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## Defending a Rule of Institutional Autonomy on “No-Harm” Grounds

*Mark Tushnet\**

My comments begin by focusing on Professor Hamilton’s defense of the “no-harm” principle—that is, the principle that legislatures have the general authority to make their rules applicable when those rules aim to reduce the incidence of harms defined with reference only to secular standards.<sup>1</sup> Professor Hamilton argues that the no-harm principle conflicts with legal rules that give religious institutions some sort of autonomy in their actions.<sup>2</sup> And indeed it does in one sense: One can *define* the no-harm principle to rule out claims of institutional autonomy.

Understood in another way, however, the no-harm principle leaves room for institutional autonomy or for exemptions of religious institutions from the application of rules aimed at reducing the incidence of harm. The argument I sketch here for institutional autonomy is basically empirical and agrees with Professor Hamilton in making harm-reduction the overriding social goal. The argument proceeds in two steps. First, I suggest that autonomous institutions may be able to socialize their adherents more effectively than institutions that lack autonomy and that—if the institutions’ values are compatible with the legislature’s—their more effective socialization can produce a net reduction in the harms inflicted by the institutions’ members. Second, autonomy for all institutions can be defended if the gains from assuring autonomy for groups whose

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1. In doing so, I will say nothing about history, in terms of either original understandings or the evolution of constitutional doctrine, and very little about particular doctrinal formulations. Instead, I will treat the choice as binary, between the no-harm principle understood as a version of rationality review and the compelling-interest or necessity standard. Professor Scharffs’s contribution suggests the important point that there may be no *general* approach to these problems at all, but rather only a number of topic-specific rules. See Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217.

2. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099.

values are compatible with the legislature's values exceed the losses from doing so for groups with values the legislature rejects.

After developing the general structure of the argument for institutional autonomy, I raise several questions about it. Denying institutions autonomy may weaken but not destroy their ability to socialize effectively, and perhaps careful attention to questions of design and their effects might allow us to come up with rules that give institutions autonomy in some restricted domains while subjecting them to regulation elsewhere. Additionally, the argument I develop is cast in terms of institutions generally, and I explore briefly the proposition that there is nothing distinctive about religious institutions that should lead us to give them, but not other institutions of civil society, autonomy. And, in conclusion, I wonder whether the essentially empirical argument I develop is one that courts can appropriately invoke, evaluate, and apply.

Consider the following possibility. Some general rule aims at reducing the occurrence of discrimination on the basis of sex. A particular religious institution is committed by the tenets of its faith to nondiscrimination on the basis of sex.<sup>3</sup> Of course, real people inevitably fall short of full compliance with the tenets of their religion. So there will be some incidents of discrimination on the basis of sex as the institution goes about its daily operations.

Professor Hamilton's "no-harm" principle allows the government to invoke its antidiscrimination laws against those incidents of discrimination.<sup>4</sup> But perhaps external supervision of the institution's operation—supervision of the sort exemplified by holding the institution liable for sex discrimination—undermines the effectiveness of the religion to inculcate the nondiscrimination norm as a matter of religious belief. That is, absent external supervision, the religion teaches its adherents that discrimination is wrong, the adherents believe the message, and they act on the belief with a high degree of compliance. Allow external supervision, however, and the adherents will not hear the message as effectively, or will not believe it as strongly, or will not bring their actions into compliance with the

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3. I am a bit uncomfortable with the standard formulation used here, which refers to "religious institutions" as if the institutions themselves were somehow religious, rather than as if they were—as they are—institutions whose members and participants self-consciously identify the work they do in the institution with a particular religious tradition. I use the standard formulation because it makes exposition easier.

4. Hamilton, *supra* note 2, at 1159.

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(religious) nondiscrimination norm. In these circumstances, the *net* effect of recognizing institutional autonomy—relative to the world governed strictly by the no-harm principle—is a reduction in secular harm. Here, institutional autonomy *serves* the no-harm principle, rather than being in conflict with it.<sup>5</sup>

I turn to filling in the sketch a bit, in a relatively informal way, to capture the intuitions that lie behind the argument. I will highlight two primary motivations that justify a rule of institutional autonomy. The first motivating idea is that the harm-preventing behavior some institutions generate sometimes exceeds the harms the institutions inevitably generate. That should be uncontroversial.<sup>6</sup> The second motivating idea is more easily questioned. Sometimes an institution’s autonomy from external supervision is a condition of an institution’s ability to generate more harm-preventing behavior than harm. The picture here is this: We want institutions to socialize people well, meaning that they should induce people to avoid inflicting secular harms. To accomplish that socialization, institutions must teach their members or subjects that certain behavior is undesirable or unacceptable. But, the argument is, sometimes an institution that is autonomous of external supervision is a more effective teacher than one that is subject to such supervision—and is more effective *because of* that autonomy.

