
THE RULE OF LAW AND THE EXEMPTION STRATEGY

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INTRODUCTION

Do exemptions from ordinary legal requirements for religious individuals and groups contravene the rule of law? If they do only sometimes, rather than always or never, under what circumstances do they do so? This Article explores these intriguing questions, raised powerfully by Marci Hamilton's important and challenging book *God vs. the Gavel*.¹

I offer some general observations about the concept of the rule of law, sketch problems posed by religious exemptions, survey various accepted features of our legal order that may seem similarly in tension with the rule of law, and consider in detail the significance of certain kinds of religious exemptions and whether it matters if they are created by legislators or judges.

These inquiries lead me to less stark conclusions than Professor Hamilton suggests and indeed to urge a reformulation of the basic question. That is better understood as: To what degree do various kinds of religious exemptions sacrifice particular standards and values that the complex idea of the rule of law embraces? Although I draw from Professor Hamilton, my aim is not to determine exactly what she thinks, but to use her ideas as a starting point for an independent account.

I. THE COMPLEX CONCEPT OF THE RULE OF LAW

In order to decide whether any practice in our legal system violates the rule of law, we need a sense of what the requirements of the rule of law are. That is not so simple. One reason is that the concept, as our legal culture has come to understand it, includes disparate elements. Some elements are undoubtedly part of the concept; the status of others

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¹ MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

is arguable. A more fundamental source of disagreement is whether the concept is mainly about techniques of law making and law application (an instrumental approach) or is mainly about values such as liberty (a substantive approach).² Some authors have proposed radical shifts in how we should understand the rule of law,³ and Jeremy Waldron has urged that the rule of law is an essentially contested concept, which at its core produces competing interpretations that are not subject to resolution.⁴

Adhering to what I take to be a standard modern understanding of the rule of law, I comment briefly on some elements that undoubtedly make up part of that understanding and other elements that one might or might not include.

A. *Applying the Law as It Is Written*

A core element (some might say *the* core) of the rule of law is that officials apply the law rather than resolving disputes arbitrarily on the basis of personal interest or inclination. The familiar phrase: “A rule of law, not of men,” suggests this notion. Of course, officials can apply the law only if there is a law deriving from a legitimate authority external to the decision maker⁵ to apply. A regime in which all disputes were taken before a ruler who dispensed justice according to his sense of the moment would not satisfy the rule of law. A society can enjoy the rule of law only if it has law and officials apply that law. One might well add other features of what Lou Fuller called the internal morality of law: rules must be general, not directed to specific cases; they must mainly operate prospectively; they must be relatively clear, accessible, and stable; and they must be of a kind that allows people to conform to them.⁶

Insofar as a legal system realizes this core element, it avoids partiality in the application of law. The law, as written, is evenly applied to the people it covers. However, this element alone provides no safeguard against gross injustice in the law that is actually written and enforced. A legal system that treats some human beings as chattel

² Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783 (1989).

³ Among the best known of these proposals is Margaret Radin’s suggestion that if we conceive rules, from the standpoint of Ludwig Wittgenstein’s theory, as based on agreement, we can adopt a sense of the rule of law that is pragmatic rather than formal and that distinguishes real law from the law on the books. *Id.*

⁴ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002). Waldron takes as his starting point different claims about the rule of law made by partisans of the 2000 election dispute between George W. Bush and Albert Gore.

⁵ See RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 4, 12-19 (2001).

⁶ LON FULLER, *THE INTERNAL MORALITY OF LAW* 33-94 (rev. ed. 1969).

property could achieve this minimal version of the rule of law. And were we to focus exclusively on this feature, we might conclude that the legalistic, racist regime of the former Union of South Africa did fairly well to satisfy the rule of law.⁷

B. *Standards of Law that Yield Relatively Clear Applications*

When we think of a rule of law, we are likely to imagine legal standards that are clear in their content and whose application to particular circumstances is (at least for the most part) definite.⁸ This aspect of a rule of law is a corollary of the first element. If the standards set by law are themselves very hard to grasp or so vague that their application to many circumstances is arguable, different officials will make different judgments about how to apply the standards. Even-handed application will be impossible, and inevitably officials will end up relying on their personal inclinations in choosing among competing possibilities for interpretation and application. By contrast, the rule of law yields what Ronald Cass has called “principled predictability.”⁹

In this regard, we may think of the rule of law as contrasting with official discretion. It contrasts most straightforwardly with the kind of discretion officials possess when the law explicitly leaves them broad latitude to decide within a range, as when a public utilities commission sets “a fair rate.” No one supposes that the law tells the commissioners just what rate is fair; they are free to consider factors that do not reduce to the application of law. The less the law guides the exercise of such official discretion, the greater the tension with the rule of law.

This ideal of the rule of law also contrasts with the kind of “discretion” judges have when the written law is so confused or so indeterminate in its scope that its application requires complicated, delicate judgments about which reasonable, well informed experts disagree.¹⁰ Judges and other officials cannot apply such laws evenly to situations until the highest court in a jurisdiction settles authoritatively what view will count as correct.

We may pause here to note that any ideal of a complete regime of laws, all of which apply clearly to whatever circumstances arise, would be impossible to achieve. More important for our purposes, there are

⁷ Fuller does note that some standards of racial identity were very hard to apply.

⁸ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁹ CASS, *supra* note 5, at 4, 7-9.

¹⁰ Ronald Dworkin has distinguished between these two kinds of discretion. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Ronald M. Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963). I have questioned whether the distinction is as sharp as he has suggested. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

strong reasons *not* to achieve such a regime to the maximum degree that is possible.¹¹ A legal system needs some flexibility. It is desirable, sometimes, to give officials discretion to set rates they deem fair; it is desirable, sometimes, to have legal standards that are relatively vague and open to changing circumstances, and whose application to many particular situations is arguable.

