

Religious Exemptions and Fairness

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The morality of religious exemptions has become one of the hot topics in political philosophy in recent years. In part, this is a response to developments in the world. The U.S. Supreme Court's 1990 decision in *Employment Division v. Smith* sparked a furious debate within the American legal academy about exemptions and free exercise. In addition, because of immigration and other factors, religious diversity has become a more salient fact in North America and Europe, and as a consequence claims to religious exemptions have proliferated. Another factor explaining the emerging prominence of religious exemptions in political philosophy is more theoretical in nature. An assessment of religious exemption claims raises fundamental questions for political philosophers about the rule of law, the authority of democracy, and the best understanding of ideals of equality and fairness.

The burgeoning literature in political philosophy about religious liberty includes a group of authors who are quite skeptical about exemption claims. The skeptics are well represented in the present volume, e.g. in the papers by May, Clayton (discussing Dworkin), and Jones (arguing against distributive-justice-based defenses of exemptions). Some leading earlier statements of a loosely skeptical position can be found in books by Brian Barry (2001), Brian Leiter

(2013), Ronald Dworkin (2013), and Christopher Eisgruber and Larry Sager (2007; see also 1994). The skeptics don't, of course, reject all claims to religious liberty. All agree that the law should not target particular religious beliefs or practices for unfavorable treatment. In this sense, neutrality is a generally accepted principle of religious freedom. But the skeptics don't think that a defensible principle of religious freedom would guaranty much beyond neutrality. There is no claim to an exemption in the face of a neutral law that has the incidental effect of burdening somebody's attempt to follow their religion.

I have some sympathies with the skeptical position. In particular, I don't think that the mere fact that someone's religious practice is burdened by a law is sufficient to create a presumption in favor of exemption (Patten forthcoming). But I shall argue that the skeptical view is too stingy in its approach to accommodating religion. There is a set of cases in which exemptions to a neutral law are justifiable on fairness grounds. The paper will present a general fairness-based rationale for exemptions, which for reasons that will become clear I call the *fair opportunity* account.

Skeptics associate religious exemptions with two kinds of unfairness. One is unfairness to those who would like an exemption to some restrictive law but don't have a specifically religious objection to it. The second is unfairness to those who have to bear the costs and burdens associated with exemptions. These two forms of unfairness are related to two standard ideas in liberal political philosophy – neutrality and responsibility. In the paper's conclusion, after

presenting the fair opportunity account, I briefly examine the arguments of the skeptics by considering how far the proposal conflicts with these standard liberal ideas.

Barry's Pincers

Debates about religious exemptions typically concern laws that restrict personal liberty. It is standard to distinguish direct and indirect restrictions (Greenawalt 2006, 3). Direct restrictions consist either of prohibitions on certain forms of conduct or requirements that individuals undertake certain forms of conduct (typically presented as public duties). Laws prohibiting the possession, sale, or consumption of particular drugs are prohibitions in this sense; laws conscripting individuals into military service or making voting compulsory are examples of requirements. Indirect restrictions condition the enjoyment of some freedom or benefit on conforming to particular prohibitions and requirements. Motorcycle helmet laws condition the liberty to ride a motorcycle on wearing a helmet. Dress codes condition the opportunity to attend a particular school or work in a particular workplace on conforming with a dress code. Unemployment insurance schemes condition the payment of benefits on a demonstrated willingness to accept available work. And so on.

Skeptics about religious exemptions are generally happy to acknowledge that many restrictions on personal liberty are onerous and troubling. They insist, however, that the reasons why the restrictions are troubling are reasons for

getting rid of them in general. Rather than carve out special exemptions for people with special concerns, such as religious ones, the restrictions should be lifted for everybody. Motorcycle helmet laws are troubling, for instance, because they smack of paternalism, which many liberals regard as generally illegitimate. Drug laws are also paternalistic and can lead to high rates of incarceration among disadvantaged communities – again, *general* reasons for thinking they should be reduced or eliminated for everyone.

