is not absolute since it would not avail against a provision that survives a strict scrutiny challenge – this is inevitable in a statute that grants in advance exemptions from an unknown number of unknown future laws; see Part VI, *infra*, for a discussion of necessary limits to religious exemptions.

But even a judge applying it to carve an exception from a statute will be able plausibly to claim that he is, like an Aristotelian judge pursuing equity, merely completing the work of the legislature and furthering its intent. (Of course this would be most obviously so under an *RFRA*-type regime, since there the legislature explicitly orders the judges to create exemptions.)

But the policy justifications for religious exemptions may not actually be supported by popular majorities. Many would contest the importance, or even appropriateness, of pluralism or multiculturalism as social goals to be pursued at the expense of the Rule of Law (or indeed at all). Similarly, those who have already found a faith to their liking, or have decided that they need none, may attach little value to the ability of others to make this choice, especially in favor of an option different from the one they prefer, or even to having an opportunity to change their own mind in the future. Not only will different polities attach varying importance to the policy considerations favorable to religious exemptions, but we can expect variations to occur, perhaps suddenly, in the same polity over time (for example in response to shifting immigration patterns or new security concerns). If the attractiveness of the policy arguments to electoral or legislative majorities decreases, believers who rely on exemptions to structure their lives and their relationship with the state can suddenly find themselves newly vulnerable. To be sure, constitutionalizing policy judgments about, say, the value of multiculturalism, might provide a measure of stability for the protection of religious exemptions, depending on the difficulty of amending the constitutional provision in question and the willingness of judges to enforce it. But if religious exemptions are to be justified independently of the vagaries of changing public opinion and of the precise wording of a specific constitutional text (not to mention the vagaries of its (re-)interpretation by judges), the justification must be rooted in fundamental rights⁵⁰.

⁵⁰ I speak of “fundamental” rights rather than “natural” rights because I do not wish to take a position on the issue whether they are in fact natural or contingent on a polity’s culture and history; of “fundamental” rather than “constitutional” rights because it is possible to be committed to such rights whether or not they are enshrined in a (written) constitutional text; and of “fundamental” rather than “individual” rights because, as I shall explain, religious freedom at least can be taken to be a collective as well an individual right.

B. Strong Communitarian Justification

The first rights-based justification for religious exemptions, which I will call the strong communitarian justification, is based on the claim that there is a collective aspect to religious feeling and practice, and therefore to religious freedom. Religions are not only sets of beliefs, commandments, and prohibitions mandatory for their individual adherents. They also give rise to communities, with their distinctive traditions, practices and identities. Exemptions, on this view, are necessary because they help protect the distinct character of these communities.

Those who hold this view warn against a certain caricature of religion which, as Laycock puts it, “assumes that religions lay down certain binding rules, and that the exercise of religion consists only of obeying the rules. It is as though all of religious experience were reduced to the Book of Leviticus”⁵¹. Although rules and obedience to rules play an important role in many religions, and a central one in some, they are not all there is to religious faith⁵²; by focusing on the rules, one neglects other aspects of a religious life.

One such aspect is that a religious life is a communal one. Religious freedom is not only “about belief, but also about the maintenance of communities of faith”⁵³. Such a community “shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations”⁵⁴. As Timothy Macklem notes,

“[f]rom a conceptual point of view, it is clearly part of the nature of religion to be a social enterprise. Indeed, it is not possible to think of a religion with only one believer [...] A person who constructs his or her own doctrine and commits himself or herself to that doctrine on the basis of faith is a visionary, not a religionist. Such a person only becomes the founder of a religion, and thus a participant in that religion, when others join in the faith and commit themselves, not only to the doctrines of the visionary, but to the creation and development of institutions and practices [...] The collective participation in belief is central to the meaning of religion.”⁵⁵

⁵¹ D. LAYCOCK, *supra*, note 39, 24.

⁵² *Id.*, 26.

⁵³ *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 21, para. 182 (Lebel J., dissenting).

⁵⁴ *Id.*

⁵⁵ Timothy MACKLEM, “Faith as a Secular Value”, (2000) 45 *McGill L.J.* 1, 25.

Thus religious rights are not only individual, but also collective. Respecting them means not only avoiding placing an individual in a situation where he must choose between following the law and complying with the rules of his religion, but also not interfering with the communities that arise with and constitute religions. This is a demanding claim to make on the modern state, which regulates so many aspects of the lives both of individuals and of associations. When state regulation comes into conflict with norms or practices that help define religious communities, granting these communities exemptions becomes necessary in order to avoid a situation where “[t]heology could remain pluralistic, but religious practice would be pressured toward homogeneity by the sheer pervasiveness of modern regulation”⁵⁶.

This concern was at the heart of the dissenters’ disagreement with the majority in *Hutterian Brethren*⁵⁷. The majority, while acknowledging that religion “is individual, yet profoundly communitarian”⁵⁸, questioned the seriousness of the impact of the picture requirement on the life of the Brethren’s community. In its view, the Brethren would only be forced to incur an economic cost to hire outside drivers and compromise on “their traditional self-sufficiency. But there [was] no evidence that this would be prohibitive”⁵⁹. The dissenters accorded more importance to the protection of the Brethren’s way of life. Thus, according to Justice Abella, the majority “fail[ed] to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community”⁶⁰. Because a religious community’s way of life is integral to its members’ choice of religion, undermining the former is an infringement of the latter. The restriction of the collective freedom of a community is inextricably linked to that of the

⁵⁶ D. LAYCOCK, *supra*, note 39, 56.

⁵⁷ See: *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 21, para. 182 (Lebel J., dissenting): “[t]he reasons of the majority understate the nature and importance of this [collective] aspect of the guarantee of freedom of religion. This may perhaps explain the rather cursory treatment of the rights claimed by the respondents”. In addition, the disagreement concerned in some measure the place where this concern entered the Court’s highly structured constitutional analysis, which I am not preoccupied with here. It concerned also, to a considerable extent, the assessment of the evidence in the record, but I believe that this exercise was at least influenced by the judges’ respective views of the relative importance of the principles at stake.

⁵⁸ *Id.*, para. 89.

⁵⁹ *Id.*, para. 97.

⁶⁰ *Id.*, para. 167.

freedom of an individual, and should be avoided when possible, including by the grant of an exemption where appropriate.

Of course, religious communities have often persisted in spite of restrictions on their freedom, sometimes of brutal restrictions. But the ability of a person or a group whose liberty is curtailed to survive the curtailment cannot, without more, justify it. And the modern regulatory state, although not likely to subject unpopular sects to outright bans or vicious discrimination such as have historically been common, will often burden them in ways that go to the heart of their way of life, due to the pervasiveness of its regulation.

The case of *Wisconsin v. Yoder*⁶¹, decided by the Supreme Court of the United States, is illustrative. The issue there was whether Amish parents had to comply with statutory provisions mandating them to send their children to school between the ages of 14 and 16 (the parents did not object to compulsory schooling for children up to 14, or rather the end of 8th grade). The parents claimed, and the Supreme Court agreed, “that the traditional way of life of the Amish is [...] a matter [...] of deep religious conviction, shared by an organized group, and intimately related to daily living”⁶². That traditional way of life, the parents argued, would be compromised by sending children to a public high school, its culture and values being incompatible with those of the Amish religious community, and the children’s absence preventing them from learning, hands on, the traditional skills that their way of life would require of them in adulthood. In his opinion for the majority, Chief Justice Burger emphasized the conflict between the modern regulatory state and the community’s continued existence *as a community*:

“As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose

⁶¹ 406 U.S. 205 (1972).

⁶² *Id.*, 216.

their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life."⁶³

The Court agreed that given the importance of the traditional "lifestyle" to the religion of the Amish, their religious community could only be protected by granting them the exemption⁶⁴.

The *Yoder* case illustrates, however, a worrying aspect of the recognition of religious communities – the risk that it a community's self-willed isolation from the rest of society will lead to *de facto* imprisonment of some of its members. The Supreme Court premised its rejection of the State's argument that it had a compelling interest in ensuring that all children up to the age of 16 were educated, in part, on the thesis that "the goal of education [for the Amish must] be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith"⁶⁵. Chief Justice Burger took pains to insist that those Amish who chose to leave their community would not be prevented from doing so by their relative lack of education, and pointed out that there was no suggestion, in the record, of disagreement on the children's part with their parents' educational plan for them. Yet the very idea that some children – or some people, whatever their age – are somehow *destined* to belong to a particular community, whose norms are likely to serve as a barrier, even if not an insuperable one, to their leaving it, should give pause to a liberal defending religious exemptions on the basis that they promote the rights of communities⁶⁶.

More broadly, the fact that many religious communities are organized on or promote illiberal, unjust, or unequal principles has worried many, including those who consider themselves sympathetic to religious liberty and to a recognition of religious groups by the liberal state⁶⁷. But, as Jeff

⁶³ *Id.*, 217.

⁶⁴ *Id.*, 218.

⁶⁵ *Id.*, 222.

⁶⁶ See: Michael YOUNG, "In Defense of the Constitutionality of Critically Discussing Religion and Ethics in Schools in Light of Free Exercise and Parental Rights", (2009) 70 *Ohio St. L.J.* 1565, 1589 and 1590 (making similar arguments).

⁶⁷ See: Jeff SPINNER-HALEV, "Liberalism and Religion: Against Congruence", (2008) 9 *Theoretical Inquiries in Law* 553, 557-567 (critically reviewing the treatment of such religious communities in the work of John Rawls and other liberal theorists).

Spinner-Halev argues, so long as society is pluralistic, members of religious groups are allowed to exit them, and children receive education sufficient to function outside the religious communities into which they are born, religious freedom requires the state to abstain from intervention in such groups⁶⁸. It is important to recall here Laycock's point that religious interests should not be held to a higher standard than secular ones⁶⁹. The state tolerates, and sometimes even promotes a myriad ways in which people's lives go differently depending on the circumstances of their birth and the social situation of their family⁷⁰. Being born into a religious community with views at odds with those of most citizens will, no doubt, have that effect, but there is no reason for the state to treat this particular circumstance of birth as cause for greater interference than any other one.

In any case, the importance of the problem of segregated or unjust religious communities in thinking about religious exemptions should not be overstated. When the state makes demands on religious communities, it is not always, and perhaps not often, because it wants to make them more open or more just. In many cases – such as *Hutterian Brethren* – segregation or injustice will simply not be an issue. Indeed, much more frequently, the strong communitarian justification will simply not be relevant to a claim for a religious exemption, simply because few believers actually belong to such distinctive religious communities as those involved in *Hutterian Brethren* and in *Yoder*. The religious freedom of most believers could be compromised in a myriad ways without affecting any tangible community. The strong communitarian argument is a reminder of an important aspect of religious life which we might tend to neglect⁷¹, but it cannot tell us much about the justifiability of religious exemptions in the majority of cases in which they are likely to be sought.

⁶⁸ *Id.*, 568.

⁶⁹ See: D. LAYCOCK, *supra*, note 39, 50.

⁷⁰ For example, certain countries' educational systems stream children into widely different tracks, having a decisive influence on their life plans, at a fairly early age, and those countries are generally not thought to be illiberal or undemocratic for this reason. Various other facts – economic, cultural, etc., – about children and their parents can also have similar effects, which even compulsory public education does not overcome.

⁷¹ See: D. LAYCOCK, *supra*, note 39, 24 suggesting that is particularly the case with “many secularized adults, who left the church in their youth after hearing much preaching about sin and failing to experience any benefits”, and thus see religion as only a set of rules, not the glue that holds communities together. Although I doubt that this statement provides a full explanation, there could be some truth to it.

C. Norm-Communitarian Justification

A second rights-based justification for religious exemptions, defended by Jeremy Waldron⁷², might be termed norm-communitarian. It also emphasizes the collective aspect of religion, but in a much different sense than the one discussed above. It sees the religious community as a community of norms, and its members as having obligations that are, in some sense, prior to the legal obligations which the state seeks to impose on them. In some cases at least, respect for believers thus demands that we let them honour these obligations, and grant them the necessary exemptions from the state's norms.

