**Chapter 5**

**Exemption Proliferation**

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An exemption permits some to act contrary to a law or rule that others are expected to follow. For many philosophers and jurists, exemptions are a necessary instrument of justice. An exemption, so the argument goes, relieves those that suffer unintended but unjust burdens and/or unequal opportunities when carrying out an important practice. Suppose this position is coherent and persuasive, a commonly voiced and potentially fatal objection remains: exemption proliferation.

The proliferation objection is essentially a slippery slope objection. It says that if we grant some exemptions then to be consistent we will have to grant so many exemptions that cumulatively they undermine, for example, social cohesion, the purpose and effectiveness of the law, legal obligation and political authority. So even if we assume that exemptions are indeed necessary for some to avoid unjust burdens, the proliferation objection says this eventually comes at too high a price. It is difficult to postulate a threshold for when exemptions cause such issues. Nevertheless, exemption proliferation at least poses a significant theoretical challenge for proponents of exemptions.

Exemption proliferation is partly driven by immigration as new religious, cultural and ethnic groups try to maintain practices that may be in tension with existing laws, rules or norms (Patten 2017, 204). Fragmentation of existing groups can also be a driver for exemption proliferation. For example, the fragmentation of religious denominations in the U.S. since the 1960s ‘is liable to be a source of considerably more varied claims for religious exemptions than was the case when the mainline churches enjoyed more ascendancy’ (Schwarzchild 2016, 193). And in multicultural societies which seek to respect value pluralism, we should not expect exemption claims to ‘become any less common’ (Maclure and Taylor 2011, 63). In sum, we ought to be increasingly conscious of exemption proliferation.

An easy way to overcome exemption proliferation would be to reject the idea of exemptions as a whole (Barry 2001; Leiter 2012; Dworkin 2013). After all, if we prohibit all exemptions – or almost all[[1]](#endnote-1) – then there is nothing to proliferate. I do not take this path. Rather than mount yet another justification of exemptions, I assume that a regime of limited exemptions is justified on the basis of protecting the integrity of individuals (Bou-Habib 2006; Maclure and Taylor 2011; Vallier 2015; Laborde 2017; Seglow 2017).[[2]](#endnote-2) Not only are integrity-based theories dominant in contemporary political philosophy, they are especially susceptible to the proliferation objection. This is because they typically take a subjective approach to integrity, which affords individuals a significant say in determining if they should follow a law or rule. Though proponents of integrity-based theories have been alive to the proliferation objection, there has not yet been a systematic discussion of the issue.

This chapter aims to address this gap. In section 1 I clarify the structure and target of the proliferation objection. In section 2 I outline the features of integrity-based theories and evaluate how each feature helps or hinders proliferation. I show that integrity-based theories are indeed vulnerable to the proliferation objection primarily due to their individualised, subjective approach to integrity. In sections 3 and 4 I discuss the sincerity test and the balancing test respectively. The tests have been justified independently of their effect on proliferation, but here I argue that they can also be a means for limiting proliferation in ways consistent with the core features of integrity-based theories. However, I conclude that integrity-based theories are somewhat hostages to fortune since it is difficult to predict the contingencies that partly determine the effectiveness of the tests.

1. **The proliferation objection**

The first conceptual distinction to be made is between the proliferation of exemptions that are *claimed* and the proliferation of exemptions that are *granted*. If legislatures or courts are inundated with exemption claims but rarely, if ever, grant those claims then the objection is limited to concerns about clogging up the court system or the balkanisation of society (Schwarzchild 2016, 194-98). Whereas, if legislatures or courts actually grant numerous exemptions, then concerns about the erosion of legal obligation and political authority are crystallised. That said, the proliferation of claims is still significant since if fewer people have a legitimate claim to be heard in the first place, then fewer exemptions are likely to be granted. This fact anticipates two stages for stemming exemption proliferation: (a) whether someone has a claim or not, and (b) whether that claim should be granted. For example, we will see in section 3, that the sincerity test concerns stage (a), while in section 4, the balancing test concerns stage (b).

Next, we can measure the proliferation of exemptions in two different ways. First, it can be measured by the range of exemptions. Here the worry is that once exemptions are granted in some areas of life, exemptions will inevitably be sought in other areas of life. The recent history of exemptions granted by legislatures and courts suggests this worry is not unwarranted as they have extended to a wide range of areas, including but not limited to: animal slaughter, uniforms, identification, education, unemployment benefit, employment, business hours, healthcare, tax, property and land development, drugs, military service, and imprisonment.[[3]](#endnote-3) When proliferation is measured in this first way, the objection lends itself more to abstract worries about legal obligation and political authority since individuals get to opt-out of numerous laws or rules that others must follow.

