

Aleksander Stepkowski

Contemporary Challenges to Conscience

Legal and Ethical Frameworks for Professional Conduct



PETER LANG

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Scientific reviewer: Prof. dr hab. Piotr Niczyporuk (University of Białystok)

This publication was financially supported by the
Ordo Iuris Institute for Legal Culture.

Gedruckt auf alterungsbeständigem,
säurefreiem Papier.

ISSN 1613-947X

ISBN 978-3-631-77555-4 (Print)

E-ISBN 978-3-631-79211-7 (PDF)

E-ISBN 978-3-631-79212-4 (EPUB)

E-ISBN 978-3-631-79213-1 (MOBI)

DOI 10.3726/b15722

© Peter Lang GmbH

Internationaler Verlag der Wissenschaften

Berlin 2019

Alle Rechte vorbehalten.

Peter Lang – Berlin · Bern · Bruxelles ·
New York · Oxford · Warszawa · Wien

Das Werk einschließlich aller seiner Teile ist urheberrechtlich geschützt. Jede Verwertung außerhalb der engen Grenzen des Urheberrechtsgesetzes ist ohne Zustimmung des Verlages unzulässig und strafbar. Das gilt insbesondere für Vervielfältigungen, Übersetzungen, Mikroverfilmungen und die Einspeicherung und Verarbeitung in elektronischen Systemen.

Diese Publikation wurde begutachtet.

www.peterlang.com

Contents

Introduction

<i>Aleksander Stępkowki</i> Contemporary Challenges to Conscience and Their Specificity	9
--	---

Part I: General Perspective

<i>Aleksander Stępkowki</i> Contemporary Conscience-Related Controversies Against Philosophical Background	19
--	----

<i>David F. Forte</i> Conscience and Republican Government	29
---	----

<i>David Thunder</i> The Place of Conscience-Based Exemptions in the Struggle Against Injustice	41
---	----

<i>Jakob Cornides</i> Freedom of Conscience – A Basic Human Right?	57
---	----

<i>Jakub Pawlikowski</i> Conscientious Objection and the Goals of Medicine	65
---	----

Part II: European Perspective

<i>Gregor Puppink & Claire de La Hougue</i> Freedom of Conscience and Conscientious Objection in the Medical Area	85
---	----

<i>Roger Kiska & Robert Clarke</i> Conscientious Objection for Medical Practitioners in European Human Rights Law	111
---	-----

<i>Michał Skwarzyński</i> Impact of the ECHR Case Law on the Use of Conscientious Objection in Poland	127
---	-----

Part III: National Perspectives*William L. Saunders*

Threats to Conscience Protection in the United States During the Years
of the Obama Administration 143

Danuta Brańska

Conscience Clause of Pharmacists and Other Pharmacy Staff 155

Appendix: Courtroom Perspective*Konstanty Radziwiłł*

Medical Doctor's Right to Act According to His/Her Conscience 165

Constitutional Tribunal of the Republic of Poland

Judgement K12/14 of 7th October 2015 169

Dorinda C. Bordley & Nikolas T. Nikas

Conscience and Science: Why a Conscientious Objection to Forced
Prescription or Dispensation of Abortifacient Drugs Is Reasonable 235

Dorinda C. Bordley & Nikolas T. Nikas

Brief Amicus Curiae to US Supreme Court Case
Stormans Inc v. John Wiesman 237

Annex: National Laws in EU Member States on Freedom of Conscience
and Conscientious Objection 251

Bibliography 277

Contributors 291

David Thunder

The Place of Conscience-Based Exemptions in the Struggle Against Injustice

Abstract: The chapter presents a balanced assessment of the merits of seeking conscience-based exemptions to general legal obligations as a strategy for fighting injustice when one happens to find oneself in a community that dissents from the conventions and practices of the majority or ruling party. Dissenting communities, in cases where they face intransigent majorities or powerful and stubborn ruling elites, may find themselves compelled to seek out responses to injustice that fall short of full-scale social reform. Among these second-best responses are measures that reduce the costs of dissent from injustice. In this category, it is preferable to secure the liberty of all from any obligation to act unjustly than to seek special conscience-based exemptions from a requirement to engage in unjust conduct, since the former is less burdensome on dissenters and more consistent with the rule of law than the latter. Some of these second-best responses to injustice may tempt dissenters to put their own security or immunity from prosecution ahead of the imperative to bring an end to grave injustices in their society, and may encourage the wider society to view dissenters as harmless sects to be tolerated rather than serious interlocutors who deserve to be listened to. In conclusion, more direct and confrontational style of engagement, even in a politically unfavorable climate, may be more effective than the pursuit of conscience-based exemptions at making an injustice socially conspicuous.

