BYU Law Review

Volume 2019 | Issue 1 Article 10

Summer 9-1-2019

The Case of the Exemption Claimants: Religion, Conscience, and Identity

Steven D. Smith

The Case of the Exemption Claimants: Religion, Conscience, and Identity

Steven D. Smith, Reporter[*]

IN THE SUPREME COURT OF NEWGARTH, 4500[1]

Per curiam. Pursuant to Appellate Rule 13-6(b), this appeal consolidates three separate appeals involving different parties, and different facts, but one common issue. In each case, a defendant-appellant who has been convicted for violating a legal provision or duty admits the violation but contends that he or she should have been exempted from compliance under the New Constitution. We have been directed to no previous decisions of this Court in which this issue of constitutional exemptions has been resolved,[2] and so we consider the cases together in order to achieve a rational, consistent, uniform resolution.

Crisp, C.J. Are citizens (or at least some citizens) entitled under the New Constitution to be exempted from complying with a law because they have, at least in their own judgment, exceptionally strong reasons not to comply? The question is raised on this appeal by three different claimants who offer three quite different justifications for noncompliance.

---

* Warren Distinguished Professor of Law, University of San Diego. I received editorial assistance in the preparation of this report from Larry Alexander, Marc DeGirolami, Rick Garnett, Jill Hasday, Paul Horwitz, Michael Paulsen, Michael Perry, and George Wright.

1. Reporter's Note: The Supreme Court of Newgarth, although relatively obscure for the most part, is noted for one much discussed decision which was reported some years ago by an eminent legal scholar. *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949), *reprinted in* 112 HARV. L. REV. 1851 (1999). The present case was decided by the same court, but two centuries later. (I'm afraid I must follow Professor Fuller in declining to disclose how the time travel issues were overcome.) I report the case here because the issues discussed by the Newgarth jurists have a strong resemblance to issues that are debated in this country today—although, as one would expect, there are also significant differences. In order to call attention to the similarities, I have taken the liberty, in various places, of adding notes indicating where parallel discussions or decisions have occurred in American jurisprudence and scholarship.

2. Reporter's Note: This issue is fiercely debated in this country at the present time. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). For one collection of a range of contemporary academic views on the subject, see RELIGIOUS EXEMPTIONS (Kevin Vallier & Michael Weber eds., 2018).

In Appeal #476-13-00, the appellant, who calls himself simply Father Edward, is a priest who carries out his clerical vocation in the County and City of Durham. On the evening of November 27, Father Edward heard the confession of a parishioner, Dick Turpin. Earlier that day, Durham police had received a report of a highway robbery in which over one million Newgarth dollars had been stolen from an armored security vehicle. From a photo lineup, the vehicle's driver had tentatively identified Turpin. The identification could not be more than tentative because the robber's face had been partly covered. After police learned that Turpin had been observed entering the confessional booth at Father Edward's church later on the day of the burglary, a subpoena was served on the priest commanding him to come before a grand jury in order to testify concerning any incriminating evidence he may have heard during Turpin's confession.

Appellant appeared and acknowledged having taken Turpin's confession, but he refused to disclose anything Turpin had told him during the confession. Father Edward explained that in his faith a confession before a priest is strictly confidential, and that he would be violating his solemn duty to the church and to God if he were to reveal what Turpin had told him. In the jurisdiction of Durham, a privilege of spousal confidentiality is recognized, as is the attorney-client privilege; but unlike in some of our jurisdictions, there is no legally recognized priest-penitent privilege. For his refusal to testify, Father Edward was accordingly held in contempt of court, and was eventually sentenced to six months in prison. He contends that this treatment violated his constitutional right to freedom of religion and that he should have been exempted from the legal duty to testify.[3]

In Appeal #476-13-01, appellant Francis Irenic was convicted of violating the Newgarth Military Conscription Act, which requires all men upon reaching the age of eighteen to register and make

3. Reporter's Note: This precise issue was considered in People v. Philips, N.Y. Ct. Gen. Sess. (June 14, 1813), *reprinted in* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 139 (3d ed. 2011). The subject has received some attention in modern legal scholarship. *See, e.g.*, 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 246–60 (2006); Michael J. Mazza, Comment, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171 (1998).

themselves available for military service. The Act contains a variety of exemptions, including exemptions for men preparing for the medical profession and men who are married and have dependent children. It also exempts from military service men who have a religious objection to serving in war; "religious" is defined as being based in beliefs about duties to a "Supreme Being."[4] Irenic refused to register or to make himself available for military service, stating that he had an earnest and categorical moral objection to war in any form. He did not attempt to bring himself within the statute's religious exemption, however, because as he explained, his objection is based not on any belief in duties to God, or to a Supreme Being, but rather on his commitment to the sanctity of human life.[5]

Irenic's conscription board rejected his request for an exemption. He nonetheless persisted in his refusal to register or serve, and he was accordingly convicted of violating the Act and was sentenced to five years in prison.

In Appeal #476-13-02, appellant Emilia Pescar was convicted of violating regulation 17.6 of Newgarth's Hunting and Fishing Code. The regulation makes it a misdemeanor to fish in any of Newgarth's lakes, rivers, or streams, except during fishing season, which the Office of Wildlife specified as running from May 1 through September 31. Pescar was cited for fly-fishing on the Big Bonanza River on November 13.

In her appearance before a magistrate judge, Pescar pleaded to be excused from compliance with the law. She explained that for her, fishing is not a livelihood or business; neither is it merely a hobby or avocation. On the contrary, for as long as she can remember going back to her childhood, fishing has been the core of her identity, or her sense of who she is, and she explained in vivid

4. Reporter's Note: The Newgarth draft law thus appears to be similar to the applicable American law at the time of *United States v. Seeger*, 380 U.S. 163 (1965).

5. Reporter's Note: The appellant's pacifist commitment thus appears to be similar to that declared by the defendant Elliot Welsh in *Welsh v. United States*, 398 U.S. 333 (1970). Welsh explained:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation.

