Cultural Exemptions: The Case of Religious Slaughter Legislation

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Abstract

Traditional Jewish and Muslim slaughter practices are incompatible with the humane slaughter regulations endorsed by many liberal societies. Hence some states have incorporated exemption clauses within their legislative schemes specifically for these groups. This paper considers four promising normative justifications that can be found within the expanding literature on 'cultural exemptions', and suggests that none seems to accurately capture the intricacies of the case of religious slaughter. By contrast, the two-stage 'fair treatment of cultural commitments' argument provides a single standard against which all claims about cultural exemptions can be assessed. The argument contains three propositions: (i) that the unfair treatment of cultural commitments can constitute an injustice, (ii) that demanding a majority tolerate (disapproved of) practices can treat their cultural commitments unfairly, and (iii) that prohibiting a minority from pursuing its own practices can treat their cultural commitments unfairly. Because the final two propositions often come into conflict, the crux of the argument consists in balancing the two competing ims against the standard of fair treatment, so as to achieve a fair and just reconciliation.

Presently, British law contains a general set of rules regulating human treatment of animals. One aspect of these is the stipulation that no animal in a slaughterhouse or knacker's yard should be slaughtered otherwise than instantaneously by means of a mechanically operated instrument in proper repair, unless it has first been rendered insensible to pain until death supervenes - by a process of stunning or some other similar means.[1] Meanwhile, orthodox Jews regard meat as fit for consumption (*kosher*) only if the animal has been slaughtered in a specific manner (*shechita* or *sechita*), namely by using an exceptionally sharp knife to cut the animal's throat in rapid and uninterrupted movements that sever the windpipe and gullet, as well as the carotid arteries and jugular veins (the main blood vessels supplying and draining the brain). The speed of incision produces a very sudden and substantial fall in blood pressure, resulting in loss of consciousness and death. Similarly, many Muslims regard some meats to be fit for consumption (*halal*) only if the animal has been slaughtered in accordance with a set of rules (*dhabh*) that also contravene the general regulations embodied in British law.[2] There is, then, a fairly obvious problem; namely, that a significantly sized minority of the population adhere to religious principles (or comprehensive moral doctrines) stipulating slaughter requirements that would be otherwise forbidden under law. In response, many states have chosen to include exemption clauses in the legislative schemes specifically for these communities, so as to enable members to eat meat produced in accordance with their respective traditional methods. For example, in the United Kingdom, current legislation holds that religious slaughter methods are permissible provided that *at the time of slaughter* the meat produced is intended for *consumption* by Jews or Muslims.[3]

This case raises at least two interesting questions for legal, political and moral philosophy. First, *halal* and *kosher* slaughter practices raise issues about the limits of toleration because - in many societies - a majority of the population both disapprove of these slaughter methods and are asked to refrain from interfering in them. Second, the form majority toleration takes, at least in the UK, is that of an exemption from an otherwise generally applicable law. Such exemptions are fairly common within legislative schemes, and come in a variety of forms. For example, as in the religious slaughter case, some religious minorities have been granted exemptions on the grounds that a general rule will impair their traditional practices or compel adherents to do something they consider to be prohibited by their faith (e.g. Quakers and Amish exempted from military conscription; the ceremonial use of wine by Catholics and Jews during Prohibition-era America; Sikhs granted exemptions from having to wear motorcycle helmets or hardhats on building sites in the UK; the religious use of peyote by American Indians; Amish exemptions from mandatory schooling laws, Social Security, some road traffic regulations, and a variety of health care and land-use regulations; American Mormons seeking immunity from prosecution to violate laws against polygamy).[4] Likewise, similar phenomenon also

characterise a large category of everyday moral reasoning. For instance, an examiner might acknowledge the presence of mitigating circumstances when marking scripts or setting deadlines; a Chancellor of the Exchequer might charge VAT on some but not all commodities, and waive tax contributions on charitable donations; a registrar might not permit close family members to marry; and states might not prosecute those with diplomatic immunity.[5] Regardless of the validity of these specific exemptions, the mere fact of their existence (and relative freedom from controversy) indicates that exemptions *per se* do not demand any great leap of imagination in our moral or legal reasoning.[6]

Recent work on multiculturalism has significantly enhanced the conceptual analysis of 'cultural exemptions',[7] and numerous normative justifications have been canvassed. Below I will consider four of the most promising ones, arguing that none applies comprehensively across the array of actual cultural exemption claims, and, in particular, that none seems to accurately capture the intricacies of the case of religious slaughter. By contrast, the 'fair treatment of cultural commitments' argument provides a single standard against which all claims about 'cultural exemptions' can be assessed. The core of the argument consists in three propositions: (i) that the unfair treatment of cultural commitments can constitute an injustice, (ii) that demanding a majority tolerate (disapproved of) practices can treat their cultural commitments unfairly, and (iii) that prohibiting a minority from pursuing its own practices can treat their cultural commitments unfairly. Because the final two propositions often come into conflict, the crux of the argument consists in balancing the two competing claims against the standard of fair treatment, so as to achieve a fair and just reconciliation.

Before bringing out the most relevant features of this case study, and then situating them within a broader examination of the philosophical literature on 'rules with exemptions', it is perhaps worth stating four controversial assumptions that, in the following discussion at least, will be held to be true. First, it will not be argued that animals have rights,[8] that animal suffering is of equal moral significance to human suffering,[9] or that killing animals is, in itself, wrong. More moderately, it will be supposed that animal suffering is a morally relevant variable, and that anti-cruelty legislation is a legitimate and desirable state end, based on sound moral reasons.[10] Second, it will be held that *shechita* and *dhabh* are morally identical in every important respect, despite the empirical differences between the two. Third, it will be assumed that *halal* and *kosher* practices cause more suffering than other forms of slaughter. Although this is far from uncontroversial, especially amongst Jews and Muslims, I shall take it to be true for two reasons: because significant numbers of people do actually believe it to be true, and because it raises the necessary standards for an argument in favour of an exemption. Fourth, it will also be assumed that the empirical reality matches the religious standards set out above, i.e. that the animals killed

for products marketed as *halal* and *kosher* were not stunned prior to slaughter.

