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Kent Greenawalt

Columbia Law School, kgreen@law.columbia.edu

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Recommended Citation

Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J. CONTEMP. LEGAL ISSUES 91 (2013).

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Religious Toleration and Claims of Conscience

Kent Greenawalt*

INTRODUCTION

One aspect of the issue of toleration of religion is how far the government and others should recognize religious claims of conscience. Such claims will be present in any liberal democracy. The particular controversies in focus shift, but certain underlying themes remain.

In this Essay, I outline what I take to be the major issues regarding government recognition of religious claims of conscience. I then address the special problems created when a claim of conscience ends up competing with an opposing claim of conscience or with basic premises about fairness and justice. We can conceive of these as competing claims of toleration. Just such competition is involved when the question is a possible exemption from compliance with laws that recognize same-sex marriage and from laws that require insurance coverage of contraceptive drugs, two prominent issues in our present political setting.

I. BASIC ISSUES ABOUT GOVERNMENT RECOGNITION OF RIGHTS OF RELIGIOUS CONSCIENCE

For the standard issue of conscience, the question is whether individuals or organizations should be allowed to engage in or avoid actions if doing so complies with their conscience, even though those actions are generally forbidden or required. The most notable example from United States history was the question of whether pacifists should be drafted into the military or jailed if they refused to comply. Here, the precise issue involves compliance of an individual person with a requirement of the government. In the United States, the primary locus of resolving that question has been Congress, the national legislature, with the Supreme Court exercising implausible constructions of the statutory language to extend coverage in important respects.¹

* This essay has benefitted greatly from discussions at conferences at the University of Colorado, at the University of San Diego Law School, and from discussions at the University of Virginia School of Law. James Nelson and Joel Harrison offered very helpful comments on prior drafts and Michael Fernandez provided excellent research assistance.

¹ My understanding of those cases appears in KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* VOL. 1: *FREE EXERCISE AND FAIRNESS* 49-67 (2006) [hereinafter *Free Exercise*] and in Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31-94 (1971).

But it is worth noting at the outset the range of variations of the relation between governments and the recognition of such claims. Some claims of conscience are constitutionally protected, or are basic human rights, recognized by international law. Other claims may be asserted as rights that legislatures or executive officials have respected or should respect, but which are not themselves established by constitutional or international law. Other claims may properly be conceived not as “rights,” but as providing the bases for the exercises of discretion by those in authority. The focus of the essay is on what are wise choices about recognizing claims of conscience; I do not examine exactly how the Religious Freedom Restoration Act and other statutes should be interpreted or how far the Constitution should be read to protect individual conscience and related organization claims.

A government’s concessions may be to organizations as well as to individuals. One may fairly question whether organizations can have a “conscience.” I believe that in some circumstances this is a proper extension of the basic concept, but for practical purposes the crucial issue is not whether we call these “exemptions based on conscience,” but whether particular kinds of organizations should receive exemptions from ordinary requirements on bases like those on which individual claims might be recognized. Most obviously, an exemption for an organization may effectively fulfill the sense of conscience of individual members and leaders. In his book, *Conscience and the Common Good*, Robert K. Vischer emphasizes how crucial private associations are to the formation of individuals’ senses of conscience, and urges that they need protection for this reason.²

Once we bring organizations into the picture, we quickly realize that the government’s relation to claims of conscience can vary from that present in the draft example and many others. First, claims of conscience need not be directed at the government. Private businesses and universities might be asked to recognize claims made by employees or students. For example, a student might ask to have his Saturday exam delayed because it would conflict with his sense of what God wills that we do on that day. Second, the government may be involved, but in a different way than granting an individual or organization an exemption from a legal requirement. The government can instead insist that organizations grant exemptions to individuals from requirements that the organization (or the government)

² ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 9, 10, 44, 71, 97 (2010).

sets. Thus, hospitals may be forbidden to dismiss or penalize nurses for refusing to participate in abortions that the hospitals have chosen to perform.

With respect to the precise content of any exemption based on conscience, a number of crucial questions arise. Among these are: (1) what counts as a relevant claim of conscience?; (2) should an exemption be limited to religious conscience or extended to all claims of conscience?; (3) must such claims be sincere, and how may sincerity be determined?; (4) must the claimant's relation to the action to which she objects be close or is peripheral involvement sufficient?; (5) what, if any, considerations should outweigh claims of conscience that ordinarily would warrant acceptance?; and (6) should standards of exemption be cast in general or specific terms? I shall address each of these questions in turn, highlighting the central issues and indicating the general responses I would give, but without exploring the issues in depth, or aiming to develop precise legal guidelines.

For each question, I shall also note another dichotomy—that between what would make sense in some ideal setting and what is a desirable resolution in our actual social context. I should acknowledge at the outset that both these notions have vague, and open-ended, content. Ideal as to what? Are we talking about perfect people with perfect motivations and perfect insight into what is right and wrong? No. What I am treating here as “ideal” does not go that far, but it does assume that officials and others are capable of ascertaining all relevant facts, that they will understand and apply accurately whatever standards are set, and that they need not give way to irrational resentments and prejudices. What this construction allows us to do is to see what deviations from otherwise desirable standards are needed to respond to human difficulties of fact-finding and norm application or to regrettable misunderstandings and hostilities that are common in a society.

When we turn to “actual social context,” we might focus on the political balance of the moment and what compromises will or will not work in a particular jurisdiction when an exemption is being considered. My reference here is more general, mentioning aspects of American culture but without tackling just what is feasible at a particular time and place.³

³ For an insightful examination that is much more specific, see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

*A. What Counts as a Claim of Conscience?*⁴

As with most fundamental concepts, the coverage of “conscience” is by no means precise. For our purposes, the serious question is not the outer boundaries of the proper use of the term, but what needs to be seriously considered if one is thinking about exemptions based on conscience. Three central concerns are: whether conscience involves a substantial intensity of conviction; its relation to moral judgments and self-identification; and whether, for practical purposes, we should conceive of organizations as having claims of conscience.

If we think about conscience as usually connected to moral judgments, we assume it involves a certain intensity of conviction, a sense that a wrong that one might commit is of a substantial magnitude. Such intensity and magnitude is not implied in all ordinary uses of the word. I might say to a friend, “You’ve made a perfectly reasonable suggestion of what I should do, but somehow my conscience tells me that would be wrong.” Here, “conscience” expresses a sort of feeling about right and wrong, one that I may not know how to defend on a reasoned basis (or whose defense I am disinclined to offer my friend). In another situation, I might say, “My conscience tells me I should take the children out to play,” without implying that a failure to do so would be a serious moral wrong. For these usages of “conscience” that do not connote a sense of a serious wrong, I might well be willing to act contrary to its implications if that were needed to avoid an adverse consequence. But in most contexts, asserting that something is a matter of “conscience” implies a strong moral conviction. It suggests my belief that I should be willing to suffer serious adverse consequences rather than perform the act. We do not suppose someone is a genuine conscientious objector to military service if he thinks he *should* serve rather than spend two years in jail. He would not fail to be such an objector if he did not have the moral courage to act on that conviction, but if he were actually willing to suffer no adverse personal consequence, we certainly would doubt the intensity of his moral sense. So objections of “conscience” typically do imply both a strong intensity of conviction and a sense of serious moral wrong. Just what the required intensity and magnitude would need to be to cross the line might vary with the seriousness of the act in question. Given the sacrifice that those who submit to the draft are making, one’s objection would need to be very powerful if military service is the question; a lesser intensity and sense of

⁴ I explore aspects of this issue in Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901 (2010).

magnitude might suffice if the question were whether a person should tell a “white lie” to assuage a friend’s feelings, and she objected in conscience to doing so.

A central question about this issue of intensity and magnitude is whether it should implicitly be incorporated as part of the standard for a legal exemption. Perhaps for some matters, all moral objections should be accommodated. A serious practical problem is that those persons deciding whether an individual qualifies for an exemption may be hard put to judge a claimant’s intensity of feeling and sense of wrongness. Nonetheless, one might think such language in the law sends the message that only those with genuinely powerful feelings should be exempted and may help discourage those with lesser moral objections from applying for an exemption.

The very connection of “conscience” to moral judgment is more elusive than the need for intensity of conviction. Apart from certain religious claims, for virtually all of the practical issues involving exemptions that are primarily conceived as based on “conscience,” conscience is related to morality.⁵ The objector believes that performing the otherwise required act would be deeply immoral, an act toward other beings on earth that wrongs them. I use “other beings” rather than “persons” because I think ideas about decent treatment of animals are moral ideas, as are notions about the stage at which embryos and fetuses deserve protection (even if they are not yet considered persons).⁶

It has sometimes been suggested that claims of conscience are tied to personal identification or connected to the search for the ultimate meaning of life.⁷ I reject the ultimate meaning approach, because many people feel claims of conscience that are not related in any conscious way to their sense of life’s meaning or their search for that meaning.⁸

The connection to personal identification is less simple. When we have deep moral convictions, they are likely to be part of our sense of ourselves. But what if we have an aspect of our personal identity that is not connected

⁵ Vischer, *supra* note 2, at 71 (referring to the exercise of conscience as communicating “a person’s moral convictions to the surrounding society.”)

⁶ An interesting development in this regard is the recent limitation of using “chimps” for research. See James Gorman, *U.S. Will Not Finance New Research Involving Chimps*, N.Y. TIMES, Dec. 16, 2011, at A26, available at <http://www.nytimes.com/2011/12/16/science/chimps-in-medical-research.html>.

⁷ See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 168-69 (2008).

⁸ I pass over versions of an “ultimate meaning” approach that are so amorphous they include virtually every attempt to understand any important dimension of human existence or responsibility.

to our moral judgment? Consider this response by a scholar to a complaint that he is paying insufficient attention to family members who need him: "You are probably right about my moral responsibilities, but my conscience tells me I am first and foremost an intellectual and that, even if I am not a particularly able scholar and have little influence, the search for truth is what I must devote my attention to." I am not sure whether we should regard this as a genuine claim of conscience; what I am sure of is that law should not create exemptions from ordinary standards based on such claims of self-identification that do not comport with strong moral convictions understood as covering responsibilities to others.⁹

The connection to moral perspectives is more complicated when we turn to religious convictions. Many religious believers think they owe it to God to act in certain ways. That may be because they assume that God directly seeks such behavior or that God has placed authority in particular human individuals and institutions, and these require the behavior. A typical Roman Catholic priest believes, as a matter of conscience, that he should not reveal what is told him in confession, regardless of how damaging his silence may be to innocent individuals.¹⁰ One could conceive this as involving a moral responsibility to the person making the confession, or as a necessary safeguard to keep the practice of confession effective, but priests who did not find either of these bases independently persuasive would still think their religious position requires that they remain silent. Simpler claims of religious conscience that are not "moral" in any simple sense are to cover one's head, or not to work on the Sabbath, or not to eat certain foods. Plainly, some nonmoral claims of this sort should be accommodated, whether as a matter of established rights or individual judgments by those with authority. We might better treat many of them simply as claims of religious exercise, without worrying whether they also amount to claims of conscience. However, if someone stands to be seriously harmed by their exercise, as could be true if the priest's silence allows an innocent person to be convicted, we might want to require that the claimant has the intensity of feeling and sense of magnitude associated with "conscience."

