

The Ironies of the New Religious Liberty Litigation

Cathleen Kaveny

The plaintiffs in recent religious liberty litigation are very different from plaintiffs in earlier cases. They are not marginalized or politically powerless. They seek to return the country to its conservative roots, rather than to escape the dominant liberal mindset. But their success has come at a cost to their own deep commitments. This essay will proceed as follows. First, I describe key elements of recent religious liberty cases, highlighting the ways in which they go beyond the older case law that ostensibly served as precedent. Second, I argue that these decisions ironically fall prey to the communitarian critiques of modern liberal democracy that have been prominent in conservative religious circles for thirty years or more. Finally, I sketch a new way forward, drawing on the notion of civic friendship and the Golden Rule, and suggest the question religious believers should be asking now is not “What are our legal rights?” but “What do we owe morally to fellow citizens who believe differently than we do?”

Objecting to practices such as abortion, contraception, and same-sex marriages, some religious believers have claimed that the First Amendment’s guarantee of religious liberty should insulate them not only from direct involvement in such activities, but also from more remote connection. And their claims have been quite successful. In *Burwell v. Hobby Lobby Stores* (2014), the Supreme Court upheld the right of the defendant, a closely held corporation owned by evangelical Protestants, to be relieved from the obligation to provide certain contraceptives, which the owners believed to be abortifacient, in the employee health insurance plan.¹ In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018), the Court decided (albeit on narrow grounds) in favor of a Christian baker who refused to bake a wedding cake to celebrate the union of a same-sex couple.²

Some people believe that these cases are victories for religious believers in the United States. If they are victories, in my view, they are Pyrrhic ones. They will not help move American society toward a more stable and mutually respectful pluralism. Moreover, they will neither protect nor advance the Christian worldview to which the religious litigants are most committed. In their quest for legal victory, the lawyers for the plaintiffs have advanced a way of viewing human beings

and human society that has been heavily (and persuasively) critiqued by Christian philosophers and theologians over the past thirty years.

Using the image of “civic friendship” and the ideal of the Golden Rule, I ponder what might happen if religious communities began to ask themselves not “What are *our* rights?” but “What do we *owe* our friends, neighbors, customers, and employees who believe differently than we do?” and “What is the virtuous way of dealing with conflicting moral beliefs, given our particular roles and role-related obligations?”

Before the culture wars, religious liberty cases were comparatively rare, and most successful ones followed the same pattern. The plaintiffs were members of small, marginalized, or isolated religious groups. They sought personal relief from a law of general applicability; they did not seek to change the law for everyone else. Generally, such plaintiffs wanted to be left alone. Moreover, the exemptions they sought generally did not impose a burden on persons outside their community. In short, the exemptions they sought were narrow and contained.³

For example, the Amish plaintiffs in *Wisconsin v. Yoder* (1972) wanted the freedom to educate their children at home.⁴ They did not question the need to educate their children, but instead argued that Amish teenagers would benefit from the home-based vocational training that would better equip them for the life most would eventually lead. They did not attack the state’s authority to mandate secondary education for the majority of children. Similarly, the Native American plaintiffs in *Employment Division v. Smith* (1990) sought relief from narcotics laws that impeded them from smoking peyote as required in their religious rituals.⁵ They did not argue that their right to religious liberty gave them a license to consume other illegal drugs, or even to ingest sacramental drugs outside of the ritual setting.

In *Sherbert v. Verner* (1963), the plaintiff, a Seventh-day Adventist, challenged a South Carolina decision that rendered her ineligible to receive unemployment compensation because she refused to work on Saturday, which was her Sabbath. South Carolina law already accommodated those who refused to work on Sunday, in accordance with the religious views of the majority of the population. Adell Sherbert did not want to take the Sunday exemption away from anyone else. She simply wanted to claim an analogous benefit for herself. Extending the same consideration to Seventh-day Adventists, who constitute less than 1 percent of the population, would not harm the majority or even significantly burden the public purse.⁶

The new religious liberty plaintiffs do not fit that pattern in three respects. First, they are not politically powerless minorities. It is true that many religious conservatives see themselves as marginalized and derided, particularly in elite universities. At the same time, however, they wield significant political and cul-

tural power, as the election of Donald Trump demonstrates. The shifting composition of the Supreme Court, and the dominance of the Federalist Society in the selection of lower-court judges, testifies to the ability of conservatives, and particularly religious conservatives, to marshal political forces in a more or less evenly divided public square. Not only do they have an agenda for society, they also have a realistic chance of accomplishing it.

