

A COST-BENEFIT ANALYSIS OF RELIGIOUS PERSECUTION: CASTING UP A DREAD BALANCE SHEET

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I. INTRODUCTION

The worst forms of religious persecution are unfathomably horrific. American law has extinguished the most severe forms of classical¹ and modern² public religious persecution. Whether other forms of public religious persecution have been reduced, or are instead on the increase, is controversial and undoubtedly important.³ This particular question, as briefly illustrated below, is unfortunately not subject to any reasoned, consensual resolution.⁴ It should come as no surprise when commentators raise largely unresolvable claims as to the existence of public persecution or of

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1. See, e.g., PAUL MIDDLETON, MARTYRDOM: A GUIDE FOR THE PERPLEXED chs. 2–4 (2011) (discussing persecution and martyrdom in early Christianity).

2. For discussion of martyrdom in general and the guillotine in particular under the French Revolution, see, for example, THOMAS CARLYLE, THE FRENCH REVOLUTION: A HISTORY 648–49 (1934) (1837) (describing mass clerical drownings); WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 258–63 (1989) (discussing intimidation and punishment of Christians); ALEXIS DE TOCQUEVILLE, THE ANCIEN RÉGIME AND THE FRENCH REVOLUTION 15–18 (Jon Elster ed., Arthur Goldhammer trans., 2011) (1856). The novel serving as the inspiration for Francis Poulenc's opera "Dialogues of the Carmelites" is GERTRUD VON LE FORT, THE SONG AT THE SCAFFOLD: A NOVEL OF HORROR AND HOLINESS IN THE REIGN OF TERROR (Sophia Inst. Press 2001) (1933).

3. See *infra* Section III.

4. See *infra* Section II.B.

the burdening of religious rights of conscience, doctrine, and practice.⁵

This article does not offer a formula for consensually resolving controversial cases of what counts as religious persecution. Instead, the article intends to draw the attention of legislatures, agencies, and the courts to an important but almost entirely neglected basic consideration in addressing alleged religious persecution. The crucial point is this: Many instances of alleged religious persecution confer immense, judicially cognizable benefits, from the standpoint of many of the victims themselves, on many parties, including those victims. These extensive benefits may co-exist alongside the obvious and undeniable costs. It can be fully legitimate for legislatures and courts to take these immense, if not infinite, benefits, especially those conferred upon the presumed victims themselves, into account in adopting or adjudicating claims over the relevant policies.

Thus, in many cases, it will be constitutionally proper for a court to consider the distinctive benefits as well as the costs of the alleged persecution, both from the perspective of the victims. This is not only a matter of calculating utilities of the alternative policies, but also of genuinely respecting the dignity and responsibility of all competent, reflective persons. Surprisingly, a court could in some cases legitimately conclude, after an appropriate and broadly defined cost-benefit analysis,⁶ that the benefits of the al-

5. Setting aside Establishment Clause issues and a number of complications, typical Free Exercise Clause and some other religious rights claims might be adjudicated under a combination of the following cases and statutes, all of which prove to be far from self-explanatory: Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb-1 to bb-4 (2006), *substantially limited by* City of Boerne v. Flores, 521 U.S. 507, 512 (1997); Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 804 (2006), 42 U.S.C. § 2000cc-1 to cc-5, *construed in* Cutter v. Wilkinson, 544 U.S. 709, 712 (2005); *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990); *see also* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. ___, 132 S. Ct. 694 (2012) (discussing religious rights and the ministerial exception as an affirmative defense to EEOC claims); Christian Legal Soc'y of Univ. of Cal. v. Martinez, 130 S. Ct. 2971 (2010) (discussing free exercise in the context of student religious organizations).

6. For an introduction to mainstream cost-benefit analysis literature, see, for example, COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew Adler & Eric A. Posner eds., 2001) (offering a collection of essays on cost-benefit analysis); E.J. MISHAN & EUSTON QUAH, COST-BENEFIT ANALYSIS (4th ed. 1988) (offering cost-benefit analysis hypotheticals); Matthew Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J. LEGAL STUD. S253 (2008) (applying subject well-being research to cost-benefit analysis).

leged persecution to the victims and others, given the victims' own genuine beliefs and values, outweigh the costs.⁷

Alleged persecution, it turns out, need not be a zero-sum or negative sum activity. The victims, the government, and the society may all be net gainers from some instances of real or perceived persecution. Of course, such a broadly defined cost-benefit analysis must be undertaken with restraint, modesty, sensitivity, sophistication, integrity, creativity, intellectual humility, and a resistance to crude quantification. A cost-benefit analysis of alleged religious persecution should recognize that not every moral, religious, or legal value is reducible to some form⁸ of crude utility.⁹ Rights may certainly transcend narrow utility calculations.¹⁰

7. This is not to suggest that any familiar religious group is bound by its own logic not only to endure, accept, or welcome unsought persecution, but to actively cultivate, intentionally provoke, or specifically demand its own persecution. For many, avidly sought or easily avoidable persecution may not qualify as genuine persecution at all. *See infra* Section IV.

Nor could government have a constitutional duty or even a right to engage in religious persecution merely for the sake of religious persecution, in response to a religious demand for persecution by its initiative-taking victims, or for the sake of any distinctly religious benefits of persecution. All of these cases would seem to violate the Establishment Clause, at least as understood by the Supreme Court of the United States. *See, e.g.,* *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (discussing the necessity for government practices to have significant secular purposes and effects). These cases also seem to press the bounds of the public accommodation of distinctively religious belief.

Finally, victims of alleged religious persecution often may believe that acts of persecution damage or even jeopardize the souls of the unrepenting persecutors, but it is unlikely that a court would factor such considerations into account, given that the alleged persecutors would most typically have no inclination to accept such a belief, Establishment Clause problems aside.

8. For a discussion of the murky indeterminacy of the idea of utility and its maximization, see David Lyons, *The Moral Opacity of Utilitarianism*, in *MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER* 105 (Brad Hooker et al. eds., 2000).

9. For a classic discussion of utilitarianism, see HENRY SIDGWICK, *METHODS OF ETHICS* bk. iv (7th ed. 1907) (1874). For a well-known defense and critique of utilitarianism, see J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973). For further discussion, see, for example, DAVID WIGGINS, *ETHICS: TWELVE LECTURES ON THE PHILOSOPHY OF MORALITY* chs. 6–8 (2006) (discussing classical utilitarianism, a fresh argument for utilitarianism, and the consequentialist argument).

10. *See, e.g.,* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch.7 (1977) (discussing the difficulty of determining the breadth of Americans' individual rights); SMART & WILLIAMS, *supra* note 9, at 77 (introducing Williams's critique of utilitarianism). For a sense, though, that focusing on consequences and rights-claims actually leads more to convergence and compatibility than to opposition and conflict. *See, e.g.,* 1 DEREK PARFIT, *ON WHAT MATTERS* pts. 2–3 (2011) (discussing the theories of universal laws and the consequentialist principles upon which they rely); David Cummiskey, *Kantian Consequentialism*, 100 *ETHICS* 586, 588 (1990) (outlining the benefits in consequentialism). For the sharply contrasting view that “[a]s a general strategy of moral reasoning, utilitarianism or consequentialism is irrational,” see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 112 (1980). For discussion of the problems and possibilities of somehow reasonably comparing conflict-

Courts and legislatures ordinarily should not insensitively decide alleged religious persecution issues solely on the basis of any unduly narrow cost-benefit analysis.

But contested claims of right, religious or otherwise, can hardly stand or fall without reference to the meaning and consequences of their recognition or denial, including their major costs and benefits. Costs and benefits, of various sorts, must inevitably inform any sensible adjudication of a claimed religious right. Ignoring major costs and benefits from the alleged victims' own authentic perspective is not necessary in order to comply with the Establishment Clause,¹¹ and disregarding the victims' own basic beliefs and value-choices would deny them elemental human dignity. For a government to acknowledge a group's values is not to endorse those values.

If the courts are to sensibly decide cases of alleged religious persecution, they must crucially consider the clear, basic, relevant beliefs and values of the affected parties, as well as the broader consequences of the possible judicial outcomes. The beliefs and values of the victims of alleged religious persecution should not be assessed on their merits or for their truth by the State. The legitimacy of motivation for holding religious beliefs should also generally not be questioned. That would indeed raise Establishment Clause issues.

But such beliefs and values may well translate directly into costs and crucial benefits on the victims' own accounting that judges may legitimately consider to resolve such cases.¹² The dig-

ing claims of interests, goods, and rights, see, for example, Symposium, *When Is a Line as Long as a Rock Is Heavy? Reconciling Public Values and Private Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707, 707–1120 (1994) (reviewing the Supreme Court's attempts at comparing the "lengthiness of individual liberties with the weightiness of public values"); R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 355–56 (2001) (noting that incommensurability need not preclude a reasonable analysis); see also *infra* note 43 (discussing commensurabilities of infinite values).

11. U.S. CONST. amend. I.

12. For a well-recognized instance in which the Supreme Court balanced interests by incorporating the evident spiritual values and religious beliefs of the directly affected religious group, see *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). While the focus of this article will, for the sake of convenience, be on case law adjudication, the basic logic of the article extends to the drafting and enforcement of statutes and even to many instances of private individual or group decision-making as well. The article does not, however, make social predictions or offer strategic or tactical advice to any group. Thus, the article does not address, for example, whether religious groups should on their own principles seek downsized, more knowledgeable, and more fervent, but perhaps less publicly visible or

nity and moral seriousness of the victims, as well as the desire for optimal government policies, require no less. Religious beliefs can be considered as beliefs without officially approving or disapproving of such beliefs on the merits.

This article applies such considerations below to surprising effect. In many instances, it turns out, serious alleged religious persecution may have unique and immense, if not infinite, legally cognizable benefits for the victims of persecution, and perhaps for others. In particular, the highest and fullest development, self-realization, or self-actualization of persecuted groups may by their own standards often count as a judicially cognizable public interest. In such cases, it will be perfectly reasonable for courts, legislatures, and administrative agencies to take such benefits into account in policymaking and adjudication.