Can an organization have a "conscience"? One way of speaking undoubtedly is that consciences are individual, that it is a misnomer to attribute "conscience" to organizations. In respect to ordinary usage,

⁹ Such convictions *can* be present for those who feel a "calling" to help others in particular ways, such as working as a nurse or a cleric.

¹⁰ The absolute duty is compared with the approaches of other clerics in a discussion of particulars for confidential communication to clergy in Free Exercise, *supra* note 1, at 246-60.

however, we might say this: "If there is a small group of individuals who work together in some way, and all share a particular view about what conscience demands, we can say that the organized group has a claim of conscience to that effect." For example, "The Smith family has a conscientious objection to abortion." The terminology becomes much more disputable if we are talking about an organization in which the authoritative doctrine and the actual view of most "individuals at the top" asserts that, as a matter of conscience, people (or believers) should not engage in certain behavior, but the organization includes many individuals who happen not to share that perspective. The crucial practical question is not whether it conforms with ordinary usage to say, "Roman Catholic hospitals believe as a matter of conscience abortions are wrong"; it is rather, whether exemptions should be granted to organizations on the ground of the conscientious views of crucial members of the organization. That is a difficult problem that I will postpone for later discussion.

B. Should Religious Claims of Conscience Be Treated Specially?

There are two basic reasons not to force people to act against what their conscience tells them. The first is that in a society that values individual liberty and autonomy, we should hesitate to require people to do what their conscience tells them is deeply wrong. This reason applies in personal relationships and within private organizations as well as in relations between the government and its citizens. Ordinarily, one would not seek to push a family member or friend to do what she says would violate her conscience, and a business or university may try to formulate duties that are consistent with the consciences of those subject to their requirements. Similarly, if the government can avoid trespassing on the consciences of its citizens, that is healthy, barring strong countervailing reasons.

The second basis for accommodation relates to the practical implications that flow from the intrinsic nature of conscience. If people really do feel that an act would violate their conscience, they will be hesitant to perform the act, even under pressure. This can set up unproductive conflict and waste. In the family context, if one insists that a spouse or adult child perform an act she says would violate her conscience, one threatens family harmony. If, despite one's insistence, the family member refuses to perform the act, one has failed to achieve one's aim and now faces the unpleasant dilemma of how to respond. If a conscientious objector to military service is put in jail, the government has failed to add to military personnel, has consigned the objector to an unproductive period of life, and has expended public resources. Of course, imposing such

sentences may weed out those who are not sincere objectors and may provide a sense of fairness for those who do submit to the draft, but these are high prices to pay. These values of refusing exemptions altogether can be substantially achieved by instead requiring alternative nonmilitary service of successful objectors.

A more positive practical reason for recognizing claims of conscience is that allowing people to act on their developed moral sense can be healthy for society. We all benefit from the exercise by others of moral convictions, and in a free society we need to recognize that variations in particular convictions can themselves be desirable.

Thus, we can start from the premise that if many citizens are conscientiously opposed to performing certain acts, that is a good reason to think seriously about a possible exemption from what is generally required. Are there reasons to exempt only religious claims of conscience? This turns out to be anything other than a simple question, and much may depend on exactly what exemption is being considered. The issue can be sidestepped, but not really avoided, by treating all claims of conscience as religious. The Supreme Court took a substantial step in this direction in *Welsh v. United States* when the plurality concluded that people “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace” if they became an instrument of war, qualified under the Selective Service Act’s requirement of religious belief.¹¹ It was widely assumed that this stretching of the language was designed to avoid the constitutional objection that, at least in this context, religious objectors could not be treated more favorably than nonreligious ones.¹²

In one sense, it is a kind of insult to nonbelievers to say that all claims of conscience are religious. Some people live their lives rejecting positive claims of religion or without relying either on such claims or on rejections of religious truth. They develop their moral senses and evaluate moral issues according to other criteria. In a society like our own, many religious believers have moral convictions—for example, about family or professional responsibilities—that are not derived from their religious understandings. On a thorough examination, those people might well be able to connect these convictions to their religious understanding and

¹¹ 398 U.S. 333, 342-44 (1970).

¹² Justice Harlan, concurring (and a necessary vote to constitute a majority), did take the position that the statutory language itself favored religious claims, but that nonreligious objectors should be included in the exemption because it would be unconstitutional to do otherwise. *Id.* at 344-62 (Harlan, J., concurring).

affiliation, but religion is not their primary source. If people undoubtedly can have nonreligious moral convictions, they can also have such convictions that have the intensity of claims of conscience. Against a possible argument that religious people will feel claims of conscience more intensely, because of belief in a Higher Authority, the answer is that not all religions posit such an Authority, and that if a Christian believes that God is ready to forgive all confessed sins, he may feel no worse about doing what he takes as a moral wrong than those who do not believe in God.

We can quickly identify reasons *not* to single out religious conscience. The most obvious reason is that it seems intrinsically unfair, if not actually unconstitutional, to draw such a distinction among people with equally strong moral convictions. A second reason is the difficulty of drawing the line about which claims of conscience count as religious. This line-drawing problem involves both the difficulty of saying what exactly makes something religious, and the manner in which many religious people have moral convictions that do not seem directly grounded in their religion, but may bear some relation, perhaps remote, to that religion.

What arguments might be made for limiting exemptions to religious claims? One might, of course, say that they have a special constitutional status; but even if the Free Exercise Clause is *a* reason to accommodate religious claims of conscience, it is not, in and of itself, a solid basis to deny extension to nonreligious claims of conscience.

The most obvious reason to limit claims to religious ones is the absence or implausibility of parallel nonreligious ones. More subtle distinctions involve how far society should be dictating the morality of its citizens, and what message an exemption may send about what is acceptable. Another concern is the basis for some nonreligious moral judgments. Finally, tied to these other reasons, is the fundamental idea that religious institutions should be largely free of government control.

When one thinks of conscientious objection to military service, we have no difficulty imagining nonreligious claims. A vegetarian's objection to eating meat could also have a nonreligious grounding. But we find it harder to think of a nonreligious claim of conscience never to eat pork or lobster in particular, or to wear a certain kind of clothing, or not to work on a particular day of the week.¹³ As the claims move away from moral appraisals, the likelihood increases that claims connected to religion will not be matched by nonreligious claims. Even as to moral claims, some may

¹³ Perhaps a parent's moral sense that he or she should spend time with their children could rise to a moral claim of conscience not to work regularly on all days when the children are out of school.

seem effectively limited to religion. Although natural law theorists present nonreligious reasons why it is wrong to use any contraceptive devices, I would be surprised if their claims, resting on a sense of the intrinsic nature of proper sexual behavior, a certain kind of moral view, seem persuasive to more than a minute percentage of nonbelievers.¹⁴ For the various kinds of claims connected to religious convictions and practices for which nonreligious analogies are hard to imagine, limiting an exemption to religious grounds makes sense. Of course, one might counter that including nonreligious claims will then not do any harm, since no one will assert them.

More perplexing issues involve what the formal organ of the general society should regard itself as confident to assert, and what message a government exemption will send. Liberal democratic governments, by their very nature, are not experts about religion; they lay no claim to have the expertness to determine what God expects of us. By contrast, officials may regard themselves as able to make judgments of nonreligious morality. If someone claims on nonreligious grounds that all war is immoral, we might point to Nazi rule in Germany and say that an unwillingness to fight back against Hitler's armies would predictably have been ruinous to much of the world. Against this proposal that governments are better equipped to make judgments of nonreligious morality than religious morality, a possible response is that what governments are capable of doing is making factual judgments,¹⁵ that they are no better equipped to make nonreligious normative evaluations than religious ones. If matters turn on discernible facts, it is true that officials may more easily identify "mistakes" others make than when the crucial disagreement is over values. But the government also has reason to be hesitant to override religiously based conclusions, say about whether a particular war qualifies as "just," even when such conclusions rest on an inaccurate factual assessment.

I also believe that the government is better equipped to make persuasive choices of value when these rest on shared cultural morality and rational analysis than when they rest on religious premises. It is true that some

¹⁴ A brief explanation of why this view will be unpersuasive to most of those who are not relying on religious reasons is offered in Kent Greenawalt, *How Persuasive is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647 (2000). Considering natural law accounts based either on teleology or self-evidence, KENT GREENAWALT, RELIGION AND THE CONSTITUTION VOL. 2, ESTABLISHMENT AND FAIRNESS 500-04, 511-20 (2008) [*hereinafter* Establishment], explores the relation of such accounts to public reason. In Nelson Tebbe, *Nonbelievers*, 97 VIRGINIA L. REV. 1111, 1156-57 (2011), the author suggests various claims for privileges that could be directly connected to religious skepticism.

¹⁵ See Adam J. Kolber, *Alternative Burdens on Freedom of Conscience*, 47 SAN DIEGO L. REV. 919 (2010).

nonreligious comprehensive views are based on premises that are no more establishable by reason than various religious perspectives, and the moral conclusions of some religious outlooks may be tested by rational analysis against the basic premises of the religion; but in general, religiously based conclusions are harder for officials to assess than nonreligious views, especially if the latter are grounded in a widely shared social morality.

Connected to the capacity of assessment is the message that an exemption may send. Insofar as an exemption is directed entirely or mainly at religiously based conscience, it can be cast as one aspect of accommodation, or toleration, of religious conviction and practice. That seems distinguishable from a judgment about the intrinsic plausibility of the religious conclusion. An exemption that extends to all claims of conscience may seem to acknowledge that the basic position taken by the claimants is not wholly unreasonable. When national security, or basic issues of justice and fairness are involved, the government may not wish implicitly to make such a concession. Thus, allowing a religion to limit clergy to males does not seem nearly as much a concession to the acceptability of gender discrimination as would a concession that any organization that feels strongly that officials should be limited to one gender may do so.

The distinction between religious and nonreligious claims has special force when one turns to possible exemptions for organizations. Religious institutions have been regarded for much of the history of this country as desirably independent of the government. Whether or not one thinks, as I do, that religious groups appropriately play a part in our political life,¹⁶ it is desirable that they not be under government control. This is partly because such independence is healthy; it is partly because governments in liberal democracies should not be regarded as competent to assess religious truth.¹⁷ One can, of course, see similar advantages in having certain other nongovernmental organizations that are largely independent, that can operate as a kind of check and limit on government power.¹⁸ But there is much less sense that these organizations should generally be able to

¹⁶ For a summary of my outlook, see *Establishment*, *supra* note 14, at 497-537.

