

Free Exercise of Religion

1. What distinguishes Mill's argument from Bentham's?

Mill and Bentham both endorse the harm principle. Utilitarians, they both rest their moral liberalism on an appeal to consequences. But they offer different accounts of the benefits that flow from a more tolerant society.

- Bentham emphasizes that abridging liberty frustrates people—thus causing them pain—by restricting the extent to which they can pursue their de facto desires. In the absence of harm to other people, the imposition of those pains is unprofitable, therefore wrong.

- Mill has a more complex utilitarian analysis of the grounds for moral liberty. Without disputing Bentham's point, he also makes two others: that abridging liberties can stifle the development and exercise of human powers: that is bad for the person who is stifled, and bad for others as well, who lose the example and provocation. And, more deeply, censorship and moralistic regulation can produce a "despotism of custom" (3.17). In the despotism of custom, people do not "choose what is customary, in preference to what suits their own inclination. It does not occur to them to have any inclination, except for what is customary" (3.6). The desire for self-development is a "tender plant." Stifle it, through suffocating conformity, and you may find people perfectly content in their confined conditions, without real opportunities for living better, self-governing lives. And that, too, is bad not simply for the individuals whose own lives are cramped, but for the society and for humanity generally. Mill, in

short, is defending toleration not simply because—taking desires and aspirations as given, it is on balance bad—but because of the effects on people’s aspirations themselves.

Mill defends a right to personal liberty, then, but the basis of the right lies in its contribution to aggregate human improvement. His defense is neither skeptical about the best way to live, nor a pragmatic case for keeping the peace, nor a form of Benthamite cost-benefit analysis, founded on quantitative hedonism. Nor is he saying: “it is your life, and you have a right to do with it as you please, and waste it if you want.” We ought to care about how good others’ lives are. But we best express that concern by ensuring their liberties, not by coercing them into being better. Once people are “capable of being improved by discussion,” protections of liberty are the surest path to human improvement.

This is a profound and important argument, connecting personal freedom to aggregate human improvement. But it also appears to be missing something important. To see what it might be missing, I want to explore some issues about religious liberty, focusing in particular on what—in constitutional law—are called “free exercise exemptions.”

2. Establishment and Free Exercise.

The first amendment to the American constitution contains two clauses that pertain to religion. Congress, it says, “shall make no law respecting an establishment of religion *or* prohibiting the free exercise thereof.” Much of the familiar controversy about the religion clauses focuses on the issue of

establishment. School prayer, crèches in public squares, vouchers that can be used for religious schools, and what to teach in biology class: those are all establishment issues. The core of the establishment clause is the condemnation of a state church, but the clause is also read as condemning government support for any particular religion, or perhaps for religion generally, as well as excessive government entanglement with religion, and any official endorsement of religion. Several important political values are advanced by the establishment clause: keeping the peace, ensuring fairness in a religiously divided society, and protecting religion from politicization. But it also is partly about preserving religious freedom. Part of the reason for avoiding religious establishment is to ensure that there is not an authoritative and collective decision on religious issues that arguably transforms religion and undermines the autonomy of religious conviction and practice.

In these concerns about preserving the autonomy of religious conviction and practice, the establishment clause overlaps with the free exercise clause. Protecting free exercise helps to ensure that individuals are able to form sincere religious convictions without undue collective pressure, and to express and practice those convictions without being subject to sanction.

But why should we be so concerned about religious convictions? Is there something special about them that marks them out for special treatment? Why not say that Congress shall make no law respecting an artistic establishment, or prohibiting the free exercise thereof? Part of the reason may be historical: the experience of religious wars between Protestants and Catholics in early modern

Europe underscored the importance of toleration. But the historical experience itself—of bloody conflict between people with competing religious convictions—may suggest something more intrinsic about religious convictions.

3. The Problem of Religious Exemptions

To see the force of this point, consider the case of *Sherbert v. Verner*. In this case, a Seventh Day Adventist was dismissed from her job because she was a Saturday sabbatarian and would not work on Saturday. Unable to find another job that did not also require working on Saturday, she applied for unemployment benefits. Those benefits were denied, because the South Carolina law required that recipients of unemployment compensation be willing to accept “suitable work when offered.” In effect, she was denied benefits because it was held that her unemployment was voluntary. Work was available, but she was unwilling to take it: not unable, but unwilling. The Court condemned the denial of benefits as a violation of the free exercise clause.

