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The Significance of Conscience in Community:
Rethinking the 'Hands Off Religion' Doctrine

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Abstract

When evaluating religious accommodation claims, courts refrain from examining the relationship between the specific claim and the common religious practice of the relevant religion. This paper rethinks this doctrine. I argue that it stems from understanding religious accommodation as a protection of conscience. This idea itself suffers from conceptual and practical challenges, which can be mitigated if we understand religion as a communal function of conscientious actions. The communal aspect bears practical and moral significance, and I explore three dimensions of it: the epistemic implications; its effect on constituting moral obligations toward others; and its importance as part of one's culture. A communal-conscientious approach to religion can mitigate many challenges that confront conscience accommodation. This suggests that the relationship between the individual's claim and their communal practice is crucial and should be evaluated by courts. I conclude by outlining the main considerations for creating a new, nuanced doctrine.

Keywords: *law and religion; religious accommodation; conscience*

Introduction

A central element of religious freedom is the government's duty to accommodate generally applicable legal norms to the needs of religious believers. Assuming such a duty exists,[1] is there any normative significance in the relationship between a given believer's religious conviction and the common understanding or practice of it in their affiliated religion? Normatively speaking, does it matter if

1. The literature on the topic is vast. For some examples, see e.g. Mark Tushnet, "The Emerging Principle of Accommodation of Religion (Dubitante)" (1988) 76:5 Geo LJ 1691; William P Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption" (1990) 40:2 Case W Res L Rev 357; Michael W McConnell, "Accommodation of Religion: An Update and a Response to the Critics" (1992) 60:3 Geo Wash L Rev 685; Ira C Lupu, "The Trouble with Accommodation" (1992) 60:3 Geo Wash L Rev 743; Christopher L Eisgruber & Lawrence G Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007); Andrew Koppelman, "Is It Fair to Give Religion Special Treatment?" (2006) 2006:3 U Ill L Rev 571; Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2012); Douglas Nejaime & Reva B Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics" (2015) 124:7 Yale LJ 2516; Frederick Mark Gedicks & Rebecca G Van Tassell, "RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion" (2014) 49:2 Harv CR-CLL Rev 343; Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2018).

their individual religious claim is inconsistent with their affiliated religious doctrine? For instance, if a prisoner demands accommodation of their diet on the grounds of a religious belief, should we be concerned with whether the religion they are affiliated with actually requires them to observe such dietary rules?

American legal tradition answers this question with a determined "No."[2] The 'hands off religion' doctrine holds that courts are forbidden from inquiring what the 'true' religious doctrine is and should evaluate religious accommodation claims regardless of their social or religious acceptance.

In this paper, I argue that this doctrine requires substantial rectification. I show that it derives from the common explanation of religious freedom as a protection of conscience, which is an individualistic and subjective notion. However, the idea of freedom of conscience itself, and the view of it as the justification for religious accommodation, are problematic—both conceptually and practically. On this premise, I demonstrate the need for an objective external parameter by which conscientious claims could be evaluated.

In the context of religious accommodation, such a parameter is available. Religious conscience is usually produced and practiced in a communal setting. The phenomenon of communal conscientious behavior has epistemic and normative significance. Viewing religious conscience as a *communal* conscience provides legal tools for the process of evaluating religious accommodation claims that overcome (or mitigate) the challenges that the concept of freedom of conscience encounters. Simultaneously, however, focusing on this communal view should set the borders of religious-accommodation law. Accordingly, the relationship between the individual's religious claim and the practice of their religious community *is* a relevant fact for the legal system's response to that claim. Therefore, the hands-off doctrine, as some scholars suggest, should be revisited.

My argument is not essentialist; it does not categorically distinguish the religious from other contexts. First, I do not claim that religious activity is the only conscientious behavior that has a strong communal aspect. Second, my argument does not categorically give preference to communal conscientious settings over individualistic ones. I do not maintain that individualistic conscience should *not* be protected, nor that it deserves, by definition, less protection than communal conscience. My account is modest, as it comes down to the following: (a) there is a special communal aspect to religious activity that has epistemic and normative significance; and (b) the classic understanding of freedom of conscience faces difficulties that can be solved, or at least mitigated, if we focus on the communal aspect.[3]

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2. In Canada, the legal rule is similar. See *Syndicat Northcrest v Amselem*, 2004 SCC 47 and its discussion in Avigail Eisenberg, *Reasons of Identity* (Oxford University Press, 2009) at 91; Gideon Sapir & Daniel Statman, *Religion and State in Israel: A Philosophical-Legal Inquiry* (Cambridge University Press, 2019) at 91. European jurisprudence is more complex, although it is turning in the American direction. See Anna Su, "Judging Religious Sincerity" (2016) 5:1 Oxford Journal of Law & Religion 28.

3. Therefore, it is probable that my account has implications for non-religious communal settings as well. This possibility, however, is beyond my scope.

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That said, even if I am correct in arguing for the need to rectify the existing hands-off doctrine, it is not obvious what the alternative is. We need a clear understanding of what it means, exactly, to 'focus on the communal aspect' of religious conscience: a nuanced doctrine is called-for. This should be done carefully, since appealing to communal practice can dangerously lead to discriminating against dissenters and stagnating religious practice, a danger that should not be underestimated.[4] While a comprehensive alternative is beyond the scope of this paper, I outline some fundamental issues to take into consideration and potential ingredients of such a doctrine.

In what follows, Section A presents the American 'hands off religion' doctrine. Section B sets out the conscience-based rationale for religious accommodation. Section C explores some of the key challenges faced by 'religious accommodation as conscience protection' theories. Section D returns to religious accommodation and develops the communal aspect of religious conscience and its epistemic and moral significance. Lastly, Section E discusses some possible elements of an alternative doctrine.[5]

A. 'Hands Off Religion'

The United States Constitution forbids Congress from making laws "prohibiting the free exercise" of religion.[6] For many decades, this clause was interpreted as containing an obligation to accommodate laws to the needs of religious people, in support of free exercise. In *Employment Division v Smith*,[7] the U.S. Supreme Court controversially narrowed this obligation—a decision that led to continual Federal and State legislative endeavors to reestablish and strengthen it.[8]

4. Throughout this article I will treat the relations between the individual and the community in quite a perfunctory way, assuming a high degree of voluntariness in membership, and consent to its practices. This is definitely not always the case, as religious communities may oppress individuals and facilitate problematic power relations (not to mention the debatable question of educating children into religion). I am aware of this critique and argue it should be taken into account while designing an alternative doctrine. Nevertheless, I do assume that communal belonging in its essence is a voluntary, identity-defining phenomenon.

5. It is important to emphasize that my discussion is limited to the question of which kind of claims deserve, *pro-tanto*, special treatment. This, however, is only one consideration of many—for example, the social price of accommodation—which I do not address. Assuming that a claim is worthwhile to accommodate does not, therefore, mean that it should be, all things considered (for example, compare a religious dietary accommodation in a public school to a religious ritual of human sacrifice).

6. US Const amend I.

7. 494 US 872 (1990).

8. For a sound survey, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 6th ed (Wolters Kluwer, 2019) at 1364; Kent Greenawalt, *Religion and the Constitution*, vol 1 (Princeton University Press, 2006) at 27; William P Marshall, "Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law" (2011) 44:1 Tex Tech L Rev 239; Winnifred Sullivan, *The Impossibility of Religious Freedom*, 2d ed (Princeton University Press, 2018) at 13-31.

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Religious-accommodation doctrine contains several components. It requires the court to consider two primary issues: the sincerity of the plaintiff's religious claim and the 'substantial burden' the general norm places on their free exercise.[9] But one optional component is absent: the 'truth' of the religious claim. In other words, does the religious community with which the plaintiff is affiliated—and in whose name they are claiming accommodation—actually hold such a belief or sustain such a practice? 'Hands off religion', the official doctrine of American law, frames this question as irrelevant for the decision and maintains that the court is prohibited from inquiring about it.[10]

This position was established in several First Amendment cases.[11] It is well illustrated in *Thomas v Review Board of the Indiana Employment Security Division*, in which the petitioner, Eddie Thomas, opted to resign from his job in a weapons factory after interpreting Biblical prophecies condemning the production of weapons.[12] He argued for state compensation for a justified resignation, which the state of Indiana refused based on the fact that Thomas' religious conviction was not shared by the church with which he was affiliated. Nor was it shared by several other adherents of the same church who continued to work at the factory. The court rejected the state's argument, explaining that the free exercise clause was meant to protect the religious principles and practices of orthodox believers and dissenters alike, and that, therefore, the fact that an individual holds uncommon religious beliefs is irrelevant for protecting their free exercise. Furthermore, a judicial inquiry into the congruence between an individual's religious claim and the official religious doctrine is a violation of the non-establishment clause, for it enhances orthodox religion in comparison to dissenting religious beliefs.[13] This conclusion is supported by history as well, since those

9. These requirements are complex and obscure. On sincerity, see Kara Loewentheil & Elizabeth Reiner Platt, "In Defense of the Sincerity Test" in Kevin Vallier & Michael Weber, eds, *Religious Exemptions* (Oxford University Press, 2018) 247; Nathan S Chapman, "Adjudicating Religious Sincerity" (2017) 92:3 Wash L Rev 1185; Su, *supra* note 2. On substantive burdens, see Michael A Helfand, "Identifying Substantial Burdens" (2016) U Ill L Rev 1771; Chad Flanders, "Substantial Burdens" in Vallier & Weber, *ibid*, 279; Samuel J Levine, "A Critique of *Hobby Lobby* and the Supreme Court's Hands-off Approach to Religion" (2015) 91:1 Notre Dame L Rev Online 26 [Levine, "*Hobby Lobby*"].