¹⁷ This premise is a central feature of the Supreme Court's approach to disputes over what group should control church property. See *Free Exercise*, *supra* note 1, at 261-89.

¹⁸ This observation seems more apt for organizations that have a wide range of objectives and outlooks, such as nonreligious universities, than organizations created for limited, nonideological, nonpolitical purposes, such as hospitals. A complication about the nature of organizations involves those that are formally nonreligious but owned by persons whose purpose is in part to further religious objectives or who have powerful convictions that they should not violate religious standards. I do not tackle the question of just what possible privileges such groups should be afforded.

operate on premises at odds with particular fundamental values held within a modern liberal democracy. As a consequence, when it comes to organizations, the reasons for limiting exemption claims to religious institutions are generally stronger than the reasons for limiting individual claims of conscience to those that are religiously based. This conclusion about organizations is partly based on the necessity of drawing lines; that some nonreligious organizations may have reasons for exemptions as strong as those of some religious organizations does not imply that, for purposes of clarity and administrability, the religion/nonreligion distinction fails.

A particular concern exists about some individual nonreligious moral outlooks, one that might arise with respect to vaccinations. (A similar concern could arise with a religious conviction as well, but that seems substantially less likely.) Many parents feel their primary moral obligation is to their own children. This could rise to a conviction of conscience that the parents should not sacrifice their children's specific interests even if that were somehow overall desirable. Here is a troubling illustration: If no one is vaccinated against a serious disease, such as polio, the slight risk created by a vaccination is far outweighed by the benefit of being protected. So rational parents would want their children vaccinated. But if almost everyone else has been vaccinated, the risk to any individual child now being vaccinated may be greater than the increased risk of getting the disease if he is not vaccinated. Were the government to allow all parents to decide for their children on the basis of such calculations, of course one problem would be serious misjudgments. But even parents who managed a precise assessment of comparative risks might opt against vaccination in a way that would slightly reduce the risks to their particular children but increase overall risk in a socially undesirable way.¹⁹ This *could* be a reason to limit any exemption to those whose religion teaches that vaccinations are wrong.

Another reason to limit exemptions to religious conscience is that it may be easier to identify honest assertions than with nonreligious claims. Even if one assumes, as I do, that what counts for religious claims of individuals is what they believe, not the dominant view of their religious

¹⁹ To illustrate, let us assume a single magnitude of harm. When the vast majority of others are vaccinated, a child not vaccinated suffers one chance in 10,000 of suffering the harm by getting the disease, and, if vaccinated, one chance in 5,000 of harm from the vaccination process. If the unvaccinated child gets the disease, the odds are he will spread it to three other children. The harm from being vaccinated is not transmitted to others. Thus the overall risk of refusing the child's vaccination would be four chances out of 10,000, or one in 2,500, of harm, as compared with one chance in 5,000.

institutions, and one further recognizes that some religious claims, including a number of those raised by prisoners, are offered by individuals as based on personal convictions that are not tied to the premises of particular religious institutions,²⁰ nevertheless, many religious claims can be simpler to assess because they are connected to standards of organized religions.

My own view is that whether a religion-only exemption is warranted depends on exactly what the exemption will be, and that issue needs to be carefully faced. For individuals, but not organizations, I think most exemptions granted to moral conscience should be extended to nonreligious claimants. But whatever one concludes about that, it is crucial to recognize two basic features: There *are* special reasons for governments to recognize religious claims of conscience, and these reasons can have weight in the decision whether to provide any exemption at all. Even when these reasons apply with sufficient force to warrant an exemption, they do not settle whether, either as a matter of justice or wisdom, a similar exemption should also be granted to nonreligious claims of conscience.

C. Sincerity and Its Assessment

To be valid, must a claim of conscience be sincere? In one sense, the obvious answer is “Yes.” People who clearly lie about their conscience should not be given an exemption from ordinary requirements. The main problem about sincerity is the practical problem of assessing it by those who decide on the applications of an exemption. With the draft exemption, draft boards made that determination after a fairly extensive examination, although as the Vietnam War continued, federal courts required objective evidence of insincerity, not so easy to come by.²¹ When exemptions are granted for less important matters, one cannot expect a searching examination of sincerity. This is a problem, although its dimensions vary considerably.

If an exemption, such as one from participating in the sale of morning after pills, confers no ordinary advantage on the person who claims that participation would violate his conscience, and if the seeking of an

²⁰ See, e.g., *Nilsson v. Mass. Dep’t of Corr.*, No. 09–40019–FDS, 2011 WL 1235474 (D. Mass. 2011). It may be important that an increasing number of Americans consider themselves religious but unaffiliated. Pew Research Center, “Nones” on the Rise (Oct. 19, 2012), <http://www.pewforum.org/unaffiliated/nones-on-the-rise.aspx>.

²¹ See, e.g., *United States v. Owen*, 415 F.2d 383, 389 (8th Cir. 1969); Donald L. Doernberg, *Pass in Review: Due Process and Judicial Scrutiny of Classification Decisions of the Selective Service System*, 33 HASTINGS L.J. 871 (1982). I happened to review such cases from 1971 to 1972 as a deputy solicitor general.

exemption is likely to cause irritation of superiors or colleagues that could down the road hurt chances for a promotion or informal benefits, a person has no incentive to make an insincere claim. On the other hand, if the claim for an exemption is not to work on Saturday, or to refrain from having a child vaccinated, we can imagine that someone who wishes to spend the day with his family, or to avoid vaccination risks for his child, might announce an insincere objection in conscience. For those who run businesses, a possible reason to assert an insincere claim is that performing the required act would disturb one's clients or workers. One way of minimizing the success of insincere claims is, as I have suggested, to limit an exemption to religious claims, which many people may be more hesitant to make up, given the typical tie of religious convictions to institutional affiliations.

A nuance about a sincerity claim concerns the intensity and sense of magnitude of an objection in conscience. Someone might have a moral objection to performing an act that does not rise to the level of conscience. Outsiders will be hard put to judge exactly the force of another's moral convictions, and to evaluate what degree is necessary to constitute a claim of conscience. What the claimant believes she should suffer if not accommodated is one test; and someone who loses her job or is demoted because she actually refuses to perform an act has helped to demonstrate a true claim of conscience. But those whose claim for an exemption is granted usually are not put to such a clear test. In any event, a connection to religious conviction, say that God or church teaching absolutely forbids particular behavior, could be one test of whether a sense that an act is morally wrong rises to the necessary degree of intensity and magnitude.

Of course, another way of dealing with this particular problem is not to require a claim of conscience, rather than granting the exemption to anyone with a belief that the required act would be morally wrong. Some exemptions have been cast in this form.²² The concern about this strategy is that it might open an exemption too far to those with lukewarm reservations. Yet another approach, one I believe should be considered more than it has been, is to allow anyone to receive the exemption if that person undertakes to do what most people would regard as at least as onerous as the required act. Thus, if a university student objects to certain uses of a yearly \$400 fee to support student organizations, let the student

²² A summary of the laws providing exemptions in respect to health care, and their various formulations, is in Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 16-33 (2010). Wilson, *supra* note 3, at App. A, gives an account of state law exemptions in regard to same-sex marriage.

contribute the same amount or slightly more to a scholarship fund instead. A similar approach could be used by governments for people who object to uses of their ordinary taxes. This strategy avoids the need for an observer to judge a claimant's sincerity and intensity of conviction.

D. Degree of Involvement

Does it matter how close the involvement of a claimant is to what is for her an objectionable act? One might think this is intrinsically relevant, or that it will affect how others respond to an exemption, or that it is indirectly one measure of sincerity, or that it affects whether the claimant can perform a sufficient component of his duties. If we think about hospitals that perform abortions, we have doctors asked to perform them, nurses asked to assist, technicians who set up the operating room for their performance, nurses who care for patients in their rooms, personnel who make beds and clean rooms, admissions officers who interact briefly with patients entering the hospital, and persons who keep hospital records, including what procedures are performed on which patients. Within drugstores, there are individuals in charge of running the store, druggists who fill prescriptions, clerks who hand drugs to customers, cashiers who accept payments, and personnel who place products on shelves and keep the stores clean. The intuitive appeal of granting an exemption seems to increase the more closely an individual would be involved in the procedure to which he objects.

The basic point about a claimant's ability to function in a job is straightforward. Given that hospitals perform abortions and women have a constitutional right to receive them, a hospital employee whose religious conversion has led him to believe that all abortions are a form of murder cannot assert both that virtually any job at such a hospital would violate his conscience, and that, nonetheless, he cannot be dismissed for his refusal to perform a job that is remote from the actual procedure.

The intrinsic relevance of degree of involvement is more debatable.²³ According to most people's ordinary sense, if a person's job calls upon her to receive answers from questionnaires that admitted patients have answered and to exchange a few words with those patients, an objection to such contact with the patients who happen to be entering to receive abortions would be unreasonable. The counterargument would be that all

²³ For a case involving such peripheral involvement, see *Spellacy v. Tri-County Hosp.*, Equity No. 77-1788, 1978 WL 3437 (Pa. C.P.1978). The case arose under Title VII, which may cover such instances but according to which, as the Supreme Court has interpreted it, employers need only make modest efforts to accommodate.

that matters is sincerity of conscience. As Steven Shiffrin puts it, “the question should not be what society regards as too remote, too principled, too fastidious, too crazy, or too offensive.”²⁴ If the person really feels that she cannot in good conscience have *any* dealings with those who will receive abortions *and* the hospital can disengage her from those contacts without great inconvenience, why not allow her to disengage?

I have no decisive answer to this counter, but I do not find it fully persuasive. I believe society is warranted in saying simply that some connections are so remote that they should not give rise to exemptions from duties. Still further, if exemptions reach too broadly, they will seem unacceptable to much of the public. Requiring some closeness of connection to the act to which one objects can be an indirect way of assuring an employee’s basic sincerity and that his moral objection really rises to the intensity of conscience.

At least for some people, the sincerity problem may have a special flavor when involvement in the act objected to would be peripheral and no adverse consequences would flow from obtaining the exemption. An individual may actually have a very strong moral objection to a particular act, and may wish to register that publicly in order to impress and influence others. Even if she would not on examination feel that she herself was doing any serious moral wrong by submitting to a highly peripheral involvement, such as admitting an abortion patient into the hospital, she might regard her claim not to do so as expressing her moral sense better than any message sent on Twitter could do. She might even hope, and believe, that if other workers followed her lead, the hospital might change its policy about offering abortions. Thus, she would have a deep moral sense about abortion, but not truly believe that a highly peripheral involvement would violate her conscience. This highly subtle form of insincerity²⁵ seems much more likely when involvement is remote than when it is direct.