Religious Slaughter and the Law

In the UK, the current legal situation and the debates surrounding its validity have been defined by the *1904 Report of the Admiralty Committee on the Humane Slaughtering of Animals*.[11] This report sought to assess the adequacy of the nation's meat supply in the event of war, and as part of that remit was required to 'ascertain the most humane and practicable method of slaughtering animals for human food and to investigate and report on the existing slaughterhouse system'.[12] The committee members explicitly declare that they are:-

> 'aware that in dealing with [*shechita*] they cannot help trenching upon very delicate ground, but it has been their earnest desire to avoid, as far as possible, giving any offence to Jewish susceptibilities. They feel, however, that considerations of humanity must be regarded as paramount, and that no unnecessary suffering could be condoned on the ground that it was incidental to the observance of any religious custom'.[13]

As such, they recommended that stunning be required in all cases. However, subsequent opposition from the Board of Deputies of British Jews was successful in blocking the proposal, and by 1922 (*Dodd v Venner*) legal precedent was established for a distinction between Jews and others with regard to animal slaughter intended for human consumption. This distinction was formally established in section 6 of the 1933 Slaughter of Animals Act.[14]

Since this decision both *shechita* and *dhabh* have remained controversial practices within British society, although opposition to them waxed and waned over time. For example, during the 1970s a variety of animal welfare groups linked criticism of religious slaughter to the discovery that Muslim entrepreneurs had developed a very substantial export market for *halal* meat in the Middle East and North Africa.[15] This campaign was influential upon public opinion to the extent that a 1983 National Opinion Poll revealed that 77 per cent of respondents were altogether opposed to religious slaughter.[16] Likewise, the Farm Animal Welfare Council (a 'quango' set up in 1979 as a direct response to pressure from animal welfare groups) published a critical report in 1985 that concluded that, although there was a dearth of scientific evidence to indicate at precisely what stage in the process of losing consciousness animals cease to feel pain, loss of consciousness following severance of the major blood vessels in the neck is not immediate and animals may experience pain for between 10 and 17 seconds after their throats have been cut, even in the best conditions.[17] These periods were judged to be 'unacceptably long',[18] and the council recommended that humane slaughter could best be achieved by ultimate stunning in all cases.[19] The government's response was to focus on some of the

subsidiary recommendations contained in the report and to reject the major proposal.[20] Since then, the FAWC has regularly appealed for the prohibition of slaughter without pre-stunning.[21]

Exemptions and the Rule of Law

The exemption from mandatory pre-stunning raises a number of thorny questions, since on a fairly standard view the rule of law commits us to a principle of formal equality: one law for all and no exceptions.[22] This is an important principle, and it would hardly be just if a political elite were to secure advantages for its offspring that it denied to others. So why, then, is the case of religious slaughter different? Why might an exemption be justified for Jewish and Muslim citizens, but not for libertarians? Jacob Levy characterises exemption clauses as 'individually exercised negative liberties granted to members of a religious or cultural group whose practices are such that a generally and ostensibly neutral law would be a *distinctive burden* on them.'[23] In the case of religious slaughter legislation, arguing for an exemption requires that one favour a general presumption mandating pre-stunning, but also hold that the universal application of this standard would too demanding, or too burdensome, for religious communities with their own distinctive and traditional slaughter methods. There are good reasons to be sceptical about this possibility, since as Brian Barry notes: 'either the case for the law (or some version of it) is strong enough to rule out exemptions, or the case that can be made for the exemptions is strong enough to suggest that there should be no law anyway.'[24] This argument contains two distinct propositions. First, that a justifiable exemption to an otherwise generally applicable law must be justified by some sufficient argument, and second, that arguments sufficient to justify an exemption are *in the vast majority of cases* also sufficient to show that the otherwise generally applicable law is unjustifiable on the grounds of liberty. If these two claims are true, then a valid exemption claim will merely indicate that the generally applicable law (to which the exemption is attached) is probably not.[25] To resist this conclusion one must demonstrate each of the following three things: that there is a good case for the initial rule, that there is some reason for exempting some from the rule, and that this reason pertains to some and not all.[26]

For the sake of clarity, it is perhaps worth noting that the *purpose* of a particular (generally applicable) law performs an important function in making decisions about potential exemptions. For instance, laws that protect the physical integrity of citizens will be unlikely to fulfil their function if they contain an exemption clause for a cultural or religious minority. In cases like this the generality of the law's aim can only be achieved with universal and context-insensitive application in each and every particular case. Meanwhile, in other cases, the general aim of a law can still be satisfied even when some

citizens are granted exemptions. For example, laws regulating workplace safety or public health might fulfil their primary aim (i.e. maintaining a certain standard of public health) whilst exempting a small percentage of citizens from particular regulations. In these cases, when an exemption is compatible with the general aim of the law, then the case for an exemption will rely upon an analysis of the demands of fairness (e.g. is it fair that any particular citizen, or set of citizens, is granted an exemption when some others will not be? who deserves an exemption? how are we to choose? etc…). Slaughter legislation provides an interesting case study in this regard, because it seems to be fairly clear that the 'purpose' of the relevant legislation is to ensure that there is a minimum threshold level below which the suffering of animals will not be tolerated. In other words, slaughter without pre-stunning is precisely the kind of act that a humane slaughter law seeks to prohibit, and any group-specific exemptions will have to satisfy a fairly stringent standard of justification.

First Exemption Argument: Upholding the 'Spirit of the Law'

One way in which the concept of a 'distinctive burden' can be filled out has to do with the idea that different cultural or religious communities often hold widely divergent world-views or belief systems, each of which might attribute different significances to the actions and circumstances in which the law of the land is applied, and thereby might be affected differently by the same piece of legislation. Hence, two pieces of behaviour that look like to be the same might have different meanings for those who perform them, and two sets of circumstances that seem identical from the point of view of one culture might look to be quite different when described in the language of another. In our case, for example, the vegetarian Anglican might regard *halal* and *kosher* meats as cruel, barbaric, and – most importantly – unnecessary. For some Jews and Muslims, meanwhile, not only are these practices indispensable if the consumption of meat is to be made possible, but, perhaps more importantly, it is the unclean practices of the majority – production line slaughterhouses and all – that are barbaric, cruel and deserving of reproach.

The idea that generally applied laws can place a distinctive burden upon holders of particular cultural commitments can perhaps be made clearer by considering a pair of examples. For instance, compare an irresponsible adult supplying alcohol to children with a priest passing a cup of wine amongst young communicants. Or contrast our intuitions about how we might feel if we knew that the man sat opposite us had a knife concealed about his person with how we might feel about a Sikh carrying a *kirpan* and thereby fulfilling his religious obligations.[27] In each of these cases it seems possible to draw a distinction between the *letter* and the *spirit* of the law. So whilst the spirit of the law is justifiably concerned about underage drinking or knife wielding football hooligans, it is

less worried about otherwise law abiding Catholics or Sikhs fulfilling their religious obligations. However, these two cases both differ from the example of religious slaughter in two important respects. First, neither Judaism nor Islam mandates the consumption of *halal* or *kosher* meats in the sense that Sikhism or Catholicism obliges followers to follow the five pillars of the faith or take communion. Second, and perhaps more importantly, the letter-spirit distinction does not carry over into the religious slaughter example in a straightforward sense, since the function of humane slaughter legislation decreeing pre-stunning is precisely to prevent the kind of suffering associated with *shechita* and *dhabh* slaughter methods.