Second, the plaintiffs in recent religious liberty cases are not isolated from the broader society. Some plaintiffs are not individuals, but rather corporations that are integrated into the life of communities across the nation and whose decisions have an impact on many others. Hobby Lobby is not a small business tucked away in the hillside. Its eight hundred stores grace malls and shopping plazas across the country.⁷ Furthermore, by their own admission, the owners of Hobby Lobby see their wealth as a gift from God, and as a means of evangelizing the culture.⁸ They have provided substantial support to the Museum of the Bible in Washington, D.C., which proffers a particular (and contestable) view of biblical history to thousands of visitors each year.⁹ By contrast, the owner of Masterpiece Cakeshop, who refused on religious grounds to serve same-sex wedding customers, was a small businessman. Yet his was a public business, which attracted customers not only through storefront sales, but also by Internet advertising.¹⁰

Third, the new religious liberty plaintiffs are not morally and politically quiescent. The Little Sisters of the Poor believe that abortion and artificial contraception are morally wrong for *everyone*, not simply for Roman Catholics.¹¹ Evangelical Protestants such as the owners of Masterpiece Cakeshop believe that the extension of the institution of marriage to include same-sex couples is premised on a faulty understanding of the nature and purpose of sexual union – for everyone. They do not seek merely to be left alone. Instead, they wish to convince the country that their moral views describe the correct way to live, not only for Christians, but for everyone. They do not avoid political engagement; they actively pursue it. I do not mean to suggest, of course, that the plaintiffs are acting alone. In many of these high-profile cases, they are cooperating with the legal and moral program of their attorneys and advisors, who often select them as the “face” of their cause for strategic reasons.

The status of the new religious liberty plaintiffs shapes the litigation of their claims. It alters the appropriate description of the relief they seek from the courts. It also distorts the application of the four-pronged test applied to religious liberty claims under the Religious Freedom Restoration Act (RFRA).¹² That test asks the plaintiff to show that it has a) a *sincere* religious belief on which the law impinges; and b) that the impingement counts as a *substantial burden* upon that belief. Correlatively, it asks the government to show that c) the objectionable law is justified by a *compelling state interest*, which d) the government has pursued with the *least restrictive means*.

Exemptions and “As Ifs.” Religious liberty plaintiffs commonly say they are seeking an “exemption” from prevailing law. The word “exemption” comes from the Latin word *exemire*, which means *to remove, take out, or take away*. But the goal of many contemporary religious liberty plaintiffs is not removal; it is reform. Within their moral worldview, the positive law mandating contraceptive coverage, permitting abortion, and enabling same-sex marriage is not legitimate, because it is an unjust law. They want to be able to act *as if* that positive law has not been enacted, because they do not believe it is fully binding as law.

What are the differences between an exemption and an “as if”? The concept of exemption centrally applies in three cases: First, it applies in cases involving activities that are physically and temporally set apart from day-to-day life, such as religious rituals. Participants in the ritual claim only that the laws they challenge (such as laws against using narcotics) should not apply in this context. They are perfectly willing to follow it in other times and places. Second, the term exemption applies when a community (such as the Amish) sets itself entirely apart from broader societal norms in whole or in part. Third, it makes sense to talk of an exemption when religious communities seek to displace the secular law so that they can follow their own norms on particular well-defined topics, such as divorce and remarriage.

But the exemption concept does not work as well in cases in which the claimant is making a general judgment about the injustice of the law as it applies to everyone. Martin Luther King Jr., for example, would not have been satisfied with a mere exemption to the Jim Crow regime. As his “Letter from Birmingham Jail” testifies, he believed the laws mandating segregation were unjust laws in the eyes of God. He acted *as if* they were not binding, because in his view, they were not. And acting as if the positive law was not binding was part of a step to changing that positive law to better conform to the moral law.