Id. at 343 (emphasis omitted).

and often poetic detail how fishing defines her as a person.[6] Although it would also be accurate to say of Pescar that she is a Newgarthian, a woman, a sister and aunt, a Sagittarius, a lover of classical music, a Giants fan, a cook, and any number of other things, in her self-conception, she does not think of herself primarily in those terms: she thinks of herself as a fisher. Hence, to ask her to fish only from May through September, she contended, is in essence to require her to deny or suspend her identity—to forego being the person she is—during more than half of each year.

The magistrate judge listened to this explanation and then commented,

> I have no doubt, Ms. Pescar, that you are sincere and passionate about everything you've told me, and I can honestly say that I sympathize with you. As it happens, I do a bit of fly-fishing myself, and if I let myself, I can imagine this becoming a kind of consuming passion for me as well. If there were some way to allow you—and *only* you—to violate the fishing regulations, I would happily excuse you. But the regulations serve a valuable and legitimate purpose—without such limits our supply of fish would rapidly be depleted—and there is no legal basis for singling you out for an exemption. And so, I must reluctantly find you guilty of a misdemeanor.

The judge then imposed a fine of $50, which is the minimum sanction allowed under the regulations.

All three of these appellants ask to be excused for their violations under the New Constitution (which is today something of a misnomer because of course the instrument is now several centuries old; but it is nonetheless "new" relative to the American Constitution on which it was modeled after the old legal order collapsed during the Great Spiral).[7] Of course, there will always be citizens—often thousands or even millions of them—who would like to be excused from complying with virtually any law the

6. Reporter's Note: A lengthy appendix to the Court's decision sets forth a transcript containing appellant's explanation. Because of its length I have not reproduced it here. However, American readers may get a sense of Pescar's conception of herself and of fishing by reading (or watching the film adaptation of) NORMAN MACLEAN, A RIVER RUNS THROUGH IT (1976).

7. Reporter's Note: Just what the "Great Spiral" consisted of is unclear, to me at least, but the event is referenced in Fuller, *supra* note 1, at 622.

government enacts. Sometimes they have good and legitimate reasons for wishing to be excused; and any one of us is likely to sympathize with some of their pleas.

But to excuse citizens from their duty to obey the law—just because they think they have a good reason for disobedience—would be an invitation to anarchy: it would be to make every woman or man a law unto herself or himself.[8] Nor would it be either feasible or appropriate for us as judges to engage in a case-by-case assessment of the reasons that various citizens may have for thinking that the law should be relaxed in their particular cases. We can exempt a citizen from complying with a law, therefore, only if there is a sound legal basis for such an exemption.[9]

And so we must ask whether there is such a basis in these cases. The answer to that question—to the *legal* question, that is—turns out to be relatively clear and straightforward. In the first appeal, Father Edward invokes Provision 1 of the Newgarth Bill of Rights, which (again, following the American Constitution on which it was modeled) provides: "The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The second part of that provision, generally described as the Religious Freedom Clause, has been interpreted to mean that the government should accommodate people in the exercise of their religious faiths, including by excusing them from complying with general laws. *See, e.g.*, *State of Weymouth v. Amish Cmty.*

This requirement of accommodation is not and could not be absolute, of course. In *Abraham v. Isaac*, an action seeking an anticipatory declaratory judgment, this Court ruled that the state's interest in the preservation of life meant that a father could not be excused from the homicide laws despite his sincere belief that God had commanded him to sacrifice his son. But if the accommodation of a religious commitment is reasonably possible, it is constitutionally commanded. Or at least so our cases

8. Reporter's Note: *Cf.* Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) (arguing that constitutionally mandatory free exercise exemptions would be impossible because they would make every man "a law unto himself") (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

9. Reporter's Note: A very similar position is energetically advanced in Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 VA. L. REV. 1 (forthcoming 2019).

have held.[10] *See Amish Cmty.*; *see also Ben v. Hur*; *Paul v. Corinthian Congregation*.

In accordance with this constitutional provision, and with the line of cases interpreting the provision, Father Edward should have been excused from testifying about what he heard in confession. In his mind and belief, such testimony would have been a gross violation of his religious obligations. To be sure, like any other constitutional right or privilege, this exemption does not come without costs. Father Edward might have provided valuable evidence; excusing him and other clergy who might find themselves in his position means that such evidence may not be available. But that is a cost which our Religious Freedom Clause commands us to accept. Given the fact that many of our jurisdictions have long recognized a priest-penitent privilege without incurring catastrophic consequences, it can hardly be argued that Durham has an overriding interest in compelling clerics to violate their obligations of confidentiality. Nor should the constitutional right of religious freedom be deemed less valuable than the statutory rights protecting spouses, or attorneys and their clients, in which similar costs of unproduced evidence are routinely absorbed.

The judgment against Father Edward should accordingly be reversed.

With respect to appellants Irenic and Pescar, by contrast, there is no legal basis for exempting them from compliance with their legal duties. I do not doubt the sincerity of either of these appellants. If I were a legislator, I might perhaps attempt to craft laws that would not burden their conscience (in Irenic's case) or their self-conception (in Pescar's case). But I am a judge, not a legislator, and I find no basis in Newgarthian law for exempting these parties.

I would accordingly reverse the judgment in Appeal #476-13-00 and affirm the judgments in Appeals #476-13-02 and #476-13-02.

10. Reporter's Note: In this respect, it appears that Newgarthian jurisprudence is similar to American free exercise doctrine from *Sherbert v. Verner*, 374 U.S. 398 (1963), through *Employment Division*.

Broad, J. I arrive at the same conclusion as the Chief Justice, but by an entirely different (and, I must say, with all due respect, less facile) route.

The cases before us present complicated issues, and it is hardly sufficient just to thumb through the text of the New Constitution to see whether there happens to be some provision explicitly authorizing an exemption. The result of that approach would be an unreflective, haphazard, hodge-podge constitutional jurisprudence—one captive to the unplanned vicissitudes and fortuitous contingencies of our political history—that would have little or nothing to recommend it in terms of the fundamental values cherished by our law: justice, fairness, equity, and rationality. To be sure, our jurisprudence was once characterized by this sort of narrow, text-bound formalism. In recent years, however, we have come to recognize that the New Constitution is not merely a legal code but something more august; it is an embodiment (albeit an imperfect embodiment, as all human constructions are) of our aspirations to justice and to reason.[11] And so our challenge and our task as judges is to interpret that instrument liberally in order to bring it ever more in line with its lofty aspirations.