Although, as the defendants of the strong-communitarian argument emphasize, obedience to rules is not all there is to religious belief and practice, it is usually an important part⁷³. It is probably also the aspect of religious belief and practice that is most likely to engender serious conflict with the demands of a modern liberal state. The norm-communitarian argument is based on the observation that when a believer seeks an exemption from a law posited by the state, this is because his or her "life in the area to which the law applies has been organized on the basis of a quite different scheme of regulation"⁷⁴, to which he or she is subject as a member of a religious community. These norms are the ones which the believer has internalized and is familiar with. Indeed, the believer might not even suspect that other norms in these areas could exist⁷⁵.

Facing simultaneous and mutually exclusive demands from the norm of his community and the law of the state, the believer is not merely inconvenienced or annoyed as anyone might be by a law one finds burdensome or silly. Obedience to the religious community's norm is not just a matter of preference, but of perceived duty, and the believer will genuinely feel torn when faced with the state's demand that he or she not comply with it, and obey the law instead⁷⁶.

But key for the norm-communitarian argument – and what distinguishes it from the individualist argument that I will consider in the next

⁷² J. WALDRON, *supra*, note 20, 22-27.

⁷³ D. LAYCOCK, *supra*, note 39, 26.

⁷⁴ J. WALDRON, *supra*, note 20, 24.

⁷⁵ See: *id.*, 24-26.

⁷⁶ *Id.*, 24.

section – is the claim that the constraints under which a religious person labors are not just a personal, private matter. The believer’s feeling of “being pulled in the direction of the [...] religious practice (contrary to state law) has social reality; it is not just a matter of subjective conviction. Because of the positive existence of a scheme of regulation rivaling the state law, the person we are considering is already under a socially-enforced burden, established as part of an actual way of life. [...] Others claiming the exemption simply as a matter of liberty or personal conscience might not be under any burden comparable to that.”⁷⁷

The norm-communitarian argument thus addresses the fear of a religious believer being above the law and claiming for him- or herself a privilege compared to other citizens. The norm-communitarian argument insists that the believer is not above the law, but under a different one. At the same time, its attention to norms having a “positive existence” in a “social reality” and not only in an individual’s mind gives the norm-communitarian approach an attractive objective character. Those who request a religious exemption using this approach should be able to show, in a relatively uncontroversial manner, the merits of their claim.

But this strength is unfortunately more apparent than real. Ascertaining religious norms obedience to which can shield from the duty to obey a state-imposed rule is problematic. As Laycock points out:

“[F]or many believers, the attempt to distinguish what is required from what grows organically out of the religious experience is an utterly alien question, perhaps a nonsensical and unanswerable question, certainly a question that reflects failure to comprehend much of their faith and experience.”⁷⁸

Yet if only the requirements of positive norms of a religion can be grounds for an exemption, the believer requesting the exemption will need

⁷⁷ *Id.*; compare this argument with the one Waldron makes on the question when a state is right to resist application to it of the rules of international law in Jeremy WALDRON, “The Rule of International Law”, (2006) 30 *Harv. J.L. & Pub. Pol’y* 15, 22: “[i]f a government has reason to resist the application of international law to itself—international law, as such, or any particular treaty or custom—it does so not as an individual defending her freedom, but as a law imbued entity that already constrains its conduct with rules of its own. Accordingly, any argument made for resisting the application of international law should be based on legality rather than the repudiation of legality”.

⁷⁸ D. LAYCOCK, *supra*, note 39, 26.

to not only to draw this distinction, but also to show that the cause of his request falls on the right side of the dividing line.

Trying to do so may require what is in many ways a *probatio diabolica*. For one thing, the proof of what the objective norms of a religious community require will often have to proceed by way of (costly) expertise. For another, if there is disagreement on these matters within the community (or among those considered experts), courts would have to determine winners and losers in theological disputations. The case of *Syndicat Northcrest v. Amselem*⁷⁹ illustrates this problem. The appellants insisted that their Orthodox Jewish faith required them to build their own, private succahs (on their balconies) to celebrate the festival of the Succot, notwithstanding their prior contractual undertaking not to raise any constructions on their balconies. The respondent argued that a communal succah (in the courtyard) would do. At trial, the Superior Court of Québec heard testimony from two rabbis, each arguing for an interpretation of the Jewish religion consistent with the position taken by the party that hired him, and concluded, in effect, that the (eventual) appellants were wrong in their understanding of their own religion⁸⁰. This decision was upheld on appeal, but reversed by the Supreme Court, which held that:

“[T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual.”⁸¹

⁷⁹ [2004] 2 S.C.R. 551. Note that this case involved private parties, with the appellants seeking in effect to obtain an exemption from the rules of the respondent condominium syndicate, pursuant to Québec’s *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, which applies to private relationships as well as to the government. The court proceeded on the basis that the content of religious freedom is the same in private-law and public law relationships: see *Syndicat Northcrest v. Amselem*, [2004] S.C.R. 551, para. 40. I am not concerned with the correctness of that proposition here; my interest is in the Court’s understanding of religious freedom, whether or not it was right to apply it in this particular case.

⁸⁰ *Id.*, para. 21-24.

⁸¹ *Id.*, para. 50.

As the Court pointed out, “[s]ecular judicial determinations of theological or religious disputes [...] unjustifiably entangle the court in the affairs of religion”⁸², which is indefensible in a pluralist, liberal society.

The second, related problem of the norm-communitarian approach is that its emphasis on objectivity renders it seriously under-inclusive. It extends no protection, as Waldron recognizes, to non-religious conscientious claims since, although such beliefs may well be shared, perhaps widely, the holders of secular conscientious beliefs usually do not form communities comparable to religious ones⁸³. This is a controversial point, and I will return to it below, in Part IV. Less controversially, even within the realm of purely religious belief, the norm-communitarian approach comes short in that it also does not acknowledge those religious obligations that are no less real for being more idiosyncratic. As the Supreme Court of the United States recognized in the case of war resisters, “minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war”⁸⁴. The same might be true, of course, of any other religious belief and obligation.

In addition to these practical and normative objections to the norm-communitarian justification of religious exemptions, it is possible to formulate a third, conceptual, one, which is perhaps the most damaging of all. It is that even with respect to a norm which has a positive existence in the “social reality” of a (religious) community, the claim for exemption is based not on the norm’s existence, but on the individual claimant’s belief in it. There seems to be, after all, no reason to provide an exemption to a member of community who can show that there exists, in this community, a norm which conflicts with state law, unless he or she *personally* subscribes to that norm. Such a situation could arise on a literal reading of Manitoba’s Safety Helmets Standards and Exemptions Regulation⁸⁵, which provides that the requirement for motorcyclists to wear a helmet “do[es]

⁸² *Id.* See also: *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981) (holding that “it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation”).

⁸³ J. WALDRON, *supra*, note 20, 24.

⁸⁴ *United States v. Seeger*, 380 U.S. 163, 172 (1965).

⁸⁵ Man. Reg. 167/2000.

not apply to [...] a bona fide member of the Sikh religion”⁸⁶. It seems that only “approximately 40 % of the world’s Sikhs”⁸⁷ actually believe that they must wear a turban at all times in public – and thus cannot wear a motorcycle helmet. Thus it is quite possible to be “a bona fide member of the Sikh religion” and have no religious compunctions about wearing a helmet. The Manitoban exemption, which reflects a norm-communitarian logic, seems to allow the persons in such a situation – perhaps a majority of the province’s Sikhs – not to wear a helmet even though they personally would not object to doing so. This is surely an absurd result, yet trying to mitigate it by reading the words “bona fide member of the Sikh religion” to exclude those who do not adhere to the belief in the mandatory character of the turban would be insulting to such people. The better solution seems to be to focus on individual, rather than group, belief⁸⁸.

D. Individualist Justification

Accordingly the third rights-based justification is an individualist one. It focuses not on the “social reality” of any belief or the mandatory character of a religiously-motivated practice, but on its sincerity and “religious or spiritual essence”⁸⁹. It thus avoids the pitfalls of the norm-communitarian approach outlined above, and is sufficiently broad to cover the situations in which the strong-communitarian argument is not relevant.

Like the norm-communitarian justification for religious exemptions, the individualist one is based on the idea that religious belief can instill in a person the sense of “an obligation, superior to that due the state”⁹⁰, which makes it impossible for the believer to comply with the state’s demands.

⁸⁶ *Id.*, para. 2(a).

⁸⁷ *R. v. Badsha*, [2008] O.J. No. 854, para. 3 (Ct. of J.) (QL/LN); 2008 ONCJ 94 (CanLII).

⁸⁸ Note, however, that – quite apart from the problems of principle which I discuss in the next section – the legislative draftsman trying to encapsulate the individualist logic in an exemption for turban-wearing Sikhs faces perils of his own, illustrated by British Columbia’s version of such a provision, which grants the exemption to “a person who (i) practices the Sikh religion, and (ii) has unshorn hair and habitually wears a turban composed of 5 or more square meters of cloth.” [*Motorcycle Safety Helmet Exemption Regulation*, B.C. Reg. 237/99, para. 1(a)].

⁸⁹ *Syndicat Northcrest v. Amselem*, *supra*, note 79, para. 47.

⁹⁰ *United States v. Seeger*, *supra*, note 84, 172.

The distinction with the norm-communitarian approach is that the individualist argument supposes that “one might be religious without belonging to an organized church”⁹¹, and “individual belief—rather than membership in a church or sect—determined the duties that God imposed upon a person”⁹². As noted above⁹³, this makes it possible to grant exemptions to those whose religious beliefs are unusual, or even directly contrary to the teachings of the faith to which the person claims to subscribe. Although there may not be such a thing as a purely individual religion⁹⁴, there can be a variety of beliefs in a single religious tradition or community. It is an advantage of the individualist justification that it does not require the liberal state to become an enforcer of religious orthodoxy.

Furthermore, the conception of religion as a matter of personal conscience has deep historic roots. The notion that conscience is “the audible voice of God that never misleads or fails and ought to be obeyed always”⁹⁵ is, according to Lord Acton, a “medieval inheritance”⁹⁶ which has since “transformed society”⁹⁷. Countered at first by religious repression, “[w]ith the decline of coercion, the claim of conscience rose, and the ground abandoned by the inquisitor was gained by the individual”⁹⁸. Ever since, “[t]he knowledge of good and evil was not an exclusive and sublime prerogative assigned to states, or nations, or majorities. [...] The soul became more sacred than the state”⁹⁹. And as it became more firmly established, the idea of conscience also expanded to encompass not only a person’s opinion as to his or her religious obligations, but more generally all “sin-

⁹¹ *Id.*

⁹² *Id.* See also: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 351 speaking of “the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be”.

⁹³ See: note 84, above, and accompanying text.

⁹⁴ See: note 55, above, and accompanying text.

⁹⁵ J.E.E. ACTON, *supra*, note 6, p. 31.

⁹⁶ *Id.*

⁹⁷ *Id.* See also: Brian TIERNEY, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625*, Atlanta, Scholars Press, 1997, p. 36 noting that “[Saint] Francis laid down in his Rule that all the brothers were to obey their superiors, but then added ‘in everything that is not against their conscience...’” (omission in the original); Noah FELDMAN, “Intellectual Origins of the Establishment Clause”, (2002) 77 *N.Y.U. L. Rev.* 346, 355-372 attributing the idea of liberty of conscience especially to Martin Luther, and charting its development up to the writings of John Locke.

⁹⁸ J.E.E. ACTON, *supra*, note 6.

⁹⁹ *Id.*, p. 32.

cere conviction about what is morally required or forbidden”¹⁰⁰. This expansion has not been without its critics¹⁰¹, but the potential for it is obvious already in Lord Acton’s description of conscience as “the knowledge of good and evil”.

This view of conscience is highly individualistic; conscience is a *forum internum* – distinct and indeed opposed to the *forum externum*¹⁰², Lord Acton’s “states, nations, and majorities”. And it is this tradition of freedom of (religious) conscience which we have inherited and which is at the root of all individual liberty, protected against the state “in order that it may not challenge the supremacy of that which is highest and best in man”¹⁰³. It is thus intimately linked with the emergence of the humanist tradition with which our notions of freedom and democracy are also closely connected¹⁰⁴.

But despite these strengths, the individualist justification is also vulnerable to serious criticism. The focus on individual belief, without reference to the beliefs and practices of any group or community, leaves it open to the charge that it protects subjective whims of exemption claimants. The response of the courts that adopt this approach is to require the claimant to show that his or her belief is sincere, “to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice”¹⁰⁵. Sincerity is a factual issue, similar to questions of credibility which (trial) courts routinely determine¹⁰⁶. Yet we might object

¹⁰⁰ Steven D. SMITH, “The Tenuous Case for Conscience”, (2004) 10 *Roger Williams U. L. Rev.* 325, 328.

