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One Law for All? The Logic of Cultural Accommodationt

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One Law for All? The Logic of Cultural Accommodation†

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I.

Our belief in the rule of law commits us to the principle that the law should be the same for everyone: one law for all and no exceptions.[1] It would be quite repugnant if there were one law for the rich and another for the poor, one law for black Americans and another for whites. Formally at least we repudiate all such classifications, and to the extent they still exist in our law or in the way our legal system is administered, we believe they disfigure, or at least pose grave difficulties for, our commitment to the rule of law ideal. We value this generality not least as a bulwark against oppression. We figure that we are less likely to get oppressive laws when the lawmakers are bound by the same rules they lay down for everyone else.[2] We are less likely to get a ban on foreign travel when there is no exemption for legislators or party members. We are less likely to get a ban on abortion when the laws apply to the wives and daughters of male legislators as well as to the wives and daughters of the ordinary citizens.[3]

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1. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (8th ed. 1915, republished 1982) ("[W]e mean . . . when we speak of the rule of law . . . that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm.").

2. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 154-55 (1960) (arguing that chief safeguard of liberty is that rules must apply to those who create and enforce them).

3. Indeed, this is one of the reasons we value a representative legislature composed of ordinary members drawn from the community. "By which means," as John Locke put it, "every

At the same time, we live in a society in which there are many different cultures and a bewildering variety of religions and belief systems, each capable of attributing peculiar significance to the actions and circumstances in which the law of the land is interested. Two pieces of behavior that look like the same action may have different meanings for those who perform them. Two sets of circumstances that seem identical from the point of view of one culture may look quite different when described in the language of another. So how do we know when the law is *the same* for everyone? Is it enough that it treats the same behavior in the same physical circumstances identically; or does the rule of law only require that we treat identically pieces of behavior that have the same significance for those who perform them and, perhaps also, for those on whom they are performed?

For example, some children get together with an older adult, and he supplies them with alcohol. A priest passes a cup of wine to young communicants. Are these the same action or different actions? A man is found in a public place with a knife concealed on his person. Is this knife a dangerous and offensive weapon? Or does it belong to a Sikh, carrying a *kirpan*, in fulfillment of religious obligation?

Of course the law can make an exception for the Sikh or for the sacramental use of wine. Laws have all sorts of exceptions, conditions, and qualifications.[4] Provided they too are stated in general terms and administered impartially, their existence does not violate the principle of the rule of law with which I began, at least not formally. Still the strategy of exception can sometimes present more difficulties than it is capable of resolving. Brian Barry, in his new book *Culture and Equality*, brings up the case of a young man arrested at a demonstration in Trafalgar Square in 1997, carrying a three-foot-long double-edged sword.[5] When the young man convinced a London court of the sincerity of his belief that he was King Arthur's twentieth century reincarnation and, as such, the Honored Pendragon of the Glastonbury Order of Druids,

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single person became subject, equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative, had established: nor could any one, by his own Authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to License his own, or the Miscarriages of any of his Dependents." II JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330, ch. vii, ¶ 94 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

4. Texas law professor Douglas Laycock has pointed out that your average statute is riddled with exemptions for all sorts of secular circumstances. If anything, it is the *failure* to use ordinary legislative techniques to accommodate religious and cultural difference – on the scale of lawmakers' normal sensitivity to differences in, say, commercial circumstances – that is puzzling and perhaps offensive and unfair to cultural and religious minorities. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50-51 (arguing that if government grants exemptions for secular reasons it must do likewise for religious reasons).

5. BRIAN BARRY, CULTURE AND EQUALITY 51-52 (2001) (quoting *Excalibur Regained as Arthur Pulls It Off*, THE GUARDIAN, Nov. 6, 1997, at 1).

the judge found he had no alternative but to give Arthur (as I suppose we should call him) the benefit of Section 139(5)(b) of the Criminal Justice Act of 1988, which provides the following statutory defense to a charge of carrying in a public place "any article which has a blade or is sharply pointed":

> it shall be a defense for a person charged with an offence under this section to prove that he had the article with him (a) for use at work; (b) for religious reasons; or (c) as part of any national costume.

The parliamentary record is pretty clear that this defense was enacted for the benefit of members of the Sikh community, not for the likes of Arthur Uther Pendragon.[6] But of course that is just the sort of thing for which one must *not* use legislative intention; one must not use it to turn a very general exception into one that is focused on the benefit to a particular person or group. One must follow the general terms of the defense wherever they lead, or else one has given up on even this *modified* version of the rule of law. So in this case, the very terms of the exception laid down in the statute led the judge to dismiss the charges and order the police to give King Arthur back his Excalibur.

II.

It is natural to think of the exemption for the use of communion wine during prohibition[7] – a harmless use (at best a sip and certainly not intoxicating) – as our model for religious and cultural exemptions. We exempt the conduct because we can see that it is not really the sort of thing at which the general prohibition is aimed.

There are interesting cases that conform to this paradigm. My favorite example is *State v. Kargar*.[8] The state of Maine has a statute that forbids various forms of sexual contact between adult and child as gross sexual assault (a felony). Mr. Kargar, an Afghani refugee living in Portland, was seen by a babysitter kissing the penis of his eighteen month old son. The babysitter told the babysitter's mother, and the babysitter's mother called the police. The police had Mr. Kargar arrested and prosecuted because in Maine, the statutory definition of "sexual contact" includes "[a]ny act between two persons involving direct physical contact between the genitals of one and the mouth . . . of the

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6. SEBASTIAN POULTER, ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE 322 n.271 (1998).

7. *See* J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 362-53 (1969) ("During Prohibition Congress created an exemption in the Volstead Act for churches using wine for Communion, though such use was subject to licensing restrictions." (citing National Prohibition Act, tit. II, § 3, 41 Stat. 308 (1919))).

8. State v. Kargar, 679 A.2d 81 (Me. 1996); *see also* Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999) (discussing *Kargar* and analyzing viability of cultural defenses to criminal charges).

other." Now, a number of witnesses, all (like Kargar) recent emigrants from Afghanistan, testified that kissing an infant son's penis is common in Afghanistan, that it is done to show love for the child, that it is acceptable up until at least the third year of the child's life, and that there are no sexual feelings involved. (Indeed, if there were sexual feelings, the same culture – Islam as practiced in Afghanistan – would punish the father's action with death.)[9]

In the end, the case was disposed of by the Supreme Judicial Court of Maine determining that someone – e.g., the court of first instance – ought to have taken advantage of the state's statutory *de minimis* provision to dismiss the prosecution. But one also can see the case as a failure of legislative strategy. Maine uses legislative language that is fanatically *rule*-like to define the offense of sexual assault. It uses a rule rather than a standard, which might require a judgment on the part of judge and prosecutor as to whether this contact was "indecent." And its rule uses purely descriptive behavioral terms like "mouth," "genitals," and "physical contact," without any reference to the point or purpose of the contact (e.g. "for the sake of sexual gratification.")[10] In

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9. Kargar testified that kissing his son's penis shows how much he loves his child precisely because it is not the holiest or cleanest part of the body. *See Kargar*, 679 A.2d at 83 n.3.

10. For the distinction between rules and standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976).

It is hard to see what the legislators hoped to achieve with such a physically specific definition of "sexual act." Were they worried about judicial discretion being exercised incompetently or inappropriately in this regard? *Cf.* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 135-66 (1991) (discussing "the reasons for rules"). Or did it just not occur to them that this legislative strategy would be beset with problems? In this regard, we must of course take into account that cases like Kargar's would not have occurred to the legislators of Maine when they defined "sexual act." As the Court in *Kargar* observed:

> In order to determine whether this defendant's conduct was anticipated by the Legislature when it defined the crime of gross sexual assault it is instructive to review the not-so-distant history of that crime. [The legislation] makes criminal any sexual act with a minor (non-spouse) under the age of fourteen. A sexual act is defined as, among other things, "direct physical contact between the genitals of one and the mouth . . . of the other." . . . Prior to 1985 the definition of this type of sexual act included a sexual gratification element. The Legislature removed the sexual gratification element because, "given the physical contacts described, no concern exists for excluding 'innocent' contacts." . . . The Legislature's inability to comprehend "innocent" genital-mouth contact is highlighted by reference to another type of "sexual act," namely, "[a]ny act involving direct physical contact between the genitals . . . of one and an instrument or device manipulated by another." The Legislature maintained the requirement that for this type of act to be criminal it must be done for the purpose of either sexual gratification or to cause bodily injury or offensive physical contact. Its stated reason for doing so was that "a legitimate concern exists for excluding 'innocent' contacts, such as for proper medical purposes or other valid reasons."

other words, the Maine provision mentions body parts and specifies contact between them as the offense, and everyone, *no matter what the significance of contact with those body parts is to them*, is held to that norm. Now, is this what we mean by legal equality, the rule of law, one law for all?