On the other hand, the skeptics argue, if there are compelling enough reasons to justify a restriction, then those reasons ought in general to be sufficiently compelling to justify enforcing the restriction on all types of conduct. *Of course* people are burdened by legal restrictions. If nobody wanted to engage in the prohibited conduct, or if everyone wanted to perform the required actions, there would be no point having a law. But some restrictions make a genuine difference to behavior and are well justified by weighty reasons of public policy. The expectation that those who are eligible for unemployment benefits accept all available work is burdensome to almost everyone – most people would prefer to pick and choose jobs according to their tastes and ambitions – but an unemployment insurance scheme that lacked some such requirement could easily be overwhelmed by an excessive number of claims.

Barry (2001, 40-50), who forcefully develops this “pincer” argument (as Greenawalt (2008, 305) calls it), offers the example of humane slaughter regulations. Two competing positions seem at least coherent to Barry. One is the

“libertarian” view that each person should be able to decide for herself how to balance the desire to eat meat with a concern for animal welfare. The second is the view that we should, as a collective, decide that the effects of certain forms of slaughter on animal welfare are so serious that these practices should be banned altogether. What makes no sense to Barry is the intermediate, “rule-and-exemption” approach that prohibits inhumane slaughter in general but then makes an exception for religiously motivated inhumane slaughter. The general idea is that almost any candidate for an exemption will end up being caught in these pincers. Either it will turn out that the law is excessively restrictive, in which case it should be lifted altogether. Or it will turn out that the law has a solid justification in which case it should be generally enforced.

Underlying this argument is a rejection of *balancing* as a fundamental feature of legal justification (Barry 2001, 182-7; Eisgruber and Sager 2007, 81-7). Proponents of exemptions tend to operate with a background conception of legal justification in which the burdens associated with legal restriction are balanced against the burdens that would be imposed on public interests if there were no restriction. The assumption is that a burden on religious conduct represents a more serious setback to a believer’s interests than an equivalent burden on someone with an ordinary preference (e.g. for a particular leisure activity). If this assumption is granted, then it is easy to see how balancing might lead to the rule-and-exemption approach. One only has to think of situations in which the public interest to be protected by a restriction would be important enough to

outweigh the interests that would be setback of most people wishing to engage in the restricted conduct in question (hence the restriction is justified in general) but the public interest at issue would not be so great as to outweigh the more significant interest of those who wish to engage in the restricted conduct for religious reasons (hence the exemption is justified).

Faced with Barry's pincers, a natural place to start is by considering how, in general, liberals ought to think about justifiable restrictions on liberty. In the next few sections, I shall develop a schematic answer to this question – the *fair opportunity* account. An important implication of the proposal is that balancing does have some role in determining the justifiable boundaries of personal liberty. There is thus more scope for exemptions than Barry and other skeptics suggest.

The Fair Opportunity for Self-Determination Principle

The fair opportunity account consists of a principle – the *fair opportunity for self-determination* (FOSD) principle – and a claim about how that principle should be weighted in thinking about the justification of particular restrictions on liberty. As we shall see, each of these components of the proposal corresponds with an account of why and under what conditions balancing is appropriate.

The FOSD principle is based on two familiar and important liberal ideas. The first is the idea of *self-determination*. An individual is self-determining to the extent that she has the opportunity to pursue and fulfill the ends that she in fact holds. A hallmark of liberal political theory is the conviction that individuals have a

weighty interest in self-determination in this sense. For some liberals, the importance of self-determination is grounded in a deeper value of personal autonomy. It is valuable for individuals to author their own lives, and one condition of their doing so is that they have the opportunity to pursue and fulfill whatever ends they happen to have. Other liberals are agnostic about autonomy (perhaps worrying that it is itself a particular end) but insist that there is a special relationship between an individual's well-being and the pursuit of her occurrent ends. On this view, it is normally a necessary condition of realizing well-being that one affirm and value the ends that one is pursuing. A standard way to promote well-being, accordingly, is to give persons the opportunity to pursue the ends they actually value. And a standard way of thwarting it is to deny them this opportunity, and so to shunt them into the pursuit of ends they do not value (Patten 2014, 131).

The second key liberal idea is that one person's efforts at self-determination can conflict with the reasonable claims of others. The most basic case of such a conflict occurs when self-determination clashes with self-determination. Such a conflict might arise because one person's ends are constituted by the aim of blocking or undermining another's. Or (more commonly) it may be that scarcity prevents two or more people from fully realizing their respective ends. When one person's self-determination conflicts with the self-determination of others, the others have a reasonable claim to be left with a fair space in which to pursue and fulfill their own ends. In addition,

there may be other reasonable claims that people have on one another besides their claims relating to self-determination. For instance, insofar as personal autonomy is an important value, and there are conditions of autonomy other than self-determination, the protection of these other conditions might constitute a reasonable claim.