In performing that task, we must start by consulting the legal text, of course, but we must also read and construe the text in light of principles of justice, as developed and articulated in moral philosophy.[12] If a particular outcome is recommended by relevant principles of justice, the text of the New Constitution will usually be supple enough to provide a textual basis for reaching the just conclusion.

So, looking beyond the bare text, do we find any principled basis for excusing one or more of these appellants from their legal

11. Reporter's Note: American constitutional scholars have expressed similar conceptions of the American Constitution. *See generally, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

12. Reporter's Note: In this respect, Justice Broad's approach to constitutional interpretation appears to be very much in line with that advocated in RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996), and RONALD DWORKIN, LAW'S EMPIRE (1986).

duties? I believe we do. While all three claimants would seem to be persons of reflection and integrity who may engage our sympathies, one of them—namely, Father Edward—stands out because his claim is based on a perceived duty to a Higher Power.[13] His obligations derive from a Source that is, so to speak, beyond the jurisdiction of our laws. We might compare him to an ambassador of a foreign sovereign. Typically, when such an ambassador transgresses our laws we do not simply arrest and incarcerate the transgressor like an ordinary criminal, but rather remand him to the justice of the sovereign that he serves.

And indeed, this was precisely the rationale that led to Provision 1 of our Bill of Rights. As noted by the Chief Justice, that provision was modeled on the First Amendment to the earlier Constitution of the United States. Although the origins and meaning of that amendment are obscure and contested by historians, the legal authorities that construed it typically linked it to an earlier and much-renowned law known as the Virginia Statute for Religious Freedom, authored by the legendary Thomas Jefferson.[14] The Preamble to the Virginia Statute set forth its rationale, beginning with the proposition that "Almighty God hath created the mind free" and that infringements of religious freedom are "a departure from the plan of the Holy author of our religion." Jefferson's friend and political ally, James Madison, explained that a person's duties to God precede and take precedence over duties to society.[15] Thus, the antecedent to our Provision 1 was explicitly anchored in the principle I have referred to above—namely, that mundane legal duties imposed by our law should give way before duties owed to a Higher Authority over whom our law can claim no jurisdiction.

By contrast, the claims of the other two appellants may or may not be meritorious as a matter of political morality, but they make no claim to being based on any duties to a Higher Power. The

13. Reporter's Note: A similar view is occasionally voiced in contemporary scholarship. *See, e.g.*, Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159 (2013).

14. Reporter's Note: This statement might be referring to *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), among other possible authorities.

15. Reporter's Note: This statement seems to be a reference to James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* CHURCH AND STATE IN THE MODERN AGE: A DOCUMENTARY HISTORY 59–62 (J. F. Maclear ed., 1995).

criteria they invoke—namely, morality and conscience (in the case of appellant Irenic) and personal identity (in the case of appellant Pescar)—are very much within the jurisdiction and competence of our legislators and our law. Those legislators are perfectly free to consider such criteria and, if they choose, to craft the law or to create exceptions in order to accommodate such concerns. In the case of the Military Conscription Law, the legislators *did* create a number of exceptions, thereby showing that they were attentive to such matters. But the laws in question create no exceptions applicable to appellants Irenic or Pescar.

I would accordingly reverse the conviction of appellant Father Edward but affirm the other two judgments. I hope that I have made it clear that I reach this conclusion not simply on the basis that there is a convenient legal *text* supporting Father Edward's claim, but rather because there is an exemption-supporting *principle* that applies to Father Edward—namely, respect for duties arising from a Source beyond our law's jurisdiction—that does not apply to appellants Irenic and Pescar, sincere as those claimants may be.

Penn, J. With all due respect, reading through Justice Broad's opinion, I feel that I have descended into a bipolar world. The first half of the opinion, dealing with the nature of our New Constitution and our obligations as judges to construe that instrument in a reasoned, principled, justice-promoting way, has an admirably progressive and enlightened quality. But the second half of the opinion, in which Justice Broad concludes that only claims for exemptions based on purported obligations to a Higher Power should be recognized, reads like something excavated from the Dark Ages.

Thus, I can endorse without reservation Justice Broad's explanation showing that as judges, we should interpret the New Constitution in light of principles of morality and justice in an effort to achieve a just and consistent constitutional doctrine. However, the specific principle embraced in my colleague's concurrence—namely, the theocratic principle of deferring to duties imposed by a Higher Power—seems to me utterly untenable for our purposes, and for more than one reason.

In the first place, the very Provision 1 of our Bill of Rights on which the Chief Justice relies, and on which Justice Broad likewise

relies (though not, he protests, for its *text* but rather for the *principle* that underlies that text), explicitly forbids any establishment of religion. This prohibition entails that government cannot endorse or rely on theological beliefs or propositions; and we have so held in previous decisions.[16] *See Religious Liberty Ass'n v. Stevens*; *Sch. Bd. v. McAllister*. But if government cannot endorse or rely on theological propositions, then it would seem to follow—*a fortiori*, in fact—that government cannot suspend the operations of its laws for particular individuals in deference to any supposed Higher Power.

More generally and more fundamentally, whatever may have been the case centuries ago in the times alluded to by Justice Broad—the times of the "legendary" (as Justice Broad puts it*) Thomas Jefferson and James Madison—it is plain that not all Newgarthians today share any belief in the existence of a Higher Power. On the contrary, a recent Plowden Survey reports that 57% of those surveyed positively reject any such notion, while another 23% are unsure; only 14% of the respondents expressed an affirmative belief in a Higher Power. (The remaining 6% evidently declined to take any position on the question.)