Such an account would be plausible if the best understanding of the law (and the law's policy in this regard) had to do with body parts and physical behavior. But in fact the policy behind the statute is in large part itself cultural: it is oriented to the particular *meaning* – the intense *sexual* meaning – of mouth-genital contact in contemporary American culture. Because the law is oriented toward cultural meaning in that way, it surely should be open to the possibility that the same behavior (with the same body parts) might have a quite different cultural meaning to those who only just now are becoming acquainted with America's sexual obsessions. In this case, an intelligent application of the rule-of-law ideal seems to militate against the idea of a single *rule* applying to everyone; it seems to argue instead for the uniform application of a *standard* that condemns the relevant contact on account of its sexual meaning rather than its purely behavioral characteristics.

III.

The *Kargar* and communion-wine cases provide examples of the need to think carefully about the application of this idea of one law for all. But that paradigm does not work for every case.

For example, it really will not do for the case of the Sikh and his dagger. Our initial thought in regard to the exception in Section 139(5)(b) of England's Criminal Justice Act might be that although the Sikhs (and Druids) technically are violating the letter of the law by carrying pointed blades in public, they really are not violating its spirit because their weaponry is purely ceremonial, unlike (say) the knives carried by soccer hooligans. But there is something patronizing in the view that the *kirpan* is carried by the Sikh initiate purely as a matter of religious observance, as though its ceremonial significance had nothing to do with its significance as a weapon. In fact, the Sikh's religious obligation is an obligation to present himself in public as a combination of saint and warrior.[11] Though it may be a ceremonial obligation, the

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Kargar, 679 A.2d at 84-85 (citations omitted). Thus, the legislators' strategy seems to presuppose that a rule should be used unless there is a good reason to the contrary. But why should this be the default position? Because *Kargar* illustrates the possibility of unpredictably innocent contacts of this sort, it seems that a more sensitive default would be to use a standard or at least to include in the rule a reference to the sexual gratification element.

11. *See* POULTER, *supra* note 6, at 277-79, 296-97 (noting that English legislators who defended special exemptions for Sikhs did so in part as tribute to their warrior service in British army, where they were also exempt from uniform regulations). It is as though a member of the

content of the obligation *is* in fact at odds with the intent behind the general prohibition in the statute. The general prohibition aims at a situation in which people do *not* present themselves to one another in public as armed, imposing, martial figures, but the religious obligation of the Sikh initiate is to present himself in exactly that light.

It is a little bit like the ceremonial use of peyote in the 1989 Supreme Court case of *Employment Division, Department of Human Resources of Oregon v. Smith*.[12] Mr. Smith used peyote in a Native American religious ceremony, but it was still a violation of narcotics law, and he was fired from his job as a drug rehabilitation counselor.[13] To avoid stigmatizing Mr. Smith as a drug addict, we must acknowledge that the use of peyote in his religion is *not* a different sort of use from the use which the Oregon law on controlled substances is supposed to prohibit. There is not a narcotic use on the one hand and a religious use on the other. The religious use *is* a narcotic use: it is the attachment of sacramental meaning to a specific kind of narcosis. (Here our paradigm of the little sip of communion wine, in relation to legal concerns about alcohol, is quite misleading.) What happens is that religion adds a layer of additional significance to the narcotic effect, but that does not detract from the fact that it is being used as a narcotic.

Moreover, in both cases – the ban on peyote and the ban on carrying knives in public – the law makers may have intended what is sometimes referred to as a "zero-tolerance" policy, *i.e.*, a policy set up to be deliberately impervious to various special motivations that people might have in connection with the prohibited conduct. As Brian Barry points out, people might be thought to have a public safety interest in *no weapons at all* being carried on the streets, whether the carriers intend them as purely ceremonial objects or not.[14] Maybe this public safety interest has to be subordinated to the Sikhs' religious interest, but there is no denying that it is there.[15] Certainly we can imagine circumstances in which the balance would tilt the other way: should Sikh convicts be permitted to carry their daggers in prisons if other prisoners are allowed their rosaries? Similarly, the drug rehabilitation program from

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Grenadier guard were given special permission to carry his rifle in public, with fixed bayonet! Poulter also observes that "[i]nsofar . . . as many Sikhs living in England today attach considerable religious and cultural significance to adherence to the 'five k's' [including *kirpan*], this is at least partly due to the 'strange syncretism of British military form and Sikh ritual symbolism,' which developed under the Raj." *Id.* at 290.

12. 494 U.S. 872 (1990).

13. *See* Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990) (holding that state agency could deny unemployment benefits to Native Americans fired for testing positive for peyote, even when peyote had been used as part of religious ceremony).

14. BARRY, *supra* note 5, at 152.

15. *Id.*

which Mr. Smith was fired might have an interest in a zero-tolerance policy concerning the use of narcotics by its staff.[16] No doubt the zero-tolerance strategy sometimes can lead to foolishness: newspapers are replete with stories of children being sent home sobbing, suspended from school, because their nail-files violated zero-tolerance rules against bringing weapons to school.[17] But if it is going to be used, then the last thing we want is zero-tolerance with exemptions for favored groups. That seems to be the worst of both worlds.

Thus, even if an exception stated in general terms does not *formally* violate the rule of law principle, it still poses a number of difficulties. If we pass a law prohibiting people from fighting in public, but then make an exception for the special category of dueling on account of its honorific significance in the aristocratic culture, I guess we still have a general law (rule plus exception) that can be consistently administered, but *in effect* we will have abandoned the principle that aristocrats are to be subject to the same restraints as the rest of us. If we pass a law prohibiting alcohol, but then add an exemption (again stated in general terms) accommodating cocktail parties held at government-sponsored gatherings, we still have something that is stateable in general terms, but no one can deny that it is against the spirit of the rule-of-law requirement that the law be the same for all.

IV.

In the rest of this paper, I want to undertake a more general exploration of whether we can square the idea of religious and cultural accommodations with the general principles of the rule of law. I intend the term "religious and cultural accommodations" to cover a variety of rules and proposals. The discussion will encompass statutory exceptions like the English example we have been considering. It also will cover exemptions and privileges supposedly secured by the operation of constitutional principles, such as the principles of religious freedom in the First Amendment to the U.S. Constitution, at least under certain interpretations, like the one enacted by Congress in the ill-fated Religious Freedom Restoration Act of 1993.[18] In addition, I want to

16. Or, the drug rehabilitation program that employed Smith might plausibly have a zero-tolerance approach to narcotics use by its counselors even if the Oregon criminal statute does not, *i.e.*, even if the statute had an exception for religious use.

17. For example, see *Boy Suspended for Pointing Chicken Finger Like a Gun*, ATLANTA CONST., Feb. 5, 2001, at 6D ("When an 8-year-old boy pointed a breaded chicken finger at a teacher and said, 'Pow, pow, pow,' he was suspended from school for three days. It happened in Jonesboro, Ark., in the same school district where, in 1998, four students and a teacher were killed and 10 students were injured when they were shot by two students. The school district has a 'zero tolerance' policy against any sort of weapons.").

18. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (1994). The statute provided:

discuss the so-called "cultural defenses" put forward and occasionally recognized by the courts in the way of mitigation or excuse of criminal violations. I mean cases in which there is a suggestion that someone should be exculpated – or their culpability diminished – for what would normally count as a criminal attack on the person or life of another because of the peculiar cultural significance that they associated with the incident. For example: A woman attempts to drown herself and her children, and she succeeds in drowning her children. But, it is said, she was practicing *oya-ko-shinju* or parent-child suicide, an ancient Japanese custom, thought not inappropriate in that culture as a response to one's husband's infidelity. Bearing this in mind, the court accepts a plea bargain of voluntary manslaughter and sentences her to time served and five years' probation.[19]

As a result, I am cramming together for consideration in this paper (1) issues about religious and non-religious accommodations, (2) constitutional and ordinary legislative issues, and (3) criminal law defenses.[20] That may give rise to criticism: even though they all revolve around cultural and religious issues, an excuse is not the same as an *ex ante* exemption, and neither of them is the same as a constitutionally-mandated accommodation. But I think the problem is worth considering on a general front, partly because I believe I can

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> § 2000bb-1. Free exercise of religion protected: (a) In general – Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. (b) Exception – Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

19. *See* People v. Kimura, No. A-091133 (Santa Monica Super. Ct. Nov. 21, 1985).

20. Even within the criminal law area, I am throwing together items that a more careful jurist would distinguish fastidiously. Consider the following: (1) A person is charged with murder and the charge is "reduced" on account of a "cultural defense." (2a) A charge of murder is reduced to manslaughter because some essential element of murder is lacking. Or, (2b) a charge of murder is reduced because of provocation, and a cultural element is invoked in characterizing the "reasonableness" of the defendant's response to provocation. Or, (2c) the presence of some other particular element – like "reasonable explanation or excuse" – leads us to reduce a charge from first- to second-degree. Or, (2d) we accept a complete or partial excuse of insanity, duress, or diminished responsibility, accepting cultural elements as part of the case that is made for the existence of the excusing condition. Or, (2e) a cultural factor, or some heading under which a cultural element might be taken into account, is mentioned in sentencing guidelines. Or, (2f) if the sentencing guidelines are not rigid, cultural considerations are taken into account as a mitigating factor by the judge. From a formalist point of view, it matters enormously into which of these slots – (2a) through (2f) – a particular cultural defense fits. But in the life of the law, what happens is that the courts or the prosecutors are convinced that (1) is true, and they simply scramble to find something, under (2), to give effect to this opinion. I am grateful to Kent Greenawalt for discussion of this point.

throw some light on our reasons for adopting one accommodatory strategy rather than another – an excuse, say, rather than an exemption, in different areas of law.[21]

V.