10. Sometimes it is referred to as the Religious Question doctrine. The doctrine has implications in other legal issues, such as the adjudication of inter-religious disputes. Here I focus only on the aspect of religious accommodation. On the doctrine, see for example Samuel J Levine, "Symposium: The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction" (2009) 84:2 Notre Dame L Rev 793; Samuel J Levine, "Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief" (1997) 25:1 Fordham Urb LJ 85; Jared A Goldstein, "Is There a 'Religious Question' Doctrine?: Judicial Authority to Examine Religious Practices and Beliefs" (2005) 54:2 Cath U L Rev 497; Christopher C Lund, "Rethinking the Religious-Question Doctrine" (2014) 41:5 Pepp L Rev 1013; Levine, "*Hobby Lobby*", *supra* note 9.

11. The doctrine is rooted in *United States v Ballard*, 322 US 78 (1944); on this case, see Chemerinsky, *supra* note 8 at 1302; Greenawalt, *supra* note 8 at 110; Marshall, *supra* note 8. See also *United State v Lee*, 455 US 252 (1982); *Lyng v Northwest Indian Cemetery*, 485 US 439 (1988) at 449.

12. 450 US 707 (1981).

13. See Chemerinsky, *supra* note 8 at 1303-04.

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who needed legal protection of their free exercise were usually minority religious groups, not mainstream believers.[14]

Despite its appeal, the doctrine has faced some critiques. The main concern stems from its limitlessness. Many personal preferences can be formulated as 'religious.'[15] Hence, if we fail to take into account the social acceptance of a religious claim, we should expect inflation of such claims.[16] A possible response to this pragmatic concern is to rely on the existing limitations on religious claims: the sincerity and substantial burden tests. These tests are arguably sufficient to block unjust religious claims. However, religious claims can be both sincere and substantially burdened by the government, yet implausibly unlimited in their scope.

Moreover, relying on sincerity and substantial burden raises the concern of a covert consideration of the place of orthodoxy within these tests. A court may suppose that the unorthodoxy of a religious claim is a proper indication of the individual's sincerity or of the weight of the burden they suffer, although there is not necessarily any connection between the two. Indeed, scholars have described and criticized particular cases in which such a phenomenon arises.[17] Covert consideration of the official doctrine or its social acceptance is worrisome because it can lead to covert discrimination between religious claims.[18]

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14. Historians of the US Constitution have, indeed, advocated in favor of an individualistic interpretation of religious freedom, based on this historical lesson. See Mark D Rosen, "Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres" (2014) 2014:3 U Ill L Rev 737; Ashutosh Bhagwat, "Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups" (2014) 92:1 Wash U L Rev 73; Alan Brownstein, "Protecting the Religious Liberty of Religious Institutions" (2013) 21 J Contemp Leg Issues 201.

15. This is especially true in the American legal tradition, as the constitutional definition of religion is broad. See Greenawalt, *supra* note 8 at ch 8.

16. For a pragmatic criticism of the doctrine, see Levine, "*Hobby Lobby*", *supra* note 9 at nn 2, 3 and accompanying text. The problem is intensified if we accept religious claims that deal with one's conscientious objection to assisting others who act against religious doctrines, such as in the case of contraception supply by employers, as discussed in *Burwell v Hobby Lobby Stores Inc*, 573 US 682 (2014). See also Nejaime & Siegel, *supra* note 1. The doctrine is criticized by philosophers as well—see Eisenberg, *supra* note 2; Sapir & Statman, *supra* note 2.

17. See Sullivan, *supra* note 8; Adeel Mohammadi, "Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners" (2020) 129:6 Yale LJ 1836 at 1857.

18. Another possible critique of the hands-off doctrine derives from a general critique of American religious freedom jurisprudence as biased toward Protestant conceptions of religion—namely, it views religion as an individualistic and private experience, which focuses largely on beliefs and spiritual experiences rather than practices. On this critique, see Udi Greenberg, "Is Religious Freedom Protestant? On the History of a Critical Idea" (2020) 88 Journal of the American Academy of Religion 74; Shai Lavi, "Human Rights and Secularism: Arendt, Asad, and Milbank as Critics of the Secular Foundations of Human Rights" in René Provost, ed, *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford University Press, 2014) 56; Laborde, supra note 1 at 13. It is arguable that the hands-off doctrine is also structured to fit the individualistic character of Protestantism. Logically, such a critique is limited to the socially-structuring possible effects of the doctrine and does not apply to actual discrimination of accommodation claims. Since the doctrine expands the scope of religious accommodation, it should not discriminate against minorities. This, of course, does not imply that, in practice, such discrimination does not occur, especially due to the covert use of orthodoxy within the existing doctrine as explained above. The attention paid to the American focus on individualistic religion sits at the base of a slightly different context, namely, the (debated) right of religious institutions to religious freedom and its tension

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B. Religious Accommodation as Protecting Conscience

The hands-off approach derives from the common justification of religious accommodation on the principle of freedom of conscience.[19] Since conscience is a "pluralistic, neutral and subjective"[20] notion, the content of one's conscience is irrelevant to the law's obligation to protect it. The content of a religious conviction, as well as its social acceptance, should be irrelevant to its respect.

The concept of conscience deserves a comprehensive inquiry, which I do not offer here; rather, I focus on its connection to the hands-off doctrine.[21] Our conscience can be described as our set of core inner moral beliefs, which constitute our moral integrity and identity. The concept of conscience is independent of any specific moral content. This is manifested in several ways, starting with its pluralistic character. Conscience is what a metaphorical inner voice tells each individual about their moral duties and obligations; hence, our respective consciences and the moral judgments they contain will differ from person to person, and will sometimes be in direct opposition to one another. Second, it is a morally neutral concept: the mere fact that one holds a moral conscientious conviction says nothing about its validity. Certainly, some people hold highly questionable moral positions to be conscientious. Third, conscience is subjective. It refers to what people believe to be morally binding, and not to what really *is* morally binding. Moreover, when a person claims that their conscience obligates them to do something, they are referring to what they believe to be morally binding to *them*. They might think that this moral conviction is true and should therefore bind everybody —but, in that case, they are no longer thinking about a conscientious obligation. Rather, they are justifying their conviction substantially, not by its conscientious character.[22]

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with other rights of individuals—mostly, their right to equality or to property. Paradigmatic examples are exemptions of religious institutions from antidiscrimination laws (see *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 565 US 171 (2012)). An increasing 'church autonomy' movement argues in favor of religious institutions' autonomy to manage their communal life. See Paul Horwitz, *First Amendment Institutions* (Harvard University Press, 2013); Richard W Garnett, "'The Freedom of the Church': (Towards) an Exposition, Translation, and Defense" (2013) 21 J Contemp Leg Issues 33; Michael W McConnell, "Reflections on *Hosanna-Tabor*" (2012) 35:3 Harv JL & Pub Pol'y 821. For critical discussion, see Winnifred Fallers Sullivan, *Church State Corporation: Construing Religion in US Law* (Chicago University Press, 2020); Rosen, *supra* note 14; Bhagwat, *supra* note 14; Brownstein, *supra* note 14; Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism" (2013) 99:5 Va L Rev 917.

19. For accounts that focus on conscience as the theoretical basis of religious freedom, see Sapir & Statman, *supra* note 2 at 16, 70; Martha C Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books, 2008); Noah Feldman, *Divided by God: America's Church-State Problem* (Farrar, Straus & Giroux, 2005); Andrew Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions" (2009) 15:3 Leg Theory 215 at n 1.

20. Alberto Giubilini, "Conscience" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2021), online: https://plato.stanford.edu/entries/conscience/.

21. For a typology of conscience in the religious context, see Koppelman, *supra* note 19.

22. *Ibid*, s III. A.

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We usually become aware of our conscience when social or legal circumstances suppress our conscientious convictions. This kind of contradiction urges the idea of *freedom* of conscience. When our conscience instructs us to act in line with what society and law expect from us, there is no political-philosophical issue at stake. But when our conscience requires us to disobey societal orders or the legal system, then the question of freedom of conscience comes into view. As a political issue, conscience is therefore not only a subjective concept but also an antinomian one.[23] This feature of conscience was referenced by Martin Luther, who described his position against Catholic institutions as a struggle between positive law and his inner moral dictates: "My conscience is captive to the Word of God. . . . Here I stand; I cannot do otherwise."[24] Luther describes himself as following a divine truth that is counter to a corrupt system. But, from the legal system's point of view, the conscientious claim undermines legal stability and requires an unequal enforcement of the law.