Indeed, the letter-spirit distinction might not be particularly useful with regard to cultural examples more generally. For instance, Barry reports the example of a young man arrested at a demonstration in Trafalgar Square whilst carrying a three-foot-long double-edged sword.[28] In convincing the court of his sincere belief that he was actually the twentieth century reincarnation of King Arthur, and thereby the Honoured Pendragon of the Glastonbury Order of Druids, the judge had no choice but to rule that he was exempt from the generally applicable law concerning carrying weapons in public.[29] According to the parliamentary record, it is fairly clear that this part of the act was enacted for the benefit of the Sikh community,[30] and not for the reincarnation of King Arthur, but it is far from clear that the *spirit* of the law which prohibits carrying concealed weapons is less applicable to Sikhs than Druids. In fact, and in a certain sense, devout Sikhs are precisely the kind of people the spirit of the law is concerned with. A *kirpan* is no mere ceremonial accoutrement, but part of a religious obligation to present oneself in public simultaneously as a saint and warrior.[31] In this sense, both the Sikh and the football hooligan violate the spirit of the law in similar ways, and this is a sense that does not apply so straightforwardly to the Druid.

Second Exemption Argument: Religious Freedom

Shechita and *dhabh* might be suitable candidates for an exemption because, for the respective religions, slaughter without pre-stunning is not a culinary preference but a principled requirement with a basis in scripture. As noted, many liberal democracies have granted numerable religious minorities exemptions from otherwise generally applicable laws on the grounds that such exemptions will be necessary for members of those groups to exercise their religious liberty. Furthermore, as Locke pointed out, the non-toleration of religious belief is fundamentally irrational, since people cannot be compelled to hold religious beliefs other than those that they do in fact hold.[32] If religious choice is both a matter of individual conscience and not entirely subject to the will, then attempts to force people to hold religious beliefs other than those that they actually do are doomed to

failure. However, Locke's principle of religious liberty only goes as far as to insist that controversial practices should not be liable to interference *because* they are religiously motivated, and does not extend to the suggestion that religiously inspired practices should be immune from state intervention.[33]

A more radical view has its precedent in the structure of justification in American constitutional jurisprudence on religious exemptions that preceded *Oregon v. Smith*.[34] Until this point exemptions to generally applicable laws that incidentally burdened religious practice were not automatically granted, but insofar as an incidental burden was created, a higher standard of justification for the generally applicable law was required. On this view, whereas liberty in general may be restricted provided that there is a rational relationship to a legitimate state interest, religious liberty may only be restricted when there is a necessary relationship to a *compelling* state interest. Levy describes this as a 'balancing test' in which the scales were weighted in a particular way, in light of the particular importance of religious commitments.[35] This more radical interpretation of religious immunity incorporates the (valid) claim driving the first 'spirit of the law' argument (that ostensibly neutral laws can place particular citizens under a special burden), and generates an equally valid principle (that restricting some liberties requires a higher standard of justification than restricting others). However, it is not obvious that all religious practices necessarily fall into this category. This is because there is an important distinction between two different restrictions on religious liberties – those affecting a person's freedom to pursue their own faith (i.e. the ability of members to fulfil duties with an authority in scripture, like following prayer requirements or dress codes, taking communion, not violating commandments and so on) and those in which the law of the land parts company from religious law or tradition to the extent that following a particular faith disadvantages, in some sense, its followers (e.g. the ability of a Sikh to work in the building trade, a Muslim to work on a Friday etc…).[36] Because a proscription against slaughter without pre-stunning would not itself constitute a threat to the religious freedom or traditional way of life of Jews or Muslims in the same sense that conscripting Quakers to military service would, and because the idea of a vegetarian Muslim is no more an oxymoron than that of a monogamous Mormon, then an *exclusive* appeal to religious freedom is no grounds for an exemption in this case.[37]

Third Exemption Argument: Equality of Opportunity and 'Cultural Inabilities'

Whilst the first category of religious practices are intimately connected to a person's religious freedom (and hence have *prima facie* grounds for an exemption on that basis), if the second category – that into which religious slaughter falls – are entitled to an exemption then it must have to do with the idea that the strict and universal application

of the relevant law will generate undeserved disadvantages (i.e. an unjustifiable inequality). In turn, this second kind of claim has received significant attention in recent work on multiculturalism, in which the idea that equal treatment should not be confused with identical treatment has been put forward. [38] One size does not fit all, so the argument runs, and to establish conditions of equality within a plural society will require that we take that diversity itself into account. What exactly is being equalised in these arguments is sometimes difficult to pin down, but perhaps one of the strongest arguments is the suggestion that equality of opportunity, properly understood, will require special cultural rights – including exemption rights – for minority cultural communities. Bhikhu Parekh, for example, argues that opportunity is:-

'a subject-dependent concept in the sense that a facility, a resource, or a course of action is only a mute and passive possibility and not an opportunity for an individual if she lacks the capacity, the cultural disposition, or the necessary cultural knowledge to take advantage of it.'[39]

On this view, if I cannot avail myself to an opportunity, then it is not an opportunity in the real sense, but merely a possibility. Hence in the case of religious slaughter, to prohibit these practices would be to deny a minority of citizens an opportunity extended to the majority and thereby to treat them unequally. It may be possible for Jews to eat food that is not *kosher*, but this is not an opportunity in the meaningful sense. It really is the case, in other words, that Jews and Muslims, if pre-stunning is made mandatory for all, will lack a genuine (negative) liberty extended to others (i.e. to eat meat), and this is not a consequence of oversensitivity or bad faith.