I conclude that exemptions for claims of conscience may properly require that a claimant’s responsibilities would otherwise connect in a substantial way to the act to which he objects. That would certainly include direct participation in the act itself, including in the hospital example

²⁴ Steve Shiffrin, *Gay Weddings: A Note on Town Clerks, Florists, and Photographers in Response to Dorf*, MIRROR OF JUSTICE BLOG, (Oct. 14, 2011, 10:25 AM), <http://mirrorofjustice.blogspot.com/2011/10/gay-wedding.html> .

²⁵ The label “insincerity” here could itself involve a serious oversimplification. If a person realized an exemption was available, she might rationalize her own perspective to honestly conclude that she had an objection in conscience.

preparation of the room for an abortion.²⁶ It *might* also include extended personal contact with the person who has chosen to undergo the procedure the claimant believes is deeply wrong. The objector might somehow feel she should not provide continuing personal support to someone who is preparing to commit a grievous wrong, even if the objector would have nothing directly to do with the operation itself. Just how tight the connection should be before any objector should succeed should depend on the nature of the act involved, and on how far an employer need extend itself if it grants an exemption from the involvement to which the claimant objects.

E. What Can Outweigh Claims of Conscience?

No one thinks claims of conscience should always excuse a person from performing otherwise required acts. The process of comparative evaluation involves three different dimensions. One is denial or inconvenience or a kind of insulting embarrassment for those who have a right to have the required act performed. If women have a right to receive morning after pills, it would be unacceptable if the grant of an exemption would prevent them from doing so. The harder questions on this score are just when practical inconvenience or embarrassment are sufficient to override a claim for an exemption. A second form of inconvenience involves those who are in charge of seeing that various acts are performed. A business cannot be expected to go to an extreme expense to make up for an objecting worker's conscientious refusal to perform a certain act. Both these kinds of hardships are straightforward, though saying when hardship or inconvenience is great enough to override a claim for exemption can be very difficult and highly controversial. How should legislators drafting laws or courts applying general statutory language strike the balance? A just answer is not only hard, it almost certainly depends on the particular nature of the act and the foundation of the claim of conscience.²⁷

A third countervailing reason against claims of conscience is different. It asserts that the very message sent by acknowledging the claim is unacceptable, that people broadly need to understand that certain actions are simply not to be tolerated, or, in the case of officials, that those who

²⁶ When I previously considered this question, I failed to address the situation of a close connection to the act to which one objects that need not involve personal contact with the patient on whom the act is performed. See Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV 47, 60-61 (2007).

²⁷ Vischer, *supra* note 2, at 26-29, 112 (emphasizing the value of allowing conflicting moral views to compete in the "market" in circumstances when that will work).

accept such positions must also accept that they have a fundamental responsibility to perform the duties of those positions. Both these kinds of countervailing reasons are now often offered by some advocates of same-sex marriage, who oppose any broad exemptions from the responsibility to recognize those marriages and not to discriminate against the couples who undertake them.²⁸ To bolster the argument that it is basically wrong to permit exemptions, these advocates often draw a comparison with racial discrimination roughly along these lines: “We would not accept many exemptions from rules forbidding racial discrimination, whether in marriage or in other aspects of life. Discrimination against gay people is no more acceptable than racial discrimination, and exemptions are no more warranted.” This argument has considerable force for those who acknowledge that those who engage in homosexual relations should be free from discrimination. I shall say a bit more about it subsequently. What I want to stress at this stage is that such arguments do not depend on anyone’s immediate practical hardship or inconvenience. Rather, the claim is that creating an exemption is itself wrong from a moral point of view, and that such an exemption can retard broader understanding that the underlying fundamental discrimination is intrinsically unacceptable.

F. The Generality of Formulations

If exemptions are to be granted for claims of conscience, should they be in general terms such as the Religious Freedom Restoration Act,²⁹ or should they specifically indicate which claims of conscience will be recognized? If legislators are persuaded that particular exemptions are warranted, as with abortions, it is probably desirable to specify those objections in law.³⁰ A problem with language that is too open is that it may make initial decisions by private employers and executive government officials difficult. However, given the wide range of claims of conscience

²⁸ Susan Brooks Thistlethwaite, *In Gay Marriage Debates, Don't Cater to Bigots*, WASH. POST (Jun. 22, 2011, 9:42 AM), http://www.washingtonpost.com/blogs/on-faith/post/in-gay-marriage-debates-dont-cater-to-bigots/2011/06/22/AGlajfH_blog.html. In a discussion I attended held at the New York City Bar Association in May 2011, these positions were put forward as counters to claims that exemptions were desirable.

²⁹ 42 U.S.C. § 2000bb-1 (2000). The act forbids government from “substantially burden[ing] a person’s exercise of religion” unless it has a “compelling . . . interest” and uses “the least restrictive means.”

³⁰ Both federal and state laws protect those who object to participating in abortions. *E.g.*, 42 U.S.C. § 300a-7 (2006); MD. CODE ANN., HEALTH-GEN. § 20-214; *see* Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortion: Roe, Casey, and the Fourteenth Amendment Rights of Health Care Providers*, 87 NOTRE DAME L. REV. 1 (2011).

people may have, there is also value in more general language.³¹ This may be especially true if part of the aim is to accommodate religious practices and convictions, which will have a wider range of variations than will nonreligious moral objections. An intermediate approach is for a statute to employ general language but set up an agency to provide more specific guidelines.

With this outline of basic premises and questions, we now turn to the particular complexities when “religious toleration” has multiple dimensions in relation to possible exemptions.

II. CONFLICTING CLAIMS OF TOLERATION AND HOW TO RESPOND

With respect to certain issues, toleration and exemption are far from simple matters. Because there are conflicting claims of toleration, it becomes debatable whether tolerance favors exemption. This contrasts with the issue of a pacifist’s objection to military service. The pacifist’s position could, in principle, if too widely accepted, put other citizens at risk, but it does not reflect badly on any other individuals in the society (except, perhaps, implicitly involving a mild negative judgment about all those who support war or are willing to fight in one). The sense that one must eat kosher food is also not a seriously negative view about everyone who consumes pork. Of course, the unwillingness to participate in an abortion does reflect a strong moral judgment about a particular act in which others are engaged, but it need not constitute a negative view about the individuals who undergo this procedure. It need not be a harsh judgment about their basic identity.³² I shall explore how far the issue of exemption from requirements to treat same sex marriage like marriages between men and women is similar to and different from these illustrations. I will then engage a similar inquiry about health insurance and contraceptives. My focus is primarily on theoretical considerations. I do not try to assess precisely what the scope of a possible exemption should be, or what compromises are needed to get underlying legislation adopted (or maintained).³³

³¹ Lynn Wardle, *supra* note 22, at 19-26 (urging a broad general standard).

³² It is certainly possible that someone’s reason for seeking an abortion could seem so degraded that an observer aware of the reason would make a negative judgment about the whole person.

³³ See Wilson, *supra* note 3, especially Part I, for a detailed analysis of answers to both these questions.

A. Performance and Recognition of Same Sex Marriage

A state adopts a law recognizing same sex marriage. It includes provisions explicitly or implicitly requiring that public officers issue marriage licenses to gay couples, and that others not discriminate against couples entering same sex marriages. Should there be any exemption, and, if so, what should it look like? We may start with the core assumption that religious institutions need not perform marriages they actually believe are invalid. In fact, no antidiscrimination law has required clerics to perform marriages they regard as unsuitable, and any such requirement would rightly be regarded as an unconstitutional impingement on the exercise of religion. Religious bodies cannot be forced to engage in ceremonies. So the genuine issues concern possible broader exemptions for institutions connected to religion and possible exemptions for individuals and for nonreligious institutions. For example, should charities and other religious bodies be required to treat a couple as married when insuring a member of the couple who is one of its employees? Should a religiously connected social organization that rents out its hall be able to refuse its use for a reception following a same-sex marriage? Should private individuals be able to refuse a rental to a gay married couple? Should a clerk in the marriage bureau be able to avoid issuing a marriage license to a gay couple?³⁴

Assuming that those who want an exemption maintain a religious conviction that marriage is a sacred relation and that God wants that relation only to be between persons of different genders, granting the exemption *is* a form of religious toleration. It accommodates powerful religious convictions that vary from the understandings of the officials who enacted the law protecting same-sex marriage. Those officials may represent a social understanding that already predominates in that state, and, if not, is highly likely to predominate in the relatively near future, given acceptance of same-sex marriage by younger people.³⁵

³⁴ See Marc D. Stern, *Same-Sex Marriages and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 1 (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008), for a survey of the astonishingly wide range of conflicts that can be resolved in various ways.

³⁵ Wilson, *supra* note 3, at 1484-85 (providing some of the relevant statistics about different age groups from surveys of opinion). According to the Pew Research Center, the percentage of people who favor same-sex marriage has risen from twenty-seven percent in 1996 to forty-seven percent in 2012. Peter Baker, *Same-Sex Marriage Support Shows Pace of Social Change Acceleration*, N.Y. TIMES, May 11, 2012, at A20, available at http://www.nytimes.com/2012/05/11/us/same-sex-marriage-support-shows-pace-of-social-change-accelerating.html?_r=1&gwh=2B947B91CBCC7B4D3C85F1294518C9C7.

But does recognizing an exemption also represent a kind of endorsement of intolerance? Certainly the advocates of gay marriage suppose that most opposition to that is based on intolerance of gay people. That is not *necessarily* the basis for opposition. Some people, who believe that sexual relations between members of the same gender are as acceptable as most other sexual relations and that people should not be treated differently because they engage in such relations, nevertheless conceive marriage as special and think God has ordained that it be between men and women.³⁶ Such persons can rightly say that their opposition to gay marriage does not represent any negative view about gay people or sexual relations between them. Nonetheless, for most opponents of same-sex marriage, there does exist an aversion to sexual relations between persons of the same gender; and for most of those who wish to engage in same-sex marriage, opposition to that seems to speak of a rejection of a fundamental aspect of how gay individuals view themselves.³⁷ In other words, the opposition to marriage represents to gay persons an unjustified intolerance that extends beyond any single act. From this perspective, the “toleration” represented by an exemption from acceptance of gay marriage represents an acceptance of intolerance, one that may delay the full acceptance of same-sex marriage.³⁸

We can see this appraisal in the comparison with racial segregation and interracial marriage. If we as a society would be extremely hesitant to grant any exemption that would allow direct racial discrimination or discrimination against interracial married couples, should we not take the same stance toward married couples of the same gender?