My point, however, is not that religious believers constitute a minority. A century or even a half-century ago, the figures might have been reversed: those who doubted the existence of a Higher Power were in the minority. The crucial point, rather, is that both then and now, belief in a Higher Power is *not shared*. Some citizens maintain such a belief; others reject it. But in a just society committed to equal concern and respect for all its citizens, public policies must be based on *shared* premises, so that all citizens can join together in public deliberation, and so that no one is coerced

16. Reporter's Note: A similar view is frequently expressed in modern religion clause jurisprudence and scholarship. *See, e.g.*, MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 15 (1997); Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 196, 197 (Nancy L. Rosenblum ed., 2000); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986).

* **[Justice Penn's Note]** Justice Broad's description may be more apt than he realizes: an acclaimed historian has recently argued that Jefferson and Madison were not actual historical persons, but rather, mythical figures constructed by later thinkers and politicians in an effort to provide legitimacy to the American political order. *See* RANDOLPH BULTMANN, DEMYTHOLOGIZING THE AMERICAN FOUNDING (Newgarth University Press 4497).

on the basis of premises that he or she reasonably rejects.[17] Consequently, a contestable and contested belief in a Higher Power who imposes duties cannot serve as an acceptable basis for public policy.

This problem is overcome, however, if we regard Father Edward's objection as one grounded in *conscience*, or in moral convictions and commitments. After all, even a non-religious citizen is possessed of a conscience; he or she affirms that some things are right and others are wrong. Conscience and moral judgment are thus things that can be recognized and embraced by all citizens, whether or not they are religious.

Once we understand that conscience is a legitimate matter for government to recognize and respect, however, it quickly becomes apparent that exemption from legal duties cannot be limited to religious objectors; it must be extended to conscientious objectors generally. In this respect, appellant Irenic is equally entitled to an exemption. His opposition to war is a matter of conscience; it is based on a sincere and reflective moral judgment. So, if we approve appellant Father Edward's request for an exemption, we must approve appellant Irenic's request as well.[18]

In reaching this conclusion, of course, I do not deny that Father Edward's plea is *for him* based on his perceived religious duty, or his duty to what he takes to be a Higher Power. I merely observe that *for us*, acting as officials of a republic composed of diversely minded citizens, it is not the theistic dimension of his claim that is relevant. We cannot say—and, fortunately, we *need not* say

17. Reporter's Note: In this respect, Justice Penn's thinking appears to resonate with that of contemporary proponents of "public reason." The outstanding example, of course, is JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005). For alternative elaborations, see, for example, GERALD GAUS, THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD (2011); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 39–75 (1990); KEVIN VALLIER, LIBERAL POLITICS AND PUBLIC FAITH: BEYOND SEPARATION (2014). For criticisms of the public reason position, see CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002); David Enoch, *The Disorder of Public Reason*, 124 ETHICS 141 (2013).

18. Reporter's Note: Justice Penn's position in this respect appears similar to that taken by some contemporary scholars. *See, e.g.*, Michael J. Perry, *On the Constitutionality and Political Morality of Granting Conscience-Protecting Exemptions Only to Religious Believers*, *in* RELIGIOUS EXEMPTIONS, *supra* note 2, at 21; Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014); *cf.* BRIAN LEITER, WHY TOLERATE RELIGION? 64 (2012) ("If matters of religious conscience deserves [sic] toleration . . . then they do so because they involve matters of *conscience*, not matters of *religion*.") (second emphasis added).

—whether his faith in a Higher Power reflects a true belief or a lamentable delusion. What matters for our purposes is that Father Edward sincerely believes that it would be morally and categorically wrong for him to divulge what he was told in confession. In that respect, he and appellant Irenic are alike or, as we say, "similarly situated." Both assert claims of conscience.

Unfortunately for her, appellant Pescar has no similar claim. We have no reason to doubt the sincerity or the intensity of her commitment to fishing. But even on her own account, she does not assert any *moral* obligation to fish, or to fish outside of the legally defined season. She asserts no claim of conscience. Rather, she merely explains that fishing is something that is very important to her based on her sense of who she is. Many a citizen who would be excused from one or another legal duty could no doubt say much the same thing. Like Pescar, they may be telling the truth. But that is not a truth that justifies being exempted from legal duties.

My position, like Justice Broad's, is based on the assumption that our task as judges is to make judgments in accordance with principles of justice, although the principle I would apply here—a principle of respect for conscience—is different from his principle of deference to a Higher Power. I recognize, of course, that my rejection of text-bound formalism does not mean that I can simply ignore the constitutional text. But in this respect, I see no great difficulty in the present case.

Our New Constitution contains, as already pointed out, a Religious Freedom Clause. "Religion" is an elusive term with no agreed upon meaning. Traditionally the term has been understood to refer to theistic belief and practice, but it is today widely recognized that there are "religions" that are not theistic — Buddhism, for example. I see no great difficulty in construing "religion" to encompass all of the earnest, sincere moral convictions that we typically associate with conscience. Indeed, we have previously said as much, albeit in dicta. *See Sidhartha v. State*. Whether or not we would conventionally describe all of these convictions as "religious," they do at least occupy a similar place and perform a similar function for non-believers (like appellant Irenic) that theistic beliefs have and perform for believers (like Father Edward). That seems to me to be more than sufficient reason

to construe our Religious Freedom Clause to cover such matters of conscience.[19]

For any who might find this rationalization unsatisfying, we can easily tie the right of conscience to the "equal treatment under law" clause of Provision 7. As we have construed it, this provision requires government to treat persons who are "similarly situated" in the same way. *See, e.g.*, *Rights All. v. Epsilon*. In this respect, for present purposes appellant Irenic is similarly situated to appellant Father Edward: both assert sincere objections of conscience to otherwise applicable legal duties. It seems clear, as the Chief Justice's opinion shows, that under the New Constitution Father Edward is entitled to an objection; equality means that the same treatment must be extended to appellant Irenic.

Conversely, in this respect, appellant Pescar is not similarly situated to the first two appellants. She does not assert an objection of conscience. She is similarly situated, rather, to the thousands and millions of other citizens who would ardently wish to be excused from some legal duty or other, but who can assert no reason of conscience in support of this wish.