Keywords: community, conscience, injustice, personal freedom

1 Introduction

The question of freedom of conscience come center stage in the United States in 2010 due to the US government's decision to require, under the auspices of its *Patient Protection and Affordable Care Act*¹ (otherwise known as "Obamacare"), that companies with 50 or more employees provide health insurance that includes coverage for contraceptive drugs and devices, including

1 Signed into law by President Obama on March 23, 2010. What later became known as the "HHS mandate" was the requirement that medium and large scale companies provide health insurance, including coverage for "preventive care," to all employees. What made the mandate especially controversial was the US Department of Health and Human Services' decision to include contraceptives under the category of mandatory "preventive care" coverage.

contraceptive drugs that act as abortifacients.² Although the bill exempted certain religious organizations such as churches, many religious organizations such as Little Sisters of the Poor, as well as for-profit companies with a Christian ethos, such as Hobby Lobby, were not exempted from the requirement. Hobby Lobby, a private, family-owned arts and craft corporation, challenged the bill, which would have cost them millions of dollars in annual fines, on the grounds that compliance with the mandate would violate the Christian owners' conscientiously held religious opposition to what they considered as "potentially life-terminating drugs and devices"³, including abortifacients. The United States Supreme Court found that the bill was illegal, since it violated the Religious Freedom Restoration Act inasmuch as it substantially burdened the owners' religious beliefs and was not the "least restrictive means" of furthering compelling government interests.⁴

Although the details of the Hobby Lobby religious freedom victory need not concern us here,⁵ the stand-off it generated is illustrative of a long history

2 In particular, Plan B (the morning after pill) and Ella (the week after pill). The bill authorized the Department of Health and Human Services to determine which "preventive" services would be mandated in employers' health insurance. Controversy erupted when the Department of Health and Human Services decided to include a number of contraceptive drugs and devices, including Plan B and Ella, under the broad umbrella of "preventive services" mandated in employee health insurance schemes.

3 See <<http://www.hobbylobbycase.com/the-case/the-decision>, where Hobby Lobby lays out the details of the case.>

4 The Religious Freedom Restoration Act was passed by the federal government in 1993 to restore the so-called "Sherbert test" established by *Sherbert vs. Verner* (1963) and *Wisconsin vs. Yoder* (1972) after that test had been struck down by the US Supreme Court in *Employment Division vs. Smith* (1990). The Sherbert test as set out in the Religious Freedom Restoration Act provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." This prohibition can only be disregarded in case two conditions are met: first, the burden must be necessary to further a "compelling government interest," not just routine policymaking. Second, the rule must be the least restrictive way in which to further the government interest in question. It was not deemed necessary by the judges in the Hobby Lobby case to inquire into the question whether or not the government interests at issue were "compelling," since even conceding that they were, the judges did not consider the means employed to advance them to be the least restrictive available.

5 However, for a useful discussion that puts the case in a broader context, see Matthew J. Franck, "After Hobby Lobby, the Struggle for Religious Freedom Continues," *Public Discourse*

<<http://www.thepublicdiscourse.com/2014/07/13418>>

of conflict between political rulers and citizens of faith, not only in the United States but in many other parts of the world. What is especially striking about these conflicts is that they need not be occasioned by a political campaign of persecution or anti-religious zeal. They may simply arise from the fact that political rulers, for whatever reason, impose requirements upon citizens that they for their part cannot in good conscience submit to. In societies becoming progressively more divided on moral questions, such as the United States and Europe, these sorts of disputes are likely to become more frequent, not only in connection with communities of faith, but in connection with any community that dissents from the values of majorities or ruling parties. Now is therefore a good time to reflect on the value of acting according to conscience, and to consider the comparative merits of diverse strategies dissenting communities might embrace in order to resist laws and social practices they view as morally pernicious or unjust.