The core of this third argument consists in the idea that a cultural inability is as serious as a physical inability, and just as deserving a candidate for compensation on egalitarian grounds.[40] One immediate difficulty consists in identifying the scope of potential candidates for compensation. For instance, Parekh thinks that if a cultural incapacity can be overcome with relative ease then the affected group might legitimately be asked to overcome it, or at least to bear the financial costs of accommodation.[41] So, for instance, possessing a cultural predisposition toward particular leisure activities might be the responsibility of the individual, whilst a set of prayer requirements that interfere with the working week might be worthy candidates for state action. The problem, as Parekh tacitly concedes, begins from the idea that because, on this approach, it is both possible and necessary to draw a line somewhere between a cultural disposition, a cultural incapacity and a cultural inability, it must also be possible to cast doubt upon any normative argument in favour of compensation in the case of the latter. This is a line of argument that has been most vociferously put forward by Barry, who argues that the vast majority of cultural predispositions should be regarded as analogous to 'expensive tastes', and thereby entirely the responsibility of the individual and affected agents. [42] On his account,

orthodox Jews, say, are no more deserving of special treatment than fans of *foie gras*,[43] precisely because the analogy between a physical disability and this particular cultural preference is unsustainable.[44]

Eating meat that is not *halal* or *kosher*, like sending your child to a school that forbids turbans, is a possibility – and indeed opportunity - in the purest sense of the term, and this is a sense that certainly does not exist for a paraplegic to reach the third floor of a building without adequate provisions for him to do so.[45] Setting aside the deep philosophical question about who should bear responsibility for this (voluntarily endorsed) cultural commitment,[46] it is immediately clear that the case of religious slaughter is not well suited to an argument from equality of opportunity. Even if one accepts that a universal law mandating pre-stunning unfairly disadvantages some Jews and Muslims, leaving them with a smaller bundle of (effective) negative liberties than other citizens, it does not straightforwardly follow that such citizens have fewer *opportunities* than anyone else, even in the sense that Parekh uses the term. Indeed, Parekh pushes the analogy between beliefs and disabilities on the grounds that such beliefs 'are constitutive of the individual's sense of identity and even of self-respect and cannot be overcome without a deep sense of moral loss.'[47] But eating *halal* or *kosher* meats, even for the most devout believer, are not the kinds of practices that lend themselves easily to the idea that they are constitutive of an individual's self-respect. Perhaps more importantly, the equality of opportunity argument, taken in isolation, entirely neglects one dimension of our case study, namely that of establishing whether or not slaughter without pre-stunning imposes an unacceptable degree of suffering.[48]

Fourth Exemption Argument: An Appeal to Human Flourishing

An exemption might be justified if it is necessary to secure the minimal conditions required for the possibility of human flourishing for all citizens.[49] Hence, for instance, Sikhs working on building sites might require exemptions from hardhat regulations because they are heavily dependent on the building trade,[50] whilst religious institutions might be entitled to exemptions from certain rules about discrimination in job application procedures.[51] In such cases an exemption is not a (strict) requirement of religious freedom or equality of opportunity, but rather a justifiable inequality warranted on the grounds that the denial of an exemption would have a sincere and negative impact upon the well-being of affected parties, inhibiting their ability to earn a living, pursue their faith, or achieve a worthwhile and flourishing life. This is a powerful argument, but it is not clear that it carries over into the case of religious slaughter. Although food (and possibly even meat) may have a justifiable place on any viable (and objective) list of the necessary pre-requisites for human flourishing, *halal* and *kosher* meats themselves seem to be less promising candidates.

After all, a vegetarian Muslim seems no more-or-less likely to flourish than a carnivorous one.[52]

Fifth Exemption Argument: The 'Fair Treatment of Cultural Commitments'

Taken in isolation, appeals to religious freedom, equality of opportunity, or human flourishing, are insufficient grounds to justify an exemption in the case of ritual slaughter. By contrast, the fair treatment of cultural commitments argument offers a more general account of the circumstances within which an exemption is permissible (the 'toleration test') and in which an exemption is justifiable or even obligatory (the 'special burden test'). In the case of ritual slaughter, the first of these is particularly important, since one of the strongest arguments against an exemption is that slaughter without pre-stunning is unnecessarily cruel, inhumane or even immoral (i.e. it falls outside the boundaries of the tolerable). Meanwhile, the 'special burden test' evaluates the extent to which the cultural commitments of all citizens - including those who disapprove of and have no desire to engage in the practice under consideration – will be treated fairly if an exemption is granted. Put briefly, a powerful, though not necessarily overwhelming, argument in favour of an exemption will be that the denial of an exemption for a tolerable practice treats the commitments of affected citizens unfairly. In other words, if *halal* and *kosher* slaughter practices can be shown to be tolerable, and if it can be demonstrated that prohibiting them places a 'special burden' upon (some) Jews or Muslims that treats their cultural commitments unfairly, then there will be good reasons to grant an exemption.

First, then, is the task of establishing whether or not *shechita* and *dhabh* fall within the limits of toleration. According to recent theories of political liberalism, in assessing culturally controversial practices citizens should 'put aside their comprehensive moral and religious conceptions',[53] which would mean that those in favour of *shechita* and *dhabh* must offer supporting reasons that are comprehensible to their fellow citizens.[54] This does not exclude religious views from public debate, provided that such views are buttressed by arguments derived from public reason.[55] However, one common argument against religious slaughter is that it causes unnecessary suffering, and critics point out that the suffering endured by the animal is both unnecessary and without tangible benefits. From a political liberal standpoint, because these animals are killed without any (useful) motive available to the standards of public reasonableness, then the pain they subsequently endure seems especially gratuitous.[56] However, the demand for reasonableness comes about when citizens (attached to diverse comprehensive moral doctrines) need to form a political conception of justice to shape the basic institutions of society. By contrast, to suggest that a practice is *tolerable* might not require such a demanding justificatory standard, since the fact one does not understand why *y* does *z* does not affect whether or not *y* doing *z* is

itself tolerable. Thus the appropriate 'tolerability test' might reasonably demand lower standards of justification, and on the 'fair treatment of cultural commitments' argument the relevant standard has to with whether or not the existence of *halal* and *kosher* practices treats the cultural commitments of non-Jews and non-Muslims fairly.

Instances of toleration can be conceptualised within the following classificatory scheme: *x* tolerates *y* doing *z* when *x* disapproves of *y* doing *z*, when *y* freely chooses to do *z*, and when *x* has sufficient power to prevent *y* from doing *z*.[57] The limits of toleration, on this approach, are established by reference to the nature of *x'*s disapproval of *y* doing *z*. More specifically, *y* doing *z* can be described as potential candidate for toleration (i.e. falling within the limits of toleration) if *x*, in full knowledge of *y* doing *z*, can separate act from agent (i.e. *y* as a person and fellow citizen from *y* as a doer of *z*). As such, intolerable acts are those for which such a separation is unfeasible, when the stain imposed upon *y* (as a consequence of being a doer of *z*) is impossible to ignore, regardless of the specific cultural commitments to which *x* happens to be attached. Hence acts of extreme and unnecessary cruelty that leave a lasting, and negative, impression upon the fundamental or essential character of the perpetrator (or evaluations of the fundamental or essential character of the perpetrator made by other citizens) will fall outside the boundaries of the tolerable.[58] The 'toleration test' does not directly appraise any potential harms that befall *x* following *y*s performance of *z,* but rather uses *x*'s attitude toward *y* following *y*s performance of *z* (or a reasonable expectation thereof) as a means to verify the extent to which *x*'s cultural commitments have been treated unfairly, if they have at all.