¹⁰¹ See e.g.: *Id.*, 325-327, for a summary of such criticism.

¹⁰² See: David LITTLE, “Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?” (2001) *B.Y.U. L. Rev.* 603, 606.

¹⁰³ J.E.E. ACTON, *supra*, note 6, p. 32.

¹⁰⁴ See e.g.: *R. v. Big M Drug Mart Ltd.*, *supra*, note 92, 346 asserting that “an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government”; S.D. SMITH, *supra*, note 100, 325 stating that “[t]hat theme [of freedom of conscience] has also been, arguably, the foundation of modern liberalism, and has infused our more specific constitutional commitments to freedom of religion and freedom of speech” [citation omitted].

¹⁰⁵ *Syndicat Northcrest v. Amselem*, *supra*, note 79, para. 52.

¹⁰⁶ *Id.*, para. 53; one might raise the question whether, in the case of a jury trial, jurors unfamiliar with a claimant’s beliefs would not be more inclined to disbelieve him, but

that sincerity, and even intensity, of feelings are hardly a reason to give a person anything – I may feel very strongly and sincerely that I crave some cheesecake, but you have no obligation to buy me any.

Something else is required to justify granting a person something as serious (and problematic) as an exemption from a law of general application. The belief at issue must not only be a sincere, but also a religious one. It must have a “religious or spiritual essence”¹⁰⁷, “a nexus with religion”¹⁰⁸, or something like that. In many, perhaps most, cases, it will be fairly easy to determine whether a belief has such a nexus; my cheesecake craving clearly does not. And the norm-communitarian argument can be useful here: if an asserted belief is known to be among the tenets of a familiar religion, the existence of the nexus is easy to establish. But in borderline cases, a court, or a legislature, is hardly better positioned to pronounce on the “religious or spiritual essence” of a belief or an action than on finer points of religious doctrine.

In such borderline cases, legislative attempts at definition and judicial attempts at parsing definitions provided by legislation or precedent are perhaps doomed, as the struggles of the Supreme Court of the United States in *Seeger* show¹⁰⁹. The Court there had to decide whether the expression “‘religious training and belief’ which Congress ha[d] defined as ‘belief in a relation to a Supreme Being involving duties superior to those arising from any human relation’”¹¹⁰ applied to the vaguely theistic, non-denominational beliefs of certain conscientious objectors. The Court observed “that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgment and retribution”¹¹¹. The only way to clarify the statutory definition the Court was able to come up with was to say that it applied to any “sincere and meaningful belief which occupies in the life of its possessor a

this is perhaps not a greater problem than any other difference between a witness and a juror which may cause the latter to be unjustifiably distrustful of the former.

¹⁰⁷ *Id.*, para. 47

¹⁰⁸ *Id.*, para. 46.

¹⁰⁹ See also: Nelson TEBBE, “Nonbelievers”, (2011) 97 *Va. L. Rev.* 1111, 1130-1140 discussing the problems with “defining religion” both in academic study of religion and in law.

¹¹⁰ *United States v. Seeger*, *supra*, note 84, 173.

¹¹¹ *Id.*, 174.

place parallel to that filled by the God of those admittedly qualifying for the exemption”¹¹². But such an open-ended analogy might not be of much assistance in hard cases.

And even if the problems of determining what a sincere religious belief is are solved, the objection to the individualist approach’s inherent subjectivity remains. When a religious believer who claims an exemption on the basis of his or her personal faith, “speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident [...] that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand”¹¹³. Yet those whose own interpretations of God’s will can dictate when a law will or will not apply to them seem to be aspiring to a place above the law, in breach of the Rule of Law requirement of legal equality. They also seem to be undermining the legal system as a system of rules since they can only decide *ad hoc*, and after a law is made (indeed, probably only after it is applied to them), whether they will comply with it or not.

IV. The Case for Religious Freedom

A. The Need for a Justification

Are the justifications discussed in the previous Part – with the limits on their scope and their conceptual flaws – the best that can be given for religious exemptions? If so, the case for exemptions will be quite weak. Before reaching such a conclusion, I want to step back, and consider why it is that religious (and perhaps some other, similar) belief is deserving of protection at all. While for some scholars a constitutional say-so is sufficient¹¹⁴, a theoretical examination of the issue of religious exemptions can-

¹¹² *Id.*, 176.

¹¹³ *United States v. Macintosh*, 283 U.S. 605, 625 (1931) (emphasis in the original).

¹¹⁴ See e.g.: R. POSNER and M.W. MCCONNELL, *supra*, note 45, 59 asserting that the United States’ “commitment to freedom of religion is a value we take for granted”; Douglas LAYCOCK, “Religious Liberty as Liberty”, (1996) 7 *J. Contemp. Legal Issues* 313, 314 and 315 stating that “[T]he why of religious liberty may not matter as much as is sometimes supposed. For whatever reason, the constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favour. [...] We can work out a regime that

not be complete if it is not grounded in an understanding of why religious freedom matters, or does not matter, in a liberal society.

It is important to be clear that the justification I want to suggest is addressed to the (secular) state, its citizens, and officials, especially those committed to what Charles Taylor describes as a view of “secularism [as] mainly concerned with controlling religion [and whose] task is to define the place of religion in public life, and to keep it firmly in this location”¹¹⁵. While Thomas Nagel argues that “liberalism should provide the devout with a reason for tolerance”¹¹⁶, it is the tenants of the secular view who are most likely to be opposed to religious exemptions, which may seem to be attempts by believers to overstep the bounds within which the state decides to keep religion.

Accordingly I do not propose to set out a comprehensive theoretical defense of religious freedom that ought to be acceptable to adherents of strong religious views who have no time for secularism of any kind and would impose their own religion on the state. Stanley Fish makes a powerful argument that such a defense is “mission impossible”, because any supposed common premises from which such a defense could proceed are in fact quite alien to those to whom it purports to be offered¹¹⁷. When the state makes decisions regarding the boundaries between the religious sphere and that of secular legislation, “there can be no justification apart from the act of power performed by those who determine the boundaries”¹¹⁸. But even if Fish is right that this will be the case from the point of

maximizes liberty with respect to religious choices and commitments without agreeing on why our Constitution specially protects liberty in that domain.”

¹¹⁵ C. TAYLOR, *supra*, note 5, p. 1.

¹¹⁶ THOMAS NAGEL, “Moral Conflict and Political Legitimacy”, (1987) 16 *Phil. & Pub. Aff.* 215, 229.

¹¹⁷ STANLEY FISH, “Mission Impossible: Settling the Just Bounds between Church and State”, (1997) 97 *Colum. L. Rev.* 2255.

¹¹⁸ *Id.*, 2261; Fish adds, parenthetically, that “[t]his is a criticism only from the perspective of the impossible goal a regime of tolerance sets for itself.” See also: LARRY ALEXANDER, “Response to Professor Greenawalt’s Lecture”, (2010) 47 *San Diego L. Rev.* 1153, 1154 arguing that no matter how tolerant and accommodating – to the point for example of introducing judicial review of legislation – a political system, its “laws will necessarily deny that dissenting views, including religious ones, are correct. No political philosophy, and no legal regime reflective of a political philosophy, can treat opposing views, religious or nonreligious, as other than wrong. A regime-any regime-will therefore ‘establish’ some views and will restrict some religiously motivated acts”.

view of the adherent of an “imperial religion,” this need not be so from the point of view of the officials of the liberal state engaged in drawing the boundaries and its citizen engaged in evaluating the work of these officials. From their perspective, the drawing of the boundaries may be founded on principle rather than an *ad hoc* exercise of raw power, even if, as Fish contends, this principle cannot be erected on some sort of apolitical higher ground accessible to all, including the would-be theocrats. In addition to circumscribing official action and making it more coherent, the existence of a guiding principle for it might make it easier for citizens to judge it.

My task, therefore, is to find a justification for religious freedom that would appeal to officials of the liberal state and to those of its citizens who favour secularism or religious tolerance. In the following sections of this Part, I will consider three such justifications: one prudential, one utilitarian, and one based on the Kantian notion of human dignity. Each of these arguments is *potentially* persuasive to the citizens and officials of the secular liberal state. They appeal to commitments which – whether or not they are so neutral as to appeal to adherents of all comprehensive views – represent basic concerns in such a state: social peace and security; the citizens’ well-being; and respect for their dignity and rights. Of course the relative weight to be given these concerns is the subject of both philosophical and political debate, which I do not propose to resolve. I take it for granted, in this article, that all matter to some degree. What interests me here is which, if any, can best justify a liberal state’s commitment to religious freedom.

B. The Prudential Justification

The first justification that we need to consider is a prudential one. The idea is simply that by allowing people freely to practice their faith society avoids conflict over religion, which can be devastating since religion so often gives rise to very strong feelings. Europe had experienced such conflicts in the aftermath of Reformation, and some people at least drew from the bloodshed’s inability to put an end to religious differences the conclusion that religious freedom was the solution. In Kathleen Sullivan’s words, it was a “settlement [...] of the war of all sects against all”¹¹⁹. On this view,

¹¹⁹ Kathleen M. SULLIVAN, “Religion and Liberal Democracy”, (1992) 59 *U. Chi. L. Rev.* 195, 199; see also the discussion in D. LAYCOCK, *supra*, note 114, 317.

religious freedom is a *modus vivendi* as much as a political value. It is an arrangement that guarantees that all sects, whatever their relative strength from time to time, will abstain from futile attempts to impose their views on others, because such attempts will bring nothing but resistance and bloody retaliation.

The prudential argument is now out of fashion; its relevance to contemporary society, characterized by “broad, even radical, pluralism”¹²⁰ of religious belief is denied when it is not derided. One can also argue (perhaps insincerely) that “this argument [...] provides no justification for protecting marginal religious groups which government could easily suppress without any threat to social order”¹²¹. But such a reaction is arguably no longer warranted, if it ever was. At least since the rise of religious terrorism, social – and even armed – conflict over religion is not a historical curiosity but a frightening reality.

Still, having only prudential reasons for protecting freedom of religion seems to invite the government in every case to engage in a calculation whether any particular restriction of religious liberty is likely to result in intolerable social conflict. Furthermore, as the re-emergence of religious violence in liberal Western societies demonstrates, protecting religious freedom is perhaps not a very effective way of securing social peace. If, as Fish argues, radicals will not be satisfied with a live-and-let-live arrangement, why should the majority bother with one? Indeed, if putting an end to violence is the aim, suppression of (at least some) religious beliefs might seem like a good idea. Thus the prudential argument, at best, is a not entirely satisfactory justification for religious freedom.

C. The Utilitarian Justification

A second, utilitarian, justification for protecting religious freedom, defended by Timothy Macklem, is that religious belief is uniquely conducive to human well-being¹²² (or at least to the well-being of some people). It being the duty of the government to promote the well-being of the citi-

¹²⁰ Frederick Mark GEDICKS, “An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions”, (1998) 20 *U. Ark. Little Rock L.J.* 555, 564.

¹²¹ *Id.*

¹²² T. MACKLEM, *supra*, note 55, 27.

zens, religious belief must be protected. However, this argument is not persuasive either.

Macklem argues that the value of religious belief is in its capacity to provide answers to certain essential questions about life and morality. For him, the distinctive trait of religious belief (as opposed, for example, to “conscientious belief”) is that it is based on faith rather than reason¹²³. When it comes to questions to which religions typically provide answers, questions about the meaning and purpose of life and the requirements of morality,

“for some, indeed perhaps for many human beings a rational approach to such matters is either intellectually inaccessible or psychologically unendurable. Yet the ability to come to terms with those matters is frequently, perhaps normally, essential to the achievement of well-being, and where reason cannot provide that ability faith must step in.”¹²⁴

Because the state bears a “responsibility for the well-being of those people who fall within its political jurisdiction”¹²⁵, it must protect beliefs which are important for their well-being. This protection is naturally limited, because not all religious beliefs “are capable of serving human well-being. Many indisputably religious beliefs, both familiar and unfamiliar, have been pursued at great cost to human well-being”¹²⁶. It follows that when protection is sought for a set of religious beliefs and practices, “a frank examination of the contribution that faith in the doctrine of the alleged religion is capable of making to human well-being”¹²⁷ becomes necessary.