Putting these two ideas together leads to the FOSD principle:

Fair Opportunity for Self-Determination (FOSD). Each person should be given the most extensive opportunity to pursue and fulfill her ends that is justifiable given the reasonable claims of others.

Some limits on a person's opportunity to pursue her ends are justifiable given the reasonable claims of others. These limits on opportunity are not limits on fair opportunity. But, when a person's opportunity to pursue her ends is limited for reasons that are not justifiable given the reasonable claims of others, she is denied a fair opportunity for self-determination.

Even without fleshing out further the idea of limits that are "justifiable given the reasonable claims of others" it is evident that some legal restrictions would not satisfy FOSD. Some restrictions are not justifiable with reference to the claims of others at all. This is true of paternalist restrictions (the justification of which generally refers to the restricted agent's own interests) and of restrictions that seek to prevent what Joel Feinberg (1988) calls "free-floating evils" (an

offense to some value that is harmful to no particular individual). The justification of restrictions of these types is not ruled out on the proposal I am offering – we will get to questions about the weightiness of FOSD in the next section. What is ruled out is that the law could restrict a person’s liberty for these reasons *and* insist that that person continues to enjoy a fair opportunity to pursue and fulfill her actual ends. Other restrictions are justified on grounds that do at least appeal to the claims of others. But if these claims are trivial or irrelevant then the restrictions would not satisfy FOSD. On any decent liberal view, for instance, the mere fact that a person’s neighbors dislike her behavior is not sufficient to show that a restriction on that behavior would be justifiable given the reasonable claims of others.

A deeper examination of the idea of restrictions that are justifiable by the reasonable claims of others would have to address three questions: (i) Which “others” have standing? (ii) Which claims exactly should be regarded as “reasonable”? (iii) When does a reasonable claim of others make a restriction “justifiable”? Under heading (i), it would be necessary to consider whether human fetuses or non-human animals have reasonable claims that are relevant to justifying restrictions for the purposes of evaluating whether someone has been given a fair opportunity for self-determination. Under heading (ii), an account would have to be provided of which particular claims that are often invoked in justifying restrictions should be considered reasonable. For instance, most people would agree that the mere fact that somebody is offended by another’s

conduct does not give them a reasonable claim against that conduct. But how much does this rule out? Do people have a reasonable claim not to be *stigmatized* by others – publicly treated as if they are less than equal members of the community?

It is question (iii), however, that is most relevant for the argument about balancing and religious exemptions that I want to sketch. Consider a scenario in which person A's pursuit of her ends conflicts with reasonable claims of person B. Under what conditions can we say that B's reasonable claims justify a restriction on A's ends? It is possible to distinguish three kinds of cases:

Unreasonable claims. The most straightforward cases are those in which A's ends are unreasonable. For instance, imagine that A aims to subordinate or oppress B in some way. In cases of this kind, it is plausible to think that B's reasonable claims should simply prevail. We are trying to describe a system or a scheme in which every person has a fair opportunity to pursue and fulfill their ends. We wouldn't expect A to accept a limit on her self-determination because of unreasonable claims by B. So nor should we expect B to accept a limit on self-determination (or on her other reasonable claims) because of unreasonable claims by A. In a system in which each enjoys fair opportunity for self-determination, A and B have symmetrical claims not to have to curtail their own self-determination, or limit their other reasonable claims, just for the sake of accommodating the unreasonable claims of the other.

