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Content Neutrality: A Defense

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Abstract

To date, both the United States federal government and twenty-one individual states have passed Religious Freedom Restoration Acts that aim to protect religious persons from having their sincere beliefs substantially burdened by governmental interests. RFRA's accomplish this by offering a three-pronged exemption test for religious objectors that is satisfied only when (1) an objector has a sincere belief that is being substantially burdened; (2) the government has a very good reason (e.g., health or safety) to interfere; and (3) there is a reasonable alternative to serve the compelling interest. Legal balancing tests like those found in RFRA are content neutral insofar as they sideline the belief-content of conscientious objections as irrelevant when determining the permissibility of granting legal accommodations. However, some theorists worry that this legal picture may be backward: perhaps balancing tests should be content non-neutral given the usual features of conscientious objections. For example, Yossi Nehushtan contends that, contrary to their typical codification, religious conscience beliefs seem undeserving of special legal accommodations because they possess uniquely strong empirical and theoretical ties to intolerance. Thus, the illiberally intolerant content of these conscientious objections might actually give the state a reason to refuse to grant legal exemptions. In this paper, I offer a cursory defense of content neutrality with respect to balancing tests like those found in RFRA. To begin, I outline Nehushtan's argument for content non-neutrality. The cornerstone of his argument is that illiberal intolerance is intolerable such that conscientious objections that are based upon illiberally intolerant values provide the state with strong, normally prevailing reason not to grant an exemption. I argue that, even when the illiberally intolerant content of one's conscience constitutes a weighty and relevant factor in determining the permissibility of granting a legal exemption, there remain significant problems. It is difficult, for example, to determine which views are illiberally intolerant and difficult to say whether illiberally intolerant views can effectively serve as the principled demarcating line in balancing tests. To conclude, I offer several cursory arguments in favor of adopting content-neutral approaches without necessarily making a comprehensive case. By drawing on the work of Amy Sepinwall, Nadia Sawicki, and Nathan Chapman, I show that content-neutral approaches can help to safeguard robust protections for conscience by permitting atypical exercises of conscience, protect minority thoughts and practices from being coercively supplanted by majoritarian understandings of morality, appropriately maintain the skepticism and humility that we owe each other as compatriots in a pluralistic society, and allow the kind of justifiable civil disobedience that has an important place in political history among other things.

Keywords

Conscientious Objection(s), Legal Exemption(s), Content Neutral Balancing Test(s), Religious Freedom Restoration Act(s), Conscience

I. Introduction

To date, both the United States federal government and twenty-one individual states have passed Religious Freedom Restoration Acts that aim to protect religious

persons from having their sincere beliefs substantially burdened by governmental interests. RFRA accomplishes this by offering a three-pronged exemption test for religious objectors that is satisfied only when (1) an objector has a sincere belief that is being substantially burdened; (2) the government has a very good reason (e.g., health or safety) to interfere; and (3) there is a reasonable alternative to serve the compelling interest. Legal balancing tests like those found in RFRA are content neutral insofar as they sideline the belief-content of conscientious objections as irrelevant when determining the permissibility of granting legal accommodations. However, some theorists worry that this legal picture may be backward: perhaps balancing tests should be content non-neutral given the usual features of conscientious objections. For example, Yossi Nehushtan contends that, contrary to their typical codification, religious conscience beliefs seem undeserving of special legal accommodations because they possess uniquely strong empirical and theoretical ties to intolerance. Thus, the illiberally intolerant content of these conscientious objections might actually give the state a reason to refuse to grant legal exemptions.

In this paper, I offer a cursory defense of content neutrality with respect to balancing tests like those found in RFRA. To begin, I outline Nehushtan's argument for content non-neutrality. The cornerstone of his argument is that illiberal intolerance is intolerable such that conscientious objections that are based upon illiberally intolerant values provide the state with strong, normally prevailing reason not to grant an exemption. I argue that, even when the illiberally intolerant content of one's conscience constitutes a weighty and relevant factor in determining the permissibility of granting a legal exemption, there remain significant problems. It is difficult, for example, to determine which views are illiberally intolerant and difficult to say whether illiberally intolerant views can effectively serve as the principled demarcating line in balancing tests. To conclude, I offer several cursory arguments in favor of adopting content-neutral approaches without necessarily making a comprehensive case. By drawing on the work of Amy Sepinwall, Nadia Sawicki, and Nathan Chapman, I show that content-neutral approaches can help to safeguard robust protections for conscience by permitting atypical exercises of conscience, protect minority thoughts and practices from being coercively supplanted by majoritarian understandings of morality, appropriately maintain the skepticism and humility that we owe each other as compatriots in a pluralistic society, and allow the kind of justifiable civil disobedience that has an important place in political history among other things.