One may level two principal objections against this justification for religious freedom. First, it suffers from the same difficulties which will arguably plague any utilitarian argument in favor of fundamental rights. Most obviously, if the well-being of a majority of citizens is enhanced by the suppression of the liberty of a minority, one needs some non-utilitarian justification for not carrying out this suppression. Perhaps more subtly, the state simply cannot provide for the well-being of all citizens, since

¹²³ *Id.*, 35-37.

¹²⁴ *Id.*, 50.

¹²⁵ *Id.*, 21.

¹²⁶ *Id.*, 31.

¹²⁷ *Id.*, 54.

its resources are limited and the well-being of some citizens is bound to conflict, in some measure, with that of other. How much it can do to make citizens better-off, and whether it can or ought to do more for some than for others, are decisions to be made either on the basis of policy or of some other fundamental principle (such as equality); a general commitment to citizens' well-being is not enough. Thus a concern with well-being cannot do the justificatory work; it is at best a starting point or a supplementary argument, but the real burden of justifying a fundamental right, including religious freedom, must be done by some other principle.

Second, Macklem's account of religion's connection to human well-being implies that religious belief is not worthy of protection when it fails to contribute to well-being¹²⁸. This raises the problem of the criteria to be used to judge whether a particular belief does so contribute. Macklem suggests two: "first that the belief in question be freely endorsed, and second, that the content of that belief be confined to those dimensions of a believer's life in regard to which his or her wellbeing depends upon faith"¹²⁹. But it is not clear who is to make these determinations, and according to what benchmarks. What does it mean for a belief to be freely endorsed? Would a belief one first learned as a child qualify? And when does one's well-being depend on holding a belief? What if a belief system increases one's well-being by answering fundamental questions about life and morality but decreases it (from an external point of view, or indeed even from the point of view of the believer him- or herself) by demanding that its adherents forebear from certain activities (for example by fasting, or abstaining from alcohol, or refusing a blood transfusion, etc.)? A justification for religious freedom based on contributions religion can make to well-being leads us into a quagmire of intractable questions which no legislature and no court can answer with any degree of objectivity.

D. The Dignitarian Justification

The third and, I believe, the most promising, justification for religious freedom is that upholding it is essential to fulfill the commitment to human dignity which is widely shared by contemporary liberal democratic states¹³⁰.

¹²⁸ *Id.*, 49.

¹²⁹ *Id.*, 49 and 50.

¹³⁰ See e.g.: *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. G.A.O.R., 3rd sess., suppl. n° 13, U.N. Doc. A/810, at 71 (1948), Preamble and art. 1; *International*

This commitment requires respect for the moral choices of individuals, and religion is an important, albeit not an exclusive, source of such choices. It must therefore be respected and protected – along with other, similar, sources.

It is not necessary for the purposes of this essay to delve on the history of the notion of human dignity¹³¹. Nor is it necessary for me to take a position on the question whether human dignity is a foundation for (other) human rights, as some have argued¹³². It is enough for my purposes to show that human dignity is closely related to one specific human right, that to freedom of religion, whether this relationship is best described as foundational or otherwise. Nor is it necessary here to disentangle or remix all “the rich and complementary aspects of the meaning of this multi-faceted term”¹³³; covering the most salient ones will be sufficient.

The one aspect that matters most for my purposes is the association of the notion of human dignity with the conception of the human being as an autonomous moral agent. This association is developed by Immanuel Kant, for whom the dignity of a human being consists in his or her capacity for moral judgment. For Kant, “morality, and humanity as capable of it, is that which alone has dignity”¹³⁴, that is, an “intrinsic worth”¹³⁵ independent of any practical consequences. Human dignity is “the dignity of a

Covenant on Civil and Political Rights, [1976] Can. T.S. n° 47, Preamble; *Canadian Bill of Rights*, S.C. 1960, c. 44, Preamble; *Basic Law of the Federal Republic of Germany*, art. 1; see also: Maxine D. GOODMAN, “Human Dignity in Supreme Court Constitutional Jurisprudence” (2006) 84 *Neb. L. Rev.* 740 reviewing the use of the concept of human dignity by the Supreme Court of the United States; Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, (2008) 19 *Eur. J. Int’l L.* 654 critically reviewing the use of the concept of human dignity by a variety of national and supra-national courts.

¹³¹ See e.g.: Izhak ENGLARD, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework” (2000) 21 *Cardozo L. Rev.* 1903, and many works cited there for a historical study.

¹³² See e.g.: Oscar SCHACHTER, “Human Dignity as a Normative Concept”, (1983) 77 *A.J.I.L.* 848, 853 and 854; Jeremy WALDRON, “Is Dignity the Foundation of Human Rights”, in Rowan CRUFT, Matthew LIAO and Massimo RENZO (eds.), *Philosophical Foundations of Human Rights*, Oxford, Oxford University Press, forthcoming 2014, for a critical assessment of such claims.

¹³³ Jeremy WALDRON, “The Dignity of Groups”, (2008) *Acta Juridica* 66, 73.

¹³⁴ Immanuel KANT, *Critique of Practical Reason and Other Works in the Theory of Ethics*, 4th ed., Thomas Kingsmill Abbott, transl., London, Longmans Green, 1889, p. 53.

¹³⁵ *Id.*, p. 53.

rational being”¹³⁶ making moral choices. Kant’s idea of dignity is more complex than this briefest of sketches, and different commentators have emphasized different aspects of it¹³⁷. For Kant, self-imposed legislation, which he calls “ethical,” and which a person obeys purely out of a sense of duty rather than some outside motive such as reward and punishment, is different from external (or “juridical”) legislation, compliance with which is secured by such external incentives¹³⁸; “ethical legislation includes in its law the inner spring of the action (the idea of duty), a property which cannot belong to the external legislation.”¹³⁹ It is the motivation, rather than the contents of the duty, that distinguish “ethical” and external legislation; indeed their contents may overlap. Thus, “it is the peculiarity of ethical legislation to perform actions solely because they are duties, and to make the principle of duty itself the adequate spring of the will, no matter whence the duty may be derived.”¹⁴⁰

There is, however, one other point about dignity, arguably implicit in Kant’s work, and developed by Jeremy Waldron, that is also important to keep in mind for our subsequent reflection on the consequences of dignitarian thought for the issue of exemptions. It is that *every* human being is a bearer of human dignity, so that we are *all* equal in that respect. Although, as Waldron and Englard show, historically dignity was understood as the privilege of a few persons in hierarchically superior positions¹⁴¹, it has now become an egalitarian value, so that no person’s claim to dignity is superior to another’s¹⁴².

Now, the Kantian idea of human dignity is inextricably linked with the idea of individual autonomy. The moral choices that confer dignity on a person are his or her own; Kant speaks of the person “obeying no law but

¹³⁶ *Id.*, p. 53.

¹³⁷ Compare J. WALDRON, *supra*, note 133, 73 arguing that “the Kantian contribution tells us about the axiological status of the values involved” – that is, about human dignity’s absolute and imperative character and I. ENGLARD, *supra*, note 131, 1919 arguing that “the concept of the moral personality’s intrinsic worth proved to be most influential in the constitutional context of the twentieth century, even if in a sense that transcended the strict Kantian conception”.

¹³⁸ Immanuel KANT, *supra*, note 134, p. 275.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, p. 276.

¹⁴¹ J. WALDRON, *supra*, note 133, 69 and 71; I. ENGLARD, *supra*, note 131, 1904-1906.

¹⁴² See: J. WALDRON, *supra*, note 133, 71 and 72.

that which he himself also gives”¹⁴³. In many cases, the contents of ethical legislation may be adopted from external sources¹⁴⁴. The law of the land is one such source, as in Kant’s example is the duty to perform one’s contractual obligations. The rule that promises made and accepted are to be kept belongs to the law of the land; but a person who feels duty-bound to perform a contractual obligation regardless of whether the law can actually sanction him or her for non-performance is acting out of a sense of duty and thus pursuant to ethical, and not external, legislation¹⁴⁵.

The key to a justification of religious freedom based on the idea of human dignity is that, for a believer, religion is also such a source. It was indeed, historically, the source *par excellence* of moral duties, although for many people in modern secular societies this is (?) no longer the case. Religious freedom is thus the freedom to choose for oneself, as part of the process of personal moral choice, those moral duties which are found in the teachings of a religion. One might object that religious teachings are not a plausible source of ethical legislation in the Kantian sense, since they are often backed up with the promise of eternal reward for compliance and eternal punishment for disobedience, so adherence to them must be motivated by these (external) incentives rather than a sense of duty. But the law too imposes penalties for non-compliance, and Kant did not think it an implausible source of ethical legislation. While it may be the case that for some believers only such exterior incentives motivate their choice to follow the precepts of their faith, it would be gratuitously insulting to assume that this is the case for all. It would also be implausible in modern pluralistic societies, where the vast majority of the citizens are aware that their beliefs are not the only ones possible, and the teachings of their religion are contradicted by those of other religions, which also make promises and threats. In a pluralistic society, the profession of a religious creed is necessarily, to some degree at least, a matter of choice.

¹⁴³ I. KANT, *supra*, note 134, p. 53; see also: Jeremy WALDRON, “How Law Protects Dignity”, (2011) New York University School of Law, Public Law Research Paper n° 11-83, p. 2 and 3, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973341> (accessed May 4, 2013) describing dignity as “the status of a person predicated on the fact that she is recognized as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her”. Waldron insists that his understanding of the kind of idea that dignity is differs from Kant’s (see p. 3), but the difference is not material for my purposes.

¹⁴⁴ I. KANT, *supra*, note 134, p. 275.

¹⁴⁵ *Id.*, p. 276.

Importantly, that religion is an important source of moral duties for its adherents is a fact, not a normative claim, and as such can be accepted even by those who do not themselves consider any religion a relevant or even an appropriate guide for their own moral choices. The normative claim in my argument – which I do not defend¹⁴⁶, but expect most citizens and officials of modern liberal states to agree with – is that human dignity is something that we, and the governments that we establish, must respect and indeed cherish. If that normative claim is accepted, and if a commitment to human dignity is understood, as I argued it must be, to entail respect for the moral choices of each person, it follows that religious freedom must be upheld in order to respect the full range of possible moral choices individuals must make.

To be sure, this justification for religious freedom may not appeal to religious believers themselves. They may feel that it fits badly with their understanding of their own faith. Believers may feel that their faith is not a matter of choice, but is imposed or inspired by a deity; that their relationship with the deity, rather than merely their personal freedom, is at stake whenever they are prevented from professing and acting on their religious creed. They may further feel that, by adopting an understanding of religious freedom grounded in personal choice, the law is being willfully and cynically blind to their experience, and thus dismissive of their standing as persons¹⁴⁷. But, once again, it is important to recall that the justification for religious freedom I defend here is addressed not to believers, but to the officials of the secular state. It is meant to offer them a reason for respecting believers, not to offer believers a reason to support the secular state. That state may well be blind to their experience, but its blindness is an inevitable consequence of its refusal to endorse any religious belief. It may be regrettable, but not insulting.

A side-note, but a significant one, is that this dignitarian justification for protecting religious freedom also applies to the protection of moral choices which are not religious, and which are often described as “conscientious.” Indeed in modern rights-protecting documents, such as the

¹⁴⁶ Which indeed I could not defend, if Stanley Fish is correct: see text accompanying notes 117 and 118, above.

¹⁴⁷ I am grateful to Sean M. Kelly for pressing this objection.

Canadian Charter, the two are often mentioned together¹⁴⁸. If the reason for respecting beliefs is their connection to morality, it does not matter whether they are connected to the divine, or have a “spiritual essence”. The very fact that they are relevant and perhaps essential to the kind of decisions on which human dignity rests justifies their protection. It is fair to say, as did the Supreme Court of Canada, that “[r]eligious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations”¹⁴⁹, but they are not the only such beliefs and practices. The dignitarian justification is consistent with what Noah Feldman describes as “the modern understanding of liberty of conscience [which] seems to be that every person is entitled not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles”¹⁵⁰. The prudential justification, on the other hand, is not, insofar as it is correct that non-religious moral commitments and beliefs “have not produced the same history”¹⁵¹ of conflict as religious ones. (A utilitarian justification could, on the other hand, be supplied for freedom of non-religious as well as religious beliefs.)

