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Martyrdom and Religious Freedom

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Essay

Martyrdom and Religious Freedom

CHRISTOPHER C. LUND

When we give religious exemptions, why do we do it? Is it because we think people will back down otherwise or because we think they won't? What exactly are religious exemptions trying to avoid? The harm to conscience that submission would bring? Or the defiance and resistance that refusal would entail?

The easy answer is both. And it is the truthful answer as well. We give religious exemptions both to avoid the prospect of martyrdom and to avoid the prospect of broken consciences. Religious exemptions protect human dignity and freedom; they also avert open contestation between church and state. Both things are good, and there is no need to choose between them.

Yet even so, the above questions still linger. And how you think about them can end up coloring your approach to all kinds of things: which claims should succeed and which should fail, how doctrine ought to be constructed, and what religious liberty is all about.

This symposium essay ponders these questions, drawing from the length of the American experience. Its basic premise is that martyrdom matters—that religious liberty has and will be shaped by the willingness of people to suffer for their faith. Along the way, it tries to offer some more specific and provocative thoughts.

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Martyrdom and Religious Freedom

CHRISTOPHER C. LUND *

INTRODUCTION

Two years ago, Notre Dame held a symposium, *Religious Liberty and the Free Society*. At the time, *Little Sisters of the Poor* was pending at the Supreme Court and no one knew how it would be resolved.¹ *Little Sisters of the Poor* involved the Affordable Care Act's contraceptive mandate as it applied to religious nonprofits.² The nonprofits objected to the partial exemption available to them, under which insurers and third-party administrators would provide the objectionable forms of contraception to their employees. Instead they wanted a total exemption from the mandate—like the one given to houses of worship—under which employees would not receive the prohibited forms of contraception at all.

The keynote speaker at the symposium was John Garvey, the president of Catholic University, which at the time was a plaintiff in a companion case to *Little Sisters of the Poor*.³ In the audience was John Jenkins, the president of Notre Dame, another plaintiff in another companion case.⁴ There were a lot of smart people in the room that day and a lot of concern about the mandate.

Garvey came before us in two different sets of shoes. As President of Catholic University, he was effectively a litigant in these cases. But Garvey's experience as a university president had been preceded by a long and distinguished career as a lawyer, law professor, and First Amendment expert. No one could claim to know church-state matters better than

* Professor of Law, Wayne State University Law School. I would like to thank Marc DeGirolami, Chad Flanders, John Inazu, Douglas Laycock, Micah Schwartzman, and Elizabeth Sepper for helpful comments on earlier drafts. A workshop at Wayne State University Law School greatly improved this piece.

¹ The case was consolidated with others into *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam).

² *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015). The Court's earlier decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), involved the right of religious for-profit corporations. The Court resolved the case by giving religious for-profit corporations the same partial exemption previously given to religious nonprofit corporations. *Id.* at 2782–83.

³ *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *see also* *Priests for Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 446 (2015).

⁴ *Priests for Life v. U.S. Dep't of Health & Human Services*, 772 F.3d 229, 255–56 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell* 136 S. Ct. 1557 (2016).

Garvey; he wrote a leading church-state casebook and several important articles.⁵ Garvey knew law and he knew Catholic theology. Maybe more than any other single person, Garvey could talk with confidence about both the legal and religious issues at stake—he could speak both objectively about the law and about how it was subjectively experienced.

Unfortunately Garvey's keynote was apparently not recorded. But I remember a question from the audience. A woman, clearly on the University's side of the dispute, asked Garvey what would happen if Catholic University lost. She wanted to know what other means of fighting would be at the University's disposal. Now Garvey could have said simply that, once its legal options were exhausted, Catholic University would (however reluctantly) comply with the mandate. In our day and age, this is what one expects. And as I remember it, Garvey's demeanor suggested this is indeed what would probably happen, though his words were more reserved, emphasizing the need to wait and see.

But what if Garvey had given the other answer? What if Garvey had said Catholic University would never comply, whatever the cost—that it would fight them on the beaches, and on the landing grounds, and that it would never surrender. It would defy the mandate; it would incur the millions in fines. Eventually Catholic University would owe itself to the Department of Health and Human Services, and John Garvey himself would walk to the White House to turn over the keys of the University to the federal government. Such things may strike you as unlikely, even silly to contemplate. But say you genuinely believed this is what would happen without an exemption. Does it change anything about how you see the case?

How much of a role does martyrdom, and fears of martyrdom, have in our system? When we give religious exemptions, is it because we think people will back down otherwise or because we think they won't? What is religious liberty trying to avoid—the prospect of martyrs or the prospect of broken consciences? Formal doctrine, at least most of the time, does not ask about such things; the law has an official policy of not inquiring into how its official policy will be received. Yet maybe martyrdom, and the prospects of martyrdom, do matter. Maybe such things do enter, however subtly and however modestly, into how controversies between church and state are framed and resolved.⁶

⁵ MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* (3d ed. 2011); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996); John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75 (1997); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); see also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

⁶ A line from Robert Cover comes to mind: "The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their

This symposium essay touches upon a wide range of subjects, from religious voluntarism to the law of civil contempt; from some renowned nineteenth century polygamy cases to some uncomfortable modern cases of child abuse and neglect. It looks at history and theory, and even a bit of doctrine—a few stray and probably unintended sentences by Chief Justice Burger in a case from the 1980s, it turns out, have caused a fascinating bit of havoc in the lower courts.

This piece is a brief exploration of martyrdom and some of the issues it presents. These matters are too complex to yield much in the way of firm conclusions or tidy prescriptions. But the basic premise here is that martyrdom matters—that religious liberty has and will be shaped by the willingness of people to suffer for their faith. And recurring throughout this piece will be a provocative and highly speculative thought—that religious liberty has a less certain future in a world without martyrdom, in a world where people do not suffer for their faiths.

No one doubts religious folks are harmed when they back down and conform. But that harm is internal to them, private and somewhat invisible, easy to dismiss and maybe even to forget. When the religious suffer in secular terms—when they go to prison, are fired from their jobs, lose their churches or custody of their children—their suffering becomes more visible and more easily understood outside the faith. Such suffering provides a secular metric by which religious passion and commitment can be gauged—a way ethereal religious devotion can be cashed out into hard secular currency. Religious beliefs themselves may not translate, but the willingness to suffer for them speaks in a language of its own. It is that willingness to suffer which gave birth to religious liberty—that suffering was the crucible in which the concept was forged—and it is worth pondering what will happen to religious liberty if it goes away. Yet this piece advances no great thesis. It contents itself with pondering over eternally recurring questions and themes. If there are answers here, they are for the reader to find.

I. MARTYRDOM, BROKEN CONSCIENCE, AND FUTILE COMPLIANCE

When religious commitment collides with legal obligation, that is where free exercise takes shape. In the classic formulation, religious believers must choose between two masters—God or Caesar, church or state. Of course, the law might bend to ameliorate the conflict; this is the issue of religious exemptions, with its own intricate history.⁷ But if the law

judicial office and their law.” Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983).

⁷ For an overview of that history, see Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 469–73 (2010).

proves intransigent, the religious believer must ultimately choose between faith or law without being able to satisfy both.

At this point, the road forks. A religious believer might choose faith, accepting the legal consequences as simply the cost of living faithfully in an unfaithful world. This we will call *martyrdom*. Or a religious believer might choose law instead of faith, backing down and accepting his or her own apparent unfaithfulness. This we will call *broken conscience*. The first is the path of defiance and resistance; the second is the path of acquiescence and submission. And connected to these ideas will be others. Sometimes, for example, the state might lose interest in coercing compliance because coerced compliance is in some way self-defeating—a kind of contradiction in terms. A Quaker, for example, may be such a terrible soldier that the state may have no interest in conscripting him even if he agrees to go.⁸ Maybe call this the idea of *futile compliance*.