II. An Argument for Content Non-Neutrality

Yossi Nehushtan offers a noteworthy argument in favor of content non-neutrality with respect to legal exemption tests. First, he contends that the limit of liberal tolerance should be illiberal intolerance – i.e., that “illiberal intolerance should almost never be tolerated by the tolerant-liberal state” (Nehushtan 2018, 198). Second, he contends that there are “meaningful and special” empirical and theoretical links between religions like Christianity, Islam, and Judaism – i.e., the Abrahamic religions – and intolerance (Nehushtan 2018, 198). As a result of these “special” links, he thinks that Abrahamic religionists are “more likely to be intolerant and act intolerantly than non-religious people” (Nehushtan 2018, 198). Under the assumption that his first two claims are true, he concludes that when they’re taken together, these claims “may provide a reason for the tolerant-liberal state not to tolerate religion as such” (Nehushtan 2018, 198). At the very least Nehushtan thinks that these two claims “provide a reason for the tolerant-liberal state not to tolerate religious claims for accommodation or religious claims for exemptions from legal rules” (Nehushtan 2018, 198). This means that Nehushtan would ultimately answer the “Is religion special?” question in the affirmative, but with a catch: since religious beliefs more broadly – which include religious conscience beliefs – are meaningfully and specially linked to illiberal intolerance, we should afford them a special, *negative* status before the law.

This argument suffers from a few mistakes worth highlighting. First, in order for the two central claims of the argument to be congruent, Nehushtan would need to argue that there are meaningful and special empirical and theoretical links between the Abrahamic religions and *illiberal* intolerance – not just any kind of intolerance. After all, Nehushtan’s argument claims that at least some forms of intolerance are tolerable – namely, intolerance of illiberal views or values. Second, while the Abrahamic religions may possess a *meaningful* relationship to illiberal intolerance, it is not obvious that they possess a *special* or *unique* relationship to such intolerance. Both secular and religious conscience beliefs, for example, plausibly seem to share a similar in-principle and in-practice link to illiberal intolerance such that special legal treatment for either form of conscience might be unjustified.

To see how both secular and religious conscience beliefs may share a similar in-principle link to illiberal intolerance, consider the example of suicide bombers offered by social-psychologist Jonathan Haidt:

To take one example, religion does not seem to be the *cause* of suicide bombing. According to Robert Pape, who has created a

database of every suicide terrorist attack in the last hundred years, suicide bombing is a nationalist response to military occupation by a culturally alien democratic power. It's a response to boots and tanks on the ground – never to bombs dropped from the air. It's a response to contamination of the sacred homeland. (Imagine a fist punched into a beehive, and left in for a long time.) Most military occupations don't lead to suicide bombings. There has to be an ideology in place that can rally young men to martyr themselves for a greater cause. The ideology can be secular (as was the case with the Marxist-Leninist Tamil Tigers of Sri Lanka) or it can be religious (as was the case with the Shiite Muslims who first demonstrated that suicide bombing works, driving the United States out of Lebanon in 1983). Anything that binds people together into a moral matrix that glorifies the in-group *while at the same time demonizing another group* can lead to moralistic killing, and many religions are well suited for that task. Religion is therefore often an *accessory* to atrocity, rather than the driving force of the atrocity. (Haidt 2013, 312)

According to Haidt (2013), illiberal intolerances – like those manifested in suicide bombings – are not the unique products of religion per se, but instead seem to be the products of ideologies that “bind people together into a moral matrix that glorifies the in-group while at the same time demonizing another group.” While these ideologies can be either secular or religious, what serves as the primary “driving force of the atrocity” is being deeply embedded within the above sort of moral matrix that glorifies the in-group and demonizes the out-group. Thus, the underlying feature that seems to drive such illiberal intolerance is not, at least in principle, unique to religious conscience beliefs.