II. SOME BASIC BACKGROUND: THE JURISPRUDENCE OF ALLEGED PERSECUTION

A. *The Idea of Alleged Persecution*

It may be tempting for a mainstream religious denomination to downplay the likelihood of its own persecution by courts, legislatures, or other important public or private entities and groups. But as Professor Mark Tushnet has observed, “even those to whom the State is presently friendly should know that they *will* be disappointed in the State someday. . . . [T]o be a believer is always to have your heart broken by the State.”¹³

Religion in general, apart from any particular denominational beliefs, practices, or lapses, is not without its contemporary academic detractors.¹⁴ The proper role, if any, of religious discourse

even clandestine, memberships or activities, under any circumstances. For one such policy vision, see ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* (2012).

13. Mark Tushnet, *In Praise of Martyrdom?*, 87 CAL. L. REV. 1117, 1123–24 (1999).

14. See, e.g., RICHARD DAWKINS, *THE GOD DELUSION* (2006); DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006); A.C. GRAYLING, *AGAINST ALL GODS: SIX POLEMICS ON RELIGION AND AN ESSAY ON KINDNESS* (2007); SAM HARRIS, *LETTER TO A CHRISTIAN NATION* (2006); CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007); LAWRENCE M. KRAUSS, *A UNIVERSE FROM NOTHING: WHY THERE IS SOMETHING RATHER THAN NOTHING* (2012); ALEX ROSENBERG, *THE ATHEIST'S GUIDE TO REALITY: ENJOYING LIFE WITHOUT ILLUSIONS* (2011); VICTOR J. STENGER, *GOD: THE FAILED HYPOTHESIS: HOW SCIENCE SHOWS THAT*

in public discussions of the political and cultural issues of the day is notoriously controversial.¹⁵ It is increasingly important to have some conception of the alleged “persecution” of religion and related ideas and to notice how such terms might be differently used by opposing groups.

For the purposes of this article, the idea of religious persecution seems to generally require an absence of sufficient justification for the alleged oppression. Burdening of religion hardly counts as persecution if it is plainly justified by the need to secure some crucial and otherwise unattainable public interest. But religious persecution need not involve actual subjective hostility, an ongoing organized campaign, or any particular degree of success in exacting compliant behavior from those allegedly being persecuted.¹⁶ It also seems clear that persecution need not be unlawful in order to count as persecution.¹⁷ A constitutional amendment limiting the free exercise of religion (and equal protection) along with a series of severe burdens imposed on a particular religious group, for example, might be both lawful and persecution.¹⁸

As for some related terminology, one might think of the idea of “martyrdom” as an exceptionally severe form of persecution, often involving an uncompromising victim response. The word “martyr,” however, originally referred merely to public witnesses to re-

GOD DOES NOT EXIST (2008).

15. See, for example, the important discussions in JOHN RAWLS, *POLITICAL LIBERALISM* (1996) and John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). See also BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 127 (1980); ROBERT AUDI, *RATIONALITY AND RELIGIOUS COMMITMENT* (2011); ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* (1997); CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2004); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* (2010); *RELIGION IN THE LIBERAL POLITY* (Terence Cuneo ed., 2005); STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010); MARY WARNOCK, *DISHONEST TO GOD* (2010); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 236 (1987).

16. While “persecution” could be defined in any number of ways for various particular purposes, these assumptions should serve the purposes of the discussion to follow. One crucial point, though, is that even intentional persecution may benefit its victims on the victims’ own value scheme.

17. *Contra* James Bridge, *Persecution*, 11 CATHOLIC ENCYCLOPEDIA (Kevin Knight ed. 2009) (1911), available at www.newadvent.org/cathen/11703a.htm.

18. One can imagine, for further example, a pogrom hypothetically in accord with Czarist law. See generally Yehuda Slutsky, *Pogroms*, ENCYCLOPEDIA JUDAICA (2008), available at www.jewishvirtuallibrary.org/source/judaica (explaining that a pogrom is “an attack accompanied by destruction, looting of property, murder, and rape, perpetuated by one section of the population against another.”).

ligious events and beliefs, with no essential element of a severe penalty for such witnessing.¹⁹ More importantly, “martyrdom” in some other usages need not involve persecution unto death. Joan of Arc apparently referred to her pain and suffering in prison as itself amounting to martyrdom.²⁰ And the distinction between “red martyrs” who go to their death, and “white martyrs,” whose persecution does not involve death, is well-established.²¹

At the other extreme, some unjustified violations even of constitutional free exercise rights clearly do not rise to the level of persecution. Consider, for example, a statute with easily administered exceptions on religious and non-religious grounds which is applied, to modest effect, against a religious group that is unknown to the government. Assume finally that the religious group cannot point to any recognized statutory exception of which the group might avail itself.²² Here, it seems, we could have a constitutional religious rights violation where the circumstances could not justify any claim that the drafting or enforcement of the statute amounts to persecution.

Consider another important legal context occasionally involving claims of religious persecution: immigration. Perhaps not surprisingly, the idea of persecution in asylum or refugee cases tends to be interpreted narrowly.²³ Persecution in the American immigration context, whether on religious grounds or not, is thus

19. See Maurice Hassett, *Martyr*, 9 CATHOLIC ENCYCLOPEDIA (Kevin Knight ed. 2009) (1910), available at www.newadvent.org/cathen/09736b.htm.

20. See *The Trial of Joan of Arc*, Eleventh Session, March 14 (W.S. Scott trans. 1956) (1431), available at <http://smu.edu/ijas/1431trial.html>.

21. See, e.g., Cólín Owens, *A Literary Preamble*, in RONA M. FIELDS, MARTYRDOM: THE PSYCHOLOGY, THEOLOGY, AND POLITICS OF SELF-SACRIFICE 3, 4 (2004). Neither martyrdom in a broad sense nor persecution more generally need involve anything like the application of torture, as that term is ordinarily understood. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (defining “torture”); Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a)(1) (2012) (defining “torture”); *Ghebrehiwot v. Att’y Gen.*, 467 F.3d 344, 353 (3d Cir. 2006) (clarifying the definition of “torture” under the Convention Against Torture). On the other hand, torture can amount under certain circumstances to persecution, even for immigration law purposes. See, e.g., *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006) (quoting *Chen v. Gonzales*, 417 F.3d 268, 272, 275 (2d Cir. 2005)).

22. We may assume that the applicable law in this hypothetical case is confined to *Employment Division v. Smith*, 494 U.S. 872, 882–85 (1990).

23. See, e.g., Eric T. Johnson, *Religious Persecution: A Viable Basis For Seeking Refugee Status in the United States?*, 1996 BYU L. REV. 757, 758 (1996) (“Despite history, international instruments, and current events, religious persecution remains an infrequently granted basis for obtaining refugee status in the United States.”).

seen as “an extreme concept.”²⁴ Generally, more is required than incidents of official harassment, intimidation, or even “minor physical abuse or brief detentions” on religious grounds.²⁵ Brief detentions along with physical abuse may or may not suffice.²⁶ Generally, “employment discrimination which stops short of depriving an individual of a means of earning a living does not constitute persecution.”²⁷ Heavy or onerous fines,²⁸ property confiscations,²⁹ or broad limits on employment opportunity³⁰ may, however, suffice. And the successful concealment of one’s religious membership, practices, or beliefs from the authorities does not rule out a claim of religious persecution.³¹

The stringency of the idea of religious persecution in the immigration context may be analytically helpful for our purposes. A cost-benefit analysis of alleged religious persecution plainly must recognize the relevant differences between, for example, torture, prolonged imprisonment, or strict martyrdom on the one hand, and lesser forms of persecution on the other. But the extreme cases, as in martyrdom, may clarify the costs as well as the cognizable benefits of lesser forms of persecution. Even a distorted “visual” enlargement of any phenomenon may allow one to better understand that phenomenon at a smaller and less readily visible scale.³² The lesser forms of religious persecution are not necessarily like martyrdom on a smaller scale. But the cases of martyrdom may make it easier to more readily notice and evaluate some genuine costs and benefits of lesser forms of religious persecution.

24. *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1353 (11th Cir. 2009).

25. *Id.* (citing *Djonda v. U.S. Att’y Gen.*, 514 F.3d 1168, 1171, 1174 (11th Cir. 2008)).

26. See the collected case discussion in *Zheng v. U.S. Attorney General*, 451 F.3d 1287, 1290–91 (11th Cir. 2006) (per curiam).

27. *Id.* at 1291 (quoting *Barreto-Claro v. U.S. Att’y Gen.*, 275 F.3d 1334, 1340 (11th Cir. 2001)).

28. See *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1095–96 (9th Cir. 2010); *Zhi Wei Pang v. Holder*, 665 F.3d 1226, 1231 (10th Cir. 2012). Compare the allegations cited *infra* note 81.

29. See *Zhi Wei Pang*, 665 F.3d at 1231 (quoting *In re T-Z*, 24 I. & N. Dec. 163, 174 (B.I.A. 2007)).

30. See *id.* (quoting *T-Z*, 24 I. & N. Dec. at 174).

31. See *Muhur v. Ashcroft*, 355 F.3d 958, 960–61 (7th Cir. 2004).

32. Plato famously argues this idea in another context. See, e.g., JULIA ANNAS, AN INTRODUCTION TO PLATO’S REPUBLIC 149–50 (1981); Norbert Blossner, *The City-Soul Analogy*, in THE CAMBRIDGE COMPANION TO PLATO’S REPUBLIC 345, 366 (G.R.F. Ferrari ed. & trans., 2007); TERENCE IRWIN, PLATO’S ETHICS 227 (1995).

B. *Alleged Persecution and “Essential Contestedness”*

One possible challenge to this analysis is important in many other contexts but turns out to be largely irrelevant to the purposes herein. The core of this challenge is that governments and other entities accused of engaging in religious persecution will typically, with reason and good faith, deny that they are engaging in persecution. The idea of persecution or of religious rights-violation carries a normative as well as a descriptive element,³³ with the normative element typically making any genuine persecution morally unjustified and wrongful. Any government that believes its actions to be justified will be more likely to deny that it is engaged in religious persecution at all than to say that its religious persecution is sufficiently justified. The government’s focus will instead be on its societal goals, with the related suffering as an unfortunate or voluntarily incurred cost.

