Law and Religion in Theoretical and Historical Context

EDITED BY
Peter Cane, Carolyn Evans, and Zoë Robinson

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LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT

Is there a place for religious language in the public square? Which institution of government is best suited to deciding whether religion should influence law? Should states be required to treat religion and non-religion in the same way? How does the historical role of religion in a society influence the modern understanding of the role of religion in that society?

This volume of essays examines the nature and scope of engagements between law and religion, addressing fundamental questions such as these. Contributors range from eminent scholars working in the fields of law and religion to important new voices who add vital and original ideas. From conservative to liberal, doctrinal to post-modernist, and secular to religious, each contributor brings a different approach to the questions under discussion, resulting in a lively, passionate, and thoughtful debate that adds light rather than heat to this complex area.

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1

Introduction

CAROLYN EVANS*

It was not so long ago that confident predictions were being made about the eventual demise of religion.[1] Religious people complained that liberal states had privatised religion; excluding it from the public square until such time as developments in science, education and philosophy rendered religion entirely obsolete. With the exception of the unusually religious United States, religion in the second half of the twentieth century played relatively little role in public domestic debates in Western societies and was rarely considered in international affairs. As former US Secretary of State Madeleine Albright put it, most Western political leaders in the 1990s thought that religious disputes 'were the echoes of earlier, less enlightened times, not a sign of battles to come'.[2]

Now, however, religion is back on the public agenda both domestically and internationally. Questions about the role of religion in public life are being prompted by a range of changes in many Western states. The power of 9/11 and terrorist attacks or threats of such attacks has been a powerful motivating factor in such reconsideration. In many ways this is unfortunate as it tends to skew the public discussion towards a debate over religion as a tool of terrorism or to a debate over Islam and the West.

Yet, long before the attacks on the World Trade Centre, there were complex and important questions being asked about the role of religion in society. A number of factors, aside from terrorism, mean that it is timely to reconsider some of the fundamental questions about the relationship between religion and constitutionalism. In particular, reconsideration is

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[1] S. Bruce, *Religion and Modernization* (Oxford University Press, 1992), 170–94.

[2] M. Albright, *The Mighty and the Almighty: Reflections on Power, God, and World Affairs* (Pan Macmillan, 2006), 9. The events of 9/11 and their aftermath, she concludes, forced her to 'adjust the lens through which I view the world' to include greater consideration of religion.

being prompted in many Western states because of the breakdown of social consensus over the role of the dominant religion. In the United States, republican Protestantism lost its place as the de facto national religion in a cultural and demographic sense and elements of that grouping now seek to re-establish its dominance by political and legal means. In the United Kingdom, the role of the Church of England as the established church is being placed under strain with the dual tensions of the rise of non-discriminatory human rights norms and the increasing religious pluralism of the population. In many parts of Europe, the influx of migrants from Muslim countries has raised questions of the way in which existing constitutional arrangements affecting religion (from France's policy of *laïcité* to Norway's established church) should deal with the rise of a substantial Muslim minority population. And in many places, there is a rise in atheism, agnosticism, humanism and secularism that often challenges the idea that any religion should be influential in law and society or at least raises complex questions about equal treatment of religion and non-religion.[3]

While the particular circumstances are new, questions about the way in which law and society should and do respond to religious groups have been grappled with for centuries. The questions play out at many different levels from the local and specific (should the uniform code at a particular school allow girls to wear headscarves?) to the broad and abstract (to what extent should religion be permitted a voice in the public square in liberal societies?). Often the public debate on these complex issues is shrill, heated, uninformed and simplistic, encouraging knee-jerk reactions to particular events with little consideration as to how they affect broader principles about the role that religions play in a particular society. Perhaps the current debate is particularly heated because religious questions have been brought to public attention again in the West through the combination of immigration and terrorism – both topics that tend to inflame public opinion.

In part to play a role in countering this type of shallow debate, in May 2006 the editors of this volume and Professor Adrienne Stone convened a conference on Law, Religion and Social Change at the Australian National University. The aim of the conference was to bring together scholars on law and religion from many different parts of the world with a view to engaging in a thoughtful and informed discussion about the

[3] For a very useful overview of changing religious demographics see P. Norris and R. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge University Press, 2004).

relationship between law, religion and society in the twenty-first century. This volume brings together some of the key papers from that conference. The authors bring to their work very different approaches to the questions under discussion: from conservative to liberal; doctrinal to post-modernist; secular to religious. In many chapters they engage in a lively debate with one another. Our aim for both the conference and this volume was to include people from various viewpoints who were passionate and thoughtful, and above all, who were capable of engaging in debate that added light rather than heat to this complex area.

As with any edited collection, particularly one arising from a conference, the essays gathered here are not, and do not aim to be, comprehensive or inclusive of all issues of law and religion. Indeed, law and religion is such a wide field that no single book could address it comprehensively. Instead, this book adds to the literature in the area by using a series of high quality chapters to address some of the fundamental questions – questions about the nature and scope of engagements between law and religion. Is there a place for religious language in the public square? Which institution of government is best suited to deciding how religion should influence law? Should states be required to treat religion and non-religion in the same way? Is that even possible? How do the historical roles of religion in a society influence the modern understanding of the role of religion in that society? The authors in the volume include some of the most eminent people working in the field of law and religion, as well as some important new voices who add vital, original ideas to the on-going debates.

Overview of the book

The chapters in this book centre around the theme of religion and constitutionalism; they raise questions about the role of religion in the state and the legal system. Some of these questions are played out in the shape of debate over a formal written constitution. It is difficult to discuss these issues in the United States, for example, without consideration of the formative role of the First Amendment's religion clauses. Other chapters are set in a context where there is no single, primary constitution document (such as the United Kingdom and Israel) or where international instruments (such as the European Convention on Human Rights) are the focus. Still others work from the level of theory, seeking to develop a principled approach to the relations between state and religion regardless of the particular constitutional arrangements that

are in place currently. All engage with some of the key questions of theory, history, constitutionalism and law.

Theory

The first group of chapters in this book are theoretical explorations of the role played by religion in public life. Each of the four chapters engages with the question of how the democratic, liberal state should treat religion. The book begins with a vigorous debate between Larry Sager and Jeremy Webber. Sager articulates and defends a conception of religious freedom based on equality between religion and non-religion and argues against a privileging of religious viewpoints and practices. Webber directly tackles this viewpoint arguing that religious freedom has an irreducibly religious core and necessarily reflects a view that religion is valuable.

Meyerson shifts the theoretical debate by moving beyond the specific context of religious freedom and onto the broader question of the role of religion in the public square. In her chapter she defends a broadly Rawlsian approach to the role of religions, creating space for religious people to use the public square but arguing that if they do, they have a moral responsibility to use publicly accessible forms of reasoning. She argues in favour of three principles of political morality: 'that the government should not act on religious purposes; that it should not assist religious groups to spread their religious beliefs; and that arguments based solely on religious convictions should not be offered as reasons for laws and public policies'.

In the final chapter that focuses on theory, Davies examines the plural legal systems under which many people live. While liberal models, such as the ones outlined in the first three chapters, may assume a single, dominant, positivist legal system, the lived reality is that there are webs of obligation that derive from religious and cultural sources as well as the liberal legal system. In contrast to Meyerson's conception of the possibility of state neutrality, Davies argues that the concept of law as an 'institutionally separate, ideologically neutral and normatively superior entity which orders our society is no longer tenable'.

History

The second group of chapters in the book look at issues of church and state by reference to history. McConnell gives an overview of four stages

of the United States Supreme Court's jurisprudence on religious freedom and charts the way in which the case law dealing with religion reflected broader social changes. He argues that the cases cannot be properly understood in isolation from other elements of the court's concerns at various times (for example with desegregation) and from changes in American society more broadly.

Radan also considers the development of First Amendment case law on religious freedom, but this time in the context of cases on the teaching of evolution in schools, particularly the *Scopes* trial and the more recent controversy over intelligent design. He argues that these cases are best understood as not being religiously specific but part of a broader debate over whether controversial cultural issues are best resolved by democratically elected institutions, such as legislatures and school boards, or by non-representative expert groups, such as scientists and judges. He demonstrates the extent to which the debate between elitism and popularism has been present since the early days of interpreting the religion clauses and suggests that earlier approaches that gave priority to representative institutions are preferable to current approaches that give preference to the judiciary.

Smith presents a very different history of state-church relations in her examination of the role of the established Church of England in modern day Europe, as exemplified in the case of *Aston Cantlow* v. *Wallbank*.[4] She argues that the role and importance of the Church of England beyond its parishioners is no longer properly understood in its historical context. As human rights and non-discrimination norms become dominant modes of discourse, they fail to account properly for and understand the older model of the established church. The traditional English model of constitutionalism developing over time, she argues, may not be sufficient to meet the challenge of re-imagining a role for the Church of England.

Contexts

The final group of papers in the book explore particular examples of the questions raised by the legal regulation of religion and how they illuminate broader questions about religion in the constitutional order. Many of them also make arguments about the way in which the constitutional and legal order needs to adapt to meet the challenges of religiously plural societies.

[4] [2001] EWCA Civ 713 and [2003] UKHL 37.

Gavison and Perez look at the issue of days of rest in a variety of Christian, Muslim and Jewish states with particular emphasis on Israel. Their exploration makes clear that the problem of official days of rest cannot be resolved by reference to standards such as neutrality or simple principles of non-discrimination. They carefully chart the legitimate claims made by majority interests in such a case; rejecting the notion that it would be better to choose a 'neutral' day of rest or abolish such days altogether because such an approach would create serious hardship for the religious majority. Yet this does not mean that minority interests simply have to be subsumed into the mainstream, as the authors argue for recognition of minority rights within the majoritarian system. Gavison and Perez acknowledge the complexities that this type of decision entails; even their desired solution may exacerbate ghetto-isation and cause inter-communal divisions, and they thus argue for some flexibility around the basic principles to facilitate solutions that best meet the needs of particular societies.

In another consideration of the way in which minority religious groups can have difficulties with the majoritarian legal system, Willheim's chapter criticises some of the traditional responses of the law to indigenous sacred sites in Australia. His paper highlights problems that may, in particular contexts, confront approaches, such as that suggested by Meyerson, which require public speech to satisfy some criterion of reasonableness. Recognition of indigenous interests in land considered sacred often conflicts with requirements of the liberal legal system for transparency and rationality. Requiring indigenous people to prove or justify their claims about the sacred nature of the land has led to some claims being dismissed on the basis of their 'irrationality' – a dismissal of their relevance that may be the logical outcome of requiring religions always to use concepts that can be equally understood by the non-religious. Willheim attempts to create a solution that recognises that the legal and political system has a certain place in resolving these disputes, particularly in weighing indigenous claims against other interests. He rejects the notion, however, that this system is the appropriate one for determining whether or how a site is sacred, saying that indigenous people should have their own system for making such determinations.

Nehushtan also considers what response legal systems should have to certain types of minorities, but in a rather different context. He explores the justifications that there might be for allowing conscientious objectors (including religious objectors) to be exempt from certain laws that apply to all others. He rejects equality as a basis for such exemptions and argues instead that tolerance is a better basis for understanding conscientious objection.

Naffine explores from yet another perspective the way in which various religious conceptions inform the law. Her chapter explores the multiple concepts of the 'person' present in the legal system and the way in which judges' attempts to keep the legal purely legal fail. Her chapter outlines various conceptions of the person that are used in 'Anglian' legal systems – from the formal legal person to the more religious conception of the person as sacred or as having a special dignity that separates it from other beings such as animals. Her chapter demonstrates, particularly through examination of the case law on foetal status, the way in which religious ideas continue to inform and underpin legal systems even when explicitly religious language or justifications are no longer used.

Finally, Evans takes us beyond single-state approaches to religious issues and considers the way in which the European Court of Human Rights has approached religious freedom cases. He argues that the court has abandoned an approach that respects religious difference and created space for religious expressions to one that is very repressive towards religion while using the language of pluralism and tolerance. He questions whether religious people need to move beyond a reliance on human rights law and to think more broadly about ways of developing religious freedom.

Underlying themes

There are numerous points of intersection, overlap and debate between the authors in this collection. There are several themes that underpin many of the chapters in this work and, in some cases, illuminate reasons why the various authors have taken different approaches to particular questions. In many cases, however, these themes and assumptions are implicit rather than explicitly discussed. In this section, I identify and explore three such themes: the definition of religion; the question of how law should respond to the blurring of boundaries between religion and other phenomena; and whether religion should be conceived of as a social good or not.

The difficulties of defining the boundaries of religion

The definition of 'religion' is notoriously contested. Domestic and international courts have grappled with it, often in the context of legal protections for religious freedom contained in constitutions or treaties.[5]

[5] See, for example, *US* v. *Seegar*, 380 U.S. 163 (1965) (United States); *Church of the New Faith* v. *Commissioner for Pay-Roll Tax (Vic.)* (1983) 154 C.L.R. 120 (Australia).

As societies become more pluralistic and more individualistic, the task of defining what religion is becomes ever more complex. People who claim that they have a religion or that they deserve the same protection as those who have a religion are no longer necessarily members of a relatively limited number of discrete communities of co-believers with settled practices and beliefs. Instead, they may belong to small, idiosyncratic groups. They may be free-thinkers or have composed a series of spiritual beliefs taken from a variety of sources. They may reject institutionalised religion but still consider themselves to be religious or spiritual in a personal sense.[6]

The authors in this book do not discuss in detail the question of what a religion is, but implicit characterisations of religion appear throughout. For most of the authors, religion is primarily a set of beliefs – beliefs that are capable of being adopted, rejected, modified or refined at the will of the believer. This is a particularly post-Reformation Western view of religion that gives primacy to the internal, intellectual aspects of religion over other viewpoints. It analogises religion with other important intellectual commitments. Nehushtan, for example, merges aspects of religion into the broader concept of conscience and claims that all 'deeply held belief[s] that [are] based on deeply held moral values of a group or an individual' should be treated equally. Meyerson uses the Rawlsian notion of 'comprehensive doctrines' that includes religions and some other philosophical or political commitments. Sager speaks a little more broadly of 'deep commitments and concerns' or 'deep passions and commitments' which certainly encompass an intellectual and internal dimension, but may also extend beyond it.

Yet other possible ways of conceiving of religion are also present in other chapters. In their discussion of days of rest, particularly in the context of Israel, Gavison and Perez discuss religion in part in the context of community, culture and ethnicity. Religion is not simply a set of internal beliefs but a way of structuring and living a communal existence in fidelity to religious teachings and cultural practice. It causes no particular difficulty for the state to allow each individual to have *beliefs* about what day of rest, if any, is religiously mandated. When it comes to the state determining whether and when to have an *official* day of rest, however, the issue cannot be resolved by simply allowing for a diversity of beliefs; liberal concepts of neutrality are

[6] Norris and Inglehart, *Religion and Politics Worldwide* above n.3, 55–56 discuss the ways in which traditional measures of religiosity tended to overlook less institutional and more spiritual or individualistic approaches to religion.

not particularly helpful in resolving this type of problem. The social problem of days of rest may not be best resolved by simply aggregating intellectual preferences and letting the majority have its way, as might be reasonable in a whole range of other policy areas. Instead, the communal nature of the religious beliefs means that different religious and ethnic communities will be advantaged or disadvantaged by any decision made by the state. As a consequence, decisions will have the potential to create or exacerbate inter-communal tensions unless minority religious group identity is also taken seriously and given space within the dominant legal/political system.

This communal and identity-driven conception of religion may not emphasise beliefs as central. In this conception it makes sense to say that a person is a 'cultural' Catholic or a 'secular' Jew even though, from a doctrinal point of view, the person has rejected all or most of the tenets of their faith. Further, people whose religion is associated with a publicly visible difference (such as the wearing of particular clothes or symbols, or adoption of a particular physical appearance) may find a religious identity ascribed to them by others even though they may not share all or any of the beliefs of that religion. Such people may be subjected to religious hatred or singled out by discriminatory government policies because they are deemed by others to be religious as a result of their cultural or ethnic connections with a particular community, even if they reject the religious beliefs of that community.[7] Both Radan and Davies, in different contexts, discuss the extent to which religion and culture are intertwined and cannot be easily dissociated from one another.

Willheim, in his discussion of Aboriginal sacred sites in Australia, implicitly raises another complexity in the defining of religion. Laws that single out religion assume that 'religion' can be neatly separated from other concepts such as law, government, morality, tradition, magic or culture. Yet indigenous cultures are but one place where such divisions do not map easily onto the beliefs and practices of the people themselves. The importance of sacred sites and the rules associated with protection of and care for those sites, for example, involve a mixture of religion, law, government and tradition.

Davies' exploration of the plurality of legal systems (some closely linked to religion and others less so) that exist in modern societies also

[7] The United Nations Special Rapporteur on Freedom of Religion or Belief has noted the intersection between racism and religious hatred and the way in which they are often combined to created an aggravated form of persecution. See A. Amor, *The Elimination of All Forms of Discrimination Based on Religion or Belief* A/55/280 (8 September 2000).

demonstrates that the demarcation between law and religion is not always clear. As demonstrated by the example of indigenous people, which is also referred to by Davies, there are webs of obligation deriving from multiple sources that operate on individuals and groups. While the state legal system may conceive of itself as having the only legitimate claim to ultimate obedience, religious or cultural regulation may make the same claim over the same people. Some of the plural legal systems that Davies explores cross the boundaries between law and religion.

Similarly, a concept such as shari'a in Islam cannot be simply reduced to either law or religion but is instead a complex intersection of the two (often influenced, in practice, by the pre-Islamic culture of a particular country in which a Shari'a court operates).[8] The Western assumption that law and religion can be neatly distinguished is challenged by many other cultures where the two are tightly intertwined.

Indeed, Naffine in her chapter uncovers the extent to which competing religious conceptions of personhood continue to influence the law even in Western liberal societies that claim to section off religion from legal considerations. Even if explicit religious language is no longer used by judges, concepts of the person as sacred have been transformed into human rights conceptions of human dignity that have their roots in the Judaeo-Christian tradition (which might be contrasted with some Eastern religious traditions that place less importance on the human being as a distinctive form of animal life).

Regulating religion when we disagree about what religion is

The difficulties of defining religion and the quite different competing conceptions of religion give rise to hard questions for constitutionalism and law. Where once it might have been accepted widely that religion provided a good basis for singling out certain beliefs and actions for different legal regulation, this is no longer a view shared by all. Many legal systems began by giving special preference, or even exclusive legitimacy, to a single religion.[9] Over time, such legal systems often moved

[8] K. Robinson, 'Muslim women's political struggle for marriage law reform in contemporary indonesia' in A. Whiting and C. Evans (eds.), *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region* (Leiden: Martinus Nijhoff, 2006), 183–210.

[9] For a useful brief overview of this historical development in Christian countries see B. Tierney, 'Religious rights: an historical perspective' in J. Witte and J. D. van der Vyver (eds.), *Religious Human Rights in Global Perspective: Religious Perspectives* (Leiden: Martinus Nijhoff, 1996), 17.

away from the notion that an established or predominant religion should have special treatment towards a principle of religious non-discrimination.[10] But once it was accepted that all religions should be treated equally, there arose a question of whether religions should be treated equally with other similar social phenomena.[11]

As the boundaries of religion become more blurred, the question of whether religion is a distinctive social phenomenon that can be theorised or regulated in some way differently to other similar phenomena, becomes acute. Should a conscientious objection to participation in war held on religious grounds be treated differently from one based on a secular humanist view? Should governments in their funding arrangements treat religious bodies (schools, hospitals, employment agencies) in the same way as non-religious bodies? Should arguments made by religious people in the public square be required to be framed in terms that are accessible to all people?

These were complicated questions even when there was a greater degree of consensus about what religion was and fewer religions present in a society. As the boundaries between religion and other forms of practice and belief break down, they become even more complex.

The debate between Sager and Webber in this volume exemplifies two different approaches to these types of questions. Sager attempts to take religion out of the equation as a distinctive phenomenon. Instead, he argues that we should treat like cases alike regardless of religious motivation and create a robust protection of religious freedom based on equal and general liberty. This prevents religion being singled out inappropriately for discriminatory treatment (for example, by preventing religious people from modifying dress codes when modifications are permitted for other good reasons) and also prevents religion from being singled out for inappropriately beneficial treatment (for example, tax-free status for doing something that other non-religious groups are taxed for doing). This approach responds to the blurring of religion into other categories such as conscience, culture or identity, by using equality rather than religiosity as the touchstone for making decisions about legal regulation. The approach fits neatly into

[10] This shift is exemplified in the international instruments that protect the rights of all people without discrimination on the basis of religion, such as the Universal Declaration of Human Rights (1948) Arts. 2 and 18 and the International Covenant on Civil and Political Rights (1966) Arts. 2 and 18.

[11] This issue often arises in equal treatment of non-religious conscientious objectors to military service. See, for example, *US* v. *Seegar*, 380 U.S. 163 (1965).

modern concerns with non-discriminatory approaches to human rights issues, as can be seen in his sustained argument against 'privileging' religion.

A similar approach is adopted by Meyerson with her use of Rawls' concept of 'comprehensive doctrines' – a conception that embraces religion but goes beyond religion as well. In this analysis, there is nothing distinctive about religion, except for the fact that religions are almost all examples of such comprehensive philosophies whereas only some political or philosophical beliefs are. Rawls' approach can be contrasted with that of some other liberal philosophers who single out religion as peculiarly problematic despite the fact that religion shares characteristics with other comprehensive doctrines.

Webber, however, argues that there is an 'irreducibly religious' element even to seemingly non-discriminatory equality-based arguments. As Webber points out, Sager does not argue that religious beliefs have an equal status to that of any old set of wishes, desires, preferences or values. In using language such as 'deep commitments' to describe the values that he equates with the religious, Webber argues that Sager is really beginning from the core religious examples and moving by analogy to other similar belief systems – a methodology that Webber argues should be more generally and explicitly adopted.

Webber's chapter usefully exposes the extent to which it is difficult to remove religious considerations from issues such as protections for religious freedom and the relationship between Church and state. But even if Webber's basic premise is accepted, difficult questions remain. Religious beliefs and practices vary widely – in taking a similar analogous reasoning approach to defining religion, several judges of the Australian High Court held that Theravada Buddhism and Roman Catholicism were both religions and thus entitled to protection under the constitutional freedom of religion.[12] Yet the two have very little indeed in common. Trying to discover what it is that they (or the many other beliefs that claim the title religion) have in common is a far from simple task and one that Webber does not claim to undertake. Yet unless we have some clear sense of what is shared by core instances of religion, it is difficult to know whether and how to analogise to other cases, although the method recommended by Webber of beginning from one's own

[12] For this assumption by the Justices of the High Court of Australia which gave rise to some difficulties in working out what the core definition of religion was, see *Church of the New Faith* v. *Commissioner for Pay-Roll Tax (Vic.)* (1983) 154 CLR 120 (Australia).

beliefs and listening carefully to what others have to say about their beliefs is a useful beginning point.

It may be that the category 'religion' is one that is both too broad and too vague to be useful in distinguishing one set of beliefs and practices from others or to use as a base line for determining whether other beliefs or practices deserve equal treatment. Yet it is not clear that any of the substitute concepts – comprehensive philosophies, conscience, deeply held beliefs – is any clearer; indeed most are even broader than religion. Moreover, understanding such concepts as substitutes for 'religion' seems to be based on the view that religion is fundamentally intellectual; but as I noted earlier, this is only one conception of religion. Finally, it may not be helpful to simply jettison the concept of religion when religion is singled out for special treatment in many constitutional systems and is given specific protection in international human rights treaties.

Social glue or dangerously divisive

A third issue that underlies the discussions in many of the chapters of constitutionalism and religion, but that is rarely directly discussed by the authors, is what attitude the constitutional system should have toward religion. Is it social glue – necessary to the stability and virtue of society? Or is it a dangerous source of division and dissent – a cause of disharmony? Or does it have a more complex and varied role?

This question might be considered central to a discussion about the place of religion in a constitutional order. If religion plays a socially valuable role, particularly if it creates a more harmonious and virtuous civil society, there might be reason for singling it out for protection. For example, that was certainly the view, even less than a century ago, of English judges who defended blasphemy laws on the basis that an attack on the fundamental features of the established religion was an attack on the legal and political system itself.[13]

Radan, McConnell and Smith in their historical treatments of the relationship between law and religion look back to a time when religion was considered integral to the social order. As Smith puts it in summarising the historical justification for Establishment in England, '[Establishment] is based on an assumption that religion has a crucial

[13] For an overview of the history of blasphemy laws and their relationship with State stability see *R.* v. *Chief Metropolitan Stipendiary Magistrate Ex parte Choudhury* [1991] 1 QB 429.

role in underpinning the morality of society, and thus the idea of a civilised society governed by law rather than force.' It is interesting that it is only in these historical treatments of religion that we are presented with a view of religion as integral to a society that functions well. While some writers, particularly Malcolm Evans, are sympathetic to the importance of religion in the life of believers, even they no longer claim that the interests of the state and of religion are intertwined in the way that they were once perceived to be. And Evans notes that the European Court of Human Rights gave short shrift to a claim by the Republic of Moldova that it 'had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion, the majority of the population being Orthodox Christians'. It was not so long ago that this claim would have been considered commonplace in many parts of Europe, but today the European Court dismisses its legitimacy in less than a paragraph.

Webber makes the most robust defence of a positive conception of religion arguing that those beliefs which are deserving of protection are those that 'are high-minded ones, spiritual ones, ones that seem to have the uplifting character we associate with religious belief, remaking us for the better'. But even here, the connection with the state and stability is less of a concern for him than individual choice and well-being.

In contrast to this conception of religious values as being essentially high-minded and uplifting, there is another, more hostile perception. This view argues that religion is a cause of dissent and disharmony which might justify singling it out for less favourable treatment. Religion may have to be tolerated on the basis of respect for autonomy, and because of the social strife that might emerge from attempts to suppress it. But if religion is detrimental to the broader social good, there might be good reasons for its regulation and limitation. This form of analysis of religion comes from a number of different sources.

For some time, of course, there have been scholars who criticise religions as irrational and dangerously delusional.[14] The authors in this volume do not take such an overtly hostile approach, but a number are concerned about the potentially divisive nature of religion. For example, some liberal theorists, such as Meyerson in this volume, are not hostile to religion as such

[14] This form of criticism has been re-emerging in recent times, perhaps most notably in Richard Dawkins, *The God Delusion* (Boston, MA: Houghton Mifflin, 2006). See also the discussion of anti-clericalism and the accompanying footnotes in Webber's chapter in this volume.

but focus on the problems of accepting religious arguments in public debate because their 'irrationality' makes them inaccessible to those who do not share their faith. Religion in this sense is a cause of division unless a mutually acceptable form of communication is developed that strips out religious language before it gets to the public sphere. While expressly denying any objection to religion *per se* Meyerson does acknowledge that the principles for liberal democracies that she proposes 'treat religion less favourably, on the whole, than non-religion'.

Focus on this perspective has been fuelled by the rise of religiously motivated terrorism. This has led some commentators to the conclusion that religion *per se* is inclined towards fanaticism, and ideological and violent non-compromise; and some commentators to conclude that these traits are peculiar to the Muslim religion. The types of constitutional conclusions that arise from such outright hostility to all religions or to particular manifestations of religion can be highly repressive and give rise to greater violence (thus justifying the need for greater repression in response to the proven violent tendencies of those oppressed).

Conclusion

As the chapters in this book demonstrate, there is no sign of the death of religion in legal and constitutional scholarship. Some questions have remained constant over the long history of questioning the relationship between the state and religions that exist within it. Some new questions are developing as old verities disappear and new beliefs develop. In their thoughtful and insightful chapters, the authors in this volume produce a variety of answers that should give all readers interested in the subject of religion and constitutionalism much food for thought.

2

The moral economy of religious freedom

LAWRENCE G. SAGER*

By asking after the moral economy of religious freedom, I mean to ask: What do we have to believe about religion, religious faith and religious practice to support an attractive and robust view of religious freedom? Do we, for example, have to believe that religious commitments and activities are more valuable to individuals or groups than other deeply motivated projects? Or, if not more valuable, more important in some phenomenological or conceptual sense? Do we have to believe in the truth or falsity of some set of premises that are at the bottom of all, most, or at least some religions? Do we have to assign special status to religion on grounds of its particular value or importance to the state? Do we, in sum, have to find some grounds of this sort to justify a privileged status for religion and its entailments, from which status we can in turn derive a reasonably warm-blooded view of religious freedom?

The stakes here are high. If religious freedom depends on a view that religion is in the sense suggested by these questions a privileged activity among the many activities that sometimes matter greatly to some people, then religious freedom is at best deeply controversial by its nature. Worse, as we will see, if religious freedom depends on religious privilege, then the idea of religious freedom is self-contradictory at its core.

To argue that religious freedom does *not* depend on the privileging of religion, accordingly, is to attempt to rescue religious freedom, not to demote religion. That, in any event, is the intent of this essay.

I begin with two propositions of political morality that should be appealing and that do *not* depend upon or entail any special privilege for religion: first, government should not devalue the deep commitments and concerns of any of its citizens on account of the spiritual infrastructure of those

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commitments and concerns. Second, government should extend to all its citizens a robust suite of familiar liberties … liberties that pertain to free expression, to free association, and to domains of private choice over matters best understood as belonging to individuals rather than to the collectivity. So we have an *equality* principle and a *general liberty* principle. Together, these compose a view of religious liberty that we can call *Equal Liberty*.[1]

I want to make two claims about Equal Liberty and its equality and general liberty principles: first, privileging claims on behalf of religion are morally indefensible and self-defeating; and second, Equal Liberty's non-privileging principles are sufficient to generate and sustain a normatively attractive view of religious freedom.

To see the problem with attempts to privilege religion, let us begin with a hypothetical to which my co-author, Chris Eisgruber, and I are partial.[2] Imagine two women who live across the street from each other in a posh suburb, both of whom by odd coincidence have the surname Campbell. Each Ms Campbell wishes to run a soup kitchen for the poor from her home, and each is barred by provisions of the applicable zoning ordinance from doing so. Only in this respect do the Ms Campbells differ: one Ms Campbell is responding to what she believes are the iron-clad demands of her religious faith; in addition to the general command to care for the needy, this Ms Campbell believes herself to have received more specific divine guidance on how to do so, and sees herself as obliged by her god to feed the poor from the precincts of her home; the other Ms Campbell is not responding to anything she thinks of as divine or spiritual, but rather to deep empathy with the suffering of her fellow human beings.

Views of religious freedom that privilege religion will be strongly tempted to distinguish between the two Ms Campbells and strongly tempted to insist on at least this much: the first, classically religious, Ms Campbell has a claim to be exempt from the reach of the zoning ordinance that the second Ms Campbell does not, a claim not to be thwarted in her response to the commands of her religion except under circumstances of overwhelming public interest. That being so, it is entirely possible that under a legal regime that respected religious liberty

[1] With my co-author, Christopher Eisgruber, I have written at some length about Equal Liberty in the context of the Constitution of the United States. Our most recent and comprehensive effort to explain, defend and apply Equal Liberty is our recently published book, *Religious Freedom and the Constitution*, (Cambridge, MA: Harvard University Press, 2007) (hereinafter, *Religious Freedom*). The ideas and arguments in this essay draw very heavily on this joint effort.

[2] See *Religious Freedom*, at 11.

because of the privileged place of religion, the religious Ms Campbell would be entitled to run her soup kitchen and the second, humanitarian, Ms Campbell would not.

Many readers will recoil from this possibility, and rightfully so. Conceived of in this way, religious freedom is self-contradictory at its base. We start with the ambition of respecting the religious views of committed individuals, and quickly find ourselves making matters of considerable consequence to the affected individuals turn on precisely the spiritual infrastructure of their commitments. Very near or at the core of religious freedom must be the notion that persons should not suffer on account of their beliefs about matters of spiritual substance – inter alia, questions of divinity. That being so, the liberty and equality faces of religious freedom are simply two ways of putting the same core principle. A failure of equal treatment as between the two Ms Campbells is, without more, a stark failure of religious liberty. A view of religious freedom that blunders immediately into painful self-contradiction is deeply unfortunate; and that is the natural fate of a view that begins with the idea that religion is privileged.

This point is closely connected with a second observation. There simply is no good reason for offering religion a priority over other deep passions and commitments. It is never possible to establish decisively a broad negative pregnant of this sort. But the structure of the most persuasive claims on behalf of religious privilege can be anticipated. The most convincing claims on behalf of the priority of religion are made either directly from within religion, or from projections about the perspective of those who are within religion. They thus depend on a form of boot-strapping or self-validation that cannot satisfy the challenge of providing reasons to prefer some projects and commitments over others. Of course, from within the cosmology of any deeply felt commitment and its entailed projects, it will be possible to argue for the primacy of that commitment and those projects. But that kind of argument privileges the religious perspective from the outset, and with the rabbit securely placed within the conceptual hat, draws it forth to no one's surprise.

This, in simple sketch, is the basis of the claim that a privileging view of religion is morally indefensible, and, accordingly, that a view of religious freedom that depends on the privileged status of religion is for that reason alone a failed view. This should make Equal Liberty – with its non-privileging principles of equality and general liberty – important and appealing, provided that Equal Liberty can carry the weight of a robust and appealing view of religious freedom.

Can Equal Liberty carry this weight? We would need to canvass a rather broad landscape of possible intersections between religious freedom and life in the modern state in order to approach a decisive answer to that question. But two very different and prominent examples of this intersection are illustrative, and offer good reason to incline toward a conclusion in the affirmative. Both of these examples depend on the equality principle of Equal Liberty for their resolution, and they combine to suggest the broad and constructive reach of that principle.

We begin with the question of state accommodation of religious needs. Under what circumstances, if any, is the just state obliged to offer religiously motivated persons exemptions from otherwise valid laws that frustrate their ability to consummate their religious projects? Traditionally, this has been understood as a question that is quintessentially linked with the privileging of religion, that is, as an issue that is best framed by asking why and to what extent religiously motivated persons are excused from the burdens of democratically chosen laws that everyone else is obliged to obey. Equal Liberty, in contrast, sees the accommodation question as turning on the obligation of the state to treat its members fairly by extending the exemptions already enjoyed by widely recognised and well-regarded groups to those less recognised or less regarded. In particular, Equal Liberty insists that the commitments and interests of the members of minority religious faiths be treated by the state with the same regard the state extends to mainstream commitments and interests.[3]

Several cases illustrate how this equality-based approach can make space for religiously motivated conduct:

- A municipality requires male members of its police force to be clean shaven, but makes an exception for those policemen who suffer from a skin condition that makes shaving extremely disagreeable and medically unadvisable. But Muslims who are prevented from shaving by their religion are not permitted any exception, and can only become policemen at the cost of transgressing a command of their faith.[4]
- A high school basketball association permits players to wear well-secured eyeglasses, despite the incipient hazard if such glasses were to fall onto the court in the midst of play. But headgear of all kinds is prohibited on safety grounds, even modestly sized, well-secured yarmulkas which Orthodox Jews are obliged by their faith to wear.

[3] See *Religious Freedom*, at 78–120.

[4] This is drawn from a real world case: *Fraternal Order of Police Newark Lodge No 1. 12* v. *City of Newark*, 170 F.2d 359 (3 Cir. 1999).

- A community permits the licensed slaughter of animals for human consumption, but prohibits the 'ritual slaughter' of animals. The prohibition is a reaction to members of the community who are of the Santeria faith, and who engage in animal sacrifice as part of that faith's sacrament.[5]

In each instance of this sort, an equality-respecting regime of religious liberty can and must insist that extant behavioral permissions be extended to groups or individuals whose religions require comparable but prohibited behaviour. Indifference, hostility or a kind of tone deafness to the idiosyncratic needs of religious faith must yield to the demand that a community must avoid discriminating on the basis of the spiritual status of its members' deep commitments and interests.

Legislative or regulative bodies respond to a variety of forces that press them to grant exceptions to general rules: political pressure, common sense, empathy, and a sense of what is just. The equality principle of Equal Liberty, in turn, insists that the licence thus created be fairly shared. In particular, no one with comparable needs and interests should be denied the benefit of an exemption on account of the spiritual commitments that underlie their commitments. In a legal regime like that of the United States, in which courts have the responsibility and authority to protect religious freedom in the name of the Constitution, an institutional division of labour will be the result. Minority religious believers can turn to the judiciary and invoke the Constitution to insist that they be given the same exemptions that more mainstream members of the community have wrung from the political branches.

Let us leave the question of religious accommodation aside and take up a second example of the reach of the equality principle in the domain of religious freedom, the question of publicly sponsored religious rituals and displays. Prominent instances include prayers in public schools and public displays of seasonal crèches or the Ten Commandments.

Here too, an equality principle can underwrite the contours of a robust view of religious freedom. From the standpoint of an equality-based view of religious freedom, what makes public rituals and displays of this sort objectionable is their social meaning.[6]

[5] The Supreme Court of the United States unanimously declared such a law unconstitutional because it singled out animal sacrifice among possible occasions for the slaughter of animals: *Church of the Lukemi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).

[6] *Religious Freedom*, at 121–158.

The concept of social meaning is somewhat complex, but for our purposes we can capture its essence by describing it as the meaning that a competent member of the relevant community would ascribe to an event, artifact or practice. While social meaning has figured explicitly in reflective discussion only in recent years, there is at least one invocation of the concept in early constitutional discourse in the United States. The occasion was the elder Justice Harlan's famous dissent in *Plessy* v. *Ferguson*.[7] The majority in *Plessy* found constitutional a Louisiana state law requiring that railroad cars be racially segregated. In the course of so doing, the majority dismissed the idea that the law stamped African-Americans with a 'Badge of Inferiority', asserting that this could not be so 'by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it'. Justice Harlan, in response, insisted that 'the real meaning' of the Louisiana law was both plain and pernicious, namely, 'that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens'. The law, accordingly, was for Justice Harlan a constitutionally intolerable reinforcement of racial caste. This invocation of the 'real meaning' of a public act clearly understands that meaning in the relevant time and place to be fixed; as such it is very much of a piece with the idea of social meaning as I use it here.

What puts publicly sponsored religious rituals and displays at potential war with the equality principle of Equal Liberty is the great likelihood that such rituals and displays will carry with them a message that celebrates some beliefs and believers and denigrates other beliefs and believers. The public denigration of those whose spiritual views do not conform to the mainstream violates the equality principle of Equal Liberty.

What matters is the social meaning of the public act, not the literal content of what is said or displayed. Important works of art, or historically valuable buildings or artifacts can be publicly preserved, displayed, and even celebrated without producing the social meaning that non-conforming spiritual views and those who hold them are devalued in the community. What matters is the social meaning of the public act of display, not the intrinsic meaning of the object that is displayed. Ordinarily, these will coincide, as when a crèche is erected in a public facility during the Christmas season. But on some occasions the object is in effect offered or framed with a social meaning that values great art, important history, or some other element of social interest that does not impugn or denigrate non-mainstream believers.

[7] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

Publicly sponsored prayer exercises, Christmas crèches, and contemporary displays of the Ten Commandments are not likely to present any such ambiguity of social meaning. There are exceptions of course. A community might in effect create a public holiday forum, and invite persons and groups of all persuasions to erect their own displays (the invitation would have to extend to agnostics and atheists as well – we can imagine a Claes Oldenberg sculpture of a question mark!). Or, heroically, a community might try on its own to create multiple displays that were so inclusive as to lose all denigrative force. But barring special circumstances of this sort, prayers, crèches and explicitly religious displays are likely to carry with them the message that some beliefs are celebrated, and others are devalued.

The question we have been exploring is whether the equality principle of Equal Liberty can support a robust and attractive view of religious liberty. We have taken two soundings from among the numerous intersections of governmental activity and religious belief to see what work can be done by the equality principle. And we have seen equality produce attractive results in areas that many have traditionally regarded as depending on a strong privileging of religion. Equality, it turns out, makes very good sense of our intuitions about the accommodation of religious conduct, and further, of our concerns with public religious displays and rituals.

The reader who is persuaded that equality can indeed underwrite a robust view of religious freedom may wonder why Equal Liberty as it is presented here needs a second principle, the general liberty principle. The general liberty principle holds that government should extend to all its citizens robust liberties of free expression, free association, and private choice over matters best understood as belonging to individuals rather than to the collectivity.

A non-privileging view of religion like Equal Liberty depends upon the general liberty principle in two respects. One thing a non-privileging view has to do is to account for some features of actual or readily imagined regimes of religious liberty that seem to insist on a privileged view of religion. A prominent example of such a potentially embarrassing feature of the religious liberty landscape concerns the selection of priests and other religious leaders. The Catholic Church, for example, will only ordain men as priests, and almost no one thinks that it would be proper for a governmental entity to insist that women be eligible for the priesthood as well.

Norms of intimate association can explain this almost universal view without privileging religion. Suppose the government tried to regulate the

choices of private citizens with regard to their best friends, their mentors, or possibly even their psychiatrists. Specifically, suppose that the government in question insisted that these choices be made without regard to race or gender. Such a regulatory regime, of course, would be all but impossible to administer, at least in modern, Western societies. But beyond this practical difficulty would lie a strong objection in principle. There is a spectrum of choices that runs from public to private, and at some point along that spectrum, we find good reason to object that the state is overreaching. Basic choices about the formation of these intimate associations of friendship, mentoring and guidance lie largely if not exclusively beyond the reach of the state. Now, for our purposes, the point is this: many organised religions have a distinct institutional structure which takes these intimate associations and imbues them with characteristics we do not associate with intimacy: formal title, group performance, and market compensation. But the association between a priest and a member of his flock remains an intimate one that in large measure ought to be outside the regulatory authority of the state. It bears emphasis that nothing in this understanding requires that religion be privileged, merely that its distinct structural features be acknowledged and responded to. Parenthetically, it is entirely possible that utterly non-religious groups might in fact be organised in the same way, in which case such groups would enjoy the same regulatory immunity as that which we instinctively believe should attach to the choice of religious leaders by organised religious faiths.

This, the *conceptual* importance of the general liberty principle, is joined by considerable practical importance: much of the liberty that is most important to minority religious faiths is given them directly by liberties that are in principle open to all. This is especially true of robust rights of free expression. The abilities to declare, proselytise, and solicit support for one's faith go a long way towards satisfying the most important – and in some times and places, controversial – impulses of minority religious faiths. Not surprisingly, in the United States, minority religious faiths have ranked among the most important consumers of the rights of free expression, and a number of the most prominent religion-favouring decisions of the Supreme Court are in fact founded in rights of free expression and involve no singling out of religion and implicate no questions of privilege.[8]

[8] Two prominent examples are *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), which protected offensive solicitation on grounds of free expression and *West Verginia Bd. of Educ.* v. *Barnette*, 319 U.S. 614 (1943), which held that the right of free expression included the right not to recite a compulsory pledge of allegiance.

In the course of showing that an attractive theory of religious freedom can – and indeed *must* – rest in substantial part upon a principle of equality, I have left one important question unanswered. Why single out religion for protection against unequal treatment? Religion, of course, is not the only domain that can be or is singled out for such protection – protection from discrimination on account of race, ethnicity, gender, and sexual orientation are staples of human rights analysis. But still, on the equality-centred view of religious freedom, religion is plucked from among a wide range of consuming activities and entailed commitments. What – if the privileging of religion is barred – can justify this heightened protection?

Vulnerability is what evokes and justifies protection – vulnerability to hostility and neglect. Arguably we need not go any further than history and contemporary experience, and observe in each that religion frequently functions as a fault line of social discord, a gravamen of injustice. But a good deal more can be said on behalf of what is paradoxical only in the most superficial sense, namely, the special protection of religion on equality grounds.

One quite basic feature of religion makes it especially vulnerable to hostility or neglect. Religious beliefs include many idiosyncratic and arbitrary dictates – arbitrary in the sense that they cannot rationally be explained to someone not in their grip, except possibly by the general defence that the group in question holds itself together in part by adherence to these dictates, or by the specific defence of textual interpretations and authorities that are themselves beyond reasoned defence. Why, for example, one day of rest and not another? What is plausibly at stake in insisting on men wearing beards (setting aside the strong aesthetic claim on behalf of this practice)? Why worry whether a particular fish has scales of the right sort before knowing whether you can eat it or not? Why insist on horse-drawn vehicles, or object to standard autopsy procedures? The arbitrary features of a given faith serve to strengthen internal bonds, but almost as a corollary they also encourage a kind of cross-group tone-deafness to the unfamiliar and inexplicable concerns of other faiths.

There is an additional congeries of related features of organised religious belief and practice that serve to make religion vulnerable to hostility and neglect. These pervasive characteristics of organised faith can be considered against the backdrop of a hypothetical that may seem threatening to the social meaning view of public displays and rituals that we explored earlier. Imagine a municipality called Fineville, which is contemplating erecting a large welcoming sign spanning the portal to the community. Two signs are being considered. The first would say 'Fineville – A Christian Community'.

The second would say 'Fineville – A Nuclear-Free Community'. Now both of these signs might well be irritating, even offensive, to some members of the community. But if we are going to object to the first sign on the grounds that it denigrates those in Fineville who are not Christians, we need to understand how the first sign is different from the second; otherwise, all public expressions of will or value that evoke serious disagreement are similarly open to objection. And to understand what gives the first sign a special denigrating valence, we need to make some observations about the way many religions happen to be.

Organised religious faiths tend to be broadly encompassing webs of belief, not small isolated chunks. Organised faiths tend, in part as a result of their breadth, to be all-or-nothing affairs; one is either inside or outside such faiths. Organised faiths typically involve substantial public rituals and assign great importance to participation in those rituals. And the stakes assigned to being faithful or faithless are typically quite high: salvation or damnation, status as a chosen member or outcast, illumination by the favour of the appropriate god or relegation to the darkness of disbelief or infidelity.

Little wonder, in light of these commonplaces of religious faith, that the social meaning of public religious gestures like Fineville's self-description as a Christian Community or the recitation of a prayer in public school is denigrative of those whose beliefs do not conform. These same features of organised religion go some distance to explain the broader phenomenon of the vulnerability of non-mainstream religious belief to public hostility and neglect. These all-encompassing webs of belief and status are much too often what intensely bind the members of tight social groups and encourage the exclusion and demonisation – or more mildly, a condescending view rife with surprise and bafflement – of those who are not inside those webs. Hence, in important part, religion's vulnerability to unequal treatment and hence the justification for an equality principle aimed at the protection of religious minorities.

I hope to have established just this: a robust regime of religious freedom can rest securely on a conceptual foundation of an equality principle and a general liberty principle. And neither of those principles need offer any privilege to religion. The moral economy of religious freedom, accordingly, does not depend upon the privileging of religion, and hence escapes what would otherwise be conceptual peril.

3

Understanding the religion in freedom of religion

JEREMY WEBBER*

Introduction

In our pursuit of an inclusive, egalitarian, individual-rights-respecting polity, we are often tempted to interpret freedom of religion as though it were designed to place religious belief on a par with other beliefs – as though it were designed to secure an absolute equality in religious matters (equality, that is, between religion and non-religion, as well as among different religious beliefs). This view is the centrepiece of an important new book by Christopher Eisgruber and Larry Sager,[1] which Sager defends ably in his contribution to this volume. Indeed, Eisgruber and Sager do more than simply assume that religious and non-religious beliefs must be treated the same: they argue that a commitment to equality and liberty alone is sufficient to generate the entire content of freedom of religion, without attaching any value to the distinctive nature of religious belief.

This, I will argue, is a mistake. My essential claim is that one cannot make sense of freedom of religion – at least if it has something like the scope that the great majority of commentators, including Eisgruber and Sager, ascribe to it – unless one recognises that the freedom is founded upon the affirmative valuing of religion. Any coherent conception of the freedom depends upon the premise that religious belief has special value and deserves special protection.

That, of course, raises a conundrum, one that I suspect plays a crucial role in Eisgruber and Sager's desire to base the freedom on something other than respect for religious belief: if freedom of religion is founded upon valuing

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[1] C. L. Eisgruber and L. G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007).

religion, how can the freedom possibly escape the fact that believers always, inevitably, value specific religious commitments, not religious commitments in general? How can someone who firmly holds to the importance of one set of religious beliefs extend that recognition to others' beliefs, beliefs that one considers to be false and perhaps even pernicious?

This is the central conundrum of all reflection on freedom of religion, rearing its head in unexpected ways in contemporary discussions. While there are ways of working through that conundrum – ways that are central to the very idea of religious freedom – they are not as simple as either a) stipulating a universal definition and justification of religious belief, b) identifying some broader class of conscientious beliefs that includes religious beliefs alongside some secular equivalent, or c) avoiding altogether any concern with the beliefs by grounding the right purely and simply in norms of equality and liberty. We never completely escape the fact that our fundamental reference point in any coherent definition of freedom of religion remains religious practice: concrete, particularised religious practice. Our conception of the freedom may be **universalising** in the sense that we aspire to universality – indeed I argue that it should be so – but we are always struggling towards universality from a location that is firmly rooted in an engagement with and appreciation of particular religious practices.

But we are now getting much too far into the argument. I will flesh out the aspiration towards universalisation later, but for the moment let me say four more things to situate the claims in this essay.

First, I do not consider the dynamic nature of the freedom to be unique to freedom of religion. It is, I believe, characteristic of all our attempts to articulate and apply rights. We always start from particular paradigmatic experiences and seek to work outward. In religious freedom those experiences are experiences of religion.

Second, in making this argument I am not motivated by a desire to expand the role of religion in the public sphere. On the contrary, I share an aspiration to equality, inclusion, even-handedness and impartiality in public interaction. Towards the end of this essay I will provide a sense of how we might pursue that aspiration. But we are fooling ourselves if we think we can define a coherent conception of freedom of religion without recognising that the freedom presupposes an affirmative valuing of religion. If we attempt to do so, we almost always end up smuggling in a covert valuing of religious practice – as indeed Eisgruber and Sager do. I would rather that the presupposition be clear so that we can address, not paper over, the fundamental conundrum with which I began this essay.

Third, nor am I arguing for extensive religious immunities from legislation. I do argue that any coherent approach to freedom of religion will attach importance to religion and will seek to accommodate religious practice. This is true even of Eisgruber and Sager's argument, as I will show. But this does not mean that religious reasons should trump all other considerations.[2] On the contrary, religious reasons have to be weighed against competing interests and may have to give way, at least in part. Nor do I claim that this weighing must always be done by courts applying constitutional limitations. As I argue elsewhere,[3] the weighing might be better done under legislative authority, either by the legislature itself or by courts or human rights commissions applying legislated standards. The special consideration due to religious reasons is relative, not absolute.

This is not, then, an argument for the primacy of religion in public life. Those who advocate expanded reliance on religion will nevertheless take comfort in this analysis, for it does suggest that if we feel obligated to protect freedom of religion it is because we attach special value to religious reasons for action. But note (and this is my fourth point) this argument cuts both ways. It is possible that one might acknowledge the force of this essay's argument and still conclude that freedom of religion is misconceived – that religious practice does not have special value after all and therefore should not be constitutionally protected. In fact, if Eisgruber and Sager were to be consistent they would have to take this step – but then the constitutional protections would not have the content they ascribe to them.

My argument proceeds in three stages. I first deal with definitions. As with most rights, the content of freedom of religion is complex and contested. The debate is often hindered by slippage between different components of the right (I). I then turn to the core argument of this essay – the argument that any coherent understanding of the freedom must assume that religious beliefs have special value (apart from an entirely minimal definition, one so minimal that very few people accept it) (II). Finally, I suggest how the aspiration towards evenhandedness,

[2] Eisgruber and Sager often make their task easier by suggesting that opposing views assert the absolute priority of religion. See, for example, *ibid*., at 5. That is a straw man. Certainly in liberal democratic polities freedom of religion has never had that priority, and I am not arguing for such an approach.

[3] J. Webber, 'The Irreducibly Religious Content of Freedom of Religion' in A. Eisenberg (ed.), *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006), 178; J. Webber, 'A Modest (but Robust) Defence of Statutory Bills of Rights' in T. Campbell, J. Goldsworthy and A. Stone (eds.), *Human Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Aldershot: Ashgate, 2006) 263.

towards the inclusion of others' beliefs, can be reconstructed upon these foundations (III).

I. What is freedom of religion?

To begin, I should set aside one historically important approach to religion that often lurks in our discussions but that is rarely acknowledged (at least until a spate of recent works revived the tradition[4]). That is the extreme version of the anti-clerical strain in liberalism: the sense that religion is inherently irrational, obscurantist, and should be superseded. I strongly suspect that this view continues to play a role in many arguments designed to keep religion out of the public sphere. When approached in this spirit, freedom of religion comes very close to freedom **from** religion. Although I will not be able to develop the argument here, I start from the position that freedom of religion is at least in part about the protection, not the elimination, of religious belief.

Even if one accepts that premise, however, there are three quite distinct strands to freedom of religion.[5]

The first is **freedom from coercion** in matters of religion – both freedom from coerced religious observance and freedom from interference with religious observance. This was the original ground on which freedom of religion was won. It remains the heartland of the freedom. While virtually all people (in Western democratic countries) would agree that religious belief itself should not be coerced, we still vigorously debate the permissible impacts that the state can have on religious practice. Does religious freedom only protect belief itself or does it also protect elements of practice? If so, how far does that protection extend and how strong should it be? Should it only proscribe purposeful attempts by the state to restrict practices because of their religious character or should it also protect against inadvertent interference?[6] It is this branch of the definition that is in cause in most claims for religious exemption. Here,

[4] S. Harris, *The End of Faith: Religion, Terror & the Future of Reason* (New York: W. W. Norton, 2004); R. Dawkins, *The God Delusion* (Boston, MA: Houghton Mifflin, 2006); D. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York: Viking, 2006); S. Harris, *Letter to a Christian Nation* (New York: Alfred A. Knopf, 2006); V. J. Stenger, *The Failed Hypothesis: How Science Shows That God Does Not Exist* (Amherst, NY: Prometheus Books, 2007).

[5] For a more extensive discussion of the components of freedom of religion and the relationship among them see J. Webber, 'Irreducibly Religious', above, note 3.

[6] See for example: *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872 (1990); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

the essential argument is that the coercive power of the state should not be used to impose religious observance or impede religious practice.

There is a second commonly accepted strand to freedom of religion, one that emerged later, namely a commitment to **equality in the relationship of all citizens to the state, regardless of religion**. This strand is not concerned merely with the coercion of belief. Rather it is concerned that all citizens, of whatever belief, are included equally in the state's regard. This is the core of the objection to the establishment of religion. Certain forms of establishment – a requirement that one renounce other religions, attend religious services or enunciate a creed – are still about coercion. But that is not true of less demanding forms of establishment. It is not true, for example, of the residual establishment of the Church of England in today's Britain, or even the Anglican establishment during the years when Roman Catholics were subject to disabilities but not direct coercion. In such situations, the key issue is not freedom from coerced belief but rather equality of membership, equality of respect, within the state.

Note that equality does not require complete state abstention in matters of religion. In fact it may require that the state take religion into account in order to respect fully its believing members. What it does require is the careful calibration of recognition so that all are treated on a basis of rough equality.

This brings us to the third strand, the strand I most want to contest: the injunction that **the state should abstain from all special valuation of religion, indeed from all entanglement with religion as distinct from any other form of belief or opinion** – that it should take a thoroughly secular approach on the grounds that anything else would constitute state endorsement of highly particularised conceptions of the good. This position strongly denies that the state can ascribe any particular value to religious belief. It requires that the state treat religiously motivated beliefs as though they were on the same plane as all other beliefs.

Only this strand of the freedom tends strongly towards the metaphor of a 'wall of separation' between church and state – the aspect of American freedom-of-religion jurisprudence that Eisgruber and Sager rightly and cogently make the principal focus of their critique.[7] But after making this argument Eisgruber and Sager try to recreate the separation (only at a level of fundamental principle rather than policy) by suggesting that freedom of religion can be defined without any distinctive valuing of religious

[7] Eisgruber and Sager, above, note 1, chapter 1.

belief – by simply requiring that it be treated the same as any other need or commitment. This cannot be the basis for a viable definition of freedom of religion, at least one with anything like a recognisable scope. It cannot co-exist with the first dimension of the freedom – the non-coercion dimension – which inevitably presupposes a special valuing of religious beliefs. I suspect that even the equality-of-citizenship dimension would be difficult to define without acknowledging the special significance of religion. Why should this be so?

II. The religious nature of freedom of religion

It may help to begin with one rudimentary (but nevertheless important) conception of the freedom that is able to treat religious beliefs as though they were entirely on a par with non-religious beliefs: the protection of the individual's interior realm of belief and thought. It is worth starting here because this conception shows a) just how limited a freedom defined in that manner would be, and b) the dependence of any larger freedom on an affirmative valuing of religion.

In its first modern formulations in the aftermath of the Reformation, freedom of religion tended to focus on the coercion of belief, particularly the punishment of heretics and forced conversion. The religious nature of the beliefs was important to the extension of tolerance: those who condemned the persecution did so because they were willing to tolerate religious questioning and interpretation (though generally within very strict limits), wished to maintain the unforced integrity of religious commitment or, more commonly, recognised the sheer destructive power of religious conflict given the tenacity with which people held to religious beliefs.[8] The freedom still was, then, a toleration of distinctively religious beliefs. But as long as it was concerned with the inviolability of the interior realm, the freedom could be extended to apply to all sorts of beliefs without losing its coherence. It could protect against any attempt to determine coercively an individual's religious, political, economic, or aesthetic commitments. Even the most mundane of personal preferences could be protected. Extended in this manner, the freedom would be concerned not so much with the protection of religion as with the control of one's own mind. Religion may have been a primary context in which this control became important but its protection need not depend upon

[8] See D. MacCulloch, *Reformation: Europe's House Divided 1490–1700* (London: Penguin, 2004).

the religious nature of the belief. A freedom so defined would be much more akin to freedom of expression – the freedom to speak one's mind – than to a distinctively religious freedom.