The reasons for religious freedom are messy and overlapping, and any plausible theory of religious liberty has to include both martyrdom and broken conscience as rationales.⁹ Sometimes thought of as the earliest Free Exercise case in America, *People v. Philips*¹⁰ involved a priest who refused to testify against a thief that he recognized from the confessional.¹¹ The court explained the dilemma: “If [the priest] tells the truth, he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testifies the truth he is wicked.”¹² This is the familiar catch-22 at the root of all cases involving religious exemptions, then and now. The priest cannot satisfy the requirements of both the law and his faith. He must choose one and face the other’s wrath.

As courts often do, *Philips* does not discuss the prospect of martyrdom—the court assumes that, if push came to shove, the priest would comply with the law despite his faith. Maybe there is a subtle point to make here; maybe it says something about the judicial craft that judges do not like thinking too much (at least openly) about the prospect of people defying their orders. So instead of talking about the harms of incarceration, the court instead talks about the harm of forcing the priest to testify against

⁸ See *Gillette v. United States*, 401 U.S. 437, 452–53 (1971) (noting “the hopelessness of converting a sincere conscientious objector into an effective fighting man”).

⁹ For my own defense of religious freedom, and for some discussion of those messy and overlapping justifications, see Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017).

¹⁰ *People v. Philips* (N.Y. Ct. Gen. Sess. 1813), reprinted in MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, *RELIGION AND THE CONSTITUTION* 94–99 (4th ed. 2016).

¹¹ For a deeper analysis of *Philips*, see Walter J. Walsh, *The First Free Exercise Case*, 73 GEO. WASH. L. REV. 1 (2004).

¹² MCCONNELL ET AL., *supra* note 10, at 96 (reprinting *Philips*).

his will—such a thing, the court says, would “expose him to punishment in a future state [and to] privations and disgrace in this world.”¹³

This is our idea of *broken conscience*, although one can see how this label is imperfect. Forced to say what happened in that confessional, the priest will face “the compunctious visitings of a wounded conscience,” “disgrace in the presence of his assembled friends,” and “the gloomy perspective of a dreadful hereafter.”¹⁴ The first two of these can be seen in secular terms—as guilt and shame, respectively. But the third has a harder time being translated into secular terms. This illustrates a point probably worth making. Harms can be phrased in secular terms—in the language of conscience—but this risks flattening the complex religious sentiments in play.

Bearing this in mind, examples of broken conscience are everywhere. One recent and illustrative case involved an Army Ranger who wanted to keep his hair long, maintain a beard, and wear a turban, all in accordance with the precepts of his Sikh faith.¹⁵ Years before, when the officer first started off as a cadet at West Point, “before [he] fully understood what was happening, he found himself in the barbershop with the other cadets to be trimmed and shaved.”¹⁶ He thought he would be kicked out of West Point if he objected, so he let it happen. Now, years later, he views that decision with profound regret. He went through a period of “significant shame and disappointment in himself,” he says, “for violating the Sikh religious requirements.”¹⁷ Such cases illustrate how martyrdom and broken conscience often go together: it is precisely that the Army Ranger feels like he once abandoned his faith that makes him now unwilling to budge on matters relating to it.

II. MARTYRDOM AND RELIGIOUS FREEDOM

Martyrdom and broken conscience each have their place, and their relative roles are probably impossible to pin down. But the idea of martyrdom—the prospect that religious folks will not back down from their religious commitments—has always been with us. American church-state history is full of people who did not back down, even after it was clear what would happen to them if they persisted. Baptists were whipped

¹³ *Id.*

¹⁴ *Id.* The court goes on with this theme for some time, explaining how the priest’s testimony would work “an offence against high heaven, and seal his disgrace in the presence of his assembled friends, and to the affliction of a bereaved church and a weeping congregation.” *Id.*

¹⁵ *Singh v. Carter*, 168 F. Supp. 3d 216, 220 (D.D.C. 2016).

¹⁶ Complaint ¶¶ 71–72, *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (No. 16-399).

¹⁷ *Id.* ¶ 74; *cf.* *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (“A sincere religious believer doesn’t forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?”).

and jailed in colonial Virginia for publishing religious sentiments and for preaching without a license; they knew the risks they were running.¹⁸ William Penn was given several chances to take his hat off; the judge held him in contempt only because he willfully refused to comply.¹⁹ In 1647, Massachusetts Bay banished Catholic priests from the colony, while also stipulating that any priest banished who came back would be put to death.²⁰ . Defiance of the rules, even if it meant death, was something to be expected.

Though it is impossible to establish this with any degree of confidence, one gets the vague sense that the prospect of martyrdom loomed larger in the minds of people centuries ago than it does today. Early American history is heavily influenced by the Christian tradition—a tradition in which martyrdom has had a very important role. Tertullian famously said that the blood of the martyrs was the seed of the church.²¹

And maybe martyrdom was just more expected in the old days. One wonderful case to teach is *Commonwealth v. Cooke*,²² a precursor to *West Virginia v. Barnette*.²³ Thomas Wall, an 11-year-old Catholic student, was told by his public school teacher to read Protestant versions of the Lord's Prayer and the Ten Commandments in the classroom. Wall's priest had earlier told him to refuse.²⁴ It was again the classic problem of two sovereigns (writ small), and Wall had to make his choice. Refusing the teacher's order, he was beaten for thirty minutes with a cane. Wall thus became a martyr (again writ small), though his case actually combines

¹⁸ See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2165–66 (2003) (giving examples). And these events were influential. See, e.g., Letter from James Madison to William Bradford (Jan. 27, 1774), in 1 THE PAPERS OF JAMES MADISON 104, 106 (William T. Hutchinson & William M.E. Rachal eds., 1962) (“That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this in the adjacent County not less than 5 or 6 well meaning men in close Goal for publishing their religious Sentiments which in the main are very orthodox.”).

¹⁹ Michael McConnell notes how Penn's case “became a cause célèbre in America,” and “came up for oblique discussion in the First Congress, during the debate over the Bill of Rights.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1472 & n.320 (1990).

²⁰ DOCUMENTS OF AMERICAN CATHOLIC HISTORY 111-12 (1962).

²¹ THE APOLOGY OF TERTULLIAN FOR THE CHRISTIANS 147 (T. Herbert Bindley trans., Parker & Co. 1890).

²² 7 Am. L. Reg. 417 (Police Ct. 1859), as reprinted in MCCONNELL ET AL., *supra* note 10, at 456.

²³ 319 U.S. 624 (1943).

²⁴ Michael Grossberg explains the backstory. In short, Boston required Bible reading in the public schools. But a compromise had been worked out in Catholic areas to allow Catholic texts to be used. When some school authorities went back on the compromise, many Catholic families and parishes objected, and Wall was thought to be an organizer and ringleader of local resistance. For these details and more, see Michael Grossberg, *Teaching the Republican Child: Three Antebellum Stories About Law, Schooling, and the Construction of American Families*, 1996 UTAH L. REV. 429, 452–55 (1997).

martyrdom with broken conscience. Wall had been beaten slowly in the hopes that he would back down. The court tells us that “[t]he blows were not given in quick succession, but with deliberation,” and “there were several intervals, at two of which [the teacher] was absent from the room some little time.”²⁵ In the face of that force and determination, Wall eventually relented—he read what the teacher wanted, presumably in tears.²⁶ And although the court says nothing about this, one cannot help but think about how Wall (like the Sikh Ranger)²⁷ must have regretted backing down later.