Luther's personal motivation to follow his conscience was religious; he saw his conscience as a revelation of the Word of God, which overrides earthly laws. But one does not need religious motivations to follow one's conscience. Conscience "delimits a sphere of personal morality that is an essential part of our sense of personal identity, understood as our sense of who we are and of what characterizes qualitatively our individuality."[25] The motivation to appeal to conscience is described in the literature using several concepts, such as integrity, identity, dignity, and autonomy.[26] Each of these terms requires close examination but, for the purpose of this paper, I will assume they largely converge in treating our core moral beliefs as a crucial aspect of how we understand ourselves and define who we are.[27]

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23. For a discussion on the antinomian character of the conscience, see Sapir & Statman, *supra* note 2 at 18.

24. *Ibid*.

25. Giubilini, *supra* note 20 at § 5. For a description of the secularization of conscience, see Brad S Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Harvard University Press, 2012); Charles C Moskos & John W Chambers II, "The Secularization of Conscience" in Charles C Moskos & John W Chambers II, eds, *The New Conscientious Objection: From Sacred to Secular Resistance* (Oxford University Press, 1993) 3.

26. See Sapir & Statman, *supra* note 2 at 19 (integrity and identity); Kevin Vallier, "The Moral Basis of Religious Exemptions" (2016) 35:1 Law & Phil 1 (integrity); Robert F Card, "The Inevitability of Assessing Reasons in Debates about Conscientious Objection in Medicine" (2017) 26:1 Cambridge Quarterly of Healthcare Ethics 82 (integrity, conceptually connecting it to identity); Alberto Giubilini, "The Paradox of Conscientious Objection and the Anemic Concept of 'Conscience': Downplaying the Role of Moral Integrity in Health Care" (2014) 24:2 Kennedy Institute Ethics Journal 159 at 160 (refers to literature that uses the notions of autonomy, self-identity, dignity, and humanity).

27. For a discussion of the conceptual connection between integrity and identity, see Vallier, *supra* note 26. Basing the respect for conscience on these different concepts or their different definitions can lead to different levels of respect. For example, consider the case of a person who is mistaken in their understanding of their own conscientious dictates. From an autonomy point of view, this should not matter so much; but, from an integrity or identity point of view, it might make a difference. In any case, for the sake of this account, I do not differentiate between them and I use these terms synonymously throughout the paper.

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The fundamental importance of conscience to human beings raises the question of how governments are to accommodate it. The idea of freedom of conscience suggests that the state is required, to some extent, to provide exemptions from generally applicable laws or offer accommodations when they contradict one's conscience. However, we need to justify why conscience differs from any other personal preference to disobey the law that does *not* require accommodation. One simple answer is that constitutional protection of a human activity is justified when that activity is essential to liberal values. So, if the values of identity, self-determination, integrity, autonomy, and so on, are essential to liberal values—and it is reasonable to assume that they are—then there is a consideration for the state to accommodate conscience.[28] The difference between conscientious convictions and other subjective preferences, then, lies in the importance of the former for liberal values.

Religious obligations are, *inter alia*, a conscientious matter. They derive from a person's deepest beliefs. In Luther's words, a religious observer hears the Word of God and is deeply committed to fulfilling it. Their identity, integrity, and autonomy are all at stake. It is therefore compelling to understand religious accommodation as a specific case of accommodating conscience. To protect the religious believer's autonomy and identity, we should accommodate neutral general norms for them, so that they need not violate their conscientious dictates.[29]

It is evident how this theory of religious accommodation formulates the hands-off doctrine. If it is conscience we are protecting, and if conscience is, indeed, a "pluralistic, neutral and subjective" phenomenon, then it should not matter if the religious claim is supported by a generalized communal practice or not. At most, this support might sometimes have evidential implications (as we will see later); but, as a matter of substance, it is irrelevant. Moreover, if it has any significance at all, it should operate vice-versa: dissenters need stronger protection of their freedom of conscience than do large mainstream religious groups.

C. Challenges to Freedom of (Religious) Conscience

Accommodating conscience is not an easy idea to defend. Nor is the convergence of religious accommodation with it. Both of these ideas have received recent

28. I assume they all are, even though some are debated. Alan Patten, for instance, questions the importance of identity for liberalism. See Alan Patten, *Equal Recognition: The Moral Foundations of Cultural Rights* (Princeton University Press, 2014) at ch 1. It suffices my discussion that the main versions of most of these concepts are widely accepted as essential for liberalism.

29. This understanding is supported historically as well. As many legal historians have shown, the evolution of freedom of religion was accompanied by conscience-based rhetoric. The terms 'freedom of religion' and 'freedom of conscience' were treated as convergent concepts during the era of the formulation of the US Constitution (see Nussbaum, *supra* note 19; Feldman, *supra* note 19).

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critiques.[30] In this section, I provide a brief survey of three common challenges to the notion that religious accommodation equates to conscience accommodation. I do not present definite arguments against accommodating conscience or against explaining religious accommodation as a protection of conscience. Rather, my purpose is to demonstrate how these challenges derive from conscience's neutral and subjective nature. This will lead me to search for objective parameters to evaluate conscience—the focus of the subsequent section.

a. The Uniqueness of Religion

If religious accommodation is a specific case of freedom of conscience, why do we need a special category for it? Why does a general category of the freedom of conscience not suffice? One possible response is that, theoretically speaking, freedom of religion is, indeed, redundant. The only reason we hold it to be a separate category is its historical development and social meaning: the concept of freedom of religion emerged before the general freedom of conscience, due to Europe's particular history of religious wars.[31] In addition, the right to religious freedom is worthy of being explicitly mentioned for social reasons, because of religion's importance to individuals.[32]

This answer would suffice if we indeed treated religious and non-religious conscientious claims alike, but this is rarely the case. In reality, legal accommodation of religious claims is much broader than nonreligious conscience accommodation.[33] Of course, this does not provide any normative conclusions. It may well be that this unequal treatment is unjust—that our treatment of religion is too permissive or our treatment of nonreligious conscience is too narrow. But, if we try to explain the concept of religious freedom as practiced, conscience alone is not enough.

The uniqueness of religious conscience has attracted vast attention in the literature, which I do not address here.[34] My point is simply that attempts to distinguish religion from other forms of conscientious behavior will remain problematic as long as we hold to the religion-as-conscience theory, precisely because of the neutral and subjective nature of conscience. Apparently, there

30. For some critical discussions of conscience in a religious freedom context, see Leiter, *supra* note 1; Koppelman, *supra* note 19; Laborde, *supra* note 1 at ch 2; Richard J Arneson, "Against Freedom of Conscience" (2010) 47:4 San Diego L Rev 1015. In bioethics, see Giubilini, *supra* note 26; Alberto Giubilini, "Objection to Conscience: An Argument Against Conscience Exemptions in Healthcare" (2017) 31:5 Bioethics 400 [Giubilini, "Objection to Conscience"]. The three objections I present here coincide with much of this work.

31. See generally *supra* note 14.

32. See Sapir & Statman, *supra* note 2 at 103.

33. See Leiter, *supra* note 1 at 1-4.

34. For important discussions, see Micah Schwartzman, "Religion, Equality, and Anarchy" in Cécile Laborde & Aurelia Bardon, eds, *Religion in Liberal Political Philosophy* (Oxford University Press, 2017) 15; Leiter, *supra* note 1; Sapir & Statman, *supra* note 2 at 100; Michael W McConnell, "Free Exercise Revisionism and the Smith Decision" (1990) 57:4 U Chicago L Rev 1109; Gidon Sapir, "Religion and State: A Fresh Theoretical Start" (2000) 75:2 Notre Dame L Rev 579 at 642; Douglas Laycock, "Religious Liberty as Liberty" (1996) 7:2 J Contemp Leg Issues 313 at 336.

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is no reason for a core moral conviction with a religious source to be deemed more deserving of protection than the same moral conviction with no attribution to religion.

b. Evaluating the Content of Conscience

Arguably, conscience should be respected, regardless of its content. If this is so, we should treat all conscientious claims equally; but this can lead to "morally repugnant outcomes."[35] For example, consider a racist doctor who refuses to treat certain patients due to their race. If their position is conscientious and genuine, a conscientious exemption should be granted. Yet, such a result seems intuitively undesirable.[36]

Certainly, it is possible to impose limitations on a conscientious claim without evaluating its content, due to the existence of conflicting interests and considerations, such as the negative effect of the accommodation on society.[37] We can limit our racist doctor's conscience not because of its content but because of the harm that will be caused by respecting it.[38] The doctor's conscientious claim might be dismissed because their refusal to treat a patient could put the latter's life at risk. This kind of consideration is indifferent to the content of the doctor's conscience. However, I do not think our rejection of the racist doctor's claim is based on such a limitation. We are not concerned merely with the direct harm their conscience can cause. Suppose, for instance, that the racist doctor ('A') suggests hiring another doctor ('B'), with the same skills, who will treat all patients whom 'A' refuses to serve. We likely still think that A's accommodation request should not be respected. Is that because of indirect damages and harms that this accommodation could cause? Perhaps. But it makes more sense to say that the harm we fear is *the acceptance of moral wrongs*. The harm that is potentially caused by respecting a racist conscience is the spread of an extremely immoral view. Such a harm principle is sensitive to the content of the conscientious belief.