The victims of alleged religious persecution, however, are instead likely to focus primarily on the effects of government actions as they experience them. They are unlikely to have an initial sense of their own persecution but to then nevertheless conclude that the government actually has a sufficient justification for its actions, so that what initially seemed to be religious³⁴ persecution was in reality not persecution at all. The government and the most directly affected parties will thus tend to systematically and irreconcilably differ as to what counts as persecution. Partly, this may be a matter of propaganda and public relations. As was observed more than a century ago, “[t]hrough the persecuting spirit has not yet ceased to influence men’s actions, it is no longer³⁵ regarded as a trait to be proud of, but seeks to hide itself under specious disguises.”³⁶

33. The Oxford English Dictionary, for example, links the idea of persecution to oppression and hostility, with their strongly negative connotations. See *Persecution Definition*, OED.COM, <http://www.oed.com/view/Entry/141431> (last visited Dec. 10, 2012).

34. It is certainly possible that the question of persecution may or may not be accompanied by uncertainty over whether the alleged persecution is on the grounds of religion, or (also) on the grounds of race, ethnicity, citizenship, tribal affiliation, nationality, or other correlated considerations.

35. Again, it seems unlikely that most governments would admit to currently engaging in persecution in any sense linked to “oppression” rather than maintain that the governmental acts in question are justified and thus do not count as persecution, whatever the costs or suffering involved.

36. John Fiske, *The Philosophy of Persecution*, 132 N. AM. REV. 1, 1 (1881).

More basically, as the above discussion suggests, ‘persecution’ is what the philosopher W.B. Gallie referred to as an “essentially contested concept.”³⁷ For Gallie, disagreements over the core meaning and central application of an essentially contested concept may not be “resolvable by argument of any kind, [but] are nevertheless sustained by perfectly respectable arguments and evidence.”³⁸

Those subject to alleged persecution will naturally be inclined to see their own religious principles, moral conceptions, constitutional free exercise rights, and other rights and obligations as outweighing or simply overriding any conflicting government policy interests. Even where the government’s intent is not perceived even in part as hostile, surely it may be thought that some sort of exemption should be viable, perhaps among other established exemptions.³⁹

In contrast, the drafters of an unintentionally, perhaps unknowingly, religiously burdensome rule⁴⁰ will be more inclined to focus on the rule’s secular purposes, including the promotion of basic rights; the weight of those purposes; the realistic impossibility of drafting a concise but religiously cost-free rule; and perhaps

37. See W.B. Gallie, *Essentially Contested Concepts*, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOC’Y 167 (1956); see also WILLIAM CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10-44 (2d ed. 1984) (discussing Gallie’s “essentially contested concepts”); John Gray, *On Liberty, Liberalism, and Essential Contestability*, 8 BRIT. J. POL. SCI. 385 (1978) (considering whether the “central concepts of social and political thought have an essentially contestable character”); Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1 (1973) (addressing why questions concerning social concepts elude decisive answers); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002) (discussing the essential contestability of law as it related to the counting of votes in Florida for the 2000 U.S. presidential election).

38. Gallie, *supra* note 37, at 167–69. It is possible that the greater the degree of political and cultural polarization, the less likely we may be to notice that ideas such as “persecution” might be essentially contested. And in turn, perhaps our failure to notice the essential contestedness of such concepts may, at least in some minimal way, contribute to further polarization. See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* ch. 12 (2012) (discussing the extreme polarization of American politics in the twenty-first century).

39. See *Emp’t Div. v. Smith*, 494 U.S. 872, 879–82 (1990) (outlining case law addressing the meaning of one or more exemptions from an otherwise neutral rule of general applicability).

40. Consider a hypothetical religious sect that considers the rare and carefully controlled ingestion of heroin as a mandatory sacrament. See generally DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS* (2005) (discussing policy justifications for and against legalizing heroin).

the possibility of the burdened religious groups somehow adapting to the rule.⁴¹

The problem of addressing essentially contested concepts, even where it is recognized, thus appears to be unresolvable. Fortunately for the purposes herein, the essential contestedness of ‘persecution’ and related ideas really does not directly matter. A sensitive cost-benefit analysis of either real or merely alleged religious persecution can always start from the perspective of the alleged victims. The cost-benefit analysis will typically then proceed to refer to a broad range of the alleged victim-group’s sincerely held beliefs, values, and priorities, insofar as they can properly be taken into account by courts and legislatures. It goes without saying that a reviewing court is not to assess those affected religious beliefs, values, and priorities on their religious or doctrinal merits or to endorse or reject distinctively religious propositions.

But courts and legislatures can learn much that may be crucial to the cost-benefit analysis of a policy, even before considering costs and benefits of the policy from the standpoint of its proponents or third parties. Simply put, the genuine beliefs and values of the alleged victims of religious persecution themselves will often be crucial to a cost-benefit analysis and certainly of greatest interest for the purposes herein. In many cases, the allegedly or actually persecuted group may believe on its own terms that the government treatment in question is actually promoting for many

41. For a non-hypothetical example of essential contestability in the context of a non-binding city council resolution, see *Catholic League for Religious & Civil Rights v. City of San Francisco*, 624 F.3d 1043, 1047–48 (9th Cir. 2010) (en banc) (rejecting an Establishment Clause violation claim based on the city council’s opposition to Vatican directive to local parishes on adoption policy).

More recently, the United States Conference of Catholic Bishops addressed important issues of religious liberty to highlight the “essential contestability” problem. *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, U.S. CONF. OF CATHOLIC BISHOPS (Apr. 12, 2012), <http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf> [hereinafter *Statement on Religious Liberty*]. The bishops’ statement itself does not appear to explicitly come to terms with well-known arguments that the religiously burdensome policies in question appropriately further a range of arguably important rights and other government interests. *Id.* The bishops’ case that the rules in question amount to religious persecution, or other religious rights violations, thus rests on the consequences of the rules from the standpoint of the alleged victims, explicitly incorporating no meaningful response to the legislators’ perspective. *Id.* For a discussion of generally how to approach some loosely related tradeoffs, see R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006).

the highest imaginable fulfillment and realization they can attain. Even state neutrality toward this and other private conceptions of the good life would not mean that the state may not adopt policies that contribute to or take account of the fulfillment of private group understandings of the good life.

C. *Alleged Persecution and Cost-Benefit Analyses*

It is fair to wonder, though, how anyone could realistically perform any sort of cost-benefit analysis that takes account of the religious beliefs, values, and priorities of an allegedly persecuted religious group. Must not a cost-benefit analysis in this context be at best crude and reductive? Yet to begin with, many important religious groups clearly undertake their own authoritative cost-benefit analyses on their own value-terms, if not in so many words.

Consider for example the ancient text entitled “The Martyrdom of Polycarp.”⁴² Referring to Polycarp and a group of other martyrs, the author declares that “they despised the tortures of the world, thus purchasing eternal life at the price of a single hour.”⁴³ This amounts to a simple, if dramatic, cost-benefit analysis. However extreme the context, this mostly qualitative weighing, balancing, implied commensuration, and decisive judgment are all that are needed for the sorts of cost-benefit analyses considered herein.

It might be said that persecution cannot possibly amount to anything but a pure “cost” for the victims, and generally a large cost at that. Perceived persecutions are indeed typically feared, avoided, and resisted. But as the quotation above concerning Polycarp⁴⁴ already begins to suggest, this need not always be the

42. *The Martyrdom of Polycarp*, in *THE APOSTOLIC FATHERS* 151 (Ludwig Schopp et al. eds., Francis X. Glinn trans., 1947).

43. *Id.* at ch. 2 (alteration in original). In more complex cases, we may be able to adopt orders or hierarchies of infinite values, and in that sense compare them. It hardly seems unreasonable to conclude that, all else equal, it is more valuable, or creates greater benefit, to send five persons to infinite bliss than to send only one of those five. But trading off one or more persons' infinite value against the loss of infinite value by one or more other persons might require the input not only of the affected parties and their relevant beliefs, but the tradeoff rates adopted by governments. In some theologies, infinite value may mean something like absolute value, in the sense of value not subject to exchange, except where one inexchangeable value tragically conflicts with another, and where a choice must be made, perhaps on the basis of the sheer number of persons on both sides. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 26–27 (1978).

44. *The Martyrdom of Polycarp*, *supra* note 42, 152.

case, given a group's espoused values and priorities. Perceived or actual persecutions can confer or amount to immense benefits on the value schemes of those persecuted.

Consider as a secular and controversial analogy one of Winston Churchill's best known public declarations. Churchill famously raised the possibility that history would judge that the "British Empire and the Commonwealth," despite the massive destruction, deprivation, and the deaths and injuries endured during the Nazi air campaign, were actually experiencing "their finest hour."⁴⁵ Churchill's reference was to the judgment of others,⁴⁶ but this reference could also have been intended to reflect at least some contemporary British judgments as well, in light of British character, virtues, values, and priorities. This is not to claim that Churchill was in fact expressing the then current sentiments of the British public. All that needs to be claimed is that he conceivably could have been doing so, despite the dreadful suffering and privation. Possible religious analogues, on generally lesser scales, are considered below.

D. *Some Relevant Limits On Cost-Benefit Analyses*

Generally, it will not be appropriate for a legislature or court to seize upon some marginal, dissident, or novel belief, articulated perhaps only in a moment of emotional fervor, in order to portray the religious costs imposed by a government policy or rule as negative or only minimal. There will also be cases in which the authenticity of a victim's reaction to alleged persecution is unclear. But in many other instances, that authenticity of belief will be well-documented, unambiguous, and clearly within the religious group's well-established general norms. Such a response can thus be said to reflect the group's genuine teachings, clear aspirations, values, and priorities. This is so even if some group members understandably fall short of their own standards under the pressures of the moment.⁴⁷ All humans are subject to self-professed

45. Their Finest Hour, *supra* note *. For an audio version, see *Churchill: 'Their Finest Hour'*, BBC (Aug. 14, 2007), http://www.bbc.co.uk/schoolradio/subjects/history/ww2clips/speeches/churchill_finest_hour.