The second measure of proliferation is the number of exemption holders. This is distinct from the first measure as we can imagine a large number of people being permitted an exemption in only one of the above areas, or a small number of exemption holders across a wide range of areas. When proliferation is measured in this second way, the objection lends itself to concrete policy concerns. For example, one might be concerned that an exemption for the religious use of a controlled substance could open the door to widespread drug use. Indeed, in *Employment Division of Oregon v. Smith* 494 U.S. 872 (1990)one of the reasons given for denying the exemption was that it would open the door to widespread and dangerous drug use (Nussbaum 2008, 152). Since the purpose of drug legislation is to protect people from such drug use, granting exemptions apparently would undermine that legitimate purpose.

The second measure of proliferation raises abstract concerns too. Suppose, for instance, that the state grants exemptions only in the area of education. Specifically, it allows parents that object to sections of the standard curriculum on religious grounds to home-school their children. Now suppose that hundreds of thousands of religious parents exercise the exemption and withdraw their children from public education to home-school them according to a curriculum that is consistent with their religious beliefs. As a result of this one type of exemption – albeit in a fundamental area of life – concerns about social cohesion and autonomy arise.

The perfect storm for dissenters of exemptions is, of course, that the range of exemptions *and* exemption holders proliferate. After all, if there were numerous kinds of exemption but only a handful of exemption holders, there would not be any serious cause for concern. Nevertheless, this conceptual discussion allows us to anticipate the fact that some measures for addressing the proliferation objection may centre on reducing exemption holders and/or the range of exemptions.

The final conceptual distinction to consider in this section is between volitional and nonvolitional exemptions. This distinction is pivotal to understanding that the exemption proliferation objection is almost always directed at only one particular category of exemptions, namely, volitional exemptions. A volitional exemption is granted when a law or rule wrongly conflicts with an individual’s wishes or beliefs. Exemptions granted on the basis of religious convictions, moral conscience, or cultural traditions fall under the category of volitional exemptions. In contrast, a nonvolitional exemption is granted when a law or rule wrongly conflicts with an individual’s physical or mental needs. Exemptions granted on the basis of disabilities fall under the category of nonvolitional exemptions.

Nonvolitional exemptions are widely accepted, while volitional exemptions are a source of deep political and moral controversy (Maclure and Taylor 2011, 66-9; May 2017, 193). Consider a school that prohibits students from bringing dangerous objects to school such as knives and syringes. Suppose a Sikh student claims an exemption to carry the kirpan, while a diabetic student claims an exemption to carry a medical syringe. No reasonable person would consider rejecting the diabetic’s claim, whereas the Sikh’s claim would be hotly contested. Or consider the fact that exemptions for service dogs in public places are widely accepted, whereas exemptions for pets are not.

An underlying reason for the difference in the controversy generated by volitional and nonvolitional exemptions is the idea that, as a matter of justice, individuals are morally responsible for their beliefs in a way that they are not for their physical or mental hardships. This means we ‘are not afflicted by our beliefs as alien impositions; rather we identify with them’. As rational epistemic and practical agents, ‘we revise, reform, and even reject our beliefs; but even where we do not, we regard our beliefs as ours and, as agents, hold ourselves (and each other) accountable for them’ (Seglow 2017, 179). In short, there is a principle of individual moral responsibility.

An upshot of this principle is that individuals are expected to internalise at least some of the costs that result from their beliefs (Seglow 2017, 180; Jones 1994). That is to say, if you find manifesting your beliefs costly despite just background conditions and legitimate laws and rules, then you should bear those costs. It would be unjust to expect third parties to do so. If you are not willing to bear the costs, then it is up to you to modify or jettison your costly beliefs. Supporters of exemptions need not entirely reject the idea of individual responsibility. Instead, they can – and do – disagree with opponents to exemptions on what kind of costs are morally permissible, what counts as just background conditions, and what makes laws and rules legitimate. Nevertheless, it is plain how the idea of individual responsibility can be marshalled to provide a justice-based objection to exemptions in general.