There is no logical contradiction between a consideration to protect integrity and autonomy (via protecting conscience) and a consideration to limit the spread of extreme and specific moral wrongs. The fact that the latter requires us to investigate the content of conscience does not logically contradict the former. It is possible to rule that conscience should be respected regardless of its content—but to a certain limit.[39] This position requires another component to be incorporated into the concept of freedom of conscience: *toleration*.[40] But, as such, it is exposed to a

35. Card, *supra* note 26 at 84.
36. *Ibid*.
37. A common formulation is that the respect of conscience is limited by some version of the harm principle. See Leiter, *supra* note 1 at 110.
38. See *ibid*.
39. For example, some bioethics scholars argue that conscientious claims should not be accepted when they contradict medicine's 'core values,' as a reconciliation of the two considerations. See Giubilini, *supra* note 26 at 169.
40. Leiter illuminates this point. See Leiter, *supra* note 1 at ch1.

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basic challenge of toleration, which is where to draw the line between tolerable and intolerable moral views. My interest is not in a particular solution but rather in the notion that, by its very definition, toleration is "a *normatively dependent concept*. . . . [B]y itself it cannot provide the substantive reasons for objection, acceptance, and rejection. It needs further, independent normative resources in order to have a certain substance, content, and limits."[41] And, therefore, as this discussion reveals, so does conscience.

The case of extremely immoral views does not exhaust the problem of evaluating content. There are cases in which the conscientious claim is just bizarre. Consider, to take Giubilini's example, a doctor who believes that bacteria have moral status and therefore objects to using antibiotics.[42] Perhaps we intuitively feel that such a conscientious claim should not be accepted. But in what sense is that doctor's claim any different from that of a doctor who refuses to perform abortions due to their belief in the moral status of a fetus?[43] An independent value is required to explain the difference.[44] This is especially problematic in the religious context because of its non-rational—that is, faith-based—foundations and practices. In what sense can we justifiably say that a religious obligation to dress up as a rooster is more bizarre or less reasonable than other commonly accepted religious practices?

c. Evaluating the Depth of Moral Beliefs

We hold many moral views. How should we define which of them are conscientious and therefore deserve protection? In the previous section, I briefly mentioned the values that freedom of conscience protects (mainly personal identity, integrity, and autonomy). Whatever these mean, exactly, the protection of conscience should be tailored specifically to the needs of their protection. If the protected interest is personal integrity or identity, protection of conscience should be limited only to the cases in which forcing one to act against one's moral view violates one's integrity or identity. These cases include only moral views that are an essential part of the individual's self-understanding and self-determination. Only a *portion* of an individual's moral beliefs should concern the freedom of conscience.

Such a limitation derives also from another point of view. Legal arrangements, at least to some extent, reflect moral values. Some legal arrangements are often controversial but, nevertheless, the legal system expects all citizens to obey them. We acknowledge the diversity of human perspectives and views but reconcile

41. Rainer Forst, "Toleration" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2017 edition), online: https://plato.stanford.edu/entries/toleration/ [emphasis in original].
42. See Giubilini, "Objection to Conscience", *supra* note 30.
43. See Giubilini's inquiry into this question, *ibid*.
44. In bioethics, this problem has led to much philosophical discussion. Some have argued that the whole concept of conscientious exemption in medicine should be rejected because there is no justified borderline between conscientious claims worthy of respect vs those that are not. See *ibid*. See also Giubilini, *supra* note 26. Others attempt to develop 'reasonableness' theories, in which external values are used to evaluate conscientious claims. See Card, *supra* note 26.

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them with the need to arrange our lives cooperatively, despite social disagreements. We do so by constituting basic democratic procedural and substantial rules while subordinating ourselves to the outcomes these political procedures will arrive at. Taken seriously, this means that every one of us sometimes acts (including the act of refraining) against our moral views. Treating 'moral views' as equating to 'conscience' will inevitably collapse this political structure because it nullifies the basic commitment to "cooperation despite disagreement."[45]

How can social institutions distinguish, then, between plain moral views and conscientious ones? In other words, at what point does a moral view become more than simply that, such that violating it will cause a person to betray their integrity? The problem is both substantial and epistemic. Substantially, there is no good way to distinguish. Any moral view can become conscientious. Given the neutral-formal character of conscience, its 'empty box' feature can hold any moral view. Epistemically, given its subjective, individualistic character, there seems to be no external judgment that can evaluate the importance of an individual's personal values to their integrity and identity. Since, as discussed above, a line must be drawn in order to justify conscience accommodation, here we face another challenge to the concept.

Social and legal institutions deal with this problem using evidential proxies, such as the claimer's consistency. How does their request for accommodation fit into their general lifestyle? Were they devoted to this practice in the past? And so on. Sometimes, the mere fact of requesting (and, if needed, fighting for) an exemption, including the social costs the claimer has to bear in doing so, is a rough proxy of the relative importance of the issue to the claimer.[46]

While such indications may suffice for social treatment of conscience, it is important to note that they might paint an inaccurate picture. In addition, even though evidential factors seem to be neutral to the content of conscience, this is not always the case. Evidential evaluation of conscience claims does not typically involve a strong judgment of their content but it may involve hidden assumptions about 'reasonable' conscientious views or how 'reasonable' conscientious people would behave. Think again about consistency: implementing such an evidential criterion assumes that coherence is a required condition of holding a moral view for it to be essential to human integrity. However, due to the neutral and subjective character of conscience, imposing this condition is, by itself, tricky to justify. The danger is that we will assume how valuable a moral view for an individual is, according to how 'reasonable' people generally treat moral views. And, while understandable, this tendency is subject to problematic biases.

45. Sapir & Statman, *supra* note 2 at 20, following Noam J Zohar, "Co-operation Despite Disagreement: From Politics to Healthcare" (2003) 17:2 Bioethics 121.

46. There are other possible limitations on conscience accommodation, which do not rely on its content but, rather, on estimations about integrity. For instance, we can assume that a person's integrity is violated strongly when they are required to act against their conscience, but less so when required to *refrain from acting* according to their conscience. Hence, protecting the former is plausible, while the latter is not. See Sapir & Statman, *supra* note 2.

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This is especially important in the context of religion. Religious justifications, at least sometimes, are not evaluable in regular moral terms, and this fact renders the evidential process more difficult. Any preference can become religious if I attach the words 'God said' to it. If God said we must eat ice cream, this becomes sufficient to constitute a religious claim. Second, it is difficult to differentiate between religious obligations on the grounds of their relative importance to personal integrity. If the Word of God commands us not to murder, and to eat ice cream, how is it possible to distinguish between these acts in the sense of their centrality to one's set of convictions?

We have seen, then, three challenges to the 'religious accommodation as conscience accommodation' idea. These challenges derive from the neutral and subjective character of conscience and the need to limit its protection, and therefore call on us to formulate some kind of external and objective criterion for the evaluation of conscientious claims. Leaving behind the general issue of freedom of conscience, I will argue in the next section that, in the religious context, such a criterion is available and that it is justifiable to rely on it in the evaluation of religious conscience.

D. Religion as a Communal Practice of Conscientious Commitments

Religion is a social phenomenon that is performed collectively and communally. This characteristic of religion and its importance for individuals are widely recognized. John Witte Jr. and others, for instance, remark that "religion is also ... a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith."[47] As Ahdar and Leigh argue:

> Religion is seldom if ever solely an individual matter. ... [T]he vast majority of human beings only find it meaningful to pursue their religious objectives together with other like-minded individuals. There is an ineradicable collective or communal dimension to religion. Organizations or associations are formed to give effect to this communal aspiration. An individual's religious life is very much tied to and dependent upon the health of the religious community to which that believer belongs.[48]

However, the communal aspect of religion, by itself, provides no reason to distinguish it from other sorts of communal engagement. It is not clear what is 'unique' about the religious form of communal membership, in comparison with, for instance, being a Yankees fan. Communal membership might be valuable for individuals, but apparently it does not merit accommodation vis-à-vis legal obligations.[49]

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47. John Witte Jr, Joel A Nicholls & Richard W Garnett, *Religion and the American Constitutional Experiment*, 5th ed (Oxford University Press, 2022) at 358.

48. Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed (Oxford University Press, 2013) at 376. For the possible implications of this notion to the rights of religious institutions, see the discussion at *supra* note 18.