46. Their Finest Hour, *supra* note *.

47. A group's valuation of martyrdom, for example, need not be entirely negated by a group member whose best intentions are, under great stress, not matched by their resolve, due to weakness of the will. See generally ALFRED R. MELE, BACKSLIDING: UNDERSTANDING WEAKNESS OF THE WILL (2012) (providing a general discussion of weak-

weakness of the will, backsliding, cowardice, or other unjustified reactions.

Also consider a more controversial limitation on a responsive cost-benefit analysis. It would typically be inappropriate for a court, when sentencing an allegedly persecuted victim in an otherwise standard criminal case, to impose an enhanced penalty on the grounds that on the defendant's own value system, the defendant has gained enormously important spiritual goals in violating a law—or in being severely sentenced. This is in some respects a close call. The defendant's lack of remorse may indeed properly be considered in sentencing.⁴⁸ And courts may seek in general to make punishments somehow meaningful. But taking a defendant's religious values into account in criminal sentencing threatens to spiral out of control from a standpoint of overall systemic fairness. Criminal sentencing is in some respects unlike typical government programs. Formal equality across cases in the criminal sentencing context is an especially important value. The ability to compare the lengths of two defendants' sentences is typically clear and of special moral importance. In other policy contexts, various sorts of inequality of impact are unavoidable.

Someone who is disinclined to register with the Selective Service, for example, on grounds of inconvenience, political preference, or fear of potential social consequences might well be effectively motivated to register if faced with the realistic prospect of even a modest fine.⁴⁹ But compare the case of a religious pacifist who sincerely believes that as the degree of punishment for non-registration increases, even unto death, the spiritual benefits even for that defendant alone increase proportionately. A life sentence, prolonged torture, or even the death penalty might seem, on some otherwise generally sensible punishment theory,⁵⁰ oddly proportionate and appropriate in such a case, and might even perversely enhance the defendant's authentic spiritual "gains"

willed action in various contexts.).

48. See, e.g., *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008); *Bergmann v. McCaughtry*, 65 F.3d 1372, 1379 (7th Cir. 1995).

49. Without at all presuming to assess the defendant's motivations, see *McKart v. United States*, 395 U.S. 185 (1969), for a sense of some possible tradeoffs.

50. But consider the critique of deterrence theory articulated in Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950–51 (2003). See also H.J. McCloskey, *Utilitarian and Retributive Punishment*, 64 J. PHIL. 91 (1967) (critiquing utilitarian justifications for punishment and advocating a retributive theory).

from refusing to register in the first place.⁵¹ Those sentences would of course depart too grotesquely from quantitative equality among various defendants in sentencing. In other regulatory contexts, though, courts can take any freely admitted religious costs and benefits into account, in appropriate cases, up until it is clear that the law is no longer taking defensible account of the claim of all persons to equal treatment and the equal protection of the laws.

Realistically, the criminal justice system cannot sustain as a common practice a sentence of a modest fine for one defendant and life imprisonment or even death for another defendant who has committed the same offense with the same degree of public harm, awareness, and intentionality. Even the mere appearance of gross disparities counts for much in sentencing. Official cost-benefit analyses that incorporate a group's religious values are instead more appropriate in deciding, within the limits of the Establishment Clause, among alternative reasonable government policies and enforcement mechanisms. In such contexts, some significant public interest may well be meaningfully advanced, in ways not otherwise available, by a policy which clearly restricts the religious liberty of the adversely affected group. In such contexts, governments can generally be more open to inclusive, publicly explainable, and well-reasoned interest-balancing and cost-benefit analyses.

E. *A Non-Religious Comparison Case: When Should Judges Consider Possible Benefits to Speakers in Restricting Those Speakers?*

Many alleged religious persecution cases will significantly differ from the typical cases in which a speaker is punished or restrained based on the content of the speech.⁵² This can be true even though some cases of alleged religious persecution may be

51. These gains could include some of the considerations discussed *infra* Section V. One complication is that on some religious views, deliberately taking the initiative and actively seeking what would otherwise be readily and properly avoidable punishment may not result in significant spiritual benefits. *See infra* Section IV. And in theory, a defendant who continues to receive an increasingly great spiritual payoff as the sentence becomes even more cruel might create unsolvable problems in arriving at some single determinate, uniquely appropriate sentence.

52. *See generally* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333–35 (2006).

based largely on what the victim has said or refused to say.⁵³ One crucial point of distinction between these two kinds of cases is that in a religious persecution case, the persecution itself may, on the victim's own value-system, be of immense, if not infinite, affirmative value for the victim, if not also for others.⁵⁴ In the more typical content-based speech restriction case, in contrast, any benefits accruing to the speaker from punishment of the speech will be limited.

It is certainly possible to argue that serious political speech-based punishment of, say, a Vaclav Havel⁵⁵ might have the effect of benefiting the regulated speaker by strengthening the victim's character, attracting attention to his writings, inspiring further writing, or even contributing in some respects to the victim's long-term self-realization. But to say in the typical such victim's own non-religious terms that a regulated speaker is substantially, if not infinitely, better off because of the imprisonment will usually not seem plausible on the best understandings of freedom of speech.

John Stuart Mill classically argued that freedom of speech specifically and social freedoms more generally contribute to self-realization, autonomy, or self-fulfillment.⁵⁶ Mill doubtless recognized that adversity, at least short of death, can strengthen one's public and private character. But for Mill, there is the sense that persecuting individuals or groups on the basis of the content of their words will often substantially promote the flourishing of individual personality, in otherwise unattainable ways that substantially outweigh the costs to the persecuted speakers.⁵⁷ This understanding may not hold in religious persecution cases. These religious contexts specifically now must be discussed.

53. Note, for example, the nature of the charges and options legally available to Polycarp and his fellow martyrs. *The Martyrdom of St. Polycarp*, *supra* note 42, at 155–57.

54. See *infra* Section V. Whether the persecution is strictly necessary, practically necessary, uniquely opportune, or by itself sufficient in obtaining that immense value will depend on the circumstances and theologies involved.

55. See VÁCLAV HAVEL, *OPEN LETTERS: SELECTED WRITINGS, 1965–1990* (Paul Wilson ed., 1991).

56. See JOHN STUART MILL, *ON LIBERTY* ch. III, 53–57 (David Spitz ed., 1975) (1859). See also, e.g., Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.—C.L. L. REV. 443, 443–44, 498–99 (1988) (discussing the “connection between speech and self” in the legal context).

57. See Mill, *supra* note 56, at ch. III, 53–59. There can, of course, be cases of secular free speech “martyrs,” in the sense that their imprisonment for unacceptable political speech builds public sympathy for them, if not greater interest in their views.

III. ALLEGED RELIGIOUS PERSECUTION IN THE AMERICAN CONTEXT: SOME CONTEMPORARY CONCERNS

This section does not yet offer any substantive considerations that might enter into an alleged persecution cost-benefit analysis. The aim is instead to first establish the relevance of such a cost-benefit analysis in the American context. Necessarily, the examples will be extremely selective.

As it turns out, physical persecution on religious grounds by government officials is not entirely alien to American constitutional history. Just before the Civil War, for example, an eleven-year-old Boston public school student was whipped for a half-hour on his eventually bleeding hands with a three-foot rattan rod.⁵⁸ The student's offense was that he refused to read not the Ten Commandments in general, but only the officially endorsed version thereof, because of his family's religious beliefs.⁵⁹ The assistant principal who administered the whipping was arrested and charged with assault and battery, but the charges were later dismissed.⁶⁰

Persecution of a quasi-official, or social, sort has also historically occurred. It has taken the form of, for example, a jury acquittal, as in the case of the killing of Father James E. Coyle in Birmingham, Alabama in 1921.⁶¹ This case involved race and ethnicity as much as religion, along with distinct Klan associations.⁶² The defense attorney who successfully obtained an acquittal for the admitted shooter of Father Coyle was the youthful Hugo Black, years before his elevation to the United States Supreme Court.⁶³

Alleged deprivations of American religious liberty are not, however, confined either to anecdote or to history. Consider the sheer number of charge receipts recently filed under Title VII on religion-based employment discrimination grounds. In 1997, the

58. DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* 156 (2011).

59. *Id.*

60. *Id.* One could attribute the whipping to the student's "insubordination," but it is hard to imagine any religious persecution case that could not be reframed as a case of insubordination or disobedience.

61. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 424–26 (2002).

62. See *id.* at 425.

63. See *id.* at 425–26, 429.

number of such claims was 1709.⁶⁴ By the year 2011, the number of such claims had reached an annual total of 4151.⁶⁵ The percentage of such cases administratively determined to reflect “no reasonable cause” remained reasonably steady at about sixty percent or slightly higher throughout this period.⁶⁶

More broadly, however, the idea of impending official religious persecution in the contemporary American context has of late been raised with increasing conspicuousness and frequency.⁶⁷ Religious persecution of various degrees anticipated or allegedly already manifested, is said to have taken on unprecedented dimensions.⁶⁸ Thus, for example, under current circumstances, “we have bishops talking of martyrdom from the pulpit.”⁶⁹

Among the most vivid such contemporary statements is that of Francis Cardinal George, Archbishop of Chicago. In 2010, Cardinal George indicated that “I expect to die in bed, my successor will die in prison and his successor will die a martyr in the public square.”⁷⁰ Bishop Fabian Bruskewitz of Lincoln, Nebraska has also declared that “[l]ike the martyrs of old, we must be prepared to accept suffering which could include heavy fines and imprisonment.”⁷¹

64. *Religion-Based Charges FY 1997–FY 2011*, EEOC, www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last visited Dec. 10, 2012).

65. *Id.*

66. For further discussion, see, for example, BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 58–59 (2011). Of course, not every actual violation by private or public parties of a statutory or constitutional religious right will be counted as “persecution.” More generally, though, Grim and Finke argue that “to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase.” *Id.* at 222. For examples of interesting religious liberty cases in the private sector employment context, see *Harrell v. Donahue*, 638 F.3d 975, 977 (8th Cir. 2011) and *Dixon v. Hallmark Cos.*, 627 F.3d 849, 852 (11th Cir. 2010).