It follows that systems of law that we may identify as fulfilling the rule of law will themselves not have the maximum possible degree of definite, predictable, even application of clear precise legal rules.¹²

C. *People Who Do the Same Things Are Treated in the Same Way*

A rather different element of the rule of law is that the law should treat similarly people who do the same thing. This ideal can be traced much farther back, but it was explicitly included as part of the concept of the rule of law in the nineteenth century by Dicey, who was particularly concerned that the rulers and powerful not have one law for themselves and another law for ordinary people.¹³ According to this ideal, no person or institution should be privileged. The law should treat commoners and nobles, rich and poor, whites and blacks similarly. As Jeremy Waldron has put it, “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.”¹⁴

This element of the rule of law is closely tied to ideas of equality. No system allowing slavery could come close to being governed by the rule of law in this sense. But a legal system that did little to compensate for differences in talent and fortune could be governed by the rule of law and still allow striking social inequalities.¹⁵

The ideal of treating people who do the same thing in the same way raises subtle questions about what it is to do the same thing, which will occupy us in subsequent sections of this Article.

¹¹ See H.L.A. HART, *THE CONCEPT OF LAW* 124–34 (2d ed. 1994).

¹² When officials do exercise various kinds of discretion, it is consonant with the rule of law for their authority to make such judgments to be conferred by law.

¹³ ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (Elibron Classics ed. 2005).

¹⁴ Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3 (2002).

¹⁵ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (representing such an ideal).

D. *No Imposition of Narrow Views, and (Possibly) Attention to the Common Good*

If according to the law, clergy who commit murder escape the death penalty that is imposed on ordinary citizens (as was the practice at one time in England), it is a patent violation of the rule of law requirement that people be treated the same way if they do the same thing.¹⁶ But what if an Act of Conformity requires all citizens to attend Anglican services? The law requires the same acts of everyone, but the very actions it requires impose one point of view over others; and it effectively privileges those who wish to worship as Anglicans in relation to those who wish to worship in other ways or do not wish to worship. It is easy to conceive that such a privileging of one particular position violates the rule of law, especially since compelling nonbelievers to worship as Anglicans impinges on them more than would some disabilities that involve explicitly unequal treatment.

One *might* think, further, that whenever legislation is adopted that does not reflect judgments about the common good but instead serves narrow interests at odds with the common good, that legislation not only constitutes a failure according to ideals of representative democracy, it also violates the rule of law.¹⁷

My own inclination would be not to incorporate into the concept of the rule of law a general mandate to aim for the common good. Such an approach would condemn much legislation as violating the rule of law, and might lead us to lose sight of what is distinctive about that concept in relation to other ideals of representative government.¹⁸

¹⁶ HAMILTON, *supra* note 1, at 243-48.

¹⁷ Hamilton stresses the need of legislators to consider the common good. I am not sure whether she sees that as a requirement of the rule of law. However, she does suggest that applications of the rule of law require a governing law enacted by legislatures “charged with consideration of the public good.” *Id.* at 274.

¹⁸ Cass gives a similar reason for not making conformity of law with sound morality an element of the rule of law. CASS, *supra* note 5, at 15. My position leaves me wanting to declare that some laws that privilege narrow positions, such as the Act of Conformity, do violate the rule of law but that ordinary pandering to the interests of lobbyists does not. I am not sure how to try to draw that line.

Much of Professor Hamilton’s Response to my essay focuses on the two fundamental questions of a desirable allocation of responsibilities between legislatures and courts in this area and on whether exemptions for religious claimants have been too extensive. My views on those questions can be found in KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOLUME I, FREE EXERCISE AND FAIRNESS (2006) [hereinafter GREENAWALT VOL. I], and KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOLUME II, ESTABLISHMENT AND FAIRNESS (2008) [hereinafter GREENAWALT VOL. II]. Here I am addressing only the relation of those fundamental questions to the rule of law. I understand Professor Hamilton’s response about that to be that *if* a body that is poorly suited for the task determines exemptions and *if* it consistently makes serious mistakes about what differences in circumstances matter, that violates the rule of law, especially if the body takes undue account of the common good. On that understanding, her

E. *Acceptance by Citizens*

Perhaps a government can adhere to the rule of law in the face of widespread nonobservance of law by its citizens, but for a society to live by the rule of law, its citizens must broadly accept governance according to the rules of law. Most obviously, citizens fail to adhere to the rule of law if they do not comply with important legal rules and with official decisions about their circumstances.¹⁹

Another possible form of “nonacceptance” is more interesting. If citizens or groups ply legislators or courts for privileges that do not accord with the rule of law, they may be seeking unfair advantages. Their failure to adhere to the rule of law consists in their attempting to get law-making bodies (including courts) to adopt measures that are not faithful to the rule of law. We could not reasonably indict someone on this count unless we have initially concluded that what she seeks is at odds with the rule of law in a way that is undesirable. To this extent, claims about this kind of nonacceptance are parasitic on judgment about what the rule of law requires.²⁰

II. RULE OF LAW PROBLEMS FOR RELIGIOUS EXEMPTIONS

A religious exemption for our purposes is a privilege not to comply with ordinary legal requirements based on a criterion that refers to religious belief or practice. Thus, members of churches for whom ingesting peyote is the central aspect of their worship services may be given a privilege to use peyote despite a general ban on use of that substance.

One might take the view that *any* singling out of a religious basis for an exemption automatically departs from the rule of law. At least one sentence in Professor Hamilton’s book adopts this approach (although I am doubtful that this reflects her full view). She writes that she is arguing “that the right balance is achieved by subjecting entities to the rule of law—unless they can prove that exempting them will

thesis about the rule of law ties very closely to her general factual claims.