I am conscious that by approaching these matters with the rule of law – "one law for all" – as my reference point, I already am skewing the discussion away from some of the most common arguments advanced in the law review literature in support of cultural accommodations. "The American criminal justice system is committed to securing justice for the individual defendant," said the unnamed student author of one of the earliest and still one of the best argued pieces on this issue.[22] "Individualized justice" quickly became a sort of mantra in the discussion of the cultural defense. Indeed, so dominant is the rhetoric of individualized justice that many opponents of cultural exemptions find it necessary to argue within that matrix rather than against it: they complain that cultural defenses in law pay insufficient attention to the individualized predicament of the complainant or victim. This is particularly the case in feminist critiques of the cultural defense.[23]

In fact, as Alison Dundes Renteln has observed, there is precious little in the way of genuine *individualization* in an exemption afforded to someone by virtue only of his membership in a group.[24] Instead, the argument seems to be

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21. I believe it is also worth having some discussion of cultural accommodations as a *general* problem, in a way that is uncontaminated by the U.S. Constitution's particular emphasis on religious liberty and the arguably artificial distinction that such emphasis requires us to draw between religious and "merely" cultural practices and beliefs, and uncontaminated too by debates about judicial review versus legislative solutions to these problems. (In that regard, I take myself to be following the invitation of Justice Scalia in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990), to consider *legislative* strategies for promoting religious and cultural liberty, as well as strategies that are mandated by the Constitution.)

22. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1298 (1986).

23. *See, e.g.*, Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 163-64 (1994) (arguing that applying cultural defense strips immigrants of individualized justice); Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765, 784 (1996) (arguing that many women would suffer loss of legal protection if abusers could use cultural defenses to avoid punishment); Sharan K. Suri, Note, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & LAW 107, 135 (2000) (arguing that use of cultural evdience fits within ideal of individualized justice because it permits punishment only for crimes committed).

24. *See* Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 499 (1993) (noting that concerns that focus on cul-

that by individualizing only to the extent of finding out to which culture someone belongs, we can use "individualized justice" to leverage our more important social commitment to cultural diversity. "By judging each person according to the standards of her native culture, the principle of individualized justice preserves the values of that culture, and thus maintains a culturally diverse society."[25]

However, I doubt whether it is possible to pursue this cultural diversity line very far in this context with a straight face. The law review authors say that cultural exemptions promote cultural diversity, which is something we should treasure. But do we – should we – treasure the fact that in our multi-cultural society there are many responses to spousal adultery, not just one? Some people get upset and go to marriage counseling or ask for a divorce. Others drown their children. Others still set fire to the offending spouse or bludgeon her to death. Do we really want to say that all of this is part of a rich mosaic of diversity that we should treasure and that our multi-cultural society would be the poorer if some of these more diverse responses were eliminated? This is one of those law review "justifications," the plausibility of which depends on there being several heavily-footnoted pages of separation between the statement of the goal – cultural diversity, how nice! – and consideration of the way it would actually apply – legal exemptions for a diverse array of murderous responses.

In general, there has been insufficient consideration of what a widespread application of cultural defenses and cultural exemptions would involve. And despite the intemperate comments I have just made, I do mean insufficient thought *in both directions*: insufficient concern about the rule of law, certainly, on the part of those who defend cultural exemptions, but perhaps as well, an all-too-easy panic about the rule of law on the part of those who oppose them.

It certainly is not difficult to paint a lurid picture of the horrors that widespread exemptions would involve in relation to our ideals of legality. All

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tural group may adversely affect individuals in group); Sharon M. Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L.J. 241, 255 (1996) ("[A] formal defense could thwart individualized justice by shifting the focus from individual culpability to cultural identity."). But Dundes Renteln sees that, in principle, individualized justice ought to be a factor weighing in favor of cultural defenses. She argues that what looks superficially like the application of different standards is in fact the sensitive application of a uniform standard – a standard that aims to treat equals equally, yet encounters cases that are different or unequal in proportion to either their difference or their inequality along some relevant dimension. *See* Dundes Renteln, *supra*, at 499. She associates this version of individualized justice with the retributivist principle of proportionality in the law's response to particular situations: we cannot be sure that we are punishing in proportion to real desert unless we pay attention to the details, including culturally salient details of motivation and meaning in each particular case. *Id.* at 500.

25. Note, *supra* note 22, at 1300.

we must do is imagine that our society has *both* a single set of laws *and* a complex mosaic of exemptions and defenses, clustered around particular minority cultures. Then it is easy to see how it might become a hybrid of affirmative action and benefit of clergy, as each criminal defendant is encouraged by his lawyers to scour his past, his ancestry, and his affiliations for *something* that can bring him within the benefit of the exemptions recognized for a newly-favored cultural group. He has bludgeoned his wife to death after she confessed adultery, and now, his lawyers ask, is there something we can find in his background that we can cite as the basis of a cultural defense? If and when we find the appropriate something, can we then coach him in whatever the courts have established as the local equivalent of the "neck verse"[26] for that culture to establish his credentials as someone governed by its traditions? How long would it be before defenses of this sort became established as a way of ensuring that the most powerful and resourceful defendants – or the children of the most powerful and resourceful citizens – would have a way of immunizing themselves against the application of laws that might not in fact have been enacted if it were thought that the powerful and the resourceful would be subject to them along with everyone else, "equally with other the meanest men," as John Locke put it?[27]

That is the most lurid picture. Certainly it is something of a panic-stricken hyperbole. Still, if we think this unfair to the case for cultural exemptions, then it is incumbent on us to say something more sensible about what is undoubtedly a tension between that case and the rule-of-law ideal, which, as I say, we value so highly.

VI.

In *Culture and Equality*, Brian Barry makes the provocative suggestion that if there are arguments sufficient to establish the case for a cultural exemp-

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26. *See* Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 CORNELL L. REV. 1158, 1185-86 (1994) (book review):

> Benefit of clergy was a legal device that had its origin in the conflicts between "Church" and "State" of the twelfth and thirteenth centuries. As a means of ensuring the clergy's right to be tried by ecclesiastical courts, English law provided that anyone capable of reciting the [first verse of the] 51st Psalm (the "neck verse") could not be sentenced to death in the royal courts. The presumption was that only clergymen could read. By the closing years of the seventeenth century, however, this device had become a well-worn legal fiction. It could be asserted by a defendant not actually in orders only once; it was available to women, who, theologically, could not be ordained, and so were unable to join the ranks of the clergy; and finally, it was unavailable to those convicted of many of the newer statutory offenses.

Id.

27. II LOCKE, *supra* note 3, ch. vii, ¶ 94.

tion, they normally would be sufficient to show that the background law is indefensible on grounds of liberty: "either the case for the law (or some version of it) is strong enough to rule out exemptions, or the case that can be made for exemptions is strong enough to suggest that there should be no law anyway."[28] This is an interesting point because it reminds us that many of the regulations to which cultural offense is taken are not laws like those prohibiting the killing of an adulterous spouse, but laws governing (supposedly in the interest of the governed) the detailed way in which ordinary life is led. They are laws about health, safety, hygiene, diet, and education, or laws promoting some general goal like the defense of the environment, for which ordinary citizens have greater or lesser enthusiasm. Many of these laws are paternalistic, and many cultural challenges to them amount in effect to anti-paternalistic critiques: "Why should the state be entitled to demand that everyone fall into line in this particular area of life?" If the state can give us a good answer, strong enough to overcome the objection from individual liberty, then fine; that is a case for the general law. But then, asks Barry, on what is the case for the exemption going to be based?

Consider, for instance, the debate about whether Sikhs wearing turbans should be exempted from the rule that requires motorcyclists to wear crash helmets. Barry says:

> Suppose we accept that it is a valid objective of public policy to reduce the number of head injuries to motorcyclists, and that this overrides the counter-argument from libertarian premises. Then it is hard to see how the objective somehow evaporates in the case of Sikhs and makes room for an exemption from the law requiring crash helmets.[29]

The defenders of an exemption may say: "Well, at worst, the Sikhs will only be harming themselves if they crash, turbaned rather than helmeted, off their motorcycles." But, as Barry insists, we can't accept this proposition *simply as a point about exemptions*:

> [I]f we are too highly impressed by the point that those who choose to avail themselves of the exemption are not harming others but merely undertaking a self-imposed risk, we are liable to conclude that the same privilege should be available to all. . . . Religion [or culture] appears to play no essential part in what is in essence a simple argument to the effect that people should be free to decide for themselves what risks of injury to accept. . . . [I]f it is valid, the argument implies that the restrictive law should be repealed, not that it should be retained and some people allowed an exemption.[30]

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28. BARRY, *supra* note 5, at 39.