67. See, e.g., Elizabeth Westhoff, *Ever-Increasing Attacks on Church Calling Us to Martyrdom*, ST. LOUIS REV. (Feb. 16, 2012, 10:15 PM), <http://stlouisreview.com/print/23404>.

68. See, e.g., *id.*

69. *Id.*

70. John Zuhlsdorf, *Religious Persecution and Martyrdom*, FR. Z’S BLOG—WHAT DOES THE PRAYER REALLY SAY? (Feb. 21, 2012), <http://wdtprs.com/blog/2012/02/religious-persecution-and-martyrdom/>.

71. Benjamin Mann, *Lincoln Bishop: Prepare for ‘Suffering’ Under HHS Mandate*, CATHOLIC NEWS AGENCY (Oct. 7, 2012), <http://www.catholicnewsagency.com/news/lincoln-bishop-tells-catholics-to-prepare-for-suffering-under-hhs-mandate/>; see also Hillary Senour, *Denver Archbishop: HHS Mandate an Attempt to Remove Religion from Society*, CATHOLIC NEWS AGENCY (June 1, 2012), <http://www.catholicnewsagency.com/news/Denver>

More analytically, Archbishop Thomas Wenski of Miami has expressed the view that recent “efforts to restrict religious liberty are seemingly founded in a reductive secularism that has more in common with the French Revolution than with America’s founding.”⁷² Cardinal Raymond L. Burke more concisely “thinks persecution may be looming” and can envision arrests for preaching the faith.⁷³ Father Paul D. Scalia⁷⁴ of the Diocese of McLean, Virginia has indicated that if religious persecution arises, the appropriate response is that of a conscious imitation of the martyr St. Thomas More.⁷⁵

A number of official religious bodies,⁷⁶ religious figures,⁷⁷ and others⁷⁸ have recently offered related analyses.⁷⁹ Again, the point is not that such persons are objectively correct in their assess-

-archbishop-hhs-mandate-an-attempt-to-remove-religion-from-society/ (internal quotation marks omitted) (“If we become martyrs, so be it.”).

72. Op-Ed, *Government Can’t Impose Practices on Catholic Church*, SUN SENTINEL, Apr. 23, 2012, at 15A (“[F]reedom of religion . . . is under great stress if not under outright assault.”).

73. David Kerr, *Cardinal Burke Reflects on his First Year in the Sacred College*, CATHOLIC NEWS AGENCY (Nov. 28, 2011), <http://www.catholicnewsagency.com/news/cardinal-burke-reflects-on-his-first-year-in-the-sacred-college/>.

74. Father Scalia is the son of Supreme Court Justice Antonin Scalia. See *Catholics Urged to Imitate St. Thomas More in Contraception Battle*, CATHOLIC NEWS AGENCY (Apr. 9, 2012), <http://www.catholicnewsagency.com/news/catholics-urged-to-imitate-st-thomas-more-in-contraception-battle>.

75. See *id.* For the sentiments of Thomas More himself, see 9 THE COMPLETE WORKS OF ST. THOMAS MORE (J.B. Trapp ed., Yale Univ. Press, 1979). See also Robert Bolt, *A Man for All Seasons* (First Vintage Int’l ed., 1990) (1960).

76. See, e.g., Administrative Committee, *United for Religious Freedom*, U.S. CONF. OF CATHOLIC BISHOPS (Mar. 14, 2012), <http://uscbb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf>; *Statement on Religious Liberty*, *supra* note 41.

77. See, e.g., CHARLES CHAPUT, A HEART ON FIRE: CATHOLIC WITNESS AND THE NEXT AMERICA (2012); Fr. Dwight Longnecker’s *Sobering Reflection on ‘The Coming Persecution,’* www.catholic.org/national/national_story.php?id=45102 (Mar. 11, 2012) (predicting that “[t]he recusants will find it strangely difficult to get or keep a job. They’ll end up impoverished and outside the mainstream,” while also forecasting acquiescence and conformity on the part of the majority); Matt Palmer, *Cardinal-Designate O’Brien Says Archdiocese Won’t Comply With “Unjust” HHS Law*, CATHOLIC REVIEW (Jan. 25, 2012), www.catholicreview.org/article/home/cardinal-designate-o-brien-says-archdiocese-won-t-comply-with-unjust-hhs-law-3.

78. See, e.g., Russell Shaw, *The Persecution Has Begun*, PATHEOS (Nov. 16, 2011), <http://www.patheos.com/Resources/Additional-Resources/Persecution-of-Religion-Has-Begun-Russell-Shaw-11-16-2011.html>.

79. For a parallel concern expressed for the continent of Europe, see the remarks of the United Kingdom’s Baroness Warsi. *Warsi’s Speech on ‘Militant Secularism’ in Full*, POLITICS.CO.UK (Feb. 14, 2012), <http://www.politics.co.uk/comment-analysis/2012/02/14/warsi-s-speech-on-militant-secularism-in-full> (“Let us be honest: Too often there is a suspicion of faith in our continent . . . where faith is sidelined, marginalized and downgraded.”).

ments. All the logic the argument requires is that some persons claiming some degree of religious persecution, of themselves or of some fellow religious adherents, believe that such persecution is taking place, or may take place, based on their own perspectives.

The claim of religious persecution is also implied by high-profile contemporary American judicial cases. Consider the language of a number of challenges to the widely discussed federal regulations promulgated pursuant to the 2010 Patient Protection and Affordable Care Act.⁸⁰ For example, the complaint filed by Colorado Christian University asserts that “[t]he government’s Mandate unconstitutionally coerces Colorado Christian to violate its deeply held religious beliefs under threat of heavy fines and penalties.”⁸¹ More elaborately, the complaint alleges that

because the government acted with full knowledge of those beliefs, and because it allows plans not to cover these services for a wide range of reasons *other than* religion, the Mandate can be interpreted as nothing other than a deliberate attack by the government on the religious beliefs of Colorado Christian and millions of other Americans.⁸²

Similar language of “deliberate attack”⁸³ on religious beliefs with the potential for substantial fines is found as well in the parallel complaint filed by Belmont Abbey College in the case of *Belmont Abbey College v. Sebelius*.⁸⁴ Related complaints refer as well to the “threat of heavy fines and [other] penalties.”⁸⁵ While the imposition of heavy fines on the basis of religion, at least from the religious entity’s perspective, may not be the gravest form of religious persecution,⁸⁶ such penalties, on the victim’s assump-

80. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 21, 25, 26, 29 & 42 U.S.C.).

81. Complaint at 1, *Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-03350-CMA-BNB (D. Colo. Dec. 22, 2011); *see also* Complaint at 1, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 1:12-cv-02542-BMC (E.D.N.Y. May 21, 2012); Complaint at ¶¶ 95-99, *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 1:12-cv-00815-ABJ (D.D.C. May 21, 2012).

82. Complaint, *Colo. Christian Univ.*, *supra* note 81, at 3; *see also* Complaint at 1, *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-00253-JTM-CAN (N.D. Ind. May 21, 2012) (“overbearing and oppressive governmental action”); Complaint, *Roman Catholic Archdiocese*, *supra* note 81, at 1.

83. Complaint, *Colo. Christian Univ.*, *supra* note 81, at 3.

84. Complaint at 3, *Belmont Abbey Coll. v. Sebelius*, No. 1:11-cv-01989-GK (D.D.C. Sept. 5, 2012); *see also* First Amended Complaint at 17, *Eternal Word Television Network v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala. Mar. 21, 2012).

85. *See* Complaint at 3, *Ave Maria Univ. v. Sebelius*, No. 2:12-cv-00088-JES-SPC (M.D. Fla. Feb. 21, 2012); Complaint, *Colo. Christian Univ.*, *supra* note 81, at 2.

86. *But see supra* notes 1–2, 19–21 (discussing martyrdom in general and the various

tions, would presumably lie somewhere on the spectrum of alleged religious persecution, and thus within the scope of the general concerns herein.

IV. SOME DIRECT AND INDIRECT COSTS OF RELIGIOUS PERSECUTION TO VICTIMS AND TO OTHERS

It is no surprise that most of the costs to the victims of alleged religious persecution are more obvious than any accompanying substantial benefits to the victim. Our brief examination of religious persecution cases in the immigration context confirms some of the possible costs of what the recipient takes to be religious persecution.⁸⁷ The costs can certainly be horrific. The range of commonly encountered costs may include death, maiming, various forms of torture, physical injury, beatings, burdensome fines, imprisonment, detention, brutal interrogations, exile or geographic displacement, mistreatment of relatives and family members, forced conversion, coercive indoctrination, imposed unemployment or underemployment, and various other forms of punitive official and social discrimination and disenfranchisement.⁸⁸ More abstractly, there may be loss of freedom, physical and emotional trauma, spiritual isolation, and the loss of familial and social support systems.⁸⁹

Additionally, the costs to the victims of alleged persecution may overlap with some of the harms associated with deprivation of freedom of speech in general, as depicted by John Stuart Mill, among others.⁹⁰ At the individual level, not being permitted to openly and publicly discuss religious matters, or to freely prose-

degrees of martyrdom).

87. See *supra* notes 23–31 and accompanying text; see also *Catholic University Files Suit to Block HHS Mandate*, CATHOLIC UNIV. OF AM. (May 21, 2012), <http://public-affairs.cua.edu/releases/2012/hhs-suit.cfm> (Statement of President John Garvey) (“Unless we can get judicial relief, we will soon have to take steps to conform to a rule we view as immoral.”).

88. See *supra* notes 1–2, 19–21. Each of these forms of persecutions would move the scales on even the crudest forms of a Benthamite hedonic calculus. See Jeremy Bentham, *A Fragment on Government*, in *SELECTED WRITING ON UTILITARIANISM* 28 (2000) (1776) (“The only consequences that men are interested in, what are they but pain and pleasure?”).