Moreover, it seems doubtful that illiberally intolerant ideologies are, in practice, uniquely religious. For example, one of the main findings of the BBC's war audit in 2004 was that the “overwhelming majority of wars and the overwhelming majority of the victims of such wars cannot be classified primarily according to religious causes or religious beliefs” (Austin, Kranock, and Oommen 2004, 17). There are, of course, obvious examples where religious communities have been targeted because of their faith however. Several of the most heinous atrocities against communities of faith in particular were perpetrated “by the three most vicious and blood-thirsty regimes ever to hold power: Stalin's Russia, Mao's China and Hitler's Germany” (Austin, Kranock,

and Oommen 2004, 17). These specific examples among others provide “a fairly strong indication” that atheistic or secular states are not “less prone to war or large scale violence” – but perhaps even more prone (Austin, Kranock, and Oommen 2004, 35-36).¹ Like Haidt, the audit argues that the common thread “linking the disposition to war of religious and atheistic states is absolutism: the more absolutist the state, the more likely it is to go to war” (Austin, Kranock, and Oommen 2004, 35-36). Thus, they conclude that a “genuinely secular (atheistic) state may be less inclined to go to war than a state in which religion is very prominent, *only as long as the secular state is one which is not pursuing a millenarian or totalitarian ideology (such as Communism or Nazism) and as long as the state is one in which pluralism and tolerance of diversity are the norm*” (Austin, Kranock, and Oommen 2004, 35-36; emphasis added).

Moving forward, we can offer some friendly amendments to Nehushtan’s argument given the above claims. First, the foundational claim of his argument can remain the same: illiberal intolerance should not be tolerated. But second, it seems like we can reasonably deny that there are special or unique in-principle and in-practice links between the Abrahamic religions and illiberal intolerance. Our examples seem to indicate that secular conscience can be in principle and in practice just as illiberally intolerant as the Abrahamic religions can be. Accordingly, we can deny that religious beliefs should be afforded a special, negative status before the law. Instead, any conscience belief – secular or religious – that relies on illiberally intolerant values can be afforded that special, negative status before the law. In short, the illiberally intolerant nature of any conscience belief may provide a reason for the tolerant-liberal state not to tolerate that claim for accommodation or for exemptions from legal rules.

With these amendments at hand, what sort of problems now remain with the view that the illiberally intolerant content of anyone’s conscience may provide a reason not to grant a legal exemption? There seem to be at least three. First and foremost, there is a *Conceptual Problem*: it is not clear that illiberally intolerant views adequately serve as the principled, demarcating line in balancing tests for legal exemptions. In other words, it is not clear that, in principle, every illiberally intolerant conscience belief should fail to receive legal accommodations. To illustrate, just consider the cases involving the ministerial exception.² In those cases, churches were exempted from anti-discrimination

1. They continue: “Atheist governments in the USSR, China and Russia were...the biggest perpetrators of mass violence that the world has ever seen, with both governments individually responsible for many more deaths than the Nazi regime of Adolf Hitler” (Austin, Kranock, and Oommen 2004, 35-36).

2. See, for example, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

laws and the application of these civil rights when hiring employees, leaving matters of internal church governance up to the church in question. Such cases would disallow the United States government from, say, forcing a Catholic Church to hire a female priest. The conscientious content in these cases is, on its face, illiberally intolerant – yet it is not clear that legal exemptions should be withheld in these cases. Indeed, extending legal exemptions to churches in matters of internal church governance may be the morally right thing to do for several reasons not least of which is maintaining the appropriate and principled division between Church and State.

Second, there is an *Epistemic Problem* for courts that try and determine whether the content of some conscience belief is, in fact, illiberally intolerant or not. Though the content of some conscience beliefs is obviously illiberally intolerant – e.g., racist beliefs – the content of other conscience beliefs is not so obviously illiberally intolerant – e.g., anti-abortion beliefs. Asking courts and judges to be the final adjudicator of such contested matters of moral philosophy and epistemology seems, at best, highly suspect.