Many culturally controversial practices might be candidates for prohibition (and thus not for exemption clauses) even if they are tolerable in the sense specified. For example, numerous critics have pointed out that a commitment to liberal egalitarian principles might rule out some (otherwise tolerable) cultural practices,[59] and even those who sympathise with cultural exemption claims in general have argued against exemptions to protect the interests of children and other vulnerable persons.[60] More generally, an intersubjective account of toleration, like the one proposed, must not jettison the objective commitment to minimising human suffering that characterises the liberal theory of justice,[61] and this compelling interest is not nullified simply because controversial practices happen to have a connection with culture, or a person's cultural commitments.[62] However, assuming that slaughter without pre-stunning falls into that category of culturally controversial practices that do not violate any fundamental principles of justice (i.e. assuming that the prevention of animal suffering is a legitimate but not a *compelling* state interest), then cultural commitments are important to the extent that they are at least one of the relevant and determinant variables in making a decision about tolerability.

On this approach, evaluations of tolerability are political evaluations, and are reliant upon an uneasy reconciliation of the normative (i.e. should *x* be able to separate *y* as a fellow citizen from *y* as a doer of *z*?) and the empirical (i.e. does *x*, in fact, separate *y* as a fellow citizen from *y* as a doer of *z*?). Although political decisions of this nature lack the satisfying sense of permanence that would follow from an objective demarcation of the limits of toleration, the benefits of the approach are that it contains within itself a richer account of why the toleration of *y* doing *z* is both important and justified, assuming that it is. In this sense decisions about the tolerability of a practice will inseparable from the *context* in which *y* doing *z* occurs,[63] and it will be necessary to balance the meaning and significance of *y* doing *z* has for *y* against the meaning and significance *y* doing *z* has for *x*. Ultimately, this is an empirical question, to be resolved by empirical research. However, for the moment, one, hopefully persuasive, argument can be put forward in favour of the tolerability of *y* doing *z* (for *x*), an argument that proceeds by comparing *y* doing *z* (slaughter without pre-stunning) with other practices that are tolerated by *x* - or in the society within which *x* lives - and the relative levels of social disapproval that these practices inspire. For example, Florida ordinances prohibiting the sacrificial slaughter practices of the Santeros were struck down, in part, on the grounds that they were applied too specifically to one particular cultural practice whilst leaving analogous practices unscathed by legislation.[64] Likewise, bullfighting supporters have stressed that eating factory farmed meat causes at least as much suffering as *corridas*, and prior to slaughter most bulls have a far higher standard of treatment than do animals reared intensively. More relevantly, Sebastian Poulter's defence of an exemption for *sechita* and *dhabh* in the UK emphasises the fact that a variety of similar practices are both legal and less controversial.[65] Taken alone, contextually grounded comparative considerations like these would be extremely weak grounds for an actual exemption clause.[66] Permitting one injustice to increase relational equality, or satisfy some notion of comparative desert,[67] on the grounds that some similar practices are, as yet, not subject to legislation, does not alter the fact that the one injustice is still an injustice. However, for the moment, the aim is not to find reasons in favour of an exemption, but simply to discern whether or not the relevant practice is tolerable, and contextually informed comparisons like these can and should play a legitimate role in political arguments about this: if *x* does *p*, and if *p* is genuinely analogous to *z*, then even if *x* disapproves of *y* doing *z* he is likely to be able to distinguish between *y* as a fellow citizen and *y* as a doer of *z*.

The fact that a practice happens to be tolerable (according to my intersubjective account of tolerance) is insufficient to even grant a presumption in favour of an exemption, hence the need for a second argument. The 'special burden test' analyses the extent to which (if at all) the denial of an exemption would treat the cultural commitments of affected citizens unfairly (including both those who wish to do *z*, and those who do not). The focus of the

‘special burden test’ is upon those instances in which a citizen’s cultural and religious commitments come into conflict with their political or legal obligations. Underpinning the approach is the general assumption, shared by the first two arguments canvassed above, that some violations of liberty are more serious than others,[68] which is then applied specifically through the concept of a cultural commitment so as to incorporate what was most valuable in the third and fourth arguments. Violations of liberty that affect our cultural commitments are especially serious violations of liberty because they intrude upon what is most important to us, the core of a person’s dignity or her sense of self, and such intrusions undermine the possibility of our flourishing. Cultural commitments count, on the fair treatment approach, because of the kinds of marginalisation, exclusion and alienation that minorities often endure in liberal democracies,[69] and especially when citizens are ‘torn’ between their cultural commitments and their obligations toward the political community.[70]

According to the ‘special burden’ test legitimate exemption claims (for tolerable practices) must be based on a genuine belief that a generally applicable law will have a *special* – and negative - kind of impact on one’s life, an impact that it will not have upon the lives of others. A special kind of impact is one that treats the cultural commitments of an affected citizen unfairly in an empirically verifiable fashion (i.e. in a way that can be demonstrated by social scientific research). In turn, *unfair* treatment is marked by three features. First, a special impact is not just a different impact, since many laws that inhibit our liberty are purposefully designed to be disproportionately burdensome on particular persons. Rather, a *special* burden comes about which the law is organised according to a scheme of regulation quite at odds with someone’s deeply held beliefs, or cultural commitments. Although this is a fairly difficult idea to pin down, the aim is to find some way in which to take account of the special intensity of commitment and devotion that people associate with their religious obligations and beliefs that does not fall back into the trap of incommensurability: after all, the animal rights activist might feel just as strongly as the Muslim in the case of *halal* meat. Second, the experience of being torn is not simply a reflection of how deeply one feels about an issue, and a libertarian who profoundly disagrees with a set of laws covering taxation will not be treated unfairly in this sense. Third, the unfair treatment of cultural commitments is not merely a matter of subjective conviction, but a certifiable fact of social reality. For instance, someone who strongly opposes restrictions on drug use might feel just as deeply about the issue as do members of a community for whom peyote performs a religious function, but only in the latter case is there an already-existing and well-established regulative framework.

Although granting special consideration to cultural commitments (because the unfair treatment of cultural commitments can place a special burden upon affected citizens) has

something in common with the more 'radical' form of religious freedom, the kind of judicial reasoning endorsed in American jurisprudence prior to *Oregon v. Smith* is significantly curtailed on this approach. Cultural, ethnic, national and religious groups do not count because such groups themselves are morally valuable, but because they can sometimes be treated unfairly, which in turn might constitute an individually experienced injustice. Hence just as these groups and their practices are not granted immunity from interference, nor is the higher standard of justification applied to all groups that can legitimately claim to be a 'culture', a 'nation', or a 'religion'. Rather, it is persons, as holders of cultural commitments, that are objects of fair treatment on this approach.