A story may help illustrate why this might be true. Those in charge of a religiously affiliated institution say, “You must avoid discriminating on the basis of sex because such actions are inconsistent with our religious precept that all are equal in God’s eyes.” A person prone to discriminate on the basis of sex replies, “Well, you’re just saying that because the government—not God—has told you to say it. If you don’t say it, you’re going to have to pay out a lot of money if I act on my inclinations. Your motivation is just to save money, not to teach me to act in accordance with God’s word. And because of that, you haven’t really given me a ground for refraining from acting on my inclinations.” If the institution is protected by a rule of institutional autonomy, its leaders can reply,

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5. The argument I have sketched is a version of the argument that rule-utilitarianism is a better form of utilitarianism than act-utilitarianism because, when implemented in the real world, action pursuant to (the right set of) rules produces more utility than action pursuant to act-by-act judgments of what maximizes utility. For an introduction to the debates, see generally J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

6. It better be, if we are to have institutions at all.

“No, no, not at all. Because of the rule of institutional autonomy, we don’t have any liability concerns at all. When we say nondiscrimination is required by our religion, we are telling you what God—not the government—has told us.” Obviously the argument I have just sketched depends crucially on empirical judgments, most notably those concerning the impact of external supervision on a religious institution’s ability to inculcate its precepts and elicit behavior consistent with those precepts.

The scenario just sketched does not—yet—set out a case for a general rule of institutional autonomy. The argument as presented may justify institutional autonomy for those religions with religious definitions of harm consistent with the secular harms the legislature identifies.<sup>7</sup> But not all religions have such precepts; indeed, some may have religious beliefs that flatly reject the proposition that the legislatively identified secular harms are harms at all. The argument sketched so far would not justify a general principle of institutional autonomy, but only a principle of autonomy for those institutions whose precepts are compatible with the secular principles the legislature cares about.

The defense of such a general principle therefore must depend on an additional quasi-normative proposition: decisionmakers—judges in particular—are unable reliably to determine whether a religion’s precepts are inconsistent with the legislature’s normative judgments. If those administering the law could easily determine that a religion’s precepts were inconsistent with the legislature’s normative commitments as expressed in its identification of secular harms, the first-level argument I have sketched would justify a rule denying institutional autonomy to religions whose precepts reject secularly identified harms as harms at all.<sup>8</sup>

The argument might be extended to justify a general rule of institutional autonomy by shifting to a higher level. As presented, the argument moved from the actions of individuals within institutions affiliated with specific religions (religions with a particular set of religious precepts) to the actions of those religions

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7. Put another way, the argument refers to religions that treat what the legislature regards as secular harms as religious harms as well.

8. Here the argument is drawn from David Lyons’s classic demonstration that rule-utilitarianism can be reduced to act-utilitarianism by a careful and complete specification of the set of rules that guide action. *See* DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

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themselves, including their actions in inculcating religious precepts. For religions that define harm similarly to legislatures, the net effect of recognizing institutional autonomy is the reduction of secular harms. Now, simply move up from the subset of religions with precepts consistent with the legislature’s to the set of all religions, including those who perpetuate or do not discourage secular harms. It could still be the case that recognizing a principle of institutional autonomy has a net effect of reducing the incidence of secular harms.<sup>9</sup>

The preceding argument lays out the case for giving autonomy to institutions affiliated with religions whose tenets condemn the secular harms the government seeks to eliminate. As previously mentioned, not all religions have such tenets,<sup>10</sup> and excluding them maximizes the benefit to society. Conceptually, there is no problem with limiting the rule of institutional autonomy by giving the “good” religions autonomy but denying “bad” religions the same benefit. Institutionalizing such a limitation is another matter.<sup>11</sup> Legislatures and courts are unlikely to do a good job of accurately sorting religions into one class containing the “good” ones—those whose tenets condemn the secular harms that concern the government—and another class containing the “bad” ones. Doing so requires legislatures and courts to examine the religions’ tenets and match them up with the legislature’s list of secular harms.

There are undoubtedly independent constitutional reasons that give cause for concern over an approach that requires government decisionmakers to make some assessment of the content of a religion’s belief system.<sup>12</sup> Those concerns aside, there is certainly a serious question of institutional capacity. Whatever their other qualities, the people we select as government decisionmakers are

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9. That is, when the negative effects of recognizing institutional autonomy are subtracted from the positive effects, the total utility remains positive.

10. The usual examples that arise in discussions like this—which are uncontroversial within the community engaged in the discussion—are Jim Jones, white racist churches, and (sometimes) the Nation of Islam.

11. Cf. Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 711 n.38 (1991) (“It is important to distinguish here the theoretical possibility of an empirically justifiable sub-class from the possibility that some theoretically and empirically distinct sub-class might still not be usable in practice.” (citations omitted)).