It is perfectly possible that members of a minority community may find that majority norms require them to violate conscientious commitments, not because they are fundamentally opposed to those norms *in general*, but simply because, on account of their own distinctive religious or moral commitments, they themselves cannot comply in good conscience with the said norms. *Wisconsin vs. Yoder*,⁶ is a case in point: The Amish community challenged a state law imposing mandatory education up to the age of 16, because it interfered with their ability to give their own children a particular kind of education, sheltered from the influences of the wider culture, in order to preserve their way of life. They insisted on giving their own style of education to their children past the eighth grade (typically age 13–14). But they did not condemn *other* families for educating their children up to the age of 16 in public schools, nor did they even condemn the state for requiring formal education up to the age of 16 for citizens outside the Amish community. Rather, they asked to be exempted from the general requirement, so that they themselves could live up to the ideals of their own community. In this case, the threat to the moral integrity of the Amish community could be neutralized, so to speak, by simply carving out an exception to the law.⁷

What interests me in this chapter is not conscientious dissent *in general*, but a particular type of conscientious dissent, one which not only speaks in the name of a dissenting community's core values, but claims to speak in the name

6 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

7 Indeed, the relative harmlessness to the wider community of granting this exemption was one of the reasons the US Supreme Court ultimately found in the Amish community's favor.

of core values relevant and binding in the wider society. This type of dissent questions the justice of a general law or social practice beyond the boundaries of the dissenting community, and naturally carries the dissenter not only to refuse complicity with the perceived injustice, but to *actively work to bring an end to the injustice* in question. A conscientious dissenter of this type, such as Martin Luther King, cannot salve his conscience with the thought that he himself has been formally exempted from actively collaborating with an evil or unjust law. He feels a responsibility, insofar as it lies within his power, to fight against an injustice, on pain of being found guilty of the complicity of the silent bystander. Even if citizens of Nazi Germany with refined moral sensibilities had secured special exemptions from being compelled to collaborate with the Nazi agenda, this would not have excused them from the duty of actively resisting Nazi efforts to demolish the rights, and ultimately destroy the lives, of Jewish residents and citizens of Germany.

At times there is a tendency to speak about conscience and conscientious commitments as if they were a very special phenomenon, associated with private life, rather than a phenomenon tied up with being a responsible member of a community. But there is a respected tradition of thought, which includes authors such as Mahatma Gandhi and Martin Luther King, that views any grave injustice unfolding before our eyes, especially injustices inflicted by or against our neighbors, as an affront to our conscience, *even one in which we are not actively complicit*. Each one of us, on this view, bears some responsibility for what happens to our neighbors and fellow citizens “on our watch,” and each one of us ought to examine his or her conscience to determine whether or not he or she is doing enough to defend their rights in the community. After all, as the old adage goes, “the only thing necessary for the triumph of evil is that good men should do nothing.” This essay takes its bearings from this tradition of thought, and therefore views the claims of conscience not primarily as revelations of the inner state of mind of the agent (“let me tell you what my conscience says”), or even about the inviolability of his own conscience (“do not make me act against my conscience”), but about injustices in the community that the agent perceives, in good faith, as sufficiently grave that they cry out for legal or social redress. In short, in this essay, I view conscience as a catalyst for the struggle against injustice. As such, I would like to explore what role, if any, conscience-based exemptions from general legal requirements could or ought to play in a dissenting community’s efforts to combat what they in good faith take to be injustices perpetrated in the wider community.

The argument proceeds in two steps. First, I offer a few remarks on the meaning and value of conscientious action, and its connection with the pursuit

of justice. Second, I examine the merits of (1) conscience-based exemptions as a tool for resisting gravely unjust social practices, when compared with two alternative strategies, namely, (2) the creation of a generic liberty of action, and (3) the root-and-branch reform of the offending practice. On my analysis, appeals to freedom of conscience, whether defended through conscience-based exemptions or through generic spheres of liberty from legal compulsion, while they may be strategically necessary to defend minority interests and rights, should be used sparingly and should not be allowed to distract dissenters from the main task at hand, the reform of unjust laws and practices, the creation of a better and more just society.

2 Conscientious action and the pursuit of justice

One of the most remarkable features of the experience of being human is the realization that we are, in some profound sense, free to determine our own destinies. When we make a choice, whether large or small, we realize that we *could have* done otherwise, we were not fore-ordained to do *this*. Of course, our actions are constrained in many respects – we are not Supermen or Superwomen; on the contrary, we are weak, vulnerable, and dependent creatures. But so are other animals, yet we do not have reports of dogs or monkeys introspecting and coming to a realization of their own freedom to shape their own futures. This sense of freedom is accompanied by a sense that our choices are charged with meaning and value, and that we bear personal responsibility for them, for the way they shape our lives, and for the impact they have on other persons. To be *responsible* is to be somehow *answerable* for what one does, to be liable for our actions, or submit them to judgment, whether we understand the judge of our actions to be our “better self,” an imagined impartial spectator, the community and its representatives, or God almighty.