But such a freedom would be very limited in scope. As soon as protection was extended beyond mere belief to cover some form of action based on that belief, the distinctive valuing of religion would begin to play a crucial role. Let me take two contemporary examples of religious accommodation.

First, consider the question of whether students should be entitled to wear yarmulkas when headgear is prohibited by a school's dress code. Why do we think this situation raises special reasons to vary the rule, reasons that would not be raised by a student's desire to wear, say, a baseball cap? One might answer, 'Because a baseball cap does not raise such deep concerns.' Why not? Precisely because we treat religiously motivated actions as more significant, more worthy of respect, than other actions.[9] It is that respect that prompts us to attach more significance to the banning of a yarmulka – indeed so much so that to treat yarmulkas and baseball caps as comparable in this context strikes us as laughable, perhaps even offensive.

In his essay in this volume, Larry Sager uses a similar example: the banning of headgear on safety grounds in basketball games. He notes that well-secured eyeglasses are permitted on the court and suggests that well-secured yarmulkas should be exempted from the rule simply so that those wearing yarmulkas are treated in non-discriminatory fashion. He uses this example to suggest that an equality-based approach is sufficient to support the accommodation of religious interests, without any special valuation of religious belief. But why should yarmulkas be treated as analogous to eyeglasses when other forms of headgear are not? The reason clearly is our special respect for individuals' religious obligations, which we then weigh against the demands of safety or the desire for uniformity. The religious nature of the practice accounts directly for the weight we attach to the wearing of a yarmulka.

Like Eisgruber and Sager, Brian Barry also wishes to establish the protection of religious obligations on grounds that do not require special treatment for religion. His argument roughly tracks Eisgruber and

[9] In their book Eisgruber and Sager admit this fact, noting that wearing a Budweiser cap would not be comparable to wearing a yarmulka: above, note 1, at 101ff. But this severely restricts their claim of neutrality between religious and non-religious interests, shifting the focus to what makes interests 'sufficiently comparable'. As I suggest below, one cannot make sense of that notion without taking religious commitments as being particularly valuable; it is that value that lifts them out of the realm of 'any secular conviction or impulse', a phrase they use to contrast what is not protected.

Sager's, although in his view the rejection of religious preference should flow right through to the structure of the outcome. He argues that whenever a request for a religious exemption is made one should first examine the rule to see whether it can be amended to accommodate the religious obligation without establishing a special exemption.[10] In the yarmulka example, one might therefore revise the rule to permit any form of headgear as long as it is well secured. This may be a prudent response. The original rule may be overly restrictive; the religious obligation may be useful in drawing attention to that fact. Moreover, maintaining an identical set of rules for believers and non-believers may have strong practical advantages: it may ease enforcement, limit the need to inquire into others' religious beliefs, and prevent less tolerant members of the community from engaging in dog-in-the-manger recriminations. But here too it is disingenuous to suggest that the response avoids any special valuing of religion. Even in Barry's analysis the revision of the rule is prompted by our concern with its impact on religious believers. No one would bother revising the rule if only baseball caps were in issue. If Barry really wanted to avoid religious judgements, he would allow the school to do whatever it wanted and let the chips fall where they may. What is more, even when a generic solution is possible, it may in some cases impair the legitimate interests of the majority more to adopt it. It can be more intrusive, not less, to require a universal solution to a specific claim. Why should all members of a school forgo the benefit of a dress code simply because there is one person particularly affected? Would it not be fairer to the non-believing majority to adopt an exception that was tailored to the religious interest – allowing individuals to wear yarmulkas, for example, as a limited exception to the school uniform?[11]

Take another example that occurs often in the literature: an entitlement to reasonable accommodation for someone who seeks to work on Sunday rather than Saturday because the latter is their Sabbath. Any such exemption would need to be subject to the requirements of the business (a key element in any test of 'reasonable accommodation'). But assuming that the employee's preference can be accommodated without undue hardship

[10] B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, MA: Harvard University Press, 2001) at 38–40.

[11] Indeed Barry is driven, for reasons like these, to accept a 'pragmatic' case for exemptions, including the adoption of a 'rule-and-exemption approach' in the case of school uniforms: *ibid.* at 50ff, especially 60 (regarding uniforms). In his discussion of such exemptions, he also makes clear that he sees special reasons to accommodate religiously required clothing. See for example his discussion of the *hijab* at 58–59.

North American anti-discrimination law makes clear that an employer has an obligation to accommodate.[12] Here again, the obligation is based on the sense that religious reasons have a superordinate importance, an importance that is not ascribed to the desire to watch college football, the simple wish to spend Saturday rather than Sunday with one's family, or even the impulsion to visit an elderly relative on a more convenient day. It is the special respect due to action on religious grounds that is determinative. To the extent that this situation raises an equality issue at all it does so not because religious practices are treated differently from secular practices but rather because one person's religious practices are treated differently from another person's religious practices – one person's Sabbath is preferred to another's.[13] If there is an equality issue it is precisely because we are dealing with interests that have a comparable level of importance.

Can we avoid this attribution of value by having our guarantee cleave to the rudimentary conception of the freedom I noted above: the protection of the interior realm of belief, eschewing all protection of religious practices such as yarmulka-wearing or Sabbath-observing? Yes, but note just how limited that freedom would be. The moment one extends the protection to outward manifestations of belief (even those considered most central, such as the ability to have a house of worship, attend a religious service, pray in public, or bury one's dead according to one's rites) the special value of religion begins to play a role in our reasoning.[14] Suppose, for example, that a state prohibited alcohol and provided no exception for communion wine. This law would have no impact whatever on individuals' interior realm of belief. They are not told what to

[12] See for example: *Ont. Human Rights Comm.* v. *Simpsons-Sears* [1985] 2 S.C.R. 536. A related issue was raised in *Sherbert* v. *Verner* 374 U.S. 398 (1963), in which the US Supreme Court overturned the decision of a state unemployment commission that had denied the plaintiff unemployment insurance on the basis that she had refused jobs that would have required her to work on her Sabbath.

[13] And this is precisely the foundation on which Eisgruber and Sager base their support for *Sherbert* v. *Verner*: above, note 1, at 14, 40–1, 97, 115–17. They expressly reject the idea that Mrs Sherbert would have had a claim if she had refused work on Saturdays because she could not find affordable child care (115–17). See also their discussion of *Employment Div.* v. *Smith* (above, note 1, at 92–3 and 96).

[14] Note John Locke's evolution from a position that separated interior belief and exterior action to one that recognised a strict separation to be impossible given believers' impulsion to engage in at least some actions on the basis of their beliefs: J. Tully, 'Introduction' in J. Locke, 'A Letter Concerning Toleration' (Indianapolis, IN: Hackett, 1983 [1689]) 1 at 6–7. Tully's introduction describes the development of religious toleration in post-Restoration England in a manner similar to my brief account below, noting the manner in which theory responded to the experience of religious conflict.

believe. They are not punished for their beliefs. But clearly any adequate conception of religious freedom would be triggered by such a law, precisely because the prohibition of communion wine raises special concerns, concerns that are not present in other contexts. We may decide that the benefits of a total prohibition outweigh those concerns, but special consideration would be necessary, consideration not required if only social drinking were affected. The same would be true of a prohibition on male circumcision, bans on religious music, the forbidding of practices integral to halal butchery, or regulations that prevented the building of houses of worship in residential areas. All would be of special concern because we treat religious interests as especially important.

Nor does the attempt to found the right on non-discrimination avoid the focus on the special value of religious belief and practice.

First, what if there is no secular equivalent? To take one of Larry Sager's examples, what if there is no secular exception to the requirement that police be clean-shaven? Is there no freedom-of-religion argument? Or do we keep searching for more distant comparisons until we find one that allows us to protect the religious practice? Perhaps all police are required to be clean-shaven, but no one controls the length of their hair. How can beards be prohibited, we might say, when long hair is not prohibited?[15] Are we not simply casting about for a comparison that will allow us to protect a practice valued because of its religious significance? If so, we should just say that and act accordingly.

Second, in none of these cases is the essential concern the fact that religious practices are treated differently from non-religious practices. For in fact, if one wants to treat religious practices the same, one should leave them exposed to legislative prohibition. For example, Sager suggests that the ritual sacrifice of animals should not be prohibited because other forms of butchery, secular in nature, are permitted.[16] But a

[15] This is not a far-fetched example. Eisgruber and Sager do range far afield in order to find permitted conduct to compare to prohibited religious practices in order to make their equality argument. In arguing for equality-based exemptions from zoning by-laws, for example, they invoke comparisons to the accommodation of 'other kinds of personal needs and commitments – such as physical handicaps, special financial hardships, educational interests, or expressive needs'. See above, note 1, at 13 and for examples, 96ff and 104ff (where they specifically note the need to range 'further afield' when there are no closely related exemptions (at 105)).

[16] The example draws on *Church of the Lukumi Babalu Aye Inc.* v. *Hialeah* 508 U.S. 520 (1993). The ordinances that were struck down in this case specifically targeted a religious practice. That deliberate targeting of religion was responsible for the court's unanimous decision.

legislature can stipulate virtually any limit on secular butchery it sees fit. All kinds of practices are forbidden by rules for the humane treatment of animals and none of those practices gives rise to special scrutiny. Why does Sager compare religious practices to the one form of secular butchery that is permitted? Why not compare religious butchery to the host of practices that are prohibited? Barry, who similarly attempts to ensure that religious reasons are given no special preference in such decisions, concludes that religious slaughtering should not be exempted from legislation for the humane slaughter of animals, and in this specific instance he is more consistent than Sager.[17]

The language of equality gains most traction when the differentiation occurs among practices all of which are religious. Then the equality-of-citizenship dimension of freedom of religion is engaged. One is no longer concerned with the elimination of coercion; one seeks a more thorough-going equality of treatment. The problem with displaying crucifixes in public buildings, for example, is not that individuals are being coerced to engage in religious practice, but rather that one religion is being affirmed while others are being disaffirmed. Sager is right to emphasise the role that equality plays in such situations.

But note that these cases still depend upon the special valuing of religion. Why do we insist that religions be treated equally when we do not impose a similar obligation on other displays? If the state chooses to recognise great cricketers we would not think that this amounted to an unconstitutional slight of netball or rugby players – even in Australia where sport comes about as close to religion as one can get. If the state exhibited photographs of distinguished scientists we would not think that this constituted discriminatory treatment of artists, musicians, or even theologians. We are keen to preserve equality in the state's affirmation of religion precisely because religion is unique, is especially significant in a way that is relevant to our moral judgements, and we are committed to treating phenomena that share that significance equally.

Eisgruber and Sager suggest one further possibility when they emphasise the special vulnerability of religious beliefs. They note the idiosyncratic and often minority character of those beliefs. They note that those characteristics expose them to special disregard. They note the historical prevalence of discrimination against religions. All of that is right, but note that once again the concern with discrimination depends upon

[17] Barry, above, note 10, at 40–4. But as noted above, Barry himself is far from consistent in other instances.

seeing the religious beliefs as especially valuable. Eisgruber and Sager are not confining their argument to situations in which believers are singled out and subjected to personal persecution: Catholics being banned from office; Muslims being expelled from villages; Jews being subjected to the worst imaginable persecution. In those situations, it would be entirely accurate to say that the religious nature of the beliefs had nothing to do with our moral concern: religion simply served as a marker by which people were singled out for discriminatory treatment. But Eisgruber and Sager are also talking about the special vulnerability of religious practices to prohibition, arguing that that vulnerability raises an equality claim, one that is not dependent on any particular value of religious practices. This further argument cannot be right. Legislation always permits some practices and prohibits others. Some points of view are always given short shrift in legislative debates, often unjustifiably, and doubtless because all too few people see the force of them. Yet we do not treat that as raising a special concern with discrimination. We only do so in the case of religious practices because we see them as having special significance, significance that should not be left to the ordinary vagaries of decision-making.

Note the nature of my claims here. I am not saying that equality is absent from our consideration of freedom of religion. On the contrary, it is a necessary element of the second branch of the freedom noted at the beginning of this essay. Moreover there are some situations where religion functions only as a marker, where the value of religious belief plays very little role. In short, concerns with equality do intersect with concerns of religious freedom, sometimes complementing them, sometimes overlaying them, sometimes essentially displacing them. The same might be said of other freedoms, such as freedom of expression or freedom of association, which similarly overlap with elements of religious practice. But the frequent conjunction of those rights is not enough to make Eisgruber and Sager's case. They need to show that equality is sufficient to address the moral concerns that arise in the context of religious freedom. In that they fail. Many of their own examples quietly attach special value to religious belief and practice.

But what about the possibility of seeing religious practice as merely one example of a larger category, where that larger category can be defined in purely secular terms?

Some commentators try to avoid entanglement with religion by seeking to calculate the relative prejudice in non-religious terms. They suggest that we should protect against interference with religious practice because the

degree of harm experienced by believers is comparable, for example, to that suffered by people forbidden to wear glasses on the basketball court.[18] On this view, our concern should be to ensure that equivalent prejudice is treated equivalently. But surely this is disingenuous as an explanation for freedom of religion. There is no serious attempt to gauge the anxiety experienced by a yarmulka-wearer and compare it to that experienced by the wearer of eyeglasses or, for that matter, that of anyone else who is discouraged or forbidden from playing. The prejudice is imputed, not measured, precisely because of the importance we attach to religion – and indeed one wonders on what possible metric comparative harm might be measured.

More plausible is the attempt to generalise the type of interests protected by treating religion as merely part of a general category of conscientious belief.[19] One sees this in Eisgruber and Sager's work, especially in their frequent invocation of the adjective 'deep'. Religion, Sager says, should not be given a priority over 'other deep passions and commitments'; he does not seek to protect all 'commitments and interests' in a manner equivalent to religion, only deep ones; and he and Eisgruber suggest that the state must not discriminate between religious convictions and 'comparably serious secular convictions'.[20] I share the desire to extend protection to other like commitments. The drive to generalise is fundamental to any viable conception of rights. But I question the extent to which the use of the adjective 'deep' succeeds in leaving religion behind.

If we were to ask, 'What does "deep" mean in this context?' I strongly suspect that the answer would begin with religious examples and work outward to include situations that displayed similar features. Indeed, that is what happened historically with the use of the phrase 'freedom of conscience', which initially had a distinctively religious content but was then extended to beliefs that were similar in nature. Even if we skipped

[18] Eisgruber and Sager generally focus on the character of the interests involved in order to establish their comparisons, especially noting the interests' 'deep' character, their association with particular 'life plans', or their character as 'needs'. I address this branch of the argument below. But on other occasions, they do suggest that their concern is with treatment that causes equivalent prejudice. They talk about the equal distribution of 'burdens' (above, note 1, at 88–90) or talk about the inflexibility inherent in the individual's position, especially when making comparison to exemptions on health grounds (117–18).

[19] A more extended version of this argument can be found in Webber, 'Irreducibly Religious', above, note 3, at 182–9.

[20] Above, note 1, at 101.

the religious examples and moved directly to, say, 'profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being',[21] those beliefs would still be defined in relation to an implicit religious touchstone. A person who was profoundly hedonistic, down to the very core of their being, would be unlikely to succeed in a case for special accommodation! The commitments that count are high-minded ones, spiritual ones, ones that seem to have the uplifting character we associate with religious belief, remaking us for the better. Indeed, the most plausible candidate for a purely secular freedom of conscience identifies conscience with the dictates of morality. But note here too the influence of religion. We do not mean morality in its philosophical sense: the provisional and eminently contestable conclusions about right and wrong conduct that we come to after philosophical debate. Those conclusions are relied upon all the time but do not enjoy any privileged constitutional status. We mean something much more peremptory, more apodictic – something akin to religious injunctions. And of course, even if freedom of conscience's distinctive content were identified with morality, that would hardly be sufficient to capture the enormous variety of religious practice, such as prayer, methods of worship, communal institutions, dietary rules, physical marks of belonging, or what to a believer is knowledge of the divine. There is good reason to reach for a generalisation of the concerns that lead us to value religion, but in doing so we inevitably start with the distinctive nature of religious practice.

III. Striving for the universal

This brings us face to face with the conundrum noted at the beginning of this paper – a conundrum that, I strongly suspect, has prompted Larry Sager to seek a religion-free freedom of religion: How can the freedom be grounded in a distinctive valuing of religious practices and nevertheless transcend, if only in part, those practices' sectarian character?

The starting point for all freedoms, especially freedom of religion, is the recognition that we must find some way to live together despite our disagreements. That recognition need not be grounded in noble and refined sentiments. It may be founded on little more than necessity: a realisation that the cost of all-out rejection is ruinous and that we had better find some way to get along. This was, in fact, the spur for freedom

[21] *R* v. *Edwards Books and Art* [1986] 2 SCR 713 at para. 97 (*per* Dickson CJ).

of religion in the modern era. Governments realised – after murderous religious warfare – that the cost of imposing religious conformity was very high, perhaps not even possible let alone desirable.[22]

They therefore chose peace. They secured a *modus vivendi* with their religious foes. At the beginning this took the form of ad hoc protocols that defined the place of each religion in the community. Rules of jurisdiction and principles of interaction were established. At first, these may have been little more than a consolidation of the situation on the ground, but as time went on the principles had to be applied to new situations. Justifications were advanced for those rules, the rules were rationalised, those rationalisations were criticised and refined, and eventually the parties developed a body of principles that seemed to provide a basis for peaceable interaction. This basis, at the every least, acknowledged individuals' physical integrity and their ability to practise a range of tolerated religions.[23]

Note that this development required no great generosity of spirit. It may be that some enlightened individuals recognised the benefits to be derived from a diversity of opinion and were willing to embrace diversity as a means of stimulating insight, reflection and freedom. But in the Reformation, it seems that for the great majority of actors recognition of the value of diversity was an effect, not a cause, of the religious freedom won during those years. People were too certain of their stance, too willing to fight for their sense of the truth, to recognise any merit in others' beliefs. It was precisely the readiness of people to stick fast to their religious beliefs and defend them to the death that resulted in their religious commitments being recognised as significant. People might consider their own beliefs to be important because they were true; they considered others' beliefs to be important because others manifestly and obstinately took them to be true.

This reveals the great truth that respect for others' beliefs need not be founded on full substantive acceptance of the beliefs' validity. Indeed, in any diverse society, it cannot be. Instead during the Reformation it took

[22] For an excellent account see MacCulloch, above, note 8, *passim*, but especially at 340ff, 370ff, 500, 674ff.

[23] Compare my account of the emergence of normative community between Aboriginal people and colonists in North America: J. Webber, 'Relations of Force and Relations of Justice: the Emergence of Normative Community between Colonists and Aboriginal Peoples' (1995) 33 *Osgoode Hall Law Journal* 623. See also: J. Webber, 'The Jurisprudence of Regret: the Search for Standards of Justice in *Mabo*' (1995) 17 *Sydney Law Review* 5.

the form of toleration, prompted by the simple fact that peace was better than strife, and peace was only attainable if people put up with each others' beliefs. One respected the beliefs not for the beliefs' sake – one might very well consider them to be dangerously erroneous – but for the people's sake – by ricochet, as it were, from the need to respect the existence and foundational commitments of the people. It has become common to denigrate toleration, seeing it as ungenerous and mean-spirited: one should not just tolerate beliefs, some would say, one should embrace them. But we should not underestimate toleration. In contrast to stronger types of acceptance, toleration takes belief seriously: by taking one thing to be true, people inevitably reject the truth of other things. And yet it allows people to live together despite their divergent beliefs: you do not need to agree; you can even consider others to be badly mistaken, and yet still live in peace.

Over time a number of principles emerged out of the effort to make toleration work. These included the inviolability of the person against reprisals due to their religious beliefs; the individual's entitlement to the sanctity of their thoughts; the toleration of rites and practices that others claimed to be central to their beliefs. And although this was a much harder lesson (one at which we still routinely fail), some people began to recognise the reciprocity between their own demands and those of others, parity between what mattered to themselves and what mattered to others, the integrity of others as moral agents.[24] Indeed, such an understanding was important in arguments over religious toleration. How could one decide what to tolerate, how could one determine how that toleration should be balanced against other social objectives, if one did not attempt to understand the meaning to others of those practices? Thus, parties were driven to understand the place of those practices within others' visions of the world and to seek analogies with their own commitments. They began the attempt to articulate in more general, more universalising terms, what the nature and significance of the beliefs might be. They embarked upon the struggle for a general conception of religious toleration and achieved a measure of abstraction from their own sectarian commitments.

In this process (which of course is on-going) the comparison to one's own commitments still provides a necessary sounding board. It is a

[24] See, for example, Jeffrey Stout's illuminating discussion of how this dialogue might take place: J. Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* (Boston, MA: Beacon Press, 1988) especially at 79–81.

sounding board that I do not believe we will ever escape. Religious practice is especially elusive, often driving us back upon our own experience for analogies, precisely because the phenomena to which it refers is so mysterious, its claimed reality ineffable, inaccessible to unbelievers, embedded within cultural phenomena and manifesting itself in a bewildering variety of practices. The only way to understand if values worthy of respect are present is to engage with them, trying to understand them in their own terms and by analogy to one's own. One does not know the significance of a yarmulka unless one listens to that person's description of the religious importance of covering one's head. One does not know whether a specific day of rest has a peremptory and sacred character unless one hears what the believer has to say. One cannot understand the significance of pushing a road through an Aboriginal burial site unless one attends to the people's beliefs and actions, seeking to comprehend them by comparison to one's own. Indeed, those comparisons are one of the ways in which we put our own presuppositions in play, seeking to understand their more general meaning, not simply imposing them.[25] A genuine commitment to freedom of religion requires a stance entirely different from a Rawlsian retreat into an artificially constrained public reason.[26] It requires engagement.

And, paradoxically, it simultaneously requires a measure of reticence, of holding back, of giving others the benefit of the doubt. The mystery of others' beliefs remains inexhaustible. Just as in the first stages of toleration, so today, we continually confront the fact that we will never completely understand, much less accept. Our effort to evaluate importance and kind, which is essential to any accommodation, must always be tempered by a reticence to judge.

Final comments

Thus far, I have focused on the toleration of religious practice. The freedom is, after all, freedom of religion. It originated in the realisation that people valued their religions deeply, held to them tenaciously, and would defend them fiercely – even though, to people faced with this obstinacy, the beliefs were manifestly false. We would be wise to follow

[25] C. Taylor, 'Understanding and Ethnocentricity' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, 1985) 116.

[26] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

our progenitors' lead and accept that freedom of religion is founded on the special importance of religious belief.

Eisgruber and Sager do this, albeit implicitly. They repeatedly extend consideration to religious practices that they would not extend to run-of-the-mill non-religious actions. There are situations in which secular values rival religious concerns in importance such that we would like to see both treated roughly the same. That is true, for example, in Larry Sager's case of the two Ms Campbells. But the fact that this sometimes occurs does not mean that we should be happy to treat religious belief as nothing special – as merely one preference among many.

The fact that the freedom finds its origin in religion does not mean that it is trapped within a particular conception of religious orthodoxy or even – this is the important point – that its moral justification is limited to self-consciously religious beliefs. I have no confidence that we can develop a generic definition that can determine, in any absolute sense, what falls inside and what falls outside the category. Our knowledge of particular religious practices will always serve as an indispensable point of comparison in our wrestling with religious freedom. But as I hope I have shown, the very idea of religious freedom presupposes a willingness to recognise commitments that operate in a comparable way whether or not they conform to a preconceived idea of religion. And that opens up the possibility of extending our sphere of regard outward, perhaps even beyond what we now consider to be the hallmarks of religious belief. After all, for the religious zealots of the Reformation era, the other's faith was not religion; it was the most profound and dangerous error.

This suggests that the categories of religion are never closed. If the same concerns are engaged, protection should extend. And how do we know if the concerns are engaged? We reflect back, continually and self-critically, on what seems to us to be most characteristic of religious belief and religious practice; on why people hold so tenaciously to those beliefs – so tenaciously that it seems that the beliefs hold them, not vice versa; and on why we want to preserve a space for such inexplicable and unanswerable mysteries.

4

Why religion belongs in the private sphere, not the public square

DENISE MEYERSON*

The role that it is appropriate for religion to play in politics is a subject of great controversy. In this paper I wish to defend the claim that religion should be regarded as a private matter. I will argue for three principles of political morality: that the government should not act on religious purposes; that it should not assist religious groups to spread their religious beliefs; and that arguments based solely on religious convictions should not be offered as reasons for laws and public policies.[1] The first two principles apply to the relations between church and state, whereas the third principle governs the conduct of individuals.[2] A further difference is that the first two principles

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[1] Principles similar to the first two principles have played an important role in the US Supreme Court's understanding of the Establishment Clause of the First Amendment. The well-known test in the case of *Lemon* v. *Kurtzman* 403 US 602 (1971) stated that a statute must satisfy three requirements if it is not to breach the Establishment Clause: it must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and it must not foster excessive governmental entanglement with religion (at 612–13). The second, 'no-aid' prong of the *Lemon* test now appears to be giving way on the court to the proposition that the Establishment Clause mandates the equal treatment of religion and non-religion ('equal aid'). On the equal aid approach, although religion should not be provided benefits that are unavailable to non-religion, by the same token it should not be denied benefits that are justified on secular grounds and available to non-religion. See W. P. Marshall, 'What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisrpudence' (2000) 75 *Indiana Law Journal* 194; T. C. Berg, *The State and Religion* (St Paul, MN: West Group, 1998), pp. 195–6. Since the case of *Lee* v. *Weisman* 505 US 577 (1992), there have also been suggestions by some members of the court that endorsement or advancement of religion may not as such violate the Establishment Clause: the test is rather whether governmental action coerces dissenting citizens.

[2] I draw here on Robert Audi's useful distinction between the institutional doctrine of separation of church and state, which applies to governmental activities as they concern

are offered as guides to appropriate law in a liberal democracy, whereas the third principle sets out to delineate the moral duties of citizens when contributing to public discourse and it is not suggested in this paper that legal effect should be given to it.

Though the insulation of religion from politics provides a very strong guarantee of religious liberty and toleration, it is nevertheless true that the three principles I propose treat religion less favourably, on the whole, than non-religion. In what follows I will present some reasons for thinking that it is justifiable to subject religion to these disadvantages and I will argue, in addition, that these reasons can and should be found acceptable by both believers and non-believers. This is because none of the arguments offered in this paper attacks religion or suggests that religion is in any way objectionable. It is argued instead that all reasonable people will accept special constraints on religion's role in public life as a way of living together on terms of mutual respect.

Locke, Rawls and Dworkin

There is more than one argument for the desirability of 'privatising' religion. One kind of argument is pragmatic. It stresses the dangers of religious involvement in the public square.[3] On this view, though religion has many obvious social benefits, it also has what William P. Marshall calls a 'dark side' – a side that he describes as 'inherently intolerant and persecutory'.[4] Marshall argues that the dark side of religion justifies placing special constraints on religion's participation in the political process. If, for instance, believers feel themselves to be subject to no restraints in seeking to influence political decisions, the intolerant are likely to treat the public square more as a battleground than a forum for debate. This in turn may encourage dangerous divisiveness among different religions as well as movements of hate, violence and persecution. If, by contrast, religion is widely seen as a private matter, this 'may quiet religious fervor'.[5]

religion, and a principle of separation for individual conduct, which is concerned with the ethical standards appropriate to the participation of religious individuals in public discourse. See R. Audi, 'The Separation of Church and State and the Obligations of Citizenship' (1989) 18 *Philosophy and Public Affairs* 259–60.

[3] The term the 'public square' comes from R. J. Neuhaus's book, *The Naked Public Square*, 2nd edn (Grand Rapids, MI: Eerdmans, 1984).

[4] W. P. Marshall, 'The Other Side of Religion' in S. M. Feldman (ed.), *Law and Religion: A Critical Anthology* (New York and London: New York University Press, 2000), p. 102.

[5] Marshall, 'The Other Side', p. 106.

I place no particular weight on this argument. The focus of my discussion will be a different argument – one which takes the view that it is moral considerations based on citizens' equal moral status which explain why religion should be irrelevant to politics. The emphasis here is on the need to find a way in which people who have very different religious beliefs may nevertheless live together in a way which is fair to all of them or respects their equal status.

On one version of this argument, the legitimacy of the exercise of state power depends on its being justifiable in terms of reasons which can be understood and accepted by everyone. This argument can be found in a rudimentary form in John Locke's 'A Letter Concerning Toleration' and it has been given a highly sophisticated contemporary formulation in John Rawls's *Political Liberalism*. In what follows I will briefly describe the Lockean origins of the argument and then turn to the views of Rawls.

Locke believed that those who enjoy equal status have only one reason to submit to political power, namely that its exercise is directed towards the protection and preservation of goods which everyone has reason to desire. Locke called these goods the '*bona civilia*' or 'civil interests': 'life, liberty, health and indolence of body; and the possession of outward things, such as money, land, houses, furniture, and the like'.[6] The imposition of orthodoxy in matters of religious belief is not a good which everyone has reason to desire because 'every church is orthodox to itself' and there is no judge 'by whose sentence [the controversy between the churches about the truth of their doctrines] can be determined'.[7] The state, Locke concluded, should therefore concern itself only with the protection of our shared or civil interests and refrain from making law about religious matters. It is, for instance, legitimate to restrict religious freedom in the interests of public safety but not to prevent religious practices on the ground that they are heretical.

Rawls's views on religion and politics are based on a connected distinction between views which everyone can reasonably be expected to endorse and views which are not of this kind. His starting-point is the concept of a 'comprehensive doctrine'. Comprehensive doctrines are doctrines about such matters as religion, philosophy and the nature of the good life. A 'comprehensive doctrine', Rawls says, is one which 'includes conceptions of what is of value in human life, and ideals of

[6] J. Locke, 'A Letter Concerning Toleration' in J. Horton and S. Mendus (eds.), *John Locke: 'A Letter Concerning Toleration' in Focus* (London: Routledge, 1991), p. 17.

[7] Locke, 'Toleration', p. 24.

personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole'.[8]

Rawls believes that in modern democratic societies there is a diversity of incompatible comprehensive doctrines and conceptions of the good. This is because achieving general agreement on such doctrines is not practically possible. There are many hazards involved in the conscientious exercise of the powers of reason – Rawls calls these the 'burdens of judgment' – and it is therefore not to be expected that even reasonable people will affirm the same views on matters to do with religion, philosophy and the meaning and purpose of life. When the limited powers of human reason are exercised within a framework of free institutions, 'a plurality of reasonable yet incompatible comprehensive doctrines is the normal result'.[9] Rawls calls this the fact of 'reasonable pluralism'.[10]

At the same time, Rawls thinks that there are basic political principles which all reasonable people can be expected to endorse, and which would therefore be fair to all of them despite their diverse religious and moral views. One of these, according to him, is the principle that the state should be neutral. A neutral state regards all comprehensive doctrines as a private matter, not a matter for the state, and its laws and policies do not take sides on what kind of life it is intrinsically worthwhile to lead. Rawls says: 'the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it'.[11]

In so far as religion specifically is concerned, a neutral state is therefore one which neither favours nor disfavours individuals on the basis of judgments about the intrinsic worth of their religious views or religious practices. It does not prefer one religious viewpoint over another, nor religion over non-religion. When the state is neutral on matters of religion, no one's religious freedom will be restricted on the ground that the majority believes their religious beliefs to be unworthy, and everyone will therefore enjoy the right to freedom of religion and liberty of conscience. Everyone will, as a result, be free to pursue their own religious goals, whatever these may be, subject only to others' enjoying similar freedom. Furthermore, there will be separation of church and state, preventing a particular religion or religion in general from being supported or endorsed by the state.

[8] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 13.
[9] Rawls, *Political Liberalism*, p. xvi. [10] *Ibid*., p. 36. [11] *Ibid*., p. 193.

Why would all reasonable people endorse these recognisably liberal principles, notwithstanding their deep and intractable disagreements on matters of ultimate value? Rawls's answer to this question depends on the possibility of conceiving liberalism as a 'political' doctrine, rather than as a doctrine which is justified by a comprehensive conception of the good. In this regard, Rawls distinguishes the kind of liberalism he espouses from that espoused by traditional liberal thinkers such as Kant and Mill. When Kant and Mill tackle questions of political and social justice, their method is to apply their comprehensive views about the good to the domain of politics. They justify liberal rights and institutions, such as the right to freedom of religion, by reference to an individualistic view of human flourishing on which the reason why the state should be neutral on religious matters and other questions of ultimate value is in virtue of the moral importance of free choice. These philosophers believe that it is better to be guided by one's own freely chosen values, however mistaken those values may be, than to be forced to live in accordance with values one has not chosen. Their commitment to liberal political values is therefore extrapolated from a deeper and more general moral commitment to the values of autonomy and individualism which are thought of as governing all areas of life.

But there is disagreement about the validity of these 'comprehensive' liberal theories and it cannot be expected that all reasonable people will affirm them. As Charles Larmore points out, there are many thinkers who reasonably stress the values of belonging, custom and community over the values of autonomy and free choice.[12] Communitarians, for instance, reject the individualistic picture of our affiliations and loyalties as things we choose. They argue that the self is not 'unencumbered' but is rather 'embedded' or 'situated' in existing social practices from which it cannot detach itself but which it must accept as setting the parameters for its choices.[13] The values of individualism and free choice will also be unattractive to many religious people. As Michael Sandel observes, believers see themselves as 'claimed by dictates of conscience they are not at liberty to choose'.[14] Because many reasonable people reject the ideal of individuals choosing their religious convictions for themselves, Rawls believes that liberal political principles, such as freedom of

[12] C. Larmore, 'Political Liberalism' (1990) 18 *Political Theory* 343–4.
[13] M. J. Sandel, 'Book Review of *Political Liberalism*' (1994) 107 *Harvard Law Review* 1770.
[14] M. J. Sandel, 'Religious Liberty – Freedom of Conscience or Freedom of Choice?' (1989) *Utah Law Review* 613.

religion, should not be expounded with reference to it. The value of respecting free choice in matters of religion represents a particular, sectarian conception of the good which is not universally endorsed, and any attempt to found the exercise of power on it would consequently be illegitimate and oppressive.[15]

How, then, is it possible for liberal rights and institutions to be justified *without* reference to contested, comprehensive views such as those of Kant and Mill? Rawls calls attention to the fact that there are certain shared, uncontroversial moral ideas which are implicit in the public political culture of contemporary democracies. For instance, in democratic regimes society is viewed as a fair system of co-operation among citizens who are free and equal. The social order is not viewed 'as a fixed natural order, or as an institutional hierarchy justified by religious or aristocratic values'.[16] By drawing on these shared ideas, a liberal conception of justice can be presented as a relatively modest, 'political' view, whose moral assertions are confined to the domain of the political and which does not rely for its justification on the validity or truth of any comprehensive doctrine. A liberal conception of justice which is 'shallow' in this way is, Rawls says, 'publicly' justifiable, by contrast with the comprehensive, sectarian forms of liberalism considered above.

Rawls thinks that all reasonable people can be expected to endorse such a political version of liberalism. For Rawls, 'reasonable' does not mean 'making good use of one's reason' or 'reasoning well'.[17] Rather, reasonable people are people who, respecting the freedom and equality of all citizens, wish to 'co-operate with others on terms that all can accept'.[18] Furthermore, reasonable people acknowledge the burdens of judgment and the consequent impossibility of resolving their more comprehensive disagreements concerning such matters as religion and the meaning of life. This means that they are willing to set aside their contested, comprehensive beliefs for the purpose of proposing principles of justice. They do not think it justifiable to incorporate special advantages for their religion or conception of the good life into the framework for social co-operation. Instead, they are in search of basic political principles which transcend their differences and which can therefore be endorsed by everyone. They will as a result be drawn to the principle of state

[15] Rawls, *Political Liberalism*, p. 37. [16] *Ibid*., p. 15.
[17] J. J. Owen, *Religion and the Demise of Liberal Rationalism* (Chicago, IL and London: University of Chicago Press, 2001), p. 114.
[18] Rawls, *Political Liberalism*, p. 50.

neutrality as a means of securing religious freedom as well as the separation of church and state.

At this point Rawls takes a further step. Having sought to *justify* liberal principles such as freedom of religion and the separation of church and state in a way which avoids reference to comprehensive doctrines, he also argues that they must be *interpreted* and *applied* without reference to comprehensive doctrines. This step is necessary in virtue of the fact that the principles are very abstract and there will inevitably be disputes about what kinds of laws and policies are compatible with them. Does the right to religious liberty, for instance, require religious exemptions from laws which do not have a religious purpose but impose a burden on some people's religious practice? Does the doctrine of separation of church and state rule out state aid to church schools?

Rawls argues that when concrete disputes like this arise, people should argue for their position in terms of public reason or reason which is common to everyone. He thinks that both officials and citizens are under a moral duty, at least when fundamental political questions are at stake,[19] to show that the laws and policies they advocate and for which they vote are supported not by reasons peculiar to some or other controversial comprehensive doctrine but by those 'plain truths now widely accepted, or available, to citizens generally'.[20] This is not to say that Rawls thinks that religiously motivated arguments should be *prohibited*. That would be inconsistent with the right to freedom of speech. He believes rather that when participating in political life, citizens are under a *moral* duty not to make their case in religious terms. He says: '[a]s an ideal conception of citizenship for a constitutional democratic regime, [public reason] presents how things might be, taking people as a just and

[19] These are questions which involve 'constitutional essentials' and questions of basic justice. Constitutional essentials concern questions 'about what political rights and liberties, say, may reasonably be included in a written constitution', whereas matters of basic justice 'concern questions of basic economic and social justice and other things not covered by a constitution' (J. Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review* 767 n. 7). Thus public reason must be used to settle such fundamental questions as 'who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property' (Rawls, *Political Liberalism*, p. 214). As Kent Greenawalt points out, there are obvious difficulties in drawing the line between constitutional essentials and basic issues of justice, on the one hand, and ordinary political issues on the other ('On Public Reason' (1994) 69 *Chicago-Kent Law Review* 686–8). This may be why Rawls states that it is 'usually highly desirable' to approach any political question on the basis of public reason (*Political Liberalism*, p. 215).

[20] Rawls, *Political Liberalism*, p. 225.

well-ordered society would encourage them to be. It describes what is possible and can be, yet may never be, though no less fundamental for that'.[21]

In later work, Rawls qualifies this slightly, by arguing that believers may advance religiously motivated arguments in public debate provided that they are also, in due course, able to advance public arguments for their views.[22] Although there are good reasons to accept this 'proviso', for it is clear that some laws and policies (prohibitions on murder and assault, for instance) are supportable by both religious and public arguments, the qualification does not seem to alter Rawls's position in a significant way. For it remains the case, on his view, that if believers cannot find sufficient public reasons for their views about politics, they should refrain from offering their religious reasons. This is out of respect for the freedom and equality of those reasonable people who could only come to share the believers' beliefs by converting to their faith. It would not be fair, for instance, to argue for the criminalisation of homosexuality on the basis of biblical authority, because this would conflict with the duty of respect we owe our fellow citizens. Believers are therefore under a moral duty to be reasonable, in Rawls's sense of that term – a duty to offer reasons for the exercise of state power which do not presuppose the truth of their religious views. Since the imposition of such a duty on individuals serves the same values as the institutional separation of church and state, it is only to be expected that the ideal of neutrality should extend to individual citizens, placing moral constraints on their conduct which are analogous to the desirable constraints on governmental activity concerning religion.[23]

Ronald Dworkin agrees that neutrality on matters of religion and, more generally, on the nature of the good life is required by respect for everyone's equal status but he reaches this conclusion via a distinction between laws based on external preferences and laws based on personal preferences. Dworkin defines personal preferences as preferences for the assignment of goods and opportunities to oneself. External preferences, by contrast, are preferences for the assignment of goods and opportunities to others.[24] Someone who disapproves of homosexuality, for instance, is expressing an external preference, 'for they prefer not only that they themselves do not indulge in these activities, but that no one

[21] *Ibid*., p. 213. [22] Rawls, 'Public Reason', 783–4. [23] See Audi, 'Separation', 292–3.
[24] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), p. 234.

else does so either'.[25] Dworkin believes that the state may legitimately seek to satisfy personal preferences but not to satisfy external or moralistic preferences. He argues that if external preferences are translated into law that is an insult to the equal moral status of all citizens, because 'those constrained suffer, not simply because their personal preferences have lost in a competition for scarce resources with the personal preferences of others, but precisely because their conception of a proper or desirable form of life is despised by others'.[26] If Dworkin is right that respect for equality entails that people should not be disadvantaged on the ground that others find their way of life contemptible, then it follows that the state should be neutral on what kind of life it is desirable to lead.

Furthermore, for Dworkin, the point of rights is, in part, precisely to secure neutrality by preventing the majority from translating their external preferences into law. Thus the right to privacy, for instance, prevents the state from banning pornography on the ground that the majority believes that it is demeaning and degrading for people to read pornography. By contrast, it would be legitimate for the state to ban pornography if pornography significantly increases the danger of crimes of violence, because in that case the law would be used to satisfy personal preferences for safety and security – that is, to prevent personal harm to those who might be the victims of violence.[27] Similarly, the right to religious freedom prevents the state from restricting religious practices on the ground that the majority finds them reprehensible, but does not preclude restrictions which are necessary to protect the safety of other people.

I have emphasised the fact that neutrality of the kind defended by Rawls and Dworkin prevents the state from taking up a partisan stance in respect of *any* controversial conception of the good, whether of a religious or secular nature. A neutral state will not aim to promote religion, but nor will it aim to promote some or other controversial secular conception of the good, such as the 'greatest happiness principle' or 'secular humanism'. For the same reason it will also not aim to promote hostility to religion. In recognising that secular arguments are not necessarily neutral, the views of Rawls and Dworkin are superior to those of Robert Audi, who argues that at least where the restriction of human liberty is at stake, secular arguments respect everyone in a way that religious arguments do not.[28] Audi defines a secular

[25] Dworkin, *Taking Rights Seriously*, p. 276. [26] *Ibid.*
[27] R. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 354.
[28] Audi, 'Separation', 278–9.

reason as 'roughly, one whose normative force does not (evidentially) depend on the existence of God (for example, through appeals to divine command), or on theological considerations (such as interpretations of a sacred text), or on the pronouncements of a person or institution qua religious authority'.[29]

But some secular reasons as defined by Audi are not accessible to all reasonable citizens. Some people, for instance, argue for stringent restrictions on access to abortion on the ground that human reproduction is a biological marvel and that the premature ending of human life is almost always to be avoided. This view is not necessarily a religious view because one can hold it without believing in God as the divine creator. Yet it is as contested a view as the view that the foetus acquires a soul at the moment of conception.[30] Other people argue for the criminalisation of homosexuality on the ground that homosexual relations are incompatible with a worthy form of life. Again, this is as contested as the view that homosexuality is a sin.[31] Views like this should therefore not be imposed on those who reasonably reject them. It follows that a secular or non-religious state purpose is not a guarantee of state neutrality, though it is, of course, necessary for it.

From theory to practice

If government should neither favour nor disfavour individuals on the basis of judgments about the intrinsic worth of their religious views or religious practices, neither preferring one religious viewpoint over another, nor religion over non-religion, what follows from this principle? There will naturally be grey areas in its application, but I suggest that the principle of state neutrality has at least the following implications in the context of religion.

Firstly, the state should neither purposefully advance religion nor suppress it: the state should not act in the name of religion. The state would act in the name of religion if it forced people to attend the services of one religion or prohibited them from attending the services of another. The state would also act in the name of religion if it were to promote religion in public schools via activities such as school-sponsored prayer

[29] *Ibid.*, 278.
[30] R. Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993), p. 92.
[31] Rawls, 'Public Reason', 780.

and religious instruction. Even if the activities in question are non-denominational and voluntary, their purpose is to advance religion over non-religion. It is not necessary to enter into the question whether prayer in schools pressurises or coerces children who are not religious. It is enough that the state's purpose is not neutral.

A less obvious example of the state purposefully advancing or endorsing religion relates to the granting of religious exemptions from generally applicable laws. Suppose, for instance, that the state were to exempt from service in the armed forces those with religious objections to war but not those with equally conscientious but non-religious objections. Exemptions of this kind are motivated by the belief that religious practices enjoy special value, or are dictated by a 'higher sovereignty',[32] entitling them to substantial immunity against legitimate governmental concerns. The Supreme Court of the United States used to adhere to this view, insisting that even generally applicable laws which merely incidentally burden religious practice had to meet a stringent test of 'compelling state interest' in order not to breach the free exercise clause of the First Amendment.[33]

It is hard to deny that to immunise religion in this way amounts to advancing or endorsing it purposefully on the ground that religious beliefs are uniquely valuable and therefore especially worthy of respect. In this view, everyone else must obey the law – even those who have just as deep but non-religious objections to it – but the religious have a claim to be above the law unless it serves interests of a particularly compelling kind.[34] The account of justice which we find in liberal thinkers such as Rawls implies that the state is not entitled to give religious commitments special treatment of this kind, privileging them over other deep and genuine commitments, because there are no reasons admissible to the non-religious which might serve to justify such favourable treatment.

Examples of liberal democratic states deliberately disfavouring a particular religious perspective are more difficult to find. They are not, however, unknown, as demonstrated by a US case, that of *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah* ('*Lukumi*').[35] The City of

[32] This is R. J. Neuhaus's phrase in 'A New Order of Religious Freedom' in Feldman (ed.), *Law and Religion*, p. 95.

[33] *Sherbert* v. *Verner* 374 US 398 (1963); *Wisconsin* v. *Yoder* 406 US 205 (1972). This approach was wound back in *Employment Division, Department of Human Resources of Oregon* v. *Smith* 494 US 872 (1990).

[34] See F. M. Gedicks, 'An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions' (1998) 20 *University of Arkansas at Little Rock Law Journal* 566–8.

[35] 508 US 520 (1993).

Hialeah, Florida, had adopted a series of ordinances designed to deal with the proposed establishment of a Santeria church in Hialeah. Animal sacrifice is central to the Santeria religion. The ordinances made it a crime to 'sacrifice' an animal, which was defined as meaning 'unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption'. Although other killings of animals raise many of the same public interest concerns as ritual sacrifice, the ordinances were carefully crafted so as not to touch them. Thus other animal killings, whether secular – like hunting – or religious – as in Kosher slaughtering, which is practised by Orthodox Jews – were exempt from the ban. The court reasonably concluded that the state had illegitimately sought to suppress Santeria worship.

The liberal principle of state neutrality, which, as we have seen, prevents the state from enacting laws for expressly religious purposes, would support the finding in *Lukumi*. But the principle also extends further, disabling the state from seeking to translate religious views and other controversial conceptions of the good into law outside the explicit religious context. For if laws ought to be based on public reasons, or reasons which are accessible to all citizens, then it follows that the state is not entitled, for instance, to prohibit practices such as homosexuality and assisted suicide, or to refuse to grant legal status to same-sex unions, on the basis of religiously motivated or analogously contested arguments. For such arguments are accessible only to those who share a certain faith, or a certain conception of the good, and political decision-making which is based exclusively on them therefore involves as much of an attempt to impose a disputed conception of the good life on citizens as, for instance, forcing them to attend religious services.

Another implication of the liberal principle of neutrality is that public money should not be used in a way which supports the dissemination of religious beliefs even if the government's purpose is not religious. Suppose, for instance, that the government wishes to provide funds to private religious schools with the secular purpose of improving the quality of education at the schools and let us also suppose that non-religious private schools are funded on the same basis. Though the funding does not fall foul of the ban on the state acting on religious purposes, it is nevertheless unacceptable for reasons that follow from the liberal view.

As numerous US cases have noted, religious schools are 'pervasively sectarian': their secular functions and religious missions are 'inextricably

intertwined'.[36] Justice Rutledge observed in the US case of *Everson* v. *Board of Education* that '[i]t is precisely because the instruction is religious and relates to a religious faith, whether one or another, that parents send their children to religious schools'.[37] Since it is impossible to separate the secular and religious functions in religious schools, state funding of the secular aspects of the school curriculum 'inevitably flows in part in support of the religious role of the schools'.[38] If, for instance, computers are provided to religious schools, or funds are given for the upkeep of school buildings, there is nothing to stop the computers being put to use for religious purposes or the classrooms being used for religious instruction. Furthermore, even if the funding is not diverted to the religious mission of the school, it frees up significant sums of money for the schools to spend on furthering their religious purposes and therefore substantially advances their sectarian activities.[39]

One objection to the use of public funds in ways such as these – ways which have the effect of supporting religious teaching – is based on the value of autonomy. David Richards argues along these lines. He claims that the moral basis for a prohibition on the state supporting religious teaching is the idea that persons ought to form and revise their religious beliefs on their own. State support for religious teaching is, according to Richards, inconsistent with 'the protection of moral independence … in the direction of one's spiritual life'.[40] But this argument relies on a comprehensive conception of the good and of the person which, as we have seen, believers and non-liberals may reasonably reject.

[36] *Lemon* v. *Kurtzman* 403 US 602 (1971) at 657. [37] 330 US 1 (1947) at 46.

[38] *Wolman* v. *Walter* 433 US 229 (1977) at 250.

[39] Justice Douglas made this point in the US case of *Lemon* v. *Kurtzman*, saying: '[t]he [religious] school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or sciences without any trace of proselytizing enables the school to use all of its own funds for religious training … [W]e would be blind to realities if we let "sophisticated bookkeeping" sanction "almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities"'(403 US 602 (1971) at 641). Murphy J. made similar points in the Australian case of *Attorney-General (Vic); Ex rel Black* v. *Commonwealth* which involved a challenge to state aid for church schools. He said: '[t]he result of the capital grants Acts is that great and increasing sums are being given to churches to acquire property, which can then be lawfully used for religious purposes apart altogether from schooling … The effect of the Grants Acts is that the wealth of the churches is increased annually by many millions of dollars of taxpayers' moneys' ((1981) 146 CLR 559 at 632–3).

[40] D. A. J. Richards, *Toleration and the Constitution* (New York and Oxford: Oxford University Press, 1986), p. 155.

A more broadly acceptable argument, one which is not tied to a comprehensive view, would call attention to the fact that religious beliefs are the subject of intractable disagreement among reasonable people, and would conclude that it is therefore unjustifiable to use public money in a way which allows religious schools to further their mission. It is not fair to force taxpayers to subsidise the propagation of beliefs and practices which cannot be justified in public terms and to which they may reasonably object. Parents have the right, of course, to send their children to schools which teach religious doctrines in virtue of their right to religious liberty, but the right to religious liberty is a negative right only. It is not a right to have the state contribute to the financial costs of its exercise because the use of public money to support the propagation of views which are not generally endorsed by all reasonable people is illegitimate.

Is neutrality a neutral ideal?

I have explained the reasons behind the view that religion should be politically irrelevant and turn now to criticisms of this idea, paying special attention to the fashionable argument that the liberal ideal of neutrality is an incoherent idea and a myth. Close examination of the critics' arguments reveals that a number of different claims are advanced under this umbrella attack. Some critics claim that the liberal ideal of neutrality makes the absurd recommendation that the state should refrain from making moral choices or from justifying its actions in moral terms. Other critics claim that the ideal of neutrality has the effect of advantaging secular world views at the expense of religious world views and that it is therefore biased against or hostile to religion. Yet others say that the liberal claim to transcend religious and moral differences, by providing a neutral framework which is impartial between the different religions and conceptions of the good, is a sham. The neutral state is not, in this view, above the fray. It is itself a competing, partisan agenda representing a substantive conception of the good. Finally, and most radically, some critics argue that moral judgments are inescapably ideological or subjective and that the idea of a neutral standpoint which adjudicates in an impartial way between the different partial standpoints is therefore in principle unachievable. These critics believe that the search for a solution which is genuinely fair to everyone, both religious and non-religious, is chimerical. In reality, they say, those who support different views on these issues are engaged in an ideological and political battle aimed at ensuring the ultimate victory of their views.

Government action free of value choice

A representative version of the first objection is contained in a statement made by David N. Cinotti. He says that neutrality is 'incoherent and its underlying premise – government action or inaction free of value choice – is impossible'.[41] This objection can be dealt with quite quickly. Of course it is true that government cannot help but make value choices, but the liberal ideal of neutrality does not deny this. The kind of neutrality which I have defended requires the state to avoid taking a view on the question of the worth of competing religious views. It states that laws and policies must be justified in terms of public reasons. But public reasons are not supposed to be *value free* or *apolitical* reasons. On the contrary, the defenders of neutrality claim that public reasons represent moral values, albeit of a special kind, namely, shared moral values. Locke, as we saw, calls these the *bona civilia* and Rawls calls them 'primary goods'. Under this heading Rawls includes the basic rights, liberties and opportunities, all-purpose means such as income and wealth, and the social bases of self-respect. He argues that we are all, as citizens, advantaged by enjoyment of these goods.[42]

Suppose, for instance, that the state justifies a restriction on religious liberty by arguing that a particular religious practice is a threat to the public's safety. The state's justification clearly rests on a moral belief, namely, that public safety is a desirable goal. The only sense in which theorists like Rawls claim that this is a neutral reason is in the sense of securing a good which all citizens can reasonably be expected to endorse, independently of their particular views about religion. It is neutral, in other words, because it does not presuppose contested religious views. Rawls certainly does not claim that public reasons are neutral in the sense of abstaining from moral or political judgment. The ideal of government acting only on the basis of public reasons is therefore not an ideal of governmental abstention from value choice.

Neutrality of effect

In so far as the second objection is concerned, it is urged that acceptance of the principle of neutrality, with its consequent exclusion of religion from the public square, secularises society and trivialises, denigrates and marginalises religion, fostering what Stephen Carter calls 'a culture of

[41] D. N. Cinotti, 'The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisrprudence' (2003) 45 *Journal of Church and State* 499.

[42] Rawls, *Political Liberalism*, p. 180.

disbelief'.[43] State neutrality therefore 'play[s] favorites on behalf of the secular'.[44] Or, as Rex Ahdar and Ian Leigh remark: '[f]ar from being neutral or inclusive, [a secular political regime] resonates as an ordering of life in accordance with the nonreligious values of some of the community at the expense of the spiritual values of others.'[45] Since a supposedly neutral state will lead to non-neutral (in the sense of unequal) *results* in so far as religion and non-religion are concerned, its claim to neutrality is therefore spurious.

One answer to this criticism is that it is not at all clear that state neutrality towards religion has detrimental consequences for religion. Rawls makes this point. He says:

> [t]he vitality and wide acceptance of religion in America is often commented upon, as if it were a sign of the peculiar virtue of the American people. Perhaps so, but it may also be connected with the fact that in this country the various religions have been protected by the First Amendment from the state, and none has been able to dominate and suppress the other religions by the capture of state power … Some citizens of faith have felt that this separation [of church and state] is hostile to religion and have sought to change it. In doing this I believe they fail to grasp a main cause of the strength of religion in this country and … seem ready to jeopardize it for temporary gains in political power.[46]

Another response – also made by Rawls – is that if the allegiance of citizens to the principles which guarantee religious, civil and political liberties is so limited that they are not willing to see their religious doctrines losing ground, then they have not genuinely embraced a democratic society's political ideals and values.[47] It is part and parcel of

[43] S. L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993).

[44] This is A. S. Greene's phrase in 'The Incommensurability of Religion' in Feldman (ed.), *Law and Religion*, p. 229.

[45] R. Ahdar and I. Leigh, 'Is Establishment Consistent with Religious Freedom?' (2004) 49 *McGill Law Journal* 679. See also Ahdar and Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005), p. 152.

[46] Rawls, 'Public Reason', 795–7. See also I. Kramnick and R. Laurence Moore: 'The godless Constitution must be understood as part of the American system of voluntary church support that has proved itself a much greater boon to the fortunes of organized religion than the prior systems of church establishment ever were' (*The Godless Constitution: A Moral Defense of the Secular State* (New York and London: W. W. Norton and Company, 2005), p. 24).

[47] Rawls, 'Public Reason', 781–2. D. A. Dombrowski remarks similarly: '[t]o endorse political justice for the right reasons … is to do so *even if* it means a decline in popularity of one's own comprehensive religious view. To *really* view citizens as free, equal and

respecting the equal status of other citizens that one does not seek to use the resources of the state so as to boost the influence of views about which reasonable people are deeply divided.

Finally, a third answer to this criticism is that neutrality of effect is an ideal which is impossible to achieve. How could the state guarantee that its policies regarding religion affect all the many religions (as well as non-religion) equally? How could it ensure that the different religions and non-religion flourish to exactly the same extent? Would the state have to forbid proselytising, for instance, if proselytising has a disproportionate impact on unpopular sects, causing them to lose adherents?[48] It is presumably on the basis of considerations such as these that Rawls says that '[i]t is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time'.[49]

Is state neutrality the faith of those who are liberals?

The third objection to the ideal of neutrality is that the ideal is not itself neutral between different belief systems and conceptions of the good but is merely the faith or orthodoxy of those who are liberals. In support of this, it is argued that only those who are liberals see their religious and other deeply held convictions as matters of private opinion which it is not appropriate to impose on others.[50] Thus Stanley Fish asks: '[w]hat does the Lockean liberal say to the person whose religion teaches that it is a holy duty to order the affairs of this world by the true faith? What so called "independent value" could be so persuasively urged that the zealous would retreat from their zeal and leave their deepest beliefs at home?'[51] And Fish answers that while there might be prudential reasons for self-restraint – for instance, if one is a member of a minority religious group it might be in one's self-interest to preach liberal values of tolerance – liberalism cannot give the zealous reasons for accepting a

reasonable-rational … is to be open to the possibility that they will walk away from one's favored comprehensive religious doctrine that one firmly believes to be true (*Rawls and Religion: The Case for Political Liberalism* (Albany, NY: State University of New York Press, 2001), p. 92).

[48] R. J. Arneson, 'Neutrality and Utility' (1990) 20 *Canadian Journal of Philosophy* 218.

[49] Rawls, *Political Liberalism*, p. 193.

[50] B. Barry, 'How Not to Defend Liberal Institutions' (1990) 20 *British Journal of Political Science* 8–10.