12. The “church property” cases, such as *Jones v. Wolf*, 443 U.S. 595 (1979), imply that the Constitution bars governments from attempting to determine on their own the content of a religion’s belief system.

unlikely to be subtle analysts of the content of a religion's belief system.<sup>13</sup> This concern is exacerbated when we note that the content of a religion's belief system is often contested within the religion itself: Some adherents will say that the religion condemns discrimination on the basis of sex, others that it does not, and still others that it does but that the behavior at issue does not fall within the religion's condemnation of such discrimination.

The conclusion then is that there should be a rule generally providing institutional autonomy to religious institutions. The "good" religions get it because giving it to them actually reduces the incidence of secular harms, and the "bad" ones get it because government decisionmakers cannot reliably distinguish between the "good" religions and the "bad" ones. And even with the "bad" religions included, the sum total impact on society is still positive. Note, though, that the case for institutional autonomy is necessarily weakened by the extension of autonomy to include "bad" religions, because the net impact of providing institutional autonomy is reduced when "bad" religions—those to whom providing institutional autonomy does *not* reduce the incidence of secular harms—are protected by a rule of institutional autonomy.

At this point I can bring Professor Scharffs's discussion into mine.<sup>14</sup> The argument I have outlined for institutional autonomy contains nothing distinctive about religions. It is applicable to the entire range of institutions in civil society, including families, nongovernmental organizations, and more. The idea of "inter-independence" that Professor Scharffs develops<sup>15</sup> seems to me applicable to that entire range as well. That is, a nation's people and the government they authorize to act on their behalf benefit from having a vibrant set of civil-society institutions. The institutions are *independent*, but they interact with the government so as to

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13. This is particularly so when, as is likely, they will be called upon most often to assess the content of the belief system of some nonstandard religion—that is, a religion with which they are unlikely to be familiar outside the decision-making context. And apart from their general ineptness at conducting such inquiries, government officials might be biased in their efforts to determine the content of such religions.

14. I will not focus here on the many subissues that Professor Scharffs's treatment of inter-independence incorporates.

15. Scharffs, *supra* note 1, at 1253–58.

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strengthen both the government and the institutions themselves.<sup>16</sup> For present purposes, then, the question arises: Should the rules about institutional autonomy for religious institutions be different from the rules about institutional autonomy for families or other nongovernmental organizations?<sup>17</sup>

As the argument I sketched indicates, one might be concerned initially about some empirical questions. Without evidence beyond their own experience and intuitions, many people seem to believe that autonomous civil-society institutions reduce secular harms overall.<sup>18</sup> We can contrast this belief with the widespread belief, apparently almost equal in intensity and scope, that the net contribution of autonomous market institutions is negative—that is, the belief that the unregulated market has the capacity to cause more harm than good.<sup>19</sup> People appear to believe that government must have the broad power to restrict the autonomy of market institutions and ought to exercise that power in a reasonably large number of cases, after careful consideration of whether regulation will in fact reduce the incidence of harm.

I confess that it is not obvious to me that civil society’s institutions, including religious ones, are categorically different from market institutions in this respect. The argument for institutional autonomy is that regulation reduces the capacity of institutions to inculcate prosocial values and to induce prosocial action. That may well be so, but the empirical question is one of degree: Will subjecting institutions to regulation reduce their ability to socialize appropriately by so large an amount as to eliminate the positive contribution they make? Vicarious liability for sex discrimination would reduce a religious institution’s ability to socialize its adherents

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16. Perhaps the European jurisprudence Professor Scharff’s surveys is more comfortable with the idea of inter-independence because Europeans are more comfortable in dealing with the general category of civil-society institutions than U.S. legal scholars.

17. One indication that they might not be different is that Professor Gilles’s important article on the institutional autonomy of families as decisionmakers has the same structure as the one I have outlined for religious institutions. See Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

18. Consider, for example, the widespread sense that parents ought to have a right to decide whether to send their children to public or private schools, or to home school them, a choice that is indeed protected by the Constitution. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding unconstitutional a state law requiring that all children be sent to public schools).

19. Here the examples are legion: minimum-wage and maximum-hours laws, environmental regulations, consumer protection laws, and many more.



appropriately (meaning, again, in accordance with the religion's own tenets condemning sex discrimination), but I wonder whether the reduction would be large.<sup>20</sup> Religious institutions, in particular, have proven to be quite resilient over time, in the sense that subjecting them to the "regulation" that inevitably comes with living in a partly secular world has affected, but hardly eliminated, the effectiveness of their communications concerning God's requirements to their adherents.