Third, and finally, let's suppose that the first two problems are surmountable and that the illiberally intolerant content of a conscience belief can be considered a "relevant" and "strong or weighty reason" for not tolerating that claim (Nehushtan 2018, 200). Given these assumptions, the state would then have a good, though "not necessarily conclusive reason" not to grant conscientious exemptions – "even in cases where the claims to be granted exemptions are not based directly on intolerant values" (Nehushtan 2018, 200). The primary concern with this view is this: even when we grant that the content of one's conscience constitutes a relevant and weighty factor in deciding whether or not to grant an exemption, just *how* weighty and relevant that reason is or should be remains unhelpfully unclear – especially when considered among the balance of competing reasons for granting or not granting an exemption. We can call this the *Weightiness Problem*. Though Nehushtan contends that the illiberally intolerant content of some conscience belief should be a relevant and weighty factor, he nevertheless concedes that this factor "should not, however, be an overriding or conclusive reason for not tolerating such claims" (Nehushtan 2018, 200). Because "there are always reasons for tolerating [illiberally intolerant] claims for accommodation or exemption," those reasons may "override the reason against tolerating such claims and may therefore justify accommodation or granting exemptions" (Nehushtan 2018, 200). In the end, then, how helpful and how much does a content non-neutral approach really accomplish if content-based reasons are just one set of relevant and weighty though non-overriding reasons within the balance of reasons? Just how

these reasons might factor into the exemption calculus is unclear and uncertain under content non-neutral approaches like *Nehushtan's* – and this seems to be as relevant and weighty of a reason as any not to endorse such views.

III. Some Arguments for Content Neutrality

In what remains, I offer several cursory arguments in favor of adopting content-neutral approaches without necessarily making a comprehensive case. By drawing on the work of Amy Sepinwall, Nadia Sawicki, and Nathan Chapman, I highlight some of the virtues of adopting a content-neutral approach over a content non-neutral approach.

A. Sepinwall's Third-Party Harm Argument

Amy Sepinwall offers a defense of content neutrality that arises in the context of addressing a separate though related question: when is a claim of moral complicity³ compelling enough to warrant an accommodation? Her answer is that conscientious objections should be evaluated under a sort of content-neutral RFRA regime, but that “a separate, additional set of considerations must be brought to bear – namely, considerations tracking the interests of third parties” (Sepinwall 2015, 1974).⁴ So, she suggests adding an additional feature to the content-neutral RFRA test for legal exemption: roughly, third-party costs “exceeding some threshold amount should be found untenable” (Sepinwall 2015, 1974). Exemptions would be denied, therefore, when these excessive and unacceptable third-party costs would otherwise result (Sepinwall 2015, 1974). Specifying exactly where this threshold might be on a cost spectrum is, Sepinwall concedes, not always clear and “a matter for democratic deliberation” (Sepinwall 2015, 1974).

Sepinwall adds and emphasizes this more extrinsic feature to the test of exemption demarcation because she believes that there are good reasons for courts to abstain from evaluating the intrinsic content of any given conscience belief. More specifically, she thinks emphasizing this additional feature will ameliorate the *Epistemic Problem*: since courts are epistemically limited when evaluating the more intrinsic features of

3. Like those seen in *Burwell v. Hobby Lobby*, 573 U.S. (2014) or *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. (2018), for example.

4. Arguably, this feature may already exist in the second, “governmental interest” prong of the RFRA test. I will set aside that discussion for now and assume that Sepinwall's feature is not already implicit or embedded within the RFRA test.

a conscience belief, they should instead focus on the extrinsic features of requested accommodations when determining whether granting a legal exemption is warranted or not. In fact, Sepinwall argues that moral beliefs in general should largely enjoy total deference by courts for this very reason. She thinks that a position of total deference to an objector's moral beliefs seems to appropriately maintain the "skepticism and humility that we owe one another as compatriots in a pluralistic society" (Sepinwall 2015, 1927). And given the reality of moral and religious pluralism, "we are often without a capacity for certitude...in moral and religious matters...that would allow us to discern truth and falsity" (Sepinwall 2015, 1927). So, it seems like an attitude of "moral deference on the part of the state" is most appropriate (Sepinwall 2015, 1927).

At this point, we should wonder: under content-neutral approaches, what will become of particular moral beliefs that are obviously wrong and illiberally intolerant – like racism?⁵ Should certain limits on moral deference and content-neutrality be appropriated so as to ensure that courts, as state actors, are not compelled to treat highly problematic moral beliefs as on par with other moral beliefs? We can offer a few responses to this *Problem of Bad Views* via Sepinwall. First, she contends that "according deference to a claim that denigrates another group is not the same as endorsing that claim" (Sepinwall 2015, 1928). Though a court should treat the moral belief with deference and neutrality, Sepinwall thinks that courts have a responsibility to clearly articulate that such a moral view "flies in the face of our most fundamental constitutional values...[thereby serving, say,] religious freedom but also [speaking] in favor of the notion of equal respect that underpins our constitutional regime" (Sepinwall 2015, 1928). Even Nehushtan agrees that allowing the authorities to grant an exemption yet "condemn their values or behavior" may be a justifiable way of "not tolerating intolerant conscientious objectors" (Nehushtan 2018, 199-200).