Independent standards of fairness. In another set of cases, there is an independent standard of fairness that can be consulted to settle the conflict. By “independent” I mean that the standard is prior to and not dependent on the specific ends that A and B each have. For instance, many conflicts over self-determination revolve around scarcity: A and B both have projects that depend on the use of scarce resources. In this context, if there are independent and justifiable standards of entitlement and fair distribution, then an appropriate resolution to the conflict would appeal to those standards. Thus, B’s reasonable claim to advance her own ends would justifiably limit A’s self-determination if and only if A’s self-determination would involve the use or appropriation of resources that properly belong to B. The idea of a fair opportunity for self-determination thus *incorporates* the idea of a fair distribution of resources. Resources, on this picture, are the means that people deploy for self-determination. Something very similar is true of fair contests. Many goods and positions (e.g. jobs, places in university) are not directly allocated as part of a fair distribution of resources but are instead regarded as the rewards for doing well in a fair contest (market competition, university admissions, etc.). If A and B both want a scarce position (e.g. a place in medical school) and B wins that position over A in a fair contest, then even though rewarding the position to B would limit A’s ambitions, this limit is consistent with A having a fair opportunity for self-determination since A lost out to B in a fair contest. The general underlying intuition here concerns

responsibility (a theme I will return to at the end of the paper): given fair access to resources and opportunities, A and B are thought of as being able to adjust their ends to fit with the means that are rightfully at their disposal. They do not have to adjust their ends, but if they decide not to then the frustration of their self-determination is a burden that they are rightly left to bear themselves.

Pure balancing. Some cases of conflicts between A and B do not fall into either of the two preceding categories. Neither A nor B has unreasonable ends, and independent standards of fairness and entitlement do not settle the conflict one way or another. The claims of motorists to mobility and of pedestrians to safety seem like a case of this kind. Cars on the road certainly pose dangers to pedestrians, and pedestrians have a reasonable claim not to be subjected to these dangers. The dangers can be reduced through regulations on driving, prudent design and maintenance of public roadways, and so on, but they cannot be eliminated entirely. But, although pedestrians have a reasonable claim not to be subjected to even the residual dangers, it is plausible to think that this claim would not justify a complete prohibition on driving. This is not, of course, because there is anything unreasonable about the pedestrian's ends. Nor is it because there is some independent standard of fair shares that resolves the conflict; it is hard to identify any such standard. Rather, it seems that in some conflicts, the correct response is to balance the competing claims, giving each some weight but adjusting the weight according to the significance of the claims at issue. In

cases of this kind, neither party gets all of what they want (or need to fulfill their ends) but each is asked to make do with a little less to leave room for the reasonable claims of the other. Thus separate paths are laid out for cars and for pedestrians, and both are regulated and limited in certain respects. This seems like a fair resolution not because it realizes some independent standard of fairness but because it fairly balances the claims of each party.

We shall return to these cases of “pure balancing” a little later when we draw some implications for religious exemptions. But first I want to describe a second respect in which the fair opportunity proposal creates a space for balancing.

The Weightiness of Fair Opportunity

The FOSD principle attempts to describe the space that each person can fairly claim in which to pursue her actual ends given that the pursuit of those ends might conflict in various ways with the pursuit by others of their ends. The principle should be regarded as an important tool for thinking about legal restrictions on personal liberty, which so often appeal to the interests of others for their justification. Whenever a restriction is proposed or an existing restriction is being evaluated, a sensible first step is to see whether the restriction is consistent with FOSD.

However, FOSD is not the only operative principle in this area. A restriction on liberty could deny somebody a fair opportunity for self-

determination and still be justified all things considered. Structuring a framework of law that leaves everyone with a fair opportunity for self-determination is a presumptive or *pro tanto* requirement, not an absolute one.

One very basic reason why FOSD is not the only relevant principle is that self-determination is not the only interest that individuals have. Self-determination is itself valuable because of deeper values of autonomy and well-being. These deeper values depend not just on self-determination for their realization but on other conditions too. Autonomy is not just a matter of successfully pursuing whatever ends one happens to have. It presupposes mental habits of reflection, criticism, and imagination, as well as a reasonable set of options from which to choose. There may be situations in which the law rightly acts to support these other conditions in a way that denies some people a fair opportunity for self-determination. Likewise, well-being may normally depend on valuing the ends that one is pursuing, but this is not the only condition it depends on. It also matters that the ends that people value are actually worthwhile. There may be situations in which the law is justified (all things considered) in nudging people towards more worthwhile ends, even in ways that would deny those same people a fair opportunity to pursue and fulfill the ends that they currently hold.