Any proposed exemption is undoubtedly complicated by the fact that unequal treatment of gay couples who wish to marry or are married does often constitute a form of intolerance and is perceived in this way by gay couples themselves. But it does not follow that exemptions are a mistake.³⁹ One important practical reason why they are not a mistake is that in many states, the granting of some exemptions in any near future may well be

³⁶ For an in-depth examination of bases for opposition and the perceptions of gay people about that opposition, see Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1308-15 (2011).

³⁷ *Id.*

³⁸ However, as a practical matter, it may be that granting exemptions will “lower the stakes” of the debate and that failure to grant exemptions will increase divisiveness and actually be worse for acceptance of same-sex marriage. See Wilson, *supra* note 3, at 1433-34.

³⁹ See, e.g., Douglas Laycock, *Afterward*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3434, at 189, 198 (focusing on the competing claims of liberty, suggesting that same-sex couples are aware “that some fellow citizens vehemently disapprove of what they are doing” and that exemptions will not greatly increase that sense).

needed to get enough support for a same-sex marriage bill to pass. But I want to engage the more principled inquiry of whether exemptions are warranted even if the legislation would pass without them. For this question, the precise percentage of people who accept gay marriage is not crucial.

Although active proponents of exemptions have had the good sense not to challenge directly the analogy to interracial marriage,⁴⁰ I think it is analytically helpful to begin there. So-called bans on interracial marriage in the United States have never represented neutral bans that treated races equally; they have been a segment of laws treating blacks as inferior. To begin with, the bans in some states did not address marriage between members of Asian “races” to whites or blacks, or both.⁴¹ Far more crucial is who counted as “black.” We know that male white slave owners with some frequency had sexual intercourse with slaves that produced children.⁴² Even if the slaves involved were wholly of the “African race,” the children were only fifty percent black. In southern states, a person counted as “Negro” if he or she had a significant percentage of Negro blood; typically one quarter or one eighth would be enough.⁴³ Thus, in some states, a ban on “interracial” marriage meant that a person who was three-quarters white could marry someone who was completely black but not someone who was completely white.⁴⁴ This is not a genuine ban on interracial marriage; it is a law designed to protect the purity of a superior race, the white one.⁴⁵ It would be extremely hard to imagine any principled

⁴⁰ The analogy is considered and rejected in Alan Brownstein, *Gays, Jews and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 413-14 (2010) (“because racism plays such a uniquely invidious role in U.S. history”).

⁴¹ See PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 81, 92 (2009) (providing charts illustrating anti-miscegenation laws that prohibited Whites from marrying Asian Americans in 1869 and 1939); Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC’Y REV. 587, 596 (2007) (providing table listing anti-miscegenation laws that prohibited Whites from marrying Asian Americans); see also Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1 (2002).

⁴² For one account of a complicated racial heritage, see RACHEL L. SWARNS, *AMERICAN TAPESTRY: THE STORY OF THE BLACK, WHITE, AND MULTIRACIAL ANCESTORS OF MICHELLE OBAMA* (2012).

⁴³ For the various rules used by southern states to classify individuals of African descent, see F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* 31-77 (1991); GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 12-24 (1910); Paul Finkleman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2109-11 (1993).

⁴⁴ See, e.g., *Perez v. Lippold*, 198 P.2d 17, 27-30 (Cal. 1948).

⁴⁵ See PASCOE, *supra* note 41, at 7-8; A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989); Reginald Oh, *Regulating White Desire*, 2007 WIS. L. REV. 463 (2007); Emily Field Van Tassel,

defense of such laws that does not rest on the need to protect the purity of the favored race—a defense that would, or should, seem absolutely outrageous to members of a multicultural, multiracial society.

How is a rejection of same-sex marriage different? Historically, virtually all cultures and religions have regarded marriage as between persons of different genders. This is understandable in light of the realities that, without modern technology, it takes a union of a male and female to produce children, and that most people's dominant sexual inclination is toward people of the opposite gender. Neither of those bases is a sound reason not to allow same-sex marriages, but they do provide a setting in which the sense that such unions are "unnatural" or "less natural" is comprehensible. Even many supporters of same-sex marriage who believe that such marriages are positively desirable for those with corresponding sexual inclinations may continue to believe that the joining of women to men in sexual relations, and members of both genders together as the parental heads of families, is somehow the *more* natural course.⁴⁶ It is also still relevant that sexual relations among persons of the same gender remained formally criminal in some American states prior to 2003,⁴⁷ when the Supreme Court declared such laws unconstitutional.⁴⁸ If states themselves, however lax their actual enforcement, were formally sending the message that such sexual relations warranted punishment, we can hardly blame citizens for assuming at that time that such relations were not desirable, and that formal same-sex marriage was not in prospect. Our society, and law, have moved a huge distance since then,⁴⁹ but how much can we blame those individuals who cling to the older view? This is particularly relevant for people who took government jobs never imagining that they might be called upon one day to facilitate same-sex marriages.

We should recognize two different levels for considering the idea that resistance to same-sex marriage is more understandable and defensible

"Only The Law Would Rule Between Us": Antimiscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War," 70 CHI.-KENT L. REV. 873 (1995) (giving an account of how miscegenation laws related to gender and a sense of desirable social organization).

⁴⁶ For a sketch of such views about the sexual acts themselves, see 2 RICHARD P. MCBRIEN, CATHOLICISM 1030-32 (1980).

⁴⁷ "[B]y 2001 only nine states (Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia) prohibited both same and opposite-sex sodomy, and four states prohibited only same-sex sodomy (Kansas, Missouri, Oklahoma, Texas)." Phong Duong, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 GONZ. L. REV. 539, 554-55 (2004).

⁴⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁹ See Erik Eckholm, *Push Expands for Legalizing Gay Marriage*, N.Y. TIMES, Nov. 13, 2012, at A1, available at <http://www.nytimes.com/2012/11/13/us/advocates-of-gay-marriage-extend-their-campaign.html>.

than resistance to interracial marriage involving white persons. The first is intrinsic persuasiveness. At this level, an advocate of nondiscrimination may say that on a careful analysis, discrimination against gays is just as bad as racial or gender discrimination, that condemnation in the past of sexual involvement with persons of the same gender was based wholly on prejudice and ignorance, and has no rational defense. After all, much classification of women that was once considered “natural” is now perceived as obviously unjust, and we should see that the same is true about classifications of gay relationships.

The second level of assessment is whether resistance to same-sex marriage is now wholly unreasonable for ordinary people. Even if one thinks such resistance has no genuine rational basis, he may acknowledge that it will take some time before that perspective is shared by the vast majority of citizens and is no longer a subject on which people are seriously divided. In that event, some accommodation may properly be given in the meantime for those not yet able to perceive the moral truth of the matter.

Whatever one concludes about the basic rationality of a resistance to gay marriage, one must recognize that a substantial part of our population is still opposed to it,⁵⁰ and this includes a significant number of religious groups with many adherents.⁵¹ Of course, not all the members of a religious group will agree with the hierarchy or the prevailing view among members. Governor Andrew Cuomo, a Roman Catholic, pushed hard and successfully to get a law authorizing same-sex marriage adopted in New York.⁵² But we still have numbers of religious organizations and individual citizens who are opposed to same-sex marriage, and some of these think it would be deeply wrong to be positively associated with such marriages. Even for those, like myself, who believe gay marriages should be authorized, these reasons point toward the appropriateness of exemptions. On the other hand, the broader the exemptions, the greater the public signal may be that the status of same-sex marriage is still questionable. Certainly

⁵⁰ See, e.g., CNN ORC Poll, Jun. 6, 2012, <http://i2.cdn.turner.com/cnn/2012/images/06/06/rel5e.pdf> (finding that 42% of those polled in the United States oppose homosexual marriage); Pew Research Center, *Growing Public Support for Same-Sex Marriage*, Feb. 7, 2012, <http://www.people-press.org/2012/02/07/growing-public-support-for-same-sex-marriage/> (finding that 45% of those polled in the United States oppose homosexual marriage).

⁵¹ Pew Research Center, *Religion and Attitudes Toward Same-Sex Marriage*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Feb. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religion-and-Attitudes-Toward-Same-Sex-Marriage.aspx>.

⁵² See Joe Nocera, Op-Ed., *Gay Marriage Halo Effect*, N.Y. TIMES, Feb. 20, 2012, at A25, available at <http://www.nytimes.com/2012/02/21/opinion/nocera-gay-marriage-halo-effect.html>.

the widespread exemptions from participation in abortions provide just such a signal about that, and without doubt that signal was intended by many of the legislators who voted for protections of those who wished not to be involved in abortions.⁵³

Exactly where this leaves us as a matter of just and wise law is highly debatable. Alan Brownstein has suggested that given the similarities between claims of gay persons to marry and claims to religious liberty, the most helpful analogy for possible exemptions is the right to engage in religious discrimination.⁵⁴ Whatever broad analogy one may find most persuasive does not settle the precise scope of exemptions.

I believe exemptions in respect to gay marriage should be limited to religious connections. Both because it is not easy to conceive of powerful nonreligious opposition to any involvement with gay married couples and because one aim of a law authorizing their marriage is to help shift attitudes toward acceptance, the basis for an exemption should not be too broad. But the law should acknowledge that a number of religious institutions and individuals do believe that such marriages violate God's law. Institutions should be allowed, if they assert a religious basis, not to participate in such marriages, and that right should extend to such involvements as the rental of halls for receptions celebrating gay marriages.

Should religious institutions be allowed to refuse employment to members of gay married couples or to deny insurance coverage of a legally eligible spouse? As to insurance, I think the right answer is "No." Religious groups that believe civil divorce is invalid from a religious perspective nonetheless hire some people who have been divorced and remarried, and their insurance covers the spouse in the second marriage. Such a group need not acknowledge that the second marriage is *really* valid or that the second spouse is *really* a legitimate spouse; it can say to itself that it is only affording insurance benefits to such individuals that the

⁵³ Many legislators, like many citizens, disapproved of the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), creating a constitutional right to abortion. *See, e.g.*, S. Amdt. 2321, 106th Cong. (1999) (Roll Call Vote) available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00337 (in the course of considering a bill entitled the Partial Birth Abortion Ban Act of 2000, there was a vote taken in the Senate on a proposal to express the sense of Congress in support of the Supreme Court's decision in *Roe v. Wade* that was passed, 51-47).