[51] S. Fish, 'Mission Impossible: Settling the Just Bounds Between Church and State' (1997) 97 *Columbia Law Review* 2272.

moral obligation to treat their religion as a private matter, for they could only accept that they were under such an obligation if they were to abandon their religious beliefs. It follows, according to Fish, that when liberalism describes the zealous as 'unreasonable' for rejecting liberal values of tolerance, this is an act of power, exclusion and intolerance. 'Unreasonable' is just a word for what liberals and their friends do not like.[52] It is a judgment informed by 'nothing more "principled" than a dislike of certain points of view'.[53] Though liberalism masquerades as 'neutral', it is therefore, in reality, 'exercising the peremptory authority it routinely condemns'.[54]

Fish's views are challenging but not, I think, unanswerable. I will argue that the principle of neutrality is fair to all reasonable people, regardless of their religious beliefs. In the first place, this is because, in placing religion largely beyond the state's reach, it confers maximum autonomy on churches to regulate their own affairs, free of liberal constraints if they wish. It also provides the strongest possible protection for religious freedom, a protection which it extends even to those who would deny it to others.

Consider the implications of the view that no one's religious freedom may be restricted unless there is a non-religious and public justification for the restriction. This means that no one's religious freedom may be restricted on the ground that the majority believes that the religion in question is intrinsically inferior. It is quite irrelevant how strongly the majority feels about the matter. If they do not have a public reason for interference with the religion – a reason that does not presuppose religious or other comprehensive views – they are obliged to tolerate practices that they may despise. Furthermore, when public reasons are invoked as a reason to restrict religious freedom, there must be a real risk of the public harms which the state seeks to prevent. It is all too tempting for the state to exaggerate the dangers of religious doctrines it dislikes, and an appeal to speculative dangers is a good indication that dislike of the doctrine is the state's real motive. In this way the principle of neutrality insulates the right to religious freedom from sectarian invasions and generates maximum impartiality among the different religions.

Contrast, in this respect, the utilitarian principle, that all preferences have a claim to be weighed in decisions about state policy. If one takes this view, and if the majority's dislike of a particular religion is sufficiently intense, it appears that the state would be justified in repressing the religion. The only way for a utilitarian to defend religious liberty in

[52] *Ibid*., 2287. [53] *Ibid*., 2292. [54] *Ibid*., 2286.

these circumstances would be to argue that religious freedom will benefit society in the long run. But this argument is hostage to fortune. It makes the protection of religious freedom dependent on contingent, empirical circumstances and, as Rawls says, such an argument 'may or may not be successful'.[55] By contrast, Rawls's view – on which preferences that would not carry weight with all reasonable people may not, no matter how intense or widely shared, enter into the decision-making process in the first place – does not make the protection of religious freedom depend on changing and fortuitous empirical circumstances.

If we think back to the case of *Lukumi*, which struck down the attempt to prevent the Santeria practice of animal sacrifice, we can see that the reason why it prioritised free exercise is precisely because it took the public reasons approach. The fact that the ordinance had been carefully crafted so as to apply only to killings of animals by believers in the Santeria religion showed that the state's purported public justification in terms of public health and preventing cruelty to animals was a pretext. Those interests could have been served in a way less restrictive of the religious freedom of the Santeria. In reality, the ordinance rested on no reason other than that the majority found the conduct reprehensible. Thus Rawls's insistence on the fact of reasonable pluralism and the consequent need, in fairness, for the exercise of state power to be justified in terms of public reasons does not, contrary to the critics' claims, promote hostility towards religion. On the contrary, it is highly protective of religious freedom. And, since believers will want to accept the benefits of the 'public reasons' view, they are obliged to accept its costs. As Justice Jackson noted in the case of *Everson*,[56] religion cannot be a private affair when that is convenient for believers but a public affair when it comes to other matters, such as taxing citizens to aid religion.

A second reason for thinking that the principle of neutrality is fair to everyone, or at least to everyone who respects the equal moral status of all citizens, follows from what Rawls has to say about the 'problem of stability' – the problem of explaining why people have reason from *within* their own comprehensive perspectives to adhere to the public conception of justice.[57] This problem arises because it is not enough that

[55] J. Rawls, *A Theory of Justice* (London, Oxford, New York: Oxford University Press, 1971), p. 450.

[56] 330 US 1 (1947) at 27.

[57] S. Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 626.

citizens should affirm the same public conception of justice. If they cannot be given reason from within their own perspectives to act on the public conception of justice, they might choose to give priority to their deeper moral and religious views when these come into conflict with justice. Rawls argues that this motivational problem is solved by the fact that the political conception of justice can be given both public and non-public justifications. Though it can be presented by drawing only on public or shared ideas, it is also compatible with all reasonable comprehensive doctrines. It will be remembered that Rawls's starting point is not the fact of pluralism as such, but rather the fact of 'reasonable pluralism' – the fact that reasonable people cannot be expected to affirm the same comprehensive doctrine. He wishes to show how citizens profoundly divided by reasonable doctrines may 'live together and all affirm the political conception of a constitutional regime'.[58] And part of his answer is that because the political conception of justice can be supported by all reasonable comprehensive views it can gain the support of an 'overlapping consensus', this being a consensus which 'consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime.'[59]

As Rawls makes very clear, the political conception of justice is not accepted as a compromise of expediency, based on self-interest, struck between the different groups in society who would prefer to impose their views on others if they had the power to do so but realise that this is not currently feasible. Such a Hobbesian *modus vivendi* would not do the work of a conception of *justice*, which is what Rawls's theory claims to offer. His is a theory of justice and therefore a moral conception. It offers stability 'for the right reasons' – that is, 'as secured by a firm allegiance to a democratic society's political (moral) ideals and values'[60] – rather than a mere compromise. This is because it can, according to Rawls, be affirmed on *principled* or *moral* grounds from within the perspective of all the reasonable comprehensive doctrines.

Naturally, they will not all endorse liberal rights and institutions for the same reasons. Thus, as we have seen, theorists like Kant and Mill, who defend liberalism as a true theory of the good, will endorse liberal rights and freedoms such as freedom of religion because they believe that the exercise of freedom is an essential component of the good life. But those who reject liberalism as a theory of the good may have other,

[58] Rawls, *Political Liberalism*, p. xviii. [59] *Ibid*., p. 15. [60] Rawls, 'Public Reason', 781.

non-liberal reasons for endorsing liberal values in politics. For instance, freedom of religion can be supported from within any religion which stresses the importance of free faith in gaining salvation.[61] As Richard John Neuhaus remarks, '[i]t is not chiefly a secular but a religious restraint that prevents biblical believers from coercing others in matters of conscience'.[62] The principle of political self-restraint can likewise be given a religious justification. Thus Michael Perry argues that Christians who are, as Christians, 'painfully aware of the fallenness, the brokenness, of human beings' should be 'extremely wary about making a political choice, least of all a coercive political choice, on the basis of a religious argument about human well-being in the absence of any independent, corroborating, secular argument'.[63] Since there are strong religious reasons for not imposing one's own religious beliefs on others – since it is not necessary to give up one's faith in order to accept liberal political values – Fish is wrong to say that liberal political values can be affirmed only by those who are already liberals.

Of course, that still leaves those who believe that it is God's command that they should do their utmost to use the power of the state to suppress doctrines that differ from theirs. As we know, Rawls says that they are unreasonable, and Fish responds that this is to exclude by definitional fiat those who are opposed to the liberal agenda of the privatisation of religion, thus begging the very question at issue. Fish argues that the principle that we should not impose arrangements on others which they could reasonably reject 'is anything but impartial … It is [a] notion of the good, as contestable as any other'.[64] 'It is a 'very personal agenda passing itself off as the impersonal judgment of all'.[65] As proof of this, Fish relies on the fact that those who believe the Bible is authoritative reject the principle. Their rejection shows, he says, that it is not a disinterested principle.[66]

But Rawls does not use the word 'unreasonable' as a synonym for those who are not liberals. Reasonableness is, for him, a much wider standard than that. He provides a philosophical analysis of what reasonableness in politics entails in circumstances where people hold widely divergent religious views. He argues that reasonable people are people

[61] Rawls, *Political Liberalism*, p. 145.
[62] Neuhaus, 'A New Order of Religious Freedom', p. 92.
[63] M. J. Perry, 'Liberal Democracy and Religious Morality', in Feldman (ed.), *Law and Religion*, p. 137.
[64] Fish, 'Mission Impossible', 2276. [65] *Ibid*., 2293 [66] *Ibid*., 2287.

who wish to co-operate on fair terms with others whom they view as enjoying equal status. Since reasonable people also recognise that it is practically impossible to reach agreement on matters of religion, and that other reasonable people may therefore have different religious views from theirs, they realise that it would be unfair to seek to write privileges for their own religion into the framework for social co-operation. It is not unreasonable to believe that there is only one true path to salvation, but reasonable people do not seek to justify the restriction of other people's freedom on the basis of this belief. For those who do not share it cannot accept it as a reason without converting to the relevant faith.

It may be more difficult for believers and non-liberals to bracket their religious views than for adherents of liberal comprehensive doctrines to bracket theirs, but the fact is that many believers and non-liberals *are* reasonable in this sense. No doubt certain fundamentalist doctrines, as well as secular comprehensive doctrines such as fascism and neo-Nazism, do not respect the right of others to disagree but rather wish to engage in what Rawls calls 'a relentless struggle to win the world for the whole truth'.[67] But though Fish claims that theirs is just a different kind of reasonableness,[68] he does not provide any arguments in support of this claim and it is hard to see how he could.

If someone sees nothing wrong with persecuting and crushing those who have different religious beliefs, no doubt they will reject political liberalism. But this does not mean that political liberalism has failed to deliver on its promise of neutrality. Suppose that two children, John and Anne, have been given a cake and John proposes cutting it in half as the fair solution, and Anne proclaims that that is not fair to her, because she wanted the whole cake. We surely would not say that John's solution was a contestable, 'personal agenda', or a mere 'perspective', based on nothing more than dislike of Anne's point of view, and we would not agree with Anne's claim that John's solution was biased against her. Nor would we agree that her rejection of his solution proves it was not disinterested. On the contrary, we would tell her that she has not grasped the concept of what it is to be disinterested. Anne may reject the ideal of fairness, but that does not prove that there is no such thing.

The same is true of the complaint that political liberalism is biased against the zealous. Political liberalism will be acceptable to anyone, whether religious or non-religious, who seeks to live together with others on a basis of mutual respect. This is a much broader class of people than

[67] Rawls, 'Public Reason', 766. [68] Fish, 'Mission Impossible', 2277.

the class of comprehensive liberals who believe that free choice is the highest value. It is the class of people who believe that when it comes to the shape of our basic social and political institutions, the ideals of justice and fairness take priority. The zealous may reject this perspective but that is not because they are reasonable in some other, as yet unexplicated sense. It is because they want more than it is fair to ask. They may sincerely say that they do not want it for themselves but are acting on the will of God. But they must concede that not everyone can be expected to accept their view of God's will.

Finally, a third reason for thinking that the principle of neutrality is fair to everyone, both believers and non-believers, is that it is compatible with the holding of strong religious beliefs. Contrary to Carter's claims that liberal political philosophers find religious ways of knowing about the world 'objectionable'[69] and 'inferior',[70] and that they are 'hostile' to the moral premises generated by religious tradition,[71] political liberalism does not attack religious beliefs as false or irrational, nor does it claim that individuals are not justified in relying on their religious beliefs in their non-public lives. It says simply that they are reasons which should not be relied upon in the public sphere. As Joseph Raz points out, this idea has been familiar since Mill propounded his harm principle.[72]

Mill thought that the majority has no right to impose its beliefs in matters of harmless or self-regarding conduct. He took the view that however morally offensive the majority may find certain conduct, if the conduct does not violate another person's rights the state has no right to prohibit it. Yet Mill did not think that there is no right and wrong in moral matters. Nor did he claim that acts that are harmless cannot be wrong. On the contrary, he said: '[t]here is a degree of folly, and a degree of what may be called … lowness or depravation of taste, which … renders [the person who manifests it] necessarily and properly a subject of distaste, or, in extreme cases, even of contempt'.[73] Mill's point was that even if the majority's contempt for certain conduct is justifiable, the majority's outrage should not, without proof of harm, be translated into legal prohibition.

[69] Carter, *Culture of Disbelief*, p. 216. [70] *Ibid*., p. 229. [71] *Ibid*., p. 224.

[72] J. Raz, 'Facing Diversity: The Case of Epistemic Abstinence' (1990) 19 *Philosophy and Public Affairs* 4.

[73] J. S. Mill, 'On Liberty' in M. G. Fawcett (ed.), *Three Essays: On Liberty, Representative Government, The Subjection of Women* (London, New York, Toronto: Oxford University Press, 1912), p. 95.

Political liberalism makes a similar argument. Political liberals argue that the state is obliged to protect goods which everyone can endorse and prevent harms which everyone wishes to avoid because these represent shared moral values. By contrast, the state should not put its weight behind religious beliefs because reasonable people disagree on such matters. Yet political liberals do not deny that the religious beliefs which they seek to insulate from politics might be true, any more than Mill denied that the moral beliefs which he thought ought not to be translated into law might be true. Nothing in political liberalism therefore suggests that religious beliefs are objectionable or suspect. Indeed, for political liberals, it would be just as illegitimate for the state to promote the view that belief in God or the Bible is false as to promote religion, for atheism is just another controversial conception of the good. The objective of promoting atheism could therefore not serve to justify the exercise of state power.

Is impartiality an impossible aspiration?

I come finally to the view that impartiality is an unachievable ideal. This is a more radical, post-modernist theme in the attack on the principle of neutrality. The claim here is not the more limited claim that liberalism is biased against the religious, but the much more far-reaching claim that no political position is capable of being fair to everyone, because moral and political judgments are necessarily biased in favour of one or another partisan position. In Fish's hands, this is said to be an implication of the liberal picture itself. Fish argues, in effect, that liberals are hoist with their own petard. He points out that the liberal argument for tolerance relies on the fact that every church is orthodox to itself and that there is no principled way of adjudicating among the competing orthodoxies. But this means, he says, that the problem to which neutrality is said to be a solution, namely, the problem of reasonable pluralism, in reality precludes the solution liberals propose – the solution of common ground. For there can be no common ground if every church is orthodox to itself: '[t]he strategy of finding common ground assumes a capacity that has already been denied by the framing of the problem'.[74]

Fish next goes on to argue that the hope of establishing political arrangements that are fair to all parties cannot be realised in principle. 'Real' neutrality is, he claims, 'not a conceptual possibility'.[75] This is

[74] Fish, 'Mission Impossible', 2263. [75] *Ibid.*, 2314.

because the aspiration to fairness is an aspiration to speak from a perspective which 'is not tied to some moral or political agenda'.[76] It is an appeal to a 'position above (or to the side of) any morality, including your own'.[77] And such a perspective or appeal is impossible. All discourses are exclusionary, and one should therefore not criticise liberalism for being exclusionary. Instead one should try to 'replace [one's] opponents' exclusions with [one's] own'.[78] Since all political theories are unfair, '[t]he only real question is whether the unfairness is the one we want. The only real question, in short, is a political one.'[79] Hence Fish praises David Smolin for openly acknowledging that, as a traditional theist, he wants victory over liberals – a victory which will, Smolin admits, force liberals to 'live in a society that is hostile to the continuance of their ways of life'.[80]

I will take these points in turn. The first point assumes that if people differ on religious matters they must differ on all matters. Fish makes no attempt to support this claim, thus begging the question against those who, like Locke and Rawls, believe that while it is not possible to reach agreement on religious matters, we do have *some* common interests. Furthermore, the view that we have common interests is entirely plausible. It is hard to deny that everyone, regardless of their religious views, has an interest in enjoying certain goods. Examples are the goods of bodily integrity, personal security, freedom from discrimination, the right to participate in the exercise of political power, some degree of education and a minimum standard of welfare and income. And if we do share interests such as these, it follows that a framework of rights and opportunities which protects them will be uncontroversial.

In so far as Fish's second point is concerned, Fish is, of course, right that neutrality is a substantive moral position. He is wrong, though, to suggest that liberals suppose – let alone pretend – otherwise. On the contrary, as we have seen, liberals take the view that the principle of state neutrality is *morally* superior to its rivals because it respects the equal moral status of all citizens in a way that rival views do not. Fish is also wrong in thinking that the moral basis of neutrality proves that it is just another personal agenda. His argument here rests on a false dilemma. He seems to think that either the principle of neutrality must be justified in a

[76] *Ibid*., 2257. [77] *Ibid*., 2277. [78] *Ibid*., 2315. [79] *Ibid*., 2256.

[80] D. M. Smolin, 'Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry' (1991) 76 *Iowa Law Review* 1097, quoted in Fish, 'Mission Impossible', 2331.

way which does not depend on moral arguments or it must be just another partisan position or 'rival faith'. Having assumed that these are the only alternatives, and given the undeniable fact that, like all political theories, the theory of neutrality is based on moral arguments, Fish concludes that its claim to be fair to everyone – believers and non-believers, liberals and non-liberals – is necessarily false. But Fish's argument ignores the possibility that some moral principles may be capable of speaking to everyone, or at least to an audience which is much wider than the adherents of a liberal, sectarian conception of the good. And a good candidate for a moral principle which transcends opposing viewpoints is, as we have seen, the principle that the exercise of state power should not be justified by views which reasonable people cannot be expected to endorse.

Like Fish, Michael McConnell commends the post-modernist position that 'there is no neutral, objective vantage point from which to view the world' and that 'we are all prisoners of our own perspectives'. He does so, however, on the basis that it has the potential to serve the interests of religion.[81] He concedes that adherents to traditional biblical religion could not find post-modernism congenial as 'a philosophical proposition', because their religious beliefs are incompatible with the idea that there is no objective basis for knowledge. He nevertheless thinks that there is 'much to commend' in post-modernism, on the political grounds that 'a world dominated by post-modernists might be thought less likely to treat religious modes of thinking as outside the bounds of reasonable knowledge'.[82] For if, as post-modernism suggests, there is no epistemological distinction between beliefs based on faith and beliefs based on evidence, then religion would be entitled to re-enter the public square on an equal footing.[83]

McConnell goes on to complain, however, that in practice it has not worked out this way: post-modernists are, if anything, according to him, greater enemies of religion than liberals. This is because post-modernists have 'treated the debunking of liberal neutrality as an opportunity for partisanship in the service of a controversial vision of liberation'.[84] This controversial vision is deeply anti-religious. Indeed,

[81] M. W. McConnell, '"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age' (1993) 163 *Brigham Young University Law Review* 182.

[82] *Ibid.*, 182, n. 66.

[83] *Ibid.*, 182–3. For a similar view see H. Baker, 'Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation' (2004–5) 20 *Journal of Law and Religion* 119–20.

[84] McConnell, 'God is Dead', 186.

post-modernists have even found it 'convenient to keep in place some of the intellectually discredited baggage of liberalism' in pursuit of their anti-religious goals. Thus Mark Tushnet, who is more than willing to deconstruct the seeming neutrality of the common law of property or contract, nevertheless takes the view that a law which imposes the same secular standards on the religious and non-religious is neutral. McConnell suggests that this is a hypocritical position for a critical legal scholar to take.[85]

This argument in puzzling in several ways. Firstly, there is McConnell's willingness to enlist a theory which he believes is philosophically suspect on the basis that it is convenient. Theorists do not usually support dubious theories for reasons of convenience.

Secondly, leaving aside the opportunistic nature of this argument, post-modernism seems peculiarly ill-equipped to play the role proposed by McConnell. Post-modernism does not demand respect for religion, as he supposes. Rather, post-modernism is in its nature a promiscuous theory. It tells us that we are free to embrace whatever views suit our political goals, liberated from the illusory bonds of objectivity, fairness and what Rawls calls 'common human reason'. As Fish explains, precisely because post-modernism holds that no view is rationally or morally superior to another, it frees post-modernists to fight for the views they happen to like – and there is no guarantee that these views will be respectful of religion. It is therefore hard to understand McConnell's complaint that post-modernists who are opposed to religion have betrayed post-modernism: if objectivity and impartiality really are myths there is no view about the role religion should play in public life which post-modernists are rationally or in fairness obliged to endorse.

Thirdly, it makes no sense to commend the view that there are no objective grounds for preferring one theory to another, only partisan grounds, and then accuse post-modernists of 'partisanship', reliance on 'intellectually discredited' views, and the adoption of 'controversial' agendas. It is, in fact, not hypocritical at all, but only to be expected, that a critical legal scholar who thinks that there are no objective constraints on theorising would take a formalistic view in some contexts and a deconstructive view in others, depending on which approach happens to suit their political agenda. McConnell's accusations of partisanship, poor scholarship and controversiality presuppose the possibility of

[85] *Ibid*., 188.

objectivity, good scholarship and uncontroversiality. But these concepts are incompatible with post-modernist epistemology.

In conclusion, my starting point in this paper has been the claim that disagreement on religious matters among reasonable people is inevitable and I have asked how a society which is guided by the ideal of treating everyone with mutual respect would respond to intractable but reasonable disagreement of this kind. Drawing on the work of John Rawls, I have defended the view that if everyone is to be treated with mutual respect, the exercise of state power should be justified in terms of shared reasons. Since religious reasons are not of this kind, I have argued that the only way to respect those who reasonably disagree about such matters is to put them aside or insist on neutrality in respect of them. This means that the state should not prefer one religious viewpoint over another, nor religion over non-religion. Furthermore, citizens should refrain from pressing purely religious arguments in the public domain. Finally, I have defended the principle of neutrality against a number of attacks, concluding that it is genuinely fair to both believers and non-believers.

5

Pluralism in law and religion

MARGARET DAVIES*

1. Introduction

The image of state law as an institutionally separate, ideologically neutral and normatively superior entity which orders our society is no longer tenable. Over the past few decades a large number of critiques have established that law is embedded in and indissociable from its cultural context, that far from being neutral it is ideologically grounded in politically weighted presuppositions, and that its once-absolute superiority is counteracted by the existence of plural normative environments within which contemporary subjects of law are situated.[1]

In contemporary Western nations, religion is often regarded by law as a matter of private freedom, as though it occupies a space which is other to law, the state, and our public sphere. In this, the 'West' is not itself unified: within the Anglosphere, for instance, Britain has an established church, while varying doctrines of separation between church and state or freedom of religion operate in the United States, Canada, Australia and New Zealand. There are also differences in whether political discourse is inflected with, or avoids, explicitly religious considerations.

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[1] See S. E. Merry, 'Legal Pluralism' (1988) 22 (5) *Law and Society Review* 869–96; J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1; G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in G. Teubner (ed.), *Global Law without a State* (1997); M. Davies, 'The Ethos of Pluralism' (2005) 27 (1) *Sydney Law Review* 88.

Recently, religion has encroached upon the 'public' consciousness in ways which two decades ago might have seemed implausible. The causes and manifestations of this encroachment are undoubtedly complicated.[2] In Australian domestic politics, for instance, family-oriented politicians espousing conservative Christian ethics (though sometimes denying formal affiliation with Christian organisations[3]) have been elected to state and federal parliaments. Is this evidence of the Christian religion actually gaining a greater influence over the electorate, does it suggest a return to Christian ethics if not institutionalised Christianity, or does it indicate an electoral backlash against the (perceived) diminishing status of religion in mainstream politics?[4] Does it indicate the growth of new sectarian political powers?[5] Is the growth of fundamentalist (theologically narrow) Christian churches indicative of a greater interest in Christianity, is it symptomatic of a conservative frustration with the socially progressive stance of some of the established denominations or does it marry right-wing Christian views with capitalist ideology in a way especially attractive to modern sensibilities?[6] In terms of international politics, the reasons for the current preoccupation with religion seem clear enough – in recent years religious conflict, or at least conflict with a strong religious flavour, has been especially prevalent and especially sensationalised in the media and in national and international politics. Given the religious diversity of contemporary Western nations, these conflicts have inevitably rebounded in the domestic sphere.

The objective of this paper is to consider the relationship of law and religion by reference to the idea of legal pluralism. For the moment, I will leave the term 'legal pluralism' only broadly defined, though it is necessary to point out that it can be understood in a variety of ways: legal pluralism refers to the multiplicity of factual normative orders, whether

[2] See generally M. Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (Crows Nest, NSW: Allen and Unwin, 2006).

[3] Media Release (undated), 'The Truth About Family First – Setting the Record Straight' at www.familyfirst.org.au/mr/truthaboutffp091104.pdf (accessed 10 March 2006).

[4] As Maddox illustrates, Christianity is still a very powerful force in Australian politics, though the level of its influence is not always recognised by the media. Maddox, *God Under Howard*.

[5] For a historical account of Protestantism and Catholicism in Australian politics see J. Brett, 'Class, Religion, and Foundation of the Australian Party System: A Revisionist Interpretation' (2002) 37 *Australian Journal of Political Science* 39–56.

[6] Maddox, *God Under Howard*, 276ff; see also V. Brady, 'The Spirit in Australia: Religion and National Character' (2005) 178 (Autumn) *Overland* 22–29 at 24.

recognised or unrecognised by state law,[7] and it also refers to the inherent openness and diversity within state law.[8] One narrative about law is that it is a singular system of norms and institutions derived from a state, essentially separate from other normative fields in a society, whether cultural, religious, or simply broad moral values. In the West, such law is often (though not always) regarded as essentially secular, in that religion is not an arm of the state, and no religion is preferred to another. Much important debate can be had about the details of state religious neutrality – for instance what a religion is, what it means not to promote a religion, how to understand the separation of law and moral beliefs, and so forth.[9] This view of law is in one sense undeniable – it is certainly the dominant understanding of what law is and how it operates: subjects, legislators, judges, and lawyers make this idea of law true by behaving as if it is true. We all assume it to be true. However, law may also be understood as a more pluralist, more social, less statist, and less secular phenomeonon. It is the aim of this paper to show how, focusing in particular on religious diversity. By and large, however, I do not address what many might regard as the really hard practical questions, such as where the limits to recognition of religious (and other forms of) diversity ought to be drawn. The fact that I do not address this question in particular should not be taken to mean that I celebrate plurality as an end in itself without limitations. Rather, my project is a different one – how to understand law as an inherently plural rather than singular phenomenon. This does not entail the celebration of difference at all costs.

This paper is in four parts. **First**, I outline the simple picture of secular state monism, and describe some of the factors which complicate it and possibly render it completely implausible. **Second**, I present some further complexities to do with our understanding of religion, culture and diversity. **Third and fourth**, I consider the possible contributions of the two forms of legal pluralism which I have identified.

[7] Griffiths, 'What is Legal Pluralism?'.

[8] J. Dalberg-Larsen, *The Unity of Law: An Illusion? On Legal Pluralism in Theory and Practice* (2000); M.-M. Kleinhans and R. A. Macdonald, 'What is a *Critical* Legal Pluralism?' (1997) 12 (2) *Canadian Journal of Law and Society/Revue Canadienne de droit et société* 25–46; E. Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13 (1) *Social and Legal Studies* 57–79.

[9] For instance, M. Sandel, 'Religious Liberty: Freedom of Choice or Freedom of Conscience' in R. Bhargava (ed.), *Secularism and its Critics* (New Delhi: Oxford University Press, 1998), 73–93; R. Audi, 'The Separation of Church and State and the Obligations of Citizenship' (1989) 18 *Philosophy and Public Affairs* 259–96.

2. Separation of law and religion

In thinking about the relationship of the state to religious communities, we often assume a simple dualism between the law (on the one hand) and dominant and minority religious groups and their beliefs (on the other). From the position of state secular monism, this assumption would be justified. By this, I mean that if you take the position that law is singular (legal monism) and is derived from a secular state, then it follows that any beliefs held by religions are in some sense other or external to that single system of law. Indeed, some versions of legal positivism hold that law has its own internally coherent authority, and that merely moral, religious, and cultural beliefs or reasons are always excluded from legal reasoning.[10] As an example of a broadly positivist-monist-statist view of the separation of law and other normative systems, I take the well-publicised comments of the former Australian Treasurer, Peter Costello, on the incompatability of religious law with Australian law:[11]

> There is one law we are all expected to abide by. It is the law enacted by the Parliament under the Australian Constitution. If you can't accept that then you don't accept the fundamentals of what Australia is and what it stands for.
>
> Our State is a secular State. As such it can protect the freedom of all religions for worship. Religion instructs its adherents on faith, morals and conscience. But there is not a separate stream of law derived from religious sources that competes with or supplants Australian law in governing our civil society. The source of our law is the democratically elected legislature.
>
> There are countries that apply religious or sharia law – Saudi Arabia and Iran come to mind. If a person wants to live under sharia law these are countries where they might feel at ease. But not Australia.

Leaving aside the fact that it was inflammatory of Costello to single out Muslims, his main point is clearly that the secular law is a single coherent system which is superior in the Australian socio-legal order to any other system of belief or value system. This is a point of view which is commonly accepted in Western democracies and importantly, it is a

[10] For a recent overview and critique of inclusive and exclusive positivism, see D. Priel, 'Farewell to the Exclusive-Inclusive Debate' (2005) 25 *Oxford Journal of Legal Studies* 675–96.

[11] P. Costello, 'Worth Promoting, Worth Defending: Australian Citizenship, What It Means and How to Nurture It', Speech to the Sydney Institute, Thursday, 23 February 2006, published at www.treasurer.gov.au/tsr/content/speeches/2006/004.asp (accessed 8 March 2006).

perspective which – like liberal political theory – can be of immense value in maintaining and developing certain principles such as those of equality, bodily autonomy, and sexual self-determination.

For instance, while Western secular states are undoubtedly *de facto* entangled with their dominant Christian heritages,[12] the ideal of secularism can provide a strong rhetorical basis for sidelining arguments based entirely on one of the many versions of Christian doctrine. As a political strategy, secularism demands that independent non-faith-based grounds for a policy argument must be identified before it can be regarded seriously in the public domain.[13] This is not to say that religion as such must always be sidelined: insofar as any faith responds to contemporary social imperatives and not merely to dogmatic theology, it can clearly offer significant contributions to public dialogue.[14] At the political level, excluding religion may only strengthen its power to operate behind the scenes.[15] Indeed, as Maddox argues, neglecting religion can pose risks to public discourse:[16] serious dialogue between multiple faiths and the non-religious communities is a more open and democratic response than a simplistic exclusion.

Of course, there are a number of factors complicating the official picture of a single, state-derived secular law which over-rides religious truths. At the broadest level we need to ask two questions. First, what is the meaning and status of secularism? Second, what does it mean to say that there is only one law?

Secularism

Meaningful separation of state and religion – if it is possible – must involve not only the disestablishment of official religions, but also a candid evaluation of publicly enforced norms: are they based essentially

[12] See C. Taylor, 'Modes of Secularism' in Bhargava (ed.), *Secularism and its Critics*. For a discussion of secularism within classical and contemporary Islamic thought, see Z. Sardar, *Desperately Seeking Paradise: Journeys of a Sceptical Muslim* (London: Granta Books, 2004), chapter 12.

[13] I do not accept the argument that a successful political ethos ultimately relies on the values of established religions. This is only plausible if such religions have a monopoly on moral reasoning and action, which is a completely untenable claim. See Audi, 'Separation of Church and State' 290ff. Cf. P. Devlin, *The Enforcement of Morals* (Oxford University Press, 1965), 23.

[14] Audi 'Separation of Church and State' 278–9.

[15] Maddox, *God Under Howard*, 309.

[16] Ibid. See also W. Hudson 'Religious Citizenship' (2003) 49 *Australian Journal of Politics and History* 425–9.

on a particular religious heritage, or are they supported by independent humanist, environmental, economic or social reasons?[17] For the present, I assume the need for *some form* of secularism in this broad sense, even though some may regard it as a partisan disregard of the world-view of believers.[18] A secular legality must be available for non-believers and for those who believe that there is a distinction to be drawn between that which belongs to God, and that which belongs to Caesar.[19] Liberal secularism, which respects an individual's right to practise and publicly espouse a faith, is to be preferred to a dogmatic or fundamentalist secularism which discourages or even condemns any public expressions of faith, for instance in the name of assimilation.[20] At the same time, two qualifications need to be made: first, that secularism may not be possible as a pure factual state, but is rather a normative aspiration and strategy; and second, that secularism *and* faith-based philosophies can co-exist within the one legal context. The second of these claims is clearly the more contentious and I will consider it further in parts 4 and 5 of this paper. For the moment I focus on the first question, of whether secularism is possible, and outline some of the factors which complicate the view that we live in a secular state governed by one law.

The first complicating factor relates to the difficulty of enshrining secularism in the law. What does secularism mean legally? One legal view of the separation of religion and the state is that the goal of separation flows from constitutional doctrine, as defined by legislation and enforced by the courts. Separation of religion and the state is a means of promoting freedom of religious belief: religion, in other words, is a private affair. The basic position is ordinarily that there should be no established or official religion,[21] a principle often supplemented by several others: a state must not officially promote or prefer one religion over another, it must not establish religious tests for holding office, it

[17] Audi, 'Separation of Church and State' 278.

[18] Taylor, 'Modes of Secularism' 36; V. Bader, 'Religious Pluralism: Secularism or Priority for Democracy' (1999) 27 *Political Theory* 597–633 at 603–7.

[19] 'And Jesus answering said unto them Render to Caesar the things that are Caesar's, and to God the things that are God's. And they marvelled at him.' The Bible, Mark 12:17.

[20] J. Scott, 'Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools' (2005) 23 (3) *French Politics, Culture and Society* 106–27.

[21] See, for instance, comments by John Howard on 2 March 2006, 'Transcript of the Prime Minister The Hon John Howard MP Joint Press Conference with The Hon Tony Abbott, Minister for Health and Aging, Parliament House, Canberra' last question at www.pm.gov.au/news/speeches/speech1796.html (accessed 16 March 2006).

must not interfere with or enforce religious observance.[22] Beyond these minimal principles, there is much variation in what separation of religion and the state can mean. Separation can be seen to be consistent with quite far-reaching legal discrimination against minority religions, including tax advantages for dominant religions, surveillance or other monitoring of non-mainstream cults and sects, and registration requirements for religions.[23] In some contexts, such as contemporary Australia, it is regarded as consistent with parliamentary prayers, Christian public holidays, and the ongoing influence of Christian heritage on state affairs.[24] In other situations, separation may mean that much religious discourse and symbolism is excluded from the public sphere.[25] It may mean banning students in public schools from wearing clothing or symbols associated with a religion.[26] Thus, there is widespread debate about particular legal rules and governmental actions and the extent to which they satisfy the separation doctrine.

However, a more serious problem for secularism is that in any society, religion, culture, and history are intertwined in legal doctrine and in the interpretive contexts which inform the law. The fact that the law says that something is or is not the case, does not make it so. As feminists and race theorists have shown, for instance, the fact that the state does not officially prefer one sex or race to another (and bolsters this general non-preference with a large number of rules and policies) is counteracted

[22] See for instance, Commonwealth of Australia Constitution Act 1900, s. 116; Universal Declaration of Human Rights, Article 18; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9.

[23] N. Stinnett, 'Note: Defining Away Religious Freedom in Europe: How Four Democracies Get away With Discriminating Against Minority Religions' (2005) 28 *Boston College International and Comparative Law Review* 429–51.

[24] Prayers constitute official endorsement, though not enforcement, of religion indicating at the very least that the process of secularisation is incomplete. However, a motion to '(i) remove religious references from statutory oaths and pledges, (ii) abolish official parliamentary prayers, (iii) remove tax advantages that solely apply for religious purposes, and (iv) to consider other ways of achieving a true separation of church and state' failed in the Australian Senate 50–7 on 1 March 2006 (SJ No. 74 21 Separation of Church and State). See also Maddox, *God Under Howard*, 56–7.

[25] See Taylor, 'Modes of Secularism'. Taylor distinguishes between 'common ground' secularism, which drew on established Christian principles without preferring any particular denomination, and 'independent ethic' secularism which attempted to find a non-religious basis for political life. The second type is more likely to insist upon the removal of religion from all spheres of state activity, such as publicly funded educational institutions. For a discussion of some particular examples see Audi, 'Separation of Church and State' 268–74.

[26] Scott, 'Symptomatic Politics'.

by many informal and hidden inequalities such as gender and racial stereotypes, unequal opportunities, existing privileges and networks, and other cultural power structures.[27] It is absurd to suggest that formal equality means actual equality. Similarly, the fact that the state does not officially prefer one particular religion over another (and underlines this with a myriad of doctrines, decisions, and rules) does not mean that there is no substantive preference. Even where the state does not officially establish a religion, does not officially prefer a particular religion, and does not officially discriminate against any religion, there may nonetheless be very substantial informal mechanisms counteracting the formal position.[28] For instance, at the intersection of law, national politics and culture, the ideal or normative citizen takes on dominant characteristics of race, culture, religion, and gender – typically in Australia, the white Anglo-Christian male.[29]

At a subtle and therefore insidious level then, the situatedness of law within a cultural context and history means that certain principles based on religion rather than reason or practicality are embedded in law: these can be difficult to remove or challenge, even when there is very good reason to do so.[30] It is inadequate, even hypocritical, for our political leaders to protest that we live in a secular state without critically reflecting on the multitude of ways in which Christianity remains embedded in our law. Moreover, the existence of legislators and judges who are not fully committed to secularism, and who feel that it is their right or even duty to draw upon religious principles in their decision-making can undermine the separation of state and religion.[31] While secularism has often been supported by religious groups who might otherwise suffer persecution, it is also sometimes deliberately undermined by religious pressure for legislators to ensure that their decisions are in accordance with their faith.[32]

[27] The literature is too vast to cite adequately, but see, for instance C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); M. Thornton (ed.), *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995); N. Lacey, 'Feminist Perspectives on Ethical Positivism' in T. Campbell and J. Goldsworthy (eds.), *Judicial Power, Democracy and Legal Positivism* (Aldershot: Ashgate, 2000), 89–113, especially 92–9; K. Nunn, 'Law as a Eurocentric Enterprise' (1997) 15 *Law and Inequality* 323.

[28] See generally Maddox, *God Under Howard*.

[29] Cf. D. Herman, '"An Unfortunate Coincidence": Jews and Jewishness in Twentieth-century English Judicial Discourse' (2006) 33 *Journal of Law and Society* 277–301.

[30] Bader, 'Religious Pluralism' 608–11.

[31] See generally Maddox, *God Under Howard*, for instance chapter 4.

[32] For an example of religious advice to legislators and other participants in public life, see 'Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life' published by the Congregation for the Doctrine of the Faith (November

Given that cultural values as well as legal principles may have a strong relationship to a particular religious heritage – a relationship which is so deep that we do not always recognise it – we need to question whether secularism is even possible, whether it is an ideal for some, but unattainable in any 'pure' or absolute form. Suppose, for instance, that a political party espousing 'family values' argues against recognition of same-sex relationships, voluntary euthanasia or abortion. A purely religious argument does not convince the community at large. However, it is possible that arguments driven primarily by religious motivations or by cynical politicians wishing to benefit from the religious vote, will nonetheless resonate with the community at large because of deeply held, though not unquestionable, values derived from or at least strengthened by religious sources – the value of marriage, the need for procreation, the ideal of the mother as nurturer, protection of the vulnerable (the unborn, the ill and the aged). In any cultural context, whether secular or not, religious values may add weight to policy arguments, compromising the secularist condition of the state. Indeed, it is often very difficult to disentangle 'religious' reasons from other types of reason, whether economic, socio-cultural, environmental, or reasons drawn from political expediency. Reasons are frequently muddled or masked and cannot be clearly located within one or another area of thought. Reasons are voiced in public spaces but motivated by private desires, emotions, and beliefs which may or may not be articulated and may or may not be religious. Recent debates in Australia over abortion and same-sex relationship recognition illustrate that a sector of the community now expect arguments to be framed in secular rather than purely religious terms. Yet separation of religion and state may even encourage participants in public debate to disguise the nature of their reasons.[33] I am therefore inclined to view secularism only as an aspiration and a strategy to be pursued in the process of disestablishment, rather than an existing state of affairs.

Monism

Second, what does it mean to say that there is only one law? Clearly it is still the mainstream legal position that all law is derived from state institutions, that it can be understood as a complete coherent system, and that other normative systems are not 'law' though they may have

2002) at www.vatican.va/roman_curia/ congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (accessed 10 March 2006).

[33] Maddox, *God Under Howard*, 93–4 and chapter 8.

strong force as culture or religion. On the other hand, just as indigenous law is real for indigenous people (and is increasingly accepted as a form of law by mainstream institutions), Shari'a is real for Muslims, Biblical and theological precepts are law for Christians, and so forth.[34] There is no necessary contradiction between the statements that there are two laws – let us say indigenous law and the law of the Australian state – and the statement that only the second form of law exists. The first statement accepts the indigenous perspective that no act of the Australian state can extinguish a law more truly existing since time immemorial,[35] while the latter statement accepts the undeniable fact that no such law is formally recognised, at least not as a self-determining normative entity. Dualism or pluralism is just as real as monism, though less powerful in the legal consciousness.

Similarly, for any person who maintains that there is a law derived from a religious source, it would be nonsensical to claim that this law had been extinguished by state law: how can a state supercede the law of a god who is seen as transcendent? Subject to my remarks above concerning unachieved secularism, state law takes little or no formal notice of supernatural entities. It is, then, unremarkable to say that there are a number of laws in a society which practises religious tolerance, and that these are real law for those who follow them. A Catholic who wishes to divorce and remarry must of course do so under the secular family law, but if s/he wishes to remain a member of the Catholic community must also follow the rather more stringent requirements of gaining an annulment by showing that the marriage did not truly exist.

The monistic paradigm of law is necessarily an exclusive one: in its effort to balance different interests, in its location within a particular cultural heritage, in its construction of benchmark persons who reflect norms of white masculinity, the law excludes the perspectives, beliefs, and even beings of a number of differently marked others. It is hard to see how a singularly defined law could do otherwise. Exclusion is one way of

[34] For a detailed illustration and analysis of the co-existence of Shari'a law and common law in the UK see Q. Mirza, 'Islam, Hybridity and the Laws of Marriage' (2000) 14 *Australian Feminist Law Journal* 1–22. See also P. Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glasshouse Press, 2005), especially chapter 6; I. Yilmaz, 'The Challenge of Post-modern Legality and Muslim Legal Pluralism in England' (2002) 28 *Journal of Ethnic and Migration Studies* 343–54.

[35] I. Watson, 'Indigenous People's Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39; see also S. Brennan, B. Gunn and G. Williams, '"Sovereignty" and its Relevance to Treaty-making Between Indigenous People and Australian Governments' (2004) 26 *Sydney Law Review* 307–52.

minimising conflict, that is, by imposing the same standards upon all. But exclusion also necessarily leads to conflict, not just between groups of people, but specifically in relation to the law. Conflict between religious law and state law arises in several forms, most of which are familiar to legal theory. First, it is sometimes impossible for an individual to obey the precepts of both the secular and the religious law. Where religious dress or promulgation of religious symbolism is forbidden by the state, but required by religious norm, the individual has a personal conflict about whether to obey the state law or the religious norm. In a more subtle sense, the values, the personhood standards, the general social assumptions of mainstream law can lead to dislocation and alienation for those whose values might be different or whose person is not adequately reflected in law.[36]

Second, we see conflict at the level of explicit law and policy: there are those who think that a religious perspective ought to apply to all members of the community regardless of faith and those who expect that religious norms should be binding only on those who adopt a particular faith. The 'enforcement of [Christian] morals'[37] is still with us, and is even alarmingly on the rise in some parts of the West. A difficulty in this context is, as I have indicated, working out what is essentially a religious norm and what is an ethical principle which might be based on either religious or non-religious grounds. The anti-abortion stance is often framed in religious terms but can also be based on non-religious grounds. In contrast, arguments against the use of contraception generally seem to be associated with particular religious beliefs. Believers sometimes feel they are entitled to defend the religious norm in contravention of the secular law – for instance by assassinating a leader, bombing an abortion clinic or attacking the embassy of a country where blasphemous material has been published.[38] Though frequently reported in the media, these acts of illegal enforcement are rare when compared to the extent of peaceful religious observance, and seem to represent only the extreme fringes of religious belief.

Third, conflict appears where a religious minority is criticised by the dominant legal culture for practices which do not accord with

[36] N. Naffine, 'Law's Sacred and Secular Subjects', this volume.

[37] Devlin, *The Enforcement of Morals*.

[38] For a discussion of these issues in the context of US criminal law, see M. C. Alexander, 'Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings' (1997) 39 *Arizona Law Review* 1161–208.

mainstream standards regarding human rights, for instance a perceived or actual lack of gender equality. Such conflict is often heightened by a failure of self-reflection on the part of Western critics, and by the 'culturalisation' of human rights violations, so that they appear to be inevitably associated with a particular culture.[39] Finally, conflict arises over the nature and status of state law and how the religious subject or citizen is (or ought to be) situated in relation to it.[40]

Like the existence of multiple laws, religious and secular, the existence of such conflicts is also unremarkable – they extend well beyond religion to all forms of conscientious objection to law, and to all forms of dogmatism regarding principles for fundamental social ordering. What is worthy of attention is not so much the existence of conflict but first, how to understand it in the context of contemporary socio-legal theory and second, how citizens, states, organisations, and decision-makers do/ought to respond.

3. Further complications

Before moving onto these questions, some theoretical presuppositions and complexities need to be briefly explained. These matters are 1) the meaning of religious diversity; 2) the relationship between religion and culture; and 3) the ever-present question of relativism versus universalism. I raise these issues specifically because it is very easy to lose sight of the truly plural nature of our social landscapes and conditions of subjectivity. By 'truly plural', I do not mean that there are many semi-autonomous communities and legal sectors which can be theorised as a social totality. Rather, I mean that there are many overlapping, interconnecting, open-ended and non-essential social locations through which identities (e.g. legal and religious) are constructed and reconstructed. These cannot be understood as a totality or at all objectively. What this means theoretically will become clearer in part 4.

[39] See S. H. Razack, 'Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages' (2004) 12 *Feminist Legal Studies* 129–74. Razack uses the term 'culturalisation' to refer the way in which, for instance, violence against women is seen as a cultural attribute of Muslim populations (and therefore its prevalence in European culture is erased). For one attempt to compare violence against women in American and Islamic society, see R. Lehr-Lehnardt, 'Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters' (2002) 26 *Southern Illinois University Law Journal* 403–42.

[40] R. Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

Religious diversity

First, what does 'religious diversity' mean? In this paper I use it to mean both the differences between and the differences within any religious group, or inter- and intra-religious difference. Sometimes the terms 'religious diversity' or 'religious pluralism' indicate a difference between religions as autonomous blocs of theological belief and cultural practice. Religious diversity is taken to mean the diversity of religions on a macro scale – Hinduism, the Bahai faith, Islam, Sikhism, Judaism, Christianity and so forth. In geopolitical discussion we have also become accustomed to referring to sub-religious groups, Sunni, Hasidic, Pentecostal, or Mormon to name a random few. Within Christianity, the religion I am most familiar with (though not necessarily most sympathetic to), there are hundreds if not thousands of self-determining denominations or sects. From a mainstream Christian position, some of them are heretical or only marginally 'Christian'. Intra-religious diversity is not only sect-based but also lies in internal critiques such as feminist critiques of patriarchal dogma and different cultural expressions of religious practices.[41] Such internal critiques may have an impact on religious doctrine and governance or they may be more or less silenced by religious leaders: in this context much depends on the modalities of power within a particular religious organisation. However, even where a particular religion has strictly controlled mechanisms for determining leadership and theology, the existence of any internal critique and any internal evolution of practice and thought indicates an entity which has the capacity to be responsive, dynamic and pluralistic, rather than an entity which is singular and non-dynamic.[42] When talking of religious

[41] The literature is obviously too extensive to cite, but some recent works which I have found interesting include: A. al-Hibri, 'Islam, Law and Culture: Redefining Muslim Women's Rights' (1997) 12 *American University Journal of International Law and Policy* 1–44; Z. Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 (1) *HAWWA: Journal of Women in the Middle East and the Islamic World* 1; J. A. McDougall, 'Women's Work: Feminist Theology for a New Generation' (2005) July 26 *Christian Century* 20–5; K. Pui-lan, 'Mercy Amba Oduye and African Women's Theology' (2004) 20 *Journal of Feminist Studies in Religion* 7–22; O. Olajubu, 'Seeing through a Woman's Eye: Yoruba Religious Tradition and Gender Relations' (2004) 20 *Journal of Feminist Studies in Religion* 41–60; B. Zeller, '"We're the Other Catholic Church" Feminism in a Radical Catholic Renewal Community' (2003) 19 *Journal of Feminist Studies in Religion* 123–43.

[42] In this respect, religion is like culture. Recent cultural theory criticises the essentialisation of culture, where culture is seen as basically singular, static, and internally coherent. See R. Post, 'Law and Cultural Conflict' (2003) 78 *Chicago-Kent Law Review* 485–508 at 490–4; S. E. Merry, 'Law, Culture, and Cultural Appropriation' (1998) 10 *Yale Journal of Law and the Humanities* 575–603.

diversity then, we need to remember the several layers of intra-religious as well as inter-religious diversity.

Culture, nation and religion

Layering of differences is also to be found in the relationships between religion and culture in their specific national settings.[43] In any given context it can be difficult to distinguish what belongs to 'culture' and what belongs to 'religion'. 'Muslim', for instance, normally denotes a religious affiliation, but it can also be descriptive of a culture, for instance in the context of secular Muslims. Some practices, such as the celebration of Christmas, have religious foundations but have been assimilated into certain cultures to the extent that its religious nature is almost invisible to mainstream culture. Not all those who celebrate Christmas are Christian. On the other hand, religious practices are often culturally differentiated, in that the 'same' religion, sect, or denomination will have different expressions in different cultural and national contexts. Religion, culture and the state are of course intimately connected in that religious beliefs are generally transmitted through social and cultural media, such as the family, educational institutions, cultural symbolism and public ceremony, as well as through more specifically religious institutions such as places of worship which serve both a religious and a socio-cultural purpose. At the same time, while all religions have a cultural history in that they have been established and developed within one or several cultures, most do not of *necessity* belong exclusively to a culture, nation or ethnicity, especially where a faith has also involved a history of proselytising.

From a position internal to a religion, it might appear dangerous to assimilate a religion merely to culture: after all, some distinctive things about religion are belief in a spiritual dimension of the universe expressed as a deity or in some other way, the explicitly articulated nature of belief and devotional practices (in contrast to cultural beliefs which are embedded in language and modes of social existence), and a conviction that one's own religion is the truth. Unlike cultures, religions have designated leaders and

[43] For a different approach to how law, culture and religion relate, see B. Berger, 'Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere' (2006) *15 Constitutional Forum* 15–22. While I agree with Berger that law and religion are cultures, in the sense of providing meanings to experience and the world, there is also at times analytical sense in distinguishing law and religion from culture: law is distinct because it is (culturally) defined as distinct and religion can be seen as distinct for the reasons I give in the text. This set of relationships is, in my view, unavoidably paradoxical.

gatekeepers of correct thought and practice. A believer's faith about religious truth must be very different from mere culture, since it transcends the material existence of the everyday context. Moreover, those concerned to critique or reform a religion may take great pains to distinguish core religious truth from cultural distortions such as patriarchy.[44] However, while culture and religion cannot be conflated theoretically, they do share some similarities: from a position external to a particular religion, there is little obvious analytical difference between culture and religion. Both 'culture' and 'religion' refer to the practices, ideas, beliefs, and ways of life of groups of people. Culture and religion overlap and intersect much as two or more cultures overlap and intersect. In many instances, therefore from the perspective of external theory, it seems to make little difference whether recognition of a group takes place along the axis of religion or of culture. Yet given the strength of commitment entailed by a genuinely held religious faith, the internal perspective may be somewhat different.

Religious/cultural relativism

A third point relates to the plurality of forms of social existence, religious or cultural.[45] 'Cultural relativism' is a reasonably common but not especially helpful term. Cultural relativism is sometimes described as the idea that the world-views of all cultures are ethically and epistemologically equal, a view which is subject to the criticism that it leaves no room for reasonable debate about the merits of a particular culture. Understood in this way, cultural relativism seems to legitimate 'cultural' or religious practices such as the suppression of minorities and dissidents, extreme gender inequalities, and other human rights violations. Cultural relativism is generally understood to stand in opposition to the view that there are universal standards, whether moral or epistemological, against which individual cultural beliefs can be assessed. The problem with this view is that 'universals' inevitably emanate from a cultural perspective – they are a view from somewhere. To acknowledge this, however, looks like a concession to relativism, while to fail to acknowledge it may lead to cultural imperialism, an explicit or implicit view that

[44] Al-Hibri, 'Islam, Law and Culture' 5.

[45] See generally M. Rosenfeld, 'Human Rights, Nationalism, and Multiculturalism in Rhetoric, Ethics and Politics: A Pluralist Critique' (2000) 21 *Cardozo Law Review* 1225; M.-B. Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in J. Cowan, M.-B. Dembour and R. Wilson (eds.), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001).

one culture is superior (morally, socially, and according to other presumed indicators of 'civilisation') to all others and may therefore be imposed on 'less developed' cultures.

For these reasons the relative/universal dichotomy is difficult to reconcile, and there is a need to move beyond it. A more acceptable understanding of cultural difference combines, paradoxically, an acknowledgement of the fact of incommensurability with the practical social need to commensurate. Cultures and religions are incommensurable because they have developed in quite different contexts of language, history, and physical environment. There is no place outside environment, language, or history from which cultures can be measured and made commensurable according to abstract universal standards. However, to say that cultures are incommensurable and that there is no objective standpoint from which to evaluate them does not entail that no dialogue can be entered into regarding particular 'cultural' or religious practices. Such a dialogue cannot take place on the basis of final and dogmatic truths (not even the 'truth' of liberal democratic secularism![46]), but on the basis of open, honest, and contingent perspectives.[47] Indeed, as I have suggested, speaking of relativities or differences *between* cultural blocs masks the relativities and differences *within* cultures and assumes a somewhat static and closed picture of culture.[48] Merely accepting difference on a large scale and according to some official or dominant view of a culture or a religion re-enacts the very silencing or suppression which is frequently the point of political tension. It can, for instance, reinforce the oppression of women within a particular religious group by conferring additional power on those already empowered within the group,[49] even where there is a lively internal feminist critique. Therefore, instead of falling into a debate about relativism and universalism, there is a need to focus on the existence of internal cultural and religious critiques, to resist cultural and religious stereotyping, and to

[46] Bader, 'Religious Pluralism' 614.

[47] I accept that this is also a form of liberalism. See generally S. Williams 'Religion, Politics, and Feminist Epistemology: A Comment on the Uses and Abuses of Morality in Public Discourse' (2002) 77 *Indiana Law Journal* 267–76.

[48] Post, 'Law and Cultural Conflict'.

[49] See A. Schachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 *Journal of Political Philosophy* 285–305: on the issue of the conflict between religion and women's rights, see generally C. Evans and A. Whiting, 'Situating the Issues, Framing the Analysis' in A. Whiting and C. Evans (eds.), *Mixed Blessings: Laws, Religions, and Women's Rights in the Asia-Pacific Region* (Leiden: Martinus Nijhoff, 2006).

negotiate contingent, rather than universal, norms responding to practical contexts and immediate needs. As Robert Post comments in relation to the need to consider specific contexts when trying to understand law in a situation of cultural conflict, '[t]he only abstract truth seems to be that we cannot escape the risks and responsibilities of practical judgment'.[50]

4. Law, pluralism and religious diversity

What can be drawn from this complicated beginning? First and foremost, no political model and no singular legal system can perfectly solve the question of how to accommodate religious and cultural diversity within a social context. If a model or a single legal framework is to ensure neutrality and equal treatment of different religious or cultural groups, it must itself be culturally or religiously neutral, which seems to me impossible in principle.[51] Moreover, models sometimes focus on large-scale forms of difference, neglecting the intra-religious, intra-cultural and hybridised varieties of diversity which I have mentioned.[52] That does not mean that there is no point in trying to construct ways in which political and legal accommodations of diversity might best be made: such efforts constitute a point of departure for changes in the positive law, represent a necessary attempt at commensuration, and bring useful concepts (such as Rawls' 'overlapping consensus'[53]) into the political lexicon. Second, however, law in its positivist-statist-secular form has a sub-text of diversity. Legal theory has a very good appreciation of law as a monistic, institutionally limited, phenomenon, but less understanding of the socially diverse nature of law. A better understanding of law as an expression of social life will, I believe, reveal its inherent pluralism and

[50] Post, 'Law and Cultural Conflict' 508.

[51] The problem here is one identified in relation to Rawls' notion of the free-standing political conception of justice as opposed to comprehensive moral world-views. Can the 'free-standing' conception be framed without any necessary reliance on a particular comprehensive doctrine? Does it all simply resolve into comprehensive (rather than merely political) liberalism, a view which – however attractive to Westerners – is hardly culturally neutral? See J. Rawls, *Political Liberalism* (New York: Columbia University Press); J. Rawls, 'The Domain of the Political and Overlapping Consensus' (1989) 64 *New York University Law Review* 233–55; M. Barnhart, 'An Overlapping Consensus: A Critique of Two Approaches' (2004) 66 *Review of Politics* 257–83.

[52] A model which does take account of intra-group diversity is Ayelet Schachar's 'vertical priority model': see Schachar, 'Group Identity and Women's Rights in Family Law'.

[53] Rawls, 'The Domain of the Political and Overlapping Consensus'.

suggest ways of promoting legal inclusivity. In the remainder of this paper I want to outline an approach to legal theory which attempts to accommodate some of these complexities. This will involve returning to my original question, which was whether and how the idea of legal pluralism can assist in thinking about religious and cultural diversity in relation to law.