A second consideration that competes with FOSD has to do with the formatting of public policies (Patten 2014, 169-70). In the cases I am thinking of, the government provides some public benefit, or imposes some public obligation, or makes some decision about its own operation. Depending on how the public

policy is formatted, the fit with the existing ends of various citizens will be better or worse. An evenhanded solution may be available, but if it is significantly more costly the government may be justified in selecting a format that is aligned with some citizens' ends and not with others. The disadvantaged citizens cannot be said to enjoy a fair opportunity for self-determination, since their ends are receiving less accommodation from public policy than the ends of others. But, on balance, this departure from FOSD may be justifiable given the overall savings it realizes. Consider, for instance, government decisions about which languages to use in offering public services and conducting public business. Citizens who speak different languages may have very strong attachments to their languages and want to see them flourish and be used in public settings. The government could accommodate these attachments evenhandedly by operating in all of the different languages spoken by its citizens. But this of course would come with significant costs. On balance, it may be justifiable for the government to designate one or two languages for official use, even though this hardly evenhanded. In this scenario, FOSD would be outweighed by a separate, welfarist consideration.

A third competing consideration arises under non-ideal circumstances. Consider, for instance, a case in which a religious majority would support state institutions only if those institutions manifested a preference for their religion. This unwillingness to support a religiously neutral state seems indefensible, but there might still be a pragmatic reason to accommodate it: it would be a disaster if state

institutions were to become ineffective because the majority withdrew their support. In this kind of scenario, it might be justifiable all-things-considered for state institutions to manifest a preference for the majority religion, but in saying this we would be implying that there is a consideration that outweighs FOSD.

There may be other considerations that compete with FOSD: the preceding list is meant to be illustrative rather than exhaustive. The important point concerns balancing. In the previous section, I argued that there is a role for balancing internal to the FOSD principle. In the present section, the claim is there is a second, external role for balancing as well. The FOSD principle has to be balanced against other considerations in determining whether, all things considered, a restriction on liberty is justified.

Balancing and Religious Exemptions

What implications does balancing have for religious exemptions? The answer depends in part on whether religious commitments are regarded as having special importance in a person's life. If they are considered special, then one might expect that a balancing calculus would turn out differently when a person is facing a legal restriction on religious conduct than if she is facing such a restriction on other conduct.

The question of whether religion is "special" is much debated in the academic literature on religious freedom, and I do not propose to add much to that discussion here. My main claim can be expressed in a conditional form: *If*

religious commitments are reasonably regarded as having special importance, then there is a principled justification for certain religious exemptions. To make the antecedent of this conditional at least minimally plausible, however, it is helpful to draw a distinction between two different senses in which religious commitments might be regarded as having special significance. One version of this idea holds that religious commitments are *uniquely* special. There is something about religious commitments – lying in their reference to the sacred or to God, for instance – that puts them in a class of their own, normatively distinct even from secular commitments that offer moral guidance or an overarching framework for interpreting life and the universe. On the second version of the idea, religious commitments are part of a *class* of special commitments that share some feature in common – e.g. they are connected with a claim to normative authority, they are important for personal identity, etc. – and that can be contrasted with “ordinary” commitments that do not share the relevant feature and so are regarded as having less significance in a person’s life. This second, *inclusive* conception of special significance strikes me as much more plausible than the first, and I will assume it throughout the remainder of the discussion. Thus, in talking of religious commitments as having special importance I am not ruling out the possibility that some (but not all) other commitments should be regarded as special also.

With these two pieces in place – the conditional form of the claim, and the inclusive conception of special significance – let us now consider some cases

where religious exemptions are debated to see how they are illuminated by the general framework I have been sketching. I organize the discussion around the distinction between balancing that is internal to FOSD (“internal balancing”) and balancing between FOSD and other considerations (“external balancing”).

(A) Internal Balancing

As we saw earlier, a restriction on somebody’s liberty is consistent with FOSD only if it is justified by the reasonable claims of others. In some situations, the conduct facing restriction is itself unreasonable, and then there is no problem saying that the restriction is justified by reasonable claims of others. In other cases, there is an independent standard of fairness and entitlement that can be appealed to in order to determine whether someone’s reasonable claim justifies the restriction. We are interested here in the third kind of case mentioned earlier: cases in which nobody’s ends are unreasonable, and there is no independent standard of fairness/entitlement to resolve the conflicting claims.