But to fully understand the place of volitional exemptions in the proliferation objection, we must observe how they impinge not just on justice, but on the ideas of legal obligation and political authority. In short, volitional exemptions give extraordinary power to individuals to dictate their own legal obligations. As Simon Căbulea May (2017, 193) explains, volitional exemptions imply ‘that an individual should not have to follow a law that other people have to follow precisely because she does not want to follow it. This is peculiar because it is in the nature of the law to impose obligations that members of the public must respect whether they wish to or not’. As noted earlier, a limited number of exemptions and/or claimants may not pose a threat to fundamental ideas of legal obligation and political authority, but May wants to press the theoretical challenge that exemption proliferation poses. He goes on to write, if ‘just any sort of volitional conflict warranted an exemption, then the concept of legal obligation would be threatened with incoherence’ (May 2017, 193-94). The challenge then is to establish a theory of exemptions that delineates special volitional conflicts from ‘just any sort of volitional conflict’. This is precisely what integrity-based theories of exemptions try to do, which brings us to section 2.

1. **Integrity**

Suppose an employee’s favourite colour is red. There is a rule that all employees must wear a uniform, which happens to be blue. The employee seeks an exemption from the rule so that he can wear his favourite colour at work. Now suppose he has a colleague who is Christian and believes she must bear witness to her faith by visibly wearing a crucifix, including at work. However, imagine there is also a rule that all employees must not wear jewellery at work. The Christian employee seeks an exemption in order to wear her crucifix.[[4]](#endnote-4)

Let us suspend the question of whether either employee should actually be granted an exemption, and ask a more fundamental question: are the two employees’ claims of equal moral weight in the first place? For integrity-based theories, the answer is no given that exemptions may be warranted only when an individual’s moral integrity is at stake.[[5]](#endnote-5) The first employee has a mere preference or whim. Were he prevented from wearing a red uniform, he would be unhappy. Even if it were an intense and longstanding preference he could be very unhappy, but he would not suffer a setback to his moral convictions. Whereas, were the Christian employee prevented from wearing her crucifix at work, she would not merely be unhappy. Instead, her integrity would be harmed, which is to say, she would fail to live up to a conviction that is constitutive of her moral identity. Or in other words, she would not be who she thinks she should be. As such, under integrity-based theories the first employee has no legitimate grounds for an exemption claim; only the second employee does.

It appears, then, integrity-based theories have a response to May’s challenge that not ‘just any sort of volitional conflict’ should warrant an exemption. By differentiating moral convictions from mere preferences, integrity-based theories attempt to isolate a special category of practices that may warrant an exemption (Maclure and Taylor 2011, 76-7; Laborde 2017, 197-217). From the outset, then, an initial hurdle is placed in front of exemption proliferation by ruling out a raft of practices that are not a matter of integrity.[[6]](#endnote-6)

But how do we know whether a practice is a matter of integrity or not? The sturdiness of the hurdle depends on how, if at all, we can answer that question. If we want to permit exemptions but cannot reliably and non-arbitrarily filter out claims that do not relate to integrity, then we run the risk of allowing any and all exemptions. Hence, the difficulty in identifying the line between people’s moral convictions and mere preferences is ‘at the heart’ of the proliferation objection (Maclure and Taylor 2011, 91-2).

If we could refer to a circumscribed list of practices that are objectively related to integrity, then we could reliably push back against the proliferation objection. Any practice put forward that does not relate to integrity ­– such as preferring to wear the colour red – would be quickly and definitively rejected. While it is easy for me to stipulate in a hypothetical case that one practice is a mere preference while the other is a moral conviction, in reality, an objective list is extremely problematic.

Against the background of reasonable value pluralism and the burdens of judgement, however, integrity has ‘an irreducibly subjective dimension’ (Maclure and Taylor 2011, 92). When there is reasonable disagreement about morality, an objective view of integrity is conceptually and morally misguided. We cannot and should not stipulate the moral convictions that individuals should live up to. That is for each individual to decide. A subjective view of integrity encapsulates that moral independence. It says that I maintain *my* integrity only when I live up to what *I* consider to be right or wrong, not what *others* consider right or wrong, or what is *truly* right or wrong (Bou-Habib 2006, 117-8; Laborde 2017, 204).

While a subjective view of integrity is appropriate in view of reasonable value pluralism, it clearly exacerbates the chances of proliferation. It does so in terms of potential exemption holders *and* the range of exemptions. With regard to exemption holders, a subjective view facilitates precisely the kind of extraordinary power that concerned May above since it allows each individual to determine when their integrity is at stake. Although, that power is somewhat bounded. Since an exemption entails some people not being subject to a law or laws that others are obliged to follow, it seems reasonable that others are owed a justification.[[7]](#endnote-7) Under integrity-based theories, that justification needs to be grounded in the idea of living up to moral convictions rather than satisfying mere preferences. Thus, in making an exemption claim, an individual must be prepared to cogently articulate how a practice is a matter of integrity for her (Maclure and Taylor 2011, 99; Seglow 2017, 183). For instance, the practice may be part of her inquiry into the ‘ultimate questions’ in life or realise special relationships or achievements that contribute to her measure of a successful life.