29. *Id.* at 48.

30. *Id.* at 48-49.

The Hell's Angel wants to feel the wind in his hair (or, these days, in what is left of his hair) as he rides along, and he too is prepared to bear the cost of head injury himself (or with health-care resources that in other respects are rightfully his).[31] Where is the case for a Sikh exemption that is not also a Hell's Angel exemption?

Is Brian Barry right about this? Is the demand for a cultural exemption just a version of the libertarian case against any regulation in the area at all? One hesitation that I have rests on the thought that there might be something particularly significant about *cultural* resistance to a paternalistic or regulatory provision, which goes beyond a mere desire for liberty. One of the things that the cultural objection reminds us of is that law-in-alliance-with-the-state (what I shall call "state law") is not the only normative order in society, and not the only agency capable of governing what people wear on their heads or any of the other myriad areas that we nowadays take for granted as the normal scope of the state's paternalistic powers. Health, safety, hygiene, and education; what people wear on their heads and how they bear themselves; what they eat, how their meat is slaughtered, what intoxicants they resort to; what they do with regard to sex, family, child-rearing – these are issues on which for many people, there is already existing positive regulation (regulation by their culture or their religion) quite apart from state law.

Thus, the objection to state paternalism is not always a libertarian one. Many of the objections are based on non-state paternalism, which I guess the law of the state has an interest in superseding. When we evaluate these objections, we must not ask, "Why should the state *rather than the individual* make the decision about headgear?" or "Why should state law be preferred to individual liberty?" but rather "Why should state law be preferred to cultural regulation?" or, more generously, "Why should the state make the decision about headgear, rather than leaving it to be made by any of the myriad processes – culture, religion, fashion – that might prevail in the absence of a state-imposed norm?" Liberty is subordinated or regulated on *both* sides of this equation; it is just a question of which regime of regulation should prevail. This is easiest to see in cases like the regulation of the slaughter of animals. The groups that seek exemptions from the usual rules governing the humane slaughter of animals, for *halal* or *kosher* slaughter, are not seeking a regime of cheerful anarchy or individual liberty, with animals being put to death in any way one pleases. For them, the slaughter of animals is already intensely regulated by highly specific rules, and their question is

31. The question is not whether he is willing to bear the cost of treating his head injury out of his own pocket, but whether he is willing to bear the cost of treating his head injury out of his share of society's resources (including the share of society's health care resources to which, as a matter of justice, he is entitled).

why these rules should not prevail over the state's rules, at least so far as they are concerned.

The state, of course, will always try to *present* the issue as one of regulation versus anarchy. It will *say* that constraint by a religion that you are free to leave is not really constraint at all, nor is constraint by a culture whose heritage you may at any time repudiate. But we should not *thoughtlessly* accept this application of the Hobbesian maxim "For he is free, that can be free when he will."[32] We should pay at least some attention to the social reality and the subjective phenomenology of the alleged "freedom" of the religiously – or culturally-constrained person.[33] For, patently, there is an important sense in which the existence of multiple regimes of regulation among different communities of butchers, retailers, and consumers is quite significantly different from no regulation at all. To use a phrase of Robert Cover's, state law is imperiously "jurispathic."[34] By asserting the importance of law from the center, and dismissing anything else as anarchy, the tendency is to stifle and kill law in the community, or law as held and practiced among communities that have boundaries different from those acknowledged by the state. "Confronting the luxuriant growth of a hundred legal traditions," the agents of state law – judges, especially, on Cover's view – "assert that this one is law and destroy or try to destroy the rest."[35]

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32. THOMAS HOBBES, LEVIATHAN 184, ch. 26 (Richard Tuck ed., Cambridge Univ. Press 1988) (1651).

33. After all, in response to Hobbes's own use of the maxim, to establish that the sovereign is never bound by his own laws, we insist on looking at the actual costs to the sovereign of changing existing laws to suit himself. The mere fact that, in some sense, he "can" do this does not settle the issue of whether he is not constrained to some extent.

34. *See* Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (suggesting that need for courts stems from need to suppress law, rather than to create it).

35. *Id.* at 53; *see also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732-33 (1989) (discussing federal court intrusion into Indian tribal sovereignty). A similar point is developed by my colleague Michael Dorf in a recent piece on an issue that developed about religious practice in the Yale dormitories. Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843 (1998). Dorf says that the religion clauses of the First Amendment recognize not only the existence of intense belief, but the existence of – at least as far as large numbers of people are concerned – the dominion of another sovereign besides the United States (or the individual states), namely the sovereign recognized in particular religious traditions. "This dimension of plural sovereignty is absent," says Dorf, "in the case of claims based on an individual's moral or other nonreligious grounds for objecting to a generally applicable law." *Id.* at 852. Dorf, too, links the point to Cover's account of alternative legal communities: "Religious obligations are obligations to submit to the norms of what Robert Cover called a nomic community – a community that is a source of norms for its members." *Id.*

I do not mean to adopt all elements of Robert Cover's critique along with his elegant and powerful rhetoric, but I do mean at least to indicate what the stakes are when paternalistic state law confronts culture in some area ripe for regulation.[36] Understanding that the cultural side presents itself in some sense as *law* for those who live by it complicates the rule of law issue I stated above. For it looks now as though the Diceyan formulation – "every man, whatever be his rank or condition is subject to the ordinary law of the realm"[37] – is already a preference for the rule of one *kind* of law over another. Among all the competitors, state law is evidently the only law that has a chance of being uniform across the whole society (by which I mean the whole society governed by the state, and everyone in it). None of the others has a prayer of being uniform to that extent. So the rule-of-law aspiration, "one law for all," kicks into the debate perhaps a little too quickly and question-beggingly: it is the inherent *ally* of state law, rather than an independent consideration that helps settle the issue between state law and its cultural competitors.

Perhaps what I stated above goes a little too far in representing the rule of law as something inherently biased in this debate about cultural exemptions. After all, Dicey's rule of law does sometimes reproach state law. Dicey himself used it famously to criticize the special status of *droit administratif* in the state practice of countries like France.[38] Still, a version of the point survives: to the extent that the Diceyan slogan "one law for all" has a critical (as opposed to a merely supportive) function in relation to state law, it is to insist, in the interests of liberty,[39] that the state should not enact either laws riddled with exemptions for the law-makers or their favorites, or special regimes of law to immunize its officials against the application of the laws they administer. But then there is something quite sneaky about using that critical edge to cut away at claims based on the growth of independent social norms, systems of cultural regulation that are, so to speak, already in place when the law muscles into an area. When we talk about these cultural exemptions, we are not talking about *norms set up to provide special exemptions for state favorites from the force of state law*; we are talking about regimes of regulation that were already there to some extent, regimes that have some

36. For a magisterial recent account of the role of such diversity in contributing to the solution of social problems that traditionally have been addressed by states from the center, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

37. DICEY, *supra* note 1, at 114.

38. *See id.* at 213-67 (discussing special legal arrangements for state officials in Continental legal systems).

39. But remember also the point made earlier to the effect that legally recognized diversity may be as much a bulwark against despotism as legal uniformity. *See supra* text accompanying notes 26-34.

entitlement, surely, not simply to be crushed or brushed aside at the imperious whim of the state.

VII.

Let us see if we cannot find a more helpful conception of the underlying logic of the rule of law difficulty, in regard to cultural exemptions.

We will start with a very simple hypothetical. A problem comes to the state's attention and the state is determined to do something to address it: the lawns around public monuments are being destroyed by people walking on the grass. States being what they are, the natural thing for them to do is pass a law that says (concerning all public lawns) "No walking on the grass." If everyone obeys, that will have the desired effect of preserving the beauty of our public lawns. Time goes by, and someone is arrested for walking on the lawn. More for fun than in hope, the defendant says to the court that, as far as he can tell, the survival of the lawns does not depend on literally *everyone* keeping off the grass; it will be enough if the overwhelming majority keep off. One or two stray lawn-walkers actually will do no damage whatsoever. Because records show that nobody has walked on these lawns for months, the defendant seeks to have his summons dismissed as a harmless de minimis offense.

Now the prosecutor may disagree with the defendant about the horticultural facts. The prosecutor may disagree that there is, in regard to the preservation of the lawn, room for the defendant's stated exemption. But even if the prosecutor accepts that there is room for an exemption, he may insist on confronting a second issue: why should the defendant, alone among all the citizens, take it upon himself to award himself the benefit of this exemption? Isn't that unfair? If there is room for some, but not all, to walk on the grass without defeating the goal of beautiful lawns, then surely we should take care that the valuable opportunity is fairly distributed. Fairness is not necessarily served by dishing it up by way of de minimis exemption to the first resourceful person who thought of it. The matter may seem trivial in the lawn case. But it is not trivial in other cases, such as conscription, when we pay very careful attention to the way in which exemptions are distributed when military service is required of some but not all. Fairness requires some procedure – such as a lottery – or some criterion – such as greater need, for example – to determine who should get the special privilege of walking on the grass or the exemption from military service.