¹⁹ A person faithful to the rule of law will observe many legal requirements, such as tax liabilities, without official intervention. Faithfulness does not preclude appeal of decisions of lower officials and does not require observance of written rules, such as some speed limits, for which literal compliance is not expected.

²⁰ Were we to accuse someone of not accepting the rule of law, we should probably also need to conclude that she recognizes that what she seeks is unfair in a way that rule of law ideals would condemn. (It would not be necessary that she recognize what the concept of the rule of law covers.)

cause no harm to others.”²¹ If one parses this sentence, part of its meaning is that when religious entities deserve an exemption because it will do no harm, and the legislature grants the exemption, the entities are not being subjected to the rule of law.

Two clarifications are important here. If someone supposes that any exemption for a religious entity departs from the rule of law, he probably will think that other exemptions, formulated according to other criteria, also depart from the rule of law. If a person adopts this view about religious exemptions and also thinks, as Hamilton clearly does, that some religious exemptions are warranted,²² the crucial practical question about a proposed exemption will not be whether it departs from the rule of law but whether its departure is justified.

Hamilton’s basic comparisons are between ordinary people subject to the law and religious persons who may get an exemption. That is also my main focus, but I should mention in passing another conceivable objection that religious exemptions always violate the rule of law. One might think that some class of persons is different enough from the ordinary people to whom a law applies so that an exemption for that class would not depart from the rule of law, but that that class is never properly definable in terms of religion. The reason is that some nonreligious people, say secular moral objectors, are not fairly distinguishable from religious objectors. According to this view—which is neither Hamilton’s²³ nor mine²⁴—the rule of law violation in a religious exemption could consist of treating religious persons more favorably than the nonreligious others who are equally deserving of the exemption.

In what respects do religious exemptions offend or depart from the rule of law? If they are clearly stated and applied according to their terms, they do not compromise the element that the law should be applied as it is written. The problems lie in the ideals of clear application and equal treatment. (I am disregarding the possibility that a failure to accord with the common good is itself a failure to accord with the rule of law.)

The most obvious point is the one that may have led Hamilton to suggest that an exemption automatically departs from the rule of law. An exemption treats differently someone who is doing the same thing as does (or would) a person who violates the law and does not enjoy the exemption. Some person or group is privileged on the basis of a religious status, activity, or belief. The rule of law is directed against

²¹ HAMILTON, *supra* note 1, at 5.

²² *Id.* at 280-81. Hamilton writes, “When the harm to others is de minimis with the exemption, religious believers should be granted the exemption.” *Id.* at 280.

²³ *See id.* at 11, 275, 280-81.

²⁴ *See generally* GREENAWALT VOL. I, *supra* note 18; GREENAWALT VOL. II, *supra* note 18.

such privileging. We need to explore this approach with more depth and nuance, but this is its nutshell version.

Not all religious exemptions are troublesome in regard to nondiscretionary judgment, but some of the most important are. A statute that protects the use of peyote in worship services can, for the most part, be applied straightforwardly and evenly. But what of a legal rule that declares that if a law imposes a substantial burden on a person's religious exercise, it cannot be applied against that person unless it serves a compelling interest that cannot be accomplished by less restrictive means. I have paraphrased the language of the Supreme Court's basic free exercise test from 1963²⁵ to 1990,²⁶ of two federal statutes,²⁷ and of some state statutes and of standards construing state constitutions.²⁸ This language is wide open and vague. Different officials and different courts faced with similar situations will apply the standard differently.²⁹ The language does not confer the kind of discretion that our public utilities commission had, but it does leave judges (and other officials) with delicate, controversial judgments about how the standard applies, precluding even application of the law. If judges are called in to make judgments for which they are not competent, and if in fact the posture of individual cases—focused on the plight of particular religious persons—leads judges to overvalue individual interests at the expense of the common good, the situation is even worse. Religious persons will often be privileged when they should not be. According to Hamilton, our culture too often equates religion with good, neglectful of the evil religions often do. For her, the substantial burden / compelling interest standard already favors religious claims unduly,³⁰ the circumstances of judicial application amplify the problem.³¹ Thus, the concerns about unclear standards play into the concerns about unjustifiable privileging of religious persons.

²⁵ See *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁶ See *Employment Div. v. Smith*, 494 U.S. 872 (1990). I am passing over whether the Court ever meant what it said. My view is that in exemption cases, "compelling interest" was not, and should not have been, taken as constraining the government to the degree that that test does in equal protection and free speech cases.

²⁷ See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to -5 (2006).

²⁸ See GREENAWALT VOL. I, *supra* note 18, at 202.

²⁹ See *id.* at 201-32 (for a broad review of cases showing the differences in interpretation).

³⁰ HAMILTON, *supra* note 1, at 91-110 (on land use).

³¹ *Id.* at 97-99 (RLUIPA as encouraging litigation that benefits religious landowners).

III. RULE OF LAW ELEMENTS AND THEIR ABSENCE: SOME COMMON
FEATURES OF OUR LEGAL SYSTEM

If we are fairly to appraise rule of law objections to religious exemptions, we need to place them into the context of other features of our legal system. That system is shot through with elements that do not conform with a simple rule of law model. These require us to acknowledge that the American legal system is a terrible failure in respect to an ideal of a rule of law; to recognize that whether we should aim to adhere to various aspects of a rule of law is often highly doubtful; to develop a much more nuanced account what is crucial for the rule of law; or perhaps to do some combination of these things.