At the time of the Framing, maybe the most salient issue regarding the free exercise of religion involved Quakers and the draft. This came up in several places, among them in the First Congress’s consideration of the proposed amendment that “no person religiously scrupulous shall be compelled to bear arms.”²⁸ That proposed amendment failed. And there is not even a real record of the failure because the Senate threw out the provision without recorded discussion.²⁹ But in the House discussion, several members openly discussed the role of martyrdom: Quakers would never submit, so it would be pointless to draft them. Elias Boudinot put it squarely: “Can any dependence . . . be placed in men who are conscientious in this respect? [O]r what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”³⁰ The fear was not that Quakers would comply at the cost of their consciences; the understanding was that they would not comply at all. From this, Roger Sherman concluded that it

²⁵ See MCCONNELL ET AL., *supra* note 10, at 456 (reprinting *Cooke*).

²⁶ See Grossberg, *supra* note 24, at 455 (“Thomas held out for thirty minutes until, with cut and bleeding hands, he finally repeated the Commandments.”). This combination of sometimes backing down and sometimes remaining strong is common. Detlaf Garbe provides this account from a Jehovah’s Witness child in Nazi Germany:

When I refused to give the Hitler greeting, which was daily required at school, I would be struck, but I rejoiced to know, strengthened by my parents, that I had remained faithful. But there were times when either because of physical punishment or out of fear of the situation I would say “Heil Hitler.” I remember how I would then go home, my eyes filled with tears, and how we would pray together to Jehovah and how I would once again take courage to resist the enemy’s attacks the next time. Then the same thing would happen again.

DETLEF GARBE, *BETWEEN RESISTANCE AND MARTYRDOM: JEHOVAH’S WITNESSES IN THE THIRD REICH 174* (Dagmar G. Grimm, trans., Univ. of Wis. Press 2008) (citation omitted).

²⁷ See *supra* text accompanying notes 15–17 (discussing a Sikh Army Ranger who regretted allowing his hair to be cut at West Point).

²⁸ For discussion of this provision, see McConnell, *supra* note 19, at 1500–03.

²⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 660 (2008) (Stevens, J., dissenting) (“[R]ecords of the debate in the Senate, which is where the conscientious-objector clause was removed, do not survive . . .”).

³⁰ 1 ANNALS OF CONG. 767 (1789) (Joseph Gales ed., 1834) (statement of Rep. Boudinot, Aug. 20, 1789).

would not even make sense to require them to find substitutes or pay equivalents: “[T]hose who are religiously scrupulous of bearing arms . . . are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other”³¹

The background here was that Quakers had long been martyrs for their faith on this point and everyone knew it. During the Revolution, Philadelphia had given a partial exemption to Quakers—they did not have to fight but they did have to pay an equivalent—and Quakers often responded with disobedience: “Quakers were fined for failing to pay taxes or equivalents, and substantial numbers had their property sold to pay the various sums they would not willingly turn over to the authorities.”³² But Quakers did not just refuse to kill for country. They often died refusing to protect themselves, which helped make their objection to war seem less self-serving. As Justice Scalia once put it:

Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though “[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming.”³³

It is hard to say whether martyrdom was more expected in the olden days. But here a trilogy of nineteenth century Mormon cases becomes tremendously important.³⁴ These Mormon cases are well known in the field. But they deserve even more attention than people usually give them. These cases have profoundly shaped how we view religious liberty in almost subconscious ways. Forget the opinions themselves; forget the legacy effects they have on modern doctrine (like *Employment Division v. Smith*³⁵); forget even the background events that preceded them. Maybe the most important thing about the Mormon trilogy of cases is what happened after them. Because what happened after them—in particular, what happened almost exactly four months after the final opinion was issued—has molded us in ways that we do not fully appreciate and sometimes do not even recognize.

³¹ *Id.* at 750 (statement of Rep. Sherman, Aug. 17, 1789).

³² Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603, 1628 (2005).

³³ *Heller*, 554 U.S. at 590 (quoting PETER BROCK, PACIFISM IN THE UNITED STATES 359 (1968)).

³⁴ See *Reynolds v. United States*, 98 U.S. 244 (1879); *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

³⁵ 494 U.S. 872 (1990).

The Mormon cases flow from the polygamy of the early Mormon church.³⁶ Facing rejection from the rest of the country, the Mormons moved west under Brigham Young. This was an attempt at separation of church and state in a primal sense; the Mormons tried to separate church and state geographically. But it did not work; the Mormons could not get far enough away. Eventually Utah became a federal territory, and Congress began to step in to try and stop plural marriage.³⁷ For a time, the Mormons survived by taking advantage of some natural advantages. Polygamy cases were hard to prove; witnesses refused to work with authorities; local officials declined to prosecute.³⁸ But Congress was sufficiently determined, and so the cases ultimately came: (1) *Reynolds v. United States*, which upheld a bigamy conviction against constitutional challenge;³⁹ (2) *Davis v. Beason*, which sustained a ban on polygamists voting;⁴⁰ and (3) *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*—the caption sums up both the case’s stakes and its holding—which validated Congress’s dissolution of the Mormon Church.⁴¹

For much of this period, Mormons refused to comply with the federal government’s antipolygamy efforts. Mormons would go into hiding or refuse to cooperate; they would lie or forget on the stand.⁴² Sometimes they would fight in a more literal sense, like the women who resisted arrest “with hatchet in hand.”⁴³ This created, as such resistance always does, a kind of game of chicken. But the Mormons were up against a Congress and a country unwilling to swerve. As the decades went on, Congress passed progressively more ambitious legislation and Mormons began to go to jail in numbers for their faith. Scrutinizing the evidence over two decades, Sarah Barringer Gordon reports that more than half of the criminal records in Utah during this period were for unlawful cohabitation, with almost 900 indictments between 1886 and 1888.⁴⁴

The final straw, and the final case in the trilogy, happened in May 1890. In *Late Corporation*, the Court upheld Congress’s decision to totally dissolve the Mormon Church and to confiscate its property.⁴⁵ But just as important as what happened in May 1890 was what happened in

³⁶ For some of the facts that follow and a wonderful overview of the subject, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

³⁷ *Id.* at 55-83 (describing some of this legislation); MCCONNELL ET AL., *supra* note 10, at 101-09 (providing a brief overview of these developments).

³⁸ GORDON, *supra* note 36, at 161-62.

³⁹ 98 U.S. at 251.

⁴⁰ 133 U.S. 333, 348 (1890).

⁴¹ 136 U.S. 1, 46 (1890).

⁴² GORDON, *supra* note 36, at 158-59, 161 (2002).

⁴³ *Id.* at 163.

⁴⁴ *Id.* at 157-58.

⁴⁵ 136 U.S. at 66.

September 1890. Four months after the decision in *Late Corporation*, Wilford Woodruff, the president of the Church, made an announcement. It had been revealed to him that the Church should cease the practice of plural marriage. Now, this short window of time between legal decision and spiritual revelation suggests a cause-and-effect relationship, but Woodruff himself made that perfectly clear when he announced the change:

Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the Church over which I preside to have them do likewise.⁴⁶

A year later, Woodruff added this in explanation:

The Lord has told me to ask the Latter-day Saints a question The question is this: Which is the wisest course for the Latter-day Saints to pursue—to continue to attempt to practice plural marriage, with the laws of the nation against it and the opposition of sixty millions of people, and at the cost of the confiscation and loss of all the Temples, and the stopping of all the ordinances therein, both for the living and the dead, and the imprisonment of the First Presidency and Twelve and the heads of families in the Church, and the confiscation of personal property of the people (all of which of themselves would stop the practice); or, after doing and suffering what we have through our adherence to this principle to cease the practice and submit to the law, and through doing so leave the Prophets, Apostles and fathers at home, so that they can instruct the people and attend to the duties of the Church, and also leave the Temples in the hands of the Saints, so that they can attend to the ordinances of the Gospel, both for the living and the dead?⁴⁷

This logic is easy to follow; even children can follow the basic idea of duress. If the two alternatives for the Mormon Church in 1890 were to abandon polygamy or die, is death really the only true option? Religions, like constitutions, need not be suicide pacts.