For the foregoing reasons, I would reverse the convictions of appellants Father Edward and Irenic, but I would regretfully sustain the conviction of appellant Pescar.

Mego, J. Seeking a suitable principle for resolving these claims, Justice Penn argues that Justice Broad's theocratic principle is disqualified because it is not shared in our society. Of course I agree. That anyone would invoke that principle in our own day, as Justice Broad does, is surprising, and indeed disturbing. I also agree that if Father Edward is exempted from his legal duty, appellant Irenic must be exempted as well.

Unfortunately, the principle that Justice Penn would use to reach that conclusion is vulnerable for the same reasons that he offers in rejecting Justice Broad's principle. A more careful

19. Reporter's Note: In this respect, Justice Penn's position appears to be similar to that taken by some modern scholars. *See, e.g.*, 1 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY 69–80 (2010); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 21 J. CONTEMP. LEGAL ISSUES 449, 461 (2013). Justice Penn's position also appears similar to that of the Supreme Court in the *Seeger* and *Welsh* cases cited earlier. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

reflection will show, I believe, that there *are* admissible grounds for exempting appellants Father Edward and Irenic, but these grounds extend to appellant Pescar as well. I will first explain why an appeal to "conscience" is no more acceptable than an appeal to religious duties, and I will then explain why the proper principle in this context must be one of respect for personal identity

I.

Justice Penn places great emphasis on "conscience," which he equates with judgments about "morality." And people can make judgments about "morality," he thinks, whether or not they associate morality with any Higher Power. In this respect, he is surely right. But does it follow that there is any socially shared commitment to "morality," and hence to "conscience"? I believe we can only answer that question affirmatively if we indulge ourselves in a massive equivocation on the term "morality."

It is hardly a novel observation that people in our society disagree over *particular moral judgments*. (Is telling a lie always "morally" wrong? Is late-term abortion wrong?) But, more importantly, they disagree over *what morality even is*. People of diverse views may use the same word to mean vastly different things.[20] And once we acknowledge these differences, it becomes apparent that there is no shared belief in the existence of anything—no single or coherent entity, nor class of desiderata—that we can call "morality."

Thus, some people associate morality with the will of God, or with a providential plan. In this view, to say that "stealing is morally wrong" means something like: "God has commanded us, 'Thou shalt not steal.'" This way of thinking is congenial, I suppose, to Father Edward. To others, though, "morality" is a purely human affair; it is based on maximizing happiness for the greatest number. So "stealing is wrong" means that stealing will result in a net overall loss of (human) happiness. To still others, "morality" refers

20. Reporter's Note: Some perceive a similar condition in our own time. Michael Smith has remarked that "if one thing becomes clear by reading what philosophers writing in meta-ethics today have to say, it is surely that enormous gulfs exist between them, gulfs so wide that we must wonder whether they are talking about a common subject matter." MICHAEL SMITH, THE MORAL PROBLEM 3 (1994). For a much-discussed diagnosis of this situation, see ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984).

to an ostensible duty of rational consistency: we should act only on principles that we consistently want others to follow as well. So "stealing is wrong" means that you cannot at the same time steal your neighbor's property and also want your neighbor to steal *your* property.

And, of course, there are plenty of other views. Among these are various more skeptical positions. By one view, moral judgments are basically just expressions of emotion or attitude: to say that stealing is wrong is to say, basically, "I don't like stealing," or maybe, "Boo for stealing!" By another view, moral judgments and norms are essentially fictions, or noble lies, that society inculcates in people in order to induce them to behave in productive and non-harmful ways—or perhaps, in a darker version, in order to keep the weaker in subjection to the stronger.[21]

We might try to say that there is still *something*—some *thing*—we call "morality," and that all of these different positions amount to different conceptions or theories about what that thing is. But this is a deeply implausible way of viewing the matter. It seems more accurate, and more economical, just to say that the same *word* ("morality") is being used to refer to a whole range of different *things* or considerations (which may or may not exist) — the will of God, the happiness of society, the emotions or attitudes people have towards different kinds of actions.

Once we recognize that the word "morality" is being used to refer to a host of quite different things, it becomes apparent that in our society there is no more a shared belief in "morality" than there is a shared belief in the existence of a Higher Power. If possible, the disagreements about morality are even greater, albeit more veiled because of the common *term* "morality." If society and the state cannot act on "religious" premises because these are not shared, as Justice Penn persuasively argues, then it ought to follow that society and the state cannot act on "moral" premises either, and for the same reason. Moreover, as Justice Penn makes clear, "conscience" typically refers to a person's judgments about "morality," or about what is "morally" right and wrong. If we cannot say (except by equivocating) that there is a shared

21. Reporter's Note: For discussion of apparently similar positions in modern meta-ethics, see generally MACINTYRE, *supra* note 20.

commitment to "morality," then we also cannot say without equivocation that there is any shared commitment to "conscience."

II.

The situation looks bleak. Still, I believe there is a way out of this predicament. We can accept that although in form both religious people like Father Edward and earnestly moralistic people like Francis Irenic purport to be making statements about something outside or independent of themselves (God, or Justice, or Morality—whatever it is), these people are, in reality and most fundamentally, telling us something about themselves—about *who they are*. Of course, we need not deny that these people *believe* they are speaking of something outside themselves; we need not even deny that in this belief they might possibly be correct. But even if we are atheists who deny the existence of God or moral skeptics who doubt that there is any such thing as morality, we can still understand that when Father Edward speaks of his duty to God, or when Francis Irenic speaks of his moral duty not to participate in war, these men are disclosing something important about themselves. They are disclosing beliefs and commitments that *constitute them as the particular people they are*. They are revealing and asserting their *identities*.