The same can be said about the plaintiffs in the new religious liberty cases. The legal relief they seek is not best understood as an exemption. They do not want to be exempted from modern society: they do not want to be carved out from it, or set apart from it, in whole or in part. They want, instead, to transform it. They want to live *as if* the unjust law has not been enacted in order to invite others to live that way as well, and eventually, to overturn the law that they believe to be unjust. In these religious liberty cases, the goals of exemption are transmuted into the goals of civil disobedience, but without the personal costs.

What difference does it make that plaintiffs in the new religious liberty cases are asking for an “as if” form of relief rather than an exemption? First, and more generally, the cases are conceived and litigated as part of a broader culture war. Consequently, they implicate both the stability and the pedagogical value of the law in ways that the older cases did not. Second, the stakes of granting an exemption become higher for their opponents, because they cannot avoid the recogni-

tion that they will not receive similar treatment when they become the minority asking for accommodation for their beliefs.

Sincerity and Burdens. RFRA requires the plaintiff to show both that they have a sincere religious belief and that the law they challenge imposes a substantial burden on their ability to act on that belief. In practice, however, the courts limit their inquiry to whether the plaintiff's objections to the law are sincere. Quite understandably, the courts do not want to put themselves in the position of weighing burdens on religious belief. Doing so would require judges to put themselves in the religious framework of the plaintiffs, and thereby risk excessive entanglement between church and state. Yet reducing "substantial burden" to "sincerity" also has its dangers, which are exacerbated in the new religious liberty wars.

What, exactly, is a sincere objection to a burden? Does it need to be tied narrowly to the legally required act itself, or can it relate to the broader consequences of the act? Consider, again, the Little Sisters of the Poor, who objected to signing a form saying that they refused to provide contraceptive coverage on religious grounds. That act, viewed in isolation, was surely not burdensome. The burden was being conscripted, no matter how tenuously, into a regulatory scheme that could result in the provision of contraception to their employees.

What about objections that are sincerely strategic? The University of Notre Dame joined the U.S. Catholic bishops and the Little Sisters of the Poor in vociferously objecting to the contraceptive mandate. After they won the case, however, Notre Dame voluntarily decided to cover contraceptives (but not abortifacients) in its employee health plan. The University could not have sincerely objected to the act required of them by the law, since they did so voluntarily. What they did object to was the fact that it was required of them. Notre Dame sincerely feared that if the government could impose a contraceptive mandate today, it might require them to cover abortions tomorrow. Theirs was a strategic, slippery-slope sincerity.

Finally, my sincere objection may be keyed to my moral assessment of the law. I may honestly experience each of its burdens as onerous, no matter how minimal they may be in themselves, simply because I believe them all to be unjust. The subjective weight of a burden, after all, is correlated to our sense of its meaning and purpose. Is being sincerely upset at being slightly impinged upon by what I believe to be an immoral law enough to qualify as substantially burdened? Or does the demand of action or inaction need be onerous in itself?

Compelling State Interests and Competing Moral Perspectives. Once the plaintiff has met its obligation to show a sincere religious belief that is substantially burdened by the law in question, it is time to consider the government's response. The government must show that the law furthers a compelling state interest, which is pursued with the least restrictive means.

But this raises a question: whose perspective on the merits of the law should the courts adopt? This question was not pressing in many older religious liberty

cases because the plaintiffs were not interested in challenging the law's general applicability or undermining the legitimacy of the interests that it furthers. But it does matter a great deal in the new cases, since competing views on the merits of the law correspond to broader divisions in society, and even within the judicial branch itself.

So how should judges decide whether the government interest is *compelling*? That term involves a value judgment. To many people, of course, birth control is morally unproblematic. But others think differently: they hold that no governmental interest furthered by the provision of cost-free birth control can be compelling because no ends can justify morally objectionable means. I suspect that judges in recent cases have sidestepped this issue by avoiding direct consideration of the moral values animating a piece of legislation, particularly if it embodies moral values to which they are hostile. Instead, they bring their values to bear indirectly, by second-guessing the legislators in considering whether the law could have been designed in a less restrictive way.