A second concern is also empirical: Does providing *churches* with institutional autonomy yield net positive results for society? Here I would draw a contrast with the case for granting autonomy to families. Regulating the internal operations of families *might* reduce their ability to socialize children appropriately quite substantially. Whether the same is true for religious institutions seems to me more questionable. For most children, the intensity of their involvement with parents is substantially greater—and therefore likely to have more powerful socializing effects—than is the intensity of the involvement of most religious believers with their churches.<sup>21</sup>

Professor Hamilton suggests one way to think about the rule of institutional autonomy:<sup>22</sup> regulation is not necessarily an all-or-nothing affair. Perhaps we can identify particular categories of an institution's operations in which regulation would indeed reduce the institution's ability to socialize appropriately. So, for example, perhaps eliminating a narrowly defined ministerial exemption would greatly decrease a religious institution's ability to socialize its adherents appropriately. That does not imply that reducing a broad ministerial exemption to a narrow one would decrease the ability to socialize adherents by the same amount, or that denying institutional autonomy with respect to one aspect of a religious institution's operation would affect another.<sup>23</sup> A decrease in the ability of a religion to socialize its adherents appropriately in a given area, due to

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20. I note that the transition from a regime of institutional autonomy to one of regulation might impose substantial one-shot costs (for liabilities built up during the era of no liability). Such one-shot costs should be disregarded as we examine the case for a prospective rule of institutional autonomy.

21. The word "most" is important in both its appearances in the sentence in the text.

22. Hamilton, *supra* note 2, at 1192–96 (discussing the possibility of having different rules for sex discrimination in connection with different roles within a church).

23. This is how I would rationalize Professor Hamilton's position on denying institutional autonomy for actions that harm third parties.

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government regulation of the harm, may be more than offset by a reduction of harm itself, leaving on the whole a positive balance.

Here the comparison with families is instructive. Many European nations believe that families should not be categorically exempt from regulation, because preventing corporal punishment, although reducing the family’s ability to socialize appropriately, yields—on balance—a reduction in social harm.<sup>24</sup> It could be that particular, discrete regulations of religious institutions—which are inconsistent with a broad rule of institutional autonomy—would have similar effects. The question is of course empirical, and we are unlikely to get solid evidence one way or the other.

At this point it is appropriate to separate out a third concern. As mentioned earlier, this concern is institutional. As between courts implementing a constitutional rule and legislatures defining policy, it is unclear which is better able to perform the two tasks that the argument for religious autonomy requires: identify and assess the relevant empirical information and draw defensible lines based on that information. Each institution has its abilities and limitations. In our constitutional system, for example, we tend to think that legislatures are good at finding and evaluating empirical information and that courts, by their development of principled doctrines, are good at drawing defensible lines. Yet legislatures are affected by limitations on their ability to process information and so may develop regulations that sweep more broadly than the available information justifies, and courts can be captured by rigid doctrines that lead them to apply rules beyond the point where their rationale extends.<sup>25</sup> Our constitutional traditions incline us to give legislatures the final word when this sort of institutional complication arises, and I am unpersuaded that the issue of institutional autonomy is one about which our traditions are likely to mislead us. In short, it seems to me a good idea to leave it up to legislatures to define the contours of the rules of institutional autonomy, because they are not likely to be worse at the job than courts would be.

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24. *See* *A. v. United Kingdom*, 27 Eur. H.R. Rep. 611 (1999) (Westlaw) (holding that the beating of a young English boy by his stepfather constituted “inhuman or degrading . . . punishment” in breach of the European Convention on Human Rights).

25. My personal view is that it would take a great deal of argument to persuade me that the courts in their constitutional capacity will likely do a better job overall than legislatures will in devising rules of institutional autonomy for religious institutions. However, I can hardly claim to have said anything that should lead anyone to share that evaluation.

There is, finally, a third stage to which the argument for institutional autonomy can be moved. At that stage the argument is that simply acknowledging the existence of a rarely or only occasionally exercised government power to regulate religious institutions so undermines those institutions' ability to contribute to the secular good that government should be denied that power categorically. As my earlier comments suggest, I suspect that making that argument convincingly would be quite difficult.<sup>26</sup>

To conclude, the argument I have outlined is, I think, what goes into a full defense of the idea of inter-independence as applied specifically to religious institutions. It seems to me, therefore, that the real conceptual competitor to the idea of inter-independence is not independence but rather *dependence*, in the sense of "subject to full regulation."<sup>27</sup> It is in this way that Professor Hamilton's contribution complements Professor Scharffs's, by carefully laying out the case for complete dependence and by allowing us to see how, even on her own terms, the case for inter-independence is not an insubstantial one.

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26. Again, the European experience with the regulation of families is suggestive. Europeans appear to believe that the mere existence of government power to regulate (exercised rarely, as in the case of corporal punishment) does not overly weaken families' ability to socialize appropriately. *Supra* note 24. If that belief is correct, it seems to me quite unlikely that regulating religious institutions could be worse for society.

27. Or, in Professor Scharffs's terms, interdependence. Scharffs, *supra* note 1, at 1251-53.