To sum up the dignitarian argument for religious freedom, it holds that religious freedom is an essential condition of the moral autonomy of individuals which the state must respect if it is committed to upholding the human dignity of its citizens. Religious choices, on this view, are above all moral choices; religious beliefs are possible guides to the moral judgment of which every human being is capable and which the state must respect.

However, meaningful respect for individual autonomy requires more than merely letting people make choices and judgments. It requires also not preventing them from acting on these choices and judgments. For the state to tell citizens that they are free to make a choice, but the state will prevent them from acting on this choice, is to speak nonsense or to make a mockery of the promise, either of which is unbecoming of a democratic state. This is not to imply that such a state has an obligation to facilitate the citizens’ carrying out of their choices, especially in the realm of reli-

¹⁴⁸ See: *Canadian Charter of Rights and Freedoms*, *supra*, note 44, para. 2(a) (speaking of a “freedom of conscience and religion”).

¹⁴⁹ *R. v. Big M Drug Mart Ltd.*, *supra*, note 92, 347.

¹⁵⁰ N. FELDMAN, *supra*, note 97, 424.

¹⁵¹ D. LAYCOCK, *supra*, note 114, 322.

gion and morality. Doing so would mean supporting one or more religious group or moral view, raising a host of issues of constitutional law and political morality, which I could not hope to discuss within the scope of this essay. Nevertheless, to protect religious freedom consistently with the requirements of human dignity, the state must not only let individuals choose and keep their beliefs, but also not prevent them from acting on them when they can do so without its assistance.

E. Human Dignity, the Rule of Law, and Religious Freedom

The claim that respect for human dignity requires respect for individuals' choices and their ability to carry out those choices, which I have developed above in connection with religious freedom, is relevant also in connection with the Rule of Law. There is a close relationship between the ideal of the Rule of Law and human dignity. And because both the Rule of Law and religious freedom are both closely connected to the underlying value of human dignity, the relationship between them is more complicated than the one which appears from the Rule of Law-based criticisms of religious exemptions and which I have so far described. These values are not only in tension; they are also complementary.

Human dignity and the Rule of Law are connected in a number of ways, two of which are especially relevant here. First, as Lon Fuller pointed out, there is a connection between the requirement of legal generality understood as the existence of a framework of rules to guide human conduct and a view of the human being as capable of moral judgment and a sense of duty, on which the commitment to human dignity rests. The very decision, he writes, "[t]o embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults"¹⁵². A beast can be ordered about without any need for rules or limits on the form or contents of the orders; indeed it can hardly be treated otherwise. A person endowed with dignity cannot be treated in this way, and accordingly a vio-

¹⁵² See e.g.: L. L. FULLER, *supra*, note 8, p. 162; for a study of the multiple ways in which the regulation of human affairs by rules protects human dignity, see: J. WALDRON, *supra*, note 143.

lation of the requirements of the Rule of Law “is an affront to man’s dignity as a responsible agent”¹⁵³.

Second, respect for Rule of Law creates a predictable environment in which it is possible to know how the state and, to an extent, private individuals are going to affect one’s projects, and to plan accordingly. When the state, which has the power to coerce the individual, and those on whom the individual relies in carrying out his plans (for example counterparties to contracts, or more generally all those whom the law prevents from interfering with one’s property and rights) act within the bounds of the law, it permits the individual to carry out his or her choices autonomously, free from unexpected interference. It is for this reason, says Joseph Raz, that “[o]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people’s dignity includes respecting their autonomy, their right to control their future”¹⁵⁴ – and letting them plan it by taking their legal environment into account.

The role of the Rule of Law in securing for individuals the ability to plan their future, which in turn is a requirement of a commitment to human dignity, allows us to link it with the freedom of religion. Religious freedom, I have argued, is the freedom to make choices based on religious morality. The Rule of Law, meanwhile, secures for the individual a predictable environment and a sphere of liberty necessary to the carrying out of his or her plans. Both a person’s ability to make moral choices and plans based on these choices and his or her ability to carry out such projects must be respected in order to protect the person’s human dignity. Thus freedom of religion and the Rule of Law can play complementary roles in its protection. The former is what allows many an individual to make some of the most significant choices in his or her life; the latter is what allows him or her to carry these choices out. In order fully to protect the human dignity of its citizens, the state must respect both their religious freedom (and, as I argued above, their freedom of non-religious conscience) and the Rule of Law. A commitment to one of these ideals cannot be meaningful without the other; conversely, when both are protected, the protections are mutually-reinforcing.

¹⁵³ L.L. FULLER, *supra*, note 8, p. 162.

¹⁵⁴ J. RAZ, *supra*, note 4, 204.

Without a legal system respecting the requirements of the Rule of Law, the protection of freedom of religion would be little better than a dead letter, since citizens would have no assurance of being able to carry out the plans and giving effect to duties which their faith inspires. Religious freedom would become an empty phrase for anyone's whose beliefs required action with which the state could interfere. Conversely, a state which upheld the Rule of Law without respecting the freedom of religion and conscience of its citizens would in effect let them freely pursue objectives which in large part they would not be free to choose for themselves. Such a situation would be quite consistent with certain formal understandings of the Rule of Law, such as that of Joseph Raz¹⁵⁵, but the Rule of Law would be of little value to the citizens of such a system. It becomes an ideal worth cherishing and striving for when it allows one to pursue one's own ends.

On the other hand, protection for freedom of religion and conscience will in some ways tend to strengthen the Rule of Law, and vice versa. By fostering the development of a diversity of belief and value systems and a multitude of personal projects which those inspire, protection for freedom of conscience makes unlikely the emergence of totalitarianism which, to pursue its own ends, is bound eventually to disregard the constraints of the Rule of Law. As F.A. Hayek pointed out, agents of a totalitarian state "must have no ideals of their own which they want to realize; no ideas about right or wrong which might interfere with the intentions of the leader"¹⁵⁶. When people have ideals and beliefs of their own, they will be less likely to submit to totalitarian leadership. Conversely, a state which upholds the Rule of Law and thus respects individuals' autonomy not only allows them to make moral decisions, but obliges them to do so. Free to face his or her own duties, to pursue his or her own objectives, the person must deal with:

"[r]esponsibility, not to a superior, but to one's conscience, the awareness of a duty not exacted by compulsion, the necessity to decide which of the things one values are to be sacrificed to others, and to bear the consequences of one's decision, [which] are the very essence of any morals which deserve the name."¹⁵⁷

¹⁵⁵ *Id.*, 196.

¹⁵⁶ Friedrich A. HAYEK, *The Road to Serfdom*, 50th Anniversary Ed., Chicago, University of Chicago Press, 1994, p. 166.

¹⁵⁷ *Id.*, p. 231 and 232.

It is to be hoped that, aware of these responsibilities, the citizens will seek to preserve, and to exercise, their freedom of religion and conscience.

Since freedom of religion and Rule of Law are thus complementary and both essential to respecting human dignity, we must look for a way to uphold both at the same time. Despite the real tension between religious freedom and the Rule of Law, sacrificing the former in a single-minded pursuit of the latter will not only amount to a significant infringement of religious believers' human dignity, but also be counterproductive. With the dignitarian justification for religious freedom in mind, I want now to reconsider whether a case can be made for religious exemptions, despite the difficulties identified in Part III.

V. Religious Exemptions Reconsidered

Religious exemptions are a way of safeguarding religious freedom by allowing believers to engage in religiously-motivated conduct that would otherwise be restricted or prohibited by law (or to abstain, on religious grounds, from conducted that would otherwise be required). If respect for the human dignity of the citizens requires that the state protect their religious freedom, it seems to follow that the state must grant religious exemptions, albeit possibly subject to some limits on other dignity-related grounds. I will consider these limits in the next Part. For now, however, I want to reconsider the rights-based arguments for, and objections to, religious exemptions canvassed in Part III in light of the dignitarian justification for religious freedom.

These arguments were, recall, the strong communitarian one, according to which exemptions are necessary to sustain communities to which religious belief gives rise; the norm-communitarian one, according to which exemptions allow believers to follow norms which, being shared by a religious community or group, have an objective existence parallel but prior to that of the norms imposed by the state; and the individualist one, according to which exemptions are necessary to let believers follow the imperative commands of their own conscience. Recall also the limitations of these three arguments: the first is very narrow; the second compromises the state as arbiter of religious dogma, does not protect dissidents or heretics, and ultimately collapses into the individualist argument; which, in turn,

seems to leave too much room to subjective whims of believers to be acceptable in society committed to the Rule of Law.

Yet the individualist argument echoes the dignitarian justification for religious freedom. It sees the believer seeking a religious exemption as asserting a duty imposed by his or her conscience, similarly to the Kantian vision of the autonomous moral agent acting under self-imposed duties. It is noteworthy that both the language of conscience and Kant's writings employ legal metaphors – the internal tribunal of conscience, the self-legislation of a Kantian moral agent – to describe the binding character of a person's moral opinions. The individualist argument for religious exemptions builds on the proposition that respect for human dignity requires that the state respect the citizens' freedom of conscience and religion, including their ability to engage in religiously motivated action. It insists that, given the overriding value of human dignity, which is at stake whenever religious freedom is infringed, the state must do so even when this involves granting dispensations from laws that only restrict religious action indirectly, as a by-product of the state's pursuit of some valid objective.

But is the linkage of religious exemptions with the dignitarian foundation of religious freedom an adequate response to the charge of subjectivity of the individualist argument in favour of exemptions? That depends on what one considers adequate. Speaking of human dignity does not allow us to show that individual religious beliefs which demands of exemptions are intended to protect are somehow not subjective. What it allows us to do is rather to show why subjectivity in this context need not be the conclusive argument against exemptions which their opponents believe it to be. The subjectivity of individual beliefs is not only the root of "storm and havoc". By aspiring to be "a law unto himself," the believer does no more and no less than assert his or her capacity for self-legislation, which is precisely what makes him or her a moral agent, an autonomous person, to be cherished as such above all other value.

This argument will not persuade those for whom majoritarianism or something like social cohesion, rather than the dignity of an autonomous individual, are the ultimate political values. I can say no more to them, without undertaking something I cannot pursue in this essay, namely a conclusive demonstration that respect for human dignity rather than the pursuit of these other values must be the ultimate purpose of the state. (Indeed, I do not think that such a demonstration is even possible.) I am

thus preaching to the choir of those who already believe, or claim to believe, in the supreme importance of human dignity. But the choir is, I believe, both sufficiently large¹⁵⁸, and sufficiently lacking in zeal when it comes to religious exemptions, to make the preaching worthwhile if successful.

Those in the choir ought to embrace, rather than disparage, the subjectivity of religious believers' claims for exemptions. Although these claims may not always have "social reality," they are, much like the norm-communitarian claims defended by Waldron, motivated not by whim and refusal to submit to any authority, but by a sincere desire to abide by rules different than those imposed by the state. In some, probably many, cases, these rules will indeed be those of a religious community. Such communities ought also to be protected, both as sources of rules for individuals and as the setting without which their decision to live by the rules they choose for themselves is sometimes impossible to carry out. Thus the dignitarian justification for religious freedom also reinforces, if only indirectly, the norm-communitarian and the strong communitarian arguments for religious exemptions. However, as Waldron points out:

"Even though it is true that people worship in groups and that [...] their religious community [...] matters as much to them as their individual creeds, still we can accommodate all of that in a traditional individualist conception, just as we can accommodate the importance of political parties and collective self-determination within the framework of individual political rights."¹⁵⁹

Despite the importance of religious communities, the protection the state owes them is essentially a means to the superior end of respecting the dignity of their individual members.

To sum up, then, the dignitarian justification for religious freedom supports the individualist argument for exemptions and, as a necessary protection for the individual believers, the requirement to protect also the communities to which they belong. But the demands of dignity do not always support claims for religious exemptions. For the believer making such a claim is not the only person in his or her community endowed with dignity. To the extent the action for which a religious exemption is claimed affects third parties, their dignity must also be considered. And because

¹⁵⁸ See the sources listed in note 130, *supra*.

¹⁵⁹ J. WALDRON, *supra*, note 133, 84.

the Rule of Law itself has, I have argued, a strong connection to human dignity, those who oppose the granting of exemptions on the grounds that they undermine it are also making a claim which deserves to be taken seriously. These countervailing considerations will sometimes outweigh the argument in favor of granting the exemption. I will devote the remainder of this article to the problems this raises: in the next Part, the theoretical issue of a framework for balancing the competing demands of dignity, and in Part VII the more practical issue of who should be charged with this balancing.