Consider Justice Samuel Alito's majority opinion in *Hobby Lobby*. He assumed, quickly and grudgingly, that the government had a compelling interest in providing contraception. Moreover, he reduced the governmental objective to its narrowest possible mechanical description: "guaranteeing cost-free access to the four challenged contraceptive methods." But that is rather like saying that the aim of the civil rights acts was limited to ensuring that African Americans could sit anywhere they wanted on the bus. Just as the interest served by the civil rights acts was racial equality, the interest served by the U.S. Department of Health and Human Services regulations was to provide seamless, integrated preventive health care for women.

The skepticism Alito signaled about the weight of the government's interest did not dissipate when he assumed without deciding that the interest was compelling. Instead, it was channeled into his stringent application of the fourth prong of the test, which asks whether the government could have used less restrictive means to achieve that interest. He toyed with the argument raised by the plaintiffs that the government might have provided free contraception by expanding another program, such as Title X. In the end, Alito simply decided that the government could have expanded the exemption already in place for nonprofit objectors to accommodate for-profit closely held companies like Hobby Lobby. He paid no attention to their pragmatic and strategic reasons for not doing so, including the difficulty of defining a "closely held" for-profit company.

The four-pronged test for considering religious liberty claims has been reduced to one functional prong. Courts assume that religious believers sincerely experience a significant burden, and that the government interest furthered by the burdensome law is compelling. They consider only whether the

law is as narrowly tailored as possible. Judges then become the equivalent of Monday-morning quarterbacks, considering whether the state hypothetically could have structured the requirement differently. For the new religious liberty plaintiffs, this contraction of the test is doubly ironic. First, and most important, it further removes straightforward political and moral discourse from judicial reasoning. Second, it reduces the judicial task to second-guessing legislative strategy, although many of the plaintiffs adopt a judicial philosophy that rejects “legislating from the bench.”

There are other ironies in the new religious liberty litigation. The new religious liberty plaintiffs tend to be religiously and socially conservative, lamenting the changes that have occurred in American society over the past half-century. Yet in order to achieve victory in the courts, religious plaintiffs have reinforced aspects of American life that they find deeply objectionable. Many of these features were identified in philosopher Alasdair MacIntyre’s *After Virtue*, whose diagnosis of the problems of contemporary liberalism has captured the imagination of many religious conservatives.¹³

MacIntyre contends that many denizens of contemporary liberal democracies treat moral discourse in an *emotivist* manner: that is, they hold the expression of a moral judgment to be nothing more than an individual’s expression of a strong feeling of attraction or aversion to a particular action.¹⁴ He maintains that the appeal of emotivism is correlated with the continuing failure to make progress on controversial moral issues such as abortion after the breakdown of a unified account of human flourishing and moral reasoning indebted to medieval Christendom. Most religious conservatives believe that their moral judgments are supported by reason; they strive to refurbish the broader Christian view of flourishing that would make those judgments intelligible. But their litigation strategy undercuts their ultimate aims. Precisely because “sincerity” has been the standard applied to plaintiffs, they have an incentive to highlight the emotional component of their moral objection, rather than explicate its inner logic.

For example, the decision of the Beckett Fund to have the Little Sisters of the Poor serve as lead plaintiffs made sense strategically. They are not only nuns; they are *little sisters*: their name invokes resonances of pious childhood innocence. *Of course* they would be viscerally repulsed by contraception, and only a moral monster would make them have anything to do with it. In this context, belaboring the hard-headed analysis of Catholic moral theology would only muddy the waters. While Catholic teaching prohibits abortion, its views on complicity are far more complicated.¹⁵ It is highly doubtful that the Little Sisters would have violated Catholic teaching on “cooperation with evil” if they had signed a government form declaring their conscientious objection to providing contraception. This is not to say, of course, that the plaintiffs could not have tried to make such a case. But given the applicable legal framework’s emphasis on “sincerity,” and the ten-

gency of American culture to equate sincerity with honest and emotionally fueled reaction, it would have been counterproductive for them to do so.