As the dissent observes, “she was denied benefits just as any other claimant would be denied benefits who was not ‘available for work’ for personal reasons.” So the Court was in effect requiring that an exception be made for those whose personal reasons are religious. It was requiring in effect that the state—ultimately meaning, other citizens—subsidize some kinds of specifically religious choices. Indeed, you might think that that special treatment for religion runs up against the establishment clause. The majority proposes in effect that the government must “single out for financial assistance those whose behavior is

religiously motivated even though it denies such assistance to others whose identical behavior [is] not religiously motivated.” What grounds are there for this special exemption?

I have mentioned the financial subsidy—and burdens on others citizens—but these may distract us from an answer to this question. Thus consider the case of *Employment Division v. Smith*. Smith and Black were working for a private drug rehab organization. Fired for ingesting peyote as part of a religious ceremony in a Native American church, they applied to the Oregon Employment Division for unemployment benefits and were found ineligible because they had been fired for work-related misconduct. For complicated reasons, the case—which the Court heard originally in 1987—was back at the Court, this time to decide whether the state could criminalize the sacramental use of peyote. No one was challenging the permissibility of a general law banning peyote, and there was now no challenge to the permissibility of a denial of unemployment benefits as a result of a criminal violation. The question was whether the state could permissibly criminalize the sacramental use of peyote. In a decision that provoked lots of opposition, the majority upheld the ban and held that no exemption for sacramental use was mandatory.

So here we have two examples of proposed free exercise exemptions. In both cases, we have a general rule that applies to everyone in a jurisdiction, and a proposal that some persons ought to be exempt from the rule because it unduly burdens their religious freedom. In assessing the case for such exemptions, four important points need to be taken into account. First, in neither case was there

any suggestion that the laws were purposefully discriminatory. This concern about intent was at issue in a 1993 case concerning a law banning animal sacrifice adopted by the city of Hialeah in response to the announcement that a Santeria church was opening there. Animal sacrifice is part of Santeria worship service. While the Hialeah regulation did not explicitly single out Santeria, it was held that suppressing Santeria practice was “the object of the ordinances,” which therefore violated the first amendment. The problem of free exercise exemptions emerges, then, not—as in Hialeah—because of the intent to impose a special burden. Instead, we have regulations that are assumed to be well-justified by a legitimate public purpose—say, ensuring that people do not exploit the unemployment insurance system or fighting a war on drugs—and a burden on religious exercise that is incidental to those regulations.

Second, no one doubted the sincerity of the religious convictions in either case or the conflict between those convictions and legal compliance: so there was no question about the burden. Putting these first two points together: we have regulations, supported by good reasons, but that also impose substantial burdens on religiously-motivated conduct.

Third, no one doubted that it would have been permissible for the legislature itself to carve out an exemption: because these were minority religions, concerns about religious establishment if there were such legislatively-constructed exemptions were attenuated. The question was whether the constitution’s free exercise clause mandated such exemption.

But, fourth, there was no suggestion in either case that the minority religious group had the capacity to win the exemption through normal politics. Thus the frank acknowledgement (Scalia writing for the majority) that “It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”

4. The Case for Exemptions

So is there something objectionable about the burdens in these cases: of well-justified regulations, which incidentally burden religious exercise, with no clear prospect of the burden being alleviated through normal politics?

To see why there might be—as a matter of political morality, and not only as a matter of constitutional law—put yourself for a moment into the shoes of the Seventh Day Adventist. Imagine her response to the suggestion that she is voluntarily unemployed: that she is unwilling, not unable. She might say that her unemployment is not voluntary at all. She did not choose the Saturday Sabbath: God made that choice, and she has a fundamental obligation to keep it. The burden on her imposed by the rules on unemployment compensation is not simply financial; it is not an inconvenience; she is being told that a condition of her holding a job, and to that extent being a full member of the society, is that

she violate obligations that she did not voluntarily undertake, but that are, for her, fundamental. The law seems to make, in O'Connor's words, "abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community."

And the same is true for Smith and Black. The ritual ingestion of small amounts peyote is a sacrament of their religion, which also forbids any sale of peyote and any use of it outside the ritual setting. They are being told that they may not do something that they think they are under the strictest requirement to do. For them, the ban on peyote is comparable to a ban on alcohol consumption that prevents its use in the sacrament of the Eucharist.