49. See Leiter, *supra* note 1 at 33.

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Yet, we should not be so quick to dismiss religion's communal aspect, which should not be examined by itself but, rather, in relation to its conscientious dimension. To evaluate religious-accommodation claims, we should combine these elements: religion is a *communal* form of developing and practicing *normative* commitments. In other words, it is a communal function of conscience. In contrast to the communal value of religion by itself, which is widely recognized, the significance of the communal aspect to religious conscience is usually overlooked.[50]

Before I continue, some qualifications are required. There is no categorical dichotomy between religious and non-religious conscience regarding the place of community. First of all, other conscientious acts can—and do—have communal aspects. Individuals who share conscientious moral views opposed to state policy, for instance, such as pacifism, may associate together and support each other. Moreover, it is arguable that such a communal or relational aspect is inherent to any kind of conscientious struggle.[51] Second, religions are not merely communal; they also embrace personal spiritual pursuits. The interrelations between communal and individualistic aspects of religious activity differ between religions and different historical periods, and are often in tension.[52] Religious experiences can definitely be totally individualistic, and that is especially true during the formative periods of new religions. As we saw above, one of the paradigmatic examples of an individualistic conscience claim is Luther's dissent from the Catholic church. Therefore, it is inaccurate to speak of religion as a unique context of communal consciousness; rather, it is a matter of degree. Usually, however, religious activity does involve a central communal aspect.[53]

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50. Two important exceptions are Laborde and Eisenberg. See Laborde, *supra* note 1 at 214-17; Eisenberg, *supra* note 2 at ch 5. Both scholars comprehend the cultural aspect of religion and its effect on the identity and integrity of individuals, and suggest (quite differently) how to take these notions into account in religious accommodation law. In brief, Eisenberg treats religious claims as other minority-group claims, and imposes on them her general theory of 'identity claims'. Laborde distinguishes between two separate kinds of religious claims: those based on conscience-like (obligational) integrity, and those based on cultural (identity-based) integrity, and suggests treating each case differently. While I share with these accounts the notion of the influence of the cultural aspect of religion on personal identity, my account attempts to collide the conscientious and cultural aspects of religion, and to investigate how one affects the other. This perspective is lacking, I think, in the previous literature. On the contrary, I do not deal with the treatment of cultural claims that are not attached to conscientious ones —which I leave to the group-rights discourse.

51. In what follows, I will discuss Walzer's account in this direction. See Michael Walzer, "The Obligation to Disobey" in Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Harvard University Press, 1970) 3. For a general relational approach to conscience, see Robert K Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge University Press, 2012).

52. The tension between individualism and collectivism within religions is a subject for sociology and psychology-of-religion research. See e.g. Adam B Cohen & Peter C Hill, "Religion as Culture: Religious Individualism and Collectivism among American Catholics, Jews, and Protestants" (2007) 75:4 Journal of Personality 709. My general and homogenous discussion of religions is, of course, problematic; in the concluding section, I argue for the need to be sensitive to differences between religions in this context.

53. The argument developed in this paper—that this communal aspect should be the focus of religious accommodation doctrine—does not necessarily suggest we should ignore claims from purely individualistic religious believers. As I explain below, such claims should be treated as

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In addition, I do not argue that, when a conscious dictate is developed and practiced in a communal setting, it is not attributed to the individual. I continue to attribute the personal conscience to the individual holding it. I also do not sustain that, categorically, communal conscience is more worthy of protection than non-communal conscience. Rather, the communal aspect of conscience enriches its importance for the individual; and, if we focus on protecting this enriched aspect, we can mitigate many of the problems protecting individualistic conscience confronts.

In what follows, I discuss the significance of the communal setting to the protection of individual conscience. At first sight, attributing such significance contrasts with the neutral and subjective feature of conscience, which I discussed earlier. Moreover, granting special weight to a communal practice of conscience might discriminate between conscientious claims. I will respond to these concerns by exploring three contexts in which this significance is highlighted. The first is the epistemic context. As noted, accommodating conscience raises epistemic problems that, sometimes, the communal aspect can mitigate. Recognizing an epistemic value of the communal setting does not mean, however, that there is a substantial significance to community. I argue that two aspects of the communal setting constitute such significance: the first is that communal conscience constitutes moral obligations toward others, and the second derives from its importance to one's culture.

a. The Epistemic Role of Community

Accommodating conscience confronts evidential challenges. As we saw above, we should accommodate only core moral beliefs that are sincerely held, but how can we measure moral importance and ensure sincerity? The conscientious claimer's membership in a community that shares the moral values the individual is arguing for gives us a good reason to believe the sincerity of the claim. It also provides a practical yardstick with which to evaluate the importance of the claim —by comparing it to its common value for other group members. This point was raised by Joseph Raz, who observed:

> The right of conscientious objection, when recognized, was traditionally associated with religious objection to military service. . . . Membership in a socially recognized community served as a test of sincerity. People enjoyed the right only if they shared the style of life of a known social group. . . . Any genuinely individualistic conception of the right to conscientious objection encounters difficulties of establishing the genuineness of the objection which the traditionally communitarian approach to the right escaped.[54]

regular conscientious claims, and therefore the law should treat them in accordance with its general attitude towards conscientious accommodation. In Section C, I argued that the concept of conscientious accommodation is difficult to defend, but of course, I did not reach any conclusions regarding this concept.

54. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at 252.

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Inferring sincerity from communal membership is not limited to the available comparison with other members. In many cases, the membership imposes serious costs on the participant. In so far as religions are a comprehensive way of life, devout membership requires innumerable changes to one's lifestyle and perhaps even personal sacrifices. If we are concerned about people making claims for conscience accommodation to avoid general legal obligations, the price an individual has to pay for religious membership reduces this concern dramatically. As Raz points out (in his context), "[i]t was unlikely that people would change their whole way of life just in order to avoid service."[55]

The price one pays when deciding to join or stay in a religious community is not limited to matters of lifestyle. It bears a broader social cost. Entering religious communities (especially conservative ones) is often an act of demarcation from the liberal permissive society at large.[56] To different extents, participation in a religious community separates one from the general social culture, in practices, ideals, values, and interests. In a different context, Jeff Spinner-Halev has accurately illustrated these social costs and argued for their significance in framing religious people's *autonomy*.[57] Accounting for these costs when evaluating sincerity is a crucial step. The communal setting of conscience can also assist in evaluating the importance or 'depth' of the issue at stake. Observing how the community treats the practice in question may help us evaluate its importance to the individual member. If the practice is central, in the community's eyes, it is probably also highly valuable for the member.[58]

It should be acknowledged that this external anchor does not solve the concerns discussed above regarding the use of evidential mechanisms. The appeal to communal practice allegedly discriminates against the dissenter or the unusual believer—the one who thinks that a peripheral religious custom is a main principle of faith and requires zealous observation—not to mention the alleged discrimination against non-religious conscientious claims.[59] Furthermore, some of the biases that derive from the use of evidential proxies, such as the consistency condition, take a new shape in the appeal to community but do not essentially change. If the use of a consistency condition imposes assumptions vis-à-vis

55. *Ibid*. See also Sapir, *supra* note 34 at 648.

56. Obviously, there are relatively liberal forms of religions, in which the values of the community and of the public converge. In these cases, however, it is less common to encounter clashes between religious doctrine and general laws, which call for accommodation. It is therefore plausible to focus on the common case of conservative, perhaps illiberal, communities. It is also important to point out that as long as the religious practice is in tension with common public values or activities, it is not so important if it is ascetic or rather libertine—the resulting social alienation can be harsh in both cases.

57. See Jeff Spinner-Halev, *Surviving Diversity* (Johns Hopkins University Press, 2000).

58. This can solve the problematically irrational aspect of religious conscience: since the phrase 'God said to' can be attributed equally to religious convictions, how can we differentiate between core and peripheral obligations? This question is elusive because it derives from an individualistic view of religion, in which the only relevant parameter is the individual's understanding or experience. In reality, the communal aspect of religion reveals that not all religious obligations are equal and that some are more central to the personal integrity of community members than others.

59. This concern was raised and discussed by Leiter, *supra* note 1 at 94.

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the reasonable believer, here we impose a community-compliance condition on religious claimers, which might be equivalently problematic.