Our very first, and core element of the rule of law was that the law should be applied as written. Yet, police may decide whether to arrest violators, and prosecutors have wide ranging discretion whether to charge people with crimes they have committed. Prosecutors employ this discretion to make individual judgments about culpability, to conserve resources (by plea bargaining to avoid trials and by not charging when they think they cannot win), and to assure crucial testimony for other cases. These aspects of our criminal law are only one way our system does not assure that people who perform similar acts are treated similarly. When I began teaching law in 1965, the dominant sentencing schemes were highly discretionary. The “just deserts” approach that led to sentencing guidelines has seriously reduced a judge’s discretion, but judges still have some latitude to make judgments about appropriate sentences that are not controlled by law. And, of course, plea bargains, which judges typically accept, include agreements over sentences that may vary greatly from the standard sentence range for the crime that a defendant demonstrably committed.

Someone might object that not applying the law to a violator is not nearly as bad as “applying the law” arbitrarily to someone who has committed a violation. I concede that, but “the rule of law” is not observed if those who demonstrably have committed serious crimes are not prosecuted or receive much lighter sentences than others who have committed the same crimes.

The written law itself contains many, many exemptions and privileges. As I have mentioned, an exemption from an ordinary legal requirement might be based on someone’s status, activity, or belief. When we think carefully about such exemptions, we recognize that the line between a privilege and an exemption is thin or nonexistent and that saying what constitutes “the same act” is frequently elusive. Among various privileges or exemptions based on status, police officers

can use force in circumstances in which ordinary citizens may not;³² doctors, lawyers, psychotherapists, and (by statute) journalists need not disclose information acquired in confidence that an ordinary friend or associate would have to disclose (no matter how private the conversation and how absolute the friend's promise of secrecy). Public officials, as well as former employers asked by prospective employers to evaluate workers, are not liable for defamatory comments that would be actionable if uttered by others. Although we commonly talk of a police officer's privilege to use force, a lawyer's privilege not to testify, a judge's privilege to defame, it's not hard to see that these privileges are exemptions. The police officer is exempt from the ordinary restrictions on the use of the force; the lawyer is exempt from the ordinary rules about compulsory testimony. Each of these privileges or exemptions is justified in terms of the common good, not because the status of the privileged person, or his particular relationship with someone else, intrinsically deserves protection.

Various privileges or exemptions parents enjoy with respect to their children are less obviously grounded entirely in notions of public good. In most states, a father violates no law if he gives his unruly child a quick spanking in the supermarket. Others around the child, even the child's teacher, are not allowed to use this degree of physical force. One *might* defend the parent's latitude as contributing to the common good, but one *might* instead, or also, view the parent-child relationship as somehow prepolitical or extrapolitical, a relationship with respect to which state interference should be restrained because the boundaries of political coercion should be limited. Putting the point differently, one might offer a natural rights or separate spheres defense of some parental privileges, rather than claiming that by some utilitarian calculus the privilege serves the general welfare. In this respect, claims about exemptions based on religion may come closer to parental privileges than those of the police, doctors, and lawyers.

When we turn to consideration of what acts are the same acts, a crucial issue about the rule of law and possible exemptions based on activity or belief, we run into the broad extent to which states of mind figure into how the law defines acts and imposes liability. A hunter shoots and kills another hunter. If he intended to kill his victim, he has committed murder. If he was pretty sure he was shooting at a deer but perceived a slight chance his target was a human being, he has committed reckless homicide, manslaughter (unless his recklessness displayed a gross indifference to human life, in which case he has committed murder).³³ If he was certain he was shooting at a deer, he is guilty only of negligent homicide, often a lower degree of

³² See MODEL PENAL CODE § 3.07 (1985).

³³ See MODEL PENAL CODE §§ 210.2b, 210.3 (1985) (murder and manslaughter respectively).

manslaughter. Or, if he acted reasonably, he is innocent of any crime.

According to the law of most states, a person who kills another lacks a self-defense justification, despite objective conditions that would support the defense (her victim is then trying to kill her), if she is unaware of the justifying conditions (or perhaps if they do not motivate her action).³⁴

If my arms push against a man in a subway, whether I have committed a tortious battery depends on whether I have been thrown off balance and involuntarily put out my arms, or I have pushed him because I am fed up with his irritating comments. As far as the person who is pushed is concerned, the physical impact could be exactly the same.

Students of the criminal law sometimes distinguish intent from motive, with motive referring to someone's ulterior purposes in performing an act. The law, it may be said, takes account of intent, but not motive. Thus, if one hunter intentionally kills another, he is a murderer, whether his aim is greed, revenge, political conviction, or charity (relieving his victim of a life the victim has said repeatedly he wishes would end). I believe the distinction between intent and motive is less than clear-cut, that a more precise classification is often in terms of more or less immediate objectives,³⁵ but certain crimes definitely make motive relevant. Two persons perform exactly the same physical act, publicizing information about the locations of American forces; one is guilty of treason because he aims to assist an enemy in wartime, the other is guilty of no crime because she wants to inform American political debate. Two white persons assault an African American. Both are guilty of the basic crime of assault; one but not the other is *guilty* of a hate crime because his reason for the assault was the race of his victim.

Apart from basic liability, motive is undoubtedly relevant at sentencing. A daughter who kills a father who is dying painfully receives a less severe sentence than a daughter who kills a father to inherit his assets.

In summary of this discussion, we need to be careful not to assume that acts are the same when there are differences in states of awareness, intentions, and motives. We also should be cautious about the extent to which the law's taking account of these differences impinges on the rule of law.

Let us turn now to open-ended formulas that require officials

³⁴ See *id.* § 3.04(1). Under the Model Penal Code, it is apparently sufficient that the actor be aware that the use of force is immediately necessary for self protection.