Legal pluralism takes a number of different forms or 'phases',[54] some of which can be quickly sketched. Most commonly, legal pluralism is seen in empirical terms: it describes the presence of several legal systems co-existing in one space. As Sally Engle Merry commented, for instance, legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field'.[55] Similarly, John Griffiths said:[56]

> Any sort of 'pluralism' necessarily implies that more than one of the sort of thing concerned is present within the field described. In the case of legal pluralism, more than one 'law' must be present …
>
> Legal pluralism is an attribute of a social field and not of law or of a 'legal system'.

One form of legal pluralism identified early on by legal sociologists, ethnographers, and anthropologists exists in the dual or plural systems of law of formerly colonised nations. In such countries law consists of several layers, various forms of religious law, customary law, local law, and usually a general European-style constitutionally defined legal system. A further empirical phase labelled by Merry in 1988 as the 'new' legal pluralism identified the multiple, layered, and overlapping normative contexts of all socio-legal spaces, and not just in those nations with a colonial past.[57] Such legal pluralism displaces state law as the prime mover of social organisation, and looks as well at the variety of cultural, religious, regulatory, semi-autonomous normative spheres which exist in any society.

In relation to pluralism in both post-colonial and other contexts then, legal pluralism frequently considers state law in relation to what

[54] M. Chiba, 'Other Phases Of Legal Pluralism in the Contemporary World' (1998) 11 (3) *Ratio Juris* 228–45; Davies, 'The Ethos of Pluralism' 96; Merry. 'Legal Pluralism'.

[55] Merry, 'Legal Pluralism' 870. [56] Griffiths, 'What is Legal Pluralism?' 38.

[57] Merry, 'Legal Pluralism'. See also A. Griffiths 'Legal Pluralism' in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (Oxford: Hart Publishing, 2002), 302–10.

Chiba calls 'minor' law.[58] The observation is made that there is a plurality of normative spheres which have arisen in various ways and which occupy different though often overlapping spaces. These different legal domains each have some relation to official or state law: they may be fully incorporated, partly recognised, or completely outside the domain of the state. In the latter situation, where non-state law is not at all comprehended by state law, a situation of 'strong' legal pluralism exists, to use the terminology posited by Griffiths.[59] This situation is pluralism *per se*, because of the irreconcilability or incommensurability between the two (or more) types of law. With 'strong' pluralism, state law does not recognise the existence of the non-state law. At the same time, the adherents of the non-state law do not see it as simply subordinate to state law and to be followed only within the confines of the freedom and privacy established by state law. Rather, the non-state law may be regarded as primary in a religious, cultural or moral sense. In contrast to 'strong' legal pluralism, Griffiths mentions 'weak' pluralism, where different bodies of law are accommodated under the one state sovereign. For instance, the state may determine that customary law or religious law is to be applied to certain subjects and in certain circumstances. This is a situation of 'weak' pluralism because difference is managed by and assimilated within an overarching framework.

Relating these forms of pluralism to religious and customary law is a detailed and nuanced anthropological or sociological exercise. Much of the scholarship deals with understanding the character of the obligations in question and studying their interaction with state law and with other normative demands.[60] The practical details are complicated and differ according to the specific situation. Exactly how does the religious law interact with state law at the level of jurisdiction? By which courts is it recognised? Which part of the religious law remains outside state law? Who is regarded as a subject, and how does pluralism impact upon status

[58] Chiba, 'Other Phases of Legal Pluralism' 229. Non-state law is only 'minor' from the perspective of the state or from the perspective of the observer who sees state law as superior or dominant. A person who feels bound by a 'minor' type of law will not see it as such, but as paramount. See also Shah, *Legal Pluralism in Conflict*.

[59] Griffiths, 'What is Legal Pluralism' 5.

[60] Mirza, 'Islam, Hybridity and the Laws of Marriage'; Shah, *Legal Pluralism in Conflict*; Yilmaz, 'The Challenge of Postmodern Legality'; Yilmaz, 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law' (2001) 21 *Journal of Muslim Minority Affairs* 297–308.

categories such as gender?[61] How do communities compromise and accommodate when their own religious law is not recognised or is contradicted by state law?[62] In addition, there are some conceptual issues which have not been fully resolved by legal pluralists working with plural law as an empirical fact. What is the concept of 'law' which operates in a study of a legally pluralistic society?[63] Does it mirror the concept of state law, or is it defined differently from the centralised, hierarchical and institutionalised state? If the latter, what are the limits to the concept of law and how is non-state 'law' distinguished from trivial social conventions or expectations? Is the collapse of law into social normativity a problem for legal pluralism?

These are important issues, especially for sociological analysis which takes the perspective of the external observer of different forms of 'law', however that is understood. As a legal theorist I take a slightly different approach, however, since my interest and point of departure is the changing nature and concept of *state* law, which I would characterise as having an intrinsic as well as an extrinsic pluralism.[64] In other words, pluralism is internal to law, and law is also one among many normative spheres in a social context. Inherent pluralism involves understanding the layers of interaction and contradiction between positive law in its commonly understood sense and a diverse population of legal subjects. Rather than conceptualising cultural and religious diversity as a social fact which is outside the framework of a neutral state law, and rather than differentiating state law and minor law, I am interested in the pluralisation of state law so that such distinctions no longer determine the shape of legal theory.[65] If law is regarded as an intrinsic part of a social environment, rather than separate from it, then the multiple contexts,

[61] See e.g. A. Griffiths, 'Legal Pluralism in Botswana: Women's Access to Law' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 123–38; A. Hellum, 'Actor Perspectives on Gender and Legal Pluralism in Africa' 13–29 in H. Petersen and H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1998).

[62] See especially Mirza, 'Islam, Hybridity and the Laws of Marriage'; V. Lal, 'Sikh Kirpans in California Schools: The Social Construction of Symbols, Legal Pluralism, and the Politics of Diversity' (1996) 22 *Amerasia Journal* 57–89 (concerning the banning of 'kirpans' – small knives traditionally worn by Sikh males – from schools).

[63] See B. Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

[64] See Davies, 'The Ethos of Pluralism'; M. Davies, 'Pluralism and Legal Philosophy' (2006) *Northern Ireland Legal Quarterly* 577–96.

[65] See also Kleinhans and Macdonald, 'What is a *Critical* Legal Pluralism?'; D. Manderson, 'Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory' (1996) 20 *Melbourne University Law Review* 1048; E. Melissaris, 'The More the Merrier? A New

conflicts, and interpretations of that environment are part of the fabric of law, not separate from it.

5. Plural law in space-time

As I have indicated, law is regarded by positivist legal theory as singular and exclusive: it is derived essentially from the state and defined by legal 'insiders'; it is bounded, conceptually (though not practically) separate from the social sphere, and organised hierarchically as a stable and reasonably determinate system of rules and principles.[66] In this sense, the possibility and necessity of law's secularism goes hand in hand with this positivist myth of separatism. Without the idea of separate spheres for law and the social/moral/cultural/religious context, there can be no secularism. The aspiration towards secularism flows from the religious freedom a 'neutral' law tries to protect, both the freedom from religion as well as the freedom to practise it. It is difficult to imagine a monistic legal world which is completely anti-secular, yet which still allows for those freedoms. Positivist monism is at present Western law's defining narrative with a mythical or fictional, yet incredibly powerful, truth-status: the question is therefore what other narratives contradict that picture of law, narratives which are more pluralistic, multi-faith, and practically situated in local social spaces. Critical legal and socio-legal scholarship has challenged legal monism and legal separatism on many fronts. Can the inherent exclusiveness of monistic law be counteracted by a picture of a more inclusive and more pluralistic law? It is this question which I wish finally to address.

Law's status as a *cultural* artefact sits alongside the separatism which is part of its defining mythology. As empirically oriented legal pluralism has illustrated, the social fabric consists of multiple normative spheres (including state law). Inessential subjects are positioned somewhat fluidly in relation to these plural contexts. If state law is a hierarchy of meanings, those meanings are nonetheless derived from, or in relation

Take on Legal Pluralism' (2004) 13 *Social and Legal Studies* 57; Davies, 'The Ethos of Pluralism'.

[66] For discussion of law's hierarchy or verticality, see F. Ost and M. van de Kerchove, *De la Pyramide au Reseau: Pour une Théorie Dialectique du Droit* (Paris: Presses des Facultés Universitaires Saint Louis, 2002), 11–12; M. Koskenniemi, 'Hierarchy in International Law : A Sketch' (1997) 8 *European Journal of International Law* 566–82; H. Kelsen, 'The Legal System and its Hierarchical Structure' in *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992); N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1997).

to, inescapably plural social landscapes, cultural conflicts, religious diversities and other markers of difference. It is the task of contemporary legal theory to understand law as an expression of this broad social setting.

The inherent pluralism of law can be understood in a technical and immanent sense: critical legal theorists, and post-modernists in particular,[67] have shown how core concepts of law are often self-contradictory and rely on a series of exclusions in order to maintain the veneer of coherence, order, and boundedness.[68] For instance, legal meaning is normalised by the application of interpretive conventions which exclude a plurality of possible meanings in favour of core meanings.[69] Such conventions are sometimes explicitly formulated as legal principles but generally speaking they transgress the legal/non-legal distinction. It is actual people who make legal meanings: they are situated in linguistic and social communities and bring their worlds into their interpretations. Similarly, the idea that the conceptual unity of law emanates from a foundation or single source is based on a definitional foreclosure of law's plural 'others' – morality, social diversity, and politics.[70] Such exclusions performed in the name of conceptual unity do not occur only once, but are reiterated in everyday constructions of law. In this sense, there are plural and irreducible factors essential to the construction of a singular law.

[67] I understand critical legal theory and post-modernism as laying some of the groundwork for a conceptual legal pluralism, though post-modern theorists have rarely characterised themselves as legal pluralists. This is undoubtedly due to the empirical and sociologically positivist nature of much legal pluralism. A counter-example is Boaventura de Sousa Santos. See S. B. de Sousa Santos, *Toward a New Legal Common Sense*, 2nd edn (London: Butterworths, 2002); B. de Sousa Santos, 'Law: A Map of Misreading. Toward a Post-modern Conception of Law' (1987) 14 (3) *Journal of Law and Society* 279–302.

[68] For reasons of space, I have simplified these more conceptual arguments almost to the point where they seem trivial or excessively formal. They have much more depth and significance than I am able to represent here.

[69] See, for instance, P. Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986), 220–1; C. Douzinas, R. Warrington and S. McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991). See also M. Davies, 'Authority, Meaning, Legitimacy' in J. Goldsworthy and T. Campbell (eds.), *Legal Interpretation in Democratic States* (Aldershot: Dartmouth, 2002), 115–31.

[70] J. Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 919; M. Davies, *Delimiting the Law* (London: Pluto Press, 1996); P. Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001); S. Motha, 'The Sovereign Event in a Nation's Law' (2002) 13 *Law and Critique* 311; M. Davies, 'Derrida and Law: Legitimate Fictions' in T. Cohen (ed.), *Jacques Derrida and the Humanities* (Cambridge University Press, 2001).

Yet internal pluralism goes beyond these immanent critiques. Considered from a socio-legal perspective, pluralism also has a spatial and a temporal dimension: it involves first, flattening law's hierarchy and seeing it as a complex horizontal as well as a vertical structure and second, understanding both the form and the content of law as a process rather than an entity which can be described simply in the present tense.

Spaces of law

Generally, the spatial diversity of law is to be found in an irreducibly plural multicultural landscape, in non-essential social groupings, and in the formation of identities in relation to such multiple normative environments.[71] The interesting question for legal theory is how to bring together the immanent critique of the unitary concept of law with the more practical socio-legal work relating to diversity. In *Unspeakable Subjects*, Nicola Lacey refers to the need for critical legal theorists to rediscover and revalue the horizontal dimensions of law,[72] which can be seen as more 'participatory' than hierarchised legal systems, and might suggest ways of transforming law into a more inclusive practice.

In my view, we can understand the horizontal aspect of law as being expressed through three inter-related axes: the axis of normative social differences, the axis of identity and subjectivity, and the axis of interpretation, discourse and communication. To give a preliminary example: a classic analysis of the convergence of pluralistic social groups, subjects, and interpretations with state law is Robert Cover's 'Nomos and Narrative'.[73] Cover commented upon the distinct associations or sites of normative meaning inhabited by religious sectarian communities, arguing that each constructs its own *nomos* or normative environment. The state is one element of such a *nomos*, but not necessarily the most significant, depending on the community involved. State law is interpreted through religious norms: thus, a plurality of possible meanings arises from law's intersection with various normative worlds and subject-positions. It is the task of legal officials, in particular judges, to contain this plurality. Cover's analysis pre-empted certain themes in both socio-legal and post-modern legal scholarship:[74] for my purposes

[71] See for instance D. Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press, 2004).
[72] Lacey, *Unspeakable Subjects*, 157–62. [73] Cover, 'Nomos and Narrative'.
[74] For instance the association of law with violence.

it illustrates the co-existence of singularity and plurality within law, and the need to understand both the aspiration for legal standards applicable to all people, and the utter incommensurability between different world-views.

In relation to the first axis of horizontal legal plurality, it is relatively easy to see that the social sphere is characterised by a multiplicity of normative spheres, ordinarily regarded as legal (positive law), quasi-legal (e.g. alternative dispute resolution), and non-legal (e.g. religion). Mainstream legal pluralism situates all such normative regularities within the general field of 'the legal'.[75] It is also relatively straightforward to see that these spheres are not neat self-contained units with merely external relations between them, but are literally seething with internal differences, with coalitions and conflicts with contiguous groups, with ideologies allied to formal law, or resistant to elements of it. They are crosscut with the social infrastructures of power such as gender and race. It is more difficult to see diverse social groupings and their plural normative systems as inherently part of a more plural concept of positive *state* law. One problem here is that we are accustomed to thinking of law as a singular and coherent institutional structure, not a loosely identified, incoherent and inconsistent mass of associations. Another problem of course is that positivist practice and conceptualisation does not draw its law from community, but rather from constitutions and institutions.

At the same time, it does seem that the boundaries of positive law are becoming more permeable, the sources of its authority more diverse, and its core institutions more sensitive to plurality. Such a transition in the core identity of law suggests ways in which diverse religions, rather than being excluded from the definition of law, might be regarded as intrinsically part of a pluralistic legal concept and practice. We see this trend in increasing acknowledgement by formal law of 'alternative' legal practices, such as indigenous law, and non-court-based dispute resolution.[76] We see it in the fact that around the edges of positive law attempts are increasingly being made to understand cultural and religious difference.[77] And we see it in the efforts made by some law reform agencies to reconstruct law as an open-ended social phenomenon, rather than as a

[75] Santos, *Toward a New Legal Common Sense*, chapter 3.

[76] E. Marchetti and K. Daly, *Indigenous Courts and Justice Practices in Australia* (2004) 277 *Trends and Issues in Crime and Criminal Justice*.

[77] Cf. N. Bahkt 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women' (2004) 1 *Muslim World Journal of Human Rights*.

bounded institutional entity.[78] Such a pluralisation of the practices and (therefore) the concept of law should not necessarily be seen as an unqualified end in itself, regardless of ethical consequences. Legal theories do not fully determine ethical and political outcomes, and repressive normative environments are consistent with both legal monism and legal pluralism.[79] As I have suggested above, legal reconstructions can only ever be contingent attempts at commensuration, and must be undertaken in a non-dogmatic spirit of openness and negotiation.

The second axis of law's horizontal existence provides a link between the plurality of social-normative spaces and positive law: this is the axis of the subject, citizen, person, or individual. If we take seriously the idea that the social fabric with all of its multiple legal spaces (including state law) is the effect of relationships between people, then all law is also pluralistic. There is an epistemological shift to be explained here. In positivist, hierarchical, unitary conceptions, law is recognised by legal officials,[80] determined by judges,[81] or in another version, the reason for the validity of law is presupposed, primarily by legal scientists and other jurists.[82] An epistemic privilege in determining, defining or recognising law subsists within the vertical structures of the law: it is essentially legal officials whose (self-supporting) version of law is regarded as legal truth. On the other hand, if we look at law horizontally, as a living social structure[83] defined and recognised by the intersubjective relations and perceptions of all subjects, quite a different picture of what law is emerges. Persons who interact with law do so from a position of inessential identities, that is, identities which exist across diverse social, religious, ethnic, and political communities.[84] Law constructed from this base is plural, not monistic: it is messy, contradictory, fragmented,

[78] R. MacDonald, 'Law Reform and Its Agencies' (2001) 79 *Canadian Bar Review* 99–118. The Law Commission of Canada referred to by MacDonald was abolished in 2006, but an archive can be viewed on the website of Library and Archives Canada.

[79] M. Koskenniemi, '"By Their Acts You Shall Know Them … " (And Not by Their Legal Theories)' (2004) 15 (4) *European Journal of International Law* 839–51. See also Santos, 'Toward a New Legal Common Sense' 89–90.

[80] H. L. A. Hart, *The Concept of Law*, 2nd edn (1992).

[81] R. Dworkin, *Law's Empire* (London: Fontana, 1986).

[82] H. Kelsen, *General Theory of Law and State* (New York: Russell, 1961), 110–1.

[83] The term 'living' is drawn from Ehrlich's concept of 'living law'. See E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll trans) (New York: Russell and Russell, 1962); K. A. Ziegert, 'A Note on Eugen Ehrlich and the Production of Legal Knowledge' (1998) 20 *Sydney Law Review* 108–26.

[84] See also Manderson, 'Beyond the Provincial' 1064; Kleinhans and MacDonald, 'What is a Critical Legal Pluralism?'.

and decidedly subversive of traditional narratives of legal form. Law from the bottom up, rather than from the top down, is open-ended and irreducible to form. Such a concept of law harnesses rather than suppresses, social diversity. This is not to say that such a pluralistic notion of law is purely subjective: that would erase the commonalities and shared meanings which relationships between people presuppose. Rather, the point is that plural perspectives and practices regarding law circulate throughout the social domain.

For example, in *Challenging Diversity* Davina Cooper discusses the process leading to the establishment of London's first eruv.[85] The eruv is an enclosure of public space by existing physical boundaries such as train lines and roads but with the addition of some poles and wires to close the gaps. The enclosed space can symbolically be regarded as private by Orthodox Jews, meaning that they are permitted to carry certain objects in this public/private space on the Sabbath. The normative context for the eruv in an area such as north-west London was clearly pluralistic: Orthodox Jews are constrained by both their religious norms and the secular (planning and environmental) law. Built environment is an expression of law and of other factors and in this case (as in others), the construction takes on plural normative meanings: for the Orthodox, it gives the streetscape a particular religious significance as 'private'; for others, it did not change the public character of the space, but was regarded as an 'unnecessary eyesore' a 'territorial act' investing an area with Orthodox symbolism or devoid of particular significance.[86] In other words, the one engagement with the planning authorities can have multiple significances in the socio-political and legal spheres (where 'law' is understood by reference to a plurality of situated perspectives). As Cooper demonstrates, the eruv represents more than just an acknowledgement of another 'plural' normative sphere based upon Orthodox Judaism: it intersects with multiple expressions of freedom and equality and generates competing normative claims for subjects-before-the-laws.[87]

This brings me to the third axis of the horizontal in law, which furnishes another link between positive law and social diversity: the axis of interpretation, discourse and communication. In a sense, this dimension is already embedded in the first two: discourse establishes the conditions and the medium for social diversity and non-essential subject positions. Analysis of discourse, interpretation and communication in

[85] Cooper, *Challenging Diversity*, 16–35. [86] Ibid., 17. [87] Ibid., 23–38.

relation to culture, subjects, and law is itself a multivariate exercise. I have already mentioned the layering of legal meanings, the pluralistic construction of law within different normative worlds, the plural constructions of subjects within diverse social environments, the lack of a clear boundary between legal and non-legal acts of meaning-making, and the difficulty of separating reasons into categorical boxes such as secular/religious or legal/non-legal. Such variables in the reproduction of discourses are also inseparable from the symbolism and structures of power: acts of definition are also often political acts, entrenching or challenging existing social hierarchies. The main point is that the need for interpretation opens law fully into a social domain characterised by plurality, not by some Herculean integrity.[88]

Times of law

Finally, it must seem as though much of what I have said about law being pluralistic (though counteracted by the assumption, the practice and the desirability of monism at certain points) makes too much of the empirical symptoms of pluralism and is, furthermore, idealistic in its aspirations for a concept of law emanating from social diversity rather than uniformity. This idealism may seem to be at odds with a certain blunt pragmatism in the sense that I also eschew models of political and legal consensus-building. Even more difficult to conceptualise in a contemporary context, is the call for participatory law, a law which expresses the conflicted situations and fragmented beings of relations between all legal subjects.

In part, my analysis has been descriptive and analytical of law in the present tense – law as it is. But it is also a future-directed perspective – law as it ought to be. Indeed, in my view 'description' is never merely in the present, it is never contained, but expresses an interpretive imperative. Saying that law *is* plural implies that we *ought* to see it that way, and that it *ought* to fulfill in practice its (non-)essential nature as plural. Description does not just arise from things in the world, but is also a form of discipline,[89] a reiterative practice which entrenches discursive realities as we might like them to be.[90]

[88] Cf. Dworkin, *Law's Empire*.

[89] M. Foucault 'Two Lectures' in *Foucault Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Brighton: Harvester Press, 1980).

[90] D. Cooper, 'Against the Current: Social Pathways and the Pursuit of Enduring Change' (2001) 9 *Feminist Legal Studies* 119–48. Cf. J. Stone, *Social Dimensions of Law and Justice* (Sydney: Maitland Publications, 1966), 550.

In this way, I unashamedly engage in what might be called a form of prefigurative legal theory[91] – an understanding or picture (but not a theory or concept) of law somewhat grounded in the present, but also directed towards future law and opening onto forms of legality which are as yet unseen. More than seeing law as a dynamic process, proceeding in a linear fashion from one point to the next, a prefigurative theoretical practice attempts to foresee and enact the future at the present time.

6. Conclusion

Importantly, law's plurality is not an alternative to its singularity. It is not necessary to state categorically that law is *either* singular *or* plural. Law can be at once *both* singular *and* plural.[92] It has a discursive singularity crystallised into theories, institutions, structures, doctrines, separatism, and so forth. But it also has a conceptual and social plurality which resists, transgresses, undermines, but also converses with the singular modality of law.

In the end, is it actually possible that an approach to law can be at once singular and plural, at once secular and accommodating of multiple perspectives on the question of faith, and at once sufficiently static to ensure stability yet sufficiently reflective and dynamic to apply 'justice' in diverse ways? The point of this paper is not to say that it is definitely possible, much less to show the way to achieving such a state of affairs, but rather to point out that in some, admittedly minimal, ways such an approach is an empirical reality and also conceptually imaginable.

[91] For other discussions of prefigurative practice, see Cooper, 'Against the Current'; J. Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2001) 27 *Journal of Law and Society* 351–385 at 383.

[92] Here as in other contexts I am indebted to Jean-Luc Nancy's idea of the 'singular plural'. See J.-L. Nancy, *Being Singular Plural* (Stanford University Press, 2000); Davies, 'The Ethos of Pluralism' 91; Davies, 'Pluralism and Legal Philosophy' n. 39 and accompanying text.

6

The influence of cultural conflict on the jurisprudence of the religion clauses of the First Amendment

MICHAEL W. McCONNELL*

For 16 words that remain completely unchanged from their adoption some 215 years ago, the Supreme Court's interpretation of the Religion Clauses of the First Amendment of the United States Constitution have shown remarkable malleability. Arguably, the court's interpretation of these Clauses has changed more often, and more dramatically, than of any other provision of the Constitution. The question I wish to explore is why. To address this question, we must put aside the standard interpretive perspective on constitutional law – the perspective that asks how constitutional provisions should be interpreted, in light of text, original meaning, history, or precedent. Those considerations do not change, at least not rapidly or radically. Instead we must ask how changes in cultural and social conditions have affected the jurisprudence of religion and state.

The First Amendment's Religion Clause consists of two parts. One, the Free Exercise Clause, prevents the government from prohibiting or punishing the profession and practice of any religion. Its counterpart is the Establishment Clause, which prevents the government, at a minimum, from designating any particular religion, articles of faith, or mode of worship as preferred or orthodox, and from compelling any person to participate in or support religious worship. Beyond these clear indications, there has been nearly continual controversy in the United States regarding such issues as: does the Free Exercise Clause protect religiously motivated conduct, such as the practice of polygamy or the refusal of priests to divulge the secrets of the confessional, from neutral and generally applicable laws? Does the Establishment Clause prevent the

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government from providing financial or other support to religious institutions when they provide educational or social services to members of the public that would otherwise be subsidized? When does protection become favoritism and when does separation become hostility? The striking fact is that the Supreme Court has given dramatically different answers to these questions at different times; indeed, four sharply different periods can be identified in the last sixty years. My project is to analyze those changes in US First Amendment doctrine in light of broader social and legal problems faced by the court and by the nation.

It was not until World War II that the Supreme Court began to develop a serious jurisprudence of the Religion Clauses. Before that time, there were only a few cases, partly because the provisions of the Bill of Rights were assumed not to apply to the actions of state and local governments, where most conflicts between religion and government take place. The court's first case interpreting the Establishment Clause was not decided until 1947, but since then the court has decided dozens of important controversies about government and religion.

I will take up the narrative between the end of World War II and 1963. The dominant theme of constitutional law during this period was how to deal with the vast expansion of federal power that occurred in the aftermath of the Great Depression and the War. The courts in the United States were forced to decide how to conceptualize civil liberties in the wake of the New Deal expansion of the welfare-regulatory state and attendant collapse of classical liberal legal theory. At the same time, post-war cultural consensus led to a confusion of majoritarianism (principally watered-down Protestantism) with neutrality. Then I will turn to the civil rights revolution, roughly 1963–80, in which religious freedoms were reconceptualized as a species of minority rights, and the doctrine of strict separation was selectively used to block the growth of private education, which was seen as a potential obstacle to the racial integration of public schools. Then came the Reagan era, roughly 1980–2000. Americans lost faith in bureaucratic governance, including public schools and mandatory integration, and looked to competition among private institutions as a more efficient and effective means for delivering social services. At the same time, the collapse of anti-Catholicism and the rise of evangelicalism augured a more assertive role for religion in the public sphere, leading to a decline in strict separationism and a rise in doctrines of accommodation and equal access.

It is too soon to be confident about our own times, but I suggest that since 2000, there has been increasing cultural and political polarization

in the United States, partly along religious-secular lines, which has led to a greater emphasis on symbolic disputes – over issues like the Pledge of Allegiance, displays of the Ten Commandments, and the like – to increased resistance to pragmatic reforms such as vouchers and faith-based initiatives, and possibly to collapse of the Reagan-era constitutional model of equal access.

I focus here on developments in the United States, because that is my area of expertise. I suspect that any stable constitutional system with democratic politics and an independent judiciary will experience a similar interplay between constitutional jurisprudence and cultural change.

1946–1963: Civil liberties in the welfare-regulatory state

In the aftermath of World War II, the US Supreme Court turned to the question of how to protect civil liberties under the post-New Deal welfare-regulatory state. Under the presidency of Franklin D. Roosevelt, the federal government engaged in an unprecedented expansion of government social welfare programs (such as Social Security, rural electrification, the Civilian Conservation Corps, federal unemployment insurance, and the like), as well as regulatory programs (such as the National Industrial Recovery Act, the Agricultural Adjustment Act, the National Labor Relations Act, the Communications Act, the Federal Power Act and the like). Similar programs were enacted at the state level. Not only did these developments strain the traditional boundaries between state and federal government, but they also strained the anti-statist presumptions of classical legal theory. No longer was government seen primarily as a neutral umpire – leaving the distribution of wealth and power to private forces of the market. Now the government became a force for redistribution. This entailed a fundamental change in legal theory, and hence in constitutional interpretation.

Classical liberal theory had always associated individual liberty with restraints on the scope of governmental authority. In Lockean political theory, civil government was limited to certain defined functions, primarily protection against foreign and domestic violence. Liberty – the retained rights of the people – could be seen as the residuum: all aspects of life that the government had no business interfering in. There was no real need to define liberties prescriptively, for liberty was broad and undefined, while governmental power was exceptional and limited. The most prominent architects of the US Constitution in 1787 proclaimed that because of the limited scope of the federal government's enumerated powers, there was no

need for a Bill of Rights.[1] This Lockean conception perfectly corresponded to the idea of a wall of separation between church and state. Define what belongs on the state side of the wall, and the vast territory on the private side, which included matters of religious belief and practice, would be left to individual conscience and private association.[2] Prior to the New Deal, the Supreme Court pursued the twin objectives of confining governmental power to its appropriately limited sphere and protecting individual rights, with the confidence that these were complementary objectives.

This unity of classical liberal constitutional theory was shattered in the 1930s, as the American people demanded, and the courts acquiesced in, a vastly wider scope for governmental intervention in what previously had been the private or the non-federal sphere. This manifested itself not only in a more generous interpretation of enumerated powers, such as the Commerce Power,[3] but also in an increased skepticism about the idea of judicially enforceable retained rights protecting freedoms not ceded as part of the Lockean social compact. The repudiation of *Lochner* v. *New York*[4] is the most conspicuous event in this chain of developments, and has been much discussed in the academic literature. There has been much less attention to the implications of these jurisprudential developments for the constitutional law of religious freedom.

It was not enough for the New Deal Court just to overrule its former decisions restricting the regulatory powers of the state. We needed a substitute for limited government as a protector of civil liberties. No longer could liberty be seen merely as the residuum of a narrowly defined governmental sphere, as Lockeans understood the problem. Once the sphere of governmental authority expanded to its democratic limits, liberties required affirmative definition and protection against new sorts of incursions.[5] Thus, the Supreme Court began to talk of "preferred

[1] *The Federalist* No. 85, at 525–6 (Alexander Hamilton) (Clinton Rossiter ed., New York: New American Library, 1961); 2 THE RECORD OF THE FEDERAL CONVENTION OF 1787, at 587–8 (Max Farrand ed., rev. ed. New Haven: Yale University Press, 1937).

[2] Compare JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, 73, 97 (Thomas P. Reardon, ed., Indianopolis: Bohhs-Merrill, 1952) (1690), with John Locke, 'A Letter Concerning Toleration', in 6 THE WORKS OF JOHN LOCKE 5, 9 (photo. reprint Darmstadt: Scientia Verlag, 1963) (London: Thomas Tegg, 1823).

[3] See, e.g. *NLRB* v. *Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937); *United States* v. *Darby*, 312 U.S. 100 (1941); *Wickard* v. *Filburn*, 317 U.S. 111 (1942);

[4] *Lochner* v. *New York*, 198 U.S. 45 (1905).

[5] This is the message of the famous *Carolene Products*, footnote 4. *United States* v. *Carolene Prods. Co*., 304 U.S. 144, 152 (1938).

freedoms" and to apply the Bill of Rights vigorously against state as well as federal action.

Perhaps most revealing was the court's development of the doctrine of unconstitutional conditions, also known as the demise of the right-privilege distinction. In classical liberal constitutional thinking, individuals were understood to enjoy the right to their own persons and the products of their labors, as defined by the common law, and the government could not interfere except to protect public health, safety, or morals. On the other hand, individuals had no right to the use of government property, such as public land, government benefits, government employment, or the like, except on the government's own terms. Thus, for example, Justice Oliver Wendell Holmes, on the Massachusetts Supreme Judicial Court, upheld the right of the City of Boston to prevent a citizen from delivering a sermon on the Boston Common[6] and in another case, upheld the right of the City to fire a policeman for expressing political views contrary to the administration.[7] "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house," Holmes wrote.[8]

We have already seen the demise of one half of this conceptual universe – the right of individuals to the unregulated use of their own persons and property; that was *Lochner*. The court was now to craft a new set of doctrines challenging the second half. Henceforward, individuals would have a protected right to their fair share of the use of public property on account of their exercise of constitutionally protected rights (subject to a complicated and still-unsettled set of exceptions based on the legitimate purposes of government).[9] Thus, the legislature is free to decide whether to open a particular park or provide a particular benefit, but not to exclude from those benefits otherwise eligible persons who wish to exercise their constitutional rights. If a minister is moved to deliver a sermon on the Boston Common, he has a right to do so, subject

[6] See *Commonwealth* v. *Davis*, 162 Mass. 510 (Mass. 1895), aff'd *sub nom.*, *Davis* v. *Massachusetts*, 167 U.S. 43 (1897).

[7] See *McAuliffe* v. *New Bedford*, 155 Mass. 216 (Mass. 1892).

[8] *Davis*, 162 Mass. at 511.

[9] *See* Epstein, "*The Supreme Court, 1987 Term – Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*", 102 *Harvard University Law Review* 1 (1988); Kreimer, "*Allocational Sanctions: the Problem of Negative Rights in a Positive State*", 132 *University of Pennsylvania Law Review* 1293 (1984); Sullivan, *Unconstitutional Conditions*, 102 *Harvard Law Review* 1413; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harvard Law Review* 1439 (1968).

only to reasonable, content-neutral, time, place, and manner restrictions;[10] if a taxpayer is entitled to a tax benefit, it cannot be denied because the taxpayer exercises his right not to take a loyalty oath.[11]

Let us turn, then, to the most significant church-state case of the post-War period, *Everson* v. *Board of Education*.[12] In *Everson*, the Supreme Court considered a New Jersey statute authorizing reimbursement to parents for bus fares to transport their children to school. The distinctive and controversial feature of this program was that it included children attending all accredited non-profit schools, including Catholic schools. The question was whether this constituted "aid" to religious education, hence aid to religion, in violation of the court's announced principle that the Establishment Clause of the First Amendment "was intended to erect 'a wall of separation between Church and State,'" and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[13]

You will note that this is a pre-New Deal – Lockean or even *Lochner*ian – way of framing the question. It presupposes, as Justice Holmes had presupposed in the two Boston cases, that individuals have the right to practice their religion with their own persons and property, but no right to use the property of the state, even on a neutral basis. For the state to allow individuals to use government assistance for the purpose of exercising religion would be to "aid" religion, in supposed violation of the First Amendment. If we regard an individual's rights as defined by interests protected by the common law, then families have no "right" to assistance in transporting their children to private school, any more than speakers have a "right" to use the Boston Common to deliver a sermon. Against this baseline, to pay for bus fare to attend religious school looks like "aid." But against the baseline of generally available benefits, when the state provides bus fares to all school children, to deny the benefit to some families on account of their religious choices looks like a "penalty" on religious exercise rather than a mere refusal of aid.

This change in baseline is fully applicable to the definition of what is an establishment of religion. In the context of limited government, any assistance to religious institutions, beyond the basic protection of property and entitlement to common use of the infrastructure, looks like "establishment,"

[10] See, *e.g. Saia* v. *New York*, 334 U.S. 558 (1948); *Kovacs* v. *Cooper*, 336 U.S. 77, 82 (1949).
[11] *Speiser* v. *Randall*, 357 U.S. 513 (1958). [12] 330 U.S. 1 (1947). [13] *Ibid.* at 16.

because rights in this context are understood as the traditional common law right to personal liberty and property. In the context of an expansive welfare-regulatory state, however, assistance to religious institutions pursuant to a broad-based social welfare program looks like neutrality, and the refusal of aid looks like interference with free exercise.

One would therefore expect the New Deal Justices to react with favor to the extension of aid to non-public schools in *Everson*. But they did not. The court split 5–4, and both halves of the court seemed befuddled about how to analyze the issue. The majority opinion reads as if were going to strike down the program, and then abruptly changes course, without persuasively explaining why. A dissenting Justice, Robert Jackson, commented that the best precedent for the decision was that of Byron's Julia, who "whispering 'I will ne'er consent,'–consented."[14] While upholding the New Jersey transportation subsidy, the majority suggested that it approached the "verge" of its constitutional power,[15] which makes no sense if the provision of general benefits has become the baseline for "aid."

Justice Rutledge's dissenting opinion is even more perplexing. In a surprising throwback to pre-New Deal thinking, the four *Everson* dissenters, New Dealers all, maintained that religious institutions could share in "matters of common right," namely fire and police protection and access to public highways. These, the dissenters averred, were "part of the general need for safety."[16] But to share in government benefits of a more affirmative sort, they said, was a forbidden subsidy to religion. Note the similarity to *Lochner*: the legitimate scope of governmental power is limited by some pre-political notion of its proper sphere: "matters of common right." The dissenters' reference to "the general need for safety" even echoes the *Lochner*ian definition of the police power, which in turn reflects Locke's idea that the scope of state authority is limited to protection of the public safety. The mystery is why these Justices, who had rejected *Lochner* in every other sphere of constitutional law, clung to it here.[17]

In the ensuing decades, the court would render dozens of confused and mutually contradictory decisions regarding school aid, seemingly unable

[14] *Ibid*. at 19 (Jackson, J., dissenting). [15] *Ibid*. at 16 (majority opinion)
[16] *Ibid*. at 60–61 (Rutledge, J., dissenting).
[17] Interestingly, the dissenters noted that for purposes of due process, what they called the "public welfare-public function view" had expanded the scope of legitimate government activity beyond its Lockean limits, but they insisted, without argument or explanation, that this new view should not be "transplant[ed] … from its proper nonreligious due process bearing to First Amendment application." *Ibid*. at 56. Why not?

to decide whether, in this context, the baseline for neutrality remained mired in a pre-New Deal Lockeanism, or whether the Establishment Clause, like the rest of the Bill of Rights, should be interpreted in light of the modern welfare-regulatory state.[18] Why the reluctance to extend to the Establishment Clause the same logic of unconstitutional conditions that the court happily applied in other areas of constitutional law?

The answer seems to lie in a second feature of this post-War period: the relative lack of religious divisiveness and high degree of complacency regarding consensual community norms. After their united efforts against anti-Semitic Nazism and godless Communism, Americans in the post-War and early Cold War period tended toward a harmonious, non-sectarian religious consensus. During this time, for example, clergy representatives of Protestant, Catholic, and Jewish faiths in New York State were able to agree upon a non-sectarian prayer to be offered in the public schools in each morning. President Dwight D. Eisenhower famously stated that "[o]ur government makes no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[19] The words "under God" were added to the Pledge of Allegiance, with scarcely any objection in the United States Congress. A non-specific, vaguely Protestant, theism seemed natural and normal. Any deviation – whether atheistic on the one hand or sectarian on the other – tended to be seen as an aberration or intrusion.

At the Supreme Court level, this acceptance of majoritarian values is perhaps best illustrated by the Sunday Closing cases, in which Jewish and other non-Christian merchants challenged widespread state laws requiring that most businesses be closed on the first day of the week.[20] Despite the "strongly religious origin of these laws," which the court recognized, the laws were upheld on the ground that the Establishment Clause "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all

[18] See, e.g. *Comm. for Public Educ.* v. *Nyquist*, 413 U.S. 756 (1973) (striking down tax credits for parents of private-school children); *Meek* v. *Pittenger*, 421 U.S. 349 (1975) (prohibiting most forms of equipment loans to parochial schools); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (permitting tax credits for parents of both public- and private-school students); *Aguilar* v. *Felton*, 473 U.S. 402 (1985) (barring New York from sending public-school teachers to parochial schools); *Agostini* v. *Felton*, 521 U.S. 203 (1997) (overruling *Aguilar*); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (overruling *Meek*).

[19] ROBERT S. ALLEY, SO HELP ME GOD: RELIGION AND THE PRESIDENCY 82–3 (Richmond, VA: John Knox Press, 1972).

[20] *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961).

religions."[21] Whatever the doctrinal justifications for these decisions, it is hard to deny that they were less than sympathetic to dissenters from the broad, non-denominational religiosity of the day.

With this in mind, we can understand that the Justices in *Everson* regarded the system of public education as consensual and unproblematic, and the preference of religious minorities for denominational schools as aberrational and unreasonable. The court described the public schools as providing "secular, neutral, and nonideological"[22] education, in contrast to "sectarian" schools, which featured "indoctrination."[23] Thus, the neutral baseline was the right of all Americans to attend the public schools. Any assistance some might seek to facilitate their attendance at private religious schools was above and beyond the right they had in common with their fellow citizens to use the common schools, and therefore was "aid."[24]

This may seem to overlook the fact that the public school curriculum is set by politically elected school boards and reflects local majoritarian values. The difference between public and non-public schools was not that the former were "neutral and nonideological" but that the values imparted by public education are selected by the government, while those imparted by non-public schools are selected by private associations. Indeed, one might argue that it was the exclusive claim of government-owned and controlled schools to public subvention – rather than the decisions of a few states to provide modest aid to children attending non-public schools – that most closely resembled a classic establishment. In such a system, like the classic establishment, the entire population is taxed to support institutions for the inculcation of values held by the majority, and dissenters are forced either to attend or to finance their own alternatives.[25] But the court never seemed to

[21] *McGowan*, 366 U.S. at 433, 441. [22] *Nyquist*, 413 U.S. at 757.

[23] See, e.g. *Mitchell*, 530 U.S. at 808.

[24] This was most clearly articulated in the later decision, *Committee for Public Education and Religious Liberty* v. *Nyquist*, in which the court struck down tuition deductions for parents of children attending nonpublic schools, along with maintenance and repair grants for nonpublic schools in low-income areas. The court described tuition tax deductions as a subsidy given to Catholic parents "in addition to the right that they have to send their children to public schools 'totally at state expense.'" *Nyquist*, 413 U.S. at 782 n. 38. This makes the program sound like a special benefit to nonpublic school families. The problem is that the description was not quite accurate. Under the program invalidated in *Nyquist*, all parents had the same right: to send their children to public school for free, or to send their children to private school with only a partial tuition subsidy. Catholic school parents were offered nothing "in addition" to what was given their public school counterparts, and in fact received less.

[25] See Michael W. McConnell, "*The New Establishmentarianism*", 75 *Chicago-Kent Law Review* 453, 466 (2000).

recognize that school-aid cases reflected a clash between majoritarian and minority beliefs; the court instead saw the cases as a clash between neutral, non-ideological schooling and sectarian indoctrination.

Opponents of private school aid might well have constructed an argument that the inculcation of community values is essential to the cultural reproduction of a society, and especially to citizen formation, and thus that the majority has the right to use tax resources to fund schools that inculcate community norms and to deny tax resources to schools that teach alternative values. Such an argument would be strikingly similar to the traditional argument for religious establishments, but let that pass. The point is that the dissenters in *Everson* did not offer anything resembling this argument. To them, instead, public schools seemed so uncontroversially "neutral" and "non-ideological" that they failed to see the schools as imparting a point of view at all.

The *Everson* dissenters thus wrote that when tax funds are used to facilitate attendance at sectarian religious schools, the taxpayer is forced to "contribut[e] to 'the propagation of opinions in which he disbelieves.'"[26] They simply did not notice that public schools, too, propagate a certain set of beliefs, indeed that the inculcation of the values of citizens is a fundamental part of their purpose. No curriculum is "neutral," as fights over such matters as how history should be taught, sex education, evolution, patriotic exercises, environmentalism, and politicized textbooks periodically remind us. It seems not to have occurred to the Justices in *Everson* that those who do not agree with the public school curriculum are forced to contribute to the propagation of opinions in which they disbelieve. Like fish who do not notice the water they swim in, the Justices apparently convinced themselves that the community consensus was not a point of view, but simply neutral.

1963–1980: the civil rights era

At some point in the early 1960s, US constitutional jurisprudence took a turn toward aggressive and activist decisions designed to protect minority rights against majoritarian oppression. 1963, the year Justice Felix Frankfurter retired from the court and was replaced by Justice Arthur Goldberg, marks the break.

Almost immediately, the court handed down decisions dramatically expanding the reach of both the Free Exercise Clause and the Establishment

[26] *Everson*, 330 U.S. at 13, quoting 12 HENING, STATUTES OF VIRGINIA (1823) 84.

Clause. The free exercise case was *Sherbert* v. *Verner*.[27] A member of the Seventh-Day Adventist Church was forced to quit her job when her employer began requiring work on Saturday. She was denied unemployment compensation benefits because her religious reasons for refusing to continue to work were deemed not to be "good cause." Under the old regime, this would not have been treated as a constitutional violation, because unemployment benefits are a privilege, and not a right. But in *Sherbert*, the court held that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[28] Indeed, the court said that to deny her benefits on account of her following the precepts of her religion "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[29]

This can be seen as the same shift in baselines already recognized, in other constitutional contexts, by the New Deal Court. Under the old view, each individual has rights in his own person and property, as defined by the set of interests protected by the common law. If he is deprived of those interests on account of his religious exercise – if he is imprisoned, fined, or otherwise punished – this violates the Constitution. Under the new view, the government has greater latitude to invade common law rights in pursuit of regulatory objectives (that is what it meant to overrule *Lochner*), but the other side of the coin is that individuals are recognized as having rights – not mere privileges – to share in the benefits of generally available government programs. Thus, if an individual is otherwise eligible for unemployment compensation, it cannot be denied on account of that individual's religious exercise. To withhold a benefit is functionally equivalent to a fine. In this way, civil liberties are protected even when we have abandoned the old common law baseline of rights. Deprivations of liberty are measured against a more complicated baseline of rights and restrictions imposed by the democratic authority of the welfare-regulatory state, rather than against common law endowments.

Sherbert thus continued and extended the New Deal reconceptualization of civil liberties, as reflected in the unconstitutional conditions doctrine. But the new twist was its attentiveness to the needs and perspectives of religious minorities. In marked contrast to the preceding period, the court began to conceive of its role as primarily to protect minorities – especially racial minorities, but also religious and later other minorities – from the unfriendly legislation of political majorities. Just two

[27] 374 U.S. 398 (1963). [28] *Ibid.* at 406. [29] *Ibid.* at 404.

years before, in *McGowan* and *Braunfeld*, the court had turned a deaf ear toward Jewish merchants complaining of being forced to conform to Sunday Closing laws. Now, the dissenters in *Braunfeld* became the majority in *Sherbert*. The court ceased to regard the non-denominational, vaguely Protestant consensus as the legitimate cultural background norm for government action, and began to use the Religion Clauses aggressively in service of what they regarded as minority and dissenting voices.

The first fruits of the new approach under the Establishment Clause were the court's decisions striking down prayer and Bible reading in the public schools.[30] In light of their generally non-sectarian character, their long history of widespread acceptance, and the excusal rights of dissenters, these practices might well have been upheld under the principles of the previous period. Now, however, the court saw no virtue in the inculcation of majoritarian religious norms, however non-sectarian, and worried instead about the possible impact on dissenting minorities. Peer pressure itself, which might in an earlier era have been regarded as a manifestation of salutary community harmony, was identified as a form of state-supported coercion.

Indeed, by 1972, the court could regard the public school experience as a reflection of a particular set of values, from which one might reasonably dissent. In *Wisconsin* v. *Yoder*,[31] the court held that members of the Amish religion had a constitutional right not to send their children to school above the eighth grade. The state defended its compulsory attendance laws on the ground that high school education is necessary to prepare young people to "participate effectively and intelligently in our democratic process."[32] But the court was willing to recognize an alternative approach to child-rearing – that of the Amish – as equally effective in achieving this purpose. Dissent from the common school had ceased to be labelled a suspect form of "indoctrination" and had become a legitimate, and constitutionally protected, form of dissent – at least for the Amish – a group so exotic that they were quintessentially "minority."

In general, the Supreme Court came to regard the Religion Clauses as part of what has been called the "civil rights revolution."[33] Much like the Equal Protection Clause, the First Amendment identified protected classes – members of previously oppressed minority races

[30] *Engel* v. *Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp*. v. *Schempp*, 374 U.S. 203 (1963).

[31] 406 U.S. 205 (1972). [32] *Ibid*. at 225.

[33] Cass Sunstein, After the Rights Revolution (Cambridge, MA: Harvard University Press, 1990).

and religions – and protected their interests against both direct and indirect discrimination. This produced a "preferred freedoms" interpretation of the Free Exercise Clause in which members of minority religions whose obligations of faith conflicted with the law were entitled to exemptions unless the government could prove that enforcement was necessary to achieve a compelling governmental purpose (*Wisconsin* v. *Yoder*), and a "strict separation" interpretation of the Establishment Clause in which virtually any form of majority support for religion could be deemed an establishment (*Lemon* v. *Kurtzman*).

Unfortunately, the two halves of this interpretation of the First Amendment were mutually contradictory. Exemptions from compliance with neutral and generally applicable laws can be seen as a kind of subsidy or privilege,[34] and the Establishment Clause, after *Lemon* v. *Kurtzman*,[35] was said to prohibit the state from subsidizing religious institutions or religious acts, even when the subsidies were provided on a neutral and generally applicable basis. If free exercise accommodations are a benefit, and benefits to religion violate the Establishment Clause, then the Free Exercise Clause as interpreted in *Sherbert* and *Yoder* violates the Establishment Clause as interpreted in *Lemon*. By the same token, refusing to provide generally available aid (bus fares, textbooks, tax credits, etc.) to a student because the school she is attending is religious is conceptually indistinguishable from refusing to provide unemployment compensation benefits to a worker because her reasons for refusing work are religious.

The Supreme Court never faced up to this contradiction. The closest it came was in *Nyquist*, where the court struck down tuition subsidies and tax deductions for families of children attending non-public schools, as well as maintenance and repair grants for non-public schools in low-income areas, and announced its view that the Establishment Clause prohibited any significant aid to religious education, even on the basis of neutral criteria. Defenders of tuition subsidies argued that they were "designed to promote the free exercise of religion [of] 'low-income parents'" who "without state assistance [would have difficulty exercising] their right to have their children educated in a religious environment."[36] The court responded that "tension inevitably exists between the Free Exercise and the Establishment Clauses, [and] it may not be possible to promote the former without offending the latter."[37] That is not precisely an answer.

[34] See William P. Marshall, "In Defense of Smith and Free Exercise Revisionism", 48 *University of Chicago Law Review* 308, 315–16 (1991).
[35] 403 U.S. 602 (1971). [36] *Nyquist*, 413 U.S. at 788. [37] *Ibid.*

As a practical matter, the minority rights orientation of the court may have obscured the tension it created between the two parts of the Religion Clause. The beneficiaries of free exercise exemptions, after all, were almost always members of minority religions, and laws challenged under the Establishment Clause generally reflected the views of the majority, or at least of politically influential coalitions. If the focus is not on religious liberty in the abstract, but on the religious interests of *minorities*, the two Clauses could be seen as working in tandem, protecting minorities and protecting *against* majorities.

The hard question is why aid to religious schools was not perceived as advancing minority rights. After all, the families who wished to attend religious schools were almost always members of religious minorities: mostly Catholics, with a sprinkling of Orthodox Jews, German-heritage Lutherans, and Dutch Reformed. Those who shared majority norms were largely content with public schools, which reflected them. Catholics, in particular, fit the profile of a previously oppressed minority. Few religious groups of such size have endured more prejudice and official hostility than Catholics, and the court must have known that Catholic schools were created because of the pervasive Protestant and anti-Catholic bias of the public schools.[38] It is odd that the court did not welcome the post-War legislative moves toward modest support for Catholic education as a sign of a decline in religious hostility and prejudice. To analyze aid to schools for dissenters as an "establishment of religion" seems upside down.

In part, the explanation may lie in a lingering anti-Catholic prejudice among some of the Justices themselves,[39] which may have been prolonged by the Church's opposition to court decisions on some salient social issues, such as abortion. But a less invidious explanation may be found in the pragmatic connection between school aid and the court's efforts to achieve desegregation of the nation's public schools. During this period, the central and most controversial project of the court was to reverse the racial discrimination of the Jim Crow era and to eradicate its

[38] *See* JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 57–65 (New York: St Martin's Press, 1999); CHARLES GLENN, THE MYTH OF THE COMMON SCHOOL (Amherst, MA: University of Massachusetts Press, 1987); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, 57–65 (Columbia, MO: University of Missouri Press, 1987).

[39] *See* Thomas C. Berg, '*Anti-Catholicism and Modern Church-State Relations*', 33 *Loyola University Chicago Law Journal* 121, 129 (2001); Douglas Laycock, '*The Underlying Unity of Separation and Neutrality*', 46 *Emory Law Journal* 43, 57–58 (1997); John T. McGreevy, '*Thinking on One's Own: Catholicism in the American Intellectual Imagination; 1928–1960*', 84 *Journal of American History* 97, 122–6 (1997).

baneful effects, especially in the field of education. Although *Brown* v. *Board of Education*[40] was decided in 1954, serious progress toward integration of the schools did not occur until after passage of the Civil Rights Act of 1964,[41] by which time suburbanization and attendant residential patterns of segregation rendered mere cessation of *de jure* segregation of little effect. As the courts started to impose compulsory busing programs for purposes of racial integration in the face of widespread opposition, private schools ceased to be regarded as havens for religious dissenters and came to be seen as a means for white families to escape integration in the public schools.

Thus, in 1968, the year the court rejected so-called "freedom of choice" plans for desegregation, the court also opened the door to taxpayer standing to challenge public assistance to religious schools under the Establishment Clause. In 1971, the year the court first ordered mandatory busing for desegregation purposes,[42] it also held, for the first time, in *Lemon* v. *Kurtzman*,[43] that a program of state subsidies for private religious education violated the Establishment Clause. In 1973, the court extended mandatory busing to northern schools.[44] In the same volume of the US Reports, the court delivered an Establishment Clause decision prohibiting maintenance and repair grants to inner city non-public schools and tuition subsidies to parents of children attending non-public schools.[45] Moreover, there was a high correlation between the Justices who supported mandatory busing and those who opposed aid to religious and other non-public schools.

In the school aid cases of the 1970s, the court thus increasingly adopted the separationist logic of the *Everson* dissenters rather than the neutral baseline logic of the *Everson* majority. But there is reason to wonder whether the court was genuinely convinced by the pre-New Deal conception of "aid." Although it applied strict separation theory to elementary and secondary education, the court consistently declined to apply it to other forms of education and public welfare spending, such as colleges, hospitals, adoption agencies, assistance to the poor, and disaster relief.[46] In all of these arenas, religiously affiliated social service agencies

[40] 347 U.S. 483 (1954).
[41] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE (University of Chicago Press, 1993).
[42] *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).
[43] 403 U.S. 602 (1971). [44] *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973).
[45] *Nyquist*, 413 U.S. 756 (1973).
[46] See generally STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX (1996); Timothy W. Burgess, Note, '*Government Aid to Religious Social Service Providers*', 75 *Virginia Law Review* 1077 (1989).

were permitted to receive government assistance, with only sporadic and non-systematic attempts to require that the public aid be devoted only to secular aspects of their programs. For example, Medicare and Medicaid provide reimbursement for the cost of hospital chaplains, and state-aided religious colleges were permitted to favor members of their own denomination in hiring faculty. Outside elementary and secondary education, the participation of religious entities in public activities was generally regarded as socially beneficial and the dangers to church-state separation as insubstantial. The difference is difficult to explain in terms of formal First Amendment doctrine. But the practical difference is this: only in the area of elementary and secondary education were private alternatives a threat to the court's integration efforts.

The school aid cases of the 1970s thus make more sense as a response to the school desegregation problem than as interpretations of the Establishment Clause. Busing was massively unpopular, and many families fled school systems subject to busing orders. Their alternatives were to move to the suburbs or to send their children to non-public schools. The Establishment Clause, though not itself related to race issues, was a convenient doctrinal means for preventing public assistance to the latter form of white flight.

1980–2000: the Reagan era

In the early 1980s, constitutional jurisprudence began another tectonic shift. The new period was characterized by a reduced faith in government-run institutions, such as public schools, a heightened interest in private – including religious – alternatives in the area of education and social welfare, and an increasing acceptance of distinctively religious voices in public discourse. This change was more gradual than the shift from the post-War to the civil rights era. There was no single year, like 1963, that marks the transition. Some signs of the change can be perceived as early as 1980, and it continued at least until 2000. Because the themes were generally consistent with the conservative revival associated with the administration of President Ronald Reagan and were promoted by his appointees to the court, I will call it the Reagan era.

Let us begin with the issue of aid to private schools. During the 1970s, as we have seen, private schools were largely identified with white flight and hence regarded, at least by the court, as obstacles to racial justice and especially to the court's program of mandatory integration. By the 1980s, however, mandatory integration was increasingly seen as a failed

experiment. Schools remained racially divided and there was no evidence that mandatory integration had improved educational opportunities for racial minorities. At the same time, studies increasingly suggested that private schools – especially inner-city Catholic schools – were often more successful than public schools in providing a decent education to disadvantaged youths.[47] Ironically, such schools often proved to be more racially integrated and more conducive to interracial harmony than their public alternatives.[48] Once the court had given up on mandatory racial integration, non-public schools came to be seen as a partial solution, rather than a threat to racial progress.

Private school aid thus came to be viewed not just through the lens of racial integration or of religion, but of effective delivery of education to needy children. Large metropolitan public school systems failed to provide even minimally decent education to their poor and minority populations, despite increased funding and new federal programs. Economists and some educators thus began to argue that schoolchildren – especially children from disadvantaged and minority backgrounds – would be better served by a system in which families could choose among schools and schools would be forced to compete for students. Notably, sociologist James Coleman, whose research had provided the intellectual justification for mandatory busing, concluded that busing had been counterproductive and that private schools – particularly inner-city Catholic schools – provided better education to minority students than the public schools.[49]

Schemes such as tuition tax credits, charter schools, magnet schools, and vouchers were proposed and in some cases implemented. These arguments resonated with broader philosophical and ideological currents of the Reagan era: the preference for competition, individual choice, and private provision of services over state-monopolized and controlled public services. Thus, three cultural currents combined to support a change in non-public education: the abandonment of mandatory busing; the increasing support, on secular grounds, for educational competition as a remedy for the deplorable state of inner city education; and the ideological shift toward competition

[47] *See* ANTHONY S. BRYCK, ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD 55–78 (Cambridge, MA: Harvard University Press, 1993); JAMES COLEMAN, ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 122–78 (New York: Basic Books, 1982).

[48] See *Coleman*, at n.102. [49] See *Ibid.* at 122–78.

and choice in the delivery of public services, in lieu of centralized and uniform governmental bureaucracy.