To respond to these caveats, first, the use of evidential tools to assess conscience is inevitable, despite its problems. Appealing to communal conscience does not aim to (and actually cannot) nullify these challenges. However, it does mitigate them by lessening the interest in the content of conscience. Second, the discrimination concern is, I believe, not a convincing one. Treating the community as an evidential proxy does not truly discriminate against dissenters or against non-religious claims. Indeed, those who truly belong to a normative community have gained by that an evidential advantage: it is easier for them to convince the state of the sincerity and seriousness of their conscientious claims. That is not to suggest that individualistic conscientious claims or dissenting claims will not succeed, providing they display sufficient evidential basis for accommodation; it merely suggests that, all things being equal, communal-based claims have an evidential advantage over others.[60] Third, my current standpoint is that, substantially, there is no difference between individualistic and communal functions of conscience. Indeed, under this assumption, the epistemic usage of communal conscience has disadvantages as well. However, I will argue that the communal functioning of conscience also bears substantial values. And, if this argument succeeds, it is important to notice that the existence of these values can be proved by evidence external to the content of conscience.[61]

To conclude this point, I contend that conscientious claims that have a communal aspect hold epistemic advantages in terms of their sincerity and centrality. The advantage of using communal practice as a guideline lies not only in the addition of new indications but also in their neutral-to-content feature. This neutrality is not complete but it lessens the tension inherent in evaluating conscience.

b. Community and Moral Obligation to Others

Let me start with Walzer's account of the moral obligation to perform conscientious objection.[62] It is important to point out that Walzer's position does not provide straightforward support for my argument, since he argues that *all* conscientious objections are communal (in the relevant sense). Nevertheless, he illuminates the first example of the moral significance of communal

60. See *ibid*. Leiter is concerned about this inequality, since he assumes that individualistic conscientious claims would probably confront greater evidential obstacles to proving themselves, in comparison to religious ones. This concern requires us to discuss how the state should formulate conscience-exemption law, in general, which is beyond the scope of this paper.

61. This approach requires us to examine the exact definition of membership in a religious community. How strong does a connection between the claimer and the community need to be in order to gain these epistemic advantages? Think for instance about two individuals imprisoned for life who, as Muslims, seek religious accommodation of a special diet. One of them was born and raised Muslim, while the other converted to Islam after 5 years in jail. Should the law treat them differently? If we only evaluate the epistemic value of their communal belonging, all other things being equal, there might be a difference.

62. See Walzer, *supra* note 51.

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conscience that I argue for: the collegial obligation of the member to their fellow community members.

Walzer holds that a person's obligation to a moral-conscientious ideal is usually embedded within an obligation to other people who share this same ideal and who rely on the individual's observance of it: obligation "begins with membership."[63] Indeed, it relies heavily on *voluntary* membership; thus, the obligation is stronger in the context of small and unorthodox groups than in "established churches."[64] A duty to disobey is constructed when the obligations felt among the minority group come into conflict with obligations incurred in a larger group—usually, the state—and override them.

Walzer provides a typology of social groups that conflict with state authority and concludes that the most typical one is that which calls for *partial* supremacy over the state: the group does not deny the state's general authority but argues that, in a specific area or context, or regarding specific people, its own moral claims are superior to those of the state. Therefore, members of this group are "partial members" of society at large.[65] Members of groups with partial claims to primacy over the state create mutual obligations to each other. They have a *prima facie* obligation:

> [T]o honor the engagements they have explicitly made, to defend the groups and uphold the ideals to which they have committed themselves, even against the state, so long as their disobedience of laws or legally authorized commands does not threaten the very existence of the larger society or endanger the lives of its citizens.[66]

The focus on the sociology of disobedience is of great importance. For if we contribute a moral obligation to uphold shared ideals within social groups, then it is plausible to argue that the state should consider this kind of obligation within the process of recognition and evaluation of conscientious claims. However, the authority's duty to consider such social obligations does not derive automatically from their mere existence. We need to justify *why* they are worthy of protection, or, in other words, what liberal values are infringed if we do not consider them. Yet, this does not seem difficult to fulfill. These obligations themselves constitute a new dimension to the original conscientious claim, thus their coerced breaching involves the violation of (yet another dimension of) personal dignity and integrity. A Muslim policeman's refusal to shave off his beard, for instance, does not only rely on his deep commitment to a religious conviction obligating him to wear a beard; it also relies on his deep commitment to his family, friends, specific community, and the Muslim community worldwide. All of these factors, together, constitute his commitment to the specific objection to removing his beard, and its coerced violation hurts his integrity across all these dimensions.

63. *Ibid* at 7.
64. *Ibid* at 10.
65. *Ibid* at 15.
66. *Ibid* at 16-17.

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Certainly, this does not suggest an *a priori* advantage to religious communities. Walzer assumes that *all* real-world conscientious objections are community-obligated. In fact, he lessens the weight of religious membership (as opposed to other forms of membership) in constituting collegial obligations. He treats membership in established churches, at least to some extent, as involuntary and, therefore, as holding less obligation-constitutive power.

I do not wish to assess Walzer's general view of all conscientious objections as communal. It is clear, however, that the weight of communal obligation is a matter of degree, and it varies in different circumstances depending on the depth of social connection and commitment within a specific group. This is true also in the context of religion. Unlike Walzer's latent contempt for religious membership as a source of collegial obligations, in many cases, religious affiliation unquestionably does create such obligations. Participation in a religious community requires the willingness to be separate, in some important senses, from the general public. Therefore, as I argued previously (following Spinner-Halev), such participation should be treated as an autonomous and meaningful act.[67] In these cases, the fellow members of the religious community share a mutual obligation to observe their shared values and commitments.[68] Moreover, it seems that the conservative religious context is a natural candidate for an obligation-constituting platform, due to its encompassing feature on the one hand, and its societal differentiation feature on the other.

c. Religious Community as Culture

Communal conscience is not only valuable due to its obligation-to-others nature. In some contexts, mainly religious ones, it has yet another substantive value. Conscientious claims that are developed within a community can be viewed as part of the individual's culture, and the cultural aspect of the conscientious conviction constitutes another reason to protect it.

Let me clarify that I am not arguing that religious accommodation derives from a right to culture. Although such an argument has been presented in the literature, I find it unconvincing.[69] Cultural rights deal with declining cultures and are concerned about their potential disappearance. Therefore, the discourse addresses general policies meant to preserve cultures, such as language rights. It is almost impossible that a specific accommodation request can be justified on these grounds. It is also normatively implausible that the justification of religious accommodation is conditional on the existence of such circumstances. Having said that, we should acknowledge that religions typically constitute all-encompassing cultures. The scholarship defending and justifying cultural rights discusses the relevance of culture and its preservation to liberal values. I argue

67. See Spinner-Halev, *supra* note 57.
68. That does not mean that there is a clear-cut definition of opting in and opting out of the community (in this obligational sense). Walzer touches upon these questions: see Walzer, *supra* note 51 at 20-21.
69. See Sapir & Statman, *supra* note 2 at 73; Sapir, *supra* note 34 at 625.

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here that religions usually function as cultures and that the justifications of cultural protection influence the value of religious accommodation.

I base my argument on a rather general definition of culture, as "a comprehensive way of life,"[70] which determines a large range of human activity.[71] "It affects everything people do: cooking, architectural style, common language, literary and artistic traditions, music, customs, dress, festivals, ceremonies."[72] Although neither of these aspects is necessarily required to define culture, they illustrate its comprehensiveness. Notwithstanding, cultures do not actually determine how individuals act. The notion of personal autonomy is not mutually exclusive with acknowledging the dominance of our cultural background in our autonomous decision-making process. Moreover, acknowledging culture's role in this process has led some liberal thinkers to emphasize the need to protect cultures to render this autonomous process possible. Culture, according to these accounts, is a necessary mediator of the meanings of our choices. Without any cultural reference, our evaluation of possibilities is restricted. Therefore, some sort of cultural affiliation must be protected by the state.[73]

However, this does not justify protecting a *particular* culture. Members of declining cultures do require some alternative to their lost culture, but this can be achieved by helping them to adjust and assimilate into the general culture. Referring to culture as a prerequisite for evaluating choices may constitute a right to *a* culture but not to one's *specific* culture. An alternative approach draws on the importance of the specific culture in which the individual was raised, in terms of their personality and identity. As Margalit and Halbertal put it:

> The right to culture is … the right to secure one's personality identity.… [I]t is clear that all persons are supremely interested in their personality identity—that is, in their ability to preserve the attributes that are seen as central by them and the members of their group.[74]

The importance of one's specific culture to the realization of liberal values can be understood in various ways. Alan Patten explains that it is a "recognizable phenomenon" that "many people value their culture intrinsically;" they feel an attachment to their culture, a special bond to other members of that culture, and share with them "many common points of reference that [certain] institutions and practices make salient."[75] They may come to value these institutions and practices themselves, be proud of their cultural heritage, and make an effort to preserve it. As a result of this attachment, "for people who identify with their

70. Avishai Margalit & Moshe Halbertal, "Liberalism and the Right to Culture" (1994) 61:3 Social Research 491 at 497.
71. For an account of the problems of definition, see Patten, *supra* note 28 at ch 2. I see no reason why the different definitions should affect my argument (although they may limit its scope).
72. Margalit & Habertal, *supra* note 70 at 498.
73. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995).
74. Margalit & Halbertal, *supra* note 70 at 502.
75. Patten, *supra* note 28 at 95-96.