There are two features of this sense of responsibility that I would like to underline: first, it is not an attitude that we assume by choice. Rather, it is a keen awareness that *like it or not*, we must answer, sooner or later, for the quality of our choices. Secondly, we are not just answerable for this or that discrete choice, but for the cumulative effect of our choices on our own personality and life taken as a whole, and on the personalities and lives of those around us. Although this responsibility must be qualified by the fact that many aspects of our lives are beyond our control, we do have a significant degree of control over how we *respond* to those restrictions, just as a football player, though he is not responsible for the rules of the game, he is in control of how he personally uses those rules to win or lose a game.

The sense of personal freedom and responsibility is not equally developed or present in everyone. In some it may be highly developed, in others muted or partially silenced. Be that as it may, insofar as we *take ourselves seriously* and come to terms with the fact that we bear responsibility for how we choose to live (or not to live), then we will take care to choose wisely.⁸ Rather than mindlessly floating through life, nonchalantly taking the path of least resistance, or merely satisfying short-term desires with no thought for their lasting value, the serious person makes a good faith effort, proportionate to the values at stake, to direct his choices aright, to shape his life according to sound criteria rather than passing whims. We could say that the serious person acts *conscientiously*, rather than frivolously. That is because he recognizes that the “business of living” is not a small matter, but a matter worthy of serious attention, concern, and effort. Conscientious action is not only something the serious agent demands of himself in the interests of living a successful or worthy life; it is also something that can enhance the life and happiness of his associates, peers, friends and family, insofar as they benefit from his efforts to live a worthy life.

So far, I have described conscientious action as action inspired by an attitude of *seriousness* in relation to the business of living, an attitude that marks off the serious person from the frivolous one. I have not proven that the serious person is morally superior, all things considered, to the frivolous person, or more worthy of our emulation. However, I think it is safe to assume that many readers will accept that seriousness and not frivolity, as a general attitude toward life, is worthy of our admiration and emulation. If this is indeed the case, then conscientious action has a special value that other exercises of freedom do not necessarily possess.

Free acts may be frivolous, thoughtless, and superficial, whereas only a special subclass of free acts, namely, *conscientious* acts, are thoughtful, deliberate, and reflective. Furthermore, philosophers have argued, quite plausibly in my view, that an agent is duty-bound to follow the dictates of his own conscientious judgments about how to act (which, for present purposes, I will consider as his *conscience*), on pain of failing in the business of living. Even if his conscience turns out to be mistaken, once he has employed due diligence in seeking out the truth of the matter, there is nothing more he can reasonably be expected to do to discover his error. I would go so far as to suggest, following St Thomas Aquinas

8 This notion of “taking ourselves’ seriously” as integral to a life we can take pride in or embrace wholeheartedly, is developed at much greater length in Harry Frankfurt, *Taking Ourselves Seriously and Getting It Right* (Stanford, California: Stanford University Press, 2006).

and St Thomas More, that a person's conscientious, reflective judgment about the right thing to do is binding upon him even if his judgment turns out to be objectively mistaken.⁹

Among those acts that are conscientiously undertaken, some are deemed by the agent to be morally recommended, while others are judged by the agent as *imperative* or necessary on pain of doing evil, or forfeiting the integrity of his character. An agent may, for example, act conscientiously when he leaves a tip for the waiter, but that does not mean that he feels he *must* leave a tip on pain of forfeiting his integrity, or that he feels not leaving a tip would be a wicked action. Contrast this with the attitude of a Jehovah's witness toward the prospect of accepting a blood transfusion. A Jehovah's witness may be firmly convinced that accepting a blood transfusion is tantamount to committing an evil action, and in that sense, a particular course of action, refusing the blood transfusion, is *strictly demanded* by his conscience. It is particularly when an agent feels bound by his conscientiously formed judgment to undertake or refrain from a particular course of action that potential legal and social conflicts may arise.¹⁰

9 Thomas More's life and death are a moving testament to the sacredness of conscience, though More was careful to insist that a conscience must be well informed and open to the wisdom and correction of the wise. More's firm but sophisticated view of the bindingness of conscientiously formed judgments is explained and elaborated on in his letters from the tower (see Thomas More, *The Last Letters of Thomas More* (Grand Rapids, Michigan and Cambridge, England: William B. Eerdmans Publishing Company, 2000)). Thomas Aquinas takes a similar view, maintaining unequivocally that a person's conscientious judgments about good and evil are binding upon him even if he is objectively in error. See *Quaestiones de duodecim quodlibet*, Quodlibet III, q. 12, a. 2 [27]: "Et ideo dicendum est quod omnis consciencia, si recta sive erronea, sive in per se malis sive in indifferentibus, est obligatoria, ita quod qui contra conscienciam facit, peccat" ("[...] every conscience, whether correct or erroneous, whether about things evil in themselves or things indifferent, is binding, from which it follows that he who acts against his conscience, sins").