With regard to the proliferation of the range of exemptions, a subjective view also allows each individual to determine wherematters of integrity arise in their lives. For example, the manifestation of one’s religious beliefs is not objectively circumscribed to the home or places of worship. Rather, an individual may determine that certain religious practices extend to public life, including education and the workplace. Further, a subjective view respects the fact that people treat different areas of life with different degrees of importance. For instance, identification photos might seem morally insignificant to many of us. Yet, for many individuals it is a morally significant that they still be permitted to wear religious headwear in identification photos, and for members of some Amish, Mennonite, and Hutterite communities even the very act of having one’s photo taken is morally problematic. The same could be said about uniforms, business hours, and so on.

So, what measures for countering proliferation are available to subjective integrity-based theories of exemptions? One possibility is to grant exemptions only on an individual case-by-case basis. This is a natural step since the family of integrity-based theories of exemptions under discussion concern not just subjective integrity *per se*, but the subjective integrity of *individuals*. In principle, an individual case-by-case basis should at least slow down proliferation compared to granting exemptions *en masse* to, for example, religious or cultural groups. In practice, however, this is not how exemptions function. As Cécile Laborde 2017, 203 fn. 19) explains, exemptions usually provide categorical protection of practices for the sake of ‘administrative convenience’. For instance, a blanket exemption for religious symbols in the workplace is made available to any relevant employee rather than have each employee claim their own special exemption.

From a justificatory point of view, it remains the case that blanket exemptions are ‘not rights enjoyed by groups as groups: they are enjoyed by individuals whose individual integrity is at stake’ (Laborde 2017, 221 fn. 65; also see Kymlicka 1995 and Jones 2010). From a proliferation point of view, however, blanket exemptions facilitate a rapid increase in the number of exemption holders. Though integrity-based theories could say only individuals may bring exemption claims – and indeed it is usually individuals that bring landmark or test cases to courts – once a claim is successful, practicalities necessitate extending the exemption to other similarly placed individuals. This may avoid the problem of clogging up the courts with numerous individual claims, but it comes at the cost of creating potentially countless exemption holders.

 So, integrity-based theories need a measure that limits the number of claims that are upheld. At this point it is important to reiterate that integrity-based theories attempt to isolate a special category of practices that *may* warrant an exemption. Integrity-based theories do not say that simply because an individual’s integrity-related practice is burdened by a law or rule, she should therefore be granted an exemption. Rather, her integrity is one interest among many. As such, she has a *pro tanto* claim to an exemption that must weighed against other interests, such as the rights of others, the costs to others and the functional purposes of a law or rule (Maclure and Taylor 2011, 100-1; Laborde 2017, 202; Patten 2017; c.f. Jones 2017). In many cases, these interests will outweigh *pro tanto* claims, thereby mitigating proliferation. I will discuss this balancing test in more detail in section 4.

Prior to the balancing test, are there measures available to integrity-based theories for limiting the range of *pro tanto* exemption claims? For instance, could integrity-based theories restrict claims to only religious practices? Some pro-exemption theorists do in fact single out religious practices for special protection (Laycock 1996; McConnell 2000; Koppelman 2006). However, integrity-based theories – particularly of the subjective kind – reject the notion that religion is special and thus only religious practices may warrant exemptions. The practice in question need not be religious in nature, aim nor grounding. It can be purely secular so long as the practice is a matter of moral conviction rather than mere preference (Maclure and Taylor 2011, 92-7).

For this reason, subjective integrity-based theories of exemptions overlap and underpin ‘liberal egalitarian theories of religious freedom’ (Laborde 2017, ch. 2). A defining characteristic of liberal egalitarian theories is that religious freedom is not a distinctive freedom. Instead, religious freedom is derivative of a more general moral value, such as integrity. In other words, religious practices are protected not because they are religious, but because they are an instantiation of the protection-worthy value of integrity. Against a background of secularisation and reasonable value pluralism, religion does not have a monopoly over matters of integrity. Thus, exemptions should not be exclusive to religious practices. Naturally, this widens the scope for proliferation, but, it is a bullet that liberal egalitarian and subjective integrity theories of exemptions must bite.