5. Interestingly, though Sepinwall grants much deferential latitude for religious claims of complicity, she nevertheless thinks that "we should expect that claims seeking religious exemptions from antidiscrimination laws would typically fail" because the third parties whose interests are relevant in these cases are those who are "immediately denied service or employment by the religious objector" (Sepinwall 2015, 1978). Moreover, she thinks that "all members of the group facing discrimination can claim an expressive injury from the discrimination" and that "other historically oppressed groups can claim that an exemption threatens them with an injury, too" (Sepinwall 2015, 1978). A state that grants an exemption to the religious objector in this case runs the risk of failing to "take seriously the great evil of discrimination" and undermining "the sense of security and respect that a decent state should confer on all its citizens" (Sepinwall 2015, 1978).

Second, deferring to and remaining neutral toward a moral claim doesn't necessarily commit a court to issuing an exemption: the objector's assertion must still be weighed against governmental interests. Hence, the entitlements that citizens enjoy would be defeasible. It may turn out, for example, that in some instances, "the government will invoke its compelling interest in the eradication of, say, racism, and it will wield that interest to defeat the bid for an exemption" (Sepinwall 2015, 1928). Remember too that the moral belief must also be weighed by the court against the interests of third parties – at least according to Sepinwall's revised test. She writes:

Third parties will presumably be able to marshal arguments that acceding to the believer's hateful claim inflicts a grave injury on them—one so grave that the court should find it dispositive. But even if third parties choose not to become too vexed about the believer's claim, the state must, again in its capacity as a defender of our constitutional regime, add to its arguments about the compelling interests underpinning the challenged legal requirement a statement decrying the challenge because it deviates from our most cherished constitutional values. (Sepinwall 2015, 1929)

As previously noted, Sepinwall thinks that adding and emphasizing this third-party harm feature will ameliorate the *Epistemic Problem*. But her feature cannot, however, fully eradicate this problem: though determining resultant harm may be an easier and more suitable task for the courts, they will nevertheless struggle, at times, to determine when an excessive and unacceptable third-party cost has resulted. Consider, for example, the plethora of cases involving religious wedding vendors and servicers conscientiously refusing to offer their services for same-sex weddings. You might think, as Sepinwall seems to, that their conscientious objection amounts to a harm sufficient for blocking an exemption from antidiscrimination law – and sufficient for the reasons articulated above (Sepinwall 2015, 1928). But you might think, as Eugene Volokh and Dale Carpenter, that no considerable harm is committed against same-sex couples when, say, a wedding photographer turns them away. They write:

[D]iscrimination by these narrow categories of expressive commercial actors is much less damaging and restrictive than other forms of discrimination. Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future, as can discrimination in housing—especially when housing is scarce

in the safe parts of town with good schools. Discrimination in many places of public accommodation has been historically pervasive, to the point that mixed-race groups might have been unable to find any suitable hotel or restaurant. But protecting the First Amendment rights of writers, singers, and photographers would come at comparatively little cost to those denied such inherently expressive and personal services by specific providers. Of course, when a photographer tells a couple that she does not want to photograph their commitment ceremony, the couple may understandably be offended by this rejection. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. (Volokh and Carpenter 2013, 19-20)

As Volokh and Carpenter note, it seems doubtful that the rejection of an expressive business rises to the level of an injury so grave and excessive that the courts should find it dispositive. Of course, there are cases where a photographer's rejection could arguably harm a same-sex couple in an excessive way – namely, by withholding services that are not otherwise available to them. For example, Kevin Vallier argues that a genuine and noteworthy harm was committed to same-sex couples when Kim Davis – the county clerk from Rowan County, Kentucky – refused (and refused to allow her *willing* deputies) to certify marriage certificates for same-sex couples that were legally available to them (Vallier 2015). However, by refusing to use their expressive talents to photograph a same-sex wedding, a photographer will likely not withhold services or interests that are not otherwise available to the couple in the way that Davis did. As Kevin Vallier explains, the actions of a religious wedding servicer “may offend, but they do not harm the couple on any sensible understanding of harm” (Vallier 2015).⁶