10 This is intended as a rough statement of the special value of conscientious attitudes and action in the moral life. For more exhaustive treatments of the subject, see, inter alia, Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: Cambridge University Press, 2009); Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995); Ian Shapiro and Robert Adams, *Integrity and Conscience* (New York: NYU Press, 1998); A. Campbell Garnett, "Conscience and Conscientiousness" and C.D. Broad, "Conscience and Conscientious Action," in: *Moral Concepts*, ed. Joel Feinberg (Oxford: Oxford University Press, 1970).

Conscientious judgments and the actions that flow from them cannot be isolated within the “private” sphere or separated from the public life of a community. We make conscientious judgments, for example, about whether or not the laws passed in our name are legitimate or binding; whether or not certain persons and groups in the community are being treated fairly; and whether or not to resist injustice by engaging in acts of civil disobedience. Those who sheltered Jews in Nazi Germany, at great personal risk, conscientiously judged that this was the right thing to do under the circumstances, that the risk was justified by the imperative to rescue their neighbors from imprisonment, persecution, torture, or death. Martin Luther King conscientiously reached the conclusion that a campaign of civil disobedience, and the public disorder that would result from it, was justified insofar as it was the only way to awaken the white man’s conscience to the evils of racism. Although some instances of conscientious commitment and action, such as the commitment of a Jew to observe a kosher diet, only directly concern the behavior of a particular religious group, many conscientious commitments, such as King’s commitment to racial equality, are oriented toward the root-and-branch reform of unjust social practices, and in that sense are anything *but* private in character.

3 The place of freedom of conscience in the fight against injustice

For the purposes of the present inquiry, let us set aside the special case of conscientious objections based exclusively on the special impact of some law or practice on a *particular person or group of persons* and their way of life¹¹, and focus instead on the case of conscientious objections motivated by larger questions of justice implicating the morality and way of life of the wider community. In this context, it seems to me that it is worth posing the following question, given the recent proliferation of conscience legislation and jurisprudence: *what role ought the value of freedom of conscience and its legal protection play in a dissenting community’s fight against unjust social practices?* Is it the “weapon of choice” or is it the weapon of last resort? Do appeals to freedom of conscience carry any significant risks if viewed as part of a larger campaign to dismantle

11 An obvious example would be *Wisconsin vs. Yoder* (1972), in which the Amish community argued that their way of life and its underlying values required that their members receive a particular sort of education, which compulsory school attendance beyond the age of 16 did not permit.

systemic injustices? We might approach One way to approach these questions by considering the comparative merits of (1) conscientious exemptions to general laws, (2) unqualified freedom under the law to withhold one's cooperation from unjust social practices; and (3) a root-and-branch reform of the offending law or practice.

Let us begin by considering the first two strategies mentioned above, namely (1) seeking out conscience-based exemptions to general laws and (2) ensuring that cooperation with injustice is optional and not required by law. What both of these strategies have in common is that they seek to reduce the cost of dissent. The first seeks to lower the cost of dissent by introducing conscience-based exemptions to general obligations, while the second does so by creating a general liberty to withhold cooperation from objectionable practices. The second approach does not need to invoke the value of conscience directly within the law. Rather, legal regulations would be drafted in such a way as to leave certain actions deemed unjust by a dissenting individual or community entirely at the agent's discretion, whether by remaining silent¹² or granting an explicit liberty from coercion within some domain of action to all similarly situated subjects without regard to their deeper motivation. For example, a Catholic community opposed to abortion and same-sex marriage could campaign for a legal arrangement in which there is no general legal obligation to participate in abortion procedures, and no general legal obligation to provide wedding services to gay couples. A law along these lines would extend the same liberty to all, irrespective of the conscientious beliefs people happen to have.

To the extent that individuals are granted a generous latitude to determine the course of their own lives, they will have a space of uncoerced choice, and within this space, they may act as their conscience dictates without suffering significant legal or social penalties. For example, in modern Western societies people are relatively free to marry whom they will, free to choose a profession, free to choose which religion to practice, and so forth. Here, the law honors and protects the value of conscientious action, but only indirectly, since the only value it explicitly protects is the value of *individual liberty*, guaranteed in areas of behavior that legislators and policymakers have good reason to believe are

12 Cf. Thomas Hobbes's claim that "[t]he liberty of a subject lieth [...] only in those things which, in regulating their actions, the sovereign hath praetermitted" (Thomas Hobbes, *Leviathan* (Indianapolis and Cambridge: Hackett Publishing Company, 1994), chap. xxi, "Of the Liberty of Subjects," p. 138).