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culture, it is difficult . . . to distinguish disrespectful treatment of the culture from disrespectful treatment of them as individuals."[76]

Religions, generally speaking, function as all-encompassing cultural systems.[77] They involve a shared set of narratives, beliefs, and traditions, bound up in a particular lexicon, all of which compose social practices and institutions.[78] The corpus constituted by these components creates the lens through which religious people—at least, the devout—examine and evaluate the options they encounter. And, as with other forms of culture, they cherish and feel attached to this corpus. These characteristics certainly do not apply to all religious people, just as they do not apply to all members of various cultures; but, for many religious groups, and many of their members, these traits constitute a recognizable phenomenon, in Alan Patten's terms.

If religions function as cultures, then the justifications of cultural rights should apply also to preserving religions. Sometimes this is termed 'religious accommodation' as well, but in a different sense to that applied in this paper. This duality is apparent in Patten's comparison of the two. He recognizes the dual meaning of a religious conviction for the religious member—the conscientious and the cultural—and frames them as two elements of the same personal interest:

> It is true that religion has certain special features that mark it out for unusually strong protection. A person may feel that she has committed an absolute wrong, or sin, if she is unable to fulfill certain of her religious convictions. And religion involves an exercise of judgment about ethical and metaphysical questions that seems particularly deserving of protection. But attachments to a culture can be of crucial importance to individuals too in ways that track, if at some distance, the importance of religious convictions. Violating a cultural attachment may not produce a feeling of having sinned, but it may lead to a sense of having betrayed or compromised a relationship of community that is of central importance in an individual's life. Likewise, attachments to culture may not be worthy of autonomous protection because they represent ethical or metaphysical judgments, but they may represent judgments about the basic social relationships that a person wants to be part of which are also worthy of protection.[79]

Here, Patten describes vividly how religious norms are important to the believer's identity or integrity in two ways. First, note the conscientious aspect—a believer's feeling of having sinned if they are prevented from acting according to the religious norm, and the ethical, metaphysical questions involved. Second, the conscientious aspect is accompanied by cultural or communal considerations, such as a feeling of being guilty of compromising community relationships that the person needs and values in their life,[80] or cherishing these norms for the implicit judgments they make about our social relationships.

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76. *Ibid*.
77. See Spinner-Halev, *supra* note 57.
78. See Sapir, *supra* note 34 at 631.
79. Patten, *supra* note 28 at 168.
80. This echoes, of course, Walzer's approach discussed above. See Section D.b.

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The importance of culture to choice or identity does not suffice when it comes to justifying cultural rights; the obligation of the state to protect it needs to be established. This is complicated, since cultures change, decline, and disappear naturally through social processes that are not directly a result of state conduct. As Patten observes, a person's preference for the preservation of their specific culture is a subjective one, and the loss of that culture may, indeed, cause them disadvantages. But even though a liberal state might have reasons to prevent these disadvantages, the individual has no moral claim with which to demand that the state do so, since such an act imposes costs of different kinds on third parties.[81]

Notice that the 'subjective preference' objection threatens the whole idea of conscience accommodation. If a legal norm was accepted following a fair procedural process, why should we not treat the conscientious claimer as someone merely presenting a subjective preference? Why should we impose the price of their exemption on others? But, as I argued above, we tend to view our conscientious beliefs differently from mere subjective preferences, due to their impact on our integrity and self-identity. On this premise, and assuming culture is vital to many people's integrity as well, why do cultural rights differ?

The answer relies on the role of coercion. Conscientious convictions are *not* regular subjective preferences, and this poses negative duties on the state. The state can coerce someone to act against their subjective preference but not against their conscience. However, it is not required to actively assist people to perform their conscientious convictions. If my conscience commands me to travel to Africa to help the poor, I have no grounds to demand that the state fund my trip. The state does have a negative requirement to not hurt my integrity (that is, to not coerce me to act against it); but, if I feel my integrity is hurt because I *must* help the poor in Africa but cannot afford it—well, that's my problem. And that is precisely the difference between freedom of conscience and cultural rights.

On this basis, we can differentiate between specific treatments of culture according to the amount of governmental coercion involved in them. Coercion, of course, is an ambiguous term.[82] But, I think, it is evident that when a specific practice is disturbed by the state to the extent that the individual feels compelled to raise a conscientious claim against this disturbance, and the practice in question is also an important part of that person's culture, then this is a case in which a state obligation to accommodate can be based not only on the violation of conscience-based integrity but on the violation of culture-based integrity as well.

Note that this kind of phenomenon—a convergence of conscientious and cultural importance—is extremely common in (if not unique to) religions. This is because many religious cultures share a special feature that is less common in other cultural settings: a strong normative order that derives its authority from

81. See Patten, *supra* note 28 at ch 3. Patten concludes that the only case in which a cultural group can demand cultural accommodation is when the state action is unfair toward the group (and elaborates on the conditions of fairness in this context).

82. See for instance the discussion on coercion in Sapir & Statman, *supra* note 2 at 80-82.

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a shared set of beliefs, values, narratives, and so on. We owe a lot of our understanding of the entangled relationship between these norms and the narratives that ground them to Robert Cover's "*Nomos* and Narrative."[83] Cover illustrates the reciprocal connections between our concept of the normative and the narratives that constitute our understanding of the universe and that stem from our culture. He does not refer specifically to religions but to normative communities in general, but it seems that conservative religious communities provide the strongest example of his theory.

Cover reveals how religious norms bear meaning far beyond the obvious 'God said to do x' frame. Religious norms, as part of a religious culture, reflect (and encounter) greater narratives, beliefs, and traditions. The normative aspect of a religion is the field in which believers execute these components of their religious culture in practice. Therefore, religious norms function as an important aspect of the cultural corpus. Such a norm obligates the devout not only because they have to obey God's will but also because their comprehensive worldview depends upon it. The normative aspect of a religion is therefore one of the main expressions of a devout person's system of beliefs and narratives in reality.

The central place of the normative within religious cultures is the primary source of tension between religion and state. Like religions, the modern state speaks mainly in normative language. And the norms of the two systems often contradict each other.[84] When the state uses coercive power against religious norms, it is pressing violently on religious culture (expressed via the norms) and not only on religious conscience. Here as well, it is useful to draw on Cover's conceptualization of the state's "jurispathic" violence.[85] Cover describes our universe as composed of innumerable normative worlds (which can simply be described as normative cultures) engaged in a process of "jurisgenesis"—the creation of new normative meanings.[86] The state's monopoly on violence grants it the power to 'kill' these alternative normative worlds and to subordinate all normative communities to one statist legal system.[87] Cover's attitude toward this phenomenon is not unequivocal, but he at least recognizes the violent dimension of state supremacy in this context and the need to properly justify it. In other words, his theory recognizes that coercion against religious norms hurts religions not only in a conscientious sense but also in a cultural one. From the perspective of the individual, this means that, in cases of cultural conscience, an individual's claim against the coercion of the state is twofold: conscientious and cultural alike.

83. See Robert M Cover, "The Supreme Court 1982 Term—Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4.
84. See Gilad Abiri, "The Distinctiveness of Religion as a Jeffersonian Compromise" (2020) 125:1 Penn St L Rev 95.
85. Cover, *supra* note 83 at 40.
86. *Ibid* at 11.
87. This jurispathic process is not exclusive to the modern state. Highly regulated communities have their own ways to control the legitimacy of religious beliefs and practices (think, for example, on the Catholic doctrine of Papal infallibility). The state, however, is unique in its monopoly on violence which may be used to construct the jurispathic process.

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In sum, when a conscientious claim has a cultural origin, state coercion violates enriched aspects of the integrity and identity of the claimer, and, therefore, accommodation can be demanded on two grounds. These two grounds not only make the claim stronger but, moreover, they also enable a separate focus on the communal aspects of the conscientious claim.

To conclude this section, then, a liberal state has strong motivations to accommodate conscientious claims when they arise in a communal context; and it presumably has an easier job doing so than when it accommodates individualistic conscience. This is for various intertwined reasons. The first is that a communal context provides important epistemic information. The second is that communal conscience holds specific value for the community member's identity and integrity, such that coercing them to act against this kind of conscience is especially problematic. This value has been explained through two prisms: (a) communal development of conscience constitutes obligations to other members; and (b) given the function of communal conscience within the structure of cultures, it carries additional importance for the personal integrity and identity of the individuals who are members of those cultures.

I should emphasize that I do not argue that the communal or cultural performance of conscience is worthy of protection *to a greater degree than* individualistic conscientious claims. This might have been true in a hypothetical setting, in which two conscientious claimers are identical in every relevant parameter except for the fact that one created their conscientious belief individualistically while the other created it within a conscientious community. This setting, however, is extremely theoretical. In reality, individuals develop their conscience in a given social setting,[88] and the members of a community do not shed their individuality just because of their membership.[89] Furthermore, such a hypothetical example assumes full epistemic knowledge, which is not available. And lastly, such a conclusion requires that we discuss considerations that might favor individualistic over communal conscience. While such considerations probably exist, I do not attempt to discuss them here. Nor do I seek to compare communal conscience with the individualistic version. Rather, I aim to show that the communal function of conscience enriches its importance for the individual and, hence, increases the justifications for accommodating it—and that focusing on these justifications mitigates the serious problems that accommodating conscience confronts. Therefore, as a legal policy, when conscience-accommodation claims are presented as a derivation of communal practices (which is the case in most religious contexts), it is plausible that focusing on the communal considerations will help in deciding whether to accommodate them—and, if so, how.[90]

88. See Walzer, *supra* note 51; Vischer, *supra* note 51.
89. See *supra* note 52 and accompanying text.
90. This does not mean that individualistic claims are doomed to fail or that, if a communal examination of a religious claim fails, it cannot succeed from the individualistic point of view. But these possibilities are beyond the scope of this article.