As in the 'toleration test', demonstrating that holder's of particular cultural commitments (i.e. Judaism and Islam) are specially burdened by a law that makes pre-stunning mandatory is ultimately a question that can only be comprehensively answered by social scientific research. For the moment, then, I will limit consideration to two potential counter-arguments that have been put forward by philosophers. First, Peter Singer points out that in most of states in which *shechita* and *dhabh* have been ruled impermissible (e.g. Norway, Spain, Sweden, Switzerland, New Zealand), religious authorities have declared that traditional precepts do not have to be followed.[71] The implication being that the cultural commitments of affected citizens would not be treated unfairly by making pre-stunning obligatory since, after a law was passed, those cultural commitments would somehow be transformed. But changes in legislative schemes alone, as Rousseau understood, are unlikely to significantly alter how a citizen understands their own deeply held beliefs, regardless of the decisions of religious authorities. Alternatively, it could be the case that Singer thinks that Jewish and Muslim compliance indicates that the relevant cultural commitments were not particularly powerful, and thus unlikely to 'specially burden' the affected citizens. But this is only one potential interpretation, and another is that given the relevant demographic facts, the respective decisions of the relevant religious authorities were simply a practical response to a situation outside of their control – i.e. affected citizens might still have felt 'torn' because their cultural commitments were treated unfairly.

Second, according to Barry, '[f]aced with a meatless future, some Jews and Muslims may well decide that their faith needs to be reinterpreted so as to permit the consumption of humanely slaughtered animals'.[72] This is, of course, entirely true, just as banning Catholics from running seminaries might encourage Catholics to reinterpret their religious beliefs. But predictions about possible future choices tell only a limited part of the story about the treatment of cultural commitments; some might choose to reinterpret the demands of their faith, some might choose vegetarianism, some might have it thrust upon them and still others might choose to emigrate. If the latter two options are as likely as the first two then

we will have at least some evidence to suggest that the affected citizens will 'feel torn' by a law making pre-stunning mandatory. Moreover, both Barry and Singer seem to neglect the fact that both Jews and Muslims deny that their practices are any more inhumane than mainstream slaughter practices. Even if this belief is misguided, it remains the case that they (necessarily) think that *shechita* and *dhabh* have divine sanction, and thus are not to be lightly abandoned. Hence the suggestion that removing an exemption will not especially burden affected citizens because their Rabbis and Imams will simply change their minds about the necessity of the rule (or if not, then citizens themselves will still be at liberty to reinterpret their own faith or to eschew meat altogether) is one that is extremely difficult to sustain.

Conclusion

Justifying the 'rule-plus-exemption' strategy requires that one is able to demonstrate that (1) there is a good case for a general rule, (2) that there is a good case for an exemption, and (3) that (2) applies to some and not all. In the case of slaughter legislation, political liberalism, norms of democratic legitimacy, or a more general concern with animal welfare could all be used to justify (1), whilst appeals to religious freedom, equality of opportunity or human flourishing will provide only weak arguments for (2) and (3). By contrast, the two stages of the 'fair treatment of cultural commitments argument' outline in a hopefully more comprehensive fashion the necessary argumentative steps that need to be filled in for an exemption claim to be valid, and in the case of religious slaughter I have suggested some reasons to indicate that an exemption would both be permissible (i.e. tolerable) and necessary (i.e. a requirement of the principle of fair treatment).
[73] The role performed by culture and cultural commitments in this argument is a limited one: practices should not be granted exemptions so as to preserve communal integrity, or to publicly affirm cultural diversity, and nor are they justified as expressions of a fundamental 'right to culture'.[74] Rather, culture matters in a far more prosaic, but critical, sense, as a reflection of the fact that people are often deeply attached to commitments that are not likely to dissipate in the near future, and that if treated unfairly, these can be the source of an injustice.

Notes

[1] Such means are prescribed by regulations made under the terms of the 1974 Slaughterhouses Act (which applies to cattle, sheep, goats, swine and horses) and the 1967 Slaughter of Poultry Act (which applies to domestic fowl and turkeys kept in captivity). See Poulter, S (1998) *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press, Oxford).
[2] Farm Animal Welfare Committee (1985) *Report on the Welfare of Livestock When Slaughtered by Religious Methods* (London, HMSO), pp. 32-3.
[3] The actual legislation includes specific exemptions for the slaughter – without the infliction of unnecessary suffering – of a bird or an animal 'by the Jewish method for the food of Jews and by a Jew duly licensed for the purpose' (Slaughter of Poultry Act, s 1(3); Slaughterhouses Act s 36(4), quoted in Poulter, *Ethnicity, Law and Human Rights*, p. 132). Relevant case history includes *Malins v Cole and Attard* (1986) in which a Muslim slaughterman was convicted under the Slaughter of