especially ethically sensitive, *whether or not that liberty happens to be exercised conscientiously.*

Extending freedom to all uniformly with regard to ethically sensitive decisions has a number of obvious advantages when compared with giving special treatment to conscientious action as a special class of action. First, it seems to favour the consistent application of the law, since the same liberty of action is extended to all without exception. Second, it favours the transparency and predictability of the law, since people know in advance, broadly speaking, the meaning and likely impact of the law, rather than having to await the results of complicated court battles or subtle tests to determine which actions count as conscientious and which do not. Third, it creates a climate that is especially favorable to conscientious action, since the freedom to act conscientiously is guaranteed in advance rather than based on the need to prove oneself eligible for an exemption from a generally applicable law.

On the other hand, securing a uniform liberty to withhold one's cooperation from unjust practices is a far cry from bringing an end to the injustices in question. While a dissenting community may find some relief in the fact that it is not compelled to implicate itself directly in grave injustices, and in the fact that nobody else is so compelled, this is hardly a cause for celebration, given that the grave injustice remains in place. Even if some will not defile their consciences, others will. Thus, securing "freedom from" injustice is tantamount to coexisting with injustice, or being an innocent bystander who witnesses but will not condone an unfolding injustice. The person who keeps his hands "clean" might reasonably ask himself the question, "could I have done something more to protect the victims of this injustice than keep my hands clean?" In short, reducing the costs of dissent by enlarging individual liberties does not seem to amount to a satisfactory response to a grave injustice.

There is another way to reduce the costs of dissenting from an unjust law or social practice, namely carving out explicit *conscience-based exemptions* to generally applicable legal or institutional obligations. Efforts to render direct cooperation with unjust social practices entirely optional may break down in cases where the majority or ruling party is convinced that a particular legal or institutional requirement, notwithstanding the controversy that surrounds it, is a basic demand of justice or required by the common good. In such a case, a liberty-based approach may fail to obtain the required concessions for conscientious dissenters, since the majority or ruling party may not be willing to set aside what they judge to be basic requirements of justice. Yet they may be willing, for the sake of social peace or out of respect for the claims of conscience, to exempt

a *limited section of the population* from a principle on the grounds that it conflicts with their conscientiously held moral or religious convictions.¹³

Conscience-based exemptions, however, are not without their drawbacks. First, at the level of the overall legal regime, granting a limited number of conscience-based opt-outs invites a multiplication of conscientious objections, which may, over time, hollow out the force of the law, or undermine its credibility as a general rule regulating the life of the community. After all, if the rationale for such exemptions is that they violate some person's or community's conscientious commitments, then there is no principled way to prevent an eruption of conscience-based objections to the law, motivated by a host of different moral and philosophical beliefs.¹⁴ In addition, where conscientious objections implicate principles of basic justice, they risk splintering a society presumed to be united by a core set of values into many different communities oriented toward diverse and incompatible values, as might occur, for example, with the emergence of special rights and obligations under Islamic (sharia) law, were Western nations to extend toleration to Islamic legal regimes in their midst.¹⁵

13 It is important to note that the rights of conscience cannot be absolute in any functional legal order. It is naturally qualified by the requirement that conscientious behavior meets some minimal threshold of reasonableness or justice. The burdens placed upon a person's conscience must be balanced against the corresponding burdens placed upon basic communal goods, such as justice and security. Someone may be safely exempted from a minor regulation like a dress-code in order to comply with their conscience, but someone may not be exempted from a law against murder or theft to comply with their conscience, insofar as the latter prohibitions protect goods that are part of the bedrock of a decent social order.

14 Judges and legislators may attempt to restrict this proliferation of conscientious objections by defining conscientious objection more narrowly, or introducing tests of sincerity and conscientiousness. The application of some such test could reveal that two actions that are materially identical may be classified in one case as an ordinary exercise of freedom, and in another case as a choice strictly demanded by the agent's best judgment about his moral or religious duties. It is the apparent arbitrariness of distinctions of this sort, at least when issued by political rulers and judges (what judge besides God and perhaps a person's confessor, spiritual director, or intimate confidant is truly competent to distinguish between superficially and conscientiously motivated behavior?), that would cast serious doubts over attempts of this sort to privilege the claims of some conscientious objectors over those of others.