In these cases, I’ve suggested, it is appropriate to balance the competing claims, limiting each to some extent in order to try to make as much space as possible for the other. A balancing operation of this kind is appropriately sensitive to the importance of the claims of each party. With a conflict between two fairly trivial claims, an appropriate balance might be quite evenhanded in the limits it expects each to accept. But if a less important claim is matched against an important one, then an appropriate balance might incline much more heavily in

favor of the more important claim. This simple observation about the logic of balancing leads to the suggestion that an appropriate balance when someone's religious concerns are at stake might look quite different than an appropriate balance when only "ordinary" commitments are at stake.

Here are some illustrations of this possibility:

Mandatory photo on driver's license. A Canadian Supreme Court case, *Wilson Colony* (2009) considered whether an Alberta regulation eliminating an exemption for Hutterites from a provincial requirement that all driver's licenses include a photograph violated constitutional protections of religious freedom. The Hutterites believe that it is a sin to consent to be photographed and they argued that the isolated and rural character of their communities made it necessary for many of them to obtain driver's licenses. The Government of Alberta argued, in turn, that photos on driver's licenses protected the integrity of the licensing system, made it easier to identify accident victims, and allowed for the harmonization of Alberta's driver's license system with that of other jurisdictions.

Reflective triangles on slow-moving vehicles. Barry (2001, 182-87) discusses a Minnesota Supreme Court case (*Hershberger I*) about a law requiring that all slow-moving vehicles display a red and orange reflective triangle. Some Amish objected to these stickers as "worldly displays" and the Minnesota court sided with their view, arguing that the requirement "burdened the exercise of Amish

religious beliefs” and was not justified by a “compelling state interest” (Barry 2001, 184).

Autopsy requirement. A third case is described by Greenawalt (2008, 315) (and attributed to William Galston). Some jurisdictions require an autopsy to be conducted on the body of anyone who dies who is not under the care of a physician. An autopsy can help to identify possible foul play and can serve other legitimate medical or public health purposes. Some groups, e.g. Orthodox Jews, object to autopsies on religious grounds. The question is whether, in circumstances where there is no reason to suspect foul play or a public health concern, individuals with a religious concern might be exempted from this requirement.

All three of these cases can plausibly be thought of as falling into the “pure balancing” category described earlier. In none of them do the claims of the contending parties involve unreasonable ends – ends that call for the subordination or oppression of others. More tentatively: in none of them is there an independent standard of fairness or entitlement that could be consulted to determine whose claims should be prioritized. Instead, in each case the right approach to deciding how much restriction is consistent with FOSD consists in weighing and balancing the competing claims – roughly, the claims to public

safety on the one hand vs. the claims to fully control one's own privacy, body, and personal property, on the other.

Furthermore, in each case the balancing exercise seems quite straightforward *for most people*. Certainly, in the two driving-related cases, the requirements in question will seem quite trivial for most people. If they constrain at all, they are matters of convenience and aesthetic preference. The autopsy requirement might seem more obtrusive to people with a particular vision of what should happen to their body after they die, but again for most people it is not likely to count as a serious setback to their pursuit of their ends. Finding an appropriate balance is thus quite easy: a law that imposes the requirements in question can be justified by the reasonable claims that everyone else has in personal safety, even if the contribution made by the restrictions to safety is quite marginal.

For people with religious objections to the practices in question, however, the balancing calculus looks very difficult. The setback to *their* interests is quite serious (or so they report) and thus the conclusion that a fair balance would favor the legal requirements at issue would need to be revisited. If the contribution to safety made by the requirements is quite marginal, then it is easy to imagine that an appropriate balance between the conflicting claims might swing in the other direction: the legal requirement should be amended or relaxed so as to leave space for the religious commitments that would be affected.

The suggestion that a balancing test should be used to think of cases like these is not a new one. Barry (2001, 186) observes that the Minnesota court followed a balancing approach and then objects that it would follow that “anybody with a sincere belief can have any law specially tailored to fit, unless the state can satisfy the ‘compelling state interest’ [test].” Considering *Autopsy requirement* Greenawalt (2008, 315-6) reaches a similar conclusion but from the opposite point of view. For Greenawalt, the case helps to show that justice can mandate exemptions even in cases of a non-discriminatory law. My argument is quite a bit narrower in its implications since it is restricted to cases of pure balancing. Barry is wrong to extrapolate from *Reflective triangles* to “any law” since other laws might not be pure balancing cases but cases where independent standards of fairness can be invoked. For the same reason, Greenawalt would be mistaken to think that *Autopsy requirement* supports any general thesis about the justice of exemptions. It may instead only support a thesis restricted to pure balancing cases.