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E. Alternatives to Hands-Off: A Preliminary Outline

In the previous section, I argued that religious-accommodation claims should be treated as communal and cultural forms of conscience. What exactly does that mean in practice? First of all, it means that the hands-off approach is inadequate for evaluating religious-accommodation claims. This statement, however, requires clarification. I argued that the communal and cultural aspects of religious conscience do not substitute the individualistic aspect of it but enrich it as an additional personal interest. But any practical suggestion to replace the hands-off doctrine will presumably narrow the scope of religious accommodation. The current legal attitude ignores the communal context—that is, it does not require any communal component for a religious-accommodation claim to succeed. Any alternative suggestion will presumably impose such a requirement. So how do I get from enriching the value of religious conscience to reducing accommodation for it? The answer lies in the theoretical and practical problems of the current doctrine outlined in this paper. It is necessary to limit individualistic conscientious claims, but this necessity encounters conceptual, epistemic, and practical problems. The result is that, as a matter of practice, courts do evaluate factors such as communal participation but do not typically *say* that they do. To restate my first conclusion: as long as we fail to produce a comprehensive and satisfying theory for the treatment of individualistic religious conscience, it is desirable for legal systems to focus on the communal and cultural aspects of religious-accommodation claims. If a claim fails on these communal grounds, it can still, theoretically, succeed on individualistic grounds—albeit it then faces the problems of such a claim, as explored above.

So what might this much-needed alternative look like? Obviously, the features that constitute the value of communal conscience (creating obligations toward others and functioning as a normative factor of culture) should be foregrounded. However, their evaluation is a complex task, and a comprehensive answer is beyond the scope of this paper. Here, it suffices to distinguish between two types of inquiry: to examine the official doctrine of the relevant religion, and to examine how religious communities function in reality. In other words, the distinction is between religious law or theology vs. sociology or psychology of religion.

Religious-accommodation law should, generally, focus on the latter. Religious law and theology carry important information, but it is only instrumental to the understanding of religious social groups. Focusing on religious law *per se* as a parameter for evaluation of religious-accommodation claims does not achieve the adequate protection of communal conscience. Ultimately, we are interested in the individual's conscientious convictions. Relying on official religious law binds the individual's identity and integrity to the official understanding of the religious institutions. Taking into account the communal element of religion means framing how this element actually influences the individual's religious self-determination—*not* how the individual *should have felt* about their

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religious convictions *if* they had devoutly followed the official doctrine of their religion.[91] In addition, adjudicating religious-accommodation claims according to official religious doctrine will obstruct the natural social processes that religions experience and discriminate against dissenters.[92] To return to the concepts developed by Robert Cover, adhering to official religious doctrine will unjustifiably grant the religious institutions 'jurispathic' power within the community.[93]

To shape a justifiable alternative to the hands-off doctrine, we need not only to understand the official doctrine of religions but also to internalize how communal participation affects individuals' self-determination and identity. In this context, several components are available, some of which I will mention here. First, what matters is not how the official doctrine of a given religion relates to a particular conviction but, rather, the social meaning of its practice or violation. Social meaning can derive from various sources, such as a common history regarding it, spiritual or mystical content attributed to its observance, or its current social symbolization.

Second, attention must be paid to religious subgroups and the borderlines that arise between them. Religions, even centralistic ones, are not homogeneous. Hence, the ways in which the relationships between subgroups are regulated, and the social processes of subgroup development, vary between religions. Paying attention to subgroups is a necessary aspect of evaluating the importance of religious claims to the individual. A person's membership in a religious subgroup is often a central part of their identity, maybe even more than their affiliation to the official religion itself. Therefore, the boundaries defining these groups likely hold a high value for their members.

The third component is the issue of religious dissenters. One of the main advantages of the hands-off approach, or so it is commonly said, is that it treats orthodox opinions and dissenting opinions alike. An approach such as that suggested here can discriminate against unorthodox dissenters' religious conscience. However, if we focus on communities rather than religious doctrines, this concern is mitigated. Religious dissenting is, itself, a communal process, as it is rarely performed solitarily. It is historically common for a phenomenon that was once considered an expression of religious dissent to eventually turn into a new religious subgroup. In such cases, the dissent itself has an important (sometimes, crucial) communal dimension to it. When dissenters pay a social price, they need their internal communal support—which, in its own right, constitutes separate narratives for the dissenter-group members. Being aware of such nuances should produce strong legal protection for dissenting subgroups.

Fourth, turning to religious doctrine when required should not be limited to the specific accommodation in question. No less important is a religion's meta-

91. My preference for sociology of religion over religious law and theology contradicts the approach of Sapir & Statman, *supra* note 2 at 87. It deserves a broader discussion and critique, which I aim to provide elsewhere.
92. *Cf* Madhavi Sunder, "Cultural Dissent" (2001) 54:3 Stan L Rev 495.
93. See *supra* note 87.

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attitude to the issues concerning unorthodox practices, such as the regulation of controversy and dispute; the relationship between subgroups within the religion; the place for personal interpretation and practice; and so on. Understanding the dynamic of a specific religion vis-à-vis these issues can illuminate our understanding of what 'communal conscience' actually means in a given context.

I am mindful that the communal proposition demands that we take into account numerous factors and delve into nuanced details of religious doctrine. Possible objections to my proposed account on these grounds can include the questionable capability of courts to implement it, on the basis that judges cannot be expected to be experts in theology or sociology. This objection, I think, is weak. Courts deal with complex materials of various kinds every day, from economics to climate change, from cyber protection to archeology. They do so using their best judgment, with the assistance of expert opinion submitted by the parties involved. The matter of religious accommodation is no different in that sense.[94]

A second possible version of this objection is that any kind of decision about how religions operate, what the religious doctrine is, or how central a religious practice is constitutes prohibited state interference in religion. Indeed, this is one reason given in the literature in favor of the hands-off doctrine. Targeting our inquiry at sociology of religion rather than theology weakens this objection. The focus on the social role of communal conscience makes the courts' decisions *external* to religious doctrine, by definition. Even when the court has to deal with the content of religious practice, it is not interfering in religion. Its convictions about a religious practice and doctrine cannot reasonably be considered a decision *for* the religion on an internal dispute; rather, they constitute an external decision, the motive of which is limited to the state's needs to accommodate religion properly.

Conclusion

The 'hands off religion' doctrine framed within the American Constitution requires courts to ignore any evidential knowledge about the practices of the religious community and about the official religious doctrine of the accommodation-claimer's affiliated religion. I explained this doctrine and its rationale by highlighting its reliance on freedom of conscience. However, conscience's individualistic nature triggers complex difficulties in setting the borders of conscience accommodation, and the reliance on it for the sake of religious freedom raises questions of redundancy and equality.

I suggest that courts should focus on the communal significance of the religious activity when evaluating religious conscience. I argue that the fact that conscience is produced and practiced in a communal setting should affect how we

94. See Ira C Lupu & Robert W Tuttle, "Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders" (2007) 7:1 Georgetown Journal of Law & Public Policy119; Michael A Helfand, "Litigating Religion" (2013) 93:2 BUL Rev 493 at 545; Richard W Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?" (2007) 22:2 St John's J Leg Comment 515 at 527-38.

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treat it. This is because of its epistemic value—required evidence that it can provide us. More importantly, the communal aspect carries substantial significance in terms of the essential values that we protect when we accommodate conscience. As we have seen, this is relevant to two aspects of communal relationships: creating mutual obligations, and the cultural meaning of communal conscientious obligations. While neither of these aspects is unique to religion, they are prominent within most religious activities (and the latter is probably almost exclusive to the religious sphere).

This proposed approach primarily has implications for how the law should treat religious-accommodation claims. I am careful not to argue for an effect on other kinds of conscientious claims, nor to compare the two categories, as this requires elaboration on many topics worthy of a separate paper. Moreover, the implications for the religious context itself are yet unclear. In general terms, I call for the rejection of a religious-doctrine-based approach, in favor of a more sociological one.

There remains much more work to be done in terms of basing and concretizing the argument presented in this paper. I have relied here on many assumptions about the nature of conscience, on the values justifying its protection, and on religious activity. These assumptions need further discussion to provide fine-tuning of the theory and its implications. Nevertheless, the paper provides a comprehensive baseline argument for the necessity and possibility of a communal theory and, respectively, a new legal doctrine.

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