To these non-religious cultural developments we must add a great change in American religious demographics. Perhaps the most important was the growth of evangelical Christianity, in both size and public presence. Traditionally, evangelicals were outnumbered by their mainstream Protestant counterparts – the mainstream being the *de facto* establishment of watered-down Protestantism so influential in the post-War, pre-civil rights era. In the 1970s and 1980s, as the mainstream Protestant churches declined in numbers, evangelical and fundamentalist denominations grew dramatically.[50] Moreover, traditionally, evangelicals and fundamentalists in the United States had been mostly pietistic in character, focusing their attention on issues of personal salvation rather than on political or social activism. With the emergence of social issues like abortion, gay rights, evolution, and sex education, evangelicals emerged from their self-imposed closet and became assertive both politically and culturally.

Roman Catholicism, the other very large religious group in the United States, also underwent considerable change. Prior to the major reforms adopted at Vatican II in 1963–4 and the presidency of John F. Kennedy, the first Catholic US President, Catholics were the target of religious bigotry, made all the more potent by its comparative intellectual respectability.[51] John Dewey, the foremost American philosopher of education, writing in the aftermath of the *Everson* decision, described aid to Catholic schools as "encouragement of a powerful reactionary world organization in the most vital realm of democratic life with the resulting promulgation of principles inimical to democracy."[52] Kennedy was forced, as no Protestant candidate ever was, to proclaim that his religious convictions would be irrelevant to his conduct of public office. By the 1980s, though, anti-Catholicism had largely dissipated, and the Catholic Church – like the evangelical churches – became more assertive in public affairs, on issues such as nuclear weapons, welfare, immigration, and abortion.

Relatedly, the religious divide in the United States shifted from its prior Protestant-Catholic axis to a division between religious and

[50] See ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA: FAITH, CULTURE AND STRATEGIC CHOICES 42–43 (2d ed. Boulder, CO: Westview Press, 1999); ANDREW M. GREELEY, RELIGIOUS CHANGE IN AMERICA 33 (Cambridge, MA: University of Harvard Press, 1989).

[51] See *McGreevy*, supra n. 42.

[52] JOHN DEWEY, 15 THE LATER WORKS, 1925–1953, at 285 (1989).

secular. An alliance developed among more theologically conservative and religiously committed Americans across denominational lines – evangelicals, conservative Catholics, Orthodox Jews, Mormons, and others – as opposed to secular and theological liberals. This alliance became so potent that so-called "persons of faith" (a popular euphemism) emerged as a major and indispensable element in the Republican Party. Among other effects, this cross-denominational alliance called into question the old idea that secularism is a neutral position. Increasingly, religious advocates claimed that secularism is an ideological and sectarian stance like any other, and that to favor the secular over the religious, on Establishment Clause grounds, is to take sides in the religio-cultural conflict.

A related change occurred on the non-religious side of the divide. Prior to the 1960s, secular intellectuals tended to be motivated by a scientific or rationalist perspective, which tended to view religion as inherently subjective and non-rational, if not worse: superstitious and backward. This attitude lent itself to the view that religion was uniquely antithetical to reason and to education, and thus to the view that religious elements should be excluded from public education and that religious education should be viewed with suspicion. The cultural tumult of the 1960s, however, tended to replace secular rationalism with multiculturalism and identity politics, that is, with a celebration of the subjective. To be sure, much of the identity politics of the post-Vietnam era – feminism, gay activism, youth culture, racial awareness, and so forth – was at odds with traditional religion. But in an ironic way, post-modern identity politics paved the way for greater acceptance of religion in public life – so long as religion was given no special status, so long as religion was just one more competing voice. Once the distinction between "reason" and "subjectivity" broke down, there no longer seemed to be an intellectually respectable basis for saying that religion was uniquely to be excluded from the institutions of education and culture. Religion could be viewed as one more identity in the increasingly diverse and culturally fractured American society.

How might these cultural changes have affected First Amendment doctrine? My suggestion is that all this – the abandonment of mandatory busing to integrate public schools; the increasing recognition of the value of educational choice and competition, especially for disadvantaged and minority students; the growing political influence of religion and decline in cross-denominational hostility; and the rise of multiculturalism – were the death knell of strict separation.

The transformation was most conspicuous in cases involving aid to non-public schools. At the end of the 1970s, constitutional doctrine forbade any significant public aid to the educational function of religiously affiliated schools. But during the 1980s and 1990s, the Supreme Court gradually dismantled its old doctrines. By 2000, the court approved a large-scale program of financial aid to non-public education through the medium of vouchers.[53] It effectively adopted the view that it is constitutional for the state to provide subsidies for education and social welfare functions performed by religiously affiliated institutions so long as funds are provided neutrally, on the basis of objective criteria, and the choice to attend a public or private, religious or secular institution is left to the individual recipient.[54] Indeed, in some contexts, the court has held that it is unconstitutional for the government to discriminate against – to decline to include – groups on the basis of their religious character. Strict separation was replaced by neutrality, or equal access.

These developments were not limited to the field of education. In *Bowen* v. *Kendrick*,[55] the court upheld a statute allowing religiously affiliated organizations to receive federal grants to provide services to adolescents to promote sexual self-discipline. The court rejected the view that the involvement of religiously affiliated institutions in such a program – touching, as it does, on morality and hence on religious doctrine – endorsed religious solutions to the problems addressed by the Adolescent Family Life Act or created symbolic ties between church and state.[56] Indeed, the court expressly approved Congress's judgment "that religious organizations can help solve the problems" of adolescent sexual activity and added its own comment that "it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life."[57] Such a statement would have been almost unthinkable a decade earlier.

More dramatically, in *Rosenberger* v. *University of Virginia*,[58] the court was to hold that a public university could not, consistent with the Free Speech Clause, refuse to fund an otherwise eligible student group on the ground that the group was religious. According to the court, this would constitute discrimination on the basis of viewpoint, a core violation of the Free Speech Clause. Note that this was not just a holding that the Establishment Clause *permits* funding on a neutral basis, but a holding that the First Amendment *compels* funding on a neutral basis.

[53] *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). [54] *Ibid.* [55] 487 U.S. 589 (1988).
[56] *Ibid.* at 606. [57] *Ibid.* at 606–7. [58] 515 U.S. 819 (1995).

In recognizing religion as a "viewpoint," the court implicitly accepted the notion that secularism is not a neutral stance. If student activities reflecting various secular ideologies could receive funding, it was discriminatory to exclude the religious.

Lest it be thought that these constitutional developments were simply pro-religion moves by a conservative court, consider the parallel developments in connection with the Free Exercise Clause. Here, too, the idea of neutrality came to dominate the jurisprudential landscape. During the heyday of the civil rights era, religious institutions and religiously motivated individuals could win exemptions from generally applicable laws on the ground that such laws burdened their exercise of religion. In 1990, however, the court abandoned its old doctrine of free exercise accommodation and held that religious practice is entitled to nothing more than neutral treatment.[59] Any special accommodation must come from the legislature. Just as the Establishment Clause did not bar religious institutions from participation in neutral benefit programs, the court held that the Free Exercise Clause did not protect religious institutions or religiously motivated individuals from neutral and generally applicable burdens and regulations.

The abandonment of the separationist idea thus went both ways. If religion is conceived as just one of many perspectives in a multicultural society, it does not make much sense to say that conflicts between law and religious conscience, and religious conscience alone, warrant accommodation. We can say, with only slight exaggeration, that the new interpretations of both the Free Exercise and Establishment Clauses were based on the idea that religion is NOT something special, to be treated separately and distinctly, but is simply one of many points of view, to be treated neutrally.

Since 2000

Where do we stand today? Since about 2000, there have been signs of a new cultural climate in the United States, characterized by increased cultural and political polarization, based at least partly on religion. Pragmatic reforms such as vouchers and tuition tax credits seem to have stalled in the political area. The idea that religious as well as public and non-religious groups should be involved in helping to provide tax-funded social services – an idea endorsed by both presidential

[59] *Employment Div.* v. *Smith*, 496 U.S. 913 (1990).

candidates, Al Gore and George W. Bush, in 2000 – has become mired in partisan politics and never passed the Congress.

In a puzzling case called *Locke* v. *Davey*,[60] the Supreme Court seemed to abandon its overarching commitment to the idea of neutrality. In that case, the State of Washington offered college scholarships to students who satisfied certain academic criteria, but excluded students who majored in devotional theology in preparation for the ministry. One such student argued that this exclusion was an unconstitutional discrimination against religion, but the court rejected that argument, finding that states have some undefined leeway to pursue separationist policies even if they discriminate. In other cases, the court upheld the constitutionality of the Religious Freedom Restoration Act as applied to actions of the federal government,[61] and adopted a strong interpretation of that legislation,[62] thus permitting Congress to pursue a policy of religious accommodation not required by the Free Exercise Clause.

The most prominent and controversial cases touching on religion, however, involved symbolic issues. Could the Pledge of Allegiance include a reference to "one Nation, under God"? May the Ten Commandments be displayed on monuments in front of county courthouses? The court side-stepped both of these questions, disposing of the Pledge of Allegiance case by finding that the plaintiff lacked standing to sue[63] and of the Ten Commandments cases by splitting the difference: upholding one Ten Commandments display and striking down the other, on the basis of an intensely fact-based analysis of each, without any broad statement of principle.[64]

It is too soon to make confident pronouncements, but this pattern suggests that the court is attempting to take a less central role in culturally salient conflicts than it has taken in the past. Rather than follow a doctrinally consistent policy of either separation or neutrality, the court seems to be allowing the political branches to take the lead – to discriminate against religion in service of separation or in favor of religion in

[60] 540 U.S. 712 (2004).

[61] In *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), the court unanimously upheld a federal law provision of special protections to the religious exercise of prison inmates. Although not explicitly addressing the constitutionality of the Religious Freedom Restoration Act, Cutter would appear to resolve any doubts under the Establishment Clause.

[62] *Gonzales* v. *O. Centro Espirita*, 126 S. Ct. 1211 (2006).

[63] *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004).

[64] *McCreary County* v. *ACLU*, 545 U.S. 844 (2005); *Van Orden* v. *Perry*, 545 U.S. 677 (2005).

service of free exercise, in ways not compelled by the Constitution. This potentially situates the legislature, rather than the court, as the decisive decision-maker in these areas of religious conflict. In the symbolic cases, the court may perceive that public passions are aroused more by the Supreme Court's endorsement of one position and repudiation of the other than by the ostensible subjects of the dispute. Surely, few people care much whether a seldom-seen monument on a county courthouse lawn contains a copy of the Ten Commandments, but many people care very much whether the Supreme Court says such a display is consistent with our constitutional values.

If increased polarization is the salient feature of the current American cultural scene, perhaps the court has concluded that its most constructive contribution is to lower the temperature. One way to lower the temperature is to use standing and other jurisdictional doctrines to avoid unnecessary decision of lose-lose cases and to defer to legislative compromise solutions, or by denying *certiorari* and thus declining to hear high-profile cases. By tolerating messy democratic solutions rather than insisting on doctrinally consistent outcomes, the Supreme Court may be hoping to avoid further roiling the waters.

7

From Dayton to Dover: the legacy of the *Scopes Trial*

PETER RADAN*

Introduction

On 10 July 1925, in the Rhea County Courthouse in Dayton, Tennessee, Judge John T. Raulston of the 18th Circuit Court called upon Reverend Cartwright to open the proceedings for the day with a prayer, a practice that was repeated at the start of proceedings on each day of the matter before the court. Reverend Cartwright duly called upon God to 'grant unto every individual that share of wisdom that will enable them to go out from this session of the court with the consciousness of having under God and grace done the very best thing possible and the wisest thing possible'.[1] And so began the case of *State of Tennessee* v. *John Thomas Scopes* (*Scopes Trial*).[2] Scopes, a teacher at Rhea County High School, appeared before the court charged with breaching section 1 of Tennessee's so-called Butler Act.[3] This Act, adopted in March 1925, prohibited the teaching, in Tennessee's public educational institutions, of 'any theory that denie[d] the story of the Divine Creation of man as taught in the Bible, and [the teaching] that man … descended from a lower order of animals'.

The *Scopes Trial* was the first case in which the teaching of evolution in American public schools was brought before the courts. A number of cases followed in subsequent years. There is every indication that this stream of

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[1] *The World's Most Famous Court Trial, Tennessee Evolution Case* (Union, NJ: The Lawbook Exchange, 1999), p. 3.

[2] For a detailed account of the trial and its background see E. J. Larson, *Summer for the Gods, The Scopes Trial and America's Continuing Debate Over Science and Religion* (New York: Basic Books, 2006).

[3] On the adoption of the Butler Act see K. K. Bailey, 'The Enactment of Tennessee's Antievolution Law' (1950) 16 *The Journal of Southern History* 472.

litigation will continue into the future. The central practical issue at stake in these cases has been, and will continue to be, that of locating the appropriate institutional forum for decision-making as to the content of science curricula in American public schools. Is it the courtroom, or is it the legislature or local school board, as the case may be? To what extent can, or should, such legislation or local school board decisions be the subject of judicial review? The technical legal issue at the heart of this question has been whether the legislation or local school board decision infringed the religion clauses in either the American Constitution or the constitution of a particular state. In the *Scopes Trial* the relevant constitutional provision was Section 3 of Article 1 of Tennessee's Constitution which stipulated that 'no preference shall ever be given by law to any religious establishment or mode of worship'. Following the 1947 decision of the United States Supreme Court in *Everson* v. *Board of Education*[4] the relevant constitutional provision has invariably been the First Amendment of the American Constitution which stipulates that 'Congress shall make no law respecting an establishment of religion [the establishment clause] or prohibiting the free exercise thereof [the free exercise clause].' The significance of *Everson* was the court's ruling that, pursuant to the Fourteenth Amendment's 'due process' clause, the First Amendment's establishment clause was also applicable to the states.

That establishment clause issues were raised in all these cases stemmed from the fact that the relevant state act or local school board resolution always raised the issue of whether it was dealing with science or religion. In the *Scopes Trial*, given the terms of the Butler Act, the 'science versus religion' question was obviously present. In subsequent cases the courts have consistently found that the 'science versus religion' question was also present in the terms of the relevant state legislation or local school board resolution, although this was not as obviously apparent in the most recent significant case decided in late 2005. Given the centrality of religion in all of these cases, it is not surprising that the teaching of evolution is an issue that lies at the very heart of America's 'culture wars'[5] that date back to the first decades of the twentieth century and in which the *Scopes Trial* was one of the first major battles.

[4] *Everson* v. *Board of Education*, 330 US 1, 15–16 (1947).

[5] The term 'culture wars' is the label given by James Davison Hunter to the religious and moral divide within American society over basic assumptions about truth, freedom and national identity which has led to conflict over control of issues in such fields as the family, art, education, law and politics. Hunter's account of the culture wars is detailed in J. D. Hunter, *Culture Wars, The Struggle to Define America* (New York: Basic Books,

In analysing the *Scopes Trial* and its legacy, this chapter is divided into four parts. Part I details the development of America's culture wars to provide the context in which the trial came to hearing, thereby providing the necessary background to fully appreciate its significance and legacy. Part II details the course of the *Scopes Trial* and explores the arguments of its prosecution and defence lawyers in dealing with the science versus religion question in the context of Tennessee's constitutional establishment clause. These arguments provided the basic framework for subsequent cases. Part III tracks the developments in case law relating to the Constitution's religion clauses in the four decades since the *Scopes Trial* that saw the courts, through the process of judicial review, adopt a broad interpretation of the establishment clause. This resulted in the courts supplanting the legislatures as the principal arbiter in decision-making in relation to the content of public school science curricula in America. Part IV addresses the question of whether the battleground for America's culture wars should be the legislatures or courts. Drawing upon the writings of Jeremy Waldron, it argues that the meaning and scope of the Constitution's religion clauses and therefore the content of public school science curricula in America, should, by and large, be determined by the relevant legislative body, thereby significantly confining the scope for judicial review of legislation enacted by such a body. Such an approach would, in all probability, reverse the constitutional developments of principles relating to the religion clauses traced in part III of this chapter.

I. The culture wars context

An understanding of America's culture wars is necessary to appreciate fully the significance of the cases dealing with the place of evolution in the curricula of American public schools. This is so because the subject of evolution is one of the central issues over which the culture wars have been, and are being, fought.

Contemporary cultural conflict in America is defined by James Davison Hunter as 'political and social hostility rooted in different systems of moral understanding', the purpose of which is 'the domination of one cultural and moral ethos over all others'.[6] Whereas cultural

1991). Hunter's thesis has been criticised. For a debate between Hunter and one of his critics – Alan Wolfe – see E. J. Dionne Jr and M. Cromartie (eds.), *Is There a Culture War? A Dialogue on Values and American Public Life* (Washington, DC: Brookings Institution Press, 2006).

[6] Hunter, *Culture Wars*, p. 42.

hostilities previously centred on issues such as doctrine, ritual, observance and religious organisation within a larger biblical culture consisting of numerous Protestant groups, Catholics and Jews, contemporary cultural conflict is not of this kind. Rather it is about how to order one's life, on both individual and collective levels. The many issues that constitute the culture wars 'can be traced ultimately and finally to the matter of moral authority', by which Hunter means 'the basis by which people determine whether something is good or bad, right or wrong, acceptable or unacceptable, and so on'.[7]

The essential divide in the culture wars is, according to Hunter, between the forces of cultural progressivism and of cultural orthodoxy. According to him, '[p]rogressivist moral ideals tend … to derive from and embody [the] spirit of the modern age, a spirit of rationalism and subjectivism'.[8] Accordingly, most secularists are adherents of cultural progressivism. For religious cultural progressivists, traditional religious sources of moral authority are no longer dominant, with morally binding authority tending to 'reside in personal experience or scientific rationality, or either of these in conversation with particular religious or cultural traditions'.[9] Cultural orthodoxy, on the other hand, reflects 'a commitment on the part of adherents to an external, definable and transcendent authority'.[10] For many Christians, this authority is to be found in the Bible. For non-religious adherents of cultural orthodoxy, 'a commitment to natural law or to a high view of nature serves as a functional equivalent of the external and transcendent moral authority revered by their religiously orthodox counterparts'.[11]

The roots of the culture wars are found in the dramatic changes wrought upon American society in the decades prior to the *Scopes Trial*. Early nineteenth-century American society was based upon the presence of relative cultural homogeneity, in which the mores of its Protestant majority dominated. A prominent aspect of this dominant Protestantism was strong opposition to Catholicism and its perceived threat of popish religious tyranny. This 'Republican Protestantism',[12] accommodated denominational differences and rivalries 'in the common effort to establish a Christian (Protestant) land'.[13] This entailed a belief

[7] *Ibid.* [8] *Ibid.*, p. 44. [9] *Ibid.*, p. 45. [10] *Ibid.*, p. 44. [11] *Ibid.*, pp. 45–6.

[12] P. E. Hammond, D. W. Machacek and E. M. Mazur, *Religion on Trial, How Supreme Court Trends Threaten Freedom of Conscience in America* (Walnut Creek, CA: AltaMira Press, 2004), p. 48.

[13] Hunter, *Culture Wars*, p. 68.

that Protestant Christianity was not only the only tradition represented in society, but also that it was the only tradition worthy and capable of building, improving and sustaining it.[14] Thus, whilst Catholics framed conflict over religious issues in terms of differences of opinion between Catholic and Protestant Americans, Protestants framed it in terms of a struggle between 'Americans' and 'foreigners', the latter thereby being 'implicitly relegated beyond the polity and its protections for religious beliefs'.[15] It was through Republican Protestantism that 'the legitimating myths of institutions and society were formed and articulated',[16] leading to an America that was 'a virtuous rural paradise for native-born white Protestants'.[17]

The influx of Catholic and Jewish migrants during the mid-nineteenth century represented a challenge to the prevailing notions of Republican Protestantism. This challenge was met by a process of accommodation of the new settlers and the emergence of a broader Judeo-Christian consensus. This accommodation led to a public discourse based upon the suppositions of biblical theism in which 'the biblical imagery of the Exodus seem[ed] to be a metaphor for the American experience as a whole'.[18] Nevertheless, Republican Protestantism remained at the core of common American cultural values.[19]

The stunning development of modern industrial capitalism in the latter part of the nineteenth century saw the first cracks appear in Republican Protestantism. For a number of generally middle-class and better-educated Protestant leaders, the social problems generated by an increasingly industrial capitalist economy were analysed from a structuralist, rather than individualistic, perspective. Structuralist analysis indicated that '[i]t was not so much sin and personal moral failure that

[14] Hammond, Machacek and Mazur, *Religion on Trial*, p. 48.

[15] T. Fessenden, 'The Nineteenth-Century Bible Wars and the Separation of Church and State' (2005) 74 *Church History* 784 at 785.

[16] Hunter, *Culture Wars*, p. 69.

[17] J. P. Moran, *The Scopes Trial, A Brief History With Documents* (Boston, MA: Bedford/St Martin's, 2002), p. 8.

[18] Hunter, *Culture Wars*, p. 71.

[19] Others argue that this broader Judeo-Christian consensus should not be overstated because 'we should not mistake the hyphen [in Judeo-Christian] for inclusion or some sign of religious pluralism. Rather, the hyphen condenses the story of Judaism's supersession by Christianity and passes off a wished-for assimilation of difference … as an instance of religious pluralism': J. R. Jakobsen and A. Pellegrini, 'Getting Religion' in M. Garber and R. L. Walkowitz (eds.), *One Nation Under God? Religion and American Culture* (New York: Routledge, 1999), p. 109.

were to blame for human hardship as it was the brutal power of contemporary social and economic institutions'.[20] This new, so-called 'social gospel' 'focused more strictly on saving the social order than on saving individual souls'.[21]

Contemporaneously with the emergence of the social gospel were related developments in modern science and learning. As George M. Marsden notes, '[i]ntellectual inquiry was shifting from concern with discovering fixed absolute truths toward looking for natural explanations of how change takes place'.[22] This transformation's most significant illustration was in the field of the origins of life, in which the seminal works of Charles Darwin, on what became known as the theory of evolution, were at the very centre of debate. Darwinism's significance was in its contribution to the emergence of a world-view which sought to explain change and development solely in terms of natural causes.[23] This world-view had its impact on theology in the form of 'higher criticism' of the Bible which until that time had been accepted as being supernatural in origin. Higher biblical criticism saw the Bible as simply the product of the evolving religious experience of Jews and early Christians. The logical consequence of this analysis was a liberal theology in which 'Christianity [was] viewed exactly as other world religions – the product of historical and cultural causes'.[24]

For conservative Protestants who were unable to reconcile themselves to the impact of the social gospel and liberal theology on traditional Republican Protestantism and their growing influence on society through an expanding public education system, it soon enough became

[20] Hunter, *Culture Wars*, p. 78.

[21] G. M. Marsden, *Religion and American Culture* (San Diego, CA: Harcourt Brace Jovanovich, 1990), p. 119.

[22] Marsden, *Religion and American Culture*, p. 122.

[23] Thus, in 1901, the notable historian, Charles Francis Adams, wrote: 'On the first day of October, 1859 [the date when Darwin's *On the Origin of Species* was published], the Mosaic cosmogony finally gave place to the Darwinian theory of evolution. Under the new dispensation, based not on chance or an assumption of supernatural revelation, but on a patient study of biology, that record of mankind known as history, no longer a mere succession of traditions and annals, has become a unified whole, – a vast scheme systematically developing to some result as yet not understood. Closely allied to astronomy, geology and physics, the study of modern history is a scientific basis from which the rise and fall of races and dynasties will be seen as phases of a consecutive process of evolution, – the evolution of man from his initial to his ultimate state': C. F. Adams, 'The Sifted Grain and the Grain Sifters' (1901) 6 *American Historical Review* 197 at 199.

[24] Marsden, *Religion and American Culture*, p. 127.

'time to get back to fundamentals'.[25] Steeped in Calvinist teachings that emphasised the sovereignty of God and the dependence of humanity on God's grace, conservative Protestants published, between 1910–15, a twelve-volume series called *The Fundamentals* defending their understanding of Christianity against theological liberalism and the higher criticism of the Bible.[26] With this the fundamentalist movement was born. Its purpose has always been to re-establish the cultural dominance of Republican Protestantism.

Paralleling these developments in modern science and learning were demographic trends in America which showed a dramatic increase in the numbers of students attending high schools. This was attributable partly to the introduction of laws requiring children to attend schools and partly to the greater availability of access to schools to an increasingly urbanised population.[27] Mandatory schooling laws initially attracted stiff opposition, especially in America's southern states, where education had previously been the province of the home and churches. The fear was that secular schools would undermine religion. However, attitudes changed by the early twentieth century when fundamentalist parents and church leaders embraced public education but at the same time sought to control it so as to ensure that schools provided a medium through which their cultural and religious values would be taught.[28]

II. The *Scopes Trial*

It was in the context of the emergence of the culture wars in the early decades of the twentieth century that fundamentalists in a number of American states campaigned for legislation that would preclude their children being exposed to modern science, especially Darwinian evolution. Tennessee's adoption of the Butler Act was an important victory in this particular campaign as well as the broader goal of re-establishing the dominance of cultural orthodoxy's vision of America. However, this

[25] M. Ruse, *The Evolution-Creation Struggle* (Cambridge, MA: Harvard University Press, 2005), p. 154.

[26] D. N. Livingstone, *Darwin's Forgotten Defenders, The Encounter Between Evangelical Theology and Evolutionary Thought* (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1987), p. 147.

[27] E. J. Larson, *Trial and Error, The American Controversy Over Creation and Evolution*, updated edn (New York: Oxford University Press, 1989), pp. 26–7.

[28] For a detailed study of these trends in Tennessee see C. A. Israel, *Before Scopes, Evangelicalism, Education, and Evolution in Tennessee, 1870–1925* (Athens, GA: University of George Press, 2004).

legislative success also presented cultural progressivists with an opportunity to challenge the Republican Protestant world-view on the basis that the legislation violated the separation of church and state embodied in Tennessee's Constitution.

The test case to challenge the constitutional validity of the Butler Act was instigated by the American Civil Liberties Union (ACLU).[29] In response to an ACLU advertisement, a small group of men in Dayton, seeing such a case as an opportunity to promote their town, persuaded Scopes to get involved. Scopes 'confessed' to having taught evolution, was duly charged and ordered to stand trial. The staged manner by which he was charged raised considerable doubts as to whether Scopes had even committed a breach of the Butler Act,[30] and this was one of the reasons why he was not called to give evidence at the trial.[31] In any event, the ACLU wanted him to be convicted, rather than acquitted, so that the case could proceed to an eventual appeal to the Supreme Court of the United States where the constitutional validity of the legislation could be tested.

Public interest in the trial was ignited when it was announced that William Jennings Bryan would lead the team of lawyers for the prosecution. Bryan had been at the forefront of the populist movement of the time and was one of America's best-known politicians, having three times been the Democratic Party's candidate for the presidency as well as serving as President Woodrow Wilson's Secretary of State before resigning in opposition to Wilson's abandonment of America's policy of strict neutrality in relation to World War I. More relevantly for the *Scopes Trial*, Bryan was the most prominent and influential anti-evolution campaigner in America, supporting the principle of anti-evolution legislation, although he had reservations about any violation of it constituting a criminal offence.[32] Bryan's involvement in the case spurred America's most famous defence lawyer, Clarence Darrow, to volunteer his services to Scopes, an offer that Scopes, but not the ACLU, gladly accepted. Although Bryan and Darrow were allies on many

[29] S. Walker, *In Defense of American Liberties, A History of the ACLU*, second edn (Carbondale, IL: Southern Illinois University Press, 1999), pp. 72–3. ACLU founder, Roger Baldwin, characterised the *Scopes Trial* as part of '[t]he age-old conflict between bigotry and enlightenment, freedom and dogma': R. N. Baldwin, 'Dayton's First Issue' in J. R. Tompkins (ed.), *D-Days at Dayton, Reflections on the Scopes Trial* (Baton Rouge, LA: Louisiana State University Press, 1965), p. 63.

[30] D. G. Wooten, 'The Scopes Case' (1925) 1 *The Notre Dame Lawyer* 11 at 20–1.

[31] Larson, *Summer for the Gods*, pp. 173–4.

[32] L. W. Levine, *Defender of the Faith, William Jennings Bryan: The Last Decade, 1915–1925* (Cambridge, MA: Harvard University Press, 1987), p. 327.

of the political issues of the time, they were at loggerheads when it came to science and religion. Whereas Bryan was a traditional Protestant who vigorously opposed Darwinism, Darrow was an atheist and an adherent of the modernist movement that was epitomised by Darwinism. For Darrow the trial was not only an opportunity to test the validity of the Butler Act, but also one to attack religion.

Following the trial's first day during which formalities relating to certification of the indictment and selection of the jury were attended to, three days of argument ensued on Scopes' first and fundamental line of defence, namely that the Butler Act was an unconstitutional violation of the establishment clause in Tennessee's constitution.

The applicable establishment clause jurisprudence of the time, dating back to the early nineteenth-century era of Republican Protestantism, held that an establishment clause was only concerned with excluding rivalry amongst the various Christian churches by prohibiting any of them from becoming an established church in the sense that the Church of England was the established church in England. Representative of this jurisprudence was Joseph Story, one of America's pre-eminent jurists of the nineteenth century, who, in his influential *Commentaries on the Constitution of the United States*, wrote:

> The real object of the [first] amendment was, not to countenance, much less advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[33]

This understanding of the establishment clause meant that there was no constitutional impediment attached to legislation that simply aided religion generally.[34] It also facilitated the profound influence of Republican Protestantism's core values upon the nature and structure of American society. In effect, there was an informal establishment of Republican Protestantism. Thus, Judge Brewer's observation, in 1892, in *Church of the Holy Trinity* v. *United States*,[35] that there was 'a clear recognition' that

[33] J. Story, *Commentaries on the Constitution of the United States* (1833), quoted in Larson, *Trial and Error*, p. 93.

[34] This is not to deny the existence at this time of an alternative view as to the nature of First Amendment rights which viewed such rights as of an elevated order and thus beyond the reach of government legislation. See Hammond, Machacek and Mazur, *Religion on Trial*, pp. 1–18.

[35] *Church of the Holy Trinity* v. *United States*, 143 US 457 (1892).

America was 'a Christian nation',[36] was not viewed as anything other than a reflection of widespread popular opinion. It was thus hardly surprising that Judge Raulston, a conservative Christian and lay Methodist minister,[37] rejected Scopes' establishment clause argument.[38]

With the rejection of the establishment clause argument, the second line of defence was raised, namely, that a proper construction of the Butler Act required the prosecution to show that Scopes had taught evolution and that evolution itself was contrary to the Bible's account of the origins of life. If this construction of the statute was correct, the issue of evolution's compatibility with the Bible arose. On this basis Darrow sought to call a string of scientific and theological experts to give evidence towards establishing the proposition that evolution was 'not in conflict with any interpretation of the Bible that intelligent men could possibly make'.[39] Judge Raulston rule that such expert evidence was inadmissible because the Butler Act only required the prosecution to establish that Scopes had taught evolution, and that consequently no issue of evolution's conflict or compatibility with the Bible arose.[40] However, Judge Raulston allowed the expert testimony to be read into the record in the event that the case was appealed to a higher court.[41]

Notwithstanding Judge Raulston's ruling, Darrow was able partially to present his case, on the eighth day of the trial, with Bryan's surprising agreement to act as an expert witness on the Bible. This presented Darrow with the opportunity of exposing the literalist interpretation of the Bible favoured by fundamentalists as *not* being an interpretation of the Bible 'that intelligent men could possibly make'. In examining Bryan, Darrow shied away from questions relating to human evolution and the more sensitive parts of the New Testament such as the virgin birth, Jesus' miracles and resurrection. Rather, he focused on the Old Testament stories including the six days of creation account in Genesis, Jonah living inside a whale for three days, and Joshua's command that the sun stand still.[42] These questions extracted concessions from Bryan that the Bible was, in some places at least, not to be interpreted literally. These concessions enabled Darrow to argue that evolution and the Bible were not necessarily inconsistent with one another. These concessions, combined with Bryan's confessions of ignorance in relation to significant areas of scientific and theological knowledge, enabled Darrow to expose the

[36] *Ibid*., 471. [37] Larson, *Summer for the Gods*, p. 109.
[38] *World's Most Famous Court Trial*, p. 102. [39] *Ibid*., p. 146. [40] *Ibid*., pp. 201–3.
[41] *Ibid*., p. 204. [42] *Ibid*., pp. 285–7, 296–9.

numerous intellectual shortcomings of the man who was America's most prominent anti-evolution spokesperson. As the editorial writer in the *Baltimore Sun* wrote at the time, the extensive reporting of the exchange between Darrow and Bryan revealed to the American public 'a striking revelation of the fundamentalist mind in all its shallow depth and narrow arrogance'.[43] In this respect the trial was a public relations triumph for Darrow and the defence case. The mainstream media claimed a defining victory for science over religion generally and of evolution over biblical creationism in particular. However, this was true only about elite opinion,[44] with anti-evolution sentiment remaining strong amongst the general population.[45] In any event, Judge Raulston ruled that, just as the evidence of the experts that Darrow sought to introduce was inadmissible, so too was Bryan's evidence inadmissible.[46]

The three days of the *Scopes Trial* devoted to the question of whether Darrow's experts could testify and Bryan's own testimony as a hostile witness for the defence raised the fundamental question of who made the ultimate decision in relation to the content of science curricula in America's public schools. Was it the judges or legislators?

The argument over this question at the trial brought into sharp focus the expanding gulf between an older democratic ethos and an emerging anti-majoritarianism that did not see majority rule and liberty as necessarily synonymous. For Bryan, the older democratic ethos supported the principle that elected officials, be they state legislators or local school board members, should have the final say in what was taught in their schools. Darrow's anti-majoritarianism supported the principle that the courts, in ensuring that public school curricula did not violate constitutionally entrenched rights of an individual, should be the ultimate arbiters of what America's public school children were taught.

Anti-majoritarianism had its immediate roots in the federal Espionage Act of 1917 and the Sedition Act of 1918 which were aimed at silencing political dissent in the wake of America's entry into World War I and the

[43] *Baltimore Sun*, 22 July 1925, quoted in Moran, *The Scopes Trial*, pp. 50–1.

[44] See F.-C. Cole, 'A Witness at the Scopes Trial' (1959) 200(1) *Scientific American* 120 for a statement by one of the expert scientific witnesses reflecting the confidence of elite opinion claiming that the trial's result was that 'evolution lost in court but won in the eyes of the nation'.

[45] Public opinion polling data collated in mid-2005, showing that 64 per cent of Americans are of the view that creationism should be taught alongside evolution in public schools, suggests that this is still the case today. L. Goodstein, 'Teaching of Creationism is Endorsed in New Survey', *New York Times*, 31 August 2005.

[46] *World's Most Famous Court Trial*, p. 303.

Russian Revolution.[47] Many political activists, who had been largely oblivious to civil liberties considerations prior to World War I, abandoned their faith in the majoritarian view of democracy as a guarantor of social progress. Rather, they viewed the rights associated with the First Amendment issues of free speech and academic freedom as the basis for advancing human freedom.[48] This anti-majoritarianism was what drove the ACLU to pursue its test case in Dayton and for Darrow (an ACLU member) to volunteer his services as part of Scopes' defence team. For them, the enactment of the Butler Act was a reflection of democratic majoritarianism that infringed the rights of free speech and academic freedom, with the trial representing an opportunity to resist that majoritarianism or, as Darrow somewhat crudely asserted, to '[prevent] bigots and ignoramuses from controlling the education of the United States'.[49]

Bryan agreed with Darrow that a critical issue in the trial was over who should control public education.[50] However, whereas Darrow's position was that this was a matter for experts to decide, Bryan had always held the view that 'it would be ridiculous to entrust the education of children to an oligarchy of scientists',[51] and his major speech at the *Scopes Trial*[52] was devoted to this issue. Bryan's opposition to the use of experts was simply another manifestation of his deep and lifelong belief in the binding authority of the will of the people as expressed through the democratic process. As the most influential populist politician of his era, Bryan had been at the forefront of campaigns against big business and political corruption and for popular election of senators, a progressive income tax and women's suffrage.[53] For Bryan, this political liberalism was entirely consistent with his anti-evolution stance 'because both involved reform, appealed to majority rule, and sprang from Christian convictions'.[54]

Although Bryan's opposition to biological evolution was rooted in traditional Protestantism, his militancy was primarily due to evolution's

[47] Hammond, Machacek and Mazur, *Religion on Trial*, pp. 78–82.
[48] Larson, *Summer for the Gods*, pp. 60–3. [49] *World's Most Famous Court Trial*, p. 299.
[50] Bryan had made statements to this effect prior to the commencement of the trial: Levine, *Defender of the Faith*, p. 331.
[51] Quotation cited in Larson, *Summer for the Gods*, pp. 104–5.
[52] *World's Most Famous Court Trial*, pp. 170–82. [53] Larson, *Summer for the Gods*, p. 38.
[54] E. J. Larson, 'The Scopes Trial in History and Legend' in D. C. Lindberg and R. L. Numbers (eds.), *When Science and Christianity Meet* (Chicago, IL: University of Chicago Press, 2003), p. 251. Bryan's most recent biographer concludes that 'Bryan was a great Christian liberal': M. Kazin, *A Godly Hero, The Life of William Jennings Bryan*, (New York: Alfred A. Knopf, 2006), p. 305.

social Darwinism offspring, described by Garry Wills as, 'the idea that human society is an arena of struggle in which the strongest prevail, the fittest survive, and poor "misfits" must be neglected in the name of progress through "betterment of the race"'.[55] Social Darwinism, which was supported by significant numbers from within the elites of American society,[56] was antithetical to Bryan's populism. In Bryan's view, social Darwinism had emanated from Darwinist evolution under the influence of the German philosopher, Friedrich Nietzsche. Bryan claimed that Nietzsche's 'Godless philosophy … led the world into its bloodiest war',[57] a reference to Germany's militarism and responsibility for World War I.

On the other hand, Darrow and his closest ally at Dayton, the renowned public intellectual and journalist H. L. Mencken, were both enthusiastic disciples of Nietzsche.[58] In his study of Nietzsche, published in 1913, Mencken wrote:

> There must be a complete surrender to the law of natural selection – that invariable natural law which ordains that the fit shall survive and the unfit shall perish. All growth must occur at the top. The strong must grow stronger, and that they may do so, they must waste no strength in the vain task of trying to lift up the weak.[59]

A year later, in a more specific reference to Nietzsche's philosophy and religion, Mencken wrote:

> Christianity and brotherhood were for workingmen, soldiers, servants, and yokels, for 'shopkeepers, cows, women, and Englishmen,' for the submerged chandala, for the whole race of subordinates, dependants, followers. But not for the higher men, not for the superman of tomorrow.[60]

For Bryan, Darrow's demand that experts give evidence at the *Scopes Trial* was simply a reflection of the latter's adherence to the superiority of

[55] G. Wills, *Under God, Religion and American Politics* (New York: Simon & Schuster, 1990), p. 101.
[56] Larson, *Summer for the Gods*, p. 27.
[57] W. J. Bryan, 'Back to God', *The Commoner*, XXI, August 1921, in R. Ginger (ed.), *William Jennings Bryan: Selections* (Indianapolis, IN: The Bobbs-Merrill Co. Inc., 1967) p. 230.
[58] Wills, *Under God*, pp. 101–6.
[59] H. L. Mencken, *The Philosophy of Friedrich Nietzsche*, third edn (Boston, MA: Luce & Company: 1913), pp. 102–3.
[60] H. L. Mencken, 'Mailed Fist', *Atlantic Monthly*, November 1914, quoted in Wills, *Under God*, p. 104.

Nietzsche's 'superman' (*Übermensch*) over the common people. Prior to the trial Bryan had written that America's scientists represented a scientific establishment which threatened American democracy with its plan 'to set up a Soviet government in education'.[61] At the trial his opposition to such a threat was exemplified by his argument that it was the people of Tennessee, through their elected legislature, and not experts through the judicial processes, who had the right to pass judgment on whether any law, including the Butler Act, was a good or bad law.[62] In advocating the primacy of the people, Bryan did not, however, claim that experts had no role to play. As he made clear in argument during the *Scopes Trial*, '[the court] is not the place [for experts] to prove that the law ought never to have been passed. The place to prove that, or teach that, [is] the legislature'.[63]

The nub of the disagreement between Darrow and Bryan over the use of experts thus came down to whether Tennessee's education policy was to be determined by the legislature or by the courts. In the former arena the people's voice would hold sway, whereas in the latter the voice of the expert would be decisive. Following the presentation of these divergent views, the trial quickly ended. The prosecution sought a guilty verdict from the jury. Darrow, wanting to ensure that there could be an appeal on the primary substantive issue of the constitutionality of the Butler Act, made the same request of the jury.[64] After considering their verdict for nine minutes, the jury found Scopes guilty and Judge Raulston ordered Scopes to pay a fine of $100.[65] Scopes then lodged an appeal to the Supreme Court of Tennessee.

The principal legacy of the *Scopes Trial* was that it provided the basic arguments which informed subsequent cases that came before the courts in relation to the place of evolution in science curricula in American public schools. The central legal question raised at the trial was whether legislation that was inspired by religious beliefs violated constitutional establishment clause principles. For Bryan no such violation occurred because the Butler Act was a reflection of the will of the common people. Bryan's faith in the will of the people as the epitome of democracy necessarily entailed that the expression of that will in the form of legislation should only be found unconstitutional pursuant to the

[61] Quotation cited in J. Gilbert, *Redeeming Culture, American Religion in the Age of Science* (Chicago, IL: The University of Chicago Press, 1997), p. 31.
[62] *World's Most Famous Court Trial*, p. 171.
[63] *Ibid.* [64] *Ibid.*, pp. 311–12. [65] *Ibid.*, p. 313.

establishment clause in the limited circumstances exemplified in Story's *Commentaries*. For Darrow, such an approach was an inadequate safeguard of an individual's First Amendment rights associated with free speech and academic freedom. Darrow's anti-majoritarianism required a significantly different understanding of the First Amendment from that favoured by Bryan because it required individual rights to prevail over majority rights. Ultimately the will of the people, as expressed through legislation, could not infringe the constitutional rights of the individual. This inevitably entailed a much broader scope for judicial review of legislation than that favoured by Bryan. Darrow's focus on individual rights necessarily implied an expansion of the scope of the constitutionally protected rights of free speech and free exercise of religion.

Ultimately the difference between the views of Bryan and Darrow revolved around what was the appropriate venue for the determination of the scope of the rights set out in the First Amendment. Darrow's belief that a broad interpretation of these rights was the best basis for advancing human freedom precluded him from placing much faith in legislatures passing laws consistent with such an approach to the First Amendment. The only way his vision of society could be achieved was by courts interpreting these rights broadly because the courts were less likely to be constituted by people like the 'bigots and ignoramuses' who constituted the legislature that passed the Butler Act. On the other hand, Bryan's faith in the common people necessitated a rejection of Darrow's views which he believed would inevitably lead to minority views being imposed against the will of the majority. It was for this reason that he opposed the introduction of expert testimony in the *Scopes Trial* because these experts, as a minority, were seeking to impose upon the majority of Tennessee's citizens, ideas and beliefs that, through the democratic processes that culminated in the Butler Act, they had rejected.[66] In effect, the conflict between Bryan and Darrow represented a divergence of views on the scope of judicial review of legislation.

III. The constitutional law legacy of the *Scopes Trial*

Given the prevailing establishment clause jurisprudence at the time it was quite predictable that Scopes' appeal to the Tennessee Supreme Court would fail. In *Scopes* v. *State*,[67] Green C. J., speaking for the court's majority, said:

[66] *Ibid.*, p. 178. [67] *Scopes* v. *State*, 154 Tenn 105 (1927).

> We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know there is no religious establishment or organized body that has [in] its creed or confession of faith any article denying or affirming such a theory. So far as we know the denial or affirmation of such a theory does not enter into any recognized mode of worship … Belief or unbelief in the theory of evolution is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of the prohibition laws. It would appear that members of the same churches quite generally disagree as to these things.[68]

However, Scopes was precluded from appealing to the Supreme Court of the United States because the Tennessee Supreme Court's quashed his conviction on a technicality, namely, that the jury, and not the judge, should have assessed any fine in excess of $50.[69]

Whilst it is likely that an appeal to the Supreme Court in the late 1920s would have failed,[70] it must be noted that this was also a time when, in response to the same societal changes that had ushered in America's culture wars, First Amendment jurisprudence was beginning to develop in ways that indicated that the court might one day declare anti-evolution legislation, such as the Butler Act, unconstitutional.

These developments were not immediately evident in establishment clause cases, but rather in cases dealing with the other First Amendment rights, namely, the freedoms of speech, the press and free exercise of religion, and the extension of their application to the states by the 'due process' clause within the Fourteenth Amendment. Ultimately these developments led to an establishment clause jurisprudence that was consistent with the arguments presented by Darrow at the *Scopes Trial* and which led to the decision in *Scopes* v. *State* being reversed. This process of change can be briefly tracked.

The initial significance of the due process clause of the Fourteenth Amendment was its application by the Supreme Court, during the latter decades of the nineteenth century, to protect the economic interests of businessmen against intrusive governmental regulation on the basis of

[68] *Ibid.*, 118–19. [69] *Ibid.*, 120–1.

[70] H. Kalven Jr, 'A Commemorative Case Note, *Scopes v State*' (1960) 27 *The University of Chicago Law Review* 505 at 508. For a contrary view, see C. E. Carpenter, 'The Constitutionality of the Tennessee Anti-Evolution Law' (1926–1927) 6 *Oregon Law Review* 130.

the principle of freedom of contract.[71] The implications of this were that the way was also opened for the court to be the arbiter of disputes between government and the individual. This became apparent following the enactment of the Espionage Act and the Sedition Act and the challenges to their constitutional validity that followed. Commencing with *Schenck* v. *United States*[72] in 1919, the validity of these Acts was challenged on the basis that they infringed the First Amendment rights of free speech and freedom of the press.[73] In 1925, in *Gitlow* v. *New York*,[74] the court asserted that these First Amendment rights would also be protected against offending state legislation by virtue of the Fourteenth Amendment's due process clause. In 1937, in *Palko* v. *Connecticut*,[75] the court opined that the due process clause similarly affected the other rights set out in the First Amendment. *Palko* also ruled that the freedom of thought and speech was 'the matrix, the indispensable condition, of nearly every form of freedom',[76] thereby expanding the freedom of speech to include religious speech.

In the same year, in *Cantwell* v. *Connecticut*,[77] the court ruled that a Jehovah's Witness who had failed to seek, pursuant to Connecticut legislation, a permit to broadcast a religious message could not be convicted of a statutory offence on the basis that the legislation violated both his rights of free speech and free exercise of religion. These rights were not absolute, the court ruling that they had to give way in the face of a clear and present danger, something that was not present on the facts of the case. (The 'clear and present danger' test was subsequently reformulated in terms of requiring 'some compelling interest' justifying the infringement of free exercise rights.[78]) In quashing the conviction made pursuant to Connecticut's legislation, the court changed the law in relation to the free exercise clause in two important ways. First, the court held that the due process clause meant that state legislation that infringed the free exercise clause would be declared unconstitutional. Second, the test for deciding when state or federal legislation violated the free exercise clause was changed. Prior to *Cantwell* the court applied the belief action principle, pursuant to which the free exercise clause allowed absolute freedom to believe as one chose, but permitted government

[71] See *Meyer* v. *Nebraska*, 262 US 390, 399 (1923).
[72] *Schenck* v. *United States*, 249 US 47 (1919).
[73] Hammond, Machacek and Mazur, *Religion on Trial*, pp. 78–82.
[74] *Gitlow* v. *New York*, 268 US 652 (1925). [75] *Palko* v. *Connecticut*, 302 US 319 (1937).
[76] *Ibid.*, 327. [77] *Cantwell* v. *Connecticut*, 310 US 296 (1940).
[78] *Sherbert* v. *Verner*, 374 US 398 (1963).

restraints on *any* actions that reflected such beliefs. As a result of *Cantwell*, religiously based behaviour was constitutionally protected unless there was 'some compelling interest' justifying its regulation. In this way, the free exercise clause 'accommodated' religion by creating exceptions to otherwise legal government restrictions on behaviour.

If religiously motivated behaviour could be so accommodated the question then arose as to what constituted religious behaviour. The key to resolving this issue was the court deciding, in a series of cases commencing with *United States* v. *Ballard*[79] in 1944 and culminating in *Welsh* v. *United States*[80] in 1970,[81] that it would not, indeed could not, get involved with defining religion, as to do so would inevitably entangle the court in evaluating the 'truth' of any religion. The consequence of this for the scope of the free exercise of religion clause was that it was now interpreted to mean free exercise of *conscience*, with the fact of the individual's conviction, rather than the content of that conviction, being the determining factor in assessing whether an individual's behaviour was constitutionally protected from government regulation. As Stanley Ingber has noted, following *Welsh*, 'the Court viewed deeply and sincerely held moral or ethical beliefs as the functional, and thus the legal, equivalent of religious beliefs. The Justices had obfuscated any distinction between religion and all other belief systems'.[82]

This broadening of the scope of the free exercise clause necessitated an expansion of the extent of *required* accommodations in relation to government regulation of relevant conduct. This extension of accommodation in the context of free exercise jurisprudence necessarily impacted on establishment clause jurisprudence.

Accommodation of religion was always recognised as being *permissible* in the context of assessing the constitutional validity of government legislation that had the effect of benefiting religion. As already noted, pursuant to Judge Story's analysis of the establishment clause, the only government legislation that would be invalidated was that which directly led to creating an established church in the sense that the Church of England is an established church. Legislation that would otherwise benefit or sponsor religion was not

[79] *United States* v. *Ballard*, 322 US 78 (1944).
[80] *Welsh* v. *United States*, 398 US 333 (1970).
[81] Relevant decisions between *Ballard* and *Welsh* included *Everson* v. *Board of Education*, 330 US 1 (1947), *Torcaso* v. *Watkins*, 367 US 488 (1961) and *United States* v. *Seeger*, 380 US 163 (1965).
[82] S. Ingber, 'Religion or Ideology: A Needed Clarification of the Religion Clauses' (1989) 41 *Stanford Law Review* 233 at 260.

unconstitutional. Accommodation of religion was thus *permitted* in a broad range of matters. However, the expansion of the scope of accommodation *required* by the broadened understanding of the free exercise clause had the necessary effect of limiting the scope of accommodation *permitted* under the establishment clause. Hammond, Machacek and Mazur summarise the position as follows:

> [O]nce conscience was recognized as the equivalent of religion, and thus what may be freely exercised, this led inevitably toward a greater separation of church and state. Circumstances in which the state was seen to be privileging religious over nonreligious perspectives could now be challenged as unconstitutional establishments of religion. Expanded free exercise meant more restriction on government sponsorship of religion.[83]

In the light of the developments towards the expanded understanding of free exercise rights by the Supreme Court in the years up to the end of World War II, it is hardly surprising that the 1947 decision of *Everson* v. *Board of Education*[84] resulted in fundamental changes in First Amendment establishment clause jurisprudence. In addition to ruling that the Fourteenth Amendment rendered the establishment clause applicable to the states, the court also gave a much broader interpretation to the meaning of the establishment clause. The court ruled that it went beyond prohibiting the formal establishment of any particular Christian denomination to precluding any assistance to religion generally, thereby reducing the scope of permissible accommodation of religion within the framework of the establishment clause. In delivering the court's majority opinion, Judge Black said:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly,

[83] Hammond, Machacek and Mazur, *Religion on Trial*, p. 111.
[84] *Everson* v. *Board of Education*, 330 US 1 (1947).

> participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'.[85]

In the context of the evolution controversy, the impact of *Everson* was confirmed in the 1968 Supreme Court decision of *Epperson* v. *Arkansas*.[86] The background to this case went back to the years immediately after the *Scopes Trial* when fourteen states introduced anti-evolution legislation. Only Mississippi (in 1926) and Arkansas (in 1928) actually enacted such legislation. However, this was due more to the desire to avoid a repeat of the *Scopes Trial*, than to inadequate support for anti-evolution legislation in those state legislatures,[87] particularly given that anti-evolutionists achieved their goals by other, less publicly visible, means. Thus, many anti-evolution school boards ensured that teachers who supported evolution were not employed. Furthermore, fundamentalists lobbied American textbook publishers to have them remove evolution from science textbooks. Sensitive to popular opinion, many publishers succumbed to this pressure. All this resulted in a dramatic slump, across America, in the teaching of evolution.[88] It was not until the 1960s, when Americans began to look more seriously at what was being taught in public school classrooms, that this trend was reversed. The Cold War rivalry with the Soviet Union was a key factor in focusing attention on the importance of science. The launching of the Soviet space satellite *Sputnik* in 1957 brought into sharp public focus the fear that America's Cold War rival was teaching science more efficiently. It was in the light of this increased attention given to the content of science curricula that the constitutionality of Arkansas' legislation was challenged.

Susan Epperson's constitutional challenge to the legislation that prohibited the teaching in Arkansas' public educational institutions of 'the theory or doctrine that mankind ascended or descended from a lower order of animals'[89] was successful before the State Chancery Court, on the ground that it constituted an abridgment of free speech, thereby violating the First and Fourteenth Amendments. In coming to this

[85] *Ibid*., 15–16. In *Lee* v. *Wiseman*, 505 US 577, 610 (1992), Judge Souter said: 'Since *Everson*, we have consistently held the [Establishment] Clause applicable no less to government acts favoring religion generally than to acts favoring one religion over others'.

[86] *Epperson* v. *Arkansas*, 393 US 97 (1968). [87] Larson, *Trial and Error*, pp. 75–81.

[88] F. M. Szasz, *The Divided Mind of Protestant America, 1880–1930* (Tuscaloosa, AL: University of Alabama Press, 1982), p. 123.

[89] Section 1, *Initiated Act No 1* (1928).

decision the court rejected the Bryanesque argument mounted by counsel for Arkansas who argued that the legislation should not be declared unconstitutional on the ground that 'the people [had] spoken' and that to undermine the people's decision would mean that there 'is no longer a government of the people, by the people, and for the people'.[90] The State Supreme Court reversed the decision in a two-sentence opinion, ruling that the legislation was within the State of Arkansas' power to specify the public school curriculum.[91] In *Epperson* a unanimous Supreme Court upheld Epperson's appeal, by declaring the Arkansas legislation unconstitutional on the ground that it violated the First Amendment's establishment clause.[92] In delivering the opinion of the court, Judge Fortas said:

> There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma … This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma … The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit … the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment … [T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man … It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[93]

The anti-evolutionists' response to *Epperson* was to argue that the biblical account of creation could be taught as science and that it should be given 'equal time' with evolution in public school science curricula.[94] This led, in the early 1980s, to the introduction of legislation in a number of states requiring that balanced treatment be given to evolution and

[90] Quoted in R. Moore, *Evolution in the Courtroom, A Reference Guide* (Santa Barbara, CA: ABC Clio, 2002), pp. 52–3.

[91] *State* v. *Epperson*, 242 Ark 922 (1967).

[92] At the time *Epperson* began to be litigated, two other states had similar anti-evolution laws. Tennessee's legislation was repealed in 1967. In 1970, the Mississippi Supreme Court, citing *Epperson*, ruled that state's legislation unconstitutional: *Smith* v. *State*, 242 So 2d 692 (1970).

[93] *Epperson* v. *Arkansas*, 393 US 97, 106–8 (1968).

[94] The 'equal time' argument had previously been made in the *Scopes Trial*, by one of Scopes' attorneys: *World's Most Famous Court Trial*, p. 187.

'creation science', as the biblical account of creation became generally known.[95] Legislation to this effect in Arkansas and Louisiana sparked two important establishment clause decisions.

In Arkansas, Act 590[96] of 1981 required that '[p]ublic schools within this State shall give balanced treatment to creation-science and to evolution-science'. A constitutional challenge to Act 590 was swiftly launched and, in *McLean* v. *Arkansas Board of Education*,[97] upheld by United States District Court Judge William R. Overton.

Judge Overton ruled that the relevant test pursuant to the establishment clause that was to be applied was that set out in *Lemon* v. *Kurtzman*,[98] where the Supreme Court said that for legislation to be constitutionally valid it had to satisfy the following three criteria:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion …; finally, the statute must not foster 'an excessive government entanglement with religion'.[99]

On the evidence before him, Judge Overton ruled as follows:

> The author of the Act had publicly proclaimed the sectarian purpose of the proposal. The Arkansas residents who sought legislative sponsorship of the bill did so for a purely sectarian purpose … The State failed to produce any evidence which would warrant an inference or conclusion that at any point in the process anyone considered the legitimate educational value of the Act. It was simply and purely an effort to introduce the Biblical version of creation into the public school curricula. The only inference which can be drawn from these circumstances is that the Act was passed with the specific purpose by the General Assembly of advancing religion. The Act therefore fails the first prong of the three-pronged test, that of secular legislative purpose, as articulated in *Lemon* v. *Kurtzman*.[100]

After ruling that creation science was not science Judge Overton said.

> The conclusion that creation science has no scientific merit or educational value as science has legal significance in light of the Court's previous

[95] On the emergence of 'creation science' see E. C. Scott, *Evolution vs. Creationism, An Introduction* (Berkeley, CA: University of California Press, 2005), pp. 99–104.
[96] The Act's full title was *Balanced Treatment for Creation-Science and Evolution-Science Act.*
[97] 529 F Supp 1255 (1982).
[98] *Lemon* v. *Kurtzman*, 403 US 602 (1971). [99] *Ibid*., 612–13.
[100] *McLean* v. *Arkansas Board of Education*, 529 F Supp 1255, 1264 (1982).