⁵⁴ Brownstein, *supra* note 40, at 405. *See also* Thomas C. Berg, *What Same-Sex Marriage and Religious Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y. 206, 207 (2010). One difference between religious discrimination and discrimination against gay couples is that the former usually is in favor of one's own religion, not a reflection of any strong negative judgment about other people and their religion.

state treats as married. Groups opposed to same-sex marriage could (and should) take a similar view about gay married couples.⁵⁵

The hiring question is more complex. For jobs in which a person is taken to be a representative of the organization, a religious group should not have to hire someone whose actions clearly violate the group's moral principles in a way that will be communicated to those directly affected by the group. A Catholic parochial school should not be required to hire openly gay teachers, even if these teachers are not involved in religious subjects. On the other hand, if the school is hiring people to work on a building, it should not be able to discriminate on the basis of someone's sexual inclinations or marital partner.⁵⁶

The exemptions granted so far in same-sex marriage laws have mainly concerned institutions, not individuals.⁵⁷ That may be politically savvy, but it is not fair. Individuals with strong religious convictions should not be required to facilitate same-sex marriages *if* their failure to do so causes neither inconvenience nor a sense of insulting embarrassment for the gay couple.

It is sometimes argued that no such exemption should be available for public officials, because they have undertaken to perform the duties of their offices. This argument is unduly formalistic. If someone otherwise qualified who takes a public position is glad to perform the vast majority of its responsibilities, and can easily exchange one particular responsibility with colleagues in the office, there is no reason to suppose that person should be refused the job or required to do that to which he objects in conscience. In fact, we now have many laws, such as the Religious Freedom Restoration Act, that do relieve officials from what would otherwise be public duties if the exemption creates no serious inconvenience. Thus, if other clerks are available, and the task can be shifted to one of them without the gay couple feeling rejected or insulted, I

⁵⁵ Of course, a group might be adamant that it does not take the view I suggest. Granting an exemption then might be prudent. See Wilson, *supra* note 3 at nn. 240-44, (noting that Catholic Charities in Washington, D.C., chose to eliminate all coverage of spouses). Nonetheless, I believe that the state can reasonably conclude that the claim for such an exemption reaches "involvement" that is too remote.

⁵⁶ In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), the Supreme Court treated a parochial school teacher who had been commissioned as a "minister" and did some teaching of religious subjects within the "ministerial exception," according to which she could not challenge her firing in secular courts. The Court was not precise about the exact boundaries of the individuals within the exception, and it is not certain whether an ordinary teacher in a parochial school would be covered. I assume that someone hired simply to work on the building definitely would not be covered.

⁵⁷ Wilson, *supra* note 3, App. A at 1509-11, (summarizing the scope of the exemptions in various states, including those given to individuals by three states).

do not think clerks whose religious conscience tells them they cannot perform a same-sex marriage should be required to do so. A nuance about this particular issue is that some clerks, when they originally took their jobs, could not have foreseen the legalization of such marriage. It is particularly harsh to say they must nonetheless perform this task, which they would never have supposed would be part of their duties.

Individuals should not have a right to discriminate against gay married couples if their involvement in the marriage itself is much more peripheral or their contact is at a later stage. Taxi drivers should not be able to refuse couples a ride to where they will get married or celebrate a marriage. Landlords other than religious institutions should not be able to discriminate against gay couples (though someone should be able to refuse to rent a room in his own apartment,⁵⁸ in circumstances that involve continuing personal contact, to those he believes are engaged in a deeply immoral relationship).

B. Insurance and Contraceptive Devices

In the early months of 2012 a sharp controversy broke out over requiring religious organizations other than churches to provide health insurance that includes free contraceptive devices. The Obama Administration's "accommodation" to allow the organizations not to pay insurance companies directly for such coverage has only marginally affected the debate.⁵⁹ Opponents of the Administration's position have contended that it interferes with religious freedom and invades areas of private choice.⁶⁰ Those who resist exemptions claim that opponents are

⁵⁸ The Fair Housing Act, 42 U.S.C. §3603 (1968) (allowing discrimination when dwellings have four or fewer rooms or units and one of these is occupied by the owner).

⁵⁹ See N.C. Aizenman, Peter Wallsten & Karen Tumulty, *Obama Shifts on Birth Control*, WASH. POST, Feb. 11, 2012, at A1 (describing the shift in the Obama Administration's position from requiring the organizations to pay the insurance companies for coverage to having the insurance companies financing the use of the contraceptives themselves). See also Ruth Marcus, *The Immaculate Fig Leaf*, WASH. POST, Feb. 11, 2012, at A15, available at http://www.washingtonpost.com/opinions/obamas-contraception-fig-leaf/2012/02/10/gIQApk6S4Q_story.html; Editorial, *A Win-Win Reversal*, WASH. POST, Feb. 11, 2012, at A14, available at http://www.washingtonpost.com/opinions/obamas-birth-control-about-face-is-a-win-win-reversal/2012/02/10/gIQAfmM34Q_story.html. An illuminating account of competing positions and approaches to resolutions is in WILLIAM A. GALSTON & MELISSA ROGERS, HEALTH CARE PROVIDERS' CONSCIENCE AND PATIENT NEEDS: THE QUEST FOR BALANCE, GOVERNANCE STUDIES AT BROOKINGS, Feb. 23, 2012, http://www.brookings.edu/~media/research/files/papers/2012/2/23%20health%20care%20galston%20rogers/0223_health_care_galston_rogers.pdf. A thoughtful defense of the Administration's proposal is made by Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, AMERICAN CONSTITUTION SOCIETY (Oct. 18, 2012), <http://www.acslaw.org/publications/issue-briefs/with-religious-liberty-for-all-a-defense-of-the-affordable-care-act%E2%80%99s-cont>.

⁶⁰ Timothy M. Dolan, *ObamaCare and Religious Freedom*, WALL ST. J., Jan. 25, 2012.

essentially disregarding women's health, freedom and equality. Given the tenor of the debate and widespread ignorance about how alternative approaches to coverage might work in practice, getting beyond the competing and strident contentions about crucial liberties to assess what strategy may be wise is not easy.

Here are some factual premises, as I understand them. Which, if any, of these should bear on the scope of exemptions is genuinely debatable, but they do set my background for understanding. The primary religious organization that opposes all use of artificial contraceptives is the Roman Catholic Church. In 1968, the majority of a papal commission established by Pope John XXIII had actually recommended a change in the Church's traditional condemnation of use of contraceptives,⁶¹ but Pope Paul VI, in his encyclical *Human Vitae*,⁶² reiterated that condemnation.⁶³ The vast majority of women and men regard use of contraceptives as morally acceptable,⁶⁴ and most Roman Catholics who engage in sexual intercourse have used them.⁶⁵ Even if the use of contraceptives does increase slightly the instances in which people engage in sexual intercourse, given modern social mores, any effort to sharply reduce sexual intercourse by discouraging use of contraceptives is doomed to failure.⁶⁶ Use of contraceptive devices by men and women cuts down on transmission of venereal disease and AIDS; that use and the use by women of pills reduces

⁶¹ Douglas E. Kneeland, *Majority Report Seeks Papal Shift on Contraception*, N.Y. TIMES, Apr. 17, 1967, at 1, available at, <http://select.nytimes.com/gst/abstract.html?res=F6081FFA3E5E137A93C5A8178FD85F438685F9>.

⁶² Encyclical Letter *Humanae Vitae* of the Sup. Pontiff Paul VI to his Venerable Brothers the Patriarchs, Archbishops, Bishops and Other Local Ordinaries in Peace and Communion with the Apostolic See, to the Clergy and Faithful of the Whole Catholic World, and to All Men of Good Will, on the Regulation of Birth (July 25, 1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html

⁶³ McBrien, *supra* note 46, at 1016-26 (summarizing earlier statements, competing arguments, and reactions to the encyclical).

⁶⁴ See *American Voters Hum, 'Happy Days are Here Again,' Quinipiac University National Poll Finds*, QUINNIPIAC UNIV. POLLING INST., (Feb. 23, 2012), <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1709> (finding that 82% of those polled in the United States find the use of contraceptives to not be wrong); CNN/ORC Poll, ORC INT'L, (Feb. 16, 2012), <http://i2.cdn.turner.com/cnn/2012/images/02/16/rel2g.pdf> (finding that 81% of those polled in the United States find the use of contraceptives to not be wrong).

⁶⁵ See *Most Catholic Women Use Birth Control Banned by Church*, REUTERS, Apr. 13, 2011, <http://www.reuters.com/article/2011/04/13/us-contraceptives-religion-idUSTRE73C7W020110413>.

That any single person of the Catholic faith has used them in the past does not show that he or she has done so when a serious practicing Catholic, but the statistics about the high proportion of Catholic women who have used contraceptives lead one to conclude that a significant proportion of practicing Catholics involved in sexual intercourse at a stage of their lives when pregnancy might result do use contraceptives.

⁶⁶ See Laura Sessions Stepp, *Study Casts Doubt on Abstinence-Only Programs*, WASH. POST, Apr. 14, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041301003.html>.

significantly the number of unwanted pregnancies and abortions. There are other drugs and medical procedures that are commonly covered by insurance to which various religious denominations object.

Given the very wide use of contraceptives and their acceptance in society, and the weakness of nonreligious arguments against their use, substantial claims for an exemption from insurance coverage must rest on religious bases.⁶⁷

The preceding paragraphs oversimplify the issues involved with respect to insurance coverage of contraceptives in two crucial respects, ones that need to be addressed by anyone seeking an overall resolution of what the government should require. In an early response to the Administration's compromise, the United States Conference of Catholic Bishops urged that the failure to clearly protect self-insured religious employers, religious and secular for-profit employers, secular non-profit employers, religious insurers, and individuals was "unacceptable and must be corrected."⁶⁸ Even if religious organizations using insurance companies were willing to accept that those companies themselves could provide free contraceptives that the religious organizations did not directly pay for, that alone would not resolve what to do with companies that have a different status or a different relation to insurance.

The other complexity that has been obscured in the primary public debate is how relevant "contraceptives" work. Standard contraceptives prevent conception; but it has been assumed until recently that *Plan B*TM and *Ella*TM, as well as morning-after pills previously in use, do sometimes prevent a fertilized egg from entering the uterus and may work on occasion to dislodge a fertilized egg from the uterus.⁶⁹ A recent article in *The New York Times* indicated that studies cast strong doubt on whether the pills did operate at these later stages.⁷⁰ The article presented stronger evidence that *Plan B*TM did not so operate than was available in respect to *Ella*TM, and it may well be too quick to reach any such conclusion about *Ella*TM.⁷¹ For

⁶⁷ It is a separate question whether an exemption granted to religious organizations should be extended to nonreligious ones.

⁶⁸ Press Release, U.S. Conf. of Cath. Bishops, Bishops Renew Call to Legislative Action on Religious Liberty (Feb. 10, 2012), <http://usccb.org/news/2012/12-026.cfm>.

⁶⁹ See Wilson, *supra* note 3, at 1418, 1455-59.