89. Rachel Sing-Kiat Ting & Terri Watson, *Is Suffering Good? An Explorative Study on the Religious Persecution Among Chinese Pastors*, 35 *J. PSYCHOL. & THEOLOGY* 202, 202 (2007) (offering interview-based evidence).

90. See *supra* notes 56–57 and accompanying text.

lytize, could involve dignitary harms and a suppression of the process of self-realization as classically described by Mill.⁹¹

If the alleged persecution in a given case is unexpected, that unexpected character might either increase or decrease the psychological costs of such persecution. For some religious groups, living in a relatively tolerant, liberal democracy may reduce any dread or anxiety over merely possible future religious persecution. But if perceived religious persecution then actually occurs, the very unexpectedness of the persecution may produce a jarring sense of dissonance and dislocation. These costs may actually be reduced among those who, in contrast, long anticipate the realistic possibility of persecution.⁹² For example, while he was under house arrest and awaiting execution, Boethius classically wrote that “it is no . . . surprise if on the ocean of life we are buffeted by storms . . . , for our chief aim is to displease the wicked.”⁹³

Even where expected, the costs of religious persecution may be either obvious or subtle. As for the obvious sort, consider the observation of Archbishop Oscar Romero in his last sermon just before his assassination: “Today we are passing to our liberation through a desert strewn with bodies and where anguish and pain are devastating us.”⁹⁴ As for the subtle sort, religious persecution can sometimes evoke more nearly a sense of desolation than of deliverance.⁹⁵

From the perspective of the persecuted, there are also the substantial moral and spiritual costs of persecution or even of merely the threat, chronic or acute, of religious persecution. These may include the weakening or the actual takeover of religious and broadly charitable institutions; succumbing to spiritual weakness; acts of cowardice and apostasy; rationalization and faint-heartedness; and the conspicuous desertion or compromise of the

91. *Id.* This is not to suggest that Mill denied that major religious denominations often tended to suppress individual creative and autonomous thought. See MILL, *supra* note 56, at chs. 2–3.

92. See Tushnet, *supra* note 13, at 1123–24.

93. BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 7 (P.G. Walsh trans., 2000).

94. Archbishop Oscar Romero, *The Last Sermon* (Mar. 14, 1980), in JAMES B. NICKOLOFF, *THE CHURCH AND HUMAN LIBERATION: THE ECCLESIOLOGY OF GUSTAVO GUTIERREZ* (1989). The reference to “our liberation” already indicates that persecution, even unto martyrdom, is not exclusively a matter of costs. See Section V, *infra*.

95. Consider the vision of Shusaku Endo. See SHUSAKU ENDO, *SILENCE* 92 (William Johnston trans., 1970) (“What a miserable and painful business it was! The rain falls unceasingly on the sea. And the sea which killed them surges on uncannily—in silence.”).

faith, for the sake of worldly prosperity or accommodation.⁹⁶ Of course, in an age of alleged persecution, it may often be difficult to sort out desertions of the faith due specifically to anticipated persecution and desertions more meaningfully due to general cultural trends.⁹⁷

There may also be spiritual costs of a more subtle, indirect sort. What if the very steadfastness and devotion of the persecuted leads, perhaps predictably, to even greater spiritual estrangement, resentment, or hostility on the part of the assumed persecutors?⁹⁸ Even if the persecuted have no share in any moral responsibility for such reactions, might these reactions not often count as spiritual costs from the perspective of the persecuted? More generally, the allegedly persecuted may view the persecution as spiritually harmful to the souls of the persecutors themselves.⁹⁹ The alleged persecutors may, of course, deny that they are corrupting their own souls or forfeiting paradise, and the state should not reject those beliefs on the merits and conclude otherwise.

Finally, and even more subtly, there are also the possible costs of voluntarily—perhaps too eagerly—seeking out and undergoing persecution “for the wrong reason.”¹⁰⁰ In some theologies, actively seeking persecution or martyrdom for the sake of personal glory,

96. See MIDDLETON, *supra* note 1, at 77–78. The sheer number of those who desert or compromise the faith to avoid persecution may loom large by comparison with those who endure persecution steadfastly. *See id.* at 77.

97. Cf. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 23–27 (2010) (highlighting demographics of religious and non-religious Americans).

98. See, e.g., *The Letter of the Churches of Vienna and Lyons to the Churches of Asia and Phrygia*, in *Medieval Sourcebook*, FORDHAM UNIV., www.fordham.edu/halsall/source/177-lyonsmartyrs.asp (last visited Dec. 10, 2012). It should be noted that the historical veracity, or completeness, of accounts of persecution are generally inconsequential to our purposes herein.

99. See, e.g., T.S. ELIOT, *MURDER IN THE CATHEDRAL* 49 (3d ed. 1950) (describing Thomas Beckett’s final sermon) (“We mourn, for the sins of the world that has martyred . . .”). This is not to suggest either that such sins are, on every theology, irredeemable, or that the persecutors in question otherwise would not be engaged in spiritually objectionable behavior of one sort or another.

100. *See id.* at 39–40, 44.

honor, esteem,¹⁰¹ or perhaps even for the sake of self-interestedly conceived heavenly rewards may count as spiritual costs.¹⁰²

Assessing human motivation, even in the most apparently altruistic¹⁰³ or benevolent¹⁰⁴ cases, is notoriously difficult and uncertain. Friedrich Nietzsche famously expressed concern for the real motives underlying martyrdom in his aphorism “he that humbly himself wants to be exalted.”¹⁰⁵ Nietzsche’s view was that the martyr died “out of *ressentiment* and a will to power . . . an example of self-exaltation [in embracing] death in order to possess power after death.”¹⁰⁶

To the extent that Nietzsche has accurately characterized some or all martyrs, then martyrdom involves the cultural costs Nietzsche described, along with the moral or other costs to the martyr. Of course, the accuracy of Nietzsche’s diagnosis of the motivation for martyrdom is not beyond controversy.¹⁰⁷ But whether Nietzsche is largely right about the personal and other costs of martyrdom seems largely unresolvable as among secular and non-secular world-views. Courts and legislatures have independ-

101. *See id.* at 39–44.

102. *See also* MICHAEL P. JENSEN, MARTYRDOM AND IDENTITY: THE SELF ON TRIAL 13 (2012) (2010) (discussing in particular Becket’s Fourth Tempter).

103. *See generally* THOMAS NAGEL, POSSIBILITY OF ALTRUISM 3 (Princeton Univ. Press 1978) (1970) (arguing that “susceptibility to certain motivational influences, including altruism, is a condition of rationality.”).

104. *See* JOSEPH BUTLER, FIVE SERMONS (Stephen Darwall ed., 1985) (1726) (developing sophisticated distinctions among selfish, self-interested, benevolent, and altruistic actions).

105. FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS 48 (R.J. Hollingdale trans., 1986) (1878). For discussion of this concept, see Lawrence Cunningham, *Christian Martyrdom: A Theological Perspective*, in WITNESS OF THE BODY: THE PAST, PRESENT, AND FUTURE OF CHRISTIAN MARTYRDOM 3, 4 (Michael L. Budde & Karen Scott eds., 2011) and J. Warren Smith, *Martyrdom: Self-Denial or Self-Exaltation? Motives for Self-Sacrifice From Homer to Polycarp*, *A Theological Reflection*, 22 MODERN THEOLOGY 169, 170–71 (2006).

106. Cunningham, *supra* note 105, at 4. For an example of Nietzsche’s reference to *ressentiment*, or, very roughly, spiteful, dishonest, resentful vengeance of the naturally weak toward the naturally superior, see, for example, FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 23–25 (Douglas Smith trans., 1996) (1887). The martyr actually engages in what one might ironically view as an early “revaluation of all values.” *See, e.g.*, MIDDLETON, *supra* note 1, at 74 (describing the inversions of values of the early martyrs, particularly in the context of the martyr Perpetua, “her day of suffering and death was in actuality her day of triumph.”).

107. *See, e.g.*, JENSEN, *supra* note 102, at 155 (discussing the relevant theology of Augustine); Smith, *supra* note 105, at 172, 185 (referring in particular to the martyrdom of Polycarp and its proper interpretation); Carole Straw, “A Very Special Death”: *Martyrdom in Its Classic Context*, in SACRIFICING THE SELF: PERSPECTIVES ON MARTYRDOM AND RELIGION 39, 41 (Margaret Cormack ed., 2001).

ent reasons to take various costs of alleged persecution into proper account, along with the benefits discussed immediately below, in setting public policy.

V. SOME DIRECT AND INDIRECT BENEFITS TO VICTIMS OF RELIGIOUS PERSECUTION IN GENERAL

Being a sincere religious believer does not, by itself, establish the attitude that one should take toward perceived religious persecution. Mainstream believers, however, often ask not for protection or for deliverance from persecution but instead for virtues like faith, hope, patience, steadfastness, or courage in the face of persecution.¹⁰⁸ To ask not for avoidance of or relief from persecution but for the capacity to respond to persecution in the right way is typically to concede, if not to embrace, the substantial spiritual value of persecution. A test, however stringent and painful, can after all be an irreplaceable opportunity of great, even unique, value.

Thus, in some mainstream religious views, perceived persecution can promote spiritual worthiness, endurance, character, hope, spiritual boldness, joyfulness, the rewards of heaven, the confirmation of the legitimacy of one's church, and can inspire repentance, increased steadfastness, and deeper conversion in other persons.¹⁰⁹ Interviews with contemporary victims of religious persecution have elaborated upon these ancient themes.¹¹⁰

These contemporary interviews and studies refer, for example, to the experience of God's presence, surrender to God, and stronger identification with the divine, along with greater discipleship and an enhanced sense of a higher purpose.¹¹¹ It is possible for someone to undergo any of these experiences in the absence of alleged persecution, and even in the absence of any sort of suffering at all. But even if these valued experiences were no

108. See, e.g., DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 80 (R.H. Fuller & Irmgard Booth trans., 1959) (1937) ("If we refuse to take up our cross and submit to suffering and rejection at the hands of men, we forfeit our fellowship with Christ and have ceased to follow Him."); Sandro Magister, *Blessed Are the Persecuted: The Lesson of the Successor of Peter*, (Apr. 23, 2012), <http://chiesa.espresso.repubblica.it/articolo/1350227?eng=y> (quoting Pope Benedict XVI, *The Church Must Not Fear Persecutions* (Apr. 18, 2012) (Joseph G. Trabbic trans.)).