Poultry Act because the chicken he was caught selling had not been slaughtered 'for the food' of Muslims (it had in fact been bought by and slaughtered for an RSPCA inspector wearing a crucifix).
[4] Additionally, indigenous peoples have also been identified as being potentially burdened by general regulations concerning hunting, fishing and land-use, because such regulations either hamper their traditional way of life or ability to gain sustenance. Similarly, some national minorities have been exempted from military conscription on the grounds that they should not be compelled to fight for the majority nation's interest. Finally, Muslim states that ban the consumption of alcohol sometimes exempt non-Muslims from this rule.
[5] Caney, S. (2002) 'Equal Treatment, Exceptions and Cultural Diversity' in P. Kelly (ed.) *Multiculturalism Reconsidered* (Polity, Cambridge), pp. 81-101, p. 85.
[6] Additionally, exemption rights are immune to the criticism that 'groups cannot be rights bearers'. Although they are group-differentiated, they are not 'group rights' in any substantial or problematic sense. For more on the conceptual difficulties associated with 'collective' or group rights see Hartney, M. (1991) 'Some Confusions Concerning Collective Rights' *Canadian Journal of Law and Jurisprudence*, 4, pp. 293-314; Johnston, D. (1995) 'Native Rights as Collective Rights: A Question of Group Preservation' in W. Kymlicka (ed.) *The Rights of Minority Cultures* (Oxford University Press, Oxford) pp. 179-201; and Narveson, J. (1991) 'Collective Rights?' *Canadian Journal of Law and Jurisprudence*, 4, pp. 329-345.
[7] See, amongst others, Barry, B. (2001) *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity); Caney, 'Equal Treatment, Exceptions and Cultural Diversity'; Levy, J. (2000) *The Multiculturalism of Fear* (Oxford, Oxford University Press); and Levy, J. (2004) 'Liberal Jacobinism' *Ethics*, 110, pp. 318-336.
[8] *Contra* Regan, T. (1983) *The Case For Animal Rights* (London, Routledge & Kegan Paul)
[9] *Contra* Singer, P. (1991) *Animal Liberation* (Harper Collins, London)
[10] Casal, P. (2003) 'Is Multiculturalism Bad for Animals?' *Journal of Political Philosophy*, 11, pp. 1-22.
[11] Committee on Humane Slaughtering of Animals (1904) *Report of the Committee appointed by the Admiralty to consider the humane slaughtering of animals, with appendix* (London: HMSO)
[12] Cited Poulter, *Ethnicity, Law and Human Rights*, p. 133.
[13] Cited Poulter, *Ethnicity, Law and Human Rights*, p. 133.
[14] The exemption was defended in the House of Commons in the following terms: 'Clause 6 has created some alarm. In this clause we exempt Jews and Mohammedans. It is not wise at the present time to interfere with the fundamental religious beliefs of any race, and the question of killing is a ritual of the Jewish and Mohammedan community which is fundamental to their religion.' Lieutenant-Colonel Moore, quoted in Poulter, *Ethnicity, Law and Human Rights*, p. 133.
[15] Poulter, *Ethnicity, Law and Human Rights*, p.134.
[16] Duffy, M. (1984) *Men and Beasts: An Animal Rights Handbook* (London, Paladin), p. 28, p. 41.
[17] FAWC, *Report on the Welfare of Livestock*, pp. 19-20
[18] FAWC, *Report on the Welfare of Livestock*, p. 20.
[19] FAWC, *Report on the Welfare of Livestock*, p. 25.
[20] Hence, the Slaughter of Animals (Humane Conditions) Regulations (1990) accepted that rotary pens ought to be discontinued (because they were judged to cause both terror and discomfort in the animals) and that slaughtered animals should not be moved until after such a period has elapsed that it can be judged that the animal has lost consciousness.
[21] Farm Animal Welfare Committee (2003) *Report on the Welfare of Farmed Animals at Slaughter or Killing – Part 1: Red Meat Animals*, (London, HMSO), pp. 33-5.
[22] '[W]e mean…when we speak of the rule of law…that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm.' Dicey, A.V. (1982) *Introduction to the Study of the Law of the Constitution* (Indianapolis, Liberty Classics), p. 118.
[23] Emphasis added, Levy, *The Multiculturalism of Fear*, p. 128. In addition, some exemptions might be justified on purely consequentialist grounds – to maintain good race relations or ensure the loyalty of religious minorities, see Barry, *Culture and Equality*, 50-4.
[24] Barry, *Culture and Equality*, p. 39.
[25] Barry, *Culture and Equality*, pp. 32-50.
[26] Barry, *Culture and Equality*, p. 43, p. 48, p. 62.
[27] Both of these, and many others, are discussed in Waldron, J. (2002) 'One Law for All? The Logic of Cultural Accommodation' *Washington and Lee Law Review*, 59, pp. 3-35.
[28] Barry, *Culture and Equality*, pp. 51-2.
[29] Namely that of Section 139(5)b of the Criminal Justice Act, which provides the following statutory defence to a charge of carrying in a public place 'any article which has a blade or is sharply pointed': 'it shall be a defence for a person charged with an offence under this section to prove that he had the article with him (a) for use at work; (b) for religious reasons; or (c) as part of any national costume.'
[30] Poulter, *Ethnicity, Law and Human Rights*, p. 322
[31] Poulter, *Ethnicity, Law and Human* Rights, pp. 277-79 & pp. 296-7.
[32] Locke, J. (1991) 'A Letter Concerning Toleration' in J. Horton and S. Mendus (eds.) *A Letter Concerning Toleration in Focus* (London, Routledge)
[33] Locke, 'A Letter Concerning Toleration', pp. 36-7.

[34] Employment Division, Department of Human Resources of Oregon v. Smith, 484 U.S. 872 (1990). Justice Scalia, writing for the majority, held that there was no religious liberty right to an exemption from a neutral law regulating hallucinogenic drugs and that the burden the statute incidentally placed on the religious practices of Native American Church did not require the court to subject the statute to strict scrutiny. Congress attempted to restore the *status quo ante* with the Religious Freedom Restoration Act of 1993, but that act was struck down in City of Boerne v. Flores, 117 S. Ct. 2157 (1997). See Levy, 'Liberal Jacobinism' and Casal, 'Is Multiculturalism Bad for Animals?' for competing interpretations of these events.
[35] Levy, 'Liberal Jacobinism', pp. 331-2.
[36] Jones, P. (1997) 'Bearing the Consequences of Belief' in R. Goodin and P. Pettit (eds.) *Contemporary Political Philosophy* (Oxford, Blackwell) pp. 551-563.
[37] See also Barry, *Culture and Equality*, p. 45-6.
[38] Kymlicka, W. (1995) *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press); Young, I. M. (1989) 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship', *Ethics,* 1 99, pp. 250-74.
[39] Parekh, B. (2000) *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London, Macmillan), p. 241.
[40] The focus here is the argument contained within Parekh, *Rethinking Multiculturalism.* Similar arguments have been put forward by Taylor, C. (1992) 'The Politics of Recognition' in A. Gutmann (ed.) *Multiculturalism and the 'Politics of Recognition'* (Princeton, Princeton University Press), pp. 60-1; Kymlicka, *Multicultural Citizenship*, pp. 114-5. For arguments in favour of compensation for physical disabilities, see Arneson, R. (1989) 'Equality and Equal Opportunity for Welfare' *Philosophical Studies* 56, pp. 77-93; Dworkin, R. (2000) *Sovereign Virtue* (London, Harvard University Press); Rakowski, E. (1991) *Equal Justice* (New York, Oxford University Press); Roemer, J. (1988) *Equality of Opportunity* (Cambridge, Cambridge University Press). For a critical review of these arguments, from an egalitarian perspective, see Anderson, E. (1999) 'What Is the Point of Equality', *Ethics*, 109, 287–337.
[41] Parekh, *Rethinking Multiculturalism*, p. 241.
[42] Barry, *Culture and Equality*, p. 33, p. 35, pp. 40-46, p. 48, pp. 295-6, pp. 303-4, p. 319, p. 321.
[43] Barry, *Culture and Equality*, p. 41.
[44] Barry, *Culture and Equality*, pp. 36-7.
[45] At a policy level, the implications of the Barry-Parekh disagreement might not be particularly far reaching. For example, in a survey of a number of the major 'cultural controversies' (e.g. allowing American Indians to ingest peyote, Muslim girls to wear headscarves to school, Sikh pupils and construction workers to wear turbans and forbidding female genital mutilation) Parekh has demonstrated that Barry actually favours the policy proposals put forward by multiculturalists. See Parekh, B. (2002) 'Barry and the Dangers of Liberalism' in P. Kelly (ed.) *Multiculturalism Reconsidered*, pp. 147-8. However, Barry is adamant that these exemptions from general rules are justified inequalities, rather than a requirement of egalitarian justice properly understood.
[46] For one discussion on this, and related topics, see Mendus, S. (2002) 'Choice, Chance and Multiculturalism' in P. Kelly (ed.) *Multiculturalism Reconsidered*, pp. 31-44.
[47] Parekh, *Rethinking Multiculturalism*, pp. 23-4.
[48] Barry, *Culture and Equality*, p. 321.
[49] Simon Caney thinks that Barry endorses this argument. Caney, 'Equal Treatment, Exceptions and Cultural Diversity', pp. 82-3.
[50] See Barry, *Culture and Equality*, pp. 49-50.
[51] See Barry, *Culture and Equality*, pp. 167-8 & pp. 175-6.
[52] The religious freedom and human flourishing arguments coincide in a significant way, namely when the freedom of religious conscience is regarded as a vital component of a worthwhile life. On Martha Nussbaum's 'capabilities approach', for example, religious freedom is important because '[t]o be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly human.' Nussbaum, M. (2000) 'Religion and Women's Equality: The Case of India' in N. Rosenblum *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, Princeton University Press), pp. 335-402, p. 342 & 347.
[53] Macedo, S. (1995) 'Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?' *Ethics*, 105, pp. 468-496, p. 474.
[54] These are the standards of 'public reasonableness', and they apply to 'citizens when[ever] they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns and for other groups who support them'. Rawls, J. (1996) *Political Liberalism* (New York, Columbia University Press), p. 215.
[55] Rawls, J. (1999) *Collected Papers* (ed.) S. Freeman (London, Harvard University Press), pp. 591-4.
[56] Casal, 'Is Multiculturalism Bad for Animals?', p. 10.
[57] See, amongst others, Edwards, D. and Mendus, S. (eds.) (1987) *On Toleration* (Clarendon, Oxford); Horton, J. and Mendus, S. (eds.) (1985) *Aspects of Toleration: Philosophical Studies* (Methuen, London); Mendus, S. (1989) *Toleration and the Limits of Liberalism* (Macmillan, Basingstoke); Heyd, D. (ed.) *Toleration: An Elusive Virtue* (Princeton, Princeton University Press).