⁷⁰ See Pam Belluck, *No Abortion Role Seen for Morning-After Pill*, N.Y. TIMES, June 6, 2012, at A1, available at <http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html>; Editorial, *How Morning-After Pills Really Work*, N.Y. TIMES, June 9, 2012, at A20, available at <http://www.nytimes.com/2012/06/09/opinion/how-morning-after-pills-really-work.html>.

⁷¹ See Wilson, *supra* note 3, at 1457-59.

those who believe that human life begins at conception,⁷² drugs operating in either of these ways constitute a form of abortion;⁷³ for those who believe life begins at implantation, dislodging fertilized eggs is abortive. Although the Catholic Church condemns both contraceptive use and abortion,⁷⁴ the latter is regarded as a graver wrong.⁷⁵ One illustration of this is in a 2006 statement by the U.S. Catholic Bishops on receiving Holy Communion.⁷⁶ Among the activities that should lead one not to take communion without receiving the Sacrament of Penance are “committing murder, including abortion” and sexual activity outside “a valid marriage.”⁷⁷ A proposal to name contraception as a reason to refrain from receiving communion was expressly rejected.⁷⁸ I infer from the absence of use of ordinary contraceptives on this list that that use would not necessarily preclude the appropriate acceptance of communion.⁷⁹

In what follows, I shall concentrate mainly on the basic question that has been the leading topic of public discussion: whether, when religious organizations use independent insurance companies to insure employees, these companies should provide ordinary contraceptive devices and pills free to the insured employees.⁸⁰ But we need to be aware that an acceptable compromise on that question could fail to settle other important issues.

⁷² I refer here not to the physical facts, but what counts as a life warranting protection.

⁷³ See, e.g., John Cardinal O'Connor, *Abortion: Questions and Answers*, § 11 (1990), available at <http://www.priestsforlife.org/magisterium/cardocqanda.html> (“There is clear evidence that certain devices called contraceptives, such as the IUD, do not prevent conception. They work as ‘abortifacients’; that is, they destroy the fertilized ovum. In other words, they are a means of abortion, not contraception.”).

⁷⁴ See *CATHECHISM OF THE CATH. CHURCH* 2270-75, available at http://www.vatican.va/archive/ENG0015/_P7Z.HTM (discussing the Roman Catholic position on abortion); PAUL VI, *HUMANAE VITAE*, Section 14 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html (discussing the Roman Catholic position on contraception); see also *Contraception, Sterilization & Abortion*, U.S. CONF. OF CATH. BISHOPS, available at <http://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/catholic-teaching/upload/Contraception.pdf> (last visited Oct. 19, 2012).

⁷⁵ Cf. O'Connor, *supra* note 73, § 11 (“Birth control and abortion are not ‘equal evils,’ except when abortion is used as ‘birth control.’ Contraception prevents the conception of life. Abortion destroys life already conceived. . . . Except for efforts to exclude abortifacients, I do not know a single Catholic bishop who would favor civil legislation against birth control.”)

⁷⁶ See Press Release, U.S. Conf. of Cath. Bishops, *Happy Are Those Who Are Called to His Supper: On Preparing to Receive Christ Worthily in the Eucharist* (Nov. 14, 2006), available at <http://old.usccb.org/doctrine/Eucharist.pdf>.

⁷⁷ *Id.*

⁷⁸ Ann Rodgers, *U.S. Catholic Bishops Tackle Contraception, Gays, Communion*, PITTSBURG POST-GAZETTE, Nov. 15, 2006, <http://www.post-gazette.com/stories/news/us/us-catholic-bishops-tackle-contraception-gays-communion-459376/>.

⁷⁹ U.S. Conf. of Cath. Bishops, *supra* note 76.

⁸⁰ See, e.g., Erik Eckholm, *Poll Finds Division over Requiring Coverage*, N.Y. TIMES, at A15, available at <http://www.nytimes.com/2012/03/02/us/politics/americans-divided-on-birth-control->

Various evaluative judgments and related estimates of fact bear on how one regards the question of compelled insurance coverage. Questions concerning both the religiously grounded moral judgments of religious institutions, and the moral judgments of those who use contraceptives, may affect the views of citizens and officials about the desirability of an exemption.

A preliminary judgment concerns the government's role in dictating what health insurance must cover. If one adopts a libertarian or conservative stance that this is simply not the government's business, one may favor limiting such misguided exercises as much as possible. Since this essay is not the occasion to take on broad issues about the range of government involvement in providing health care, I shall assume, in accord with my actual view that, barring some special reason to the contrary, government rules for the coverage of health insurance are fully appropriate.

One must next ask whether providing free contraceptives is an important aspect of protecting women's health and avoiding unwanted pregnancies. Whether contraceptives are a form of "health care" is itself a debated issue, but one that is primarily rhetorical.⁸¹ So long as we know what they can do in respect to a person's body and life prospects, the key question is whether they should be easily available. Providing free contraceptives may not be critical for women who are able to pay for them without difficulty, but it can be highly important for women who cannot afford to do so. And the cost of contraceptive pills, the most effective way to assure that sexual intercourse does not lead to pregnancy, is not minimal.⁸²

Two competing perspectives then present themselves. Requiring that an organization provide insurance coverage for acts they regard as immoral may be seen as demanding that they participate in or encourage these acts. One might or might not believe this participation is affected if what the organization pays for directly does not include such coverage, but the

coverage-poll-finds.html; Robert Pear, *Senate Rejects Measures Letting Employers Deny Birth Control Coverage*, N.Y. TIMES, Mar. 2, 2012, at A1, available at <http://www.nytimes.com/2012/03/02/us/politics/senate-kills-gop-bill-opposing-contraception-policy.html>.

⁸¹ Compare PLANNED PARENTHOOD ACTION CENTER, THE FACTS ON BIRTH CONTROL COVERAGE FOR WOMEN, <http://www.plannedparenthoodaction.org/positions/facts-on-birth-control-coverage-for-women-1117.htm> (last visited Aug. 18, 2012) with Letter from the U.S. Conf. of Cath. Bishops, to Health, Education, Labor and Pensions Committee Opposing EPICC (Sept. 10, 2001), available at <http://old.usccb.org/prolife/issues/abortion/sencom91001.shtml>.

⁸² See INST. OF MED., CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011); see also CENTER FOR AM. PROGRESS, THE HIGH COSTS OF BIRTH CONTROL: IT'S NOT AS AFFORDABLE AS YOU THINK (Feb. 15, 2012), http://www.americanprogress.org/issues/2012/02/pdf/BC_costs.pdf.

insurance company must nevertheless provide it for those who wish it. The competing perspective is that paying for required insurance (directly or indirectly) is essentially similar to paying general taxes, in circumstances when some of that general tax money pays for activities the taxpayer regards as immoral. One possible stance about these competing perspectives is that citizens and legislators considering an exemption should for this purpose just accept whatever is the view of the religious organizations involved.

An individual woman who takes birth control pills could have different outlooks about that. She might think she is doing nothing morally wrong, or she might acknowledge that she is committing a moral wrong, but lacks the determination to avoid doing wrong by refraining from sexual relations. One can certainly imagine Roman Catholic women who have each of these views. A more complex, intermediate, position is also worth considering. A woman might believe that using artificial contraceptives is, viewed by itself, morally undesirable; but not nearly as bad morally as having an abortion. She might feel that if she became pregnant against her wishes, she would be strongly tempted to seek an abortion. Committing the relatively minor wrong of using a contraceptive would be a way to prevent her later committing the much graver moral wrong. Whether one accepts this form of reasoning as appropriate, it is not illogical. If we know we are susceptible to committing a grave wrong in certain circumstances, we may think it is better morally to choose behavior that itself involves a lesser wrong, rather than to refrain and greatly increase the risk that we will commit the grave wrong.

For women who regard the ability to use contraceptives as a crucial aspect of their liberty and wellbeing, measures that would seriously reduce their availability may seem to be blind to their basic interests, a form of intolerance of their outlooks on life, and an effective denial of, or impediment to, the equality of women and men.

When it comes to an evaluation of an individual's behavior by the religious institutions that seek an exemption, the needed analysis is much more subtle and complex. I shall sketch here my present grasp of Roman Catholic perspectives. One may or may not think different outlooks within the church have any bearing on what concessions should be made to sincere claims made by Catholic organizations. The official doctrine is clear that use of artificial means of birth control is a moral wrong. Some natural law theorists make an argument for this position that rests on the fundamental nature of sexual intercourse and does not depend on religious

bases,⁸³ an argument I have suggested is plausible to few outsiders. Whatever the persuasiveness of any nonreligious argument, the church has clearly adopted the position that artificial birth control is wrongful.

Roman Catholic writers over the years, dating back at least to Thomas Aquinas, have discussed whether one is committing a sin if one conscientiously concludes that the church's position on a moral issue is mistaken.⁸⁴ One illustration, given in discussions in which I have participated, is capital punishment. Authoritative church documents now declare capital punishment to be wrong (barring extraordinary circumstances), but it has been suggested by some that a loyal church member could take a different view and that such a view might be an acceptable basis for a judge to condemn someone to a death sentence.⁸⁵

Over the years there has been considerable disagreement among Catholic thinkers and members of the hierarchy over just how far this latitude to act on one's settled convictions extends.⁸⁶ One question is how far a devout Catholic should consider himself free to develop a personal conscientious view at odds with the church's expressed position. This question raises complexities about the nature of moral norms—how far they are based on reason and are law-like, to what extent do specific applications depend on particular circumstances, and what is the status of judgments of the hierarchy (some of which historically have been later rejected by church officials).⁸⁷ A closely related question is the range of issues on which such a Catholic may be at liberty to go against church

⁸³ I briefly outline such arguments and my response to them in Kent Greenawalt, *How Persuasive is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1666-71 (2000).

⁸⁴ See Charles E. Curran, *Conscience in the Light of Catholic Moral Tradition*, in 14 CONSCIENCE: READINGS IN MORAL THEOLOGY 4 (Charles E. Curran, ed., 2004).

⁸⁵ On the church's position, see CATHECHISM OF THE CATHOLIC CHURCH 2267, available at http://www.vatican.va/archive/ENG0015/___P7Z.HTM; see also IOANNES PAULUS PP. II, EVANGELIUM VITAE, ¶ 56 (1995), available at http://www.vatican.va/edocs/ENG0141/___PP.HTM#-19. John Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQUETTE L. REV. 303 (1998), consider both the authority of the church's teaching and the variety of roles judges may play in respect to capital punishment.