⁴⁶ Wilford Woodruff, *Official Declaration 1*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Sept. 24, 1890), <https://www.lds.org/scriptures/dc-testament/od/1> [<https://perma.cc/44A2-T23Z>].

⁴⁷ Wilford Woodruff, President, Church of Jesus Christ of Latter-Day Saints, Address at the Cache Stake Conference (Nov. 1, 1891), <https://www.lds.org/scriptures/dc-testament/od/1> [<https://perma.cc/44A2-T23Z>].

But it is important to also see this from a religious perspective, as Woodruff himself did. Maybe the faithful thing for the Mormon church—maybe the thing God wants—is to abandon plural marriage. This is, in fact, what Woodruff says: If the alternatives are the abandonment of plural marriage and the destruction of God’s church—a church that is the light and future of the world—God’s will must be for the former. Woodruff would have known the line about the Sabbath being made for man and not man for the Sabbath, and Woodruff would have seen polygamy along the same lines.⁴⁸

To those who see martyrdom as essential or inherent in religion,⁴⁹ this may sound like a weak response to be expected only from people insufficiently committed to the faith.⁵⁰ But the religious logic in Woodruff’s position holds. And there is also here a distinction between individual and corporate martyrdom that sometimes gets lost. It is one thing to die yourself for your faith; it is another thing to commit someone else. And there is also the question of whether martyrdom will really work anyway. Think about Woodruff again—or think about the mandate from John Garvey’s position. If it would solve the problem that Catholic University faced, Garvey might decide to go to jail for the rest of his life or suffer personal bankruptcy. But liability for the mandate is corporate and not personal. No amount of time that Garvey spends in jail for contempt will save Catholic University. There is nothing he can do. Woodruff was in the same position.

Woodruff applied a straightforward conception of duress: when religious obligation conflicts with legal obligation, religious obligation bends to avert the conflict. In this way, religious duress is a kind of mirror image of religious exemption—religious exemptions involve precisely the

⁴⁸ In a thoughtful and striking piece, Frederick Gedicks defends Woodruff’s position: “Mormons understand their church to exist in the world to do God’s work, and the church clearly cannot do God’s work unless it exists in the world From the perspective of the nineteenth-century church, there were aspects of Mormonism which were more important than plural marriage, and it became clear to the leaders of the church at that time that it was necessary to choose between them.” Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167, 172 (1992). For a quite different approach, see Stanley Hauerwas & Michael Baxter, *The Kingship of Christ: Why Freedom of “Belief” is Not Enough*, 42 DEPAUL L. REV. 107, 125 (1992).

⁴⁹ See Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1119 (1999) (“A person who truly believes cannot—simply cannot—be induced to change his or her beliefs.”); Hauerwas & Baxter, *supra* note 48, at 126–27 (similar). *But see* Paul Horwitz, *Against Martyrdom: A Liberal Argument for Accommodation of Religion*, 91 NOTRE DAME L. REV. 1301, 1330 (2016) (arguing that “Tushnet’s account of religious belief and its relationship with the world . . . is . . . based too much on a theology that assumes God is done speaking” and that religious groups are constantly refining their beliefs in ways that can appear from the outside as changes).

⁵⁰ See Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 25 n.125 (2015) (“[T]he general view held by non-Mormons of the Mormon abandonment of the practice of polygamy . . . [is] the cynical view that these changes are insincere capitulations to external pressure.”).

same conflict but with legal obligation doing the bending. Yet here is the knot. Knowing better than to require the impossible, religions often have some conception of religious duress.⁵¹ But such conceptions must prompt us to reconsider the whole issue of exemptions. In the aftermath of the Manifesto, Woodruff remarked: “[W]e have carried [God’s commandments] as far as we could; but when we cannot do it, we are justified. The Lord does not require at our hands things we cannot do.”⁵² What could please a government more than a statement like that? This neatly solves the problem of two masters, doesn’t it? If the Kosher rules allow Jews to eat non-Kosher food when no Kosher food is available, why again should a state prison provide Kosher meals? The denial of an accommodation itself becomes an accommodation; the state erases the religious obligation by refusing to cater to it.

The Mormon episode teaches a number of lessons about religious exemptions. But maybe the big lesson is this: don’t make exemptions. If you make exemptions, you will have to keep on making exemptions and you will never get what you want. But if you don’t make exemptions, those religious folks will back down. They might martyr themselves in the short term, which will be hard for them and frustrating for you. But eventually they will come along. With enough pressure and enough time, you can get them to change their minds even about theology. And then everyone wins: you get what you want, and they will be satisfied with the new theology that they forget you had a role in creating.

This is all tongue-in-cheek, of course, but it is worth asking why we shouldn’t view the Mormon cases this way. Don’t they end happily enough? The Mormon church abandons polygamy in 1890. By 1894, every repentant polygamist is pardoned.⁵³ By 1896, all the church property is returned.⁵⁴ That is a swift and relatively peaceable end to a very long conflict.⁵⁵ Paul Horwitz has thoughtfully pointed out how it can go the other way too—church-state conflicts can sometimes act to solidify, unify, and galvanize religious groups in their opposition to the state.⁵⁶ And there are traces of Horwitz’s logic in the Mormon story too. When Congress first

⁵¹ For one example, see CATECHISM OF THE CATHOLIC CHURCH pt. 3, art. 8(IV), ¶ 1859 (2003), http://www.vatican.va/archive/ENG0015/_P6C.HTM [<https://perma.cc/AMG9-YYGN>] (“Mortal sin requires full knowledge and complete consent . . . [which] implies a consent sufficiently deliberate to be a personal choice.”).

⁵² Gedicks, *supra* note 48, at 171 (footnote omitted).

⁵³ See Proclamation No. 369 (Sept. 25, 1894), <http://www.presidency.ucsb.edu/ws/index.php?pid=70911> [<https://perma.cc/ZBQ3-4FSK>].

⁵⁴ See Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIG. 281, 312 (1989).

⁵⁵ See Gedicks, *supra* note 48, at 169 n.6 (“[P]ersecution ceased almost immediately upon the Mormons’ abandonment of plural marriage.”).

⁵⁶ See Horwitz, *supra* note 49, at 1320 (“[I]llegal religious groups—like other groups—harden as well as soften, snap as well as bend, react as well as give.”).

began acting against polygamy, it actually strengthened Mormon commitment to the practice.⁵⁷ Horwitz's point is that religious freedom can help contain and reduce illiberalism within religious groups, and he must be right at least sometimes. But this ends up yet another disturbing aspect of the Mormon cases. The conflict with the Mormon Church lasted decades and only ended when Congress finally brought in the overwhelming firepower necessary to win. Might the deep lesson be that the state needs to stop thinking in terms of half-measures and just dial up the persecution to eleven right from the start?⁵⁸

The Mormon cases are ingrained in our consciousness; they are a core part of our national experience with religion. They are the earliest cases where the Supreme Court wrestles with the idea of religious exemptions—the only such cases from the nineteenth century, in fact. And they have some doctrinal weight even now; *Employment Division v. Smith* took them as having established a rule from which the Court has never deviated.⁵⁹

The Mormon cases have become a kind of dominant narrative, and it is unfortunate that other narratives have gotten less attention. Contrast the experience of the late-nineteenth century Mormons with the mid-twentieth century Jehovah's Witnesses. In World War II, five thousand Jehovah's Witnesses spent time in prison in America for refusing both the draft and alternative service.⁶⁰ Meanwhile, somewhere between a third to half of Jehovah's Witnesses in Germany were either imprisoned, executed, or sent to concentration camps.⁶¹ And the striking thing is that Jehovah's Witnesses—unlike other objects of Nazi persecution like the Jews—had the ability to stop the forces against them by signing a simple form

⁵⁷ GORDON, *supra* note 36, at 87.