VI. Limits to Exemptions

Protecting the dignity and rights of persons and safeguarding the Rule of Law can justify the government in refusing to grant religious exemptions, even though respect for human dignity imposes a *prima facie* requirement to do so. The traditional bogeyman in any discussion of such limits is human sacrifice, which the Supreme Court of the United States invoked in *Reynolds* to justify its holding that religious exemptions were never required and indeed inimical to the Rule of Law. The Court said:

“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?”¹⁶⁰

Of course, if one is arguing that exemptions are at least sometimes necessary, it is all the more important to have an explanation for why this would not be the case for any surviving Aztecs looking to appease the gods.

Indeed, dealing with the Aztecs is about the easiest thing such a theory needs to do. The actual cases likely to arise are bound to be rather more difficult, because less clear-cut. An explanation for why the government never need – never may – exempt Aztec priests from homicide laws is insufficient. It is preferable to have a coherent theoretical framework for thinking about when exemptions should be granted and when they should

¹⁶⁰ *Reynolds v. United States*, *supra*, note 18, 166; see also e.g.: Eugene VOLOKH, “A Common-Law Model for Religious Exemptions”, (1999) 46 *U.C.L.A. L. Rev.* 1465, 1472.

not. Even though an exemption is always at odds with the ideal of the Rule of Law, it is less problematic if it is granted pursuant to some general framework laid down in advance than purely *ad hoc* in response to each demand. And in addition to the virtues of generality and predictability, such a framework would help avoid suspicions that exemptions are doled out to favoured groups and withheld from unpopular ones.

One issue that arises in designing such a framework is that of neutrality. In granting religious exemptions, the state needs to ensure insofar as possible that, while remaining an instrument for guaranteeing religious liberty, they do not become a tool of promotion of religion¹⁶¹. In economic terms, the exemption ought to remove a tax on religious belief and its exercise, but not to provide a subsidy. Most obviously, the exemption must be tailored to do no more than resolve the conflict between the claimant's belief as to religious obligation and the law from which he or she seeks to be exempt. Otherwise, the exemption will become an inducement to the practice of (a particular) religion, in violation of both religious freedom and legal equality.

But even if the state does not resort to such crude tactics, two issues arise, as McConnell points out:

“First, an individual might be persuaded or induced to adopt a religion or religious practice because of the influence of the government's support. Second, the person might decide to feign a religious belief or practice in order to qualify for the accommodation. The former problem is the more serious problem for religious liberty, but the latter is almost certainly more likely.”¹⁶²

It is also the easier to deal with, since any entitlement to a religious exemption is typically conditioned on the sincerity of the claimant's belief¹⁶³.

As for the possibility that the availability of an exemption for the holders of certain religious views induces those who do not hold these views to adopt them to avail themselves of the exemption, McConnell is right that only rarely will it present real difficulty¹⁶⁴. Inducements offered by exemptions unrelated to the religious obligations or moral duties of the

¹⁶¹ See: Michael W. McCONNELL, “Accommodation of Religion”, (1985) *Sup. Ct. Rev.* 1, 35.

¹⁶² *Id.*

¹⁶³ See e.g.: *Syndicat Northcrest v. Amselem*, *supra*, note 79, para. 51.

¹⁶⁴ See also: D. LAYCOCK, *supra*, note 39, 17.

claimant are clearly impermissible, as explained above. But in some cases – McConnell’s example, as well as Douglas Laycock’s, is the availability of an exemption from compulsory military service to conscientious objectors – the benefit of the exemption, even directly related to the religious beliefs, may be so desirable, quite apart from any religious significance, that it may become an incentive to convert. McConnell writes that “[w] here the benefit is so desirable that a religious accommodation would likely induce – and not merely facilitate – religious practice, the preferred solution may be to widen the benefit rather than to deny the accommodation”¹⁶⁵. So one solution to the problem of conversion in order to avoid military service is that adopted by the Supreme Court of the United States in cases such as *Seeger*: expanding the exemption to conscientious objectors who do not follow a traditional faith, thus “decreas[ing] the likelihood that the government’s exemption policy would pressure [them] into accepting a theistic faith, while retaining the accommodation for religious objectors”¹⁶⁶. One could go a step further and provide the same exemption also to non-religious conscientious objectors. But of course the more complete and more radical solution is to get rid of compulsory military service altogether. Libertarianism, as mentioned in Part I, often eliminates the need for (problematic) exemptions. But it is not always a desirable, or even a possible, policy. Still, the example of the draft might be unique. As Laycock observes, “[m]uch religious activity is self-restraining, burdensome, or meaningless to non-believers”¹⁶⁷. Few exemptions that might reasonably be available to religious believers seem so attractive as to be capable of inducing a *sincere* conversion. It is rather difficult to imagine a man converting to Sikhism, stopping to cut his hair, and taking up the turban, only to be allowed to ride his motorcycle without a helmet¹⁶⁸.

In addition to the issue of neutrality, the framework for granting religious exemption must address the problem, raised already in Part I¹⁶⁹, of the “room for exemption.” Here we must keep in mind two possibilities. On the one hand, a claimed religious exemption may be problematic because a believer who avails him- or herself of it will thereby infringe the rights of

¹⁶⁵ M. W. McCONNELL, *supra*, note 161, 36.

¹⁶⁶ *Id.*

¹⁶⁷ D. LAYCOCK, *supra*, note 39, 17.

¹⁶⁸ It is, I think, significant, that the draft is the only example with which both McConnell and Laycock come up in discussing this issue.

¹⁶⁹ See text accompanying notes 20 and 32.

another person. The other is that, although not threatening the rights of any specific person, the exemption will undermine the effectiveness of a justified or even desirable governmental action or lead to an erosion of the Rule of Law. As Jeremy Waldron points out, the consequences of these two situations for the issue whether there is room for exemption are not the same. There is no room for an exemption which enables an infringement of rights, but there may well be some in many cases of the second sort¹⁷⁰. In order to avoid the mistake made by the Supreme Court's reasoning in *Reynolds* – reasoning that because we could not possibly make exemptions for adepts of human sacrifices, we could not make exemptions in any other cases lest they undermine the Rule of Law – I will consider the two possibilities in turn.

As a general rule, exemptions intended to protect the dignity and rights of one person should not do so at the expense of the dignity and rights of another. All persons, third parties as much as believers who would benefit from religious exemptions, have equal dignity, and the believer's claim can have no priority over the rights of his or her fellow-citizens. As Waldron explains, when rights of individuals are at stake, there is no room for exemptions that would lead to their violation. The issue here is not merely “general deterrence” of violations of rights (Waldron's example is a homicide); “it is a matter of utmost urgency that *each one* be prevented”¹⁷¹. That is the easy explanation for denying exemptions from homicide laws to the adepts of human sacrifice and holy wars.

The right to life is of course not the only one that can justify the state's refusal to grant an exemption. A man who locks up a woman to prevent her from having an abortion or from speaking with other men must not be granted an exemption from prosecution for unlawful confinement on the grounds that he is following the dictates of his religion. Even if he is, he also violates his victim's rights to liberty, to the security of the person, to freedom of association, etc. The same is true of members of a polygamous sect who arrange or perform forced marriages, or of Swedish Kopimists engaged in ritual copyright violations¹⁷².

¹⁷⁰ See: J. WALDRON, *supra*, note 20, 30 and 31.

¹⁷¹ *Id.*, 30.

¹⁷² See: “Sweden Recognizes New File-Sharing Religion Kopimism”, *BBC News*, January 5, 2012, online: <<http://www.bbc.co.uk/news/technology-16424659>> (accessed May 14, 2013).

However, the general statement that exemptions that would lead to violations of individual rights are not permissible must be clarified with respect to the right to equality. There are three ways in which exemptions could be said to infringe equality rights, but none of these infringements would, I believe, justify the state in denying a religious exemption. Otherwise, exemptions would never be permissible, because all exemptions could be said to create inequalities in at least one of these three ways.

The first way in which religious or indeed any exemptions might be said to infringe the equality of citizens who do not benefit from them is simply a violation of what I referred to above as “Diceyan equality” – the principle that the law should be the same for all¹⁷³. I have argued, in discussing this “fairness objection” to exemptions, that it is valid only against exemptions based on status, but not those based on activity. I also suggested that while religion seems, at first, similar to status, things are, in reality, more complicated. Having considered the justification for religious freedom and religious exemptions, we can now see how religious belief is different from mere status. The reason for protecting religious belief is its connection with moral choices, and to be meaningful, this protection must extend to action motivated by such choices. Religious exemptions are exemptions for an activity which has special value because it is inextricably linked to the human dignity of those who engaged in it. Just like exemptions for other kinds of activity which the state has a duty or an interest to protect or encourage, they do not offend against the equality of the citizens who do not benefit from them.

A second way in which some religious exemptions might be said to create inequality between those who benefit from them and those who do not is by shifting certain burdens or costs which citizens ought to share equally from the former group to the latter. As McConnell acknowledges:

“Sometimes these costs are not inconsiderable. A young man’s chances of being drafted, and perhaps killed, are increased if some of his coevals are exempted by virtue of their beliefs. A merchant’s economic position may be seriously injured if some of his competitors are exempted from the Sunday Closing Laws.”¹⁷⁴

¹⁷³ See Part II, *supra*.

¹⁷⁴ M. W. McCONNELL, *supra*, note 161, 37.

The best response to such concerns, however, is similar as to those regarding an apparent violation of Diceyan equality. Arguably, all exemptions have some cost-shifting consequences. An exemption from tort liability for negligent rescuers shifts the costs of their negligence from them to the hapless victims of their clumsiness; an exemption from speed limits for police officers on duty might increase accident rates and motorists' insurance costs. This cost-shifting is, as I suggested in Part II, a way for society to internalize (some of) the costs of these necessary or beneficial activities, and it is generally accepted even though it might not re-distribute these costs equally. (For instance, all those rescued by good Samaritans benefit from the assurance the law offers the latter that they will not be liable for negligent actions committed in the course of a rescue, yet only those who are, in fact, victims of negligence in these circumstances, are made to bear the burden of the exemption.) Since religious exemptions also benefit an activity which society has a duty to respect, we must also accept their incidental re-distributive effects, even when these create some inequality. This is not to prejudge the issue whether the effects of a given exemption will be such that they will compromise the effectiveness of a valid legislative scheme and render the exemption objectionable on that ground. The point here is only that religious exemptions' cost-shifting effect, without more, should not count as an unacceptable infringement of equality. That said, it seems likely that in most cases these effects will be quite small – the removal of a few conscientious objectors from a pool of tens or hundreds of thousands of draft-eligible men does increase the remaining ones' odds of being drafted, but only marginally.

A third way in which some religious exemptions could be said to create inequalities is that they may be available to some but not to all believers who could conceivably take advantage of them. To be sure this will sometimes be a real problem. As a matter of principle, “[r]eligious pluralism,” – or simple equality – “demands that, where possible, the government’s actions must not be permitted to affect the previously existing religious mix. One church, or an alliance of churches, must not be permitted to wrest advantages from the state that are not available to other sects”¹⁷⁵. But judges and, even more so, legislators “are more likely to respond sympathetically to religious claims that are familiar, easily understood, and unthreatening”¹⁷⁶. Of course any deliberate favouritism along these lines must be

¹⁷⁵ *Id.*, 39.

¹⁷⁶ D. LAYCOCK, *supra*, note 39, 14.

avoided. But even with the best intentions in the world, legislators and judges can only respond to information they have, and thus to the needs of those groups they are familiar with from their own background or experience, or those which are able to make themselves heard – which may not be the case of small, poor, or unpopular minorities or isolated individual conscientious objectors. It will be important to keep this problem in mind when reflecting, in the next Part, on the issue of the best forum or fora to consider claims for exemptions.

But real though this problem can be, it should not lead us to respond by simply denying any exemptions, in the interest of equality, on the principle that if exemptions cannot be granted to all, then they should be granted to none. A liberal state should not “prefer [...] even-handed repression to imperfect liberty”¹⁷⁷. It is also true that, as Laycock points out, “[i]n any exemption case, one can imagine, and often identify in the real world, a religion with an analogous practice so disruptive or dangerous that few judges would require an exemption”¹⁷⁸. But again, it would be a mistake to conclude that since that other religion could not be granted an exemption, equality requires that none should.