This indicates that we now have not one, but two headings of legal uniformity under whose auspices a claim for exemption may be resisted. If the grass is so fragile that literally everyone must stay off it, then we resist the defendant's claim on the ground that nothing less than uniform application

will do.[40] But if there *is* room for exemption, we still may resist the defendant's opportunistic claim by maintaining that exemptions must be distributed according to rules that are the same for all.[41] Thus, claims for exemption may be met by rule-of-law based resistance on two fronts: (A) Is there room for exemption, given the generality of the law's aim? (B) If there is room for exemption, is it fair to give the benefit of that room to the members of this cultural or religious group as opposed to other people in society?

This framework is useful in analyzing a number of the cases involving cultural or religious claims. Consider the issue presented in the 1997 case of *City of Boerne v. Flores*.[42] The City of Boerne, like many municipalities, enacted an ordinance to "protect, enhance and perpetuate selected historic landmarks" and to "safeguard the City's historic and cultural heritage."[43] The Roman Catholic church of St. Peter was not designated as a landmark, but it fell partly within the "Historic District" designated by Boerne's Historic Landmark Commission under the ordinance. When the Archbishop of San Antonio, for the church, sought a building permit to enlarge St. Peter's, the application was denied by the Landmark Commission. Consequently, Arch-

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40. Of course, people may disagree about whether there is room for exemption. Consider *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the issue was whether a Jewish air force officer could be exempt from military uniform regulations to the extent of wearing a yarmulke. Chief Justice Rehnquist wrote:

> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."

Id. (quoting Chappell v. Wallace, 462 U.S. 296 (1983)). Whether one sees these as general policies that may be pursued more or less tightly, or as rigid imperatives that must be administered with absolute uniformity if they are to work at all, is a matter of dispute.

41. Notice also how this turns the tables on the case that is usually made for cultural and religious exemptions. That case usually is supported with the rhetoric of fairness: it is *unfair* to impose these laws on religious or cultural minorities. But now we are asking not whether fairness requires an exemption, but whether fairness permits an exemption for the minority culture. The questions are not incompatible, of course: fairness could permit an exemption and still it might be an open question whether fairness required it. For a vigorous critique of the "fairness requires" approach, see BARRY, *supra* note 5, at 252-91.

42. 521 U.S. 507 (1997).

43. *See* Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996) (quoting Ordinance 91-05).

bishop Flores sought the benefit of a religious exemption from the application of the city's historic district rules, arguing for it as a matter of constitutional protection of religious freedom (as interpreted by Congress in the Religious Freedom Restoration Act).[44]

Now *Boerne* is remarkable for many things, not least for its providing a belated counter-example to Kathleen Sullivan's observation in 1992 "that not a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner."[45] But I do not want to focus on that, nor on the issue of judicial supremacy posed in the Court's attitude to the Religious Freedom Restoration Act. Let us approach it from a purely legislative or administrative point of view. We are the City Council enacting the ordinance, and we are considering inserting an ex ante religious or cultural exemption; or we are the Historic Landmark Commission and we are considering an ex post exemption for this particular case. Is there any reason of principle not to grant an exemption? Well, we apply our two-pronged test: (A) is there room for an exemption? and (B) if there is, is it fair to assign the benefit of that room to this religious group?

On (A), the answer seems to be "yes." The protection of the City's historical and cultural heritage surely is not an all-or-nothing matter. Like most legislative goals, it is a matter of degree, and it is the sort of thing that normally is pursued with a great many compromises. Moreover, every indication is that St. Peter's church is not crucial to the preservationist scheme: It is not itself a designated landmark, and it was arguable even whether the whole structure fell within the "Historic District." At worst, if the church had had the benefit of an exemption, the result would be that the historic character of downtown Boerne would have been slightly or somewhat compromised.[46]

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44. *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (noting arguments of Archbishop Flores).

45. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992).

46. If time permitted, I would like to discuss the dangers in any simple view that the city's historic preservation law is not a regulation *about religion*. Suppose, to vary the case in *City of Boerne* slightly, Archbishop Flores and his flock had become convinced that baroque decoration was an offense to God and proposed to convert the ornate exterior of their church into something as plain as a Quaker meeting-house. Meanwhile, the city has enacted historic preservation ordinances, the terms and application of which reflect the secular aesthetic preferences of the leading citizens. Are we happy – in this hypothetical – with the city simply prohibiting the church's iconoclasm? I think we should not be.

A better way to look at the issue is that the decoration of churches, like the organization of ceremonies and the use of song, is a religious matter; it is part of what a religion involves – the use of earthly beauty to the glorification of God – and as various iconoclastic movements have shown, historically the theological stakes in this regard can be very high indeed. As a secular matter, the city's preference for beautiful churches is utterly parasitic on this: it is like

On (B), the issue is interesting. In his concurrence in the Supreme Court decision in the case, Justice Stevens observed that "[i]f the historic landmark happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure."[47] There was something unfair, he implied, about the church claiming the benefit of an exemption simply because it was a religious group; this, to his mind, smacked of religious preference, indeed of something approaching establishment.[48] He raised an interesting point. It is a version of Brian Barry's point, adapted *mutatis mutandis* from the crash helmet case. Assuming, in the crash helmet case, that the state has an interest in reducing the number of head injuries from motorcycle accidents,[49] it is plain that reducing the number is a matter of degree, so there is certainly room for exemptions.[50] The question is: Given the existing room for exemption, why should the benefit of that room go to Sikhs and not to Hell's Angels, given that members of both groups have a strong desire for non-canonical headgear? Similarly, why should the Catholics rather than the secular art gallery get the benefit of the room for exemption that there undoubtedly is in the City of Boerne's historic preservation scheme? Why is it fair to give the benefit of the exemption to the group claiming it on cultural or religious grounds?[51]

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an English atheist's affection for the Book of Common Prayer. The idea that the city ought to be able to enforce these preferences, as soon as its legislators are capable of blinding themselves to the religious values on which their preferences are parasitic, is something I find profoundly offensive. Now *City of Boerne* is not *exactly* the hypothetical case I have just outlined. But it is not so far from it as to justify the quite *careless* way in which the Supreme Court majority categorized the aesthetic regulations in question as neutral, secular, and having nothing to do with any matter of religion.

47. *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring).

48. *Id.* "Because the landmark is owned by the Catholic Church, it is claimed that RFRA [the Religious Freedom Restoration Act] gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Id.*

49. BARRY, *supra* note 5, at 48.

50. I mean the reduction can be more or less, depending, among other things, on how many motorcyclists wear crash helmets. Suppose all do, then we reduce head injuries from a large number, x, to perhaps a smaller number, m. Suppose all but a few do, then we still get a reduction, only now not quite so much: to n rather than m. It is hard to imagine why the state should be so compulsive about reducing the level to the mth, rather than to the nth degree. So we could afford to have rule plus exemption and still pursue our policy to some extent.

51. Notice that this fairness point is not the same as a "floodgates" or "parade of horribles" argument – the sort of argument used in *Smith*, and much earlier in *Reynolds v. United States*, to the effect that if a religious exemption were allowed in the instant case, the floodgates would open and everyone, citing a spurious religious grounds, would "become a law unto

VIII.

I am not sure that there ever has been a satisfactory answer to this question. Archbishop Flores and the enactors of the Religious Freedom Restoration Act presumably seek refuge in the religion clauses of the Constitution at this point, claiming as a matter of positive constitutional law that we have no choice but to give religious liberty special preference over liberty generally. But that is not a satisfying answer; it merely accepts the Framers' stipulation. Thus, let me try something else.

I should warn you that the remarks that follow in the rest of this Part are quite tentative and sketchy. They certainly do not correspond – nor are they intended to correspond – to established constitutional doctrine. Since *Smith* and *Boerne*, the Court has been emphatic that there is *no* constitutional requirement of exemption for religious groups under generally applicable laws not aimed specifically at a religion or at religious practices.[52] As I said before, what I am musing about here (in response to Justice Scalia's invitation to consider legislative rather than constitutional strategy) is what would be a fair and tolerant approach for law-makers to adopt with regard to exemptions.

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himself." Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)). The floodgates argument posits that were there room for exemption, we would be unable to control the number of exemptions and that they would quickly overflow from the room available for them. This is different from the fairness point.

52. Nor is there a constitutional requirement of strict scrutiny for these laws in their application to religion. As Justice Scalia explained in *Smith*:

> The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, . . . or before the government may regulate the content of speech, . . . is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields – equality of treatment and an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly. . . . If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Smith, 494 U.S. at 885-88 (internal quotations and citations omitted).