³⁵ To illustrate, if *A* breaks into a house with an intent to commit a theft, he has committed a burglary. Suppose he is arrested as he enters the house. Is his broad intent to enter and steal, or is his motive in entering to steal? Both characterizations are accurate.

applying the law to weigh benefits and harms. Such formulas are in tension with an ideal that legal standards should be clear and capable of being evenly applied, but we find them at many points in the law. Most extensively, negligence constitutes a fundamental standard for tort liability and plays an important part in the criminal law.³⁶ Both branches of law also employ recklessness, which unlike negligence involves a conscious awareness of risk.³⁷ One is negligent or reckless if one takes an unjustified risk that causes harm. One is not negligent or reckless if the likely good from an action justifies the risk. Thus, a doctor whose patient dies in an operation may defend against a claim of tort liability by claiming that every action that his surgical team performed was justified by a calculus of risk and likely benefit. In jury cases, jurors determine whether actors have been negligent, and different juries may reach opposite conclusions in similar cases.

In medical cases, jurors can usually focus on the likely welfare of a single patient, but other cases may demand a different kind of calculus. The chief of a firefighting unit orders that homes be destroyed to prevent the spread of a forest fire. Was it negligent to cause the certain destruction of ten homes as a safeguard against a 40% chance that the fire would engulf those homes and, by burning them, spread further? Jurors must weigh a definite harm to individuals against a possible wider good to be achieved by preventing the fire's spread. (Even if one thinks economic analysis is the way to approach such problems, uncertainties about facts, about valuations of various goods, and about incentive structures can create doubt about the right outcome; and the law provides no assurance that jurors will stick to economic analysis.)

The justification defense in criminal law requires a direct weighing of harm and benefit.³⁸ What would otherwise be a criminal act is not so if the act was necessary to avert a harm more serious than that against which the law protects. *B* breaks her leg. *D* realizes that the injury is not life threatening, but *B* is in severe pain. *D* drives *B* to the hospital going 50 miles per hour on the streets with a speed limit of 30 miles per hour. Was *D* justified? A judge (or jury) must decide.

Various constitutional standards require courts to weigh harms and benefits, although prior cases serving as precedents tend to circumscribe the open-endedness of various doctrinal formulas. A search is unconstitutional if it is unreasonable. Reasonableness depends on some balance of the degree of intrusion on individuals against public need. When some forms of acquiring evidence are involved, a court asks

³⁶ The negligence relevant for criminal law involves a more extreme form of careless behavior than ordinary negligence.

³⁷ Historically, the courts did not systematically distinguish between recklessness and negligence in this way. The Model Penal Code's distinction in those terms has been influential.

³⁸ See MODEL PENAL CODE § 3.02 (1985).

about “reasonable expectations of privacy.”³⁹ The inquiry is not only about what expectations people actually have but what expectations they should have; and that depends partly on what intrusions are necessary to serve public interests. In both equal protection and free speech law, the compelling interest standard figures prominently. A prison has a race riot; the warden segregates prisoners temporarily by race. Whether his action is constitutional depends on whether temporary segregation is required to serve the compelling interest of saving lives. Were the segregation to be challenged, a judge would have to assess the degree of danger and the feasibility of alternatives that do not involve racial classification.

When we examine the law, we run up constantly against standards that require comparisons of harm and benefit, some applied by juries, others by judges. Some allow a focus on risks and prospective benefits for single individuals (the medical malpractice example); others require judges (or jurors) to assess the harm to one individual against a broader possible good. Standards of this sort are found in the common law, in statutes, and in constitutional doctrine. As with legal references to mental states, including motives, we must be cautious about condemning open-ended standards as violations of the rule of law.

As Frederick Schauer has put it, “[M]any existing and justifiable forms of legal decision-making are more particularistic than rule-based”⁴⁰ because the law explicitly or implicitly conveys a broad discretion or because the legal standard that is applied is so open-ended it requires particularistic evaluation.

IV. RELIGIOUS EXEMPTIONS AND THE RULE OF LAW

A. *Clearly Stated Rules*

How do religious exemptions fare when we view them from the perspective of the rule of law? We can first take relatively clear, specific exemptions whose application is straightforward.

We should recognize, at the outset, that the reasons why people engage in behavior (their motives) can affect how we would describe their activities. Ingesting peyote in a worship service within a community of believers may be quite a different experience, presenting quite different risks, than using peyote alone simply to see extraordinary visions. If activities are distinctively different, the law’s treating them

³⁹ *Katz v. United States*, 389 U.S. 347 (1967).

⁴⁰ Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 646 (1991).

differently may not violate any precept or element of the rule of law.

As I have noted, we can understand privileges not to testify as exemptions from a duty to testify. Paralleling the doctor-patient and lawyer-client privileges is the priest-penitent privilege, which now typically covers most confidential communications to clergy, including what people say in counseling sessions, and which is more absolute than the privileges of doctors and lawyers.⁴¹ (Depending on how exactly the privilege is formulated, the real holder of the privilege may be the cleric himself or the person who has disclosed to the cleric and who may be able to waive the privilege.)⁴²

The privilege has ancient roots in the common law. Most states now have statutory formulations, but because Congress refused to adopt a commission's recommendations about privileges, the federal privilege remains a matter of common law.

Whether the legal holder of the privilege is the cleric himself or the person who has communicated to him,⁴³ the privilege rests on a combination of the status of the cleric and the activity of confidential communication. In some circumstances, whether that activity is taking place might depend on the motives of the person who discloses information. Suppose a minister is a former bank robber, and a friend who is a member of her congregation asks to speak to her in private. The friend says he is thinking of robbing a particular bank but wonders whether that is a good idea. If his plan—say already revealed to a co-conspirator—is slyly to enlist the minister in the robbery, his communication would probably not be protected. If he is genuinely seeking her advice about how he should behave, the conversation would be protected.