An additional comment on exemptions and the right to equality concerns exemptions from anti-discrimination legislation, such as allow, for example, the Catholic Church to hire only men as priests, or would permit any religious congregation to reject an application by an atheist to become its minister. It is not clear why there should be such exemptions. They seem to condone violations of gender or religious equality. It can be no response to say that the rules defining access to the ministry are central to a religion and of the highest importance to its adherents. It may well be that the rules on human sacrifice are of the utmost importance to the Aztecs, but we would not be more sympathetic to their claims for an exemption from homicide laws for this reason. The response is rather that anti-discrimination legislation normally entitles a person not to be disfavoured on the basis of certain personal characteristics *unless* possession or lack of the characteristic in question can be shown to be a *bona fide* occupational requirement. Thus exemptions from anti-discrimination laws are best understood, and can only be justified, as not really exemptions at all, but as irrebuttable presumptions that, for example, gender is (literally) a

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

bone fide occupational requirement for a Catholic priest. The beliefs of a religious group, and its right to preserve itself as a community organized around such beliefs, mean that it is reasonable for it to ask that its ministers comply with or share these beliefs. The special nature of religious belief makes such beliefs fundamentally different from a mere dislike, however intense, of a group protected from discrimination, which could not justify an exemption from anti-discrimination legislation. Thus the “exemptions” do not violate the right to equality conferred by anti-discrimination legislation, properly understood.

To sum up thus far, exemptions must not become a tool for promoting the practice of religion generally or of a specific creed. Nor may they be granted if doing so leads to violations of the individual rights of persons other than the exemption’s beneficiary. However, certain apparent inequalities that the grant of exemptions might be said to create should not count as unacceptable violations of individual rights. But what of those exemptions which, although not infringing on the rights of any specific person, nevertheless compromise the pursuit by the state of policies it deems expedient or even necessary? It is in these cases that the problem of the “room for exemption” really arises.

It is probably impossible to set out in advance a rule for deciding whether or not an exemption is warranted in such cases, since their circumstances can vary a great deal. To the delight of the lawyers and the dismay, perhaps, of the philosophers (and of Rule of Law hardliners), case-by-case balancing of a number of factors is inevitable¹⁷⁹. Among these factors are the importance of the regulatory scheme at issue; the availability for either the state or believer of alternatives to the course which leads to a collision between the state’s regulation and the believer’s understanding of his or her religious duty; and the degree of impairment which the legislative scheme suffers from each exemption, the number of people who are likely to avail themselves of the exemption, and thus the magnitude of total expected impairment to the regulatory scheme. However, while this last group of factors can only be a matter for case-by-case evaluation, it is possible to venture some general observations about the first two.

¹⁷⁹ As I discuss in the next Part, such case-by-case balancing can happen in advance of the enactment of a statute by the legislature: it need not take the form of an exercise of equity by a judge.

The first observation concerns the importance of the regulatory scheme and, specifically, paternalistic regulation. Insofar as the objective of a regulatory scheme is to make those subject to it better off (typically by protecting them from themselves), rather than, say, provide for the common security or welfare, the argument in favor of exemptions becomes especially compelling. For the believer whom a paternalistic regulation prevents from complying with his or her religious duty, the regulation is more than an inconvenience, as it may be for any other person. Mr. Warman thought he should be free not to wear a helmet while riding his motorcycle; but while we sympathize with him (or not, depending on our libertarian sensitivity or lack thereof), his situation is significantly different from that of a Sikh who feels he *may not* wear a helmet because he *must* wear a turban at all times. Those for whom complying with a regulation is an inconvenience, but a morally indifferent one, might on the whole be better off complying. Because the regulation does not interfere with their moral choices, its application to them does not detract from their dignity as autonomous moral agents even though it takes something away from their liberty. By contrast, those for whom compliance is also a *moral wrong* will not be made better off by complying; on the contrary, compliance will mean an infringement of their dignity. If the legislation's aim is really to make such persons better off, then the best way to achieve this aim is to grant them exemptions.

The second observation concerns the availability of ways to avoid conflicts between state regulation and religious duties. It seems obvious that avoiding such conflicts in the first place is better, from the Rule of Law perspective, than to solve them by granting exemptions, since it does not require compromising, in one way or another, the generality of the law. The difficult questions here are what the cost of conflict-avoidance might be, and who must bear it. Sometimes the state may be able to avoid a conflict at little cost, whether for example by crafting its regulations to take the need of religious believers into account or indeed by abstaining from regulation at all if the regulation serves little or no useful purpose¹⁸⁰. But if the only way to avoid conflict is for the state to abstain from an important regulation – for example, not to regulate potentially dangerous objects onboard aircraft in order avoid conflict with those Sikhs who believe it

¹⁸⁰ See: M. C. DORF, *supra*, note 49, 851 and 852 explaining how focussing on the purpose of certain laws which enforce conventional morality might undermine political support for such laws.

their duty to carry the kirpan – it would be both unrealistic and indeed wrong to ask the state to do so.

The next question to ask in such cases is whether the believer can do something on his or her side to help avoid or minimize the conflict – and, again, at what cost. Now it is important to recall a point made earlier in this essay: it is both wrong and futile to try to distinguish what a religious believer “really” has to do to comply with the demands of his or her faith and what is supererogatory on some “proper” interpretation of his or her religious duties. Thus it would not do to tell the believer that he must help avoid conflict between his faith and state regulation by subscribing to a less demanding version of the creed than that which he or she favors, but which has the benefit of not conflicting with the law (for example to tell a Sikh that he does not really have to wear a turban, and therefore he is to blame for any conflict between his beliefs and the rules requiring him to wear a motorcycle helmet).

But it is not wrong to ask whether the believer could avoid a conflict between his beliefs and the law by avoiding engaging in the activity which creates this conflict. Sometimes this will be impossible, for example because the activity in question is a legal obligation, such as compulsory military service. A drafted Quaker or pacifist have no choice but to ask for an exemption; nor does a prisoner subject to prison regulations that conflict with his or her religion. Sometimes, although not mandatory, the activity will be a matter of legal or even constitutional entitlement – for example voting or attending parliamentary hearings. Sikhs should not have to choose between testifying before a legislative committee and wearing their kirpans, as they now do in Québec¹⁸¹. Sometimes, the cost of giving up on the activity may be too high to be fairly imposed on the believer, as perhaps in the case of a shopkeeper whose Sabbath falls on a Saturday and who seeks an exemption from a Sunday-closing law. But in at least some cases, the activity in question is quite optional, and the believer has many alternatives. Thus a Sikh who cannot ride a motorcycle because he wears a turban rather than a helmet can drive a car instead, and his claim for an exemption is not as compelling as, for example, that of his co-religionist who is

¹⁸¹ See: Rhéal SÉGUIN, “Invited to Quebec Legislature, Sikhs Then Barred for Carrying Kirpans”, *The Globe and Mail*, January 18, 2011, online: <<http://www.theglobeandmail.com/news/politics/invited-to-quebec-legislature-sikhs-then-barred-for-carrying-kirpans/article1874725/>> (accessed May 14, 2013).

excluded from a legislature or a public school because he or she wears a kirpan.

It is clear, from the foregoing, that the issue whether a religious exemption ought to be granted in a given case to respect a believer's human dignity is not an easy one. Will the exemption lead to violations of other people's rights? How important is the legislative scheme from which exemption is sought, and how seriously will the exemption compromise its objective? Can the state or the believer help avoid creating the need for the exemption? When the questions to be answered are so complex, it is also a matter of some importance *who* will be called upon to answer them.

VII. Fora For Granting Exemptions

In an immediate sense, it is normally the government official charged with applying the law, whether an officer of the executive branch or a judge, who will grant an exemption to a religious believer who seeks to avoid its application to him or her. The official will have to ascertain the sincerity of the claimant's belief and existence of a conflict between this belief and the regulation¹⁸² – if these two conditions do not obtain, there is no reason for an exemption. But, as we have seen, they are not sufficient. Even when the threshold conditions obtain, there may be good reasons, discussed in the preceding Part, for not granting the exemption. These reasons can be weighed against the demands of religious freedom and human dignity in three different fora, separately or in combination: legislatures (including executive branch officials exercising delegated legislative power); courts; and administrative agencies (a category in which I include officials in the executive branch exercising administrative powers and such creatures of the state as schools). Each of these fora has its peculiar strengths – but all have drawbacks too.

¹⁸² A significant point, as Judge Richard Posner insists in *Menora v. Illinois High School Ass'n*, 683 F.2d 1030, 1033 (7th Cir. 1982) (“The conflicting claims of church and state are a source of some of the bitterest and most divisive controversies in our society. Weigh them and choose we shall if we must, but we want first to satisfy ourselves that the claims really are irreconcilable.”).

A. Legislatures

Legislatures can create religious exemptions to the laws they enact by adding exemptions to each enactment, specifying which religiously-motivated activities are to be exempt from its effect and on what conditions. Legislatures can also enact omnibus provisions directing the officials charged with applying all or some significant part of its laws to grant religious exemptions, as for example the U.S. Congress has done in enacting the *RFRA*. The latter class of legislatively-mandated but judicially – or administratively-created exemptions is in some significant ways different from that of exemptions created by legislatures themselves (which I will refer to as “legislative exemptions”), and I will discuss it in the next section, dealing with exemptions created by courts (“judicial exemptions”). In this section, my focus is on purely legislative exemptions.

Legislative exemptions have several obvious advantages over those created by courts or by administrative agencies. One, of course, is that they have (greater) democratic legitimacy (though the difference is much less significant if courts or agencies create exemptions pursuant to a legislative mandate). They are also preferable from a Rule of Law point of view. For one thing, legislative exemptions are prospective, whereas those created by courts are necessarily retroactive to an extent. For another, being addressed to classes of people, they are less incompatible with the desideratum of legal generality than those addressed to specific individuals. And, as Kent Greenawalt observes, legislative exemptions can be applied more consistently than judicial (or, we might add, administrative) ones¹⁸³.

Legislative exemptions also have the advantage of resulting (at least if the legislative process functions well) from a serious examination of the issue whether there is room for the exemption. The legislature can study the likely effects of a proposed exemption, hear testimony from experts and officials who will be charged with applying the law, and decide whether the exemption will or will not unduly compromise the objectives that it is pursuing in enacting the law¹⁸⁴. Indeed, this is another reason for believing that legislative exemptions are less detrimental to the Rule of Law than

¹⁸³ K. GREENAWALT, *supra*, note 36, 1531.

¹⁸⁴ See: M. W. MCCONNELL, *supra*, note 161, 30: “the government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exceptions”.

judicial or administrative ones: the legislature will presumably not grant an exemption unless it believes that doing so will not lead to anarchy. (The legislature *might* of course be wrong, but it is surely more likely to err on the side of caution than of license.)

But legislative exemptions also have weaknesses. The first is the difficulty to design in advance, in general terms, an exemption that is well tailored to the difficulty it is intended to address. If the attempt is not entirely successful, the resulting exemption may be overbroad or otherwise have perverse effects. So an exemption designed to allow Sikhs to carry their kirpans in public notwithstanding the prohibition on carrying knives and similar objects might be used by a self-proclaimed reincarnation of King Arthur carrying a “three-foot long double-edged sword”¹⁸⁵. Now it may be that this result is normatively the right one – the state, after all, is not entitled to prefer traditionalist Sikhs to latter-day Druids – but it may also be that while there is room for an exemption for relatively small ceremonial daggers, there not enough room for Excalibur.

This example also illustrates the second weakness of legislative exemptions, perhaps more worrying than the first. It is that legislatures are likely not to be very good at protecting the rights of small, disorganized, or unpopular religious groups, still less of individual religious dissenters or conscientious objectors, because, even with the best intentions in the world, they will have a hard time anticipating what the needs of such groups or individuals might be. And, of course, it is not realistic to assume that legislators will always devote their best efforts to catering to the needs of small minorities. Even when actual prejudice is not a factor, a legislator’s time is not infinite, and it is only normal that he or she will devote more of it to larger or better organized groups able to deliver more votes¹⁸⁶. This problem is compounded, as Eugene Volokh observes, by “[t]he separatist religious beliefs of some groups, such as the Amish, [which] may make it especially hard for them to mobilize politically”¹⁸⁷. What makes things worse, says Laycock, is that “[l]egislators are under no obligation to be principled. [...] [T]hey are free to reflect majority prejudices, to respond to the squeakiest wheel among minorities, to trade votes and make compromises, and to

¹⁸⁵ J. WALDRON, *supra*, note 20, 4. See Waldron’s discussion of this problem at 4 and 5.