So, why is it not unfair to other citizens to give members of minority cultures or religions special accommodations with regard to otherwise generally applicable laws? One sort of answer attends to the special intensity of commitment and devotion that people associate with their religious obligations. But that will hardly do as a direct response to the fairness complaint, particularly if the complaint comes from those passionately opposed the law in question, but on non-religious grounds. They feel strongly – the religious people feel strongly; where is the relevant difference? I have argued elsewhere that it is normal for the law to have to stake its claim to our compliance and support in a context of serious moral and political disagreement as to what the content of the law's demands ought to be.[53] If a given provision is opposed by 30% of those to whom it applies, there is surely something invidious about granting the benefit of the space for, say, a 5% exemption-rate to those whose opposition happens to be religious, while dismissing the claims of other members of the 30% who might have felt equally strongly. Maybe as a matter of prudence the state should be reluctant to pitch its puny enforcement resources against someone who is convinced that he will suffer eternal punishment if he does what the state demands. But the threat of eternal damnation is hardly characteristic of all religions, nor even of all religious obligations for those religions that do in principle acknowledge the possibility of hellfire. And of course this line of argument provides little explanation for the tolerance that we have for non-religious *cultural* exemptions, which may not be associated with anything of the kind at all.

A moment ago, I asked: what is there to distinguish religious and cultural opposition to a given law, on the one hand, from other sorts of opposition which might be felt equally strongly? But maybe this is the wrong question to ask. The Sikh who feels strongly about carrying his *kirpan* may or may not be opposed to the provision of the Criminal Justice Act that outlaws weapons in public. Maybe he agrees that public weapon-carrying in general is a good idea, but I do not think his Sikh faith or culture commits him to this. (On the contrary, initiates of his brotherhood are supposed to practice "the five k's," precisely to *distinguish* themselves from others around them.) In this case, then, it would be a mistake to focus on any comparison in intensity between his desire to carry the *kirpan* and someone else's (say, Bernard Goetz's) opposition to the law. On the other side, someone may oppose a particular law without any thought that if his opposition is defeated it would be appropriate to seek an exemption for himself. I may oppose strongly the prohibition of alcohol without thinking that I have a case (strong in proportion to my opposition) for an exemption for my personal use. Even

53. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 7 (1999) (arguing that purpose of law is to enable people to act together or within a single framework despite disagreement).

if one's opposition is based on cultural or religious values, it may not be appropriate to seek an exemption.

This indicates that the case for exemption should not be regarded as though it were in any sense proportionate to the extent or intensity of one's opposition to the law. I think the claim for exemption is characteristically based on a different sort of factor. It is based on the belief that the state law provision will have a special kind of impact on one's life, which it will not necessarily have on the lives of others. Here I want to refer again to my earlier point about the positive existence of some alternative scheme of regulation sustained by a religion or a minority culture.[54] A requirement of state law may be irksome and burdensome to many, but it has a particular sort of impact on somebody whose life in the area to which the law applies has been organized on the basis of a quite different scheme of regulation. Such a person may well feel *torn* if the state law is applied to him – torn between a requirement imposed by the state and another imposed by his church or community. But it is not just a matter of how strongly he *feels*; nor is it a matter of his own strong or conscientious belief that he – or we all – ought to be under a different obligation.[55] His being pulled in the direction of the cultural or religious practice (contrary to the state law) has *social* reality; it is not just a matter of subjective conviction. Because of the positive existence of a scheme of regulation rivaling the state law, the person we are considering is already under a socially-enforced burden, established as part of an actual way of life, a burden grounded in the actually-existing and well-established regulation and coordination of social affairs afforded by a religious or a cultural tradition. Others claiming an exemption simply as a matter of liberty or personal conscience might not be under any burden comparable to that. (To repeat Michael Dorf's formulation: "Religious obligations are obligations to submit to the norms of what Robert Cover called a nomic community – a community that is a source of norms for its members. This dimension . . . is absent in the case of claims based on an individual's moral or other nonreligious grounds for objecting to a generally applicable law.")[56]

Being torn in this way is just one aspect of the phenomenon I want to capture. Others include the basis of a person's acquaintance with the scheme of regulation. Cases involving cultural exemptions sometimes involve people who profess ignorance of the laws that the state has applied to them in defi-

54. *See* Part VI and accompanying text (discussing Robert Cover and charge that imposition of state law was *jurispathic*).

55. *But see also* Jeremy Waldron, *Cultural Identity and Civic Responsibility*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 155 (Will Kymlicka & Wayne Norman eds., 2000) (discussing relation between claims based on cultural identity and claims based on culturally-grounded opinions).

56. Dorf, *supra* note 35, at 852.

ance of their culturally-based expectations.[57] *Kargar* – the case of the man arrested for kissing his eighteen-month-old son's penis – was certainly a case of this kind.[58] Now the usual response to such professions is to fall back on the old Blackstone maxim that mistake or ignorance of the law is no excuse:[59]

> For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense. *Ignorantia juris, quod quisque tenetur scire, neminem excusat,* is as well the maxim of our own law, as it was of the Roman.[60]

But the appeal to Blackstone is inconclusive in the present context for a number of reasons. First, the maxim is not in fact taken seriously as a general principle by very many modern authorities.[61] Second, as Dan Kahan points

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57. Of course not all people do. As Anh T. Lam explains in *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PACIFIC ISLANDS L.J. 49, 58 (1993), "cultural minority defendants usually know that it is illegal, for example, to kill one's wife or one's children." *Id.*

58. *See generally* State v. Kargar, 679 A.2d 81 (Me. 1996).

59. *See, e.g.*, SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 288-89 (5th ed. 1989) (stating that defendants must comply with American law regardless of cultural background). *But see* Deirdre Evans-Pritchard & Alison Dundes-Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 22 (1995) (criticizing maxim and suggesting that cultural backgrounds of Hmong provide for mistake of fact defense to rape because defendant had different understanding of event, not law).

60. 4 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 27. Apparently Blackstone restated Sir Matthew Hale's position, *see* MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 42 ("[I]gnorance of the law cannot relieve criminal liability 'because every person is bound to know the law, and presumed to do so.'"), who in turn had relied on the 1568 civil case of *Brett v. Rigden*, 1 Plow 340, 342, 75 Eng. Rep. 516, 520 (1568), but Blackstone adds the curious remark that the ignorantia maxim "is as well the maxim of our own law, as it was of the Roman," referring to DIG. 22.6.9 (Ulpian, Ad Edictum 18). In fact, the similar Roman maxim *error juris nocet, error facti non nocet* ("error of law injures, error of fact does not") never was applied by the Romans to the field of criminal law. *See* David De Gregorio, Comment, People v. Marrero *and Mistake of Law*, 54 BROOK. L. REV. 229, 248 n.90 (1988). Its exclusive application to civil law was constricted and limited to certain specific situations, all involving private rights. *Id.*

61. See Robert L. Misner, *Limiting* Leon*: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 518 n.77 (1986) for several critiques of Blackstone's maxim:

> Glanville Williams [who called Blackstone's maxim "ludicrous"] summarizes some of the more telling rejections of Blackstone: Lord Mansfield drily remarked that "it would be very hard upon the profession, if the law was so certain, that everybody knew it," and Maule J. is credited with the observation that "everybody is presumed to know the law except His Majesty's judges, who have a Court of Appeals set over them to put them right."

Id. (quoting GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 290 (2d ed. 1961)). As to the status of Blackstone's maxim in modern American law, see Justice Brennan's state-

out, although our doctrine today is not entirely consistent, the courts are most likely to recognize ignorance of the law as a defense in relation to an offense that is *malum prohibitum* rather than in relation to one that is *malum in se*; in other words, "courts have recognized mistake of law as a defense because the underlying conduct violates no moral norms independent of the law that prohibits it."[62] But we can hardly pretend that the distinction between *mala in se* and *mala prohibita* is culturally neutral, or that acquaintance with its application fairly can be required of everyone, irrespective of his background. Indeed, precisely the problem we are dealing with is that the congruence between moral norms and legal norms differs as between defendants from different cultural backgrounds. To put it another way, being acquainted with (or immersed in) the moral practices that make sense of the state law notion of *mala in se* is part of the cultural equipment for dealing with the law that some people may have and that others lack in a multi-cultural society.[63] As for *mala prohibita*, surely the issue is that members of a minority culture may very well find it surprising or mysterious that some action is prohibited, whereas members of the mainstream culture may be quite inured to this. This element of *being taken by surprise* may not correlate with intensity of opposition to the law in question, but it may well correlate with the cultural or religious factor, inasmuch as there is no basis – except specific legal knowledge – for a person not acquainted with debates in our culture on some issue to become aware of legal prohibitions. In the mainstream culture, both defenders and opponents of a given law will be roughly aware of its provisions as a matter of cultural know-how. The issue will be in the culture, even if there is no particular consensus on it. People in a particular culture who are alert to public debate on a given issue know that they should anticipate the possibility of regulation. In other words, knowledge of the law is in large part a matter of being on *alert* in various areas in which there are likely to be regulatory issues and knowing to which areas to be alert. (It follows, I think, that those responsible for enforcing the law should try to figure out as far as they can in advance

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ment in *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring): "If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement – mens rea – of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy." *Id.* This is not at all the same as saying ignorance of law is never an excuse.