[58] This normative argument builds upon the conceptual analysis contained within Benbaji, H. and Heyd, D. (2001) 'The Charitable Perspective: Forgiveness and Toleration as Supererogatory', *Canadian Journal of Philosophy*, 31, pp. 567-86.
[59] For instance Okin, S. M. (1998) 'Feminism and Multiculturalism: Some Tensions', *Ethics*, 108, pp. 661–84; Okin, S. M. (1999) 'Is Multiculturalism Bad for Women?', in J. Cohen, M. Nussbaum and M. Howard (eds.) *Is Multiculturalism Bad for Women?* (Princeton, Princeton University Press); Shachar, A. (2001) *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, Cambridge University Press).
[60] Thus Kymlicka thinks that *Wisconsin v Yoder*, which exempted Amish schoolchildren from mandatory schooling after a certain age, compromised liberal principles. Kymlicka, W. (1996) 'Two Models of Pluralism and Tolerance' in D. Held (ed.) *Toleration: An Elusive Virtue*, pp. 95-6.
[61] Shklar, J. (1989) 'The Liberalism of Fear' in N. ROSENBLUM (ed.) *Liberalism and the Moral Life* (London, Harvard University Press).
[62] 'Parents having genital cutting performed on their daughters suggest that such ritual cutting should be exempt from child abuse laws; Hmong men argue that their courtship by 'capture' should be exempt from rape and kidnapping laws. Undoubtedly there are distinctive cultural meanings of ritual genital cutting and courtship by capture; but the moral interest being served by the laws against abuse, rape, and kidnapping far outweigh the claimed liberty to practice one's own culture.' Levy, *The Multiculturalism of* Fear, p.132.
[63] According to one commentator 'much of the political theory of multiculturalism seems to be of the contextual variety' Kukathas, C. (2004) 'Contextualism Reconsidered: Some Skeptical Reflections, *Ethical Theory and Moral Practice*, 7, pp. 215-225, p. 215. Methodological defences of this approach can be found in Spinner-Halev, J. (2000) 'Land, Culture and Justice: A Framework for Group Rights and Recognition', *Journal of Political Philosophy*, 8, pp. 319-42; Miller, D. (2002) 'Two Ways to Think About Justice' *Politics, Philosophy and Economics,* 1, pp. 5-28; and Carens, J. (2000) *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press).
[64] The Court noted that "fishing…is legal. Extermination of mice and rats…is also permitted. Florida law…sanctions euthanasia of 'stray, neglected, abandoned, or unwanted animals'…the infliction of pain…'in the interests of medical science'…and '…hunt[ing] wild hogs'' (*Church of Lukumi Babul? Ay? v. City of Hialeah*, 508 U.S. 520, 113 S.Ct 2217 (1993) II3B). See Casal, 'Is Multiculturalism Bad for Animals?', p. 8.
[65] Poulter, *Ethicity, Law and Human Rights*, p. 45.
[66] Casal, 'Is Multiculturalism Bad for Animals?' pp. 16-21.
[67] Kagan, S. (1999) 'Equality and Desert' in L. Pojman and O. Mcleod (eds.) *What Do We Deserve? A Reader on Justice and Desert* (Oxford, Oxford University Press) pp. 298-314, pp. 300-2.
[68] Taylor, C. (1979) 'What's Wrong with Negative Liberty?' in A. Ryan (ed.) *The Idea of Freedom* (Oxford, Oxford University Press), pp. 175-93.
[69] O'Neill, S. (2003) 'Justice in Ethnically Diverse Societies: A Critique of Political Alienation' *Ethnicities*, 3, pp. 369-392.
[70] Waldron, 'One Law for All?' pp. 24-5.
[71] Singer, *Animal Liberation*, p. 154.
[72] Barry, *Culture and Equality*, p. 35.
[73] One further point about the relationship between the two component stages of the fair treatment argument is perhaps worthy of note. Namely, that the 'more tolerable' y doing z is for *x*, the less powerful the 'special burden' argument needs to be, and by contrast the 'less tolerable' y doing z is for *x*, the greater the need to demonstrate a clear and strong 'special burden'.
[74] Margalit, A. and Halbertal, M. (1994) 'Liberalism and the Right to Culture', *Social Research*, 61, pp. 491-510.