Moreover, we can acknowledge that there is good reason for us, and for our law, to respect people's basic identities, and to refrain from violating or infringing people's identities. This observation rests on a crucial distinction between *identity* and *interests*—and on the priority of the former over the latter.[22]

Most of our actions and decisions affect our and other people's interests—their desires, expectations, or preferences. Now, interests inevitably compete with each other. If I invest more of my money in a retirement plan, I will have less money available for this year's vacation. If the government spends more on military defense, it has less to spend on education. So there are trade-offs to be made: and weighing or trading off interests against each other is at the heart of what law and government do. And yet interests do

22. Reporter's Note: For an emphasis on this distinction in contemporary scholarship, see CÉCILE LABORDE, LIBERALISM'S RELIGION 204 (2017); Jocelyn Maclure, *Conscience, Religion, and Exemptions: An Egalitarian View*, *in* RELIGIOUS EXEMPTIONS, *supra* note 2, at 9, 12.

not exist "in the air," so to speak, or in a void. The very possibility of interests depends on persons who possess those interests. *Persons* are essential and primary; *interests* are derivative. And so an injury to those persons—to their *identities*—is of a different order than a mere denial of interests.

The basic point can be made in contractarian terms for those who find illumination in that way of thinking (which of course was hugely influential in pre-Spiral political theorizing). Suppose that in a state of nature or in a pre-political state, we were to deliberate and negotiate about how to form a social contract for our mutual benefit. As presumptively rational agents, what would you or I give up, or what would we risk, in exchange for the benefits of a civil and political order?

You might well find it beneficial to sacrifice various interests, even including interests that you might describe as liberties, in order to obtain the blessings of government and rule of law, with the security and order that these would bring. But you could hardly agree to sacrifice your identity, no matter how great the benefits. Because having lost your identity, *you* would no longer be there to enjoy those benefits. As an old saying of unknown origins put it: "What doth it profit a man to gain the whole world and lose his own soul?"

Unlike commitments to a Higher Power or to conscience, the commitment to what I might call the integrity of identity is truly shared by everyone in our society. Not everyone believes in God (much less in the God of Father Edward). Not everyone believes in morality in any meaningful, non-equivocating sense, and without a shared commitment to morality there is no shared commitment to conscience. But everyone has an identity. Because without an identity, a person would not be a person. Put it this way: if someone denies having an identity, she has declared herself to be nobody, and has thereby disqualified herself from participating in the discussion.

So if there is any principle that can help us resolve these claims for exemptions, it is not the theocratic principle, nor the principle of freedom of conscience. Rather it is the principle of the integrity of identity. And it follows that a crucial distinction for sorting out the various reasons people have for wishing to be excused from complying with their legal duties is the distinction between claims

based on infringement of identity and claims based on the impairment of interests. The person who says, sincerely, that compliance will violate or infringe her identity is in a very different and much stronger position than the person who says that compliance will be costly, or inconvenient, or painful.

But applying this distinction leads us to a result quite different from those favored by my colleagues. Appellant Pescar has earnestly and lucidly explained how being a fisher is central to her conception of herself—to her identity. Her claim for an exemption from the fishing regulation is accordingly very strong. It is surely as strong as those of appellants Father Edward and Irenic. After all, those parties have not even made any explicit claims about identity. We can credit their claims only by inferring that when Father Edward talks about God and when Francis Irenic talks about conscience and moral duty, they are telling us something about how they are constituted—about what is core to their identities. That is a plausible enough inference, I think, and so I am happy to recognize exemptions for them. Even so, their claims are surely no stronger than that of Emilia Pescar, who spoke emphatically and explicitly in terms of her self-conception or identity.

In reaching this conclusion, I am not averse to talking about and recognizing a "freedom of religion" (which is to be sure explicitly set forth in our New Constitution) or a "freedom of conscience" (which is *not* explicitly acknowledged but is without doubt a venerable concept in our tradition). I merely urge that we acknowledge that those rights or commitments have their grounding in the principle of the integrity of identity.[23] And I urge

23. Reporter's Note: In justifying religious freedom and freedom of conscience in terms of a more fundamental commitment to personal identity, Justice Mego's position resembles one taken in a good deal of contemporary scholarship, jurisprudence, and legal advocacy. *See, e.g.*, Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 9–11, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111); ROBERT AUDI, DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE 42, 71 (2011); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 293 (1999); AMY GUTMANN, IDENTITY IN DEMOCRACY 151–91 (2009); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 67–68 (1996); Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 113–18 (2015); Troy L. Booher, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 471–72 (2004); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U. S.F. L. REV. 389, 400–02 (2010); David B. Cruz,

as well that we give effect to that principle even when there does not happen to be a clear textual basis for invoking it in a given case. For those who demand such a textual basis, I would be happy enough to resort to the "equal treatment of the law" clause of Provision 7, as generally explained by Justice Penn but adjusted in accordance with the views expressed in this opinion.

I would accordingly reverse all judgments below and would grant the exemptions claimed by all appellants.

Kharossiv, J. In her impressive and elegant opinion, Justice Mego has reduced this line of reasoning and jurisprudence to its logical conclusion—or rather, I might say, to its inevitable *reductio ad absurdum*. Indeed, in a rough way, my colleagues' opinions track the reductionist historical course of our jurisprudence.

Start with the idea that was once unapologetically asserted by the founders (whether real or legendary) of this line of our jurisprudence: namely, that our law should exempt those who act, as they suppose, from *duty to a Higher Power*. Can that idea serve to distinguish some exemption claims from others, as Justice Broad contends?

Apparently not. Or at least, so Justices Penn and Mego tells us; Justice Mego is shocked—yes, shocked—that anyone "in our own day" would even suggest the possibility. Now, as an aside, I might observe that in the abstract, I am not sure why what Justice Mego deprecatingly calls "the theocratic principle" cannot serve as a basis for law. It is true that the idea is one that many today, including myself, would find woefully unpersuasive, because we do not believe that there *is* any Higher Power. And yet many of our fellow

Disestablishing Sex and Gender, 90 CALIF. L. REV. 997 (2002); Rebecca Redwood French, *From* Yoder *to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 77–78 (1999); Christie Hartley & Lori Watson, *Political Liberalism and Religious Exemptions*, *in* RELIGIOUS EXEMPTIONS, *supra* note 2, at 97, 106–07; Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 357 (1986); Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 61 (2018); Maclure, *supra* note 22, at 11; Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 344–45 (2001); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (articulating that the Constitution protects right of "persons, within a lawful realm, to define and express their identity"); Town of Greece v. Galloway, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting) ("A person's response to [religious] doctrine, language, and imagery . . . reveals a core aspect of identity—who that person is and how she faces the world.").

citizens *do* believe the idea, and it is arguable that the idea is embedded in aspects of our law, including the Religious Freedom Clause. As it happens, many of our laws are based on ideas that I myself do not believe; but they are laws nonetheless.