Is the priest-penitent privilege any more at odds than the doctor-patient privilege with the rule of law principle that people who engage in similar acts should be treated the same way?⁴⁴ I see only two arguments to this effect. The first is that the doctor-patient privilege serves the common good, whereas the priest-penitent privilege is some kind of concession to the power of religious institutions, or a recognition of a transcendent sphere, or an accommodation to people's belief in such a sphere. In fact, one can make a plausible common good

⁴¹ GREENAWALT VOL. I, *supra* note 18, at 246-57.

⁴² Some clerics (particularly Roman Catholic priests) may refuse to testify even if the persons who have confessed to them have waived the privilege, and the law of evidence in some states supports their right to refuse.

⁴³ One might view the similar acts here as the original disclosures or the possible giving of compelled testimony, or both; but, in any event, a confidential disclosure to a close friend does not enjoy the protection of a disclosure to a doctor or cleric.

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argument that protecting admissions of wrongdoing to clergy promotes psychological and social health. But, as with privileges parents enjoy toward their children, we sense that more is going on, that in part the law treats these vital religious relationships as within a separate sphere.

I think that within a society in which religion is disestablished, the privilege cannot rest on a judgment that true religious understanding requires nondisclosure by clerics. But if many citizens believe these religiously based relationships between clerics and communicants lie in a realm that should be beyond state intrusion, its legislators or judges may appropriately respond to that sentiment and provide a privilege, knowing that in some rare instances its exercise will seriously compromise fact-finding at trials. It would be a mistake to suppose that any rule of law principle somehow bars responsiveness to the idea that the law should make accommodations to domains of separate spheres, such as family and religious institutions. That principle does not require that all judgments about exemptions focus upon common good reasons cast in utilitarian terms about temporal welfare.

A second argument that the priest-penitent privilege is, among testimonial privileges, peculiarly at odds with the rule of law, is that it draws an indefensible distinction between communications that receive the privilege and those that do not. There are indisputably troublesome borderline problems about quasi-clerics (such as nuns and church elders) and about denominations in which all members regard themselves as ministers, but in light of the religious understanding of most Americans, setting apart communications to clerics is at least one sensible, and defensible, approach.

The examination of the cleric's privilege not to testify allows us to see that at least some exemptions cast in terms of religious relationships do not seem a serious threat to the ideal of a rule of law.

A much more troubling and complex issue is one to which Professor Hamilton devotes concentrated, and impassioned attention—children who die because their parents do not seek standard medical treatment. Hamilton argues powerfully that these parents should face the full gambit of criminal liability; they should not be treated better than others who perform similar acts. More generally, she argues that religious exemptions should not be granted when the harm to others is more than *de minimis*; the harm to children who die is about as far from *de minimis* as one can get.

The issues about criminal liability arise against a shared assumption that if public officials realize that a child requires medical care parents will not provide, they can step in to assure the treatment. Further, they can remove the child from the parents' custody if she is, say, a diabetic who needs continuing care the parents refuse to give her. Parents have no right to prevent medical treatment for a needy child.

We are, thus, focusing only on criminal sanctions for neglect and for causing a child's death.

One of Hamilton's contentions is that exempting parents from criminal sanctions encourages them to conceal afflicted children. No doubt, the likelihood of concealment is one important factor in determining what the law should provide, although I am uncertain that instances of concealment will be fewer if the full range of the criminal law is employed than if it is not. In any event, the main force of Hamilton's argument lies elsewhere: allowing parents who cause their children's deaths to "get off" is unjust and it sacrifices deterrence that could save children's lives (because parents faced with criminal penalties are more likely to seek standard treatments).

Hamilton's powerful appeal raises questions about what acts (or omissions) are similar to others, about appropriate penalties, and about deterrability. Many parents who believe in faith healing must experience agonizing doubt as the physical condition of their child worsens, but they certainly do not intend the death of their children. They are, indeed, trying hard, according to the methods of their religious convictions, to see that the child is cured.⁴⁵ Parents who are fully confident that spiritual methods will work are guilty only of negligent homicide. They have not acted as a reasonable person would, but they have neither intended that the child die nor perceived a risk that their failure to seek ordinary treatment will cause death. Other parents may perceive a risk that their failure to get medical treatment will cause their child's death, but believe that the risk is slight because of their faith in spiritual healing. None of these parents have committed murder.⁴⁶ Even if we stick with standard categories of criminal liability, the faith-healing parents are radically different from those who kill intentionally or with a blatant disregard for the value of life.

Are these parents different from other parents whose neglect of children's illnesses result in death? Some neglectful parents are indefensibly indifferent to the welfare of their children or they incapacitate themselves from acting responsibly by alcohol or drug use. The parents who believe in faith healing are, by contrast, typically doing the best they know how to save their children. The comparison between them and parents who are simply ignorant about the medical condition

⁴⁵ This statement is not quite accurate for parents who understand that a standard form of medical treatment may be necessary to save life, but who believe they are still barred from accepting that treatment. This is how Jehovah's Witnesses may regard some blood transfusions, all of which are forbidden in their view. In her response, Professor Hamilton remarks on parents who may desire, and intend, the death of their children. What I say about states of mind does not cover such instances, if they exist, of failures to get adequate medical treatment. Nothing I say is addressed to the parents' state of mind about the coverage of the law.

⁴⁶ I put aside a possible theory that a parent has committed the felony of child neglect that results in death and is thus guilty of felony murder.

of their children, or about what medical treatment can do, is more troublesome. The ignorant parents do not understand that their failure to act risks their children, but that is no defense to a charge of negligent homicide. One may say they are to blame for not informing themselves and that punishment may encourage other parents to become better informed. At least some parents who rely on faith healing, typical Christian Scientists come particularly to mind, are quite well informed; they have made a deliberate decision that other methods work better than ordinary medicine. That is some basis to treat them differently from parents who are simply ignorant, although this is the most disturbing asymmetry if the religious parents are exempted from punishment and other neglectful parents are not.