Regardless of whether a practice is religious or secular, can we at least exclude practices that are morally abhorrent such as infant sacrifice, honour killings, and genocide? Clearly individuals should not receive an exemption to engage in such practices. But, does a subjective view of integrity mean morally abhorrent practices are at least *pro tanto* worthy of exemptions? I think the answer should be yes.

For some, the idea that morally abhorrent practices could be a matter of integrity is fundamentally mistaken (Koppelman 2009). However, this moralised view is incompatible with a subjective view of integrity. A subjective view allows for the fact that individuals may seriously err in their moral judgements, yet wholeheartedly believe they are right. For instance, an individual may consider infant sacrifice to be a sacred duty, which if not performed poses spiritual and existential peril. Clearly this individual would consider infant sacrifice a matter of integrity then. But, all things considered, it is better that he lives without integrity. A subjective integrity theorist is able to say this since integrity is just one value among others, including the basic rights of others such as the right to life (Lenta 2016, 254). Though a moralised view of integrity helps limit *pro tanto* claims in the first place, I believe this comes at the cost of theoretical consistency. A subjective view more accurately captures the moral convictions of all individuals but exemptions for morally abhorrent practices can still be denied under the balancing test.

To conclude this section, let us consider one more class of practices that perhaps should be denied *pro tanto* status, specifically, silly or trivial practices. By ‘silly’ or ‘trivial’ I mean practices that appear to most people to be so comical or inconsequential that they could not possibly be a matter of integrity. The concern about silly or trivial practices is a common manifestation of the worry about exemption proliferation. Pro-exemption theorists have grappled with chicken suits (Nussbaum 2008, 169), baseball caps (Maclure and Taylor 2011, 77), and clown hats (Laborde 2017, 199-200). The issue is not merely theoretical either. Pastafarians – members of the parodic Church of the Flying Spaghetti Monster who believe that must wear colanders on their heads in identification photos – have in fact received exemptions in various jurisdictions. And Laborde – whom defends a subjective integrity-based theory of exemptions – concedes that it may not be possible to exclude Pastafarians (Laborde 2017, 207 fn. 37).

This discussion also returns us to the hypothetical example that opened this section. What if the employee insists that wearing a red uniform is a matter of integrity for him? Must we accept this and assume he has a *pro tanto* claim to an exemption? Under a balancing test, his claim might be denied on the grounds that the costs to the employer of providing bespoke uniforms is unfairly high, but the concern about silly or trivial practices here is that they should not have *pro tanto* status in the first place.

Given that I have claimed subjective integrity-based theories should not deny morally abhorrent practices *pro tanto* status, it would be absurd of me to now say that silly or trivial practices should be denied *pro tanto* status. The individuality that underpins a subjective view of integrity means that we must allow for others being committed to practices that we find silly or trivial. After all, many of us find religious practices silly or trivial, but no pro-exemption theorist would deny them *pro tanto* status.

It remains the case that a claimant must still be able to articulate how a practice is a matter of integrity for him. Yet, if this only amounts to a mere assertion – however well-articulated – from the claimant, it is a relatively easy test to meet, even for practices that are allegedly silly or trivial. For example, imagine that the employee says wearing red at all times is deeply important since it is an act of remembrance and reverence for generations of his family that served and died in an army that wore red uniforms. The idea is a familiar one even if the importance of wearing red is not, since many individuals wear or carry mementos of lost loved ones.

In any case, the mere assertion that a practice is integrity-related seems insufficient. To justify being exempt from a rule or law that others must follow, it seems reasonable to ask if a claimant *really* believes a practice is integrity-related. This question is relevant to all exemption claims, but particularly so when a practice appears to be silly or trivial (Adams and Barmore 2014, 64). What is required, then, is a test of the claimant’s sincerity. This brings us to section 3.

1. **Sincerity**

Recall that integrity entails living up to one’s moral convictions. When a practice is a matter of moral conviction, we would expect a sincere claimant to make a serious effort to perform that practice. By contrast, an insincere claimant would make no, little or erratic effort to perform a practice she professes is a matter of moral conviction. The lack of serious effort strongly suggests that the practice does not have the kind of pull on her conscience that an integrity-related practice should. In the context of integrity, then, sincerity is defined as the ‘coherence between what is said and what is done by the claimant’ (Laborde 2017, 207). Where there is sufficient coherence, the claimant does have a *pro tanto* claim to an exemption and *vice versa*. As such, the existence of a *pro tanto* claim is not solely dependent on the mere assertions of the claimant – her deeds must match her words also.