Many conservative Christians have also endorsed MacIntyre's judgment that liberal society encourages a corrosive and morally *solipsistic individualism*. They have lambasted the dominance of the language of individual rights in secular liberal culture and lamented the concomitant occlusion of the language of duty and obligation.¹⁶ Yet the legal strategy adopted by the plaintiffs in the new religious liberty cases has entrenched the individualistic, self-centered orientation of rights language so often complained about by religious and social conservatives. This charge may seem misplaced. After all, organizations such as the Little Sisters of the Poor, Catholic Charities, and the University of Notre Dame have rightly claimed that their religious mission requires them to serve others. They ask only to serve in a manner that is consistent with their own normative vision. Doesn't this make them altruistic, not morally self-centered?

They are altruistic, but on their own moral terms. And that is the key. We may helpfully distinguish between the *ground* and the *object* of their activities. While the object is other-regarding, the ground is entirely self-regarding. In framing their cases for legal consumption, the new religious liberty plaintiffs focused exclusively on their own rights, understood in a narrow sense: their rights to follow their own moral code in employing and providing services to others. Furthermore, they claim the right to act as if they had no duties to others who in good conscience did not view matters such as same-sex marriage, contraception, or abortion in the same manner.

For deeply and devoutly Roman Catholic plaintiffs, this constricted and decontextualized understanding of rights language is ironic, for three reasons. First, the Roman Catholic tradition has not understood rights in a way that is abstracted from a more holistic understanding of the good of the entire community. Second, in the Catholic moral tradition, rights are not to be defined separately and set off against duties. Third, since the Second Vatican Council, official Catholic teaching has acknowledged the need for all people in pluralistic societies to recognize the dignity of those who do not understand moral claims in the same way they do. In fact, granting recognition is a moral duty of a Catholic institution. Recognizing the dignity of others with different moral views requires developing a set of habits, including imaginative empathy, compassion, and a lively sense of fairness. It may be within my legal rights to take a particular action, but is it morally right to do so? Will it build up admirable qualities of character, enabling me to more fully flourish as a member of the community? Asking these questions, of course, is not good litigation strategy. The exclusive focus on protecting and defending our rights consumes all the moral air in the room.

In MacIntyre's view, moral obligations are deeply tied to one's social role.¹⁷ Roles not only empower the individuals who inhabit them, they also create legiti-

mate expectations (and to that extent moral obligations) on the part of those who interact with the role-holder. Unfortunately, recent religious liberty litigation has not encouraged plaintiffs to reflect critically on their variegated social and institutional roles, the practices associated with those roles, or the legitimate expectations that can be associated with those roles on the part of third parties.

Recent religious liberty plaintiffs tend to highlight two roles, both of which pertain to the divine-human relationship. First, they present themselves as children of God, who are obliged to follow the moral rules that God has imparted to His children. Second, they present themselves as a prophetic witness to God's word, to provide the secular world with a clear model of upright behavior. But divine child and prophetic witness are not the only roles that these plaintiffs occupy. They also occupy roles that deeply embed them within society, roles which (as MacIntyre pointed out) generate a rich set of obligations, some of which are reciprocal.

The Little Sisters of the Poor are an employer, and some of their employees are not conservative Roman Catholics. Masterpiece Cakeshop holds itself out not only as a specialty bakery, but also as a participant in the stream of commerce, which is open to all comers. Hobby Lobby may be a closely held corporation – the number of people who own it is small – but it is also a very large enterprise, employing thirty-eight thousand people. What shape does the moral obligation to respect the conscience of others take for those who inhabit these roles? Someone might object that the stylized combat of constitutional litigation is not the appropriate place for such self-reflection on the part of religious plaintiffs. That is true enough. Yet it is also true that litigation should not supplant or distort such reflection within religious communities themselves.

The plaintiffs in the new religious liberty cases have been largely victorious. They have likely won the legal right to refuse to include contraception, gender transition measures, and abortion in their health care packages. They may have won, at least under certain conditions, the legal right to refuse service to same-sex couples. But under what conditions should they exercise these legal rights? The question is important because it is not always morally justified to exercise a legal right.