¹⁸⁶ See: D. LAYCOCK, *supra*, note 39, 15; E. VOLOKH, *supra*, note 160, 1481.

¹⁸⁷ E. VOLOKH, *supra*, note 160.

ignore problems that have no votes in them”¹⁸⁸. For all these reasons, we cannot hope that the concerns and needs of small or unpopular groups will consistently get a full and fair hearing in the legislative forum.

B. Courts

Letting courts grant exemptions from laws they interpret and administer makes it possible to remedy the problems of legislative exemptions. Deciding in specific cases, judges can verify whether religiously motivated conduct that appears to conflict with a general law was really meant to be prohibited – whether “it is [...] really the sort of thing at which the general prohibition was aimed”¹⁸⁹ (whether, in Waldron’s example, a sip of communion wine is really the sort of thing that a prohibition against adults supplying minors with alcohol was meant to apply to, considering that it is not really intoxicating). If it is not, they will conclude that the law simply does not apply to the facts of the case, obviating the need for an exemption and preserving the Rule of Law. Even when the conflict is real and the need for an exemption rather than a narrow interpretation of the law at issue arises, particularized decision-making allows courts to tailor the exemptions they craft to the needs of the claimants before them in each case.

Furthermore, unlike legislatures, courts must listen to each claim for an exemption properly brought before them, no matter how peculiar or unpopular the views on which the claim is based, and judicial independence allows them to uphold such claims without fear of retaliation. Admittedly, judges too “are more likely to respond sympathetically to religious claims that are familiar, easily understood, and unthreatening”¹⁹⁰, but at least they are in a better position to overcome this problem than are legislators.

However, judicial exemptions are vulnerable to the familiar challenges against judicial lawmaking in general. They lack democratic legitimacy; they are retroactive; they are addressed to particular individuals rather than to classes of people; and they may not be granted consistently. Furthermore, judges may lack the information necessary correctly to decide the question of the room for exemption. The parties may not be willing or

¹⁸⁸ D. LAYCOCK, *supra*, note 39, 15.

¹⁸⁹ J. WALDRON, *supra*, note 20, 5.

¹⁹⁰ *Id.*, 14.

able to present all the relevant aspects of a case, and it seems at least possible that “the posture of individual cases – focused on the plight of particular religious persons – leads judges to overvalue individual interests at the expense of the common good”¹⁹¹. In short, judicial exemptions lack any of the virtues of legislative ones.

This critique is somewhat overstated. In common law systems, some judicial law-making, including, for example, creative interpretation of statutes to safeguard individual rights, is typically not seen as illegitimate. Insofar as a judicial decision is a binding precedent, it has a prospective value and speaks, in the future, to the entire class of persons in situations similar to that of the parties. *Stare decisis* also helps ensure consistency. Finally, in cases involving religious exemptions from state regulations, an organ of the state is presumably going to be a party, so that the court will be provided with the perspective of the common good, as represented by the state, making these cases somewhat different from purely private-law matters with public-policy implications. Nonetheless, these are only mitigating factors, and the criticisms outlined above are basically sound, albeit too strongly, or crudely, worded.

One attempt deal with these criticisms is to subject judicial exemptions to a legislative mandate and give the legislature a final say over whether any particular exemption should be granted. Eugene Volokh calls this the “common law” method for granting exemptions, because in traditional common law fields, such as contract or tort, decision-making is left mostly to courts, subject perhaps to some initial guidance and, more importantly, to subsequent intervention by the legislature to correct those judicial decisions that the legislature deems wrong¹⁹².

Volokh points to a number of advantages this approach has over those that rely on purely legislative or purely judicial exemptions. It enlists the courts’ ability to act as decentralized information-gatherers to which complaints can be brought as the problems arise, without the need to anticipate all the potential problems before the enactment of each law and to mobilize the considerable resources that may be necessary to attract a legislature’s attention. If the court’s initial decision is to grant the exemption, the “common law” approach “shifts the burden of overcoming legislative

¹⁹¹ K. GREENAWALT, *supra*, note 36, 1520.

¹⁹² E. VOLOKH, *supra*, note 160.

inertia to favor exemption supporters¹⁹³, because it requires legislative action to abolish exemptions created by courts, rather than to create them in the first place. And before taking such action, law-makers “would have to confront the fact that [it] would hurt a particular religious group, and perhaps confront a record of some months or years during which the exemption was available and the sky didn’t fall”¹⁹⁴. Furthermore, secure in the knowledge that if their decisions prove unworkable or too dangerous, the courts can experiment with exemptions more freely than if their decisions are final and irreversible¹⁹⁵. Indeed, Volokh argues, “experimentation is particularly important in religious exemption cases, where so much turns on uncertain predictions about an exemption’s effect”¹⁹⁶. At the same time, a legislative mandate to create exemptions confers democratic legitimacy, if only of the delegated sort, on the courts’ action, and the possibility of legislative reversal of judicially-created exemptions leaves to the democratically accountable branch of government the final say on intractable issues of public policy that inevitably arise in trying to decide whether there is room for exemption in any given case.

But attractive as this picture is, it is not entirely without blemish. Corrective legislative action, which is its central and distinguishing feature, may be more problematic than Volokh supposes. Depending on the circumstances, it may turn out to be either insufficient or excessive. It will be insufficient if legislative inertia, increased perhaps by the organized resistance of an interest group or by a general aversion to legislation which explicitly overrules rights-conferring judicial decisions, prevents the legislature from overturning judicial exemptions. It will be excessive if, on the contrary, the legislature overrides a judicial decision granting an exemption due to excessive zeal for a particular legislative scheme, or prejudice against the religious group that benefits from the exemption, rather than a thorough consideration of the room for exemption question. Whether the “common law” model Volokh favors is really an improvement over those that rely on legislative or purely judicial exemptions will depend on whether either or both of these problems with corrective legislative action is likely to be overcome in a given polity at a given moment.

¹⁹³ *Id.*, 1469.

¹⁹⁴ *Id.*, 1481.

¹⁹⁵ *Id.*, 1487.

¹⁹⁶ *Id.*, 1489.

Another possibility to combine the strengths of legislatures and courts would be to implement a division of labor between the two fora, assigning to each the part of the decision-making process at which it is most expert. Thus courts would decide whether a proposed exemption would cause violations of individual rights, and legislatures would decide whether there is room for exemption. But a neat separation along those lines is surely unworkable, even if it were normatively attractive. It is not, for it would be perverse to tell legislators not to worry about the impact of the legislation they consider on individual rights, and courts, not to consider the practical impact of their decisions.

C. Administrative Agencies

Administrative agencies (a category in which I include government officials, schools, prisons, etc.) are a possible third forum for granting exemptions, sometimes overlooked due to a focus on legislatures and courts. But agencies deserve some attention, because their institutional characteristics put them in a position to grant religious exemptions in ways that make such administrative exemptions different from legislative and judicial ones.

Now to some extent, the administrative agencies' functions are identical to those of other branches of government, when they are entrusted with making regulations or with quasi-judicial decision-making. But the agencies have two important specific roles as well. First, they are responsible for designing the details of and managing the delivery of a variety of public services. Second, they are also charged with applying and enforcing general rules, whether of their own or of the legislature's making. The distinction between these two roles is not very sharp. Agencies make and apply rules that frame their service-delivery activities. For example, prison authorities (such as the Correctional Service of Canada) might make rules providing for the hiring of chaplains, specifying the security clearances and other qualifications they must possess, and prescribing the way in which prisoners can communicate with them; these rules are the framework guiding the government's delivery of the service of spiritual guidance for prisoners. But it is important to distinguish these two roles of administrative agencies. As I observed above, claims for religious exemptions made against the government as a provider of public services give raise to even more difficult questions than those that arise from its role as

rule-maker and –enforcer. Accordingly, my focus here is on the enforcement activity of administrative agencies, not on their role as service-providers, although I use examples that arguably implicate the latter function, because the agencies operate in similar fashion in both these roles.

Agencies have two distinct advantages over both legislatures and courts. The first is that, being in charge of administering a relatively narrow part of the law, they may have access to more information relevant to deciding whether there is room for any given exemption, and more time for making such decisions, than legislatures or courts. Furthermore, in the course of administering a program, they constantly acquire more information, which allows them to revise and fine-tune their decisions on an on-going basis in ways which are not available to legislatures (due to lack of time and resources) or courts (for the same reasons, but also due to the rules that prevent courts from acting *sua sponte*).

The agencies' second advantage is that they may have greater opportunities than either legislatures or courts to engage in dialogue with groups or persons affected by their policies. Legislatures often lack the time and resources to do so. Judicial decisions are typically one-offs, and courts normally do not get an opportunity to revise them in light of new information. Agencies may be able to do so. They can, sometimes at least, collaborate with the believers requesting an exemption to ascertain their needs and to devise a solution which will fulfill these needs without compromising the agency's objectives or will compromise them as little as possible. Judge Posner sought to take advantage of this ability in *Menora*, a case in which Orthodox Jewish students sought an exemption from the rule of the Illinois High School Association prohibiting high school basketball players from wearing any sort of headwear – including the skull-caps which the students felt a religious duty to wear at all times. Rather than granting the exemption outright, which may have had negative safety consequences, the court directed the complainants “to propose to the Association a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns”¹⁹⁷. Only if the Association

¹⁹⁷ See e.g.: *Menora v. Illinois High School Ass'n*, *supra*, note 182, 1035; see also: *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, a case concerning the right of a Sikh pupil to wear his kirpan to school: the accommodation finally endorsed by the Supreme Court of Canada was originally proposed – though not subsequently ratified – by the respondent school board (para. 3-5).

were reluctant to agree to such a compromise would the court intervene to impose the exemption.

In this way, administrative discretion, so often decried by the defenders of the Rule of Law, might be made to serve its interests by ensuring that the law remains as general as possible. Administrative exemptions may also be easier to devise, obtain, and implement, than legislative and judicial ones: a letter or a meeting might accomplish what in other fora would require the expense of a lobbying campaign or a lawsuit.

But this hopeful description of administrative exemptions relies on view of agencies as willing to accommodate the concerns of those – including the adherents of unpopular minority creeds – to whom their policies apply. In many cases, this view is likely to prove unjustifiably optimistic. Even if agencies do not use the cloak of discretion to hide outright hostility to religion in general or a religious group in particular, they may “tend to be single-mindedly focused on the benefits of their legislation”¹⁹⁸, perceiving any countervailing interests as unimportant.

In reality, agencies, no more than courts and legislatures, are not a perfect forum for deciding whether a religious exemption should be granted or withheld. A good framework would probably involve all three – using a “common law” model, but perhaps leaving courts a final say on certain matters (for example whether legislative action on a given exemption was motivated by bad faith or prejudice), and assigning agencies sufficient discretion to create exemptions, subject to legislative and judicial oversight. Of course specific institutional arrangements of each polity – whether it has judicial review of legislation, and of what sort, its arrangements for judicial review of administrative action, the ease of access of minorities to its legislative process and to courts – and the relative homogeneity or pluralism of its religious landscape must also be taken into account in choosing the approach to exemptions that will work best in that polity.

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Exemptions from laws of general application conflict with the ideal of the Rule of Law, which requires laws to be general and to treat all those

¹⁹⁸ D. LAYCOCK, *supra*, note 39, 57.

subject to them equally. Yet general laws may conflict with sincerely held religious and conscientious beliefs, triggering demands by the holders of such beliefs to be exempt from their application. There are no easy ways to resolve this tension between the Rule of Law and religious liberty, but we must attempt to reconcile these ideals, both of which ultimately serve the value of human dignity, because a failure to uphold either of them weakens the other, whereas when both are protected, this protection becomes mutually reinforcing. There are, however limits on when exemptions may be granted, based both on the individual rights of those who might be affected by the exemptions and on societal concerns, among which the Rule of Law. Every organ of the state ought to be enlisted, to the best of its specific abilities, in the attempt to decide when an exemption is or is not appropriate. There are surely no perfect answers to the multitude of questions that arise in attempting to reconcile liberty of conscience and the Rule of Law, but this is not a reason for legislators, judges, administrators, and citizens, not to try to improve on those answers we are able to give now.