⁵⁸ In a set of interesting papers, Netta Barak-Corren has begun exploring these matters empirically. In one study, for example, she asked principals of conservative religious schools how they would handle a teacher who had gotten pregnant out of wedlock. Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination*, 67 HASTINGS L.J. 957, 978, 989–91 (2016). She found that legal outcomes and the kinds of legal remedies imposed had significant though complicated effects on religious decision-making. *Id.* at 1019. See also Netta Barak-Corren, *Beyond Dissent and Compliance: Religious Decision Makers and Secular Law*, 6 OXFORD J.L. & RELIG. 293, 294–95 (2017).

⁵⁹ See 494 U.S. 872, 878–82 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . We first had occasion to assert that principle in *Reynolds v. United States* . . . [and] the rule to which we have adhered ever since *Reynolds* plainly controls [this case].” (citation omitted)).

⁶⁰ Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 29 (1990) (citing MULFORD Q. SIBLEY & PHILIP E. JACOB, *CONSCRIPTION OF CONSCIENCE: THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR, 1940–1947*, at 34, 83–84, 355–58 (1952)); see also M. JAMES PENTON, *APOCALYPSE DELAYED* 142–43 (2d ed. 1997).

⁶¹ See DETLEF GARBE, *BETWEEN RESISTANCE AND MARTYRDOM: JEHOVAH’S WITNESSES IN THE THIRD REICH* 484 (2008) (summarizing and scrutinizing a number of academic works, concluding that there were between “25,000 and 30,000 [Jehovah’s Witnesses]” and “[t]en thousand of [them] were imprisoned for various periods of time”).

renouncing their faith. (Few did.⁶²) But only in this way can we understand the otherwise bewildering remark by the director of the Research Institute at the United States Holocaust Museum: “The Jehovah’s Witnesses were literally the only martyrs of the Holocaust.”⁶³

If the lesson of the Mormons is that sometimes religious people will back down, the lesson of the Jehovah’s Witnesses is that sometimes they won’t. But many people know the Mormon experience; fewer know about the Witnesses’. Most church-state classes cover the Mormon era in some detail; my sense is that most do not even mention the Jehovah’s Witnesses in World War II. Perhaps this is because most law school classes tend to revolve around Supreme Court cases—although there are actually some Supreme Court cases tangentially bearing on this issue.⁶⁴

This theme of martyrdom runs through the entire Jehovah’s Witness experience. Take, for example, their refusal of blood transfusions. Often such refusals happen outside of any legal context—no legal issue necessarily arises simply because a Jehovah’s Witness refuses a transfusion and then dies a preventable death. But occasionally that suffering intersects with law, and then one can see notions of martyrdom quite clearly.

A case out of Kansas involves martyrdom in the literal sense. Mary Stinemetz was a Jehovah’s Witness on Medicaid who needed a liver transplant.⁶⁵ Ordinary liver transplants require blood transfusions. But in Nebraska, they were now doing bloodless liver transplants—transplants, amazingly enough, without transfusions. Yet Kansas refused to pay for

⁶² Detlef Garbe explains how, early on, some Witnesses were willing to sign statements guaranteeing them release. But those early statements required Witnesses only to pledge future good behavior; they did not require a renunciation of the faith. When later statements required a clear and unambiguous renunciation of the faith, “extremely low numbers” of Jehovah’s Witnesses signed them. *Id.* at 287. This, of course, baffled the Nazis: “How could somebody who is given the opportunity to be released choose to go to a concentration camp?” *Id.* at 291.

⁶³ See Joel P. Engardio, *Jehovah’s Witnesses’ Untold Story of Resistance to Nazis*, CHRISTIAN SCIENCE MONITOR (Nov. 6, 1996) (“Unlike Jews and others targeted by the Nazis, the Witnesses were prisoners of conscience. They could have bought freedom by signing a declaration card that renounced their faith and pledged allegiance to Hitler. Few took the offer.”).

⁶⁴ In *Cox v. United States*, 332 U.S. 442 (1947), the Supreme Court ruled 5–4 against several Jehovah’s Witnesses seeking to be considered ministers within the meaning of the World War II draft exemption. *Cox* is particularly interesting now after the Court’s decision in *Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2012). *Hosanna-Tabor* and *Cox* involve quite different contexts, of course, but both cases address the scope and justifications of a ministerial exception. Various comparisons and contrasts come to mind. To take one example, *Cox* and *Hosanna-Tabor* have different takes on the relevance of the time someone spends on religious activities. *Compare Cox*, 332 U.S. at 451 (“The documents show that Thompson and Roisum spent only a small portion of their time in religious activities, and this fact alone . . . is sufficient for the board to deny them a minister’s classification.”), with *Hosanna-Tabor*, 565 U.S. at 194 (“The amount of time an employee spends on particular activities is relevant in assessing that employee’s status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.”).

⁶⁵ *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 143 (Kan. Ct. App. 2011).

such a procedure for Stinemetz, because Kansas had a policy of only reimbursing in-state procedures.⁶⁶ Kansas probably thought Mary Stinemetz would back down. Surely, if push came to shove, she would choose the regular liver transplant over dying. But that is not what happened. Instead Mary Stinemetz died—a martyr for her faith in twenty-first century America.

An equally dramatic case involving Jehovah's Witnesses and blood transfusions comes out of Mississippi. Mattie Brown was a Jehovah's Witness who had been shot by her daughter. The state knew that Brown was a Jehovah's Witness and that she would refuse a blood transfusion. Worried that Brown would die and thus deprive it of a valuable witness, the state went to court and got an order forcing a blood transfusion on her over her objections.⁶⁷ The Mississippi Supreme Court eventually found that order unconstitutional, but it was too late—the surgery (and the transfusion) had already happened. And so Mattie Brown had to live with the contamination of her body and the possible loss of her salvation.

Some think there are changes afoot in American religion—that religion in the United States is becoming less of a durable commitment and more of a lifestyle.⁶⁸ People have more choice in their religious faiths and more consciously experience their religious faiths as chosen. But however true this may be, there are still millions of Americans who are resolute in their faiths. And one cannot help but wonder whether, in some deep way, the law is responsive to that. When one looks at cases involving Jehovah's Witnesses and blood transfusions as they arise in various contexts, one sees judges taking inordinate care to protect the religious beliefs in question.⁶⁹ In the *Stinemetz* case, for example, the Kansas court was in no way bound to give a religious exemption. That court essentially created a right of religious exemption through a bold reinterpretation of its state constitution.

⁶⁶ And this came despite the fact that bloodless liver transplants actually cost less than regular ones, so an exception for Stinemetz here would have actually saved Kansas money. *See id.* at 155 (“[I]t appears that the bloodless technique for a liver transplant is less expensive than a procedure involving blood transfusions, which the KHPA is willing to fund. Thus, the KHPA is unable to argue that the agency is being fiscally responsible as the steward of Kansas tax dollars by denying Stinemetz’ request for prior authorization for the bloodless liver transplant.”).

⁶⁷ *In re Brown*, 478 So. 2d 1033, 1035 (Miss. 1985).