We might find the necessary insight to address these questions by exploring the convergences of two concepts: civic friendship, drawn on by Western philosophers from Aristotle to Rawls, and the Golden Rule, which many religious traditions view as incorporating their core moral insights. Both concepts ask the plaintiffs to reflect on their obligations, not only their rights, as members of a broader, pluralistic community. They ask the plaintiffs to view themselves in a complex web of relationships, in which they are not only vulnerable, but also powerful. Moreover, they invite the plaintiffs to see these relationships not as comprising a

series of fleeting transactions, but as extending over time, and partially constitutive of their own character. They encourage the plaintiffs to see their moral flourishing, therefore, as connected to acting with integrity in the society in which they live: a pluralistic liberal democracy. Some think that these concepts are too general and even vacuous to provide much guidance. I am not quite so skeptical about their usefulness. While they may not provide a fully developed moral charter of rights and obligations, they do channel our attention in a fruitful direction, asking us to look away from our own interest and to step into the shoes of other people in the community.

Civic Friendship and Reciprocity. The ideal of civic friendship is an old one. It is difficult to apply to our geographically dispersed and pluralistic society. Consequently, it is beyond the scope of this essay to work out fully the implications of civic friendship for our current controversies over religious liberty; I can only point to key issues. Briefly, I think civic friendship requires a) equal political standing; b) prima facie regard for the determinations of one another's conscience; and c) a certain reciprocity with respect to d) the common project of maintaining our liberal representative democracy. Working out what each term means with respect to the task of religious liberty is a complicated undertaking. I can only begin it here by focusing on the criterion of *reciprocity*. The challenges it poses for religious liberty exemptions help explain the social tensions we face over the granting of them.

At its basic level, reciprocity means that over time, I hold myself ready to extend to you considerations analogous to the ones that I expect from you. In the context of private friendship, it requires each friend to cultivate the dispositions to give and to receive. Civic friendship also requires reciprocity. Contemporary political and legal theorists have argued that reciprocity is at the basis of the rule of law: each of us promises to give up our freedom to advance our own self-interest in the way we view best in exchange for the promise of everyone else to do the same thing. Breaking the law, on this view, is a violation of reciprocity because one takes for oneself a liberty that has not been accorded to everyone else.

How might the claim of reciprocity operate in the case of religious liberty claims in our constitutional democracy? We might begin with a simple observation: generally, in the United States, the majority gets to make the laws. At first glance, reciprocity could mean that I promise that if I am in the majority, I will make an exception (as best I can) to my generally applicable laws in order to accommodate your deeply held religious/moral beliefs. You promise to do the same if you are in the majority. Working out what this promise and expectation of reciprocity means in concrete cases is very challenging. We run into problems of both form and substance.

Let's look first at prohibitions. Say that the law *prohibits* action X, and I want an exemption so that I can perform action X for religiously infused moral reasons.

Let us suppose, as well, that the prohibition is controversial. In deciding whether to grant an exemption, the defenders of the prohibition are doubtless considering their own status if the prohibition is repealed. But what would reciprocity look like if this were to transpire?

If the prohibition is lifted, of course, those opposed to the act are not obliged to engage it. In some cases, that may be enough to protect their sphere of moral action, if the prohibition relates to a ritual requirement they understand as binding only on members of a particular social group. So, if the Utah legislature repealed a law banning restaurants from serving coffee, Latter Day Saints would arguably be fine. But prohibitions and restrictions that encode widely applicable judgments about common morality and the common good raise different questions.

For example, religious conservatives opposed repealing laws stringently restricting divorce. They reacted with frustration to remarks like: “If you don’t like divorce, just don’t get one.” They think the law against divorce is an important piece of the common morality. It is not dissimilar to the reaction of post-repeal Prohibitionists to the retort, “If you don’t approve of drinking alcohol, just don’t drink.” The problem, in their view, was not the actual act of taking a sip of alcohol. The problem was the moral climate created when many people drink many sips of alcohol. When Prohibition was repealed, the idea of an exemption for its proponents was nonsensical, for two reasons. First, an exemption from a permission is logically impossible. Second, and more important, the real problem was that the religiously infused moral and political worldview of the Prohibitionists was defeated. From that sort of defeat, there is no exemption. And there is no reciprocity.