62. Dan M. Kahan, *Ignorance of Law Is an Excuse – But Only for the Virtuous*, 96 MICH. L. REV. 127, 149 n.89 (1997) (collecting cases).

63. For the notion of "cultural equipment" in this context, I am grateful to Jessica Almqvist, The Relevance of Cultural Difference for Social Justice: The Case of Cultural Equipment (unpublished draft), drawing on Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 286 (1986) (discussing how culture influences action by shaping a tool kit of cultural equipment from which people construct strategies of action).

what areas of life and action in which people from, say, immigrant communities are likely to be surprised to find that the state has an interest; and they should try to do something, in the way of outreach and publication education, about this gap in their knowledge and expectations.)

This brings me to a third point. Because our topic is the rule of law, we should remember that afficionados of that ideal always have been particularly interested in legal *publicity* and *promulgation* and in the basis on which people become familiar with legal regulations.[64] This is not supposed to be just a fake or formalist interest. Rule-of-law theory is interested in the importance of actual promulgation, and the rule-of-law ideal is supposed to hold actual legal systems to quite high standards in this regard.[65] Thus, when we confront the question of cultural accommodations within a rule of law framework, it ill behooves us to rest anything on a presumption that everyone is already familiar with the law's requirements. On the contrary, not just our multi-cultural sensitivity but also our rule-of-law ideals direct us to look very carefully at the *cultural* equipment that knowledge of the law presupposes, and at the way in which this equipment – access to the basis on which laws can be known and legal regulation anticipated – is distributed in society. Under this heading of *cultural equipment*, I have in mind everything from language skills to a person's having a background in a culture that has grown up side-by-side with state law in a way that makes its members familiar with the main contours and tendency of welfare-state regulation and that has been able to set or adjust its cultural sights accordingly.

IX.

My suggestion has been that the fairness objection sometimes can be answered by noticing the special situation of someone who feels bound by authoritative and compelling norms that are at variance with those promulgated by the state, norms that may loom larger on that person's horizons than the arcane and perhaps (to them) quite unfamiliar provisions of state-law regulations. It is a sketchy suggestion, and it needs much more work, but I do think it is important. At the same time, I am aware that my suggestion will not work in all cases.

Sometimes it is the purpose of the law to change or to have an improving impact upon existing cultural practices. State law may aim to reform some

64. *See, e.g.*, LON FULLER, THE MORALITY OF LAW 43-44, 49-51 (1964) (discussing publication and promulgation of laws and duties, and benefits and problems therof).

65. There are also rule-of-law issues connecting *constancy* of the laws (opposing frequent change) with promulgation. *See id.* at 79-81 (arguing that "legislative inconstancy" is principle forming internal morality of law that seems least suited to formalization in a constitutional restriction).

aspect of mainstream culture. It may aim to stigmatize domestic violence, for example, or to outlaw vendettas, or to stop people from beating their children, or to change the culture of masculine honor that leads some men to respond murderously to their spouse's infidelity. Consider the last of these examples. We say to hot-blooded young men in mainstream culture: "Look, we know this is difficult for you, but you have to curb your rage, even when your partner has been unfaithful, because this sort of response is no longer going to be regarded as reasonable or even excusable behavior." Now that imposes a certain cost on the mainstream culture – a cost we think is well worth imposing – but that nevertheless must be borne by people brought up to behave in a particular way. There will be a certain amount of discomfort and disorientation for a generation or two as they struggle with unfamiliar and – to them initially – inappropriate modes of self-control.

Then suppose we have a case in which a member of a minority immigrant community responds murderously to his wife's adultery and subsequently invokes a cultural defense. An expert anthropologist testifies that in the man's native culture, a wife's adultery is considered an enormous and appalling stain on his family, reflecting on the man's ancestors and descendants, and that an out-of-control murderous reaction would not be unusual or abnormal for a member of this particular culture in this sort of situation. One example is the case of *People v. Dong Lu Chen*,[66] a notorious case in which a Chinese immigrant bludgeoned his wife to death with a claw-hammer after she confessed that she had been unfaithful to him.[67] Leaving aside for a moment the

66. No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1998).

67. People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1998). There are numerous articles discussing this case, beginning with Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991), whose description is as good as any:

> In the recent New York case of *People v. Chen*, the court used the cultural defense to reduce the sentence for a Chinese immigrant who murdered his wife. Dong Lu Chen – a man who had immigrated from China one year earlier – decided to talk to his wife, Gian Wan Chen, about their sexual relationship. When she admitted to having an affair, he left the room, returned with a hammer, knocked her onto a bed and hit her on the head eight times, killing her.
>
> Chen confessed to killing his wife. His defense attorney argued that cultural pressures had resulted in Chen's "diminished capacity," rendering him unable to form the necessary intent for a charge of premeditated murder. Burton Pasternak, a professor of anthropology at Hunter College in New York City, testified on Chen's behalf. He explained that in traditional Chinese culture, a wife's adultery is taken as proof that her husband has a weak character; divorce is considered shameful. A husband often becomes enraged upon hearing of his wife's infidelities and threatens to kill her. However, someone in the community generally stops him before he actually harms her. Since nobody could stop Dong Lu Chen, the defense argued, his wife died.

question of exactly what form the defense took in Chen's case, it is pretty clear that members of the mainstream culture would have a legitimate complaint of unfairness if anything like this cultural defense were to succeed in the case of the immigrant. They would say, "Look, *everyone* must modify their culture in this regard. *Everyone* is having to develop new forms of self-control, which are at odds with the way they have been socialized. Why should society give the members of this culture a special exemption from a painful process that *every* culture in this society is having to undergo?"

X.

That would be the fairness response for cases of this kind. But in cases of this kind, there is also a response to the argument for a cultural defense that requires us to ask whether there is even *room for exemption*.

A particular law or legal doctrine may be evaluated in various ways in the context of whether room for exemption exists, given the generality of the law's aim. Compare – forgive the flippancy – a ban on homicide with a ban on hunting wild animals out of season. The ban on hunting might be motivated by a desire to preserve some species of animal, giving it a chance to breed or to ensure perhaps a fair supply of deer for hunters *in* season. Such a law naturally admits of room for exemption because the preservation of the species is a matter of degree and probably one deer more or less does not matter. Our aim is to reduce the killing of deer during the off season – preferably to reduce it to zero, but if not to zero then as near to zero as we may reasonably come. So there is space there that might be made available, say, to Native Americans who have a cultural or religious imperative of sacrificing a deer on mid-winter's day. (Of course, there would still be the problem of fairness.)

With a general prohibition on murder, the case is quite different. It is true that the law's policy is to reduce the number of homicides, preferably to zero or as close to zero as possible, and some aspects of the law's operation, such as punishment of homicide for the sake of general deterrence, are connected to this aim. But the law also has a more immediately focused relation

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> In this case, the cultural defense was successful. Judge Edward K. Pincus found that Chen "was driven to violence by traditional Chinese values about adultery and loss of manhood." According to Judge Pincus, Chen's Chinese heritage created pressures that led him to kill his wife; it made him more "susceptible to cracking under the lesser crime of circumstances," resulting in his diminished capacity. The court found Chen guilty of . . . second degree manslaughter and sentenced him to five years probation – the lightest possible sentence for the charge.

Id. at 621-22.

to any particular homicide or potential homicide: it is a matter of the utmost urgency that *each one* be prevented. So, for example, if I am about to kill Brian Barry, the law's attitude toward me is much more focused than its attitude toward my hunting out of season. The ban on murder gives law enforcement officials an immediate and powerful reason to stop me from killing Brian, and if need be, they will devote enormous resources to this end. This is quite apart from any question of punishment. As far as the specific-prevention aim of the law is concerned, there is no room for any exemption: *Brian is not to be killed.* But then suppose nevertheless the law fails and I do kill him. Then the law must punish me. Now part of the point of this punishment is general deterrence. Insofar as *that* policy is concerned, there might be room for exemption. The policy of generally deterring homicide will go forward only marginally less effectively if I am let off from punishment for killing Brian. However, punishing me also would have a more focused aim – doing justice to Brian posthumously, or maybe to his loved ones. There, once again, there may be much less room for compromise.

Another way of putting this is to say that some of the most important aspects of the law's ban on homicide are "right-based": they are oriented to the interests of individuals (their interest in not being killed) one-by-one, rather than *en masse* in the spirit of minimizing killing.[68] As far as the possible killing of Brian Barry is concerned, the duties that the law imposes exist for the sake of preventing or, if it cannot be prevented, for the sake of punishing, *that killing*. In this regard, it is quite unlike the ban on hunting, which – to say the least – is never focused on the lives of particular deer (Bambi excluded) in quite the same sort of way.