⁶⁸ This is a theme of ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* (2003). For some thoughtful reflections on Wolfe’s book in contexts close to ours, see Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1660–69 (2004).

⁶⁹ For an analysis of this, see Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 166–67, 169, 171–73 (2016) (discussing various instances involving Jehovah’s Witnesses in various postures).

It ratcheted up the standard of review because it could and because there was a result it believed justice clearly demanded.⁷⁰

Martyrs are frustrating people to deal with—they are “prickly people,” as Tom Berg has put it.⁷¹ There is an understandable temptation to shout at William Penn that it is just a hat; he need not go to jail for this. Cases frequently involve religious practices that are meaningless outside the faith, often even unnoticeable to the rest of us. We think of how we wear our hair and whether we wear a scarf as fashion choices; some of us loathe them accordingly. But there are people who will not compromise on such matters and will lose everything to follow the dictates of conscience.

One striking case involved a Native American kindergartner whose family had recently moved to Needville, Texas.⁷² The family asked the school district to let the boy wear his hair long, in accordance with religious beliefs of their Apache tribe. The school refused, insisting that only girls could have long hair. But perhaps the most arresting thing about the case is the family’s commitment. The boy had never cut his hair and the boy’s father had not cut his hair in ten years. The father was threatened with the loss of his job unless he cut his hair; he refused to cut his hair. The father was told to cut his hair for brain surgery; he still refused to cut his hair. Faced with all this, the Fifth Circuit treated this as an easy case: “Superintendent Rhodes’s concern for aesthetic homogeneity . . . is insufficiently compelling to overtake the sincere exercise of religious belief.”⁷³

If judges can be influenced by notions of martyrdom, legislatures can as well. Legislatures sometimes make religious exemptions, and certain classes of legislative exemptions make sense mostly if martyrdom (and the prospect of martyrdom) is taken as a primary rationale. If religious believers in question will violate the law in question and endure the assigned punishment, that becomes a reason why a legislature might exempt them *ex ante*. In such cases, the state is essentially backing down—recognizing that for all its powers, the state has limited ability to command obedience and that sometimes it may not be worth punishing disobedience.⁷⁴

⁷⁰ Later the Kansas legislature passed its state RFRA, statutorily codifying the holding in *Stinemetz*. See KAN. STAT. ANN. §§ 60-5301–5305 (2013) (describing the provisions of the state RFRA).

⁷¹ See Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 70 (2003) (“In matters of religious liberty, we must give substantial attention to the prickly people; it is their rights that are most often at stake.”).

⁷² For the case and the facts that follow, see A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 251–58 (5th Cir. 2010).

⁷³ *Id.* at 271.

⁷⁴ See Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1123 (1999) (“[Such acts of defiance] put the question to the State: What do you truly want to do?”).

Exemptions from the draft, previously discussed in this Essay, may be the best example. Quakers paid fines for resisting the draft in the eighteenth century and Jehovah's Witnesses went to prison for resisting the draft in the twentieth.⁷⁵ Even if a legislature had no sympathy for the religious beliefs or groups in question, draft exemptions could make sense as a way of dealing with the sheer fact of noncompliance.

Another area where (for good reason) there is little sympathy with the religious belief in question is with religious exemptions to child abuse and neglect laws. These religious exemptions come not from courts but from legislatures, who have sometimes protected religious parents who forego medical treatment for their children for religious reasons. The details of these exemption schemes vary considerably. Some states immunize religious folks from civil claims of child neglect; some immunize them from criminal claims of abuse and neglect; a few even immunize them from charges of homicide.⁷⁶ The background here is that a number of faiths, often insular Christian communities, believe in the avoidance of modern medicine as a matter of faith.

These exemptions are striking. The life of a child is a compelling governmental interest, if anything is. If ever there were a place where the law should override religious judgments, this would be it.⁷⁷ These exemptions thus seem not only indefensible but incomprehensible. There is no conceivable rationale for letting children die when they could be saved. But of course, this is where notions of martyrdom come in.⁷⁸ What if the religious parents in these cases will not back down? What if there is nothing the state can do to make them change their minds? After all, if parents are willing to stomach the possible death of their child, and all that comes with that, no threat the state will impose is likely to matter all that much.

The cases here are hard to read. But take the case of the Schaibles, a faith-healing family from Pennsylvania who rejected medical care on

⁷⁵ See *supra* notes 28–32 and accompanying text.

⁷⁶ Walter H. Hawes IV, *Faith-Healing Prosecutions: How Religious Parents Are Treated Unfairly by Laws That Protect Their Liberty*, 54 AM. CRIM. L. REV. 885, 893–94 & nn.56–57 (2017); MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 64 (2d ed. 2014); Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1173 (2007).

⁷⁷ Most will agree with this: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.” *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

⁷⁸ This is not to say that this was the original rationale for these legislative exemptions. For an overview of that quite path-dependent history, see Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 104 GEO. L.J. 1111, 1125–26 & nn.115–23 (2016) (reviewing PAUL A. OFFIT, *BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE* (2015)).

religious principle.⁷⁹ They lost their two-year-old son, Kent, to treatable pneumonia. Convicted of involuntary manslaughter, they were sentenced to ten years of probation. Years later, the Schaibles had another child, Brandon, who was eight months old when he came down with pneumonia. The situation must have felt eerily familiar to them. Again they did not see a doctor and Brandon too ended up dying—a second child lost to perfectly treatable pneumonia. One gets a sense that the deterrent functions of the law simply do not operate here: If Kent's death, and the prospect of Brandon's death, are not enough to make the parents take Brandon to see a doctor, what can the law do? The law seems anemic in comparison to the powers with which we are now dealing.

We can put the Schaibles in jail; we probably should. But still we must ask what good will be served by doing so. The children are dead. Jail is not going to deter the Schaibles. Maybe jail for the Schaibles would help deter the less committed members of their religious community, although those folks will be the ones least in need of deterrence—they would be the ones already likely to turn tail and go see a doctor if their children became seriously ill. There is still the simple retributive case, of course. But even this gets complicated, because conceptions of blameworthiness get complicated. Reading these cases is like reading cases about criminally insane defendants; the more you read, the harder it becomes to judge the defendants because they do not seem like they are from this world.

Perhaps the Schaibles should lose custody of their remaining children. There is a sense to this too, though it is different than saying the Schaibles should be thrown in jail. Taking away custody is prospective and preventative; jail is retrospective and punitive. But even the custodial question gets tricky, because such arguments are so obviously elastic—they would support the state preemptively taking away all the children of every faith-healing family at birth.

One sees some of these points in *State v. Hickman*, a recent Oregon case involving a family belonging to the Followers of Christ.⁸⁰ The parents were sentenced to six years in prison on manslaughter charges relating to the death of their newborn, David. Shannon Hickman had gone into labor two months early. Some people do home births nowadays, but no one would do that with a baby two months premature. Yet Shannon went to her parents' house for the delivery, as her religion taught. And she stayed there, even after the newborn refused to eat, even after his breathing became labored, and even after he changed color from pink to blue-and-gray. The facts of this case are visceral and painful; suffice it to say that the baby died from sepsis nine hours after birth. Of course these parents are

⁷⁹ For this case and the facts that follow, see *Commonwealth v. Schaible*, No. 1003 EDA 2014, 2014 WL 10584785 at *1–*2, *4–*7 (Pa. Super. Ct. Sept. 15, 2014).