When we think about just punishment, we need to recognize that the faith-healing parents have tried to act for their child's welfare and that they experience her death as a terrible loss. This sets them apart not only from those who try to kill but also from those whose negligence causes the death of strangers. We should not be surprised that prosecutors and judges are inclined to be lenient.

The issue of deterrence is complex. Parents convinced that faith healing will work may not be much deterred by criminal sanctions, especially since the possible death of their child will probably seem much more threatening to them than remoter criminal penalties after that occurs. But for parents who are already ambivalent about what to do, the prospect of criminal penalties may exert a push toward seeking ordinary medical treatment. I think the main deterrence consideration is more indirect. Highly publicized instances of Christian Scientists being carted off to jail because their children have died may reduce the attractiveness of Christian Science (and other similar religions) for people who might otherwise be inclined to embrace that faith.

Where does this analysis take us? There are significant arguments against an exemption from criminal liability for parents whose religious rejection of ordinary medical treatment leads to the death of a child, but there are counter arguments. If the crucial considerations come down to effective deterrence and competing views about "just" punishment, we should not understand a well considered decision to exempt those parents from all or some forms of criminal liability as an offense to the rule of law (whether or not we actually agree with that decision). And that is true even if legislators recognize that some harm to children may be the consequence of their decision. If, however, legislators act thoughtlessly or in response to pressure *and* they categorize exemptions in terms they cannot reasonably defend, *then* we may say that they have failed to act in accord with the rule of law value that similar acts should be treated similarly, and they have done so in a manner that fails to give needed legal protection to innocent victims.

Although an exemption of this sort does not favor the powerful of society in any straightforward sense, Hamilton suggests a more subtle argument about unwarranted privilege. Americans generally view religion as benign. This attitude opens the way for affected religious groups, small as they may be, to succeed in the political process, compromising the vital interests of innocent, defenseless, unrepresented children. In this manner, we can see that a dominant attitude towards religion results in a privilege to do harm that is at odds with the common good. Insofar as this critique succeeds, it intensifies concern about a sacrifice in rule of law values.

B. *Vague Standards with Uncertain Applications*

A major aspect of Professor Hamilton's complaint about religious exemptions concerns vague standards whose application is uncertain. These are found in federal and state statutes, as well as in judicially developed doctrines implementing free exercise guarantees. Is any such standard a serious breach of the rule of law? Do the particular standards courts and legislators have formulated raise especially serious rule of law problems?

I assume here, with Hamilton, that *some* exemptions cast in terms of religion are appropriate. On at least certain occasions people with religious reasons to perform specific acts, such as ingesting peyote in worship services, may properly be treated differently from most people who would like to perform those acts. Further, not every exemption need be cast in terms of persons with moral, conscientious, or associative reasons to perform acts (broader categories into which persons with religious reasons would fall); sometimes exemptions are sensibly limited to these with religious reasons. I also assume that, despite Hamilton's treatment of the decline of institutional and status privileges as an evolution toward fairness and equality,⁴⁷ that an exemption might properly be offered that includes more than individual belief and practice and that directly benefits corporate religious groups and their officers. The clerical privilege not to testify is an example of status being crucial; exemptions for peyote use go to those who participate within religious groups.⁴⁸

Hamilton's fundamental approach to religious exemptions is that they are properly granted if those performing an act for religious

⁴⁷ HAMILTON, *supra* note 1, at 238-72.

⁴⁸ The special constitutional limits of judicial scrutiny of religious doctrines in property disputes might also be viewed as favoring religious organizations, and this is especially so if a state decides to defer to the highest adjudicatory bodies of hierarchical churches. See GREENAWALT VOL. I, *supra* note 18, at 270-77.

reasons do no harm that is more than *de minimis*.⁴⁹ She strongly urges that legislators, not judges (and presumably not jurors), must make the determination whether a particular proposed exemption would or would not do harm, and whether it is or is not consonant with the common good.⁵⁰ We need to ask whether performance of this task by judges rather than legislators necessarily violates the rule of law, and whether individual assessments violate the rule of law if the standard of decision favors religious claims more than Hamilton proposes.

When judges are left to apply vague standards like those in the federal and state statutes, the rule of law ideal of judges evenly applying a clear law that is declared in advance cannot be satisfied. If a legislature grants a specific exemption, it produces a written law that can be applied consistently; that becomes impossible if judges must engage in the complex, difficult weighing of considerations. But we have seen that many parts of our law require judges or jurors to undertake just such endeavors. If we do not perceive these as violating the rule of law in a troubling way, we may doubt that using such an approach for religious exemptions necessarily does so.

I see no compelling reason to suppose that the subject of religious exemptions necessarily falls into the lap of legislators. The law of evidence was developed historically by courts; deciding whether to recognize a clerical privilege not to testify was then properly in the judicial domain. And a state constitution might explicitly provide that its free exercise clause, to be applied by courts, involves a right to engage in otherwise illegal acts that do not harm anyone.

A plausible objection to judicial resolution under vague standards has to rest on a claim that the particular standards for decision are ones courts are incompetent to apply and, relatedly, are highly uncertain in application; or are ones that inevitably will yield unjustified resolutions in favor of exemptions that involve religiously grounded acts.

The formulas to which Hamilton objects provide for relief from legal requirements that impose substantial burdens on religious exercise unless applying the requirements to religious claimants is needed to serve a compelling interest that cannot be achieved by less restrictive means. Were the compelling interest approach to demand of the government as much as is demanded of it in instances of racial discrimination, religious claimants would win a great deal of the time. Results would then be fairly predictable, but at the cost of privileging much behavior that should not be privileged. Were a different standard used, one that tracked Hamilton's sense of when legislators should confer exemptions, results might also be fairly predictable, and the task of judges not too onerous. The standard that the statutes contain lies

⁴⁹ HAMILTON, *supra* note 1, at 280.