⁸⁶ See Bernard Haring, *Does God Condemn Contraception?*, COMMONWEAL, Feb. 10, 1989, at 69-71 (observing two schools of thought within the Catholic Church on the usage of contraception). Compare Charles Curran, *Theologians on Birth Control: Spouses May Decide*, WASH. POST., Jul. 31, 1968, at A18, and Press Release, Canadian Conf. of Bishops, Canadian Bishops' Statement on the Encyclical "Humanae Vitae," ¶ 26 (Sept. 27, 1968), available at http://catholicinsight.com/online/church/humanae/article_960.shtml with Press Release, U.S. Conf. of Cath. Bishops, Human Life in Our Day, ¶¶ 37-45 (Nov. 15, 1968), available at <http://www.priestsforlife.org/magisterium/bishops/68-11-15humanlifeinourdaynccb.htm>; O'Connor, *supra* note 73, ¶ 10.

⁸⁷ See generally LINDA HOGAN, CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION (2000). Hogan suggests a personalist ethics that recognizes that conscience is based on reason, intuition, emotion, and imagination about consequences. *Id.* at 135-49.

teachings without committing a sin.⁸⁸ On this issue, leading Catholic thinkers have varied over the centuries. Although believing that individuals should develop their sense of conscience based on the objective requirements of natural law, Thomas Aquinas also wrote that “every conscience, true or false, is binding, in the sense that to act against conscience is always wrong.”⁸⁹ That emphasis is considerably removed from those who urge that the institutional church’s teachings on morality should always be followed.

Given the prevailing social view about ordinary contraceptives *and* the church’s acceptance of the “rhythm method” to prevent pregnancies, an outsider might well think that an individual Catholic’s disagreement about the church’s view of contraceptives, which also prevent unwanted pregnancies, would be as reasonable as disagreement with its view about capital punishment. But the contrary view is that the position on contraceptives is established by an authoritative and binding church standard of the Magisterium, which includes statements by the Catholic bishops and the Pope.⁹⁰

As I have noted, from the church’s point of view, a pill that operates after conception involves a more serious moral wrong than those that prevent conception, and their use may be regarded as less susceptible to conscientious disagreement by individual Catholics.⁹¹ As far as I am aware, no one has suggested a larger accommodation for religious organizations in respect to any pill that may sometimes operate as an “abortifacient”; but I wonder if an approach along these lines is feasible and could make a difference to those involved.

The possibility of conscientious disagreement by individual Catholics does not, of course, tell us what Catholic organizations, given the clear convictions of their indisputable leaders, should be required to do; but it

⁸⁸ The position taken by modern leaders within the church is that faithful members should adhere to positions adopted by authoritative church statements. See JOSEPH CARDINAL RATZINGER & TARCISIO BERTONE, S.D.B., *DOCTRINAL COMMENTARY ON THE CONCLUDING FORMULA OF THE PROFESSIO FIDEI*, (1998). One feature of differences in view about subjective conscience and its role concerns the kind of reasoning that one uses to make moral judgments. See Curran, *supra* note 84, at 11-17. Competing views about conscience by Catholic writers over the centuries are described by Linda Hogan, *supra* note 87. She suggests that the presently dominant position within the church is undesirably less sensitive to individual conscience than the vision of the Second Vatican Council.

⁸⁹ Hogan, *supra* note 87, at 4

⁹⁰ The status of various positions of the Magisterium is itself complex, *see id.*, and about certain positions there can be doubt as to whether they have been adopted by the Magisterium. See *generally* READINGS IN MORAL THEOLOGY NO. 3: THE MAGISTERIUM AND MORALITY (Charles E. Curran & Richard A. McCorkick, eds., 1982).

⁹¹ This may be indirectly implied by the U.S. Bishops’ position on communion, *supra* note 78, and Cardinal O’Connor’s letter, *supra* note 73.

could soften arguments that every use of contraceptives is necessarily morally wrong in the sense of sinful. In respect to the woman who might defend her action on the ground that she is doing a lesser moral wrong to avoid a more serious one, I believe the church's position is that this is unjustified, because people should not commit acts that are intrinsically wrong in order to prevent other more serious moral wrongs.⁹² The perspectives of most individual Catholics could also influence how one perceives the balance of reasons for and against particular forms of exemption.

Whether the Catholic Church will develop one precise view about its degree of involvement in insurance coverage is not yet clear. Were religious organizations themselves required to distribute contraceptive devices, that would definitely be a form of participating. Were taxes paid by the organization to mix with other tax payments that together helped *the government* to subsidize use of contraceptives, that presumably would be acceptable (in the minimal sense of not generating an unresolvable conflict).⁹³ On a scale of increasing involvement from provision by the government, we can put: (1) the organization pays for an insurance plan that does not itself include contraceptives, but the insurance company must provide free contraceptives (the proposed accommodation of the Obama Administration); (2) the organization pays for coverage that itself includes free contraceptives (this was the Administration's original position); (3) the organization, as a self-insurer, directly provides free contraceptives or directly pays companies to provide them. We know that the Catholic Church and various other religious organizations strongly objected to the Administration's initial proposal. Although some Catholic groups have indicated they would find the proposed accommodations for companies that are not self-insurers to be acceptable,⁹⁴ important members of the Catholic hierarchy have objected that the "accommodation" proposal is merely formalistic—that, in reality, given the price of the insurance, the church would still be paying indirectly for the free contraceptives. The idea of "paying" here is complicated by the likelihood that, given the costs of pregnancies, the use of contraceptives may actually reduce the overall cost

⁹² I discuss various views among Roman Catholic thinkers about this general position in respect to the boundaries of a general justification defense in criminal law in Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense, Criteria for Political Action, and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1 (1986).

⁹³ General taxes paid to the federal government do help subsidize some efforts to lower population growth in foreign countries.

⁹⁴ Various positions by leading Catholic groups are noted and cited in Galston & Rogers, *supra* note 59, at 4-5.

of coverage. In one sense, then, the organization would not be paying anything extra for contraceptives; but the overall funding it was providing the insurance company would still partly be used for that purpose.

Clearly, the position the church favors is that it not be compelled to support the use of contraceptives in any way whatsoever. But it is not certain what exactly church organizations think should and will be the practical consequence if a full exemption that goes beyond the Administration's accommodation is not granted. In respect to state or local requirements about nondiscrimination against gay couples, in respect to adoption or foster care, some Catholic groups have decided to terminate forms of activity, believing that the degree of participation in what would be wrong is simply unacceptable.⁹⁵ Cardinal Francis George of Chicago and other Catholic leaders have implied that such a response might take place over health care requirements, given the steep penalties attached to noncompliance for large institutions.⁹⁶ On the other hand, the church has generally opposed government programs that encourage use of contraceptives, but church connected organizations do not refuse to pay taxes on that basis. We do not know how many church organizations would react with a conscientious refusal to participate if the Administration's plan goes into effect.⁹⁷

This question of reaction can matter both at the levels of principle and practicality. As far as principle is concerned, one could perceive an organization's absolute refusal to accede, even if it must give up an activity (such as maintaining a religious hospital or university) that it values greatly, as demonstrating its intensity of conviction and its perceived magnitude of the wrong it would be committing. Its "all or nothing" position, like that of the pacifists' willingness to go to jail, would show the genuineness of its insistence on an exemption for religious conviction. Although outsiders might say the position is too unreasonable to deserve accommodation, they could hardly deny the strength with which it is held. At the practical level, those considering an exemption must assess the risk of withdrawal from insurance provision or, more radically, from basic activities, and ask how much would be lost for the good of society if many Roman Catholic (or other religious) organizations made such decisions.

⁹⁵ See Wilson, *supra* note 3, at 1446-47.

⁹⁶ *Id.* at 1448.

⁹⁷ Of course, for self-insurers, the accommodation will not work; they would have to pay for the coverage themselves, accept substantial penalties, or somehow arrange for other insurers to cover these aspects of health care.

Even if those making decisions about exemptions are confident that organizations will not respond by withdrawal, that hardly eliminates all concerns about a desirable exemption. Perhaps religious organizations should not be forced indirectly to support acts they regard as immoral even if doing so is preferable for them to ceasing to provide social benefits.

Here is my present and tentative conclusion about this issue. Given the widespread acceptance and actual use of contraceptives among both the broader population and individual Roman Catholics, and given the harms that reasonably can be thought to be prevented by providing free contraceptives to those who would otherwise find it difficult to afford them, no resolution should sacrifice this interest. What does need further exploration is whether there are other feasible schemes, such as contraceptives provided by the government (perhaps only for those persons who could not pay for them easily).⁹⁸ The government subsidy might be accompanied perhaps by some special, but manageable, fee for organizations that choose to opt out of standard forms of insurance coverage. Such a fee could serve both as a means to preclude insincere claims and to avoid a surplus secular benefit (money saving) for the organization granted an accommodation based on moral convictions.⁹⁹ Such a plan would allow religious organizations to avoid being involved even to the degree of the Administration's proposed accommodation. Were such an arrangement feasible, the value of protecting religious exercise and liberty could be achieved without sacrificing health care for women. Any negative symbolism an exemption might convey to some observers of a lack of respect for women and women's health would then be greatly reduced. Were such an arrangement respecting this aspect of religious freedom workable, it could then be assessed whether the privilege involved should extend to nonreligious groups.

In summary, the question of what exemptions should be made as a matter of law or granted by those in charge of public and private enterprises depends partly on how one perceives the nature of conscience, its significance for individual liberty and social welfare. Further questions are whether, and how far, religious claims of conscience are special, and whether any organizations should be acknowledged as legitimately raising

⁹⁸ On possible provisions by the government, see Letter from Sr. Carol Keehan, President and CEO, Catholic Health Ass'n of the United States, Robert V. Stanek, 2011-2012 Board Chairperson, Catholic Health Ass'n, and Joseph R. Swedish, 2012-2013 Board Chairperson, Catholic Health Ass'n, to Marilyn Taveenner, Acting Adm'r, Ctr. for Medicare & Medicaid Servs., Dep't of Health and Human Servs. (Jun. 15, 2012), *available at* <http://www.modernhealthcare.com/assets/pdf/CH80052615.PDF>.

⁹⁹ The latter reason is emphasized in an article by Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 70-81 (2006).

such claims. In relatively simple situations, an exemption for some may add to burdens borne by others, but reflects no negative attitude about what the others are doing. Examples of this would be not requiring Orthodox Jews to work on Saturday and excusing pacifists from military service. In the more complex circumstances of same-sex marriage and health care insurance, the very granting of exemption may reflect a strong negative attitude by those receiving it toward the activities for which they seek the exemption, and perhaps about the individuals who engage in them. Those who participate in the practices themselves may feel that an exemption somehow reinforces those negative attitudes, and represents a form of intolerance or lack of concern for their identity and welfare. As the discussion has reflected, this problem seriously complicates decisions about what exemptions are good ideas; but it does not eliminate the possible desirability of some limited exemption. To show this has been the burden of this essay.