> conclusion that creation science has, as one major effect, the advancement of religion. The second part of the three-pronged test for establishment reaches only those statutes having as their *primary* effect the advancement of religion. Secondary effects which advance religion are not constitutionally fatal. Since creation science is not science, the conclusion is inescapable that the *only* real effect of Act 590 is the advancement of religion. The Act therefore fails both the first and second portions of the test in *Lemon* v. *Kurtzman*.[101]

As to the third prong of the *Lemon* test, Judge Overton said:

> References to the pervasive nature of religious concepts in creation science texts amply demonstrate why State entanglement with religion is inevitable under Act 590. Involvement of the State in screening texts for impermissible religious references will require State officials to make delicate religious judgments. The need to monitor classroom discussion in order to uphold the Act's prohibition against religious instruction will necessarily involve administrators in questions concerning religion. These continuing involvements of State officials in questions and issues of religion create an excessive and prohibited entanglement with religion.[102]

In 1987, in *Edwards* v. *Aguillard*,[103] the Supreme Court had to deal with Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act of 1981, which stipulated that '[p]ublic schools within [the] state shall give balanced treatment to creation-science and to evolution-science … When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.'

The majority of the Supreme Court ruled that the legislation violated the first prong of the *Lemon* test. Delivering the majority opinion, Judge Brennan said:

> In this case, the purpose of the … Act was to restructure the science curriculum to conform with a particular religious viewpoint … [T]he … Act is designed *either* to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, 'forbids *alike* the preference of a religious

[101] *Ibid*., 1272. [102] *Ibid*. [103] *Edwards* v. *Aguillard*, 482 US 578 (1987).

> doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma'. [*Epperson* v. *Arkansas*, 393 US 97, 106–7][104]

In dissent, Judge Scalia (Chief Justice Rehnquist joining the dissent) ruled that the evidence as presented in the case was insufficient to establish what purpose Louisiana's legislators had in mind when they adopted the balanced treatment legislation.[105]

Following the decisions in *McLean* and *Edwards*, the anti-evolutionists' campaign seemed to be legally dead and buried. However, during the 1990s with the emergence of the field of 'intelligent design' (ID) with its questioning of the core of evolutionary theory, the latter's place in public school curricula was again placed under the spotlight.

ID lays claims to being a scientific alternative to evolution. A core of scientists, mathematicians and other scholars, building upon recent discoveries in cell biology and molecular genetics in particular, argue that naturalistic explanations relating to the complexity that characterises life at the cellular and molecular levels are completely inadequate. Furthermore, on the basis of the techniques of information theory, they claim that 'certain features of the universe and of living things are best explained by an intelligent cause rather than an undirected process such as natural selection', placing themselves in 'a scientific disagreement with the core claim of evolutionary theory that the apparent design of living systems is an illusion'.[106] Critics of ID claim that that the 'intelligent cause' or designer involved is God, and that therefore ID is simply creationism under another name – 'creationism in a cheap tuxedo'.[107] This is vehemently denied by ID theorists who argue that the identity of the designer is unknown and ultimately irrelevant. Although many ID theorists believe that the designer is God, all of them deny that ID's rejection of anti-evolutionism is based upon religious authority or belief. They argue that what distinguishes ID from creation science is that ID requires no prior religious commitments and relies solely on empirical data that is evaluated on generally accepted scientific principles.[108]

[104] *Ibid*., 592–3. [105] *Ibid*., 634.

[106] Cited from the homepage of the Intelligent Design Network, www.intelligentdesignnetwork.org/.

[107] D. Peterson, 'The Little Engine That Could Undo Darwinism', *The American Spectator*, June 2005, 34 at 36.

[108] C. Luskin, 'Alternative Viewpoints about Biological Origins as Taught in Public Schools' (2005) 47 *Journal of Church & State* 583 at 591–4.

In 2004 the Dover Area School Board in Pennsylvania passed a resolution that stipulated:

> Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.

The constitutionality of the School Board resolution and a subsequent clarifying press release was successfully challenged before District Court Judge John E. Jones III in *Kitzmiller* v. *Dover Area School District*.[109] In dealing with the issue, Judge Jones stated that two related tests of constitutionality had to be applied, namely the *Lemon* test and the 'endorsement test'. The latter, developed as a gloss to the *Lemon* test by Judge O'Connor in *County of Allegheny* v. *American Civil Liberties Union*,[110] was described by Judge Jones as follows:

> The endorsement test emanates from the 'prohibition against government endorsement of religion' and it 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.' [*Allegheny*, at 593] (emphasis in original). The test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.[111]

Judge Jones concluded that the School Board's resolution breached the endorsement test in that both students and citizens at large would perceive the School Board's resolution as an endorsement of religion.

In relation to the *Lemon* test, Judge Jones' decision focused on its first prong and concluded that 'the secular purposes claimed by the Board amount to a pretext for the Board's real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause'.[112] In particular, Judge Jones asserted:

> Although as noted Defendants have consistently asserted that the ID Policy was enacted for the secular purposes of improving science education and encouraging students to exercise critical thinking skills, the Board took none of the steps that school officials would take if these stated

[109] 400 F Supp 2d 707 (2005).
[110] *County of Allegheny* v. *American Civil Liberties Union*, 492 US 573 (1989).
[111] *Kitzmiller* v. *Dover Area School District*, 400 F Supp 2d 707, 714–15 (2005).
[112] *Ibid*., 763.

> goals had truly been their objective. The Board consulted no scientific materials. The Board contacted no scientists or scientific organizations. The Board failed to consider the views of the District's science teachers. The Board relied solely on legal advice from two organizations with demonstrably religious, cultural, and legal missions, the Discovery Institute and the [Thomas More Law Center]. Moreover, Defendants' asserted secular purpose of improving science education is belied by the fact that most if not all of the Board members who voted in favor of the biology curriculum change conceded that they still do not know, nor have they ever known, precisely what ID is. To assert a secular purpose against this backdrop is ludicrous.[113]

At the heart of Judge Jones' decision is his ruling that ID is not science. However, there is respectable intellectual opinion that suggests that ID is within the scope of a science curriculum and therefore could be taught in public schools.

In *McLean*, it was held that the essential characteristics of science were that: '(1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative, i.e. are not necessarily the final word; and (5) It is falsifiable'.[114]

Is this too narrow a definition of science? Columbia University Law Professor Kent Greenawalt suggests that it is. Greenawalt does not find ID particularly persuasive as science within the scope of a *McLean*-like definition, nor does he suggest that the teaching of evolution would be enhanced by references to ID. Nevertheless, he concludes that ID is 'within the range of constitutionally permissible judgment' as 'one conceivable' alternative to the standard evolutionary theory.[115] His argument is based upon the legitimacy of teaching ID in reference to the question of the *limits of science*. In this respect Greenawalt writes:

> Advocates of … intelligent design [theories] claim that the available scientific evidence suggests that a purely scientific explanation of the origin of species is not only unavailable now, but is unlikely in the future. So understood, the theories, relying on scientific evidence, are partly about the limits of science.[116]

[113] *Ibid*., 762–3 (2005).
[114] *McLean* v. *Arkansas Board of Education*, 529 F Supp 1255, 1267 (1982).
[115] K. Greenawalt, *Does God Belong in Public Schools?* (Princeton, NJ: Princeton University Press, 2005), p. 124.
[116] Greenawalt, *Does God Belong in Public Schools?*, p. 110.

Greenawalt's argument that theories about the limits of science do belong in science is stated in the following terms:

> Science cannot explain why anything at all exists, why our lives have meaning, if they do, and why we should be ethical. These intrinsic limits, set by the nature of the scientific enterprise, should definitively be mentioned in science courses, and it would be appropriate for texts and teachers to discuss controversies over the exact nature of these limits, including competing suppositions about the relationship of science and religion … If convincing evidence of such limits lay within science itself, their analysis would appropriately fall within the scope of science courses.[117]

In the context of the limits in evolutionary theory, ID theorists have argued that complex biochemical processes, such as the blood-clotting cascade of events which, when activated by a cut, lead to the formation of a blood clot, lack any explanation within an evolutionary framework, a point conceded by many scientists who otherwise embrace evolution.[118] For Greenawalt, this amounts to an 'evidential gap' in evolution.

From the perspective of what would be constitutionally legal in relation to such gaps, Greenawalt explains the proper role of the science teacher as follows:

> [S]cience teachers should cover the evidential gaps and controversies surrounding the neo-Darwinian synthesis. Any evidence for a kind of order of a sort not yet integrated into the dominant theory should be fairly presented … Science teachers should *not* get far into the question of whether any as yet undiscovered principles of order in evolution, were they to exist, are likely to have proceeded from a creative intelligence. One reason not to engage this possibility at any length is that students with religious objections to standard evolutionary theory may build much more than is warranted from any scientific perspective from conjectures about intelligent design.[119]

Greenawalt's insightful analysis is important as it gives a basis to distinguish the decision in *Kitzmiller*. Greenawalt's argument is not dependant upon rejecting the point of *Kitzmiller*, namely that ID is not science. Rather, he argues that a science curriculum is not confined to teaching what comes within the definition of science, but legitimately extends to

[117] *Ibid*., p. 113. [118] Peterson, 'The Little Engine', p. 39.
[119] Greenawalt, *Does God Belong in Public Schools?*, p. 115.

an understanding of the limits of science and scientific theories. If so, Greenawalt makes a reasonable case for ID being useful as a prism through which to explore the limits of science. The majority opinion in *Edwards* v. *Aguillard*, with its suggestion that 'teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the *effectiveness of science instruction*' (empahsis added)[120] tends to support this argument.

IV. The *Scopes Trial* and control over public school curricula

In the introduction to this chapter it was stated that the central practical issue in all the cases from, and including, *Scopes* v. *State* was that of locating the appropriate institutional forum for decision-making as to the content of science curricula in American public schools. Does the decision of the legislature or local school board, as the case may be, determine the matter, or do the courts have the final say? This question raises the conflict between the principles of democratic majoritarianism and judicial review and there is no doubt that the current answer to it, dating back to the decision in *Epperson*, is: 'the courts'. An emphatic rejection of democratic majoritarianism is found in *McLean*, where Judge Overton said:

> The application and content of First Amendment principles are not determined by public opinion polls or by a majority vote. Whether the proponents of Act 590 constitute the majority or the minority is quite irrelevant under a constitutional system of government.

In the context of the culture wars during the latter half of the twentieth century, cultural progessivists generally supported judicial review and adherents of cultural orthodoxy were generally supportive of democratic majoritarianism. The support that cultural progressivists have given to judicial review is due to the fact that, to a large degree, federal courts, and in particular the Supreme Court, have for some time been generally sympathetic to their agenda. On the other hand, the fact that state legislatures have enacted provisions consistent with their agenda has meant that adherents of cultural orthodoxy have generally favoured democratic majoritarianism.

[120] *Edwards* v. *Aguillard* 482 US 578, 594 (1987).

However, 'outcome-related' reasoning[121] does not provide any principled legitimacy to any answer to the question of whether legislatures or the courts should have the final say on the content of American high school science curricula, or indeed, on any disputed culture wars issue. Such reasoning leads to forum shopping, with cultural warriors, for often pragmatic rather than principled reasons, simply favouring the forum most likely to resolve any particular issue in a manner consistent with their particular agenda.[122] Thus, in the context of the First Amendment's religion clauses, there are indications that in recent years, through a number of bare majority decisions, the Supreme Court, applying a 'post-modern competing orthodoxies framework' that relies heavily on the First Amendment's free speech clause, has made inroads into the strict separation of church and state principle first enunciated in *Everson* and thereby, to some degree at least, re-introduced religion into the public square.[123] What is of concern to cultural progressivists is that the present domination of a conservative executive and legislature at the federal level will lead to judicial appointments that will consolidate, rather than reverse, this trend.[124] This has led some cultural progressivists to distance themselves, in varying degrees, from support for judicial review and increasingly look towards democratic majoritarianism as their preferred approach.[125]

[121] This term is taken from J. Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, discussed at 1376–86.

[122] Forum shopping is not always favoured by groups concerned with the outcomes on culture wars issues. Thus, in the context of the *Scopes Trial*, the *New Republic* magazine opposed the Butler Act and agreed with Darrow that the legislators who voted for it were foolish and misinformed. Nevertheless, the *New Republic* argued that Tennesseans had the right to make what others might take to be wrong decisions. To have denied the Tennesseans the right to ban the teaching of evolution was akin to asking them to commit a type of religious suicide. On the other hand, if Tennesseans realised that they had made a wrong decision, it could readily be repealed: P. K. Conkin, *When all the Gods Trembled, Darwinism, Scopes, and American Intellectuals* (Lanham, MD: Rowman & Littlefield, 1998), p. 106.

[123] H. Baker, 'Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation' (2004–2005) 20 *The Journal of Law and Religion* 97.

[124] See, for example, Hammond, Machacek and Mazur, *Religion on Trial*, pp. 127–49.

[125] Thus, in the wake of the recent appointments of Chief Justice Roberts and Justice Alito to the Supreme Court, Bruce Ackerman has advocated that Supreme Court appointments be for non-renewable terms of twelve years which he opines would give 'ambitious jurists an incentive to avoid … right or left-wing constitutional ideologies. Over time, the twelve-year turnover assures that doctrinal evolution tracks centrist constitutional understandings, *leaving it up to the democratic politicians to lead the country down more adventurous paths to the left or right, as the voters choose*'. (Emphasis

The question that needs to be addressed in this context is whether there is a principled basis upon which to anchor one's preference for either judicial review or democratic majoritarianism. As a fundamental principle, democracy is an appropriate basis upon which the legitimacy of these alternatives can be assessed. On this basis, Jeremy Waldron has made compelling arguments favouring democratic majoritarianism.[126] Waldron's basic proposition is that judicial review, irrespective of the outcomes it generates, is democratically illegitimate. However, the legitimacy of democratic majoritarianism is, Waldron argues, conditional upon the relevant society being one 'with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, … in reasonably good order, set up on a non-representative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e. about what the commitment to rights actually amounts to and what its implications are) among members of the society who are committed to the idea of rights'.[127]

Waldron's pre-conditions are important in that they address valid criticisms that can be made of his basic proposition. For example, Christopher Eisgruber offers a powerful critique of election processes and concludes that, under some circumstances and for some issues, elected legislators are poor representatives of the people, and that in such circumstances the federal judiciary will have a better democratic pedigree.[128] The consequence, he suggests, is that judicial review will result in 'judgments more or less consistent with some current of mainstream American political thought'.[129] Eisgruber's 'poor representatives of the people' point is met by Waldron's first pre-condition, that requires a legislature that is 'a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy'

added.): B. Ackerman, 'The Stealth Revolution, Continued' *London Review of Books*, Vol. 28, No. 3, 9 February 2006, 18 at 18.

[126] Waldron, 'The Core of the Case Against Judicial Review'. The argument in this article builds upon a string of his earlier works, especially *Law and Disagreement* (Oxford: Clarendon Press, 1999) and *The Dignity of Legislation* (Cambridge University Press, 1999).

[127] Waldron, 'The Core of the Case Against Judicial Review', p. 1360.

[128] C. L. Eisgruber, 'Democracy and Disagreement: A Comment of Waldron's Law and Disagreement' (2002) 6 *Legislation and Public Policy* 35 at 41–5.

[129] *Ibid*., p. 45.

where 'legislators deliberate and vote on public issues, and the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting' and where 'these processes connect both formally (through public hearings and consultation procedures) and informally with wider debates in society'.[130] In this way legislators would not be 'poor representatives of the people' when votes are cast on any given issue. On this basis, in the context of the *Scopes Trial*, Bryan made the valid point that, although he had no objection to Darrow's experts being heard, the appropriate place for them to give their evidence was before the legislature and not, as Darrow claimed, in the courtroom.[131] Furthermore, should legislators make a 'wrong' decision, they can quickly reverse it by repealing the relevant legislation. Indeed, this is exactly what happened when, in November 2005, a newly elected Dover Area School Board reversed the thirteen-month policy on ID that had ignited the *Kitzmiller* litigation. On the other hand, 'wrong' judicial decisions cannot be so readily reversed, in that such a reversal is dependent upon others instituting litigation that presents a court, generally the Supreme Court, with the opportunity to do so. Thus, it was forty-one years before *Epperson* presented the Supreme Court with the opportunity to overrule *Scopes* v. *State*.

Given the pre-conditions that he imposes on the application of his basic proposition, Waldron's endorsement of democratic majoritarianism does not completely exclude judicial review. Nor, given its entrenchment in the American constitutional framework, can it do so. This then inevitably raises the technical legal issue referred to in this chapter's introduction, namely, whether legislation infringes constitutionally guaranteed rights which, in the context of this chapter are the First Amendment's religion clauses. Whether an infringement occurs depends upon the meaning of the particular right in question. On this question, if Waldron's pre-conditions for democratic majoritarianism are met, the inevitable consequence is an interpretation of the religion clauses that is consistent with the nineteenth-century interpretation exemplified in the writings of Joseph Story. Legislation reflective of the principle of democratic majoritarianism, such as that adopted in the cases of *Epperson*, *McLean*, *Edwards* and *Kitzmiller*, is entirely consistent with the nineteenth-century understanding of the scope of the religion clauses.

[130] Waldron, 'The Core of the Case Against Judicial Review', p. 1361.
[131] *World's Most Famous Court Trial*, p. 171.

On the other hand, judicial review in accordance with the immediate post-*Everson* era interpretation of the religion clauses necessarily undermines the operation of democratic majoritarianism, even if Waldron's pre-conditions are satisfied.

However, giving effect to democratic majoritarianism does not mean that the legislatures will, or will not, necessarily act in a manner consistent with either the nineteenth-century or post-*Everson* era understandings of the religion clauses. Whether they do or do not will be a matter for the legislature. On the other hand, the historical record suggests that giving effect to democratic majoritarianism will lead to legislation being adopted and implemented that would be unconstitutional according to the immediate post-*Everson* era understanding of the religion clauses. Such a prospect undoubtedly concerns cultural progressivists, but this is not a basis for rejecting democratic majoritarianism for the simple reason that there is nothing to prevent the Supreme Court itself moving away from the post-*Everson* interpretation of the religion clauses and towards something resembling their nineteenth-century interpretation. Indeed, even though much of the immediate post-*Everson* era interpretation of the religion clauses remains intact, as Michael McConnell's chapter in this book shows, it has evolved and continues to evolve,[132] arguably in directions that appear to be increasingly at odds with the views of cultural progressivists.

It could be argued that a return to the religion clauses jurisprudence of the nineteenth century would be a return to the days in which there was an informal establishment of America's majority Protestant population. However, such an argument reflects a misunderstanding of what underpinned that informal establishment. America's religious landscape today is vastly different from that of the nineteenth century. The informal Protestant establishment arose not because the courts were not resolving the kind of issues that emerged in the twentieth century, but because a particular brand of Protestantism, steeped in Calvinist doctrine, reigned supreme in terms of religious beliefs. In contemporary America, with its significant diversity of religious traditions,[133] such an informal establishment would, at least on a national level, be impossible.

[132] See pp. 115–22.

[133] In 1789 Protestants represented about 99 per cent of the American population. In 2002 they represented 52 per cent of the population: K. O'Keefe, *The Average American, The Extraordinary Search for the Nation's Most Ordinary Citizen* (New York: Public Affairs, 2005), p. 38.

It would be very unlikely at a state level, especially in the more populous ones. On the other hand, such an informal establishment could arise at the county level.[134] Whether such a possibility is a sufficient justification for the continuation of the post-*Everson* era religion clauses jurisprudence is, however, debatable. First, any such informal establishment would be only applicable to a territory and population that, in the context of the territory and population of the United States is as a whole, relatively insignificant. Second, and perhaps more compellingly, an argument can, and has been made, that, in such circumstances, it '[m]ight … be desirable to allow people to establish explicitly religious communities – provided that no one is forced to join, everyone is free to leave, and basic human rights are respected'.[135]

The argument presented in this chapter in support of the principle of democratic majoritarianism, as outlined by Waldron, over judicial review should not be taken as indicative of support for one or other side on any particular culture wars issue. Nor will the choice of venue for resolving issues such as public school science curricula in any way alter the reality that their resolution will continue to be bitterly contested, irrespective of whether the venue is the courtroom, or the legislature. This chapter's argument is that principled legitimacy attaches to the legislature and not to the courtroom, and for this reason such matters should be resolved by the former and not the latter.

Conclusion

The *Scopes Trial* was a major, early, but indecisive, battle in America's culture wars which pitted the forces of cultural progressivism against those of cultural orthodoxy over control of the content of science curricula in American public schools, especially in relation to Darwinian evolution. The trial raised two key issues, namely, the meaning of the First Amendment's establishment clause and the extent to which legislative provisions relating to public school curricula were open to judical review. Since the Supreme Court decision in *Everson*, a broad

[134] In the early 1980s, the followers of Bhagwan Rajneesh applied for legal recognition of the City of Rajneeshpuram as a municipality of the State of Oregon. The application failed on the basis of a ruling by the District Court for the District of Oregon to the effect that such an application violated the First Amendment's establishment clause: *State of Oregon* v. *City of Rajneeshpuram*, 598 F Supp 1208 (1984).

[135] M. W. McConnell, J. H. Garvey and T. C. Berg, *Religion and the Constitution* (New York: Aspen Law & Business, 2002), p. 93.

interpretation of the establishment clause has generally held sway. This has meant that legislative provisions relating to public school science curricula have, in cases such as *Epperson*, *McLean*, *Aguillard* and *Kitzmiller*, been held unconstitutional on the basis that the relevant enactment has involved the teaching of religion rather than science. The meaning of the establishment clause and the permissible scope of judicial review have been features of all these cases, just as they were in the *Scopes Trial*. However, there are indications that the broad interpretation of the establishment clause in the immediate post-*Everson* era is giving way to a narrower interpretation. If so, this will inevitably, and as argued in this chapter, appropriately, lead to a lesser scope for judicial review of relevant legisation. Such a result will lead to legislatures, as opposed to the courts, increasingly having the final say as to the content of public school science curricula. It will not result in any lessening of the intensity with which this and other culture wars issues are debated. Deeply rooted in religion, America's culture wars show no signs of abating for, as Wills has written, 'the obvious cultural reason that the Bible is not going to stop being the central book in [America's] intellectual heritage.'[136]

[136] Wills, *Under God*, p. 124. Since the 1950s, when pollsters began questions about Americans' beliefs, polls consistently reveal that over 90 per cent of Americans believe in God, over three-quarters of Americans believe in miracles and more than 60 per cent say that religion is very important in their lives: Larson, *Summer for the Gods*, p. 278.

8

A very English affair: establishment and human rights in an organic constitution

CHARLOTTE SMITH*

Introduction

This chapter seeks to address the difficulties inherent in attempts to balance the presence of an Established Church and the modern human rights framework within a single constitution. It will argue that Establishment, which demands a place for religion in the public sphere, pulls in an opposing direction to that of the human rights framework, the general tendency of which is to remove religion into the private sphere. It will be argued that there is too often little attempt to address the potential conflict between human rights and Establishment, and an attempt will be made to examine the consequences of this omission.

The focus of this chapter is upon the treatment of the Church of England within the human rights framework as implemented in the United Kingdom by the Human Rights Act 1998. In seeking to address this it will highlight the difficulties and complexities created, for those concerned with constitutional reform, by the non-documentary nature of the English[1] constitution. It will illustrate that these difficulties and complexities are doubly present in respect of attempts to address the position of an Established Church which is itself a wide and varied body which has been subject to its own history of reform and its own internal forces.

Through an analysis of the decisions of the Court of Appeal and the House of Lords in the case of *Aston Cantlow* v. *Wallbank*[2] this chapter will examine the consequences of the interaction of a constitutional unwillingness to address the potential conflict between the ideologies

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[1] Since the chapter is concerned primarily with the Establishment of the Church of England it is taken to deal with the English constitution.

[2] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v. *Wallbank and Another* [2001] EWCA Civ 713 and [2003] UKHL 37.

of Establishment and the human rights framework; the history and characteristics of the English constitution and the Church of England and its institutions; and the language and frameworks developed under the European Convention on Human Rights (European Convention) and implemented in domestic law by the Human Rights Act 1998.

The difficulty of addressing ideological questions in the English constitution

As any student of English constitutional law learns, the English constitution is non-documentary and scattered in nature. Rather than having a single document, underpinned by a consistently enunciated constitutional ideology, and seeking to make legal provision for all constitutional eventualities, England possesses a morass of legal and non-legal sources, developed (and developing) over a long constitutional history in response to particular events, needs and challenges. Primacy is given to pragmatism, history and tradition rather than to ideology.[3] This creates several problems for those seeking to study the constitution, and its development, and to postulate reforms on that basis.

The first problem for putative students and reformers is that of 'finding' the constitution in all of its various forms and existences. Further, its scattered nature and the heavy reliance on non-legal mechanisms, together with the primacy accorded to parliamentary sovereignty, renders any attempt at thorough, principled and consistent ideological development difficult. The English constitution is a being in a state of constant change and exists as an entity which is constantly being moulded by the political and legal exigencies of the time. It is the creation of parliamentary compromises and political settlements.

The essentially organic and historical nature of the constitution creates, or is perhaps indicative of, another difficulty to be faced by those seeking to restructure or rationalise it. Its very form seems to speak of an instinct against such wholesale and principled reform, and of an apparent reluctance to discard outgrown constitutional arrangements or ideologies. There is a reluctance to do more than tinker with anything except the manifestly unworkable. Thus, for example, the royal prerogative remains a significant means of constitutional action, albeit governed by

[3] F. Ridley, "There is No British Constitution: A Dangerous Case of the Emperor's Clothes" (1988) 41 *Parliamentary Affairs* 340; S. Sedley, "The Sound of Constitutional Silence" (1994) 110 *Law Quarterly Review* 2.

constitutional conventions which require that it be exercised in accordance with the will of the democratically elected executive.

Some have sought to argue that the English constitutional character is changing, and that since 1998 there has been a clear attempt to pursue a principled and consistent constitutional reform agenda. Much of that reform agenda, however, has been pursued in a manner indicative of the survival of the old ways. Thus, for example, different arrangements exist for devolved government in Wales, Northern Ireland and Scotland; the House of Lords Act 1999 removed all but a few of the hereditary peers from the second chamber without a finalised plan for the composition of the second chamber being put into place; and in June 2003 the office of the Lord Chancellor was apparently abolished in a Cabinet reshuffle.[4]

Finally, insofar as English constitutional reform and development has consistently looked to history and tradition for validation, this history is itself misleading. It has used history in the same sense as the common law does. It is interested in a received authority rather than the real existence of matters as historical events. This means that in a profoundly historical constitution there is in reality little engagement with the true history or historical existence of constitutional arrangements or concepts. While this may often be unproblematic it may lay traps for the unwary.[5]

The nature of the constitutional arrangement signified by Establishment

Establishment may take many forms and each example of it will reflect the particular heritage, history and assumptions of the constitution within which exists. At its most basic level, however, it denotes a special relationship between the Established Church and the state and nation[6] in respect of which it is Established. In the words of one of its foremost nineteenth-century defenders:

[4] See R. Brazier, 'How Near is a Written Constitution?' (2001) 52 *Northern Ireland Legal Quarterly* 3.

[5] C. McCrudden, 'Northern Ireland, Belfast and the British Constitution' in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 5th edition (Oxford University Press, 2007) at pp.196–7.

[6] Here 'state' is used to signify the constitutional organs of government while 'nation' is used to signify the people or community living within the territorial limits of the state.

> The 'Establishment' of the Church of England consists in certain relations, different from those of other religious bodies, in which the Church of England now stands towards the State, or the Public Law and Government of the country.[7]

In common with all such constitutional arrangements Establishment exists not only in a statement of law but in a web of theory and sentiment which has grown up in support of that law and become interwoven with it.[8] Further, it has two dimensions as it denotes both a relationship with the organs of the state and a relationship with the individual citizen.

In England the Establishment of the Church of England has historically been expressed in an integration of church, state and nation, which has operated on three levels. Firstly, that integration has existed in shared apparatus of central government and administration, and most notably the role of the Monarch and Parliament in respect of the church. Secondly, it has existed in the integration of shared apparatus of local government and administration. This was seen historically in the role of the parish as a unit of both civil and ecclesiastical administration, and in the role of the vestry as the central body in both ecclesiastical and civil matters. Finally, it was evidenced by the assumption that all English men, women and children, unless in a state of active dissent, were members of the Church of England and had legal rights and obligations in relation to its services. It is with this last aspect of Establishment that this chapter is primarily concerned.[9]

The integration of the Church of England and the nation, expressed in the idea of a national membership, highlights the underlying rationale or purpose of Establishment. It was an expression of the state's assumption of an obligation to make public provision for religious services. Further, it was an expression of the church's assumption of a duty to minister to the nation as a whole.[10]

[7] R. Palmer, *The Endowment and Establishment of the Church of England. An Address Delivered at Blackmoor on Monday, January 11, 1866* (London: Cassell and Co., 1886) p. 3.

[8] See P. M. H. Bell, *Disestablishment in Ireland and Wales* (London: S.P.C.K., 1969), Introduction.

[9] For a more detailed examination of Establishment, see generally N. Doe, *The Legal Framework of the Church of England: a Critical Study in a Comparative Context* (Oxford: Clarendon Press, 1996). See also C. Smith, 'The Church of England: Some Historical Reflections on a Constitutional Conundrum' (2005) 56 *Northern Ireland Legal Quarterly* 394 at 396–414.

[10] See generally P. Avis, *Church, State and Establishment* (London: S.P.C.K., 2001).

The nature of establishment in an organic constitution and a broad church

The Establishment of the Church of England is no exception from the general character of the English constitution. As Peter Edge has noted:

> Although the Church of England occupies a special place in the English jurisdiction, making it the paradigmatic form for one type of State Church, this position is the product of normal legal rules, scattered through the English statutes and case-reports. There is no formal statement of how the Church of England and the State are to interact.[11]

The Establishment of the Church of England is as scattered, and as profoundly historical and pragmatic, as any other part of the constitution and it has been developed and adapted to change in much the same way. Some reforms and developments have been driven through state action, most notably perhaps the formation of the Church Commission in the nineteenth century. Other reforms, though often necessarily implemented by statute, have been instigated by different elements within the church. Among the most notable of these was the creation of the Church Assembly and the various mechanisms granting the church greater powers of self-government.

While secular constitutional arrangements in England are often the result of political compromise and expediency, those relating to the Church of England are profoundly influenced not only by political considerations, but also by the incredible theological diversity within the church. The normal tension between stasis and change in English constitutional affairs is reinforced and exaggerated by the varying reactions of the church's different theological elements to social and political change.[12] The church's search for a *via media* just as much as the normal vagaries of English constitutional reform has meant that, while there has certainly been substantial modification of the relationship between

[11] P. W. Edge and G. Harvey (eds.), *Law and Religion in Contemporary Society: Communities, Individualism and the State* (Aldershot: Ashgate, 2000) p. 2.

[12] For discussions of this in the context of the eighteenth and nineteenth centuries, see generally G. F. A. Best, *Temporal Pillars: Queen Anne's Bounty, the Ecclesiastical Commissioners and the Church of England* (Cambridge University Press, 1964); O. Brose, *Church and Parliament: Reshaping the Church of England, 1828–1860* (Stanford, CA: Stanford University Press, 1959); K. A. Thompson, *Bureaucracy and Church Reform: The Organizational Response of the Church of England to Social Change, 1800–1965* (Oxford: Clarendon Press, 1970).

church, state and nation, there has not been a radical or consistent reformulation.[13]

It is undeniable that such modifications as have been made to the Establishment have reflected a growing differentiation between church, state and nation, and a widening gulf between them. The creation of the Church Assembly and the increase in its powers and reformulation as the General Synod marked the grant of greater autonomy for the church, and increasing divergence from the norm of integration of church and state in central government and administration.[14] Similarly, the replacement of the old parish vestry by parochial church councils composed solely of active conformists signalled the death of integrated local government and administration.[15] These changes themselves reflected an acceptance that, with changes in patterns of belief and the assumption by the state of many functions previously performed by the Church of England, the close integration between church and nation had been undermined.[16] This has not, however, led to a systematic and total abandonment of the national mission or traditional trappings of Establishment.[17]

The influence of modern social and philosophical mores

The increasing differentiation between church, state and nation is, in part at least, a consequence or reflection of the way in which the social, political and philosophical mores of society have changed over the past two centuries. Establishment is founded upon the principle that it is right and proper for a state to make public provision for religious services, and thus to care for the spiritual and moral welfare of its citizens. It is based on an assumption that religion has a crucial role in underpinning the

[13] For a discussion of this see J. P. Parry and S. Taylor, 'Introduction: Parliament and the Church of England from the Reformation to the Twentieth Century' (2000) 19 *Parliamentary History* 1–13.

[14] Though integration remains in the continuing role of the Crown and Parliament in church government.

[15] Civil functions were removed from the vestry (in which all parishioners could vote) by section 6 of the Local Government Act 1894. Its ecclesiastical functions were transferred to the parochial church council by measure in 1921.

[16] For a very personal reaction to this see C. F. Garbett, *The Claims of the Church of England* (London: Hodder and Stoughton, 1947) and A. L. Smith and L. T. Dibdin, 'The Relations of Church and State in England' in *Report of the Archbishop's Committee on Church and State* (London: S.P.C.K., 1916) chapter 2. See also generally Brose, *Church and Parliament*.

[17] For a general introduction to the history of Establishment, see K. Medhurst and G. Moyser, *The Church and Politics in a Secular Age* (Oxford: Clarendon Press, 1988) chapters 1 and 2.

morality of society, and thus the idea of a civilised society governed by law rather than force.[18] While the Anglican theory of Establishment has adapted to the idea that the advantages of the church's structures and institutions may be a more valid justification of its constitutional position than any claims to absolute spiritual truth,[19] this adaptation remains based on an assumption that religion has a valid place in the public sphere.

The foundations upon which Establishment rests were ably summed up by one of its nineteenth-century defenders when he asked his readers:

> Can the State when aware that masses of people will never seek any form of religion or moral training of their own accord, and of the inability of private resources to cope with the wants of great populations hurried and worried with much service, – can it wash its hands of all responsibility, and blandly reply, 'Am I my brother's keeper?'.[20]

His assumption was that the state could not. Such an assumption cannot be made with such certainty today. As one commentator has noted:

> The confessional State still survives in the remaining constitutional role of the Church of England, but, in practice, if there is a uniform ethos which underlies British society, it would seem to be essentially materialist. The ethos may rely upon some shared humanitarian principles which particularly emphasise the equal right of all citizens to share in the material benefits of society. However the very concern to treat all citizens equally means that it is difficult for the State to treat their beliefs seriously because that would be likely to involve discrimination, giving priority to certain beliefs over others.[21]

In the society and state in which Establishment currently operates the assumed link between religion and morality, and the propriety of state concern with religious provision, are challenged by undercurrents of

[18] For a statement of this common argument, see e.g. R. Palmer, *The Defence of the Church of England against Disestablishment*, 5th edition (London: Macmillan and Co., 1911) at p. 73.

[19] For one example of an attempt to defend the Establishment on this basis, see S. L. Holland, *The National Church of a Democratic State* (London: Rivingtons, 1886) at p. 8.

[20] Holland, *The National Church of a Democratic State* p. 10.

[21] D. Harte, 'Defining the Legal Boundaries of Orthodoxy for Public and Private Religion in England' in R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford University Press, 2001) at p. 472.

moral relativism and enlightened cynicism.[22] This is not to say that religion has become irrelevant,[23] but such conditions strike at the propriety of the state's links with one particular institution, and at the church's traditionally defined national mission and membership.

Such conditions, while causing the state to distance itself from the church, have a profound impact upon attitudes and assumptions within the Church of England since churches, 'being of man and therefore made of the dust of the earth as well as the breath of the divine, are always entangled with the culture and structure of their age'.[24] What has been referred to above as the essentially materialist identity of the modern state is a far cry from the notion of a state which is joined to a church in order to promote the spiritual and moral welfare of society.[25] Further, the widening gulf between the Church of England and the great mass of people in England has a profound impact upon the church's confidence in its traditionally defined ministry to the nation. While reactions to these challenges have varied within the Church of England and over time, one consequence has arguably been an assertion of doctrinal identities and boundaries, and a resulting loss of catholicity or breadth, which has itself undermined any notion of the church's ministry to the nation as a whole.[26]

The influence of the human rights framework

The legal context in England in which prevailing social and political attitudes towards religion are most frequently played out is that of

[22] For a discussion of the possible consequences of this, see P. Weller, 'Equity, Inclusivity and Participation in a Plural Society: Challenging the Establishment of the Church of England' in P. W. Edge and G. Harvey (eds.), *Law and Religion in Contemporary Society* pp. 53–67.

[23] On this point, see e.g. G. Davie, *Religion in Britain since 1945: Believing without Belonging* (London: Blackwell, 1994) which can be contrasted with S. Bruce, *Religion in Modern Britain* (Oxford University Press, 1995). For an assessment of the different approaches of these scholars to the question of modern religiosity, see T. Jenkins, 'Two Sociological Approaches to Religion in Modern Britain' (1996) 26 *Religion* 331–42. See also *A House for the Future* (Cm. 4534, 2000) at para. 15.5.

[24] O. Chadwick, *The Secularisation of the European Mind in the Nineteenth Century* (Cambridge University Press, 1975) p. 72.

[25] See e.g. T. Arnold, *Fragment on the Church*, 2nd edition (London: B. Fellowes, 1845) at p. 11.

[26] On this point, see e.g. P. Avis, *Church, State and Establishment* (London: S.P.C.K., 2001) at p. 16 and K. Medhurst, "The Church of England: a Progress Report" (1999) *Parliamentary Affairs* 275–90 at 289–90. Arguably this underpins much of the current debate about the church's policy on homosexuality and homosexual clergy.

human rights. In its treatment of the state and of religious institutions the human rights framework provides a definite and unavoidable challenge to the foundations of Establishment. It does so firstly in the identity or character which it gives to the state, and secondly in the role and mode of protection which it accords to religious belief and expression.

As noted above, traditional rationalisations of Establishment, at least on the part of the Church of England, have identified the state as sharing some degree of moral identity or purpose with the church. The human rights framework, however, works on the assumption that the state is an essentially amoral entity against which the individual requires protection.[27] As such it gives legal credence to a view of the state which sits ill with the idea of it as a fit ally for the church in the pursuit of its mission.

A caveat to this argument is that sometimes the appeal to human rights, and the vindication of those rights, can itself provide the state with a quasi-moral identity or mission.[28] This is perhaps best illustrated by the rhetoric of the 'War on Terror' and its frequent appeal to a vision of liberal democracies, founded upon (implicitly Judeo-Christian) values and the respect of human rights, battling against the evil of organisations and states which fail to respect such values. Such rhetoric appears to accord to the state a moral identity at odds with that seen in other situations.[29] Nor is such a moral identity, given its propensity to alienate particular faith groups, unproblematic for its constitutional relationship with a church which is self-consciously trying to develop a role and mission which gives due recognition to the multi-cultural and multi-faith nature of modern society.

More significant still is the way in which the human rights framework protects religious beliefs and expressions, and the role which it accords religion in society. Essentially the human rights framework protects religious freedoms by imposing a prima facie duty of non-interference upon the state. This duty is not absolute since the state may be under a duty to intervene to prevent religions from being disrespected, to ensure that individuals and communities are placed in a position to exercise

[27] Hence the dichotomy between the individual and the state expressed in Article 34.

[28] On the argument that in some senses religion has been replaced by faith in human rights – and a discussion of modern assumptions and sensitivities – see C. A. Gearty, "The Holism of Human Rights: Linking Religion, Ethics and Public Life" (2004) 6 *European Human Rights Law Review* 605–9.

[29] On this point, see A. MacIntyre, 'A Partial Response to My Critics' in J. Horton and S. Mendus (eds.), *After MacIntyre: Critical Perspectives on the Work of Alistair MacIntyre* (Notre Dame, IN: University of Notre Dame Press, 1994) p. 303.

their rights to freedom of religion and conscience, and to regulate religion in order to prevent harm to others.[30] Beyond this limited sphere of state activity, however, religion becomes a matter which is private to individuals, and one in which the state ordinarily has no interest or role.[31] Ultimately religion, which the very essence of Establishment pronounces to be a public matter with a public role in the life of state and nation, is relegated to the margins of public life and ultimately to the private sphere. In the words of Van Bijsterveld:

> [R]eligion is firmly enmeshed in the constitutional structures of practically all Western European countries … However inadequate these approaches have become in defining church and state relationships today, they demonstrate that religion is more than a purely private phenomenon. Despite this, the popular perception remains that religion is a personal concern functioning in the private sphere.[32]

In conclusion, while prevailing social attitudes have for some time sat uncomfortably with the assumptions upon which the Establishment rests, the implementation of the European Convention by the Human Rights Act 1998 has created a distinct legal tension in the fabric of the English constitution. The human rights framework and Establishment pull in opposing directions. Moreover legal and political antipathy towards the recognition and removal of such inconsistencies will probably prevent any attempt to address this situation. The problems created by these conflicts, and by the nature of the English constitution, are all

[30] See e.g. *Wingrove* v. *United Kingdom*. (1997) 24 E.H.R.R. 1 at 48 where the European Court of Human Rights held that the refusal to classify a film on the basis that it treated a religious subject in a manner calculated to outrage those with an 'understanding of, sympathy towards and support for the Christian story' was a legitimate restriction of freedom of expression under Article 10(2). On the duty of the state to ensure that its citizens can exercise peaceful enjoyment of their right to freedom of religion see *Otto-Preminger* v. *Austria* (1995) 19 E.H.R.R. 34. For a justification of restrictions to freedom of religion in order to prevent social harm see *R. (on the Application of Begum)* v. *Head Teacher and Governors of Denbigh High School* [2006] UKHL 15 – especially Lord Bingham at para. 34 and Lord Hoffman at para. 65. On the developing jurisprudence in this area, see S. C. Van Bijsterveld, 'Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments' in R. J. Adhar (ed.), *Law and Religion* (Aldershot: Ashgate, 2000).

[31] For a critical evaluation of this approach, see S. C. Van Bijsterveld, 'Freedom of Religion: Legal Perspectives' in O'Dair and Lewis, *Law and Religion*, pp. 299–310.

[32] Van Bijsterveld, 'Religion, International Law and Policy in the Wider European Arena' p. 166.

too apparent in recent case law concerning the Church of England. This is seen most clearly in the case of *Aston Cantlow* v. *Wallbank*.[33]

The facts and legal treatment of *Aston Cantlow* v. *Wallbank*

The facts of *Aston Cantlow* are a perfect illustration of the continuing significance of Establishment, and the potential complexities of attempting to deal with it in a historic constitution which had recently implemented the European Convention into domestic law. In *Aston Cantlow* the ancient means by which provision was made for public religious services were challenged under Article 1 of the First Protocol and Article 14 of the Convention.[34]

The complainants were freehold owners of rectoral land in the form of a field which formed part of a parcel of glebe land, since fragmented, which had been allotted to a predecessor in title under an enclosure award in 1743. Since the land formed part of the rectory of the parish its owners incurred a duty to keep the chancel of the parish church in a state of repair.[35] The enforcement of this obligation lay in the hands of the parochial church council under the Chancel Repairs Act 1932. Under this Act any owner of rectoral property to whom the parochial church council issued a repair notice, and who subsequently failed to pay the sum of money requested, was subject to proceedings in the civil courts for recovery of the monies owed. The legal challenges brought before the Court of Appeal and House of Lords arose from such proceedings.

The complainants argued that the parochial church council was a public authority for the purposes of section 6 of the Human Rights Act 1998, and that as such it was prohibited from acting in a manner inconsistent with their Convention rights unless required to do so by the provisions of primary legislation. They argued that the repair notice contravened their right to property as set out in Article 1 of the First Protocol, and further that it was discriminatory and thus contravened Article 14 of the Convention. In response the parochial church council refuted the argument that it was a public authority for the purposes of section 6 of the Human Rights Act. Alternatively, it argued that the chancel repair obligation fell within the exceptions allowed to the right to property as being in the public interest, and that it was not discriminatory. Finally they argued that they had been

[33] [2001] EWCA Civ 713 and [2003] UKHL 37.
[34] Freedom of religion was not at issue.
[35] The network of rights and obligations discussed in the case will be dealt with fully below.

required to act as they did by the Chancel Repair Act 1932. In responding to these arguments the Court of Appeal and the majority in the House of Lords reached very different conclusions.

To the question of whether the parochial church council was acting as a public authority when it issued the repair notice the Court of Appeal answered in the affirmative. In doing so it drew heavily on domestic judicial review case law and focussed on the character of parochial church councils. It was thus significant to their decision that the parochial church council was exercising legal powers unavailable to private individuals which determined how individuals, including those who were not members of the Church, should act, and which were enforced by the civil courts.

The House of Lords, in contrast, focussed its attention upon the jurisprudence of Article 34 of the Convention. This emphasises that the European Court of Human Rights (European Court) is concerned with addressing breaches of individual rights by state parties. It establishes an essential dichotomy between private individuals, whose rights are to be vindicated, and state actors, whose international obligations are to be enforced by the European Court. It states that:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention.

By focussing their attention on Article 34 the House of Lords highlighted the international context within which section 6 of the Human Rights Act, which is the domestic equivalent of Article 34, operated.[36] Section 6 of the Human Rights Act was concerned with defining those bodies or persons in respect of whose acts or omissions liability arose under the Convention. Applying the jurisprudence of Article 34 the majority held that the parochial church council was not acting as a public authority when it enforced the chancel repair obligation. They noted that the Church of England, by virtue of Establishment, had unique links with the state and exercised certain public functions. However, they emphasised that it was in essence a private religious organisation. The enforcement of the chancel repair obligation was a private act which did not engage the responsibility of the state.

[36] The rights incorporated into UK law by the Human Rights Act 1998 are not intended to be relied upon in disputes between private individuals.

Having reached different conclusions on the public authority point the Court of Appeal and majority in the House of Lords again differed on the application of Article 1 of the First Protocol and Article 14 of the Convention. The Court of Appeal held that in seeking to enforce the chancel repair obligation the parochial church council had acted in a manner which breached the right to property, and that enforcement of the obligation amounted to a discriminatory form of public taxation. They held that such enforcement discriminated without rational basis between those who owned rectoral land and those who did not. It was also relevant that the obligation could arise at any given time, that there was no link between the value of the land and the extent of the obligation, and that no element of its social or other rationale survived.

In finding that the enforcement of the chancel repair obligation was not a public function the House of Lords refuted the Court of Appeal's view that the obligation was a form of public taxation. They emphasised its form as a private law obligation arising, and voluntarily accepted, as a consequence of the ownership of land. Its enforcement was that of a private obligation, and thus excluded from the scope of the Human Rights Act 1998 by section 6(5). Nor, since the obligation was voluntarily assumed and was owed by all owners of rectoral property, was the enforcement of the obligation discriminatory and thus in breach of Article 14. Their Lordships further held that even if the parochial church council were undertaking a public function, it was required to do so under section 2 of the Chancel Repairs Act 1932, and was thus exempted from liability for its actions by virtue of section 6(2) of the Human Rights Act 1998.[37]

The expressions of Establishment dealt with in *Aston Cantlow*

In *Aston Cantlow* the stage was set for the senior judiciary to address the potential conflict between the assumptions of the human rights

[37] For commentary on the case, and on the use of section 6(3) of the Human Rights Act 1998, see P. Cane, 'Church, State and Human Rights: Are Parish Councils Public Authorities' (2004) 120 *Law Quarterly Review* 41–8; F. Meisel, 'The *Aston Cantlow* Case: Blots on English Jurisprudence and the Public/Private Law Divide' [2004] *Public Law* 2–10 and D. Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] *Public Law* 329–51. See also the contrasting positions taken by A. Pearce and N. Doe *et al.* in their memoranda to the Joint Committee on Human Rights on 'Churches as Public Authorities' in The Meaning of Public Authority under the Human Rights Act (HL39, HC382 of Session 2003–04, The Stationery Office). The case is also discussed in A. Pearce, 'Aston Cantlow : Chancel Repairs and the Status of Church of England Institutions' (2003) *Law and Justice* 151.

framework and those underpinning Establishment. It raised both the question of the public character of the Church of England and its institutions, and the question of public interest in the provision of religious services. By examining the judicial treatment of these questions it is possible to see the significance of the gap between modern and historical assumptions about the role of religion in the public sphere; the difficulties created by the nature of development and reform in the English constitution; and the relevance of different reactions within the church to social and political change. To understand this, however, it is first necessary to examine the constitutional arrangements under discussion and their modern development and existence.

The historical Establishment, the national mission of the church and the public provision for religious services

The essential rationale of the arrangements under discussion in *Aston Cantlow* was as a means for making national provision for religious services, rather than as a means necessarily of providing for the private expression of belief.[38] They were a means of serving the national mission and public role of the Church of England as an Established Church. They were a manifestation of the assumption that it was fitting and necessary for the state to make public provision for religion, and of the conviction that:

> A national church understands that its mission is to the whole nation, to the whole population considered as a great community (or a community of communities). It is committed to providing its ministry of word, sacrament and pastoral care to every section of the population.[39]

The arrangements were based upon the basic assumption that all English people were, at least in theory and unless they actively placed themselves outside its community, members of the Church of England. Historically this assumption was safeguarded by both legislation and canon law, which worked to render membership of the Church of England and the state coextensive. Thus while Canons Nine and Thirteen of 1603 excluded those who did not conform to its practices from the community of the church, statutes such as the Test Act 1673 and Corporation Act

[38] On this point contrast F. Cranmer and A. Pearce in their memoranda to the Joint Committee on Human Rights on 'Churches as Public Authorities'.

[39] P. Avis, *Church, State and Establishment* (London: S.P.C.K., 2000) pp. 15–16.

1661 excluded from the full civic life of the nation those who were not in conformity with the Church of England.[40]

Having drawn the boundaries of the church's laity as being broadly coextensive with the boundaries of the state, the law imposed obligations of religious observance upon those individuals. Canon law and statute imposed on all English nationals the obligation to attend the services of the church on Sundays and days of religious observance.[41] In consequence, the common law accorded to all individuals resident in England certain legal rights in respect of their parish church. They were given the right to attend worship there, to have their children baptised there, and, subject to certain exceptions, to be married there, and to be buried in the parish burial ground according to the rites of the church.[42]

That the legal rights of individuals existed in relation to their *parish* church highlighted the structures or systems through which the church sought to serve its national mission, that is the parochial and territorial systems. The Church of England was tied into the very fabric of state and nation by a system of organisation which made provision for every geographical area of the state. Its national mission was served by a system of organisation which divided the church into geographical units of which the smallest was the parish.[43] The legal rights of individuals were then determined by reference to their place of residence, so that all individuals resident in the geographical area of a particular parish had legal rights in respect of the parish church.

The national mission of the church, as provided for through the parochial and territorial systems, was funded by a complex web of financial obligations. Under the territorial system, provision was made for the maintenance of churches and clergy through the endowment (usually by private benefactors) of parishes with glebe land, and the right of the rector to receive a tithe of the produce of the parish. In return for the right to receive tithe, the rector undertook a legal duty to maintain the chancel of the church in a state of reasonable repair. Often, as happened in the parish of Aston Cantlow,

[40] Although ad hoc amendments were made to this position from the beginning of the eighteenth century. See J. Bradley, *Religion, Revolution and English Radicalism: Nonconformity in Eighteenth Century Politics and Society* (Cambridge University Press, 1990).

[41] See Canon 13 of 1603 and also statutory obligation under 5 & 6 Edw. 6, c.1 – from which Dissenters are released by 9 & 10 Vict. c. 59.

[42] See *Taylor* v. *Timson* (1888) L.R. 20 Q.B.D. 671 and *Re Perry Almshouses* [1898] 1 Ch. 391 at 399.

[43] For a detailed history of the parish system, see N. J. G. Pounds, *A History of the English Parish: the Culture of Religion from Augustine to Victoria* (Cambridge University Press, 2004).

these lands and rights, having passed into the hands of the monasteries, came into the hands of lay rectors at the time of the Reformation. These lay rectors retained the right to receive tithes and also the obligation to maintain the chancel of the church.[44]

While rectors had the right to receive tithe, and the obligation to keep the chancel in repair, the ordinary parishioner, defined as such by his residence in the parish or his ownership of property which was rated under the poor law, was obliged to pay his tithe. The parishioners were also responsible for the upkeep of the nave of the parish church. This was paid for by a system of church rates administered by the parish vestry. In conformity with the idea of close integration between church and state the vestry was concerned with both civil and ecclesiastical administration and was composed of all parishioners.[45]

The modification of traditional arrangements – between stasis and change

The arrangements outlined above reflect an unambiguous assertion of the role of religion in the public sphere. These arrangements have been subjected to social, theological and political forces which have often led to profound changes in constitutional reality. Such are the vagaries of English constitutional reform, however, and such is the diversity of the church itself, that the situation is as much one of continuity as of change. The truth of this can be seen in an examination of the arrangements as they currently stand.

It has almost certainly been fallacious since the time of the Reformation to talk of the membership of church and nation as being coextensive. From the eighteenth century onwards Parliament explicitly recognised this and passed Acts which accorded a degree of religious freedom to those not in conformity with the Church of England. Finally, in the nineteenth century, the repeal of the Test and Corporation Acts in 1828 and the Roman Catholic Relief Act 1829 permanently removed from the constitution the link between religious conformity and civic participation.[46] Later in the century the general legal obligation to attend

[44] For a history of chancel repair obligations, see [2003] UKHL 37 at paras. 97–107.

[45] See the Vestries Acts of 1818 and 1819 (58 Geo. 3 c. 69 and 59 Geo. 3 c. 85) at sections 3 and 1 respectively.

[46] See J. Bradley, *Religion, Revolution and English Radicalism* (Cambridge University Press).

the services of the church was amended so that it no longer applied to those not in conformity with the Church of England.[47] Other statutory reforms, such as those allowing for civil registration of marriage, and those which removed testamentary and matrimonial suits from the ecclesiastical courts, progressively distanced the church and its officers from the lives of many ordinary men and women who would previously have come into contact with them.[48]

From the middle years of the nineteenth century the experience of the Church of England was often of an increasing alienation from the nation, and from the state apparatus through which many of its affairs were administered.[49] While some elements in the church continued to hold to the old ideas of national mission and membership, others responded to the sense of threat and alienation by seeking to reaffirm the spiritual authority and identity of the church distinct from its relationship with the state.[50] In doing so they sought doctrinal standards of membership and unity, which increasingly differentiated churchmen from other individuals. So, too, they fought for a greater degree of autonomy from the state in church government, and for a means of church government in which only churchmen were active.[51]

The at least partial victory of a new narrower vision of church membership, and of the greater differentiation of the government of church and state, was witnessed in the creation of the Church Assembly as a distinctively ecclesiastical forum for the administration of ecclesiastical affairs.[52] At a local level this scheme was implemented by the creation of parochial church councils, which assumed the ecclesiastical duties formerly exercised by the vestry in addition to functions relating to the

[47] 9 & 10 Vict. c. 59.

[48] See generally F. Knight, *The Nineteenth Century Church and Society* (Cambridge University Press, 1995).

[49] For expressions of this, see e.g. R. Oastler, *Convocation: The Church and the People* (London: C.W. Reynell, 1860) at p. 13 and E. Akroyd in *Report of Church Congress* (Cambridge: Deighton Bell, 1863) at p. 86.

[50] For reference to such sentiments, see C. Wood and Rev. J. Llewelyn Davies in *Report of Church Congress* (Cambridge: Deighton Bell, 1878) at pp. 116–17 and 122–4 respectively. Note the tension between a need for doctrinal cohesion and the traditional national mission as evinced by different churchmen.

[51] For a detailed examination of traditional church structures and notions of membership in the nineteenth century, see generally Roberts, 'The Role of the Laity in the Church of England c1850–1885' (D.Phil., Oxford, 1974) and Knight, *The Nineteenth Century Church and Society*.

[52] Church of England Assembly (Powers) Act 1919. Now reformulated and granted more extensive powers under the Synodical Government Measure 1969.

mission of the church in the parish.[53] Lay membership of these councils was limited to those who were baptised, confirmed (or ready and desirous to be confirmed), who were actual communicants, and who declared themselves to be members of the Church of England.[54] The electoral franchise was drawn more broadly, requiring lay electors to have their name on the electoral roll of the parish, to be baptised, to be resident or habitual worshippers in the parish, and to declare themselves to be members of the Church of England (or a church in communion with it), or a member of a church not in communion with the Church of England but which subscribes to the doctrine of the Holy Trinity.[55]

The balance drawn by the provisions relating to parochial church councils reflects a compromise between traditional notions of a nationally defined membership exercising legal rights in respect of their parish church, and newer notions of a distinct body of active church men and women who are increasingly likely to worship in the church of their choice rather than the church of their parish. Thus, for example, the council is still a *parish* council and continues to exercise functions in relation to all parishioners, and not simply the congregation. Similarly, the provisions concerning the electoral franchise are drawn so as to comprehend as many residents as possible. However, the provisions draw a clear distinction between active conformists and the wider community, and the rules explicitly recognise that an increasing number of people worship outside their parish. That this balance is intentional can be seen from an examination of the report which first set out the scheme.[56]

While constitutional arrangements concerning both the religious beliefs of individuals and the government of the Church of England now recognise the distinction between citizenship and church membership, the courts have continued to uphold the legal rights of the residents of the parish in respect of their parish church.[57] Neither standing in

[53] As currently set out in the Parochial Church Councils (Powers) Measure 1956, sections 2 and 4. The civil functions of the vestry had been removed by section 6 of the Local Government Act 1894.

[54] See rule 14 of the Church Representation Rules. [55] See *ibid*., rule 1(2).

[56] *The Report of the Archbishop's Committee on Church and State* (London: S.P.C.K., 1916) at pp. 42 and 65.

[57] See *Combe* v. *Edwards* (1872–75) L.R. 4 A. & E. 390 (rejection of responsive plea in ecclesiastical suit that the complainant held a seat in an independent chapel). For the traditional definition of a parishioner as someone holding (poor) rateable property in the parish, see *Kensit and Others* v. *The Rector and Churchwardens of St Ethelburga Bishopsgate Within* [1900] P. 80; *Etherington* v. *Wilson* (1875–76) L.R. 1 Ch. D. 160; *Davey* v. *Hinde* [1903] P. 221.

ecclesiastical courts nor the right to attend the services of the parish church are limited by reference to religious affiliation or conformity.