What about the potential for reciprocity in the case of exemptions from legal *requirements*? In these situations, the law requires me to perform act Y, and I do not want to perform act Y. Again, assume I think the requirement is based on the imposition of false and alien morality. For example, consider the situation of a religiously based social service agency that refuses to place children for adoption with same-sex couples. It would be possible to grant the agency an exemption, allowing it to place children only with opposite-sex couples. In many cases, however, the exemption is only a second-best option. Some such agencies are run by religious traditions that do not believe any agency should place children with same-sex couples. In their ideal world, such placements would be prohibited, because they are bad for the children and bad for the community. So those who consider whether to grant or deny the exemption will recognize that reciprocity is not likely to be forthcoming if same-sex marriage is someday abolished.

In addition to prohibitions and requiring certain actions, the law also comprises *enablements*, which empower patterns of activities and relationships. Enablements are not requirements and prohibitions. Yet to be effective, an enablement often needs to be buttressed by both. Consider the new institution of same-sex marriage. A baker who refuses to make a cake for a same-sex wedding does not

“disobey” the enablement, but he does thwart it. Should he be granted an exemption? In considering this question, the proponents of same-sex marriage must be mindful of the fact that claims for religious liberty are not isolated pleas for accommodation, but instead function as loci of political-moral contestation. Those who object to same-sex marriage would eradicate it for everyone. Consequently, the challenge of the requirement of reciprocity bleeds into the challenge of the “as if” that I discussed earlier. It is one thing to give an exemption to a discrete religious or moral group that a) does not think the norm they follow applies to those who do not belong to their group; and/or b) is not engaged in a viable struggle to legally (re)establish that norm in the broader community. But it is another thing entirely to grant an exemption to a group that sees the exemption not as an article of peace with the dominant culture, but as a staging area to wage a culture war. In the latter type of situation, an exemption may be politically wise; it may function as a political-moral “escape valve.” But given the concerns about reciprocity, it is difficult to justify in principle.

The Golden Rule and Role Relations. “Do unto others as you would have them do unto you.” As many philosophers have noted, the Golden Rule is a formal requirement. It is not hard to imagine a ruthlessly consistent Nazi saying, “If I were a Jew, I should be killed too.” At the same time, the Golden Rule is not without substantive ethical import. First, it has epistemological implications; it encourages agents to gather more information about the impact of their actions through an imaginative exercise. Second, it has arêtic implications. It encourages agents to exercise the virtue of empathy with those who will be most affected by their actions.

The most significant impact of the Golden Rule, I think, will be encouraging religious liberty plaintiffs to consider the obligations incumbent upon them by virtue of their role relationships. In the *Hobby Lobby* case, the majority held that closely held for-profit corporations are eligible to make religious liberty claims. The Golden Rule invites employers to ask themselves how they would respond to the imposition of an alien morality as a condition of their own employment. How would they feel if the shoe were on the other foot? Answering this question in a noncircular way requires thinking more systematically about the role relationship between employers and employees. The new religious liberty plaintiffs need to address the question: what are the characteristics of a virtuous employer?

An employer is not a parent, nor an overlord, nor a teacher. In my view, it is best to see employers as engaged in a limited common project with their employees, which limits what can justly be expected of the employees. *Hobby Lobby*’s owners may be evangelical Christians, but its purposes as set forth in its articles of incorporation in effect at the time of the lawsuit are thoroughly secular. Within limits, an employer is entitled to control an employee’s behavior on the job. Yet restrictions that extend to their personal lives require a heavy justification. For example, a counselor at an addiction treatment center can legitimately be prohib-

ited from using drugs or alcohol, and the spokesperson for a vegan diet/lifestyle brand can legitimately be contractually prohibited from eating meat. In these situations, the objectives of the enterprise legitimately extend into the employees' personal lives.

A heavy burden falls on employers that want to constrict what employees can do with their compensation. It would be possible for Hobby Lobby to enter into a contract with its employees which prohibited them from purchasing pornography, contraceptives, and abortions with their wages. But to do so would be to step far beyond the rightful bounds of its role as an employer. I believe the same can be said of health care benefits, which are part of an employee's compensation package. The federal government has developed a basic benefits package that was designed to maintain the health of the covered individual and the whole population. Employers who consider psychiatry or contraception morally illegitimate can certainly make their views known to their employees. They can petition the government to revise the standard benefits package. Yet they ought not overstep the boundaries of their role, to rewrite the benefits package according to their own medical-moral lights.