⁸⁰ For the case and the facts that follow, see *State v. Hickman*, 358 P.3d 987, 988–91 (Or. 2015).

blameworthy in every usual sense of the term: All of these problems would have been handled if the child had been born in a hospital or sent to the hospital shortly after birth.⁸¹ But at the same time, the reader here feels not only anger at the parents, but also confusion, sadness, and despair. Try as one might to deny it, the Hickmans here did what they earnestly thought best for their child. And even after their child's death—a child they loved—the two parents still believed that what they did was right: “Both of them testified that, looking back on David's death, they would not have done anything differently.”⁸² In the second Schaible case, where the parents were sentenced to three-and-a-half to seven years in prison, the trial judge described them as “loving and caring parents, with the significant exception of their absurd and dangerous views on medical care for their children.”⁸³

This is martyrdom. The law can punish disobedience after the fact, and it can try to circumvent the possibility of disobedience (by, for example, preemptively taking away custody). But it has a hard time coercing obedience before the fact. This is not to say that the Schaibles and Hickmans of the world have suffered enough. Maybe they haven't. But despite the obvious retributive case, the question lingers—what is there is to be gained by imprisoning a couple who have lost their children?

Of course, these cases simultaneously push in the other direction as well. All this discussion of martyrdom can illustrate how the whole concept of religious accommodation can seem wrong-headed, dangerous, and borderline insane. In these cases, the state and a religious believer are trapped in a game of chicken, so to speak. Both sides say the same thing: Sometimes we will back down and sometimes we won't. Sometimes we will back down because we suspect you won't. But on some things, we will refuse to back down. And you can't know in advance which things those are.

In such situations, why should the state be the one to swerve? Does it not send a terrible message—that rather than expecting private citizens to back down, the state will itself back down? And does it not set a terrible precedent—by suggesting that the state will back down when faced with

⁸¹ Striking is this passage:

If defendants had called 9–1–1 at the moment that David was born, when they noticed that he was born prematurely, medical professionals immediately would have been able to give David antibiotics to ward off any infection resulting from Shannon's chorioamnionitis; to monitor and regulate David's temperature and breathing; and to feed David intravenously. If David had received that treatment, one doctor estimated that David would have had a 99 percent chance of survival.

Id. at 990.

⁸² *Id.* at 991.

⁸³ *Schaible*, 2014 WL 10584785, at *8.

disobedience, does it not encourage such disobedience? Any game theorist would tell you what the state needs to do. The state needs to credibly and irrevocably precommit to not making exemptions. But this runs problematically into the prevenient nature of religious beliefs. The religious believers in these cases *already have* precommitted to their course of action. The state finds itself the last party to act, which is intolerable in games of chicken.

III. MARTYRDOM IN THEORY AND DOCTRINE

All these ideas—about whether religious believers will back down or not, about the relative theoretical roles of the rationales of martyrdom and broken conscience—would be interesting even if they had nothing to do with the doctrine or theory of religious freedom. But they do have something to do with the doctrine and theory of religious freedom.

To start with theory, some of the most influential and persuasive accounts of religious accommodations speak in terms of incentives. Take Douglas Laycock's notion of substantive neutrality, under which "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."⁸⁴ This is about incentives: government should not be pressuring people on religious matters, in any direction. But if you think about this for more than a second, it raises a query. If exemptions are about relieving religious pressure, what about those who experience no pressure? Martyrs—those truly committed to the faith—are not going to change their ways for want of a religious exemption. Does that mean we have less reason to give exemptions to such folks?

It is easy to brush off such ideas as silly and beside the point. But before doing that, consider the Supreme Court decision that has led lower courts down precisely this kind of path: *Thomas v. Review Board*.⁸⁵ Chief Justice Burger surely had his virtues. But he really did a number on First Amendment doctrines, at least in the area of the Religion Clauses. Conservatives usually start with his opinion in *Lemon v. Kurtzman*,⁸⁶ criticizing it for the doctrine it created.⁸⁷ Liberals usually start with his

⁸⁴ Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990). Michael McConnell and Richard Posner developed similar ideas under the label of "incentive neutrality." See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37 (1989) ("The purpose of the Free Exercise Clause, in this view, is to remove governmental disincentives to religious choice.").

⁸⁵ 450 U.S. 707 (1981).

⁸⁶ 403 U.S. 602 (1971).

⁸⁷ The classic line is still Justice Scalia's: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school

opinion in *Marsh v. Chambers*,⁸⁸ criticizing it for the doctrine it ignored—namely *Lemon*, which, again, Burger had written.⁸⁹

Chief Justice Burger's opinion in *Thomas v. Review Board* has attracted less notice, but it too has its issues. *Thomas* involved a Jehovah's Witness who worked at a foundry fabricating sheet steel.⁹⁰ When the foundry closed, he was transferred to a department that made tank turrets. But Thomas was a pacifist, and he refused to make tank turrets. So he quit his job. Earlier cases had held that religious objectors had to be given unemployment benefits in such circumstances.⁹¹ But the Indiana courts denied Thomas benefits because they deemed his objections too inconsistent to count as genuinely religious.⁹² Other Jehovah's Witnesses were willing to make tank turrets, and Thomas himself had proved willing to make sheet steel (some of which would later be used for tank turrets). Nevertheless, the Supreme Court ruled for Thomas in an eight to one decision.

Usually when *Thomas* is taught, it is for some now-uncontroversial premises. Courts generally should not investigate whether a person's beliefs are internally consistent or whether they are consistent with the beliefs of their co-religionists. But *Thomas* also contains a curious passage about burdens. *Sherbert* had held the denial of unemployment benefits counted as a burden for Free Exercise purposes.⁹³ That logic was akin to the logic of Laycock's notion of substantive neutrality: just as much as a civil fine or criminal penalty, the loss of unemployment benefits can pressure people away from their religious commitments. In *Thomas*, Justice Burger quotes the relevant passages from *Sherbert*, but then adds this:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be

attorneys" *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

⁸⁸ 463 U.S. 783 (1983).

⁸⁹ See *id.* at 800–01 (Brennan, J., dissenting) ("I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").

⁹⁰ For the facts that follow, see *Thomas*, 450 U.S. at 710–13.

⁹¹ E.g., *Sherbert v. Verner*, 374 U.S. 398, 399, 401–02 (1963).

⁹² *Thomas*, 450 U.S. at 713–15 (referring to *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 391 N.E.2d 1127 (1979)).

⁹³ *Sherbert*, 374 U.S. at 406.

indirect, the infringement upon free exercise is nonetheless substantial.⁹⁴

Sherbert had created a categorical rule that the loss of government benefits was a burden. And in defending that rule, the Court spoke of the religious pressure that such losses can create.⁹⁵ But *Thomas* could be read to suggest something slightly different—namely, that the loss of government benefits should count as a burden only when it creates religious pressure in the individual case. When *Thomas* speaks of “important benefit[s],” it leaves the reader to wonder what benefits might not be sufficiently important. When *Thomas* speaks of “substantial pressure,” the reader wonders what amounts of pressure might be constitutionally insufficient.

To be sure, Burger probably did not mean to create doctrine here at all. He probably just meant to repeat what *Sherbert* said and put it in his own words. But his addition of gratuitous adjectives (“important” and “substantial”) confuses the matter and threatens to make new requirements from old cases.

To be sure, *Thomas* should not be read this way. The idea that a burden exists only when there is “substantial pressure” in some individual case, cannot square with the Supreme Court’s other cases. The Court in *Sherbert*, for example, did not care how much religious pressure Adele Sherbert actually experienced—it did not talk about how much in unemployment benefits she received, or how much money she had, or how committed she was to her faith. *Sherbert* created a categorical rule: if the government requires you on pain of penalty to do something your religion forbids, or forbids something your religion requires, that is a burden on religious exercise.⁹⁶

Yet if one took this possibility from *Thomas* seriously, it would be a different way of approaching free exercise cases. In each individual case, the judge would try to discern how much religious pressure would be created by the denial of an exemption. Only in cases of significant pressure would exemptions be appropriate. In this way, religious exemptions would

⁹⁴ *Thomas*, 450 U.S. at 717–18.