More generally, and with apologies, it seems to me that in maintaining that a society or a government can permissibly act only on premises shared by all of its citizens, my more sanguine colleagues consign themselves to a fantasy world. Consistently applied in a highly pluralistic society like ours, this notion would quickly issue in political paralysis; and so, of course, the notion is *not* consistently applied, but rather becomes an occasion for sophistry and hypocrisy. The claim that premises need to be shared by *all* citizens gets watered down into something like a requirement that the sharing extend to all *reasonable* citizens, at which point it becomes faintly ridiculous: a reasonable person seems to mean little more than "a person who thinks more or less in the way *I* do." For myself, I believe my church-going neighbor is profoundly mistaken in her beliefs; but so far as I can tell she is no less "reasonable"—no less intelligent, sensible, or sociable—than I am. With all due respect, I cannot help but suspect that my colleagues who talk about a "community" constituted around "shared premises" or "shared values" are indulging in the same sort of wishful thinking and projection that they so often ascribe to the "sectarian" folks they disdain.

But these are cavils. The pertinent fact is not legal or philosophical but rather sociological: whether or not it is excluded by Provision 1 or by some requirement of shared premises, the theistic principle has come to seem unacceptable. In this respect, I accept Justices Penn's and Mego's views as authoritative—not because those views are compelling on their merits, but because the Justices who hold them are typical of our governing classes.

And so we begin by reducing the basis for exemption (as Justice Penn does) into a respect for *conscience* and morality. Upon further examination and experience, though, this position also comes to seem inadequate, and so (as Justice Mego's opinion nicely reflects) we dissolve conscience into something supposedly even more elemental—selfhood, integrity, or *personal identity*. With identity, Justice Mego believes she has reached bedrock. But when subjected

to the pressure of examination, the bedrock turns out to be as shifting and insubstantial as sand in a desert storm.

"Personal identity" is after all the most elusive of concepts. Any person—any Tom, Dick, or Harriet—is made up of countless attributes or features: physical features like height and weight and hair color, cognitive or mental features including knowledge and beliefs and language, emotional features or personality traits like cheerfulness or stinginess. The list could go on and on. So, among all these myriad features, which ones constitute the person's "identity"?

All of them? Then, if any single feature changes, is the old identity replaced by a new one? Every time I get a haircut or clip my fingernails I become a new person with a new identity? How utterly disorienting! This view being manifestly untenable, we evidently are to suppose that *some* of the person's features are identity-constituting and others are merely incidental. But then how do we know—how does the person herself know—*which* features constitute identity and which are incidental, perhaps bearing only upon a person's "interests"?

My recollection from undergraduate days is that the problem of personal identity is one that philosophers have struggled with, but without discernible success. What is it (if anything) that allows us to say that the ninety-year-old Charles has the same identity, or is "the same person," as the one-year-old Chucky, even though scarcely a single physical or cognitive feature of the infant remains in the elderly man. Perhaps nothing: personal identity may be (as some philosophers think) a kind of illusion. Or, if we find that conclusion too dispiriting, we might look to, say, bodily continuity—or perhaps continuity of memory—as the most promising answers. But each of these answers invites telling objections; I need hardly review them here. And in any case, neither the physical nor psychological accounts of personal identity will help any of the appellants in this case. After all, none of those parties contends that compliance with the legal duties to which they object will interrupt their bodily continuity or their memory of events in their personal histories.

Perhaps Father Edward might offer us some account of personal identity in terms of a ghostly immortal soul, or something of that sort. But although (unlike Justices Penn and Mego) I would

not rule out such a theory *a priori* merely because of its "religious" nature, I doubt very much that any such spiritual account would be serviceable for our purposes. Or that it would be at all helpful to these appellants. After all, so far as I can tell, none of them has claimed that compliance with the objectionable duties will somehow extinguish their immortal souls.

Justice Mego offers no philosophical or theological account of what "identity" consists of. Hers, it seems, is a more permissively egalitarian or perhaps libertarian approach: she seems to be saying that every one of us gets to choose for ourselves which features are central to our identity, or to our "self-conception." And why not? If my neighbor Joe believes that he is essentially a golfer, or a flautist—if he believes that these features define "who he really is"—who am I to gainsay? (Even if Joe can't hit a fairway to save himself and his flute playing is wretched.) And if he tells me he is Napoleon Bonaparte, or Caligula, it would be not merely pointless but imprudent for me to contradict him.

And yet . . . people change their self-conceptions constantly. People who thought of themselves as being Christians to the core become agnostics, and vice versa. People who thought of themselves as poets or musicians or incipient novelists learn that their talents are disappointingly meager and begin to think of themselves instead as teachers, or lawyers, or bird watchers. Have their "identities" thereby changed? Do we really think—do *they* think—that they are no longer "the same person"? Would it seem other than crazy, for example, to suggest that they should no longer be bound by, say, their former debts (or answerable for their former crimes) because it was someone else—some other person—who assumed those debts, or who committed those crimes? After all, what could be more unjust than to punish one person for another person's crimes?

To be sure, we do sometimes say, for example, that "Mary is a new person" ever since she changed her religion, or changed her job, or started seeing a new boyfriend. These ways of speech no doubt express some sort of metaphorical point. At the same time, we don't for a moment doubt that Mary_2 is bound by all of the obligations incurred by Mary_1, and is entitled to all of the property and benefits of Mary_1. Nor do we think we need to get acquainted all over again. ("I knew your predecessor well, for many years

—charming person, although sometimes a bit overbearing—but now, tell me about yourself.") Mary is still Mary.