The continued assumption that all individuals have rights in respect of their parish church demonstrates continuity with old ideas of Establishment as making public provision for religious services. However, an examination of the sources of funding demonstrates a patchwork of seemingly haphazard survivals and substantial dismantlement.

The society envisaged by the system of tithes, church rates and chancel repair obligations was a patriarchal and agrarian one, which exhibited a general conformity to the Established Church. The system was profoundly challenged, particularly in urban areas, by the impact of the Industrial Revolution, population movement and falling agricultural prices in the nineteenth century. Changing patterns of belief and conformity further challenged it.[58] By the middle of the nineteenth century political opposition and campaigns of non-payment had resulted in the abolition of many of the main forms of funding which had historically supported the public provision of religious services. The payment of tithes in kind was replaced by money payments which increasingly failed to match the financial requirements of the church.[59] Compulsory church rates were abolished by statute in 1868 and it had become almost impossible to secure recovery of either voluntary rates or tithes in many areas. The church had ever more frequently to rely upon the voluntary efforts of active conformists to fund a legal duty owed to all residents in any parish.[60]

The sole remaining feature of the old system of funding was the chancel repair obligation of lay rectors. Yet stripped of its long-vanished social context and the surrounding web of obligations and the right to payment of tithe it seems both anachronistic and a little bizarre.[61] It stands alone as a remnant of a lost social vision, more often forgotten than it is subjected to the harsh light of day.

In conclusion, an examination of the manifestations of Establishment dealt with in *Aston Cantlow* reveals a system which seeks to provide for

[58] See Mole, 'The Victorian Town Parish' (16) *Studies in Church History* 361–71.

[59] Though Best notes (see pp. 461–80) that commutation had little real and sustained effect on church income until after 1878 – although industrialisation, inflation and difficulties in recovery also affected the issue.

[60] For an early complaint to this effect, see 'Churchwardens' (1877) 43 *Saturday Review* 260–1.

[61] For criticism of the situation, see Law Com. No. 152 (1985*) Property Law: Liability for Chancel Repairs* and J. H. Baker, 'Lay Rectors and Chancel Repairs' (1984) 100 *Law Quarterly Review* 181–5. See also Lord Nicholls at [2003] UKHL 37 at para. 2.

the public provision of religion. It underpins a system of legal rights to its services which the church owes to any inhabitant of any parish. While many aspects of the constitutional relationship have been modified, and some of them now appear not a little strange, the essence of the system of public provision remains.

The treatment of Establishment in *Aston Canlow* v. *Wallbank*

Turning first to the judicial treatment of the chancel repair obligation, those by whom it is owed and those in whose interest it exists, one sees immediately a gaping chasm between the ideological underpinnings of that obligation and the judges' understanding of it. This gaping chasm is an amalgam of changed social context, the stumbling blocks created by the process of English constitutional reform, and changed conceptions of the proper role and treatment of religious provision.

As noted above, the right of rectors to receive tithes, and the corresponding obligation of rectors to pay for the repair of the chancel of the parish church, were part of a complex network of rights and obligations by which provision was made for the public services of the Church of England in respect of which all residents in a parish had legal rights. Of this complex network of rights and obligations only the legal rights of parishioners and the lay rector's chancel repair obligation remain. Their survival undoubtedly appears distinctly odd. This sense of oddity is aggravated by the fact that the application of the chancel repair obligation is haphazard and wholly inadequate for the preservation of the plant of the church. There are very many parishes in which there is no lay rector to whom the obligation attaches. As the Law Commission has noted:

> Only a minority of parish churches are even potential beneficiaries [of the chancel repair obligation] and the line which divides those which qualify from those which do not is drawn by history alone and not on any other, more rational, basis, such as parochial need.[62]

Given this it is hardly surprising that, with the exception of Lord Scott,[63] their Lordships fell into the trap of assuming that the chancel repair obligation and its enforcement were matters concerning the interests of a

[62] Law Commission Working Paper 86 (1983) *Transfer of Land: Liability for Chancel Repairs* para. 5.3.

[63] See [2003] UKHL 37 at paras. 130 and 135.

congregation or a denomination,[64] rather than all residents of a parish. In doing so, particularly in relation to the question of public interest under Article 1 of the First Protocol of the European Convention, their Lordships consistently understated the continuing significance of parishioners' legal rights in their parish church.[65] Insofar as any of the judges were prepared to uphold the argument that enforcement of the chancel repair obligation was in the public interest they did so, not on the basis of legally enforceable rights to religious services, but upon the basis of the public interest in maintaining historic buildings.[66] Thus, their decisions are indicative of both a discomfort with the public role of religion and a total failure to understand that this is exactly what Establishment, of which legally enforceable chancel repair obligations are a part, is supposed to support.

The majority in the House of Lords further held[67] that the fact that parishioners had legal rights in respect of their parish church could not sustain the argument that enforcement of the chancel repair obligation was a public act.[68] In reaching this decision, and once again failing to grasp the rationale of the arrangements, their Lordships focussed exclusively on the form of the obligation and the mode of its enforcement. As such its existence as a private law incident of land ownership, and its enforcement by a civil law action for recovery of a debt, were the decisive factors.[69]

In their treatment of the nature and functions of parochial church councils the House of Lords and Court of Appeal adopted stances reflecting the tensions outlined above in respect of the creation, empowerment and

[64] The Law Commission also erred in this way – speaking of the 'denominational nature of the liability'. See Law Commission Working Paper 86 (1983) *Transfer of Land: Liability* para. 5.3.

[65] Many individuals who are not habitual church-goers exercise their legal rights to 'hatch', 'match' and 'dispatch' according to the rites of the Church of England, while a smaller but still significant number will attend popular services such as Christingle services and Midnight Mass at Christmas. Others, though they do not exercise their right to attend its services retain some sense of 'ownership' of their parish church. For a discussion of religion and attitudes to the Established Church in modern Britain, see D. Rogers, *Politics, Prayer and Parliament* (London: Continuum, 2000) at chapters 11, 14.

[66] See e.g. [2001] EWCA Civ 713 at para. 41 and [2003] UKHL 37 at paras. 64 and 138.

[67] Lord Scott dissenting – see [2003] UKHL 37 at paras. 130 and 135.

[68] [2003] UKHL 37 at para. 16 per Lord Nicholls; para. 63. Though it is noted that Lord Hope, at para. 74, is concerned at the probable consequences, given lack of alternative provision, of any decision which prevent parochial church councils from enforcing chancel repair obligation.

[69] [2003] UKHL 37 at para. 16 (per Lord Nicholls); para. 63 (per Lord Hope); para. 89 (per Lord Hobhouse); para. 171 (per Lord Rodger).

vision of those bodies. Thus, echoing concerns for continuity with the past, the national mission of the church, and close integration of the church with the state and nation, the Court of Appeal found that the council was public in nature, at least when enforcing the repair obligation. In reaching this decision it emphasised that the council was a body constituted by law and that it exercised powers originating in statute and including those of the vestry,[70] that its actions were binding upon even people who were not members of the church,[71] and that its functions were set out by a measure which itself had the force of primary legislation.[72] By contrast the House of Lords emphasised that parochial church councils formed part of a scheme to grant the church greater autonomy and give to it a means of self-government in which only its active members could participate, and in respect of which the church owed no accountability to the public at large.[73] They noted that this was the rationale for the church's ability to formulate measures for Parliament to pass. Further, they emphasised that the functions of parochial church councils were essentially private and religious matters in which the state had no role.[74]

The assumption that parochial church councils are concerned predominantly with the concerns of the 'congregation of believers in the parish' and that they are 'essentially … domestic religious [bodies]' which do not have 'public responsibilities'[75] once again hides the complex history of parochial church councils and the nature of the obligation which was being enforced. The membership of parochial church councils is confined to active members of the Church of England elected by a more widely defined constituency of such members. Their functions, however, relate to all residents of a parish. The enforcement of the repair obligation, for example, provides for the upkeep of a parish church in respect of which all residents have legal rights, and to which many residents continue to go in order to mark significant events in their lives. These rights are themselves the product of an assumption that it is constitutionally

[70] Which had acted for the whole parish and in which all rate-payers could vote.
[71] This concentration with the character of the parochial church council and the source of its power reflects the concerns of domestic judicial review case law.
[72] See [2001] EWCA Civ 713 at paras. 32 and 35.
[73] For Lord Hope this was the decisive factor in determining their private status – [2003] UKHL 37 at paras. 56–8.
[74] [2003] UKHL 37 per Lord Nicholls at paras. 14–15; per Lord Hobhouse at paras. 83 and 86; per Lord Rodger at paras. 149–52.
[75] [2003] UKHL 37 at para. 86.

valid for the state to make provision for public services of religion to be available to all citizens.

The failure of the majority in the House of Lords to appreciate the public role accorded to religion by the arrangements which they were called upon to consider is explained by their reliance upon Article 34 of the European Convention and its jurisprudence. This further explains why the Court of Appeal did not reach the same decision, since it was not so concerned with the international human rights framework within which the case arose, and largely focussed on domestic judicial review jurisprudence which was more amenable to the notion of reviewing the actions of Church of England bodies.[76]

The House of Lords dealt with the case as explicitly concerning whether or not the enforcement of the repair obligation by the parochial church council engaged the responsibility of the state at the European Court in Strasbourg, and made extensive reference to the distinction between governmental and non-governmental bodies under Article 34. It then became vital, at least with regard to the claim that the parochial church council was a 'core' public authority under section 6(3) of the Human rights Act, that governmental bodies did not enjoy the protection of the Convention.[77] Thus, it was unthinkable, given that steps had been taken in the passage of the Human Rights Act 1998 to avoid such a situation, that a church or its institutions should readily be held subject to Convention obligations and treated as a governmental organisation.[78]

The reliance upon Article 34 also led to the extensive reliance upon European jurisprudence on Established Churches, which has consistently held that such churches are not governmental organisations

[76] [2001] EWCA Civ 713 at paras. 34–5. In domestic judicial review jurisprudence the courts prior to the Human Rights Act 1998 had declined jurisdiction to review the actions of private (non-Established) religious bodies. See e.g. *R.* v. *Chief Rabbi of the United Hebrew Congregations ex parte Wachmann* [1992] 1 W.L.R. 1036; *R.* v. *Provincial Court of the Church in Wales ex parte Williams* (1999) 5 Ecc. L.J. 217. However, the courts had been willing to exercise judicial review over certain aspects of the Church of England because it had a special status as the Established Church. See *R.* v. *Archbishops of Canterbury and York ex parte Williamson*, *The Times*, 9 March 1994. For a summary of the legal treatment of the Church of England prior to the Human Rights Act 1998, see M. Hill, 'Judicial Approaches to Religious Disputes' in O'Dair and Lewis, *Law and Religion*.

[77] See e.g. [2003] UKHL 37 per Lord Nicholls at paras. 6–12; per Lord Hope at paras. 44–66; per Lord Hobhouse at para. 87.

[78] See section 13 of the Human Rights Act 1998, which requires the courts to 'have particular regard to the importance of' freedom of religion if their determination of a question under the Act might affect the exercise of that right by a religious organisation or its members.

whose activities engage the responsibility of the state under the Convention.[79] While it might be argued that the European Court has itself misunderstood the nature of Establishment in its many variations, its jurisprudence justified the decision reached by the House of Lords. Under that jurisprudence there was no room for the argument that religious provision was a proper matter of state concern, or that religion had a significant role in the public sphere. Once again this highlights the tension between Establishment and the human rights framework.

Reliance upon Article 34 probably influenced the decision reached by the majority of the House of Lords in a less immediately obvious way. While Article 34 jurisprudence probably reflects commonly held assumptions about what the relationship between church and state should be, its use of the word "governmental" almost certainly renders more sensitive any decision about the status of a church body. The claim that an Established Church was a governmental body would have run counter to the theology and constitutional claims of independence from state interference entrenched in the Establishment of the Church of Scotland, with which the Scottish members[80] of the panel must have been familiar.[81] While understandable, the assumption that the Establishment of the Church of England is like to that of the Church of Scotland is, however, flawed since Establishment has many different forms and no two examples of it are truly alike.[82]

Less obvious still is the possibility that the use of the term 'governmental' raised the spectre of long-decided battles concerning the spiritual autonomy and authority of the Church of England as a religious organisation with an identity distinct from any link with the state. These historical theological sensitivities and controversies, though almost certainly unappreciated by the judges who unwittingly evoked them, shaped the decision in *Aston Cantlow* via judicial reliance[83] upon Phillimore's dictum that:

> A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian

[79] See particularly *Hautanemi* v. *Sweden* (1996) 22 E.H.R.R. C.D. 155 and *Holy Monasteries* v. *Greece* (1994) 20 E.H.R.R. 1.

[80] Lords Hope and Rodger.

[81] See Lord Hope's explanation of the Church of England's relationship with the state at [2003] UKHL 37 para. 61 and that of Lord Rodger at paras. 154 and 156.

[82] Though the *Wakeham Commission* made this assumption. See *A House for the Future* (Cm. 4534, 2000) chapter 15.

[83] See citations at [2001] EWCA Civ 713 para. 31; [2003] UKHL 37 paras. 61 and 156.

> faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.[84]

This dictum was delivered in response to argument by counsel that the Established Church of England was, by virtue of its Establishment, not properly considered to be a religious institution. Moreover, it was delivered by a judge who had, prior to his elevation to the bench, been retained counsel to the High Church English Church Union, a proponent of disestablishment and a strong advocate of the spiritual autonomy of the Church of England.[85] Phillimore was particularly sensitive to claims that the Church of England was a government department. In citing him it is arguable that their Lordships, though almost certainly unaware of the context of that dictum or the theological concerns of the judge who enunciated it, became similarly sensitised, or at least distracted from current difficulties by their reference to long dead concerns.

Conclusion

This chapter has sought to highlight the organic, pragmatic and historical nature of the English constitution in general and of Establishment in particular. In doing so it has tried to explain some of the difficulties facing both reformers and the judiciary. English Establishment consists of a network of seemingly erratic survivals and sporadic adjustments and developments in response to specific needs or events. The result is a web of constitutional arrangements, some of which sit uncomfortably with modern constitutional developments and principles, and current social and political assumptions.

While it is possible to criticise the majority in the House of Lords in *Aston Cantlow* for their failure to recognise the clash between the foundations of Establishment and those of the human rights framework, it should be noted that this constitutional inconsistency, together with an apparent unwillingness to address it, is written across the face of the English constitution. As such Establishment, which rests on the assumption that religious provision is a legitimate matter of state concern and

[84] *Marshall* v. *Graham/Bell* v. *Graham* [1907] 2 K.B. 112 at 126.

[85] On Phillimore's High Churchmanship and that of his father, see W. Phillimore to Acland 21 September (n.d.) Devon RO 1148/M Box 3/4 and Henry Reeve (October 1852) PRO 30/29 Box 23/2 f 62 Leverson-Gower Papers. See also W. Phillimore, *The Government of the Church in Relation to the State and the Laity* at Lambeth Palace Library, reprinted from the *Union Review*).

public interest, and which assumes that religion has a role to play in the public sphere, exists side by side with the human rights framework, which tends to exclude religion from the public sphere.

The coexistence of Establishment and its ideology alongside the human rights framework, and the attitudes and assumptions which underpin it, result in some very obvious inconsistencies in constitutional arrangements. The judiciary in *Aston Canlow*, hearing a case within the human rights framework, were plainly discomforted by the notion of religion in the public sphere. Yet the church continues to officiate at state occasions. Its bishops are still appointed by the Queen on the advice on the Prime Minister, and, while not a common occurrence, modern Prime Ministers have exercised their right to veto the appointment of candidates nominated by the church.[86] So, too, while Parliament rarely vetoes church measures it continues to take an active role in negotiating their content.[87] Such state involvement in church government sits ill with the idea propounded by the majority of their Lordships, of the Church of England or its institutions as essentially private religious bodies.

In part at least the travails of the judiciary in seeking to address the constitutional position of the modern Church of England can be traced to a wilful failure on the part of reformers to recognise that Establishment sets the Church of England apart from other religious bodies. Thus, for example, the sections of the Royal Commission on House of Lords reform that dealt with the privileged position of Anglican bishops did not consider Establishment. Similarly, while section 13 of the Human Rights Act was drafted to address the concerns of other religious bodies, by requiring the courts to have special regard to the consequences of any finding under the Act for the ability of religious bodies or their members to exercise freedom of religion, no section of that Act sought to address the position of the Church of England; unless perhaps the provision that church measures should have the status of primary legislation[88] was intended to have the same effect.

A further source of difficulty has been created by the lack of historicity or historical awareness in a constitution which habitually looks to the past for validation. *Aston Cantlow* was a powerful example of the

[86] See K. Medhurst, "The Church of England: A Progress Report" (1999) *Parliamentary Affairs* 275–90.

[87] See J. Behrens, "The Churchwardens Measure 2001" (2001) 6 Ecc. L.J. 97–110.

[88] See section 21 of the Human Rights Act 1998. This means that measures cannot be invalidated by the courts (section 4).

potential for difficulty created by the unwitting and ahistorical evocation of episodes in the national past in a legal context which seeks to utilise the modern and supra-national terminology and analytical model of the human rights framework. Many of the judicial attitudes evinced in *Aston Cantlow* towards the treatment of Establishment were significantly influenced by an unfortunate collision between the jurisprudence of Article 34 of the European Convention and a dictum delivered in the context of long-dead battles regarding the spiritual identity of the Church of England and its existence other than as a tool of government or state. Neither is it insignificant that two of the judges who emphasised most rigorously the spiritual and private nature of the church are Scottish, and thus come from a country in which the absolute independence of the Kirk from state interference is constitutionally guaranteed.

Finally, the European Convention itself creates problems with regard to national constitutional and legal treatment of Established Churches. It does so by wilfully closing its eyes to existing relationships between state signatories and churches. It tends to ignore institutional relationships between church and state and to assume that the rights which it guarantees are exercised on a level playing field. It provides little guidance on how to proceed when this is not the case.

This chapter is a plea for a considered examination of Establishment's foundations and consequences, and how those relate to, or conflict with, the jurisprudence and assumptions of the modern human rights framework. It is undeniable that the time is now more than ripe for a fundamental reassessment and remodelling of the relationship between the church and state. The growing influence of European attitudes and rationalism require this. The current tendency to continue the long-established English constitutional tradition of 'muddling through' and 'making do' must end. If reform must be entered into then it should be engaged with in a logical and self-aware manner, and not, as seems currently to be the case, as an exercise in ad hoc and piecemeal adjustments masquerading as a coherent reform agenda.

Assuming that such a reform process is to be engaged with then there are several major questions which must be addressed. The first of these is whether or not there is a necessary conflict between public provision for religious services and individual freedom of religion. Such arrangements do not impinge upon the freedom of individuals to believe and worship as they choose. However, they are still problematic since one assumes that religion is fundamentally the concern of the individual, and the other rests on an assumption that religion should have a place in the

public sphere. Moreover, the creation of positive legal rights in respect of the services of the Church of England may discriminate between the Church of England and other religious bodies contrary to Article 14 of the European Convention and may in some circumstances be said to limit the church's right to freedom of religion.

Another major question concerns whether we believe that there is a continuing justification and rationale for the public provision of the services of religion as provided for by Establishment. The attitudes of the majority of the House of Lords in *Aston Cantlow* would seem to indicate a withdrawal of support from such provision. If this is the case then both the legal rights of the parishioners in respect of their parish churches, and chancel repair obligations, are an outdated irrelevance that should be abolished.

If the legal rights of parishioners in respect of parish churches are an irrelevance, and if public religious provision is seen to be out-dated, then due attention must be given to the role of the Church of England in the 'grand' aspects of the constitution. If public provision of religious services is inappropriate or irrelevant then so too, logically, is the favoured role of the bishops in the legislature, in state ceremonies, and at other events. Similarly, the role of Parliament and the Crown in the government of the church becomes indefensible. As such, the foundations of the current constitutional arrangements unravel and disestablishment is the only logical conclusion. If, however, support remains for the public provision of religious services and the role of religion in the public sphere then constitutional arrangements should be made which are appropriate to the nature and diversity of the modern state and nation.

Whatever conclusion is reached in the question of the probable collision of the ideologies of Establishment and the human rights framework, it is painfully apparent that the current situation with regard to the chancel repair obligation is unsatisfactory. It is the essence of irrationality. The extent of the financial obligations owed by lay rectors bears no relationship to the value of their interest in land and liability can arise at any time. As a means of financing the provision of public services of religion it is anachronistic, ill fitted to the needs of modern society and wholly inadequate. This fact must be faced regardless of concerns about the absence of alternative means of funding.

It is probable that whatever the conclusion reached on the constitutional relationship between church, state and nation, it will be the Church of England itself which will have the decisive role in reformulating that relationship. For many within it the national mission and identity served by the parochial and territorial systems remains an essential feature of the

church. For others, however, doctrinal purity, self-determination and freedom of personal belief have become the dominating feature in any debate about what the church should do, and what it should be. Reconciling these elements is a far from easy task and such reconciliation is unlikely to happen in the near future. Further, just as the international human rights context has complicated domestic constitutional debates about the treatment of religion, so, too, the international context of the Church of England within the wider international Anglican Communion must complicate its efforts to reformulate its identity and its relationship with the state.

9

Days of rest in multicultural societies: private, public, separate?

RUTH GAVISON* AND NAHSHON PEREZ#

Introduction

Days of rest have not been given a central place in discussions of modern societies. However, regulation of days of rest provides a fascinating illustration of a variety of central issues in such societies. In Western societies, the issue of days of rest has usually been seen as concerned with the relationship between state and religion. Religions make demands about the way the day of rest, which is also a day of special worship, should be observed. So long as communities were religious and homogeneous, religious days of rest were generally observed. Usually, the right of members of other religions to their own observances was respected to some extent, at least in the private sphere. As societies became more secularized and plural, such arrangements began to be challenged both by secular members of the majority culture, who resented what they saw as religious coercion,[1] and by members of minority cultures and religions, who saw an opportunity to reduce the burdens they had carried under the traditional arrangement. Both challenges invoked human rights discourse, demanding that arrangements respect individual as well as collective rights to freedom of religion and freedom from religion, and rights to culture. The subject is also discussed as an issue of minority

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[1] This was accompanied by a process of individualization in Western societies. In this context, Michael Walzer has suggested a distinction between the collective *holiday* and the individualistic *vacation*. See M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp: 184–96.

rights, and as an aspect of the ideal of multiculturalism. In some countries, the issue has legal or even constitutional significance.

Despite all these challenges, in most countries there is a shared, official day of rest, which is the day of rest and worship observed by the culture and religion of the majority. The character of days of rest may change, depending on many factors, including the religion and the culture and their conception of the day of rest, the extent of religiosity of the society in question, the strength of commercial forces, the strength of unions and their position on a shared day of rest, as well the level of pluralism and the impact of globalization. In many societies, differences of view about a shared day of rest cut across major significant groups. This fact adds complexity to the social practices and the social and legal challenges they present.

Clearly, a shared day of rest based on majority culture is very convenient for observant members of that culture. Other groups (secular members of the dominant group or members of minority religions and cultures) may regard it differently. This article highlights the challenges that this arrangement poses in multicultural societies. The focus will be on the tension created when the majority culture and cultural minorities do not share the same traditions regarding the day of rest. We shall see that such situations give rise to conflicting moral intuitions: liberal-multicultural theories usually support accommodating minority cultural requests; however, doing so might create barriers to integration by institutionalizing sub-cultures.

The article has two main purposes. The first, which is more descriptive in nature, is to identify the problem of days of rest in multicultural societies. The second purpose, which is more prescriptive, is to suggest some guidelines for reasonable solutions. These guidelines are not supposed to be definitive; rather they aim to exclude some extreme possibilities, while acknowledging the numerous legitimate solutions to the issue of days of rest. In short, our argument will focus on the following issue: is a decision by the state to decide upon an official day of rest that reflects the majority's culture a justified decision? Such a decision may burden individual members of minority cultures in various ways. First, members of minority groups may not be allowed to rest on their chosen day; second, they may wish to work on the majority day of rest; and lastly, the wish of members of minorities to have their own day of rest may impose economic burdens on them. Another important issue may arise in cases in which the collective dimension of the day of rest requires territorial concentration of a particular community, creating potential

barriers to integration. The two legitimate liberal goals of accommodation of minority cultures and their full integration are in tension one with the other.

We shall argue that the majority may indeed choose a day of rest that reflects its culture,[2] but also that such a choice will be more legitimate if the interests of members of minority groups are accommodated to prevent members of minorities being deprived de facto of the ability to maintain their cultural interests[3] because the cost of continued affiliation to a minority culture becomes too high.[4] We shall argue that the collective dimensions of minority cultures should also be accommodated by the state because of their importance for individual well-being.[5] However, the separatist force of such cultural dimensions may be significant, and may indeed raise issues of incommensurability.[6] The goals of full accommodation and maximum integration may not sit well together. Instead of trying to propose one-sided solutions, we shall sustain that tension throughout our discussion of various possible solutions to the issue of days of rest.

In order to demonstrate the difficulties and complications of the issue of days of rest, our discussion will first consider the content and significance of days of rest (which is as important as the choice of the day of rest) in three religions – Judaism, Islam and Christianity – mainly, but not solely, in modern Israel. Our aim is to supplement our argument with sufficient empirical "flesh" rather than to provide a thorough theological or sociological analysis. Next, we will describe the current situation in Israel, and in some Christian and Muslim counties. Third, we shall offer a

[2] This raises another question: what is the justification for the majority's prerogative? The answer has to rely upon an argument that stresses the importance of culture to individual well-being and also explains why protecting minority members is important as well. This issue cannot be elaborated here. For some possible arguments see W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), N. Perez, "The Liberty to Culture, A Substantial Liberty Approach", paper delivered at the ALSP conference, June 2006, Dublin.

[3] See the opposite view of P. Jones, "Bearing the Consequence of Belief" in R. Goodin and P. Pettit (eds.), *Contemporary Political Philosophy* (Oxford: Blackwell, 2006), pp: 607–20.

[4] See Perez, "The Liberty to Culture", see also, J. Heath, "Culture: Choice or Circumstances" (1998) 5:2 *Constellations* 183–200.

[5] That is, for the purposes of this article, the collective aspects will be justified solely on the basis of their contribution to the individual well-being.

[6] Incommensurability has played an important part in contemporary political theory since Berlin. See in this regard J. Kekes, *The Morality of Pluralism* (Princeton University Press, 1993), pp: 53–75, W. Galston, "Value Pluralism and Liberal Political Theory" (1999) 93:4 *American Political Science Review* 769–78.

normative, or prescriptive framework for dealing with the many issues raised by days of rest.

Weekly cycles and their significance in Judaism, Christianity and Islam

General

Today, a weekly cycle is almost universal. Yet, unlike days and months, which are related to natural cycles, the week is a human artefact. Furthermore, there is a tension between the number of days in the year – 365 – and the length of months. Nonetheless, efforts to change the calendar in a way that would keep dates and months stable over the years, or would "liberate" the calendar from religious influence, have failed.[7] Today, a weekly cycle has been adopted as a universal norm in the guidelines of the conventions of the International Labour Organization. Under these conventions, individuals are entitled to a day of rest every week, which should be at least of twenty-four hours, added to the daily mandatory rest of at least eleven hours.[8]

In many countries, the weekend consists also of a secondary day of rest (in Western Christian countries, Saturday is secondary to Sunday, while in Israel there is a growing pattern of treating Friday as a secondary day of rest). The two days receive different legal treatment, and while many social activities (such as education and government) are suspended on the secondary as well as on the primary, religious day of rest, the primary day of rest is the one on which work and commercial activity are prohibited or at least diminish.

[7] One notable effort was that made by the revolutionary forces in France. They introduced a special republican calendar, which had twelve months of thirty days and an extra month to take care of the rest of the days of the year. Each month was divided into three ten-day periods. The last day of each month was declared a general day of rest. The calendar lasted from 1793 to 1805 and was cancelled by Napoleon. Communist USSR tried to move to a five-day week in 1927 and a six-day week in 1930, but it reverted to the seven-day week in 1940. Further attempts to change the weekly cycle through the UN failed because of pressure from Christian and Jewish groups whose religious cycle of worship and work/rest would have been disrupted by the change.

[8] See Conventions c106 (1957) and c30 (1930) at the ILO web site (www.ilo.org/ilolex/english/convdisp1.htm), see also: R. Gavison, "Days of Worship and Days of Rest: The Case of Israel" in W. Brugger and M. Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (New York: Springer, 2007), pp: 379–414 .

Identifying religious traditions that have existed for many years and in many different communities is a daunting task. Many elements of such traditions are dynamic and evolve as the relevant communities and their spiritual leaders adapt to changing conditions. What follows should therefore be taken very cautiously. It is not supposed to be an authoritative exposition of the different traditions, but a suggestive account of elements central to them. Furthermore, while we will be talking about the three religions, internal to each are different traditions on many of these issues. Some variations are contingent and temporary, while others have been institutionalized in different streams or denominations of the same religion. Finally, all major religions have had to cope with pressures of secularization; and all religions have also had to deal with situations in which believers live in societies where theirs is a minority tradition and so may have to adapt their practice and doctrine. Nevertheless, similarities and differences among religions in the meaning and practices of days of rest are interesting and relevant to the way political and legal arrangements should be devised.

Judaism

Sabbath is one of the most central elements of the Jewish tradition. The commandment to keep it is among the ten most basic commandments in Judaism, and the sacred nature of the day is mentioned in the opening verses of the second chapter of the Old Testament:

> And by the seventh day God ended his work which he had done; and he rested on the seventh day from all his work that he had done. And God blessed the seventh day, and sanctified it; because in it he rested from all his work which God had created and performed.[9]

It is worth noting that the ten commandments appear twice in the *torah*, and the rationale given for the duty to keep the Sabbath is different in the two places. The first instance is Exodus 20, and the relevant commandment is presented thus:

> Remember the Sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work; but the seventh day is a Sabbath to the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor the stranger that is

[9] Genesis, Chapter 3, 2–3.

> within thy gates; for in six days the Lord made heaven and earth, the sea and all that is in them, and rested on the seventh day: therefore the Lord blessed the Sabbath day, and hallowed it.[10]

The second is in Deuteronomy 5:

> Keep the Sabbath day to sanctify it, as the Lord thy God has commanded thee. Six days thou shalt labour, and do all thy work; but the seventh day is the Sabbath of the Lord thy God; on it thou shalt not do any work, thou, nor thy son, nor thy daughter, nor thy manservant, nor thy maidservant, nor thy ox, nor thy ass, nor any of your cattle, nor thy stranger that is within thy gates; that thy manservant and maidservant may rest as well as thou. And remember that thou wast a servant in the land of Mizrayim, and that the Lord thy God brought thee out of there with a mighty hand and a stretched out arm; therefore the Lord thy God commanded thee to keep the Sabbath day.[11]

In both texts, the prohibition of work is general and applies equally to all within one's household. In both of them the source of the prohibition is God's commandment and the day is sacred. But whereas in Exodus the rationale for the prohibition is the process of divine creation itself, in Deuteronomy the rationale is the memory of slavery in Egypt and the need to give everyone, slaves included, a day of rest.

In many traditions, to the original religious and sacred nature of the day of rest is added a social meaning in response to a need to adjust to societies many of whose members do not observe religious commandments. In Judaism, this duality is present in a very clear form from the very beginning of the tradition.

The exact nature of the prohibition of all work is not clear, and the task of "translating" the general prohibition into detailed practices has been assumed by religious leaders. We know that one cannot light a fire or collect wood, and that one cannot cook, because there are explicit prohibitions on these activities in the texts. There is also a prohibition on driving and on carrying things across the settlement line. In general, working for money is prohibited, but the prohibition seems not to cover physical effort, and one can move things in the house. Nonetheless it is not usual that such activities are undertaken on the Sabbath because they do not suit its festive and restful atmosphere. The limitations apply for

[10] Exodus, 20, 8–11. [11] Deut. 5, 12–15.

the whole day, starting Friday night. The purpose is to make Sabbath very different from the other six days of the week.[12]

The need to couch these practices in obligations is based on a deep understanding of human nature: it is hard for people to break away from their routine and their work. They can only experience the different character of the day if breaking these routines is a matter of strict religious duty. In other words, the prohibitions are in part paternalistic, based on the insight that in their absence, the distinctiveness of the Sabbath is likely to erode very quickly.[13]

It would be a mistake to see the Jewish Sabbath as characterized solely by the prohibition of all work and travel. The practice is to devote at least some part of the Sabbath to worship and study, but there is also an obligation to enjoy it! Thus there are three obligatory meals on the Sabbath, and there are texts suggesting that it should be an enjoyable day.

From the very beginning, as we saw, the Sabbath had a social meaning. The social aspects are both external – manifested in relations between Jews and non-Jews (or now, between observant and non-observant Jews), and internal – concerned with the building of community. Sabbath observance also gives social life a tempo that includes both work and relaxation, parts of life dealing with matter and with the spirit. Sabbath is also a useful mechanism to keep observant Jews apart and distinct from others. The limitations imposed on observant Jews during the Sabbath mean that they will tend to live close to Jewish centres, communities and synagogues, and that at least during the Sabbath their social life will mainly be with Jews. Thus the Sabbath, and the Jewish calendar in general, provide one of the main mechanisms to maintain the cultural distinctness of Jews. Needless to say, this makes it harder for Jews to assimilate and contributes to their being seen as different, with all the complex implications of this situation.[14]

Within the Jewish community itself, Sabbath has a variety of functions. First it imposes a mandatory, general day of rest applicable to all

[12] For a general discussion see A. J. Heschel, *The Sabbath – Its Meaning for Modern Man* (New York, 1951). Naturally, there are many discussions of the reasons for the prohibitions and their theological justification. While the biblical prohibition is very general, later traditions clarified the prohibitions and created a detailed set of practices. One basic rationale of these prohibitions is the wish not to create anything new. Hence the fact that some physical effort is permitted, but activities which involve less exertion but create something new (like cooking or writing) are not.

[13] E. Sveid, *The Book of Time* (sefer mahzor hazmanim) (1986), pp: 39–40 (in Hebrew).

[14] Sveid, *The Book of Time*, p. 11.

within the community. Second, it means that the synagogue is not only a place for prayer and worship but also the place where members of the community meet regularly, participate in special events (such as bar mitzvah or groom-Sabbath), pray for the sick, pray for the dead, and learn about community events. Finally, today, as a result of secularization, observance of the Sabbath is one of the main measures of the religious status of individuals and businesses. Only a person who observes the Sabbath in its entirety can be counted among the orthodox. Reform Jews do not see themselves as bound by the orthodox interpretation of religious duties. They do observe some form of religious worship and rituals, but do not see themselves as bound by Sabbath limitations such as not travelling or writing. Conservative Jews and Reconstructionist Jews stand somewhere in the middle.

About 75 per cent of Jews in Israel are non-observant. They may light candles or have a Sabbath dinner, but they do not worship and rest. Traditional Jews usually go to synagogue for prayers and have at least some of the Sabbath meals, but they do not comply with the orthodox prohibitions against driving and writing on Sabbath.

The public character of the Sabbath in Israel is a serious source of political struggle among Jews. While all agree that Sabbath will be the official day of rest, there are many who resent the prohibitions of commerce and trade. Some of the resentment comes from people who feel this is "religious coercion" while some comes from those who feel that this unduly restricts commercial opportunities. We shall elaborate more on this situation in the section on Israel – the Jewish State, below.

Christianity

Early Christians were Jews, and they observed the Sabbath as did all Jews.[15] In addition, from very early on, they had a Sunday celebration of the Eucharist to signify the resurrection of Jesus. It is not clear when Sabbath observance ceased and Sunday became the official day of worship for the church. It is also not clear why Sunday was chosen as the relevant day. Some say it is related to the pagan Sun-day, while others speculate that there was a wish to move from using the seventh day to using the eighth,[16] possibly because this is the day on which light was

[15] See *Hebrew Encyc.*, Sabbath, vol. 31, p: 429 (Zvi Verblowski) (in Hebrew).

[16] Sunday is of course also the first day of the week, but some describe it in this context as the eighth day.

created. It seems that initially Sabbath and Sunday were both seen as special days, and that Sunday's ceremonies were added onto Sabbath observance.

It is interesting to note that in the second and third centuries AD Sunday was seen as a day of worship and prayer, but the prohibition of work was not a part of the day. In fact, this element was seen as Judaic and was resisted as an undesirable "return" to Judaism. Nonetheless, with time general laws, prohibiting work or declaring a break in the weekly routine on Sundays, were adopted.[17] The issue of the relationship between the Jewish Sabbath and the Christian Sunday was officially discussed in the Third Council of Orleans, in AD 538, where it was said that the kinds of work prohibited on the Jewish Sabbath are permitted on Sundays, but that there is a general prohibition of work to allow Christians to join in the church ceremonies on Sundays.[18]

Practice developed in diverse ways in different denominations. Some Christian groups (such as the Adventists) reverted to fully fledged Sabbath observance on the seventh day. Others hold a conception of Sunday that is very similar to that of the Jewish Sabbath. Yet other groups see Sundays as mainly a day of worship and rest, but without the religious obligation to desist from work on Sundays.

The main religious obligation on Sundays is to attend a church service. But in most denominations, this takes only an hour or two. It is unclear whether there is a theological basis for any other limitation on this day, and there is a debate whether the element of rest is or should be a part of the religious meaning of Sunday.

Modern life conditions in the West have created a massive challenge for Christianity. While a sizable number do go to church on Sundays (about 40 per cent in the US, less in most Western countries[19]), many spend the rest of the day doing whatever they wish, including shopping. Others feel that church-going interferes with their effective use of the weekend. Some cannot go to church because they must work. Some theologians respond to the challenge by minimizing the content of religious obligations on the day of worship. Religious services may be

[17] For a general discussion see S. Bacchiocchi, *From Sabbath to Sunday* (Rome: Biblical Perspectives, 1977), pp: 251–6. http://english.sdaglobal.org/dnl/bacchi/books/sab2sun.pdf.

[18] W. E. Straw, *Origin of Sunday Observance* (Washington DC, Review and Herald Publishing Association, 1939), p: 33. (www.maranathamedia.com.au/Download/Books/Origin%20of%20Sunday%20Observance-WE%20Straw.pdf).

[19] See C. K. Hadaway *et al.* "What the Polls Don't Show: A Closer Look at US Church Attendance" (1993) 58 *American Sociological Review* 741–52.

offered on Friday or Saturday night to permit those who cannot attend on Sundays to meet their religious worship obligations. Others seek to continue to see Sunday as both a day of worship and a day of rest, and insist that religious education should seek to explain to people the benefits of strict observation of the Day of God. They see Sunday as similar in conception to the Jewish Sabbath and based on the same biblical commandment. Yet others argue that there is no biblical basis for that; that Christians chose Sunday only later and in order to differentiate themselves from Jews because of external threats; and that the time has come for Christians to return to the biblical sense of God's day.[20]

Islam

Islam does not have a clear distinction between weekdays and the weekend. One may say that the week starts with Saturday and reaches its peak with the midday prayer on Friday, but Islam does not have the same weekly cycle found in Judaism and Christianity.

Prayer is one of the five "pillars" of Islam, and people have a duty to pray five times a day. Friday is special because it is the day of meeting or coming together, and it is mandatory for men to pray the midday Friday prayer in public and in a group. This prayer is special because it starts with two additional parts, and it ends with a mandatory speech (kh'utba) by the imam. The kh'utba has both religious and public importance. It deals with matters of faith and religion but also with current affairs.

The Friday midday prayer takes place in special mosques called 'mosques of the gathering'. In general, the mosque in Islam serves many functions and is much more than a place of prayer and worship. Islam does not make Friday a day of rest. In fact, immediately after the verse demanding that people pray the midday prayer on Friday in the mosque they are told to return to their daily regular pursuits. At least two explanations were given for this difference between the Moslem and Jewish attitude. The first was that Moslem society was commercial rather than agricultural, so that work was less time-consuming and physically demanding. Friday in fact created great opportunities for commerce

[20] For a detailed account and an argument for returning to the biblical basis of the Sabbath, see the analysis by Bacchiocchi, *From Sabbath to Sunday*.

precisely because many people were gathered for prayer.[21] The second explanation is more theological in nature: Islam has a strong opposition to any personification of God. Consequently Islamic theologians object to a prohibition of work on the day of meeting because this to them seems to involve such personification.[22]

The practice of days of rest

In homogenous religious societies where the norm is religious observance, political and cultural practice will naturally reflect religious demands (and social goals[23]). However, the previous discussion suggests that even amongst such societies there might be variations in the nature of the day depicted as special by religion. In heterogeneous societies, as most modern states are, the diversity of approaches amongst religions and groups within religions (and, of course secular individuals), both in choice of the day of rest and in its features, may raise complex issues.

Israel – the Jewish State

Israel is the only country in the world where the public culture of most communities is Jewish. The public character of the Sabbath and the Jewish calendar are among the most obvious signs of this culture. As we saw, the most structured and differentiated day of rest among the three religions is the Jewish Sabbath, because it involves special and prolonged prayers as well as very detailed regulation of the whole twenty-five hours of the day,[24] including serious limitations on people's regular pursuits. In observant Jewish neighbourhoods there is no traffic, no radio or television, and no work. People do not write, cannot play musical instruments or talk on the telephone. Technology means that people may use electricity by setting timers to turn it on and off without human intervention.

[21] H. Lazarus-Yaffe, *Islam* (Tel Aviv, 1980), p: 32 (in Hebrew); E. Ashtor, *A Social and Economic History of the Near East in the Middle Ages* (Chicago University Press, 1974); P. Risso, *Merhcants and Faith: Muslims, Commerce and Culture in the Indian Ocean* (Boulder, CO: Westview Press, 1995).

[22] H. Lazarus-Yaffe, *More Talks on Islam* (Tel Aviv, 1985), p: 63 (in Hebrew).

[23] See M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp: 184–96.

[24] Since the Jewish *Shabbat* begins before sundown, and ends after sundown, the *Shabbat* day is more than twenty-four hours.

However, many Jewish communities are comprised of Jews who do not observe at all. In Israel, since the public culture is Jewish, and the Jewish calendar applies, people feel they can maintain their Jewishness without active membership of any religious community.[25]

From very early on after the state was founded in 1948, Israel declared the Sabbath its official day of rest (although non-Jews were allowed to observe their own day of rest if they chose). This was a part of an agreement between the non-religious majority and the orthodox minority according to which the state would guarantee the public cultural distinctness of the Sabbath. The religious basis of the agreement was revealed in the fact that the Sabbath day was defined as starting from the night before. But the laws did not touch on the behaviour of individuals. Rather, they provided for closure of all public and governmental institutions and imposed a general prohibition on working and employing others.

In 1951 a labour law was enacted that prohibited Jews from working on the Sabbath. Municipalities and local authorities regulate hours of opening and closing of businesses on the Sabbath.[26] Jewish schools, governmental institutions, public transportation and health care providers all observe the Sabbath as their rest day. This means either a complete cessation or significant reduction in the level of social activity. Laws prohibiting work on Sabbath clearly help religious Jews by lowering the costs of Sabbath observance. If the laws were enforced, Jews in Israel would be under less economic pressure to work on the Sabbath because most businesses would not operate.[27] Such laws also have a significant effect on the public culture in Jewish communities and in Israel as a whole.

The creation of the Jewish state witnessed an attempt to revise Sabbath rulings. Religious agricultural communities, for example, insisted that religious law must allow for the work needed to take care of animals. Similarly, new rulings were made to allow work required for basic services such as security and health care. After the 1992 "constitutional revolution",[28] the 1951 law prohibiting work on the Sabbath was challenged as

[25] For an elaboration of this, see Gavison, "The Significance of Israel in Modern Jewish Identities" in B. Rephael *et al.* (eds.), *Contemporary Jewries: Convergence and Divergence* (Leiden: Brill, 2003), pp: 118–29.

[26] Gavison, "Day of Worship and Days of Rest".

[27] The issue is more complex because non-Jewish businesses are open; and in some fields of economic activity, the relevant markets are outside Israel, an issue made more relevant by globalization.

[28] D. Dorner, "Does Israel Have a Constitution?" (1999) 43 *St Louis Law Journal* 1325; Y. M. Edrey, "The Israeli Constitutional Revolution/Evolution, Models of Constitutions,

unconstitutional; but the court upheld the law on the ground that it served a legitimate purpose and did not infringe the right to freedom of work more than was required.[29] However, the court did not address the fact that the laws prohibiting work are not enforced in Israel and there is a great deal of commercial activity on the Sabbath. This weakens the economic and cultural benefits afforded to orthodox Jews by the laws prohibiting work on the Sabbath. In one case that came before the labour court, the court ruled that a production plant working on shifts throughout the week is not allowed to reject a job applicant solely because he observes the Sabbath and cannot work shifts on that day.[30]

Non-Jews and non-Jewish communities are expressly exempted from the operation of Sabbath laws. In Arab communities government offices usually close on Fridays. In some Moslem communities there is a five-day week, with Thursday and Friday as the days of rest. Schools vary in their closing days. Some Christian schools close on Saturday and Sunday, some Moslem schools close on Friday and Saturday, and some mixed schools close on Friday and Sunday, or only on one of them. Commerce rarely stops completely in the Arab sector, and Jews in particular go there to shop on Saturdays.

Non-Jews can choose their day of rest, and may prefer their "cultural" day. Yet many of them work within the Jewish sector, so they take Saturday as their day of rest as well.[31]

An important development is the gradual transition of the Israeli market toward a five-day week, with Friday and Saturday as days of rest. Today, governmental agencies, as well as many private workplaces, work five days a week. This development may help to accommodate Muslim Israelis, who can enjoy their traditional day of worship on the

and a Lesson from Mistakes and Achievements" (2005) 53 *American Journal of Comparative Law* 77.

[29] HCJ 5026/04 *Design 22* v. *Rozenzweig*. For a detailed analysis of the Design 22 decision, see Gavison, "Day of Worship and Days of Rest".

[30] Municipal Appeal (Beer Shebba) *1779/99 Oved* v. *Lam Research Ltd* (in Hebrew). In similar cases in England the courts upheld the dismissal of employees, stating that freedom of religion was not infringed, since the employee was "free to resign". See St. Levinson, "The Hallow Day" (2005) 155 *New Law Journal* 1320.

[31] Most schools are segregated by language. Hebrew-speaking Jewish schools close on Saturdays and Arabic-speaking schools differ as mentioned above. Non-Jews who go to Jewish schools follow the Jewish calendar. In the small number of Jewish-Arab schools in Israel, schools usually have a two-day weekend (Friday and Saturday), with each of the groups taking their own holidays. For the complex dynamics of these schools, see R. Gavison, "The Neve Shalom School", working paper # 379, Center for Rationality, H.U.; it may be seen at http://ideas.repec.org/p/huj/dispap/dp379.html.

secondary public day of rest; but it does not solve the problem of the Christian religious minority.

In short, non-Jews may enjoy their own cultural rhythm in their own communities. Non-Jews may be inconvenienced by the fact that they are dependent for many services, such as hospitals and government offices, on the Jewish community and its cycles. The activity level of these services is lower on the Sabbath than on other days. This may be understandable for Jews but a burden for non-Jews. To some extent this inconvenience is inevitable, and in other contexts special arrangements may be made to minimize the practical difficulties. The issue has never got to the courts and is not mentioned in political discussions about the rights of the Arab minority in Israel.

It may be that the Jewishness of Israel also creates problems for Jews not encountered by Jews living as minorities elsewhere. Where the Sabbath is not an official day of rest Jews can enjoy it as a day of commercial and recreational activity. This is the case for secular Jews, but even observant Jews can enjoy existing services such as public transportation that is not operated by Jews and does not require use of money. In Israel, since legislation sometimes follows traditional Jewish norms, allowing activities that are a desecration of the Sabbath according to religious law may be problematic. Because religious (and legal) regulation of the Sabbath is so comprehensive and regulates such a long period of time, it may seem unreasonable even to many who concede that it may be legitimate for Israel to designate Saturday as the official day of rest.[32]

Christian countries

At various times, starting in AD 321, there have been laws prohibiting commerce on Sunday in all Christian countries. In the US we find such Sunday laws in the early seventeenth century. By the end of the eighteenth century, all thirteen colonies had Sunday laws, and by the end of the nineteenth century, forty-six of the states had them.[33] The trend

[32] From a religious perspective, there is no difference between public transportation, which is usually prohibited, and "private" driving, which is permitted. In Design 22 the decision dealt with a commercial institution seeking to operate on Sabbath. One judge suggested that while the prohibition of commerce is legitimate, it would not be legitimate to prohibit all forms of entertainment. For details on the history of Sabbath regulation in Israel, see Gavison, "Days of Worship and Rest".

[33] M. Goos, "Sinking the Blues: The Impact of Shop Closing Hours on Labour and Product Markets" (London: Centre for Economic Performance, October 2004), p: 6. http://center.uvt.nl/macro/papergoos_jmp.pdf; A. J. King, "Sunday Laws in the 19th Century" (2000) 64 *Albany Law Review* 675.

reverses in the twentieth century. In 1961, thirty-five states had Sunday laws, and by 1985 the number had come down to twenty-three. It is important to note that these developments took place despite the fact that in 1961 the US Supreme Court upheld Sunday laws as not involving discrimination or violating freedom of religion.[34] In Canada, on the other hand, the change started in 1985 when the Supreme Court declared that a 1907 Sunday law (Lord's Day Act) prohibiting all labour, commerce and fee-based recreation on Sundays was unconstitutional and violated the right to freedom of religion in the 1982 Charter.[35]

In some cases in the US Sunday laws were strictly enforced and people who opened their businesses on Sundays were fined and at times even imprisoned. This presented those who kept Saturday as their day of rest with a difficult dilemma and many decided to open their shops on Saturdays in order to survive.[36] Sunday laws have been challenged in the US both on grounds of freedom of (and from) religion and on the basis that they discriminate against those whose religion requires them to rest on another day (Saturday for Jews and Seventh-Day Christians) and who were forced by Sunday laws not to work on Sunday. Both issues were raised in cases decided by the US Supreme Court.

The most famous decision is *McGowan*, which concerned the constitutionality of Sunday laws in the context of the opening on Sunday of a large supermarket.[37] Justice Warren, writing for the majority, reviewed at length the history of Sunday laws and concluded that, despite their religious origins, their present rationale was the wish to allow workers a shared day of rest, and that this did not violate the Constitution. Justice Douglas, in dissent, thought the laws were based on religion and were therefore unconstitutional.

In *Braunfeld* v. *Brown*[38] it was claimed that Sunday laws actually forced Jews and Seventh-Day Christians not to observe their own religion's days of rest because they could not afford to close their businesses for two days a week. They thus sought exemption from the application of Sunday laws (as was granted by some of the states which had Sunday laws). Justice Warren rejected the argument by saying that although

[34] *McGowan* v. *Maryland*, 366 U.S 420 (1961).
[35] *R.* v. *Big M Drug Mart Ltd* [1985] 1 S.C.R. 295
[36] S. A. Kaplan, *Can Persecution Arise in America?*, (Washington, DC: Review and Herald Publishing Company, 1967), pp: 6–7. www.maranathamedia.com.au/Download/Books/CanPersecutionAriseInAmerica.pdf).
[37] *McGowan* v. *Maryland*, 366 U.S 420 (1961).
[38] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961).

Sunday laws raised the cost for Jews and Seventh-Day Christians of observing their Sabbath, this did not amount to imposing a legal duty on them to violate their religious commandments. The burden was economic, and it was justified by the important social functions of Sunday laws. Allowing people to open their businesses on Sundays would disturb the tranquillity of the day and would give some people the unfair competitive advantage of being open on a day when most other businesses had to be closed. Finally, the need to identify those who were exempted from Sunday laws would put too great a burden on law enforcement agencies. Justice Brennan led a three-Justice dissent, saying that Sunday laws in many states did contain such an exemption but that this had not led to the feared consequences, and that the absence of a permit system for opening on Sundays discriminated against those whose religion required them to rest on a day other than Sunday. Justice Douglas repeated his principled position that Sunday laws offended the prohibition against establishment of religion.

Title VII of the US Civil Rights Act 1964 made it unlawful to discriminate against employees because of their religion. An employer is required to accommodate the employee's religion, unless he "demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business".[39] It has been argued, nevertheless, that courts have interpreted the duty of accommodation in a very limited way.[40]

These decisions may be in some tension with the earlier *Sherbert* decision of 1963.[41] Sherbert, a member of the Seventh Day Adventist church, lost her job after she declined to work on Saturdays. She failed to find a new job for the same reason. Her application for unemployment benefits was denied on the ground that she had failed, without good cause, to accept suitable work that was offered to her. The decision was

[39] Section 701(j).

[40] For example, in *Hardison* v. *T.W.A*, 432 U.S. 63 (1977), the court upheld discharge of a worker who did not agree to work Saturday shifts, stating that the employer was under no duty to sustain costs (except *de minimis*) in order to accommodate the worker's religion. See P. Zablotsky, "After the Fall: The Employer's Duty to Accommodate Employee Religious Practices under Title VII after *Ansonia Board of Education* v. *Philbrook*" (1989) 50 *University of Pittsburg Law Review* 513. Attempts to amend Title VII in 2003 to impose a larger burden on employers were not successful.

[41] This issue has gained significant attention from scholars. See, for example, M. McConnell, "Free Exercise Revisionism and the Smith Decision" (1990) *University of Chicago Law Review* 1109.

affirmed by the lower courts but reversed by the Supreme Court, which found that denying the benefits imposed a burden on her free exercise of religion, and forced her to make a choice that Sunday worshippers did not have to make. The dissent considered this decision to be contrary to the ruling of *Braunfeld* v. *Brown*. The majority said that the case differed from *Braunfeld* because here there was no compelling state interest such as there was in *Braunfeld* (namely that of designating a uniform day of rest).[42]

In Europe, practices relating to Sunday laws are more varied. Until the 1990s, only Luxemburg, Belgium, Spain and Sweden had relaxed their Sunday laws. At that time England, Wales, Holland and Finland joined in, and there are signs that intended liberalization is planned in France and Italy.[43] Today, the strictest limitations on commerce on Sundays are in Germany, Holland and Denmark.[44] In 1996 the European Court of Justice annulled a provision in a directive (laying down minimum standards of health and safety for workers), which gave priority to Sunday as the day of rest, on the ground that "the council failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week."[45]

Strict Sunday laws clearly were originally religiously motivated. However, where they survive today, in full or limited form, their rationale is social and cultural. In Germany, for example, the strictness of Sunday laws is attributable to labour unions who insist that workers should be able to rest on a day shared by the community as a whole. It is

[42] *Sherbert* v. *Verner et al., Members of South Carolina Employment Security Commission et al.*, 374 U.S 398 (1963). It might be worth noting that as a result of later decisions (especially since *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and the failure of the US Religious Freedom Restoration Act of 1993, current US law does not seem to support religious exemptions. But a full discussion is beyond the scope of the current article. See M. Nussbaum, *Woman and Human Development* (Cambridge University Press, 2000), chapter 3.

[43] M. Skuterud, "The Impact of Sunday Shopping Deregulation on Employment and Hours of Work in the Retail Industry: Evidence from Canada", McMaster University, August 2000. www.ciln.mcmaster.ca/papers/cilnwp45.pdf.

[44] S. Kajalo, "Sunday Trading, Consumer Culture, and Shopping – Will Europe Sacrifice Sunday to Recreational Shopping?" prepared for the "sosiologipaivat 1997" – conference. Arranged by the Westermarck Society, Helsinki, 1997. http://scholar.google.com/scholar?hl=en&lr=&q=cache:x0sQNDx0hBMJ:hkkk.fi/talsos/con97fin.pdf+sunday+law+europe.

[45] Case C-84/94 *UK* v. *Council of the European Union* [1996] E.C.R.I-05755. See http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61994J0084:EN:HTML.

relevant to our concerns to note that challenges to Sunday laws often arise from economic pressures for a seven-day working market, and that the threat posed by Sunday laws to individual liberty and interests does not stem solely from the "religious" aspect of the day of rest. Be this as it may, once Sunday laws were relaxed, members of religious minorities in Christian countries no longer needed to face the dilemma of being under a duty to avoid work on Sundays as well as on their own religious day of rest. The issues are still relevant to those countries where Sunday laws are strictly enforced. Moreover, the problem is real where one's religion requires one not to work on a day that is considered a regular day of work in the community.

Jews have struggled with being in a minority in Christian countries for hundreds of years. There were periods in which no Jewish worship was allowed. At other times, Jews who refused to work on the Sabbath faced a serious threat of losing their jobs with non-Jewish employers. To this day Jews (and Seventh-Day Christians) may incur the economic disadvantage of not being allowed by their religion to work on a workday, and of some kinds of employment not being available on Sundays. The hardship is aggravated by the fact that the Jewish Sabbath begins at sunset on Friday, meaning that there are times of the year when Jews and Seventh-Day Christians cannot complete a full day's work on Friday either. Such was the case in *Konttinen* v. *Finland*,[46] in which a Finnish national railway worker became a Seventh Day Adventist after working some years at the railway. He was dismissed from work not because he had to refrain from work on Saturdays, but because he had to stop working at sunset on Fridays, and there were some Fridays in winter on which he had to leave work before his shift was over. The European Commission of Human Rights rejected the claim that he had been wrongly dismissed and that his freedom of religion had been violated on the basis that he had been dismissed because he refused to observe his working hours. The fact that this refusal was religiously based did not mean that it was protected by freedom of religion

Many Christian countries have large and growing Muslim communities living within them. As we have seen, Islam does not impose severe and prolonged religious restrictions on people's freedom on Fridays. Nonetheless, Muslims may resent the fact that they are "forced" to stop working on a day designated by a culture different than theirs, and that

[46] App. No. 24949/94 European Commission of Human Rights (1996), available at: http://hudoc.echr.coe.int.

they are not allowed free time to observe their own customs. Cases involving Muslims have begun to reach municipal and European courts. In *Ahmad* v. *UK*,[47] the European Commission of Human Rights rejected a claim by a Muslim schoolteacher in England who had been denied a schedule change in order to attend Friday prayers. The Commission ruled that denial of his request did not infringe his freedom of religion because he was aware of the working hours when he took the job, and because he was offered a part-time post.[48]

Muslim countries

Traditionally, Muslim countries did not designate a weekly day of rest and worship. Often there would be a break from work in prayer time, especially for the Friday midday prayer; but commerce and trading continued throughout the week. In 1829 the Ottoman Empire instituted a weekly day on which government offices were closed, and chose Thursday, which was a neutral day in terms of religious traditions.