Whether there is coherence is a question of fact. It is something that can studied objectively via evidence of the claimant’s actions. An objective basis is essential for any sincerity test to be principled and reliable. After all, if mere assertions from a claimant are insufficient to grant an exemption, then ‘mere disbelief of a claimant’ is insufficient to deny an exemption (Greenawalt 2000, 205). The objectivity of the sincerity test takes on special significance in the context of proliferation and integrity-based theories. We saw that the subjective dimension of integrity-based theories was the principal source for the proliferation objection. It allowed individuals extraordinary power to determine their obligations. A sincerity test based on objective factors should allow us to rein in subjectivity, and thus exemption proliferation too.

Crucially, the objectivity of the sincerity test need not undermine a subjective view of integrity. The test asks whether there is coherence between the claimant’s actions and *her* moral convictions as she *perceives* them. For this reason, the sincerity test should not be used as an underhanded way to test the truth of a claimant’s beliefs, particularly in the case of religious beliefs (Greenwalt 2000, 200-1; Loewentheil and Platt 2018, 270-72). For example, a court should not consider a claimant to be insincere simply because her interpretation of a religious practice diverges from the mainstream. To do so would be imposing orthodoxy, which is flatly incompatible with the individualised, subjective view of integrity that underpins liberal egalitarian theories of religious freedom (Maclure and Taylor 2011, 82-3). To reiterate, courts should be testing the internal consistency between the claimant’s beliefs and actions, not the consistency between the claimant’s beliefs and external sources such as the majority’s beliefs or traditional texts.

So what kind of evidence is appropriate for demonstrating sincerity? A major source is documentation and witness testimony concerning patterns of behaviour consistent with the object of the exemption. For instance, in *Watson v. Green* 569 F.3d 115 (2009), a claimant seeking an exemption from military service as a conscientious objector submitted a series of letters that attested to his anti-war beliefs and participation in anti-war marches. Or in *Howard v. United States* 864 F. Supp. 1019 (D. Colo. 1994)*,* witnesses testified that the claimant had regularly attended religious services and study groups. Equally, documentation and witness testimony concerning inconsistent behaviour or a failure to bear costs can be used as evidence of insincerity. For example, in *Reed v. Faulkner* 842 F.2d 960, 963 (1988)*,* the claimant was observed by prison staff violating the religious diet and grooming practices for which he sought an exemption.

Of course, no individual is perfect and so claimants should not be expected to demonstrate a flawless history of consistent behaviour (Adams and Barmore 2014, 63; Loewentheil and Platt 2018, 254). Indeed, there may be good reasons for the claimant’s inconsistent behaviour, particularly where it would be costly for the claimant to be consistent. Evidence that one has borne the costs of exercising one’s beliefs is a strong indicator that a practice is matter of integrity – it shows that one is willing to take a stand and make sacrifices. Yet, in some cases the costs may be unreasonably high, especially when other moral convictions are at play. For instance, an employee may sincerely want an exemption in order to attend religious services but has thus far acquiesced in her employer’s demands because providing for her family was more important than losing her job in order to attend religious services. Though that was her choice, whether that was a *fair* choice is precisely under debate in the exemption case. Justice may require she receive an exemption so she can attend religious services *and* provide for her family under her existing employment. Thus, although documentation and witness testimony provide some objective basis, there is interpretive work still be done. Judges and other officials will have to carefully evaluate the body of evidence and consider alternative explanations for inconsistent behaviour.

Despite these complications, the sincerity test can still function as a measure against the proliferation of *pro tanto* exemptionclaims. It is often claimed that courts are loathe to question the sincerity of claimants. Indeed, in the recent *Burwell v. Hobby Lobby* 573 U.S. (2014) case, Justice Ginsburg proclaimed that the court ‘must accept as true’ any assertions of a sincere belief. Yet, legal scholars have shown there is in fact a rich history of the courts denying exemptions on the basis of insincerity using documentation and witness testimony of inconsistent behaviour (Greenawalt 2006, ch. 7; Adams and Barmore 2014; Loewentheil and Platt 2018). In fact, had the sincerity test been applied in the *Hobby Lobby* case then there was substantial evidence that the claimants were insincere and thus should not have had a *pro tanto* claim to an exemption (Loewentheil and Platt 2018, 274-76).

And what about silly or trivial practices? Consider again Pastafarians. Had a sincerity test been applied in those cases, I believe there was sufficient evidence to deny them a *pro tanto* claim to an exemption. This is because Pastafarians rarely, if ever, wear colanders on their heads except when an identification photo is being taken. Further, Pastafarians have not demonstrated a willingness to bear the costs of their beliefs, such as forgoing a driving license – and thus the liberty to drive – when they were told they could not wear colanders in their identification photos.