15 The possibility of the creation of local pockets of sharia law has been the subject of public debate within the United Kingdom. See, for example, the Archbishop of Canterbury's speech (given on February 7, 2008) fielding the possibility of the tolerance of some elements of Sharia law within British society even if they are in tension with national laws: <<http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>>

From the perspective of minorities seeking to promote their vision of justice in society at large, the short- and medium-term gains for their communities – namely, a wider sphere of freedom to pursue the values and lifestyles they see as worthy of their allegiance – may be offset by some significant losses. First of all, conscience-based exemptions to generally applicable laws may provide spotty and unreliable protection for conscientious action, since (1) the full reach of exemptions may be difficult to anticipate, given the grey area between conscientious convictions and mere preferences, and given the uncertain application of conscience rights to corporate entities; and (2) exemption-based protections typically place the onus on the exempted to show that they qualify for the exemption to an otherwise binding law.

Secondly, the introduction of exemptions to laws perceived by a minority as gravely unjust may weaken the power of dissenting communities to witness against injustice and to participate credibly in mainstream debates about justice. After all, insofar as conscience-based exemptions are geared toward the collective toleration of dissenting behavior rather than toward the comprehensive reform of behavior and institutions, laws either permitting or mandating injustice may remain substantially intact *even after dissenters' hard-fought liberties have been secured*. Indeed, dissenters who have fought long and hard to be tolerated by the wider community and not legally required to defile their consciences may think twice before risking this hard-won victory by fighting to abolish the unjust practices they object to. Concomitantly, majorities, once they perceive that dissenters' campaigns have shifted away from a far-reaching critique of mainstream practices toward special accommodations for conscientious objectors, may be encouraged to view dissenting communities as idiosyncratic sects to be *tolerated* within a circumscribed domain, rather than equal conversation partners to be seriously engaged in the debate over how the political community as a whole should be governed. After all, dissenters may be granted certain liberties and immunities without seriously endangering mainstream values and practices.¹⁶ In short, the net effect of strategies focused on reducing the cost of dissent may well be to further entrench contested majority views, weaken the political influence of minorities in the wider culture, and discourage minority

16 Imagine if the white allies of Martin Luther King's civil rights movement had sought conscience-based exemptions to racially discriminatory laws, rather than condemning the injustice of racism head-on and advocating a radical reform of the laws in question. They would hardly have added much to the civil rights movement when compared with King's tactics of public protest and civil disobedience.

and majority parties from engaging with each other in a serious way about basic principles of justice.

Dissenting communities may decide to embark on a more traditional path in the fight against unjust practices, namely, the path of active, head-on resistance to the offending law or practice. Dissenters may actively campaign against unjust laws and practices in the public square, contesting them on their merits, protesting against them, demonstrating the dissenting community's resolve to stand against injustice no matter the cost, and even engaging in acts of civil disobedience to draw the attention of the wider community to the gravity of the injustice they are protesting. Even if the dissenting community is vastly outnumbered or out-gunned, the advantage of this direct, confrontational style is that it brings visibility to the cause the dissenters represent, and leaves no shadow of doubt in onlookers' minds that the dissenters are not merely pleading for special exemptions or campaigning for the survival of their way of life, but fighting for what they take to be *basic principles of justice relevant to the wider society*. This style of engagement sets the bar of success much higher than a campaign aimed at protecting the rights of conscience. It says to the world, "we will not pack up and go home until this injustice is rectified." A dissenting community with that spirit is a force to be reckoned with, and not one that can easily be dismissed or bought off with some local concessions.

A large part of the reason dissenters of this sort pose a greater threat to the practices they are protesting against than they might were they merely to seek conscience-based exemptions, is that by demanding the wholesale reform of those practices (rather than just controlling some of their effects), and making themselves a "thorn in the side" of the broader community, refusing to rest content with local concessions, they generate a tension in the wider society that becomes painful for those involved and demands to be resolved. I am not referring here to the tension generated by threats of violence and intimidation, but by the tension generated by those who are willing to stand up against established practices they conscientiously judge to be unjust and to suffer the consequences of their opposition in a peaceful, civil, and public manner. Their accusations, amplified through peaceful protest, public debates, advertising campaigns, and acts of civil disobedience, may strike a cord with their audiences, and may eventually begin to penetrate their complacency and make them wonder if practices they had until then accepted as "civilized" and "perfectly normal" are in fact as innocent as they had liked to think until then. The evident disharmony between moral opinions of different sections of the community becomes a serious problem that demands the attention of the society as a whole. Martin Luther King described this as "creative tension," and believed that nonviolent resistance, including civil

disobedience, could generate such a tension in the wider society, and eventually shake people out of their moral complacency.¹⁷