109. See MIDDLETON, *supra* note 1, at 32 (citing a range of scriptural sources).

110. See Ting & Watson, *supra* note 89, at 202.

111. See *id.*

more likely under persecution than under some other imaginable circumstances, which often seem doubtful, they could still count as important benefits crucially attributable to the alleged religious persecution.

Less personally, those who suffer alleged persecution often believe that it is precisely—perhaps distinctively—their sufferings, and their reactions thereto that can inspire initially distant or hostile persons to become religious believers.¹¹² Apparently there is evidence that this conversion-through-persecution effect characterizes other historical eras as well.¹¹³ Many of the persecuted would see this unique effect as of immense value.

One recent victim of religious persecution offered a surprisingly unequivocal and much broader endorsement of suffering for the faith, however alien such thinking may be to cultures influenced by unsophisticated forms of utilitarianism¹¹⁴ or hedonism.¹¹⁵ This pastor summed up the concept in the following plainspoken, earnest, forthright terms:

So, is suffering good? Yes, extremely good. Through suffering we experience God. Through suffering we see God's glory. So the theology of suffering is a must learn subject for all God's children. Don't escape. North American Christians try very hard to avoid it. Why? Because they don't know that suffering is a blessing.¹¹⁶

The sincerity, internal logic, and at least occasional orthodoxy of such reactions illustrates again how perceived religious persecution can differ dramatically in its value, even to the persecuted,

112. *See id.* at 206.

113. *See, e.g.,* JOYCE E. SALISBURY, *THE BLOOD OF MARTYRS: UNINTENDED CONSEQUENCES OF ANCIENT VIOLENCE 1* (2004) (recounting examples of Christian martyrs as intriguing, impressing, and leading to the conversion of many Romans during the first three centuries of Christianity).

114. *See, e.g.,* SIDGWICK, *supra* note 9.

115. *See* FRED FELDMAN, *PLEASURE AND THE GOOD LIFE: CONCERNING THE NATURE, VARIETIES, AND PLAUSIBILITY OF HEDONISM* (2006). Less philosophically, and more critically, see NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1985); JEAN M. TWENGE & W. KEITH CAMPBELL, *THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT* (2010). *See also* Dan Weijers, *Intuitive Biases in Judgments About Thought Experiments: The Experience Machine Revisited* (Oct. 2, 2011), available at www.danweijers.com/pdf/The%20Experience%20Machine%20Revisited%20-%20Dan%20Weijers.pdf (emphasizing the role of the status quo bias).

116. Ting & Watson, *supra* note 89, at 207. Among the authors' interview subjects, "[m]any suffered emotionally when they felt abandoned by God or came face-to-face with their personal weaknesses. However, there was an overwhelming validation of the suffering they all went through—all focused on the lessons learned, the insights gained, and the joys experienced." *Id.* at 208.

from other sorts of rights violations. The protection of free speech and assembly rights generally promotes several important values, including the self-realization opportunities of the speaker.¹¹⁷ Racial discrimination and denial of equal protection, too, are rightly thought to directly injure the parties discriminated against, if not the politically dominant groups as well.¹¹⁸ This article has discovered that religious persecution can be dramatically different in its costs and benefits.

Consider as well the recent reflections on the effects of religious persecution by a twice-imprisoned victim of the late Romanian regime:

Someone asked me if my sufferings in prison helped me in any way. I answered, "No, they have not helped me, but I'm the result of this suffering. If I do something, if I am anything, if you see something in me, know that it is because of suffering. Without this suffering, I have nothing!"¹¹⁹

Persecution can thus be seen as fundamentally constitutive of one's very worth and identity,¹²⁰ above and beyond its various liberating and purifying effects.¹²¹ More broadly and more socially, religious persecution is often thought to result in greater unity

117. See *supra* notes 56–57 and accompanying text; see also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 126 (1989).

118. See, e.g., Martin Luther King, Jr., *Letter From Birmingham Jail* (Apr. 16, 1963), available at <http://mlk-kpp01.stanford.edu/index.php/resources/article/annotated-letter>. Dr. King writes that racial segregation "gives the segregator a false sense of superiority and the segregated a false sense of inferiority." *Id.* at para. 16. For broad background, see G.W.F. HEGEL, *THE PHENOMENOLOGY OF SPIRIT* 111–19 (A. V. Miller trans., 1977) (1807) (discussing subservience and the relation between lords and servants in philosophical terms).

119. GEORGE CALCIU, *INTERVIEWS, HOMILIES, AND TALKS* 332 (St. Herman of Alaska Brotherhood ed., 2010).

120. See *id.*

121. See *id.* at 296; WILLIAM ULLATHORNE, *PATIENCE AND HUMILITY* 80 (1998) (1908) ("We may certainly obtain more grace and glory from God through persecution than through kindness if we know how to use it rightly.").

among otherwise diverse groups of the religiously committed,¹²² in addition to strengthening and fortifying the persecuted group.¹²³

Some of the broader benefits of perceived religious persecution may, however, be self-limiting as well as self-propagating. At the time of the French Revolution, Edmund Burke concluded that “[t]he robbery of your [French] church has proved a security to the possession of ours. It has roused the people. They see with horror and alarm that enormous and shameless act of proscription.”¹²⁴ Thus some instances of persecution may have a sort of “inoculation effect” on other parties, limiting the geographic spread of both its costs and benefits.

But it is equally possible that religious persecution might have a disinhibiting effect on other governments, perhaps creating “demonstration effects,” “viruses,” or “contagions,” in which formerly unthinkable persecutions become realistically “thinkable.”¹²⁵ While it is difficult to be sure about such matters, it seems possible, by analogy, that the various European political revolutions of 1848 cannot be fully accounted for with each taken in isolation.¹²⁶ Or perhaps the early repudiations of Soviet-style governments in Eastern Europe encouraged the later repudiations.¹²⁷ By loose analogy, it is not difficult to imagine both self-limiting and self-propagating effects of religious persecutions, within and beyond borders.

122. See, e.g., Michael Nazir-Ali, 5 *ECCLESIOLOGY* 250, 254 (2009) (reviewing *THE SUFFERING BODY: RESPONDING TO THE PERSECUTION OF CHRISTIANS* (Harold D. Hunter & Cecil M. Robert, Jr. eds., 2006)) (“It may be that persecution will lead to that unity which we have all been praying for but which has eluded professional ecumenists and church bureaucrats these many years.”). In a metaphorical, or perhaps more profound, sense, the former Soviet dissident Natan Sharansky referred to “a mystical feeling of the interconnection of human souls [across time and space] forged in the gloomy prison-camp world . . .” NATAN SHARANSKY, *FEAR NO EVIL* 356 (Stefani Hoffman trans., 1998) (1988).

123. Consider the Third Priest’s speech: “[T]he Church is . . . triumphant in adversity . . . fortified by persecution.” ELIOT, *supra* note 99, at 84. For comparison, see Alfred Lord Tennyson, *Becket act V* (1884).

124. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 131 (1906) (1790).

125. Cf. SUSAN BLACKMORE, *THE MEME MACHINE* (1999) (discussing the phenomenon of Internet viral videos, computer viruses, or self-replicating memes that rapidly spread information and social phenomena like viruses).

126. See, e.g., MIKE RAPPORT, *1848: YEAR OF REVOLUTION* (2008).

127. See *CENTRAL AND EASTERN EUROPEAN POLITICS: FROM COMMUNISM TO DEMOCRACY* 22-25 (Sharon L. Wolchik & Jane L. Curry eds., 2008) (discussing the collapse of communism throughout Eastern Europe); TIMOTHY GARTON ASH, *THE MAGIC LANTERN: THE REVOLUTION OF ‘89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE* 78 (1990) (reviewing the Eastern European political climate and government transitions following the Cold War).

The benefits to victims, and indirectly to others, of alleged religious persecutions can also be viewed from the perspective of the particular virtues evoked or inspired by such persecution. Consider for example the widely valued virtues of courage and fortitude.¹²⁸ For a number of religious groups, courage and fortitude are valued not merely in their own right, but in the extreme, for their linkage to the willingness and ability to withstand persecution even unto martyrdom.¹²⁹

Here, among many other possible cases, is an instance of courage enabling the invaluable witness, from the religious group's perspective, of innocent, conscientious suffering unto death:

One of the policemen who had helped to hunt him down . . . walked up to the priest and with tears in his eyes begged Fr. Pro to forgive him. [Fr. Pro] put his arm around the shoulders of the shaking man and said, "You have not only my forgiveness *but my thanks*."¹³⁰

Or consider the sustained courage and fortitude of Sister Dorothy Stang, who worked on land reform and environmental issues in Brazil despite repeated threats until the moment of her assassination:

128. See THOMAS AQUINAS, *TREATISE ON THE VIRTUES* 57 (John A. Oesterle trans. 1966) (1984) (highlighting "fortitude, a disposition by which the soul is strengthened for that which is in accord with reason, against any assaults of the passions, or the toil involved by any operations"); PAUL TILLICH, *THE COURAGE TO BE* 8 (1952) (discussing St. Ambrose's views on courage as "the strength of the soul to win victory in ultimate danger, like those martyrs of the Old Testament"); see also DOUGLAS N. WALTON, *COURAGE: A PHILOSOPHICAL INVESTIGATION* (1986) (featuring numerous illustrative anecdotes in broader contexts); N.J.H. Dent, *The Value of Courage*, 56 *PHIL.* 574 (1981) (considering courage a cardinal virtue); Amelie Oksenberg Rorty, *The Two Faces of Courage*, 61 *PHIL.* 151 (1986) (defining courage as a way to overcome life's obstacles); Nancy L. Schwartz, "Dreaded and Dared:" *Courage as a Virtue*, 36 *POLITY* 341 (2004) (noting that courage is necessary to survive persecution).