The sincerity test has a role in not just countering the proliferation of *pro tanto* claims, but also in countering the proliferation of exemption holders once a blanket exemption has been granted. Suppose one sincere claimant is successful in a test or landmark case. Indeed, this particular claimant may be a ‘new convert’ to a practice and thus it would be unfair to expect them to produce a record of consistent behaviour (Loewentheil and Platt 2018, 277). In any case, as noted in section 2, it is common practice for a blanket exemption to be granted following the first successful claim. The sincerity test can still be deployed where evidence comes to light that an individual using a blanket exemption is doing so insincerely. For instance, an employee may take advantage of a blanket exemption for time off to attend religious services, but there is evidence that the employee consistently violates his purported religious beliefs outside of working hours.

However, we must conclude this section with an important caveat about the robustness of the sincerity test. Since the test is based on the simple coherence between the claimant’s words and deeds, it could be undermined by a determined claimant that does not really believe his practice is matter of moral conviction. Instead, the claimant simply wants material gains such as a tax exemption. Knowing that a sincerity test would be applied, the determined but insincere claimant could build a record of consistent behaviour under false pretences. Such cases are another bullet that integrity-based theories of exemptions will have to bite. As Laborde (2017, 207) states, ‘judges cannot and should not pry on individual consciences’.

That said, since the claimant is seeking an exemption for a practice that is currently burdened by a law or rule, building a record of consistent behaviour is not costless and, in many cases, the costs will be significant such as forgoing a driving licence. Thus, the sincerity test offers some meaningful deterrent. Then again, if we assume that most claimants have genuinely felt convictions, then the sincerity test cannot do all the work in countering proliferation. As such, we require an additional test to counter the number of exemptions that are actually granted. This brings us to the balancing test in the next section.

1. **Balancing**

Recall that an assumption of the balancing test is that integrity is one value among many. Though an exemption helps protect the integrity of exemption holders, the exemption will invariably have consequences for countervailing interests, such as the rights of others, the cost to others, and the functional purposes of a law or rule. Where the countervailing interests outweigh the interest of the claimant in maintaining his integrity, the state has a ‘compelling interest’ to deny the exemption and enforce the universal application of a law or rule.[[8]](#endnote-8)

We have previously encountered a straightforward case for the balancing test. Recall that where a morally abhorrent practice would harm the basic rights of others such as the right to life, the state clearly has a compelling interest to deny an exemption. However, the majority of cases are not as clear-cut. First, take the claimant’s side of the scales. It can be difficult to properly appreciate the weight of a practice for a claimant, particularly when it seems trivial to the majority, such as having a reflective triangle on the back of one’s vehicle (Patten 2017, 214). Congruent with the subjective view of integrity, judges and other officials should be as understanding as possible of the claimant’s point of view, but this is obviously not easy in practice (Nussbaum 2008, 139).

The claimant’s side of the equation is further complicated if we believe that not all integrity-related claims have equal weight. Paul Billingham (2017, 5-9) argues we should adopt this view using the ‘centrality’ and ‘obligatoriness’ of practices to determine their weight. If a practice is deemed obligatory – such as Sikh men wearing a turban at all times – then the claim is weightier than if the practice was not obligatory – such as Christians wearing a crucifix. However, in keeping with the subjective view of integrity and avoidance of religious orthodoxy, a practice need not be obligatory to be a matter of integrity and it is left to the individual to determine how central a practice is to their religion. As such, Christians that seek an exemption to wear a crucifix at work, for example, can have a *pro tanto* claim to an exemption, but, that claim is less weighty than Sikhs that seek an exemption to wear a turban at work. Naturally, claims that are less weighty are more likely to be outweighed and so the balancing test is at least helpful for limiting proliferation in cases of non-obligatory practices.

Now consider the countervailing interests on the other side of the scales. Different countervailing interests will arise in different cases, each case will likely have numerous countervailing interests, each of which will not always be easily quantified. Take, for example, exemptions from uniform rules. One countervailing interest is the cost to the employer if the exemption entails the provision of bespoke uniforms. But how do we decide if the cost is too great? It needs to be decided according to a wider theory of distributive justice, over which there is of course considerable disagreement. And should we take into account the employer’s desire to have a consistent image for their organisation? If so, how do we measure and then compare it to the integrity of employees?