4 How to reduce the costs of dissent

Now, let us recall the central point of this discussion: efforts to reduce the cost of dissent, whether through conscience-based exemptions or generic liberties to refrain from engaging in unjust practices, are not the only weapons in the fight against injustice, and there are good reasons for preferring other weapons, in particular campaigns aimed at full-scale reform, where conditions permit. Admittedly, the weapons of conscience-based exemptions, universal liberty, and far-reaching reform, are not mutually exclusive. They could very well constitute a multi-pronged campaign against injustice. However, dissenting communities should be aware that efforts employed to reduce the personal and communal costs of dissent, *while simultaneously* fighting aggressive campaigns for social and legal reform, may be sending mixed signals to their adversaries and to the general public. Seeking generic or conscience-based liberties to withhold cooperation from unjust laws seems to send the signal that we object to an activity *because we have idiosyncratic moral beliefs and find this activity personally offensive*. It seems to convey the message “Whatever you ask of other people, leave me alone to follow my conscience.” Whereas fighting unjust laws and practices on their merits seems to send a clear signal that the dissenter objects to an activity *because it is wrong and unjust, period, not just wrong for me but wrong for any human being*. While these two messages are logically reconcilable, conveying them *both* simultaneously, particularly in a culture under the sway of relativistic principles, is likely to lead to considerable confusion, since a relativistic mindset will likely interpret a conscientious objection as motivated by a desire for subjective wholeness or inner coherence or peace, rather than as a desire to see justice done in the wider political community.

17 See Martin Luther King, Jr., “Letter from Birmingham Jail,” in: *Why We Can’t Wait* (Signet Classics, 2000). Tactics of this sort were used, in some cases with great success, in the campaign for the abolition of slavery in the United States and Britain, in the independence movement in India, and in various civil rights movements around the world over the course of the twentieth century. Resistance to communism in Poland and other Soviet-occupied countries was spearheaded by public denunciations of Communist policies and principles, combined with the willingness of some social and religious leaders to risk imprisonment, torture, or death for their opposition to the Communist regime.

5 Conclusion

I have done my best to present a balanced assessment of the merits of seeking conscience-based exemptions to general legal obligations as a strategy for fighting injustice when one happens to find oneself in a community that dissents from the conventions and practices of the majority or ruling party. I have suggested that dissenting communities, in cases where they face intransigent majorities or powerful and stubborn ruling elites, may find themselves compelled to seek out responses to injustice that fall short of full-scale social reform. Among these second-best responses are measures that reduce the costs of dissent from injustice. I have further argued that within this category, it is preferable to secure the liberty of *all* from any obligation to act unjustly than to seek special conscience-based exemptions from a requirement to engage in unjust conduct, since the former is less burdensome on dissenters and more consistent with the rule of law than the latter. But I have also suggested that either of these strategies may tempt dissenters to put their own security or immunity from prosecution ahead of the imperative to bring an end to grave injustices in their society, and may encourage the wider society to view dissenters as harmless sects to be tolerated rather than serious interlocutors who deserve to be listened to. Finally, I have pointed out that a more direct and confrontational style of engagement, even in a politically unfavorable climate, may be more effective than the pursuit of conscience-based exemptions at making a problem socially conspicuous and generating the sort of “creative tension” that Gandhi and King sought to induce in their campaigns against injustice.

Let me conclude by underlining that it is not my intention to delegitimize or condemn efforts by dissenting communities to secure opt-out rights for those who are vulnerable to legal obligations to engage in what they judge to be unjust conduct. Rather, I simply wish to remind advocates of freedom of conscience of the costs this strategy can incur, especially when pursued as an alternative to more far-reaching campaigns against injustice. A fundamentally unjust legal and social arrangement that extends conscience-based exemptions to dissenters is liable to impose special legal burdens on dissenting communities, to “ghettoize” society into a plethora of diverse communities whose views of justice and rights diverge radically, and to reduce the public standing of dissenters to that of a benignly tolerated sect, rather than a serious moral and political force to be reckoned with. To keep these costs to a minimum, advocates of freedom of conscience ought to resist the temptation to abandon more ambitious and transformative tactics in the fight against injustice. They ought to see exemptions not as permanent settlements, but as lesser evils, halfway houses to full legal and social

reform. More traditional strategies of combatting injustice, such as political advocacy, public education campaigns, lobbying, and civil disobedience, should be employed both during and after campaigns for conscience-based exemptions. In this way, dissenting minorities will remain dynamic forces for social reform rather than collapsing into the equivalent of self-contained Amish communities, relatively harmless to the wider culture.