⁹⁵ See *Sherbert*, 374 U.S. at 406 (“[T]o condition the availability of benefits upon this appellant’s willingness to violate a cardinal principal of her religious faith effectively penalizes the free exercise of her constitutional liberties.”).

⁹⁶ See discussion *supra* note 95 and accompanying text regarding *Sherbert*. In the Supreme Court’s recent case involving a Muslim prisoner seeking to wear a beard, the state memorably told him: “You will abide by [Arkansas Department of Correction] policies and if you choose to disobey, you can suffer the consequences.” *Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015). The Court’s opinion concludes this is a substantial burden, but the opinion never explains what “suffer the consequences” actually means. The Court simply moves on to the next issue. See *id.* at 861–63.

be reserved for non-martyrs. After all, if exemptions are designed to relieve religious pressure, true martyrs will not need them.⁹⁷

This would be a radical and fascinating change in the doctrine. It would mean, for example, there was no burden in the *Stinemetz* case—the Kansas case involving a Jehovah’s Witness on Medicaid who needed a liver transplant but objected to a blood transfusion. The religious exemption made a lot of sense—it cost the state less money and saved a human being’s life.⁹⁸ But under this conception of *Thomas*, *Stinemetz* could not even claim to be burdened by Kansas’s denial, because, in *Thomas*’ terms, she would not have felt any “substantial pressure” to “modify [her] behavior” or “violate [her] beliefs.”⁹⁹ Mary *Stinemetz* was never going to back down, no matter what.

Yet an even better example of the strangeness of this logic comes from a case where it was adopted.¹⁰⁰ Jason Heap was an applicant for a Navy Chaplaincy. Things looked good for Heap; he had studied theology at Oxford and got a perfect score in the personal interview. But eventually it came out that Heap wanted to be a Humanist chaplain, and that pretty much doomed his chances. He brought a straightforward claim of religious discrimination, which seemed quite plausible.

Yet the district court denied Heap’s claims on the startling theory—taken from Burger’s opinion in *Thomas*—that even if Heap’s claim of discrimination was factually correct and legally cognizable, his claim still failed because the burden on him was insufficient. Here is the court’s logic:

Here, Dr. Heap has not shown that becoming a Humanist Navy chaplain is dictated by the tenets of Humanism or that by not becoming a Navy chaplain he is somehow in violation of the tenets of Humanism. Rejecting Heap from the Navy chaplaincy does not put substantial pressure on Dr. Heap to modify his behavior and violate his beliefs.¹⁰¹

This logic is counterintuitive; it may take a few readings to follow it. But the essence is simply this: Heap is such a committed Humanist that he won’t abandon his Humanist convictions simply because we don’t give

⁹⁷ In *Thomas*’ terms, because a “burden upon religion exists” only when there is “substantial pressure on an adherent to modify his behavior and to violate his beliefs,” a true martyr will never be burdened. *Thomas*, 450 U.S. at 717–18.

⁹⁸ See *supra* notes 65–65 and accompanying text summarizing the *Stinemetz* case.

⁹⁹ See *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 147 (Kan. Ct. App. 2011) (explaining that *Stinemetz* would have refused to accept a blood transfusion “even in a life-threatening situation”).

¹⁰⁰ See *Heap v. Carter*, 112 F. Supp. 3d 402 (E.D. Va. 2015). For more on the facts of this case, see *id.* at 409–11.

¹⁰¹ *Id.* at 422.

him a job, so there's no substantial burden on his religious beliefs when we don't give him that job.

This logic is unlikely to persuade people, in part because of its raw unfairness and in part because it does not fit with anything else the Court has ever done. It is inconsistent with *Sherbert* and other recent cases. It would be like saying, in *McDaniel v. Paty*, that states could exclude ministers from serving in the constitutional convention because no one would abandon the ministry over such a small thing.¹⁰²

Yet these arguments keep resurfacing. They did so, for example, last term in the Supreme Court's decision in *Trinity Lutheran*.¹⁰³ *Trinity Lutheran* involved a Missouri program that gave money to resurface school playgrounds, but categorically excluded religious schools from participating. One of the state's arguments was that the denial of funds was insufficient to amount to a burden on religious exercise, because it was too insignificant to create any religious pressure on the school.¹⁰⁴ The Court never mentioned the argument.

What makes this argument so interesting, of course, is how it inverts traditional understandings regarding martyrdom. It says the weak (those susceptible to religious pressure) should get exemptions and the strong (those not so susceptible) should not. But our earlier discussion of martyrdom imagined it precisely the other way: giving exemptions to the strong (those who will not back down) but not the weak (those who will).

And there is, in fact, an area of law that does exactly the latter—an area of law where judges make predictive judgments about who will comply, and where the law exempts those that it decides will not comply. This is the realm of civil contempt. The classic paradigm case here works well for us. Take a reporter who refuses to turn over her sources despite a valid subpoena. Black-letter law says that the reporter should be incarcerated to get the reporter to comply with the court's order. But the black-letter law also makes an exception. If it becomes sufficiently clear that the reporter will not comply, civil contempt becomes inappropriate and the reporter must be released.¹⁰⁵ Of course, the judge does not simply

¹⁰² See *McDaniel v. Paty*, 435 U.S. 618, 628–29 (1978) (holding unconstitutional a provision of the Tennessee Constitution that barred ministers from serving as delegates in the state constitutional convention).

¹⁰³ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

¹⁰⁴ This is how Missouri proposed to distinguish *Locke v. Davey*: “A state’s refusal to support an aspiring pastor’s religious education surely exerts a greater pressure on free religious exercise than does a state’s refusal to subsidize a church daycare’s secular capital improvement project.” Brief for Respondent at *21, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 3548944, at *21. Missouri also quoted the familiar passage from *Thomas* quoted in the text about how there needed to be “substantial pressure” on the religious adherent to violate his beliefs. *Id.* at *27.

¹⁰⁵ At that point, criminal contempt takes over. See, e.g., 3A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 703 (4th ed.) (“Because the justification of imprisonment for

take the reporter's word that she will never comply; every reporter would simply learn to say the right words. Instead, the judge must make a predictive judgment about whether the reporter will comply.¹⁰⁶ And judges making these decisions seem to be well aware of how speculative their judgments will inevitably be.¹⁰⁷

CONCLUSION

Martyrdom is a fascinating topic with a long history, much of it having nothing to do with law. But the law too must address martyrdom. It must decide what to do about martyrs, just as martyrs must decide what to do about the law. The resulting relationship, dialectical and iterative, leads to some knotty puzzles regarding faith and law, and provides a unique window into what religious liberty is all about. Rather than trying to solve those puzzles, this Essay instead tries simply to describe the view through that window.

civil contempt is to induce compliance with the court's order, the defendant can no longer be confined after compliance becomes impossible [or] [w]hen it becomes obvious that sanctions for contempt are not going to compel compliance.”).

¹⁰⁶ See *In re Grand Jury Proceedings*, 994 F. Supp. 2d 510, 514 (S.D.N.Y. 2014) (“Essentially, the judge is called upon to predict whether the contemnor has in turn correctly predicted his own obstinacy.”).

¹⁰⁷ See *Simkin v. United States*, 715 F.2d 34, 38 (2d Cir. 1983) (“A district judge's determination whether a civil contempt sanction has lost any realistic possibility of having a coercive effect is inevitably far more speculative than his resolution of traditional factual issues.”).