As Martha Nussbaum (2008, 153-54) points out, we should also have a healthy scepticism when the functional purposes of the law are cited as a reason for denying an exemption. Recall that in *Employment Division v. Smith,* the denigration of the paternalistic purposes of drug regulations was cited as a reason for denying an exemption for Native Americans to use peyote in their religious ceremonies. Slippery slope arguments of this kind depend on the veracity of their empirical predictions, and in *Employment Division v.* *Smith* and similar cases, the evidence suggests that worries about the spill-over effects in drug use are unfounded. Thus, under the balancing approach it appears that the state does not have a compelling interest in the absolute application of drug regulations. Similarly, we ought to have common sense about how many people are interested in making use of blanket exemptions since peyote use has not accelerated following the *Religious Freedom Restoration Act* (Nussbaum 2008, 163-4).

The above empirical doubts create a complicated picture for the proliferation objection. On the one hand, it suggests that the balancing test may be wrongly deployed in some cases, and thereby more exemptions should have been granted. Yet, on the other hand, it suggests that we should not be very concerned about a proliferation of individuals exercising a blanket exemption or taking advantage of an exemption for ulterior motives. As such, the force of the proliferation objection is weakened in the first place.

As a result of all the above complexities, it is difficult to say how effective a balancing test will be at countering proliferation. For this reason, Peter Jones (2017, 173) writes that ‘legal exemptions, both religious and nonreligious, are better conceived as exercises in adhockery’ and Jonathan Seglow (2017, 189) insists we ought to accept that the ‘accommodation of deeply held religious and other convictions is too complex an issue to be settled by algorithms’. Nonetheless, in tandem with a strong principle of individual moral responsibility, a substantial number of claims have been rejected using a balancing test. Thus, it can be an effective measure for countering proliferation even in the face of numerous *pro tanto* claims (Nussbaum 2008, 146). Further, proliferation itself could be considered a countervailing interest. Where there is sufficient evidence that granting an exemption would open the floodgates, courts ought to consider this under the balancing test.

1. **Conclusion**

To conclude, integrity-based theories of exemptions are vulnerable to the proliferation objection. This is primarily due to their individualised, subjective approach to integrity, which affords individuals significant latitude for challenging the legitimacy of laws and rules. We can turn to the sincerity test for an objective means of limiting the number of *pro tanto* claims without compromising the individualised, subjective view of integrity. And the balancing test offers a means for limiting the number of claims that are then upheld. But integrity-based theories are not entirely out of danger, at least in theoretical terms. This is because it is difficult to predict the contingencies inherent in the sincerity and balancing tests, such as the determination of claimants with ulterior motives, or the costs that should be borne by third parties.

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1. **Notes**

 Barry (2001, 49), Leiter (2012, 101) and Dworkin (2013, 136) all make exceptions for when exemptions should be granted. [↑](#endnote-ref-1)
2. As a result, this chapter focusses on exemptions for individuals rather than groups or institutions. [↑](#endnote-ref-2)
3. See Greenawalt (2006) for a survey of the various exemption granted in the U.S. by both by legislatures and courts. [↑](#endnote-ref-3)
4. This is inspired by the real case of *Eweida v. United Kingdom* [2013] ECHR 37, in which a British Airways employee sought an exemption to wear a crucifix over her work uniform. [↑](#endnote-ref-4)
5. Maclure and Taylor (2011, 76-7) and Laborde (2017, 199-200) use similar comparisons to reach this conclusion. [↑](#endnote-ref-5)
6. May (2017, 200-2) is sceptical that integrity-based theories can explain why ‘non-moral projects’ should not also receive exemptions. However, I doubt the counterexamples he raises really are as a non-moral as he assumes, and so I do not think the proliferation he envisages is plausible. [↑](#endnote-ref-6)
7. Whether one must provide a justification based on shareable rather than merely accessible reasons may also be a way of limiting exemptions. This depends on the background theory of public reason, which I do not have the space to discuss here. However, on first impressions, it seems accessible reasons are more conducive to a subjective view of integrity than shareable reasons. On shareable v. accessible reasons, see Vallier (2018). [↑](#endnote-ref-7)
8. In the philosophical literature, this approach is commonly known as ‘reasonable accommodation’ (e.g. Maclure and Taylor 2011). In legal practice it is associated with the ‘*Sherbert test*’ from *Sherbert v. Verner* 374 U.S. 398 (1963) and judgements of the European Court of Human Rights (see Billingham 2017, 1-2). [↑](#endnote-ref-8)