⁵⁰ *Id.* at 275, 297; *see also* Professor Hamilton's Response in this issue.

between these points on a spectrum. RFRA explicitly indicates that it is meant to follow the constitutional standard the Supreme Court employed from 1963 (when *Sherbert v. Verner* was decided) up to 1990 (when *Employment Division v. Smith* eliminated a constitutionally based exemption for most circumstances). After *Sherbert v. Verner*, most courts, including the Supreme Court, rejected most claims for exemption.⁵¹ Although courts used the language of the compelling interest test, they sustained applications of general laws against religious claimants on bases that would not have been strong enough to support racial discrimination or laws aimed at curbing expression. So, what we had under *Sherbert v. Verner* and have under the more recent statutes was and is an intermediate standard under which religious claims win and lose with some frequency. This undeniably enhances the degree of uncertainty and produces unevenness of results.⁵² But we could say the same thing about the basic standard of negligence in torts or the general justification defense in criminal law.

Hamilton offers the further challenge that judges are incompetent to apply the standard they have been given.⁵³ The basic reason is that judges must weigh the burden on religion against the common good served by a restrictive law's application, but the circumstances of individual cases do not provide adequate factual information to assess issues of the common good. For example, judges may be unaware just how many disciplinary and administrative problems may be caused by a concession to a prisoner's claim to deviate from ordinary prison rules.⁵⁴ Hamilton has undoubtedly raised a serious problem. When the common good involves factors not obvious from the claim of the religious person, perhaps the government is not likely to produce the relevant information (based on testimony or the kind of background sources on which appellate courts feel free to rely). However, it seems likely that courts can be adequately responsive to the common good if they afford reasonable deference to administrative judgments, an approach supported for prison cases by the Supreme Court's recent decision in *Cutter v. Wilkinson*.⁵⁵ Indeed, if judges simply accept virtually any assertion prison officials make about the requisites of discipline, underestimations of the common good reasons to deny privileges will be few.

I am not sure how much of Hamilton's case about judicial incompetence rests on an example she has chosen, but her analysis of that example drifts so far from my own assessment, it gives me pause

⁵¹ See, e.g., *United States v. Lee*, 455 U.S. 252 (1982).

⁵² For a summary of a range of cases, see GREENAWALT VOL. I, *supra* note 18, at 201-32.

⁵³ HAMILTON, *supra* note 1, at 297.

⁵⁴ *Id.* at 153, 156.

⁵⁵ 544 U.S. 709 (2005).

about the strength of her overall thesis. Orthodox Jewish students playing sports wanted to wear yarmulkes held by bobby pins, in violation of the rule of a high school association against players wearing headgear, which was based on a concern that if headgear fell off that could endanger other players.⁵⁶ Writing during the period when *Sherbert v. Verner* represented the constitutional rule, Judge Richard Posner for the Seventh Circuit expressed some doubt that the Talmud required that yarmulkes be worn by those engaging in sports and also suggested that a chin strap might hold a yarmulke without any safety risk. The court held that the Jewish athletes did not have a constitutional right to wear yarmulkes insecurely fastened by bobby pins, but it remanded to the district court to see if the plaintiffs could find a way to secure the head covering in a manner that would meet the safety concerns. Among Hamilton's remarks about the case are these: "the court was basing its decision on an individual assessment of Jewish law";⁵⁷ the court took on "the full power of the legislative or regulating powers—assessing the need for accommodation, the means of accommodation, and even the financial cost";⁵⁸ this "was judicial law making at its most arrogant."⁵⁹

My sense of the case is quite different. Given the exact dispute before it, the court upheld the association's application of its safety rule. It reached no final determination about Jewish law or about feasible alternatives. The plaintiffs on remand were left to decide for themselves what they thought Jewish law allowed and to come up with a safe alternative, if they could. Here there was nothing elusive about the common good. The safety danger was easily explicable and comprehensible. In short, the assessment of the religious claim against the state's interest in safety seemed comfortably within judicial capacity; and Judge Posner's willingness to go beyond the exact parameters of the original conflict has seemed to me a wholly appropriate way to promote a resolution satisfactory to both sides, if one were possible.

No doubt, other cases do present more difficult questions about common good; but if the issue is judicial competence, as compared with legislative competence and legislative willingness to address peculiar, narrow problems, we need to look carefully at the range of issues courts face when they apply statutes like RFRA and RLUIPA.

In summary, we have seen that one element in the concept of the rule of law may be less fully achieved than it could be, when

⁵⁶ *Menora v. Ill. High Sch. Ass'n*, 683 F.2d, 1030, 1031 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983).

⁵⁷ HAMILTON, *supra* note 1, at 124.

⁵⁸ *Id.* at 125.

⁵⁹ *Id.* at 126.

exemptions from ordinary legal requirements are granted to those with religious reasons to perform otherwise illegal acts; and that another element in the concept of the rule of law is unfulfilled when exemptions are cast in general and vague terms, to be applied on a case by case basis. But both specific and general exemptions resemble other aspects of our legal system that are uncontroversial and are not thought to detract from the ability of our society to live by the rule of law in some general sense.⁶⁰ If we take “the rule of law” as an either-or concept, it plainly does not demand that all aspects of the legal system fit the pattern of clear legal rules applied evenly. Whether the present set of religious exemptions gives undue advantage to religious persons and groups and imposes tasks on courts for which they are ill suited raises important and difficult social questions. These questions do tie into questions about the proper place of various rule of law elements, but we can reach no simple judgments about what the rule of law requires in respect to religious exemptions.

⁶⁰ See Schauer, *supra* note 40.