The case for free exercise exemptions, then, is founded on the idea that religious reasons—or at least some kinds of religious reasons—have an especially fundamental role in the ethical outlook of believers. Given their content—as fundamental requirements—the believer does not think of him/herself as having any option but to follow them. Whether you endorse or reject such exemptions, it is essential to understand the particular severity of the burdens on individuals that exemptions are intended to alleviate: they are being told that they ought to do something that they think they must not do, or ought not to do something that they think they must do.

Now I am not suggesting here that religious convictions are the only sources of reasons for exemption. What makes the case for the exemptions is that the reasons for engaging in the conduct that the regulation addresses have a particular weight or significance for a person. So suppose that I am a pacifist,

and give every evidence from the conduct of my life that this is a sincerely held conviction, and part of a larger system of moral convictions that I live by. Then I arguably have a case for an exemption from combat service, not because my convictions are religious but because I would be compelled to violate my fundamental moral obligations if I was required to serve.

5. Grounds for Hesitation

Now the fact that there are strong reasons for the exemptions does not settle the question about whether such exemptions are required as a matter of law or as a matter of right. There are three reasons for resisting them.

First, we might find a religious group that claims an exemption for just about anything: the baby torturing religion, or the human sacrifice religion. But this first objection is not compelling. We should not conclude from the fact that some conduct is unacceptable, no matter what the reasons for it, that the weight of the reasons in support are always irrelevant: I am suggesting that the reasons matter, not that they decide the question. The disagreement between O'Connor's concurrence and the dissent in *Employment Services* is instructive on this point. They agree that the war on drugs is an important policy, and if conducting that war required a blanket ban on peyote, then the use of peyote in worship would have to give way. They disagree about whether such a ban is required, but they all acknowledge that the government needs to find a very strong reason—a compelling interest—for burdening religious exercise. If the war on drugs is such

a reason, then certainly protecting babies from torture is a good enough reason. There is no reason to think that free exercise exemptions will multiply like rabbits.

Second, you might worry that if exemptions are permitted, then each person will claim a right to follow only the regulations that he or she approves of: that “each conscience is a law unto itself.” But once again, this conclusion is unwarranted. The essential point, once more, is the need to draw distinctions: making a claim based on sincerely held, core religious convictions, particularly a conviction about fundamental requirements that would be burdened by a regulation, is different from claiming an exemption in the name of less weighty considerations, about preferences, or customs, or personal aspirations, or cultural practices. Thus O’Connor’s claim that the right way to think about claims for exemption is to “decide each case on its individual merits,” by determining “whether the burden . . . is constitutionally significant and whether the particular criminal interest asserted by the state . . . is compelling.”

6. Utilitarianism

Whether any particular exemption is warranted, then, is a complicated matter: we need to reflect on the nature of the burden on the convictions and conduct of the believer and on the rationale for imposing it. And it is here that we come back to the concern I want to raise about utilitarianism generally—a concern that applies to Mill’s utilitarianism as well as Bentham’s. I emphasized in the discussion of Mill’s that his case for the harm principle, and for religious and moral toleration, turns on the idea that such toleration brings large social benefits: his case for

freedom of expression, for example, turns not on the burdens that restrictions impose on the speaker, but on the costs of conformity to society and humanity generally. His case for individuality turns principally on the benefits of “experiments in living” for the general welfare, and not on the burdens that restrictions imposed by restrictions on tastes and pursuits.

The issue for religious exemptions suggests that something important is missing from this way of thinking about issues of political morality. Even if you think that such exemptions are rarely required, the case for them brings out the importance in our political morality of something other than the aggregative thinking characteristic of utilitarianism, even in its Millian form. What is missing is an appreciation of the nature of the burdens on individuals that regulations impose: a case for religious liberty does not depend solely on the benefits that flow from its protection, but on an appreciation of the special burdens that its restriction imposes, and the need for a particularly compelling rationale for imposing those restrictions.

The underlying problem is that utilitarianism is insufficiently attentive to how the life of each person goes. What the case of exemptions brings out is that when it comes to justice, the separate lives of individuals matter in a way that aggregation fails to acknowledge: as Rawls puts it, utilitarianism neglects the moral importance of the separateness between persons. If we find the implications of utilitarianism unacceptable, then we should be motivated to look for an alternative doctrine that is more attentive, in its underlying structure, to the lives of individuals.