129. See JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 117 (Daniel F. Coogan trans. 1964) ("The essential and the highest achievement of fortitude is martyrdom . . ."); see also HANS URS VON BALTHASAR, *LOVE ALONE IS CREDIBLE* 116–17 (D.C. Schindler trans. 2004) (1963) ("Love . . . means unconditional commitment, which implicitly (that is, when necessary) includes a willingness to go all the way to one's death. . ."); Straw, *supra* note 107, at 44; EUSEBIUS OF CAESAREA, *HISTORY OF THE MARTYRS IN PALESTINE* 2 (William Cureton trans., 1861), available at www.tertullian.org/fathers/eusebius_martyrs.htm.

130. ANN BALL, *BLESSED MIGUEL PRO: 20TH CENTURY MEXICAN MARTYR* 79–80 (1996) (emphasis added). Note, in the context of the costs and benefits of religious persecution, that the persecuting government encouraged official photographs of the multiple executions by firing squad, but in light of the photographed behavior of the martyrs, "made the possession of the photographs a crime." *Id.* at 81. For a sense of the relevant circumstances through the technique of the novel, see GRAHAM GREENE, *THE POWER AND THE GLORY* (R.W.B. Lewis & Peter J. Conn eds., 1970) (1940).

Dorothy stood up again. [One of her two assassins] asked if she had a weapon. She answered that the only weapon she had was her Bible, which she immediately produced from her bag. She read a passage about how God left all things for everyone to use, and then she read from the Beatitudes. . . .¹³¹

For many religious groups, displays of virtues, including courage or fortitude, in circumstances of persecution are of incalculable spiritual value for the persecuted victim. But that need not exhaust the value of such conspicuous virtue for the religious group. The broader religious group and the direct victim of persecution may well believe, as suggested above,¹³² that perceived religious persecution will result, however unintentionally,¹³³ in the spiritual or even worldly advancement of the persecuted group. This can be a matter of clear doctrine, not mere bravado or rationalization. Whether the doctrinal elements of any such belief are sound on the merits is, of course, beyond the state's official assessment under the Establishment Clause.¹³⁴

Thus some religious groups may well hold that in the classic language of the early theologian Tertullian, "[t]he more you mow us down, the thicker we rise, the Christian blood you spill is like the seed you sow."¹³⁵ Of course, an allegedly persecuting government may view any such unintended propagation effect as in various respects costly. But for some religious groups, this propagation effect will also be considered a vital benefit in various ways. Religious groups need not be overly optimistic. The majority of religious group members may, in the end, abandon all resistance, let alone martyrdom. The threat of repression may well induce more craven submission, or passivity, than meaningful re-

131. ROSEANNE MURPHY, *MARTYR OF THE AMAZON: THE LIFE OF SISTER DOROTHY STANG* 141–42 (2007).

132. See generally *supra* notes 122–23 and accompanying text.

133. See, e.g., BALL, *supra* note 130, at 81 (highlighting the official re-calculation of the propaganda value of the photographic record of the martyrdom).

134. Classically, see the broad language of Justice Robert Jackson in the free speech and free exercise case *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion. . .").

135. TERTULLIAN, *THE APOLOGY OF TERTULLIAN* 143 (W. Reeve, A.M. trans., London, Newberry House 1889); see THOMAS MORE, *UTOPIA* 73 (Robert M. Adams rev. trans., 1992) (1516) (noting of the Utopian populace: "after they had heard from us the . . . marvelous devotion of the many martyrs who shed their blood to draw nations far and wide into the Christian fellowship, you would not believe how they were impressed") Straw, *supra* note 107, at 49.

sistance. These choices may have their own perhaps substantial spiritual costs, especially if those who (voluntarily) submit would have otherwise taken a spiritually crucially superior path.

But there is even here one further complication. As one contemporary author suggests, perhaps “the very fact that so many [early Christians in Rome] lacked the courage to become martyrs¹³⁶ led to an enhanced respect for those Christians who did stand firm.”¹³⁷ If so, this may have increased the worldly influence over time of the most orthodox believers among an allegedly persecuted group. This development, too, could count as a substantial benefit from the perspective of the allegedly persecuted group.

Martyrdom is the extreme response to alleged religious persecution. Obviously, many instances of alleged persecution do not involve the threat or actuality of death, and death is obviously distinctive. But even the extreme cases of martyrdom can further inform an understanding of the legitimately cognizable costs, and the immense, if not infinite, benefits of some lesser instances of alleged religious persecution to the victim group.

The admittedly non-intuitive idea that being put to death for one’s beliefs may not, all things considered, be genuinely harmful to the condemned party did not originate with the Roman martyrs. Socrates clearly presented such a view some five hundred years earlier, although he also warned of the serious moral harms done by his accusers to themselves.¹³⁸ Developing Socratic themes already expounded in the *Crito*,¹³⁹ martyrs such as Ignatius of Antioch and Polycarp concluded that they might well do more genuine good in and through their death in persecution than by otherwise living out their years.¹⁴⁰

136. The very idea of a “martyr,” in its original sense, apparently refers to a public witness for the faith. See ST. AUGUSTINE, *THE CITY OF GOD* 450–51 (Gerald G. Walsh & Daniel Honan trans., 1964).

137. SALISBURY, *supra* note 113, at 21–22; see also MIDDLETON, *supra* note 1, at 62 (noting that tranquility in the face of death was occasionally intended to favorably impress onlookers).

138. See Plato, *The Apology*, in EUTHYPHRO, *APOLOGY*, *CRITO* §§ xviii at 30, xxxiii at 48, 49 (Rachana Kamtekar ed., 2005).

139. See *id.* at 68.

140. See Tripp York, *Early Church Martyrdom: Witnessing For or Against the Empire?*, in *WITNESS OF THE BODY*, *supra* note 105, at 20, 36. On Polycarp, see Leonard L. Thompson, *The Martyrdom of Polycarp: Death in the Roman Games*, 82 *J. RELIG.* 27 (2002). Neither the religious group nor the state need assume that those who endure persecution, or

This is not to suggest that all voluntary religious martyrdom is motivated by a desire for benefits, personal or collective. A martyr could be motivated by a sense of fittingness or gratitude, or a desire for a closer unity with the divine, for purification, or to make some sort of repayment, rather than by benefits in any standard sense.¹⁴¹ Fulfilling these aims could be considered of immense, if not infinite, value. As noted above, they could be properly accompanied by a sense of joy or of triumph¹⁴² consistent with the various anticipated benefits¹⁴³ to the victim and to others.

VI. CONCLUSION

Much of this argument for a legislature or court to take into legitimate account the immense, if not infinite, benefits uniquely derivable from religious persecution, from the perspective of those who believe themselves to be persecuted, may seem, however coldly logical, to still be somehow worrisome, even if not constitutionally inappropriate. There can be no casual assumption, however, that the details of the current constitutional case law of religious freedom offer the final moral or logical touchstone. As Professor Steven D. Smith has argued—in an entirely different context—“[t]he assumptions and rationales that gave rise to our

those who somehow avoid it, would have led a life of “neutral” spiritual character, before or after any instances of persecution.

141. See MARILYN MCCORD ADAMS, HORRENDOUS EVILS AND THE GOODNESS OF GOD 156 (1999) (“[R]eligious martyrs transform their tortured deaths from degrading occasions of victimization into acts of worship by offering themselves in sacrifice to God.”); *Martyrdom of Ignatius*, in 1 ANTI-NICENE FATHERS 129 (Alexander Roberts & James Donaldson eds., 1995) (1885), available at <http://www.ccel.org/ccel/schaff/anf01/> (“[H]e inwardly reflected, that the confession which is made by martyrdom, would bring him into a yet more intimate relation to the Lord.”); *Martyrdom of Polycarp*, in 1 ANTI-NICENE FATHERS, *supra*, at 41 (“[I]t is well for me to be changed from what is evil to what is righteous.”); ORIGEN: AN EXHORTATION TO MARTYRDOM 59 (Rowan A. Greer trans. 1979).

142. For reference to these elements of the classic martyrdom of Perpetua, see THE MARTYRDOM OF PERPETUA 31 (W.H. Shewring ed., 1996 (1931)); *The Passion of Perpetua and Felicity*, in 3 ANTE-NICENE FATHERS, *supra* note 141, at 704; Mary R. Lefowitz, *The Motivations for St. Perpetua’s Martyrdom*, 44 J. AM. ACAD. RELIG. 417 (1976) (discussing various forms of personal and relational liberation and empowerment).

143. Consider, without assuming the reliability of any detailed account, the report of *The Martyrdom of Justin Martyr*, in 1 ANTI-NICENE FATHERS, *supra* note 141, at 306 (“Rusticus the prefect said, ‘Do you suppose, then, that you will ascend into heaven to receive some recompense?’ Justin said, ‘I do not suppose it, but I know and am fully persuaded of it.’”). We should emphasize that cost-benefit analyses, in some appropriate form, are not denied to anyone who recognizes that some values can be characterized not only as immense, but as genuinely infinite. See *supra* notes 6. For the classic work of Georg Cantor, see Joseph Dauben, *Georg Cantor and Pope Leo XIII: Mathematics, Theology, and the Infinite*, 38 J. HIST. OF IDEAS 85–91 (1977).

distinctive constitutional commitments have been forgotten, or rejected, or ruled inadmissible,” leaving us with a constitutional law of “empty convention.”¹⁴⁴ It should come as no surprise then, that the case law of religious freedom commonly yields unsatisfactory analyses and outcomes, however it is deployed. Nor are the details of that law beyond critique. The arguments raised herein should be assessed not on the basis of their novelty or unfamiliarity but on the basis of their merits.

144. Steven D. Smith, Book Review, *Discourse in the Dusk: The Twilight of Religious Freedom*, 122 HARV. L. REV. 1869, 1907 (2009) (reviewing KENT GREENWALT, RELIGIOUS AND THE CONSTITUTION VOLUME 2: ESTABLISHMENT AND FAIRNESS (2008)).