Just to reiterate Sepinwall's earlier claim: given this new feature, exemptions would be denied when excessive and unacceptable third-party costs would otherwise result. But specifying exactly where this threshold might be on a cost spectrum is not always clear. In cases involving racism, the resultant harm would be so clearly excessive and unacceptable that requested accommodations would absolutely fail. But in cases involving religious wedding servicers and discrimination against same-sex couples, the

6. Vallier adds: “As John Stuart Mill taught us, any free society must distinguish between harms and offenses. We have trouble with that distinction, but it is critical for freedom” (Vallier 2015).

resultant harm may not be comparably as potent. John Corvino offers some helpful insight as to why the resultant harm of these two cases may be different after all:

When civil rights laws were passed, discrimination against blacks was pervasive, state-sponsored, and socially intractable. Pervasive, meaning that there weren't scores of other photographers clamoring for their business. State-sponsored, meaning that segregation was not merely permitted but in fact legally enforced, even in basic public accommodations and services. Socially intractable, meaning that without higher-level legal intervention, the situation was unlikely to improve. To treat the lesbian couple's situation as identical – and thus as obviously deserving of the same legal remedy – is to minimize our racist past and exaggerate L.G.B.T.–rights opponents' current strength. (Corvino 2015)

In sum, Sepinwall argues that courts should afford a great deal of deference and neutrality when facing a conscientious objection. After all, "pluralism demands respect for religious differences, but that respect goes both ways: it entails that we must be open to many claims of conscience, but we must also ensure that these claims do not unduly or disproportionately interfere with the interests of discrete third parties (Sepinwall 2015, 1972). However, the deferential conclusion sketched here does not necessarily entail that an objector is always entitled to an exemption. Even though the courts "should in general treat as true the ...adherent's claim..., they must still consider whether acceding to a request for an accommodation would impose undue burdens on third parties" (Sepinwall 2015, 1910).

B. Sawicki's Respect for Conscience Argument

Sawicki's defense of content neutrality begins with her claim that true respect for any conscience belief demands a consistent, coherent, and repeatable mechanism for legal accommodation, even if that test is open-ended and results in uncertainty at the outermost margins (Sawicki 2012, 1395). As such, she thinks that the most promising legal mechanism for meeting these demands is the kind of content-neutral balancing test we see in RFRA (Sawicki 2012, 1396). The alternative is to include content as a relevant feature within the mechanism for legal accommodation – something that Sawicki fears may yield less consistent results, produce less coherent justifications, and may, as a result, lose repeatability as a mechanism over time. Of course, she grants that balancing approaches are subject to some criticism – e.g., they may risk being used as

a proxy for judgments based on majoritarian values – but she nevertheless contends that the alternative to establishing a content-neutral guiding principle is to flatly “abandon the promise of freedom of conscience and concede that American society considers exercises of personal conscience to be valuable only to the extent that they align with widely accepted moral principles” (Sawicki 2012, 1396). Such an alternative, Sawicki argues “would undermine the foundational purpose of legal accommodation of conscientious belief, which is to protect individuals from oppressive majoritarian understanding of morality” (Sawicki 2012, 1396). Thus, she contends that “only a content-neutral approach...is consistent with the principles of a pluralistic society that respects the inherent value of conscience” (Sawicki 2012, 1445).

Moreover, Sawicki worries that the pragmatic implications of failing to adequately respect conscience beliefs and protect them from oppressive majoritarian understandings of morality may be socially unworkable as well. She notes that “we begin to understand the pragmatic argument for legal accommodation of conscience” only when we “accept that an individual may be driven to act in accordance with her strong conscientious beliefs regardless of the consequences” (Sawicki 2012, 1404). Indeed, those in the grip of conscience often feel the compulsion of conscience so deeply that they say that they could not live with themselves if they were to violate their conscience (Sorabji 2014, 36). So, Sawicki’s argument for accommodating conscience beliefs maintains “that a civil society is unlikely to function effectively if it chooses to punish conscientious objectors” (2012, 1405). She writes:

Punishment in a civil society can serve many purposes, among them retribution, deterrence, and reform. However, punishing a person for acting in accordance with her conscience rarely serves these purposes effectively. First, because it is impossible to coerce belief against someone’s wishes, punishment of conduct motivated by conscientious belief is unlikely to result in reform or rehabilitation. On a similar note, the threat of punishment is unlikely to deter those acting on the basis of conscientious conviction. That being said, some conscientious objectors (those who are more susceptible to the threat of punishment, perhaps because their moral commitments are not as firm) may be swayed by the threat of legal penalty, and may choose to comply with the law despite their conscience’s voice to the contrary. What is the likely result for these persons, we might ask? “Deterrence of those who lack the will to act on their

convictions exacts a terrible price. Their feeling that they have yielded to compulsion and violated their most deeply held beliefs and principles may involve profound resentment and loss of self-respect." Finally, when it comes to retribution, many believe that the retributive purposes of punishment are poorly served by punishing individuals who act on the basis of moral compulsion rather than self-interest or impulsiveness. (Sawicki 2012, 1404-05)

Overall, Sawicki's pragmatic argument for accommodating conscience beliefs recognizes the punishment concerns raised above and responds accordingly. Of course, you may worry that "granting conscience-based exemptions from legal obligations as a matter of course may wreak havoc on the state's ability to maintain order" (Sawicki 2012, 1405). But her point is that "the same can be said of a state that rejects claims of conscience altogether" (Sawicki 2012, 1405). Because a society cannot adopt laws that perfectly align with all of its citizens' beliefs, Sawicki contends that a "society must order itself in such a way as to mediate between the interests of social order and the interests of citizens who might feel disenfranchised by laws that violate their conscientious beliefs" (Sawicki 2012, 1405-06). And perhaps the only pragmatic and workable way to accomplish this, as Sawicki thinks, is to offer adequate, content-neutral accommodations for conscience beliefs like those discussed above.

C. Chapman's Anti-Tyranny Argument

Finally, Nathan Chapman also offers several reasons for why we ought to adopt broad, content-neutral, defeasible entitlements for conscience beliefs. Perhaps most importantly, he argues that granting such entitlements for conscience may help to protect against tyranny insofar as "protecting conscience undermines the totalization of morality by the government" (Chapman 2013, 1494). Like Sawicki, Chapman contends that content-neutral entitlements in particular can limit the "government's pretensions to absolute moral authority" by permitting "nonconformist moral thought that aims to undermine moral tyranny" (Chapman 2013, 1499). These protections may be especially important for minority thoughts and practices that wish to persist against the conclusions promoted by the majority. These protections may further allow for "majority decisions to be provisional," allow the "persuasiveness of minority speech to be aided by the persuasiveness of minority action," and allow for those who disagree with prevailing norms to "prolong internal and national dialogues over contested moral issues" (Chapman 2013, 1500). Additionally, the ability to contribute to the kind

of justifiable civil disobedience that has “an important place in political history and theory” – the kind that can be “particularly effective at jarring a morally apathetic society into taking notice and making important changes” – will be increasingly secured as well (Chapman 2013, 1499).

Of course, the virtues of offering broad, defeasible, and content neutral entitlements are best displayed when the moral views of the government or majority are obviously bad. But it seems like such entitlements should be offered during the good times and the bad – at the very least – in order to uphold the suitable level of consistency and toleration. After all, tolerance requires, as Brian Leiter suggests, not merely being indifferent toward some group, but actively putting up with the perceivably wrong, mistaken, or undesirable beliefs and actions of that group (Leiter 2013, 8). A tolerant attitude toward conscientious objectors, therefore, would seemingly allow them the opportunity to be wrong by permitting a legal exemption in some cases. Otherwise, we may run the risk of a kind of “totalization of morality” on the part of the government stressed above. Moreover, we should remember that every permitted accommodation requires at least some degree of tolerance insofar as a conscientious objection is, by nature, requesting exemption from a law that is otherwise taken to be correct or justified. As Yossi Nehushtan notes, the very act of granting a conscientious exemption “presupposes that the state does not share the conscientious objector’s values or his way of balancing between values” (Nehushtan 2018, 130). Indeed, the state “believes it would be unbearable and indeed intolerable if everyone shared the objector’s kind of conscience and reasoning” (Nehushtan 2018, 130). So, tolerance is required to grant any legal exemption to any kind of conscientious objector – even in cases when the law is wrong and the conscientious objector is right.

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