Recent religious liberty litigation may have provided a successful tactic for social conservatives fighting the culture war. In using that tactic, however, social conservatives may have blunted their own most powerful critique of Western liberal society: its atomistic individualism, its reduction of morality to feelings, and its inability to think in terms of the common good rather than the contestation of interest. If the litigation sorts out largely in their favor, perhaps religious entities will move beyond the categories of First Amendment cases and retrieve their own moral commitments. They may ask themselves two questions: what do we owe others as a matter of civic friendship in a pluralistic society, and how should we exercise the power we have, given our own role-related obligations and the Golden Rule? The answers they develop may put us all on a more stable path for living together peacefully and with mutual regard.

AUTHOR'S NOTE

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ENDNOTES

- ¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
- ² *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719 (2018).
- ³ In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court held that the religion-based exemption in the Universal Military Training and Service Act of 1948 must be extended to “sincere and meaningful belief which occupies in the life of its possessor a place parallel” to the place occupied by God in the lives of those who generally seek the exemption. But the Court upheld the requirement that successful applicants for the exemption object to all war, not merely to a particular war in *Gillette v. United States*, 401 U.S. 437 (1971). It is true that successful conscientious objectors oppose war for everyone, not merely themselves. But there is little chance that they will succeed in convincing the nation to lay down its arms in all cases.
- ⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
- ⁵ *Employment Division v. Smith*, 494 U.S. 872 (1990).
- ⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963), was essentially overruled by *Employment Division v. Smith* as a matter of constitutional interpretation. Its force was partially restored (at least with respect to federal regulation) by the Religious Freedom Restoration Act of 1993 (RFRA).
- ⁷ Hobby Lobby, “Our Story,” <https://www.hobbylobby.com/about-us/our-story>.
- ⁸ David Solomon, “Meet David Green: Hobby Lobby’s Biblical Millionaire,” *Forbes*, October 8, 2012, <https://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/#2757a8e35807>.
- ⁹ Elizabeth Dias, “The Family Behind a \$500 Million Bible Museum Hopes to Change Washington,” *Time*, November 17, 2017, <http://time.com/5029473/bible-museum-steve-green-hobby-lobby/>.

- ¹⁰ Julie Compton, “Meet the Couple Behind the Masterpiece Cakeshop Case,” NBC News, December 6, 2017, <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976>.
- ¹¹ In fact, the United States Conference of Catholic Bishops strongly urged that the mandate be repealed in its entirety. “Only rescission will eliminate all of the serious moral problems the mandate creates; only rescission will correct HHS’s legally flawed interpretation of the term ‘preventive services.’” Office of the General Counsel, United States Conference of Catholic Bishops, Letter to Centers for Medicare & Medicaid Services, Department of Health and Human Services, August 31, 2011, <http://www.usccb.org/issues-and-action/religious-liberty/hhs-mandate/upload/Interim-Final-Rules-on-Preventive-Services.pdf>.
- ¹² The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. RFRA represented widespread rejection of Justice Scalia’s majority opinion in *Employment Division v. Smith*, which relaxed the protections given to free exercise. RFRA re-established the more stringent test to evaluate governmental actions that interfered with free exercise that was articulated in *Sherbert v. Verner*. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA was unconstitutional as applied to the states. Because the issue in *Hobby Lobby* revolved around federal regulation, RFRA applied in that case.
- ¹³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame, Ind.: University of Notre Dame Press, 2007).
- ¹⁴ *Ibid.*, chap. 1.
- ¹⁵ Traditional manuals of moral theology have not condemned nurses who handed a doctor the instrument with which to perform an abortion. The rationale is that they are performing their routine work, albeit in a morally illicit procedure. See, for example, Gerald Kelly, *Medico-Moral Problems* (St. Louis, Mo.: Catholic Health Association, 1958), 332–333.
- ¹⁶ See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1993).
- ¹⁷ MacIntyre connects virtues to character, and character to social role and role-related obligations. See chapter 3 of *After Virtue*. The argument is clearest in Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Ind.: University of Notre Dame Press, 1988).