(B) External Balancing

As we saw earlier, FOSD is not an absolute requirement but a *pro tanto* one that can be defeated by sufficiently important conflicting considerations. So how strong is the presumption against denying someone a fair opportunity for self-determination? Two hypotheses can help us to think about this question. The first is that the weightiness of FOSD is a function of the importance of self-

determination. The more important it is for individuals to have the opportunity to pursue and fulfill their actual ends, the weightier the presumption against denying them a fair opportunity for self-determination.

The second hypothesis is that the importance of self-determination for an individual is a function of the importance for the individual's life of the commitments that she would pursue in exercising her self-determination. While self-determination has some general generic importance, it has heightened importance when the commitments at stake have special significance for the individual (Patten 2014, 133-6). To put this another way, it is especially important for individuals to be self-determining, and thus to have a fair opportunity for self-determination, in some areas of life: religion, morality, friendship and other close personal associations, the body, sexuality – these and other areas of life are ones in which it is especially important for individuals to be able to follow their own ends. They are thus areas in which the presumption against denying someone fair opportunity for self-determination is especially difficult to overcome.

Rather than pursue these hypotheses further, I want to consider how, together with fair opportunity account, they point to an argument favoring religious exemptions. Let's begin again by considering a couple of cases:

Peyote. An Oregon law prohibited all uses of peyote, a drug that was ingested as part of Native American religious ceremonies. When the Supreme Court examined the prohibition it found a “valid and neutral law of general applicability.”

Advocates of an exemption argued for a balancing approach in which the public interest served by the prohibition is weighed against the substantial burden on religion that was the prohibition's effect.

Conscientious objection to combat service. Some religious groups, such as Quakers, believe that it is wrong to use violence to achieve their or the state's ends. In states that have conscripted people into combat service, the members of these groups have sought exemptions.

Debates about both of these cases have tended to pit balancers – who maintain that the state must have a “compelling” reason to burden a core religious conviction – against those who reject the relevance of burdens to a law's justification. The fair opportunity proposal I have been developing allows us to think about these cases in a somewhat more nuanced way. The key insight is that each case involves external balancing: FOSD is weighed against competing considerations. Because balancing is appropriate in these situations, the argument for exemption can proceed along the track favored by exemption proponents. But this is not because balancing is *generally* the right way to think about legal justification, and so standard objections to balancing do not get any purchase.

Consider *Peyote* first. A law prohibiting peyote imposes a restriction on liberty. Such a restriction denies fair opportunity to potential users unless it is

justified on grounds that appeal to the reasonable claims of others. Many standard rationales for prohibitions of this kind would not pass this test. A paternalist justification would fail, for instance, since it does not even appeal to claims of other people. Nor, arguably, would some justifications that do cite the claims of others, such as the argument that drug use sets a bad example or that it turns people into less productive citizens. While these arguments have the right form, the considerations they invoke are too weak or speculative to justify an outright prohibition.

If the prohibition on peyote denies fair opportunity, then there is a presumption against it. But such a presumption could be defeated by a sufficiently powerful competing consideration – a consideration “external” to FOSD. Most obviously, there could be a weighty paternalist reason for prohibiting, or at least heavily regulating, the use of peyote. If such a reason were compelling enough, then the prohibition would be justified all-things-considered even though it would not leave prospective users of the drug with a fair opportunity for self-determination. But, once the argument follows this balancing logic, the door is open to an argument for religious exemptions. For most people (presumably) nothing of great significance is lost by the prohibition. Given a weighty paternalist reason, the balancing calculus is quite straightforward. But for religious users the prohibition is very consequential. Holding the strength of the paternalist reason constant, one can easily imagine that the preponderance of reasons would swing over to the other side for these individuals. At the level of

principle, then, there is both an argument for the general rule and for a religious exemption.