In short, changes—even quite fundamental changes that affect a person's self-conception—do not actually result in a change in personhood, or in personal "identity," in any very strong sense of the term. To appreciate this point, we need only consider closely the claims made by Justice Mego in her eloquent opinion in this case. Suppose the government prevents Emilia Pescar from fishing during the months between September and May (if necessary by putting her in jail). Justice Mego tells us that the government would thereby "violate" or "infringe on" Ms. Pescar's "identity." What does this even mean? That the person who was Ms. Pescar will somehow pass out of existence (perhaps to revive on May 1 when fishing season begins again)? That seems an extravagant characterization.

Or suppose we embrace the extravagance and say, "despite outward appearances, the person going under the name of Emilia Pescar from October through April has a different identity—she is actually not the same person—as the Emilia Pescar from May through September." So it seems that a person (the summer Pescar) has been deprived of existence, at least for half of the year (and perhaps forever, if we were to jail her for an indefinite term). That seems tragic—because, after all, every person is precious. But then again, a new person (the winter Pescar), one who wouldn't otherwise have existed, has been brought into existence. That seems cause for jubilation—because every person is precious. Perhaps (all persons being of "equal moral worth") the tragic loss and the transcendent gain cancel each other out?

But then probably, as is usual in these kinds of lofty deliberations, I am missing the point. Probably when Justice Mego suggests that a person's identity is "violated" or "infringed," she doesn't mean that the person and her identity are somehow extinguished. Maybe the point is just that the person isn't permitted to live in accordance with her "identity," or her "self-conception." If this is what Justice Mego is saying, she is surely right. But of course, we knew that all along. Now it seems we are just saying that the person isn't permitted to live as he or she really, really wants to live, or as he or she thinks he or she should live. That observation

merely brings us back to where we started. But where is the reason for giving special priority to the claim for an exemption?

Moreover, it seems to me that on this understanding of Justice Mego's position, she forfeits much of her argument for giving special priority to identity-based claims. She argues, for example, that identity-based claims must take precedence over interest-based claims because interests can't exist in a void; they presuppose a person (and hence, she adds, in great haste, an "identity") in order to exist at all. But on the reduced understanding of what it means to "infringe" an "identity," there is still a person in the picture (and hence, of necessity, an "identity"?)—a person who can enjoy "interests."

In a similar way, if I am a rational agent in a state of nature negotiating about what to give up in order to obtain the benefits of law and government, it may be true that I would never sacrifice my "identity" *if* that means something like sacrificing my life, or my personhood. Because then, as Justice Mego explains, I wouldn't exist to enjoy the benefits of law and government anyway. (Actually, in my own case at least, I believe I *would* accept a one-in-four chance of personal annihilation in exchange for, say, the Taj Mahal.) But if we're only talking about sacrificing "identity" in the sense of sometimes not being permitted to live in the way I want to live (or, if you prefer, in the way the-person-I-think-I-am would want to live), then I might be perfectly willing to make concessions in that "identity" column. I might give up a smidgeon of my "identity" in exchange for a windfall to my "interests." Or, to be blunt, I might fail any longer to see the pertinent difference distinguishing the "interests" column from the "identity" column.

I recognize that arguments based on selfhood or personhood or "identity" are currently fashionable. I think I even understand some of the reasons for that popularity. Those reasons are conspicuous in Justice Mego's opinion. In an age of massive and seemingly irresolvable disagreements about what kind of God (if any) exists and about what "morality" even is (not to mention the more obvious disagreements about all manner of specific "moral" and "justice" issues), it is natural that advocates, including lawyers and judges, would search for some more secure foundation for making normative arguments and normative judgments. "Identity" has seemed to provide such a foundation to many.

Because it seems (as Justice Mego beautifully explains) that every one of us *has to have*, and to value, "identity."

Unfortunately, we have no adequate and workable theory or account of what "identity" is. And so arguments based on "identity" end up trading on the same kinds of confusion and equivocation that Justice Mego skillfully diagnoses with respect to "morality."

My own conclusion is that we have not come up with any viable distinction or principle that would permit us to distinguish among the multitude of reasons that people have for wishing to be excused from complying with their legal duties. Once we've rejected the "Higher Authority" principle (as it seems we have, whether or not we needed to), neither the "conscience" principle nor the "personal identity" principle can check our descent. And so our choices, it seems (unless we are to give up our pretensions to being "principled"—a prospect at which my colleagues shudder with horror), are to exempt *everybody* who wants to be excused from complying with a law, or *nobody*.

But that is scarcely a choice at all. We obviously cannot exempt everybody: as the Chief Justice observes, this would amount to anarchy. And so we must exempt . . . nobody.

This, I think, is where my colleagues' logic leaves us. Contrary to their lofty intentions, it seems, they have convinced me: I accept the conclusion of their logic—even if they don't. I would accordingly affirm all of the judgments.

Per curiam. Lacking a majority position or opinion, we have had to resort to counting votes. Among five Justices, four (Crisp, Broad, Penn, and Mego) have voted to reverse the conviction of appellant Father Edward. The judgment in Appeal #476-13-00 is accordingly REVERSED. Only two Justices have voted to reverse the conviction of appellant Francis Irenic, and only one Justice has voted to reverse the conviction of appellant Emilia Pescar. The judgments in Appeals #476-13-01 and #476-13-02 are accordingly AFFIRMED.

ON REHEARING

Penn, J. (with whom J. Mego joins).

Appellants Francis Irenic and Emilia Pescar have moved for rehearing. Upon reconsideration, I remain of the view that I expressed in my initial opinion; and Justice Mego authorizes me to say that she would continue to adhere to the views she expressed in her opinion. We both agree, however, that an outcome granting an exemption to appellant Father Edward but denying an exemption to Francis Irenic constitutes an intolerable violation of the fundamental principle of equal treatment. Justice Mego would reach the same conclusion regarding appellant Emilia Pescar. The commitment to equality is fundamental to our constitutional order. In order to maintain equality, we therefore deem it necessary to deny all of the claims for exemptions. Justice Kharossiv agrees with this conclusion. The convictions in all three appeals are accordingly AFFIRMED.

Crisp, C.J., and **Broad, J.**, dissent from this judgment for the reasons expressed in their initial opinions.