This helps us understand certain things about proposals for a cultural defense. In areas like homicide, no one *ever* proposes the cultural defense as anything other than an excuse or an ingredient in an excuse.[69] No one who believes in the cultural defense would oppose a police officer intervening to prevent Mr. Chen from killing his wife. Similarly, no one, whatever their cultural sensitivity, would suggest that our respect for diversity and individualized justice requires us to stand back and let Mrs. Kimura drown her chil-

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68. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-35 (1974) (outlining use of moral restraints and goals as related to individual rights); Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 195 (1984) (defining relation between rights and interests); *see also* Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 13 (Jeremy Waldron ed., 1984) ("A prohibition on torture is right-based only if the implications of torture for a single individual are taken to be sufficient to generate the requirement; but if it is argued that no single interest can generate a requirement until the impact of the action in question on other interests has been considered, then we are dealing with a utilitarian goal-based approach.").

69. I guess the closest we ever come to justification is the possibility of a peculiar cultural apprehension informing the application of principles of self-defense.

dren. There is no room for that sort of exemption. The only room for exemption, leaving quite aside the issue of fairness that I raised a moment ago (fairness vis-à-vis the duty of self-control borne by members of the mainstream culture), is at the level of punishment, when combinations of plea-bargaining, excuse, and mitigation kick in. (So Mr. Chen and Mrs. Kimura both find that murder charges are reduced to charges of second degree manslaughter, and they do not face incarceration.)[70] And even then, as feminist critics of the decision have emphasized, there is injustice to the rights of the victim; full vindication of the victims' rights would leave no room for exemption at all, not even at the level of punishment.[71]

By contrast, in some of the other cases we have been considering, there would be no point in having cultural accommodations if they operated only like excuses. Dr. Goldman does not just want his guilt mitigated and his punishment reduced for wearing non-uniform headgear in the Air force; he wants not to be prevented from wearing it.[72] The statutory defense that exculpates the Sikh with his *kirpan* in England means not only that he does not pay a fine or go to jail for carrying a weapon in public; he should not even be stopped or arrested. This also holds true for the legislative exemptions envisaged for

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70. For a discussion of *Kimura*, see *supra* note 19 and accompanying text. In *Dong Lu Chen*, the resolution was as follows: The New York Superior Court judge, heavily swayed by the expert's testimony about the cultural roots of Dong Lu Chen's actions, acquitted Dong Lu of second-degree murder and found him guilty of second-degree manslaughter. The judge opined:

> Were this crime . . . committed by the defendant as someone born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first-degree. . . . [B]ut based on the cultural aspects, the effect of the wife's behavior on someone who is essentially born in China, raised in China, and took all his Chinese culture with him except the community which would moderate his behavior, [I] . . . find[ ] the defendant guilty of manslaughter in the second degree.

Dong Lu Chen was freed on his own recognizance until sentencing. On March 30, 1989, the judge sentenced Dong Lu to five years probation and no jail time. *See* Cathy C. Cardillo, Note, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85, 93 (1997) (footnotes omitted) (describing *Dong Lu Chen*).

71. *See, e.g.*, Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1097 (1996) (suggesting that balancing must occur between defendant's interest in using cultural defense while victim's interest in obtaining full protection of laws); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 36 (1995) (arguing that criminal justice system must accommodate diverging goals of feminists and multiculturalists); Li, *supra* note 23, at 782 (arguing that victim's rights militate against allowing cultural defense in context of violent crimes).

72. *See* Goldman v. Weinberger, 475 U.S. 503, 504-07 (1986) (noting Goldman's argument that regulation in question infringed on First Amendment freedom of religious exercise).

Native American church members and their peyote and for Catholics and their communion wine during prohibition.

So whether there is room for exemption, and how much room for what sort of exemption, will depend first, on what legal policy the law is seeking to promote; second, on what strategy is being used to pursue that policy; and third, on how the policy and the strategy play out with regard to different aspects of the law's application.

XI.

I will now summarize the role that cultural understandings may play in debates about the regulation of various forms of behavior. Suppose that there is support in a society like ours for the imposition of a scheme of regulation or restriction in some area of life – motorcycle safety, historic preservation, toilet-training, narcotics use, whatever. The claim that regulation is necessary will no doubt strike some people as wrong, and among these, some will regard it as culturally biased. Nevertheless, the proposal has been made – it is out there on the table – and the question is now whether we as a society should proceed with it. At this stage, the members of society must *talk to one another* and evaluate the proposal, trying as hard as they can to communicate and understand what may seem (initially at least) like incommensurable as well as incompatible points of view.

I do not believe this process can be trumped or short-circuited on the basis of any claim about the natural or neutral necessity for the scheme of regulation. (Although it often it is, in a sort of casually majoritarian way: we just *assume* that our welfarist projects are legitimate, and we attribute our deafness to any contrary view to cultural relativism on side of the dissenter.)[73]

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73. In Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 312-13 (1999), I argued that this is something that human rights proponents are often particularly guilty of. For example,

> we are not entitled to sanitize the Muslim response to our toleration of pornography as nothing but relativist resistance to the universalization of our standards. It is much more important than that. Precisely because relativism is for the most part silly and misconceived as a philosophical position, any resistance to our universalization of human rights doctrine should be read charitably as a direct challenge to the substance of the doctrine. . . . [I]t should not be taken as a resistance to universalization as such. . . . *If* we are going to strut around the world announcing, and where possible enforcing, universal human rights claims, the only thing that can possibly entitle us to do that is that we have carefully considered everything that might be relevant to the moral and political assessment of such claims. It is not enough that we have considered what Kant said to Fichte, or what Bruce Ackerman said to John Rawls. The price of legitimizing our universalist moral posturing is that we make a good faith attempt to address whatever reservations, doubts, and objections there are about our positions *out there, in the world*, no matter what society or culture or religious tradition they come from. Apart from that discipline and that responsibility,

On the other hand, I do not think that debate on such issues between members of different cultural and religious communities is necessarily a dialogue of the deaf. Humans are enormously curious about each other's ideas and reasons and are enormously resourceful in listening to and learning from one another across what appear to be barriers of cultural comprehensibility, often far beyond what philosophers and theorists of culture predict is possible. Perhaps over-influenced by the Wittgensteinian idea that effective communication presupposes some sort of agreement in judgments,[74] we theorists tend to think that deliberation requires a framework of common concepts and understandings; and we are less embarrassed than we ought to be when, time and again, various seafarers and traders and migrants prove us wrong. At any rate, I think it is a serious mistake to approach the problem of inter-cultural deliberation with the *a priori* conviction that a stalemate of mutual incomprehensibility is bound to result. This approach tends to tilt all too quickly into an untested and quite malignant assumption to the effect that "there is no talking to these people."

In this debate about the regulation-proposal, the existence of a particular cultural practice may figure in two ways. It may figure, first, as the experiential basis of a view about the desirability of regulation. For example, Native American users of peyote may oppose a blanket ban on the use of this hallucinogen, arguing on the basis of their experience with it that the substance has valuable psychological and spiritual properties when used moderately in a properly supervised environment. Second, the existence of a particular cultural practice may serve as the basis of a proposal for a specific exemption from any general ban on the use of peyote, if such a ban is implemented despite the Native American users' first intervention. This proposal will have to show that there is room for exemption and that it may be allocated fairly to the members of this group. Thus it is at this second stage that we ask the two questions – (A) concerning the room for exemption and (B) the fairness of applying any exemption to one group over another – that I have identified. At this point, if I am right in what I said in earlier Parts, the argument will be about special hardship and people being torn two ways by existing state law and existing cultural laws.

> we have no more right to be confident in the universal validity of our intuitions than our opponents in another culture have to be confident in theirs. And that is a difficult assignment, because such doubts and reservations and objections will often challenge not just the content of our conclusions, but our whole way of thinking about the issues that we address in our human rights concerns.

Id.

74. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 88e, ¶ 242 (G.E.M. Anscombe trans., 1973) (stating that "[i]f language is to be a means of communication there must be agreement not only in definitions but also. . . in judgments").

Now here is my point: I do not think we gain anything by conflating these two types of intervention. Returning to Brian Barry's book, *Culture and Equality*, I think part of the problem with Barry's analysis is that he conflates the two kinds of intervention. Uncharitably, Barry thinks that the second intervention is just the rear-guard strategy of a sore loser who has lost out in the first battle. In his account, the Native American we are imagining simply opposes laws that restrict his use of peyote. He first tries to oppose them as a general matter of principle, based on his cultural experience. Then when he fails at that, he tries to modify them by securing for himself an exemption. That really does make the exemption strategy look disreputable as an approach to legality. It really does look like something incompatible with the rule of law. But if we adopt the more careful analysis that I have suggested, we can see that each of the two interventions that I am imagining is much more respectful of legality. We also can see that there is nothing automatic in the progression from the first intervention to the second. Everything depends on what sort of argument prevailed at the first stage, for any argument about the room for exemptions and their proper distribution is going to have to be relative to that; and it depends too on the particular case that can be made – a hardship case or whatever – for giving the group in question the benefit of whatever room there may be for exemptions to the general law we have enacted.

ARTICLES