Turning to *conscientious objection*, exemption seems problematic to many people on fairness grounds. Most people would rather not be conscripted into combat service, but presumably the government has determined that conscription is necessary for the public good. By refusing to serve, conscientious objectors seem to be refusing to do their fair share of a dangerous and unpleasant task. But this response to conscientious objectors fails to do justice to their position. Many do not object to doing their fair share. They are often willing to take on dangerous and unpleasant tasks that serve the public good, so long as they are not required to kill others intentionally. They ask for latitude in *how* they serve the public, not to be relieved from the general obligation to do so. From this perspective the question of fairness concerns whether a particular system of conscription is excessively prescriptive about how individuals are to discharge their public obligations. The imposition of a public obligation can deny fair opportunity for self-determination if it is unnecessarily specific about the time, manner, and place in which the obligation is to be performed. The question then becomes whether it is possible to design a conscription system that allows individuals to mesh their public obligations with their other ends and commitments.

As Greenawalt (2006, 53-4) has observed, one possible solution would be to set up a system in which anyone subject to conscription is permitted to choose

between a period of combat service and a *longer* period of non-combat public service, where the difference of length between the two forms of service is calculated to ensure that enough people are available for each. Creating such a system would be a way of accommodating conscientious objectors without adopting the rule-and-exemption approach. Imagine, however, that legislators decide against adopting the proposed system on the grounds that it is too complicated or expensive to administer. They would, in effect, be saying that FOSD is outweighed by other factors (welfarist ones). This may well be plausible in general, especially if most people would opt for combat service (because of the shorter length). At the same time, given the nature of their objection, one could easily imagine that the welfarist consideration would not outweigh FOSD for religious objectors. So, as with the peyote case, once balancing is allowed to play some role in the overall framework, it is hard in this case to dismiss the pro-exemption position.

The Roots of Exemption Skepticism

By way of a conclusion, let me consider how the fairness-based case that I have been developing fares against the underlying reasons for skepticism offered by the critics. These reasons can be organized into two main categories. Some argue that religious exemptions are unfair to people who object to a law but who lack a specifically religious objection. Why should they have to comply when those with a religious claim do not? The underlying concern here is with state

neutrality: the law should not be singling out specific classes of ends and offering them special solicitude that is withheld from other ends.

The second fundamental criticism relates to responsibility. Barry and others object to the balancing approach because it gives people a stronger claim when their ends have a particular character. Like catering to expensive tastes, this seems inconsistent with the liberal idea that individuals should be regarded as responsible for their ends. Exemptions allow religious believers to offload burdens onto others that they should be bearing themselves.

Let us consider these two challenges in turn. The argument I have sketched makes two substantial claims that are relevant to the neutrality challenge. One is that there are contexts where balancing is the right way to think about legal justification. The other is that a burden on a religious (or other special) commitment is a more severe setback to a person's interests than an equivalent burden on an ordinary commitment. If these two assumptions are granted, then it is hard to see what the force is of the concern about neutrality. It is true that religious objectors are receiving a benefit that others are not, but if the argument for exemption goes through this is because the law would not (on balance) be justified for them whereas it would be for others. This argument is not defeated by observing that some of these others would prefer not to be constrained by the law, since presumably it is not the mere fact of a preference that gives the religious believers a weighty claim in the first place.

What may be underlying the neutrality objection is a sense that it is impossible to craft an exemption that applied perfectly to all and only the people for whom it is justified. I suspect this is true. But it does not help matters to refuse exemptions to everyone. Refusing all exemptions more or less guarantees that there will be a class of people for whom the law is unjustified that are subject to it never the less.

I am sympathetic with the responsibility objection and for this reason I do not think that balancing provides a general approach to thinking about legal justification (Patten forthcoming). The cases of “expensive taste” that philosophers worry about tend to be cases in which there are well-defined standards of fairness and entitlement that logically precede the burdens on particular commitments. Against a generalized balancing approach, I agree that in these cases the onus is on people with burdened commitments to adjust their commitments or put up with the burden. But in the contexts where I think exemptions can be defended, the responsibility objection has no purchase. In cases of internal balancing, there is no independent standard that can be consulted to anchor a claim of responsibility. And in cases of external balancing, the argument for an exemption is, at root, an assertion of the importance of each having their fair share against claims that compete with fairness.

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