As a result of imperial activity, Western days of rest were introduced into Muslim countries and remained in place when the foreign rulers left. In time, some of the newly independent countries, in a return to tradition, switched to either Friday or a Thursday-Friday weekend, while adopting the Western conception of the weekend (mainly for social reasons). In most Muslim countries, government agencies are closed all day Friday, while private businesses close Friday morning and may open after the midday prayer. But there are exceptions. Some Muslim countries still keep Sundays as their day of rest, to facilitate commerce with the West.[49] In other places, however, attempts to do this met with great opposition, based on a wish to maintain an authentically Muslim public culture that is not "parasitic" on Western culture.[50]

The Kur'an instructs Muslims to treat the "nations of the book" (Christians and Jews) with respect, and to enable them to practise their

[47] App. No. 8160/78 (1981) 4 *European Commission of Human Rights Reports* 126.

[48] Similar cases were similarly decided in Germany and Austrian courts more recently. For a discussion, see M. Hill, "On the Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the UK" (2005) 19 *Emory International Law Review* 1129, 1161–2; L. S. Lehnot, "Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under The European Convention", 2002 *Brigham Young University Law Review* 563, 593–4.

[49] This is the case in Turkey and in Morocco. In Lebanon, government offices close at 11:00 am on Fridays, and are closed all of Sunday.

[50] This is what happened in Algeria.

religion without interference. Other non-Muslim groups, whilst not receiving the same respect as the monotheistic religions, were also granted protection from persecution and forced conversion.[51] In this aspect, Islam was constituted as a relatively tolerant religion, at least in theory.[52] This is why, although not always enjoying full civil and social equality, Jewish and Christian minorities have always been relatively well treated in Muslim societies. In numerous Islamic states, Jews and Christians enjoy freedom of religion, including the right to establish community institutions.[53] The lot of other religious minorities, such as the Bahais, is much less fortunate because often they are not recognized as religious groups whose practices need to be recognized and respected.

The relatively relaxed cultural and religious significance of Friday in Islam means that Islamic countries' choice of Friday as their official day of rest and the day on which government offices and schools are closed is not supplemented by laws prohibiting commerce on Friday or any other day. In fact, as we saw, Friday may be a big day for commerce.[54] Thus observant Jews and Christians are not under an obligation to observe the state official day of rest in addition to their religious day of rest.

The de facto multicultural state: what should be done about days of rest?

We have now set the stage for the normative discussion. Most modern countries contain a variety of religious and cultural communities. How should the state regulate the religious and cultural lives of these

[51] A. Saeed and H. Saeed, *Freedom of Religion, Apostasy and Islam* (Aldershot: Ashgate, 2004), pp: 21–2; K. DalaCoura, *Islam Liberalism and Human Rights* (London: Tauris, 1998), p: 46.

[52] Abdul Aziz Said Meena Sharify-Funk, *Cultural Diversity and Islam* (Landau, MD: University Press of America 2003), 24, 78. J. Landau, *Jews in Egypt in the 19th Century* (Jerusalem, 1967) 19–20 (Hebrew) quotes a document saying that during Jewish high holidays many of the government offices were closed, indicating the high level of integration of Jews in the economy. However, the situation in some Muslim countries is far from satisfactory. See, for example, the US State Department report on religious freedom in Saudi Arabia: www.state.gov/g/drl/rls/irf/2002/14012.htm.

[53] Such is the case in Malaysia, in which the freedom to profess and practice other religions peacefully is a part of the constitution. Sharify-Funk, *Cultural Diversity and Islam*, pp: 123–6, and in Jordan, where non-Muslims enjoy a constitutional right of autonomy in the areas of religion, community and schools. R. Patai, *The Kingdom of Jordan* (Princeton University Press, 1958) p: 223.

[54] We were told by the staff of the Egyptian embassy in Tel Aviv that this is the situation in Egypt.

communities? Some writers argue for a "state of all its cultural communities", allowing people to belong to the nation but also feel that they belong to their own community.[55] This kind of multiculturalism is a response to the original liberal reaction to pluralism, namely to privatize all the non-civic affiliations of citizens, creating a "state of all its citizens", who all belong to the one, shared, civic nation, which is the only entity enjoying public recognition.[56] However, liberal states are often accused of not giving adequate recognition to communities. Minorities similarly often complain that majorities oppress the minorities living within the state, or at least that they impose on them pressures to assimilate and thus do not recognize their full rights to culture.[57]

Privatizing all non-civic affiliations has some advantages. It aims to treat citizens equally in a double sense – they are all equal as citizens, and they are also equal in the sense that no non-civic affiliation is granted recognition by the state.[58] Thus no non-civic affiliation is privileged over others. However, this formal equality does not translate into social reality. A liberal society may recognize rights to cultural expression as a part of the right to freedom of association.[59] The right to freedom of religion is often both an individual and a communal right because it includes permission to conduct worship and religious teaching in a community. All this is quite consistent with the state's own neutrality and the privatization of all non-civic affiliations.

However, neutral liberalism of this sort does not in fact treat all non-civic affiliations in the same way.[60] The inability of political theory, and of liberal states, to remain neutral with regard either to conceptions

[55] B. Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*. (New York: Palgrave, 2000). However, the status of minorities within minorities needs then to be addressed, see N. Perez, "Should Multiculturalists Oppress the Oppressed?" (2002) 5 (3) *Critical Review of International Social and Political Philosophy* 51–79.

[56] M. I. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99(2) *Ethics* 250–74.

[57] W. Kymlicka, "Do We Need a Liberal Theory of Minority Rights? A Response to Carens, Young, Parekh and Forst" (1997) 4(1) *Constellations* 72–87.

[58] For suggestions that more or less follow this vein of thought, see J. Waldron, "Cultural Identity and Civic Responsibility" in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press, 2000), pp: 155–74. B. Barry, *Culture and Equality* (Oxford: Polity, 2001).

[59] This is Kukathas' argument: C. Kukathas, "Are there any Cultural Rights?" in W. Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford University Press, 1995), pp: 228–56.

[60] B. Yack, "The Myth of the Civic Nation" in R. Beiner (ed.), *Theorizing Nationalism* (New York: SUNY Press, 1999), pp: 103–19.

of the good or to culture has been pointed out over and over again.[61] Indeed, as our description of rest days shows, the choice and meaning of the day of rest, far from being neutral, are grounded in thick cultural traditions. In this context it is perhaps preferable to use the term "even-handedness", rather than neutrality. Neutrality suggests the possibility of a hands-off policy to culture, which is impossible. By contrast, even-handedness treats equally all existing cultural demands (that do not violate individual human rights).[62]

It seems then, that our analysis points in the direction of accommodating minority cultures. This is indeed an important liberal and multicultural goal. However, most political societies also need to maintain a sense of social cohesiveness and solidarity. Shared civic affiliation is an ingredient of that sense of social cohesiveness, but it is usually too thin to provide the needed cohesion. When a nation shares a culture, the cultural underpinnings of citizenship reinforce civic solidarity through cultural ties.[63] This is where the views of liberals and political sociologists are usually in tension because there is a disagreement about the need to have a thick, shared public culture.[64] Another issue is that the practical demands of modernization and economic efficiency impose restrictions upon the possible pluralistic solutions to the issue of days of rest.

Last, and very important, is the concern that accommodating cultural needs of minority cultures, especially if such policies are implemented in a variety of fields[65] (schools, dwellings, language,[66] etc.) may result in

[61] J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp: 107–62; W. Kymlicka, "Comments on Shachar and Spinner Halev: An Update from the Multiculturalism Wars" in C. Joppke and S. Lukes (eds.), *Multicultural Questions* (Oxford University Press, 1999), pp: 112–33.

[62] For a discussion of even-handedness, see J. Carens, *Culture, Citizenship, and Community* (Oxford University Press, 2000); A. Patten, "Liberal Neutrality and Language Policies" (2003) 31(4) *Philosophy and Public Affairs* 356–86; R. Bhargava, "What is Secularism For?" in R. Bhargrave (ed.), *Secularism and its Critics* (Oxford University Press, 1998), pp: 486–542.

[63] E. Shils, *Tradition* (University of Chicago Press, 1981), Chapter 3, esp. pp: 163–75, 179, 185–7; E. Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983), pp: 140–3. A "thick" shared cultural background may be produced by a combination of layers of identity – some shared, others different. See D. Miller, *Citizenship and National Identity* (Cambridge: Polity, 2000), pp: 125–42.

[64] See the liberal arguments of H. L. A Hart, "Social Solidarity and the Enforcement of Morals" (1967–8) 35 *University of Chicago Law Review* 1–13.

[65] See J. Spinner Halev, *The Boundaries of Citizenship* (Baltimore: John Hopkins University Press, 1994).

[66] See in this regard, T. Pogge, "Accommodation Rights for Hispanics in the US" in W. Kymlicka and A. Patten (eds.), *Language Rights and Political Theory* (Oxford University Press, 2003), pp: 105–23.

exclusion and creation of a barrier to integration. Indeed, this is where liberals face contradictory moral intuitions: on the one hand, accommodating minority cultures is a tenet of liberalism, but on the other, cultural diversity might create social enclaves from which individual members of such groups would have difficulty exiting. Therefore, when there are many cultures in a society, and especially when the relationships between them are adversarial, the state needs to think creatively about how to recognize the different cultures while not undermining civic solidarity[67] or the ability of communities to live side by side, about how to maintain equal respect for the cultural interests of individual members of the different cultures, and lastly, about how to enable full integration and economic and social opportunities for minority members. Regulating days of rest may be seen as a particular instance of this general issue.

Days of rest and worship are components of culture. We saw that, while the idea of a shared weekly day of rest has become very widespread, both the exact conception of the day and its identity are still reflective of particular cultures, mainly those related to the great religions. Divergence in cultural practices, such as dress traditions, can be relatively easily accommodated in mixed territorial space.[68] However, like language, practices with regard to days of rest are a cultural feature of very public character, and a special challenge to multiculturalism. Days of rest must be unified for the entire society, or at least for provinces and states (in the case of federations). Days of rest must be shared by the people living in the same geographical space, and full accommodation of pluralism[69] is not practical.

[67] This issue has given rise to a lively polemic: how *thick* does the shared solidarity need to be? For the purpose of this article, we shall assume that the combination of a unified single day of rest plus accommodation of a second day is the preferable path, as it both supplies a shared framework and recognizes relevant differences.

[68] Although some aspects of clothing, such as the head cover of Muslim women, turbans and even the Jewish skullcap, have been deemed in some cases to offend against the requirements of public culture and prohibited in public schools or posts. D. Bodansky, "*Sahin* v. *Turkey*; Teacher Head-scarf Case: ECHR and German Constitutional Court Decisions on Wearing of Islamic Head-Scarves" 100 *American Journal of International Law* (2006) 186; E. T. Beller, "The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society" (2004) 39 *Texas International Law Journal* 581, 581–6, 609–23; J. E. M. Machado, "Freedom of Religion: A View from Europe" (2005) *10 Roger Williams University Law Review* 451, 488–95.

[69] This also means that granting full individual freedom in the issue of days of rest is problematic, as it would create economic pressures upon individuals not to choose a common day, and would harm individual ability to spend time with families and communities. Indeed individual freedom to choose a day of rest is hostile to the collective dimension of individual welfare.

This is the background to our discussion. We would argue (1) that it is permissible and usual that the official day of rest will reflect the cultural preferences of the majority group, and that recognition of minority cultures may have complex spatial implications; (2) that the accommodation of the days of rest of minorities contributes to the legitimacy of the majority's choice (the importance of this point is stressed later); (3) that accommodation of minorities' days of rest can take two shapes – individual and communal – and that both types of accommodation should be pursued, subject to limitations especially if accommodating minority cultures would mean creating social enclaves that prevent integration; and (4) that actual arrangements in given societies will depend on the nature and choice of the day of rest, the nature of the relationships among the various religious communities, and also on the relationships between the religious and the secular members of particular cultural communities. Therefore, our suggested guidelines forbid certain policies, but allow for a diversity of possible solutions.

Explaining the model

A central element of the arrangements we have studied is a mandatory, shared day of rest determined by the culture of the dominant group. On this day (with or without a secondary day) government, banks and schools are closed, and other services are offered at a reduced level. Shops are either closed or operate on a limited schedule. People who, for religious or cultural reasons, wish not to work on a day different from the official day of rest may have to refrain from working for two days a week rather then just one. More generally, people who would like to work or operate their businesses or obtain unavailable services on the official day of rest cannot do so.

The described arrangement clearly does limit the freedom of individuals and may burden communities whose religion or culture is different from that reflected in the arrangement. Does it also rise to the level of violation of their rights? Are these matters of freedom from religious coercion? We agree with the courts in all Western democracies and with the international bodies which rejected these claims. They have rejected the claim that people have *a right* that the state will not designate as the general day of rest the day recognized as such by the majority culture. They have held that a right of this sort does not follow either from the right to freedom from religious coercion or from international law relating to the rights of workers. Mostly, courts have said that the

religious element of the day is not the dominant one, and that it is permissible for a society to enforce a shared day of rest for all its population. True, members of minority religions have a right, stemming from freedom of religion, not to be required by law to violate their religious commandments and to be free to observe their own day of worship. But they do not have the right that the state in which they live will recognize their religious-cultural day of rest as the official day of rest for all.[70]

However, some accommodation is required for the majority's choice of day of rest to be acceptable. First, no member of a minority should be required to work on his or her day of rest. Second, depending on the occupation in question, members of minority cultures should be allowed to work on the official day of rest. Those who work in government and related occupations will not be able to work on the day of rest. However, working in other occupations should be allowed, at least when no important competing interests are at stake.

Lastly, there is much controversy about whether a member of a minority may properly be disadvantaged if he or she takes an "extra" day (or hours) of rest in addition to the official rest period. Should potential employers be required to grant their employees a second day of rest; and if so, who should bear the cost? The current answer, which is given by some political theorists[71] and provides an acceptable interpretation of the position of the US Supreme Court, is that if the burden imposed upon members of minorities is merely a by-product of a general rule (rather than a direct result of a policy intended to harm a specific group or denomination), there is no duty to accommodate minority members.

However, the choice of the majority's day of rest is not neutral even if it enjoys general applicability.[72] Its rationale is the interest of the majority in expressing their culture in the shared public sphere. As we have seen, it is difficult to accommodate fully minorities' days of rest, because

[70] Gavison, "Day of Worship and Days of Rest: A View From Israel".

[71] P. Jones, "Bearing the Consequence of Belief", B. Barry, *Culture and Equality*, C. Lund, "A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence" (2003) 26 *Harvard Journal of Law and Policy* 627–65.

[72] General applicability merely means that there is universal compliance. Neutrality is much more demanding and concerns the content of the law or rule, which should be neutral towards conceptions of the good. Therefore, a rule may enjoy general applicability even though it is not neutral. See S. Caney, "Equal Treatment, Exceptions and Cultural Diversity" in P. Kelly (ed.), *Multiculturalism Reconsidered* (Oxford: Polity, 2002), pp: 81–101.

this might harm integration, the functioning of the market and many state activities. Nonetheless, minorities' cultural interests should be recognized in ways compatible with the shared nature of the weekly cycle. This recognition should be upheld unless an important and contradicting interest arises.

The problem is, of course, that an important interest (or "compelling interest" as it is frequently called in the American context) can be defined in many different ways.[73] However, in this context, we only wish to stress that an "important interest" must be shown. We are not concerned to give content to this admittedly somewhat vague concept.[74] The important step is to shift the burden of explaining to the side that argues that the interest of members of minorities should be denied.

We have seen that different days of rest are easier to respect in different spatial areas. In such areas communities could also have linguistic and cultural autonomy, and maintain their own schools and institutions. In such cases, some have indeed argued for a policy of sub-national self-determination;[75] but, while respecting the cultural interests of the group members, this may make integration more difficult. The problem of other, "solely" religious minorities is relatively simpler: although complex arrangements for accommodation of various attitudes towards days of rest might be required, territorial concentration would present fewer problems, because the linguistic and national aspects would not be present.[76] However, as we stressed throughout the article, the dilemma between accommodation and integration is serious, and it is difficult to frame policies that can achieve both.

The advantage of our quasi-historical review of the meaning and character of the day of rest might be of assistance here. It is clear that finding adequate solutions to the issue of days of rest depends not just on the identity of the day, but also on the cultural character of the day and

[73] For example, simply stating that there are costs does not constitute a sufficient reason to justify disrespect for a minority day of rest. In this we follow the left liberal tradition that denies that economic efficiency should trump individual freedom and rights. See, for example, R. Dworkin, "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights* (Oxford University Press, 1984), pp: 153–68. See in this regard Perez, "The Liberty to Culture".

[74] See Nussbaum, *Woman and Human Development*, chapter 3.

[75] C. Gans, *The Limits of Nationalism* (Cambridge University Press, 2003).

[76] In the Israeli context, the "Sabbath conflict" in Jerusalem between ultra-orthodox Jews and the state (and secular Jews) is a strong reminder that struggles for days of rest and the shape of the public sphere are complex enough even in the absence of the linguistic and national differences. Yet the spatial segregation of the ultra-religious and their special institutions do make their integration into Israeli society harder.

the cultural features of the society in question. In general, the more liberal and flexible the dominant culture, the easier it is for other religions and cultures to be accommodated and the easier it is for members of such groups to keep their own traditions. Such a liberal, dominant culture can come from flexibility in the religion on which this culture is based, or because the culture has become less religious, or because the culture has incorporated external influences, or because all of the above. The converse is also true. The less flexible the dominant culture, the greater the hardships minorities are likely to face in keeping their own traditions.

The extent of accommodation also depends on the character of the minority. The less liberal the minority cultures, the more difficult it will be for a liberal, dominant culture to tolerate and integrate them. This difficulty stems from the difference in values and beliefs but also from the fact that the more restrictive the minority culture, the greater the effort that will be needed to accommodate its special needs.

Finally, the types of accommodation made may depend on the general relationships within and between the relevant communities. The relative numbers of the various groups and their sense of physical and cultural security are of course very central, as is the question of whether differences are negotiated through public debate, in the courts, or by violent struggles.

Conclusion

This article has dealt with the issue of days of rest in divided societies. We have argued that the majority may indeed choose a day of rest that reflects its culture, but that the legitimacy of such a policy will be increased if minorities are accommodated in various ways, because complete privatization of the cultural interests of minorities might result in a de facto deprivation of the individual's ability to maintain his or her cultural interests. We have argued that the collective dimensions of cultural interests should also be accommodated by the state because of their importance for the individual well-being. However, the separatist tendency of such demands is significant, and this may require consideration of the complex relationship between the competing liberal goals of integration and accommodation. Therefore, our framework tries to address both aspects of cultural policy without pretending that magic policies that enable both full accommodation and full integration exist or if they do are free of difficulty.

We hope that the historical discussion in the first part of the article has contributed to a deeper understanding of the nature of the issue of days of rest. The meaning and character of the day as well as its identity need to be taken into account if proper understanding of the issue is to be achieved. We also hope that the combination of description and theoretical suggestions has provided helpful insights with regard to the important issue of days of rest, which has so far received insufficient attention in the literature of multiculturalism.

10

Australian legal procedures and the protection of secret Aboriginal spiritual beliefs: a fundamental conflict

ERNST WILLHEIM*

The essays in this book explore the intersections between law and religion. When Australian law intersects with Aboriginal religion the outcome is a massive collision. This essay explores that collision, a collision between core legal values of the dominant legal system and core religious values of a small minority group, Aboriginal Australians. That collision, or conflict, arises because Aboriginal religions are fundamentally different from mainstream religions. That difference is legally significant. But the dominant legal system has failed to accommodate the difference.

In this essay I contend that Australian law has failed to resolve a fundamental conflict between, on the one hand, basic common law values including openness and transparency in public administration, open administration of justice, a legal culture that gives special weight to the protection of private property interests and, on the other hand, Aboriginal religious values, in particular, the secret nature of much Aboriginal religious belief. I further contend that, because Australian law has failed adequately to recognize and to adapt to the secret nature of much Aboriginal religious belief, because common law values particularly principles directed at protection of private property interests prevail, laws enacted for the purpose of protecting Aboriginal religious beliefs have failed to achieve their purpose. The final part of the essay offers suggestions for reform, including mechanisms for protecting the confidentiality of secret spiritual beliefs.

Australian federal law, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, seeks to protect places and objects of spiritual significance to Australia's indigenous people, Aborigines and Torres Strait Islanders. I contend that the Act has fundamentally failed. It has failed

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Aboriginal people, who have been unable to secure protection. On the contrary, the processes under the Act have led to denigration of Aboriginal people and denigration of their religious beliefs. It has also failed non-Aboriginal people, who have become frustrated by delays and uncertainty. Massive legal costs have been incurred, burdening Aboriginal people, non-Aboriginal people and the community.

Why has a well-intentioned law had such disastrous, and clearly unintended, consequences? In brief, the Australian legal system establishes a non-Aboriginal process for the authentication of Aboriginal religious belief. That in itself is inherently offensive to Aboriginal people. Furthermore, aspects of that process are inimical to core Aboriginal religious values. Aboriginal religious or spiritual beliefs commonly require that particular knowledge be restricted to certain individuals or groups and not be further disclosed. Yet the statutory procedures for obtaining protection, including application to those statutory procedures of the common law principles of procedural fairness or natural justice, require full disclosure of the details of secret knowledge or beliefs to non-Aboriginal decision-makers and to the opponents of protection. Disclosure of secret knowledge or beliefs through a public inquiry process destroys the values Aboriginal people seek to protect. Aboriginal people must break their religious laws to secure protection for their religion. The very legal procedures which are intended to provide protection themselves inhibit applications for protection. Accordingly the desired outcome fails because the decision-making process is fundamentally flawed.

Religions commonly identify particular places and objects as having special religious or spiritual significance. For some Christians, for example, sites where those Christians believe miracles occurred, and sites where those Christians believe the Virgin Mary or other saints appeared, are revered. Aboriginal religions are no exception. For Australian Aborigines, particular places and objects have sacred/spiritual significance, usually associated with the Aboriginal view of the cosmos. It is important for Aboriginal people that these places not be disturbed. But Aboriginal religions differ from most religions in one important respect. Knowledge about such places and objects, their location and the reasons they are significant may, according to Aboriginal beliefs, be restricted.

The scheme of the Act

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* makes provision for protection of areas and objects of particular

significance to Aboriginal people. Somewhat unusually, for legislation enacted as long ago as 1984, the Act includes a purpose provision: 'The purposes of this Act are the preservation and protection … of areas and objects … that are of particular significance to Aboriginals …'[1] The mechanism for securing protection under the Act is set in train by an application to the minister from an Aborigine or a group of Aborigines. Section 9 provides for an emergency declaration, for a limited period. Section 10 provides for a 'permanent' declaration. An application may be made 'orally or in writing',[2] arguably a legislative indication that formality is not required. On receipt of a s 10 application for a 'permanent' declaration, the minister must appoint a person to prepare a report. The person so appointed is required to give public notice of the application, invite interested persons to make representations and report to the minister. If, after considering the report and the representations, the minister is satisfied that the area is a significant Aboriginal area and that it is under threat of injury and desecration, the minister may make a declaration making provision for protection of the area from injury or desecration.[3]

A declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, protecting an area that is of special religious significance for Aboriginal people, may have adverse consequences for non-Aboriginal interests. Site protection may prevent, for example, mining activities, construction of a dam or other forms of development. In two challenges to declarations made under the Act, the Federal Court has, in effect, enlarged the simple procedural steps set out in s 10, namely application, followed by public notice, representations and report. The court has construed the public notice requirement strictly and has held that ordinary common law principles, including natural justice or procedural fairness, apply to the s 10 reporting process.[4] The court rejected submissions that the Act should be construed in light of its stated purpose, that accordingly the public notice requirement should not be construed as imposing great formality and that application of natural justice principles to require full disclosure of secret Aboriginal beliefs might prevent achievement of the purpose of the legislation.[5] It followed

[1] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 4.
[2] Sections 9 and 10 both include this formulation.
[3] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, ss 10, 11.
[4] *Tickner* v. *Chapman* (1995) 57 FCR 451, *Minister for Aboriginal and Torres Strait Islander Affairs* v. *State of Western Australia* (1996) 66 FCR 40. These cases are considered below.
[5] *Tickner* v. *Chapman* (1995) 57 FCR 451, *Minister for Aboriginal and Torres Strait Islander Affairs* v. *State of Western Australia* (1996) 66 FCR 40.

from the court's decision requiring the application of natural justice principles that those who would be adversely affected by a declaration were entitled to access to the application for protection, including the submissions in support of protection.

Herein lies the difficulty. Secrecy may be an inherent quality of an Aboriginal religious site. Yet an application for protection may require disclosure of the location of the site and the reasons for its significance, thereby destroying its value. There is a fundamental flaw in the Australian legal system for protection of Aboriginal religion. Australian law is unable to accommodate this aspect of Aboriginal religious practice. Aboriginal people face a dilemma: to protect their religious beliefs, Aboriginal people must disclose that which they seek to protect: they must break their religious rules or forego the protection of the law.

Secrecy as an essential element of Aboriginal religious belief

Australian courts have recognized that Aboriginal people have rich spiritual and religious traditions which inform their customs and their ceremonies. There is no single Aboriginal religion. Before European settlement, there were many hundreds of distinct Aboriginal communities, many hundreds of languages and considerable religious diversity. A common thread was a version of what is now referred to as the 'Dreaming', stories about ancestors and spirits. These ancestors and spirits have a relationship with people, places (commonly referred to as sites) and objects. Rituals and ceremonies are associated with sites and objects. Spiritual powers play a major role in Aboriginal life. Living people are connected mystically to places. Power, or 'energy', and the right to use it, may be associated with sites and objects. Aboriginal people venerate the places where power or force is believed to be concentrated. Only the right individual with the right ritual can release the power from a site or object. Aboriginal culture is oral. Knowledge about a site or object, and the associated ritual, may be restricted to particular elders whose duty it is to guard that knowledge and pass it on selectively to appropriate others including, at an appropriate time, the succeeding generation. Elders 'own' stories, songs and dances. Only the elder who 'owns' the knowledge has the authority to speak about it. The authority of the elders is accepted. Many beliefs and ceremonies are gender-related. Men may have general awareness of women's rituals and women of men's rituals but they will not have specific knowledge about sites important in the rituals of the other sex and are not able to speak about them. Men will not disclose details to women and vice versa. For example, women have beliefs, rituals

and ceremonies, particularly relating to puberty and childbirth, in which men do not share. Male initiation rites are consciously concerned to induct males by stages into the fellowship of the most senior men who understand the religious mysteries in part or whole. The ultimate purpose is to ensure the passage to and retention by the rightful persons of the knowledge required for the continuance of life. These beliefs, ceremonies and rituals form part of the religious life of the community. They govern social relations and customs, including initiation and burial. Access to religious knowledge is a basis for power in the community. Restrictions on disclosure are part of 'The Law'. Disclosure contrary to 'The Law' is thought to have adverse consequences for the community. Improper disclosure may be 'dangerous'. 'Sickness' may result. The traditional authority of elders and the social stability of the community may also be undermined.

Early Christian missionaries saw Aboriginal people as primitive and sought to prohibit Aboriginal religious practices. It was customary for missionaries to make every effort to eradicate Aboriginal culture, even to the extent of prohibiting Aboriginal children in Christian mission schools from using their own Aboriginal languages. More recently, especially since a constitutional referendum in 1967, removing aspects of the Constitution that discriminated against Aboriginal people, Australians have come to recognize the richness of Aboriginal spiritual life. Legislation relating to Aboriginal land claims and Aboriginal heritage protection has given specific recognition to the Aboriginal spiritual affiliation to land and the need for protection of Aboriginal spiritual beliefs. Questions concerning protection of secret Aboriginal religious beliefs have arisen in several contexts but in recent times those questions have arisen primarily in the context of land claims and applications for heritage protection.

A survey of the cases

I turn to a brief survey of some of the cases that address the issue of secret Aboriginal beliefs. It will be seen that, in land claim cases under both Northern Territory and federal legislation, judges have been sympathetic to secrecy claims and have been willing to make appropriate orders to protect the confidentiality of evidence relating to secret Aboriginal religious beliefs. These cases may be contrasted with heritage protection cases where the Federal Court has given primacy to protection of competing non-Aboriginal private property interests over protection of secret Aboriginal religious beliefs.

In *Foster* v. *Mountford and Rigby*,[6] Muirhead J granted an injunction restraining the publication of a book describing secret Aboriginal places and ceremonies having deep religious and cultural significance. Muirhead J referred to the plaintiffs' concern 'that the revelation of the secrets to their women, children and uninitiated men may undermine the social and religious stability of their hard pressed community'.[7]

Northern Territory land claim cases

In Northern Territory land claims, Aboriginal applicants have had to demonstrate 'common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land'.[8] Orders have been made restricting access to evidence relating to secret Aboriginal beliefs and practices. Some such orders have restricted access on a gender basis. Thus in the *Daly River (Malak Malak) Land Claim*,[9] the claimants sought to tender an anthropologist's report concerning a ceremony staged when girls reach puberty. The ceremony was strictly confined to women and the female claimants did not want the report to be made available to any men other than the Commissioner. All counsel in the case were male but Toohey J, sitting as Aboriginal Land Commissioner, found female practitioners were available and ordered that the report should be made available only to counsel and their advisers who were female.[10]

In the *Warumunga Land Claim*, the Aboriginal Land Commissioner, Maurice J, referred to 'the secret nature of Aboriginal religious beliefs and custom' as 'a pivotal feature of Aboriginal social life and politics'.[11] He ordered the production of documents relating to sacred sites, but:

> The production of the records will occur whilst I am sitting in camera. Only myself, my associate, counsel assisting, counsel for the Attorney-General, possibly my consultant anthropologist and the researcher who gathered the

[6] (1976) 14 ALR 71. [7] 14 ALR 73.
[8] *Aboriginal Land Rights (Northern Territory) Act 1976*, s 3(1).
[9] Daly River (Malak Malak) Land Claim, Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory, Canberra, Australian Government Publishing Service, 1982.
[10] *Ibid.*, Appendix, 86–9.
[11] *Warumunga Land Claim*, Reasons for Decision (1 October 1985), 31.

> material will be present. They will not be permitted to use any of the information so learned for any purpose other than the land claim.[12]

This procedure was subsequently upheld on appeal.[13]

Federal Native Title Act 1993 cases

The *Federal Court of Australia Act 1976* makes provision for the court to make orders forbidding or restricting the publication of particular evidence but only where this 'appears to the court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth'.[14] In applying s 50, the court will have regard to 'the public interest in open justice', which 'will not lightly be interfered with'.[15]

The *Native Title Act 1993* makes more specific provision. When first enacted, s 82(3) provided that the court was not bound by the rules of evidence.[16] The Act went on to provide that, in native title proceedings, the court '*must* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait islanders'.[17] This was a most important provision. As Branson J put it:

> Section 82 of the Native Title Act may be thought expressly to recognise that the taking of some evidence relevant to a native title application without any deviation from the traditional processes of the court may result in offence to the cultural and customary concerns of certain indigenous Australians or, alternatively, in relevant evidence which would otherwise be available being withheld from the court for cultural or customary reasons.[18]

Branson J went on to refer to 'the degree of likelihood that if the requested restrictions are not imposed on the publication of such evidence the evidence will not be given',[19] the issue which, as will be seen, was absolutely critical in heritage protection cases.

In an early native title case, Olney J rejected an application by the native title claimants that female legal practitioners not have access to certain culturally restricted evidence. His Honour held that s 82 did not modify s 78 of the *Judiciary Act 1903*, providing for legal representation in courts exercising federal jurisdiction. It followed that the court was

[12] *Ibid*., 106–7.
[13] *Aboriginal Sacred Sites Protection Authority* v. *Maurice; re the Warumunga Land Claim* (1986) 10 FCR 104, 107.
[14] *Federal Court of Australia Act 1976*, s 50.
[15] *State of Western Australia* v. *Ben Ward* (1997) 76 FCR 492, 500.
[16] Section 82(3).
[17] Section 82(2), emphasis added.
[18] *State of Western Australia* v. *Ben Ward* (1997) 76 FCR 492, 508.
[19] 76 FCR 510.

unable to make an order restricting counsel's access to evidence on a gender basis.[20] That decision was overruled by the Full Court in *State of Western Australia* v. *Ben Ward*,[21] where an order was made in the following terms:

> Occasions may arise when it will be in the interests of the administration of justice that the taking of evidence should occur in restricted circumstances. These occasions may arise where traditional laws and customs prevent women and men respectively speaking about certain matters, for example, matters going to Law, ceremony and ritual, in the presence of persons of the opposite gender and the communication of the details of such matters to persons of the opposite gender.[22]

The court rejected submissions that the orders restricting access by counsel to culturally restricted evidence on a gender basis infringed Chapter III of the Constitution,[23] although the court went on to indicate that parties may not have any right to select a judge on the basis of gender.[24]

In *Hayes* v. *Northern Territory*,[25] the Alice Springs land claim, sacred objects were shown to and spoken of before the judge and counsel (all of whom were male) but the transcript of that session was marked restricted and was ordered to be unavailable to the parties generally, let alone to the general public.[26]

[20] *Yarmirr* v. *The Northern Territory of Australia* (1997) 74 FCR 99. Olney J did not find it necessary to deal with the Commonwealth Solicitor-General's argument that if there were such a power it would be in conflict with Chapter III of the Constitution (74 FCR 104). The argument may surprise some since in the earlier case of *Western Australia* v. *Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144, the Commonwealth had successfully argued that access by counsel for the State of Western Australia should to be restricted on a gender basis. Significantly, a change of government had intervened between the two cases.

[21] 74 FCR 501–2, 510–11. [22] 76 FCR 502.

[23] 76 FCR 499, 508. Chapter III of the Australian Constitution vests judicial power in the High Court and in such other federal courts as the Parliament creates (s 71). Decisions have established that it is beyond power to require or allow a federal court to exercise judicial power in a manner which is inconsistent with the essential elements of a court or with the nature of judicial power (74 FCR 506). The argument here was that counsel were officers of the court and that to restrict counsel on the basis of gender was contrary to natural justice (74 CLR 498), a view rejected by all members of the court. After referring to s 82 of the *Native Title Act*, in the passage cited in the text, Branson J went on to hold that the placing of restrictions on access to evidence was not contrary to the obligation of the court in exercising judicial power to afford procedural fairness.

[24] 74 FCR 499. [25] [1999] FCA 1248.

[26] B. A. Keon-Cohen, 'Client Legal Privilege and Anthropologists Expert Evidence in Native Title Claims', in B. Keon-Cohen (ed.), *Native Title in the New Millenium* (Canberra: Aboriginal Studies Press, 2001).

Following a change of government, s 82 of the *Native Title Act 1993* was significantly amended. The rules of evidence now apply unless the court otherwise orders;[27] the court '*may* take account of cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, *but not so as to prejudice unduly any other party*'.[28] The Federal Court rules make specific provision relating to cultural evidence of a confidential or secret nature in native title proceedings including the making of orders relating to presentation of evidence about cultural matters and restricting access to documents.[29]

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 cases

Gender and secrecy issues have loomed large in applications for Aboriginal heritage protection. Notwithstanding the clear purpose provisions of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*,[30] the Federal Court in its construction of the procedural requirements of the Act has given emphasis to protection of adverse consequences for non-Aboriginal property interests, even where such a construction has resulted in a failure to achieve protection of areas of spiritual significance to Aboriginal people.

The *Broome Crocodile Farm* case

In preliminary proceedings in the *Broome Crocodile Farm* case,[31] a challenge to a protection declaration made by the Commonwealth Minister, Robert Tickner, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Western Australia sought access to an anthropological report relating to a site used for male initiation ceremonies. Counsel and instructing solicitor for Western Australia were both female. An affidavit by an Aboriginal elder, Mathew Gilbert, stated:

> These passages concern men's business and should not be told to women or uninitiated Aboriginal men. That is the law and it is dangerous to break the law.

[27] Section 82(1) as amended by *Native Title Amendment Act 1998*, No 97 of 1998.
[28] Section 82(2), emphasis added. [29] Federal Court Rules, O 78, R 33.
[30] Section 4, above, p. 216.
[31] *Western Australia* v. *Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144.

Carr J considered that the interests of justice required at least one of the State's female counsel and female solicitor to have access to the restricted material. He ordered that the report be produced for inspection by the State's counsel and solicitors save that only one shall be female.[32]

In that case, the court ultimately set aside a declaration that had prevented the extension of a crocodile farm near Broome, Western Australia.[33] The purpose of the declaration was to protect a male initiation site, including an initiates' track and two nearby ceremonial grounds, a 'two snakes dreaming site' and a song cycle concerning the travels of mythological beings whose exploits are celebrated in secret ritual. According to Aboriginal tradition, it was dangerous for women or uninitiated men to observe these rituals. The area was said to be 'imbued with power below the ground surface and poisoned'.[34] The crocodile farm operators had obtained a site clearance following a report by a female anthropologist. Many of the features of the site had not been disclosed to the female anthropologist or to the developers. At a very late stage in the reporting process, the Goolarabooloo Aboriginal Corporation made a submission concerning a 'two snakes dreaming site'. The time for completion of the report had virtually expired. The reporter read this submission out to the objectors over the phone but because of the time constraint did not provide written copies. The crocodile farm owners and the State of Western Australia questioned the claims of significance on the basis of lack of credibility and recent emergence. Their challenge succeeded, primarily on the ground that the State and the crocodile farm owners were denied procedural fairness because they had not been given a reasonable opportunity to respond to the late submission. It is this aspect of the decision, that procedural fairness applies, without qualification, to the reporting procedure and that, in consequence, all the material the applicants provide in support of their application must be fully disclosed to objectors, that makes the case significant.

The Full Court rejected submissions by the minister's counsel[35] that the legislation set out the relatively simple procedures to be followed, including public notice and the right to make representations, and that

[32] 54 FCR 149–50. For a discussion of the decision, see E. Willheim, '*Western Australia & Ors* v. *Minister for Aboriginal & Torres Strait Islander Affairs*' *Aboriginal Law Bulletin*, vol 3, No 69, August 1964, 17.

[33] *Minister for Aboriginal and Torres Strait Islander Affairs* v. *State of Western Australia* (1996) 66 FCR 40.

[34] 66 FCR 47, 49. [35] Willheim.

no further more onerous requirements should be engrafted onto the statutory scheme.[36] The court held that those affected are entitled to a proper notice of the case they have to meet. Natural justice was not excluded. Rejecting submissions by the minister's counsel that the legislation should be construed in light of the objects stated in the Act, the preservation of areas and objects of particular significance to Aborigines in accordance with Aboriginal tradition,[37] and that application of natural justice requirements such as full disclosure of secret Aboriginal beliefs might prevent achievement of those objects, the court gave emphasis to the effect a declaration may have on other persons' interests.[38] 'It would be wrong then to permit one group to raise a ground of significance … and yet deny those to be affected seriously by such a decision knowledge of what is relied upon …'[39] Arguments based on urgency and practicality were also rejected.

The *Hindmarsh Island Bridge* case

The most significant, most controversial and most long running of the cases under the *Aboriginal and Torres Strait Islander Heritage Protection Act1984* is the *Hindmarsh Island Bridge Case*. The controversy arose out of a proposal to build a bridge over the mouth of the Murray River to improve access to Hindmarsh Island in light of proposals for a marina and other real estate development. An anthropological survey prepared by Mr Rod Lucas found no significant Aboriginal heritage objections to the bridge proposal but recommended further consultation with Aboriginal bodies. After it became public knowledge that work on the bridge was about to commence, an Aboriginal organization, the Aboriginal Legal Rights Movement, applied to the minister, Robert Tickner, seeking protection of sites under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The minister made an emergency declaration under s 9 and appointed Professor Cheryl Saunders to prepare a report under s 10. Evidence was given to Professor Saunders concerning restricted women's knowledge. An anthropological report, prepared by Dr Dean Fergie, referred to the archaeological significance of the area and recorded what in some places is referred to as 'secret women's knowledge' and in other places as 'secret oral tradition'. The content of that knowledge or tradition was included in two appendices to Professor Saunders' report, placed in envelopes marked 'To be read by

[36] 66 FCR 52. [37] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 4.
[38] 66 FCR 53. [39] *Ibid*., 58.

women only'. In the ensuing public debate, these appendices became known as the secret envelopes. Professor Saunders' s 10 report to the minister concluded:

> Hindmarsh and Mundoo Islands and the waters surrounding them have a supreme spiritual and cultural significance for the Ngarrindjeri people, within the knowledge of Ngarrindjeri women, which concerns the lifeforce itself. If destroyed, the Ngarrindjeri people believe they will be destroyed … Dr Fergie's report describes the area … as 'crucial for the reproduction of the Ngarrindjeri people and of the cosmos which supports their existence. The adequate functioning of this area is vital to Ngarrindjeri existence'.[40]

On 9 July 1994, Minister Tickner made a declaration under s 10 of the Act banning any act that would desecrate any part of a defined area, thereby effectively banning construction of the bridge. Motions for disallowance of the declaration were moved, and defeated, in both Houses of the Parliament.[41] A judicial review application brought by the Chapmans (the developers behind the marina proposal) was, however, successful, and the decision to make the declaration was quashed on two grounds.[42] Both grounds were based on protection of the interests of opponents of the declaration. The minister's appeal was unsuccessful.[43]

The first ground was that the notice published by Professor Saunders under s 10 of the Act was technically deficient in not adequately identifying the area for which protection was sought and the apprehended injury or desecration; it followed that the whole process was fundamentally flawed. That notice referred to 'significant Aboriginal areas in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island in South Australia'. Bearing in mind the nature of the Aboriginal belief identified by Professor Saunders, some may consider this an entirely adequate and appropriate identification. That was not, however, the view of the court. Black CJ rejected submissions by counsel for the minister[44] that, since an application may be made 'orally or in writing', no great formality should be required.[45] He also rejected counsel's submission that, since one of the matters with which the report must deal is the extent of the area that should be protected,[46] it cannot have been

[40] Professor Cheryl Saunders AO, *Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the Significant Aboriginal Area in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island, Pursuant to section 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, July 1994.

[41] Senate, 11 October 2004, House of Representatives, 9 November 2004.

[42] *Chapman* v. *Tickner* (1995) 55 FCR 316. [43] *Tickner* v. *Chapman* (1995) 57 FCR 451.

[44] Willheim. [45] *Tickner* v. *Chapman* (1995) 57 FCR 451, 457. [46] Section 10(4)(c).

intended that the application itself or the public notice of the application must closely define the area for which protection was sought.[47] Black CJ also held that it did not matter that 'everyone knew' what the matter was about,[48] or that Professor Saunders received over 400 representations.[49] Burchett and Kiefel JJ substantially agreed. Submissions based on the beneficial purpose of the Act were rejected, as were submissions that more detailed identification in a public notice of an area sought to be protected might lead to further injury to the area or to a violation of traditional beliefs and that this would be contrary to the purposes of the Act.[50] The court's focus was on formal compliance, not on whether objectors were disadvantaged in fact.

The second ground was that the minister had not personally 'considered' the representations.[51] He had not read the secret envelopes but had relied on advice from a female adviser that 'there was nothing in the confidential appendices that did not support what was said in Professor Saunders' report'.[52] The minister's argument, that he was satisfied by the body of the Saunders report that he should make a declaration, that the confidential appendices were clearly marked 'to be read by women only', that in light of this marking it was not appropriate for him to read them and that his female adviser had advised him that there was nothing in the appendices that did not support the Saunders report, carried no weight with the court. Black CJ and Kiefel J also rejected counsel's submission that, since the confidential appendices were clearly marked 'To be read by women only', and since the applicants knew the minister was a man, the applicants clearly did not intend that the confidential envelopes be read by the minister and therefore they should not be treated as representations for the purposes of s 10 of the Act.[53] Some may find it curious that a court would find legal error on the part of the minister in not reading a submission which those making the submission clearly did not want him to read. The court's reasoning focused entirely on technical construction of the legislation. There is no suggestion in the reasoning that if the minister had read the confidential appendices, the outcome might have been different or that opponents of the declaration had in any way been prejudiced. Burchett J referred to 'the very great power to override the major interests and rights of citizens … The special nature of the power, and the severe consequences of its application, also suggest that its exercise would not have been seen as a common or ordinary task'.[54]

[47] *Tickner* v. *Chapman* (1995) 57 FCR 451, 458. [48] *Ibid*., 461.
[49] *Ibid*., 473, also 486 per Kiefel J. [50] *Ibid*., 458, 492. [51] *Ibid*., 461–2, 478, 493
[52] *Ibid*., 466. [53] *Ibid*., 466, 497. [54] *Ibid*., 477.

Because the original notice published by Professor Saunders was flawed, the second defect, that the minister had not 'considered' the representations, could not be remedied by referral back to the minister. The failure to publish a proper notice could only be cured by recommencement of the process, from the publication of a public notice onwards.[55]

The Federal Court focuses on legal form

Central to both the *Broome Crocodile Farm* and the *Hindmarsh Bridge* decisions is the emphasis on technical procedural deficiencies. Arguably, the court's primary focus in each case was on very close examination of compliance with the formal procedural requirements and on the protection of the procedural rights of the objectors rather than on the objects of the legislation, protection of Aboriginal sites.[56] Common law principles relating to the conduct of administrative processes prevailed. These could not be modified to accommodate traditional Aboriginal beliefs. As Burchett J starkly put it:

> Aboriginals, just like all their fellow members of the community, if they wish to avail themselves of legal remedies must do so on the law's terms. To take away the rights of other persons on the basis of a claim that could not be revealed to the maker of the decision itself would be to set those rights at nought in a way not even the Inquisition ever attempted.[57]

The procedural fairness principles on which the court relied were developed very much in the context of immigration cases, disputes between an individual and the state, where the liberty of the individual was at stake. The object of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is protection of sites of spiritual significance to Aboriginal people. Arguably, application of common law procedural fairness requirements defeats that purpose. Why? Because confidentiality or secrecy is so inextricably linked with spiritual significance. Public disclosure of the religious or spiritual beliefs that make a site significant infringes those spiritual or religious beliefs. If the purposes of the Act are to be achieved, the law must recognize that restrictions on disclosure are integral to the significance of Aboriginal sites.

[55] *Ibid.*, 466, 497.

[56] eg, 'the Parliament … was also conscious of the effects upon the interests of others a declaration may have', *Tickner v Chapman* (1995) 57 FCR 451, per Kiefel J, at 492.

[57] 57 FCR 451, 478–9.

The *Hindmarsh Island Bridge* case: further developments

The Hindmarsh Island Bridge saga did not end with the decision of the Full Court quashing Minister Tickner's declaration. Following dissent within the Ngarrindjeri community and claims by 'dissident' Ngarrindjeri women that the 'women's business' was fabricated, the South Australian Government appointed a Royal Commission to inquire whether the 'women's business' was a fabrication. The South Australian Hindmarsh Island Bridge Royal Commission reported, on 19 December 1995, that the 'women's business' had been fabricated for the purpose of obtaining a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to prevent the construction of the bridge.[58] The Commission's conclusions rested in large part on late emergence of 'women's business' and the supposed irrationality of women's business. The Commission ignored critical evidence that supported the 'women's business' claims – for example, the evidence of historian Betty Fisher, whose notes of conversations with Aboriginal elders taken in the late 1960s or early 1970s recorded that Hindmarsh Island was a significant place for women and that restricted women's practices took place there.[59]

The Ngarrindjeri women who had sought the declaration did not give evidence to the Royal Commission. Their participation was limited to making a statement through counsel at the start of formal hearings, which gave their reason for not doing so.

> We are deeply offended that a government in this day and age has the audacity to order an inquiry into our secret sacred spiritual beliefs. Never before has any group of people had their spiritual beliefs scrutinised in this way. It is our responsibility as custodians of this knowledge to protect it. Not only from men, but also from those not entitled to this knowledge. We have a duty to keep Aboriginal law in this country. Women's business does exist, has existed from time immemorial and will continue to exist where there are Aboriginal women who are able to continue to practice their culture.[60]

The contents of the secret envelopes were not part of the evidence before the Commission.

[58] *Report of the Hindmarsh Island Bridge Royal Commission*, presented by Iris E. Stevens, Royal Commissioner (State Print, Adelaide, December 1995), 299.

[59] Mathews J subsequently had the notes tested and the results confirmed Mrs Fisher's account that she wrote the notes in the late 1960s or early 1970s (*Hindmarsh Island Report*, 27 June 1996, 49).

[60] *Chapman* v. *Luminis, (No 5)* [2001] FCA 1106, [327].

The Report by Mathews J

Also on 19 December 1995, a further application for a s 10 declaration was made to the Commonwealth Minister, Robert Tickner. In response to a request from the applicants, and a recommendation from Minister Tickner, the Prime Minister designated a female minister, Senator Rosemary Crowley, to act on behalf of Minister Tickner. Minister Crowley appointed a Federal Court Judge, Justice Jane Mathews, to prepare the report required under s 10. A federal election intervened. The Labor Government, of which Ministers Tickner and Crowley were members, was defeated and a Liberal/National Party Coalition Government was elected. The new minister, Senator John Herron, refused to arrange for a female minister. During the course of the s 10 reporting process conducted by Mathews J, the Full Court's decision in *Minister for Aboriginal and Torres Strait Islander Affairs* v. *State of Western Australia*[61] was handed down. The opponents of the application now sought access to all the information submitted in support of the application. When Mathews J told the applicant women that a male minister, Senator Herron, would read her report and that, in light of the Full Court's decision, she could no longer honour the condition of confidentiality on which she had accepted material and that all material provided in support of the application would have to be made available to opponents of the application, the applicant women withdrew their evidence of the culturally restricted knowledge.[62] One leading writer described the dilemma the women faced:

> Insofar as their concern about the bridge project relates to women's beliefs, they need to specify those beliefs in order to have any chance of gaining the protection of the Act. But if they specify those beliefs in circumstances where they must be read by a man, they violate the very laws and beliefs which they are concerned to protect.[63]

Mathews J's report was delivered to Minister Herron on 27 June 1996. In the absence of the evidence concerning restricted knowledge, Mathews J concluded that there was insufficient material to support a declaration.[64] The dissident Ngarrindjeri women, who had denied the existence of secret women's business, did not participate in the inquiry process conducted by Mathews J. However, they successfully challenged the constitutional validity

[61] (1996) 66 FCR 40. [62] *Hindmarsh Island Report*, 27 June 1996, 44–5.
[63] G. Nettheim, 'Women's Business and the Law', *Aboriginal Law Bulletin*, Vol 3 No 80, May 1996, 24.
[64] *Hindmarsh Island Report*, 27 June 1996, 2–3.

of her appointment. On 6 September 1996, the High Court held that the appointment of a Federal Court judge, to prepare a report for the minister, was incompatible with the judge's judicial office.[65] It followed that her report had no status under s 10.[66]

The Hindmarsh Island Bridge Act 1997 prevents the making of a declaration

The s 10 application was therefore still outstanding. In addition, a fresh s 10 application was lodged. The new minister, Senator John Herron, was now under a clear legal obligation to appoint a new reporter to report to him on the outstanding application or applications for a s 10 declaration.[67] He failed to do so. On 17 October 1996, the government introduced legislation to prevent the making of a declaration in relation to the Hindmarsh Island Bridge area.[68] A challenge to the constitutional validity of the legislation failed.[69]

New Federal Court proceedings: the Ngarrindjeri women are vindicated

The Chapmans subsequently brought proceedings in the Federal Court against the minister who made the declaration (Robert Tickner), the first reporter (Professor Saunders) and the anthropologist (Dr Dean Fergie), seeking to recover losses following the making of the declaration. Von Doussa J was not satisfied that the restricted women's knowledge was fabricated or that it was not part of genuine Aboriginal tradition.[70] That finding was all that was technically necessary to dismiss the application brought by the Chapmans. Von Doussa J went much further. He referred to evidence that the relevant knowledge was part of an oral tradition handed down by female relatives of preceding generations and went on to hold that knowledge handed down in that way clearly constituted part of 'the body of traditions, customs and beliefs' of Ngarrindjeri people.[71]

[65] *Wilson* v. *Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. It has been held that there are constitutional restrictions on the availability of judges appointed under Chapter III of the Constitution to perform non-judicial functions. In this case, the function of reporting to the Minister under s 10 was seen as incompatible with the holding of the office of a judge appointed under Chapter III of the Australian Constitution.

[66] The report was nevertheless tabled in Parliament, Senate *Hansard*, 17 September 1996, 3532.

[67] *Tickner* v. *Bropho* (1993) 40 FCR 183. [68] *Hindmarsh Island Bridge Act 1997*.

[69] *Kartinyeri* v. *The Commonwealth of Australia* (1998) 195 CLR 337.

[70] *Chapman* v. *Luminis Pty Ltd (No 5)* [2001] FCA 1106, summary, [12], reasons, [400].

[71] *Ibid*., [275].

He considered the nine Ngarrindjeri women who gave evidence concerning restricted women's knowledge as part of genuine Aboriginal tradition to be credible witnesses who genuinely held those beliefs.[72] He had previously ruled that Aboriginal tradition confined the disclosure of restricted women's knowledge to Ngarrendjeri women chosen by those who possessed the knowledge as appropriate to be entrusted with it.[73] Von Doussa J took evidence in closed session and considered:

> the confidential evidence shows that according to the tradition asserted, Hindmarsh Island, Mundoo Island and the surrounding waters are not sacred because of beliefs associated with arcane practices which once took place on Hindmarsh Island and Mundoo Island (see Commission Report p 236), but rather, the practices are a manifestation of a spiritual belief about those Islands and the surrounding waters. Important to that knowledge is the Goolwa Channel. According to the belief, the spiritual importance of the Islands and surrounding waters will be injured or desecrated if Hindmarsh Island is linked to the mainland. The confidential evidence indicates that the secret envelopes offered an explanation why that would be so.[74]

And he methodically analysed and rejected the 'planks' on which the Commission's conclusions were based.[75]

The outcome of this lengthy process was vindication of the views of the applicant Ngarrindjeri women. But their application for a declaration protecting their sacred area failed and, following the passage of the legislation preventing the making of a declaration in relation to the Hindmarsh Bridge area,[76] the bridge was built. One reason the application failed was that Minister Tickner, being male, had not personally considered the 'secret envelopes' attached to the report provided to him by Professor Saunders and marked 'To be read by women only'. Problems of this kind can be overcome by appointment of a female minister, as happened with the appointment by the Labor Government of Minister Crowley. The subsequent Coalition Government was not willing to appoint a female minister. More significantly, the application failed because of the decision in the *Broome Crocodile Farm* case that natural justice principles required that the reporter inform opponents of a declaration of all the material being submitted in support of a declaration. Once it was made plain to the Ngarrindjeri women that, in order to

[72] *Ibid.*, [317]; see also [319].
[73] *Chapman* v. *Luminis Pty Ltd (No 2)* (2000) 100 FCR 229, 243–5, [40]–[50].
[74] *Ibid.*, [343]. [75] *Chapman* v. *Luminis Pty Ltd (No 5)* [2001] FCA 1106, [332]–[399].
[76] *Hindmarsh Island Bridge Act 1997*.

have any real prospect of successfully pursuing their application for protection it would be necessary for them to disclose their secret beliefs and that their submissions would be available to the opponents of the bridge including men, they chose to withdraw the only evidence which had any prospect of sustaining their application. The legal process which had ostensibly been put in place to enable their beliefs to be protected ultimately failed them.

The Junction Waterhole declaration

More successful, at least from an Aboriginal perspective, was the declaration made by Minister Tickner to protect two important Dreaming Tracks and a Two Women Track within the area of a proposed flood mitigation dam on the Todd River in the Northern Territory (Junction Waterhole).[77] Again, gender and secrecy were a key issue. The minister's reporter, The Hon Hal Wootten QC, reported:

> I (Wootten) was told how, when a Northern Territory Minister was reacting skeptically to Aboriginal women's concern about the Nyiltye site because they would not tell him about it, women were saying in their own language, 'how can he expect us to tell him about things we cannot discuss with our own husbands?'[78]

That declaration was expressed to operate for a period of twenty years, was not contested and remains in force.

Other obstacles to protection: allegations of improbability and fabrication

The procedural fairness issues considered in the *Broome Crocodile Farm* case and the *Hindmarsh Island Bridge* case constitute the major legal obstacle to effective operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The Federal Court gave primacy to protection of non-Aboriginal property interests over achievement of the stated purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. These cases also generated considerable public

[77] May 1992.

[78] The Hon J. H. Wootten, A. C., Q. C., *Significant Aboriginal Sites in Area of Proposed Junction Waterhole Dam, Alice Springs*, Report to the Minister for Aboriginal Affairs under s 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1992) (hereinafter cited as Wootten, *Junction Waterhole Report*), 7.4.4.

controversy. In the course of that controversy practical obstacles to protection of Aboriginal sacred sites emerged. Both applications for protection were actively opposed on substantive grounds. In both cases, it was seriously contended that Aboriginal claims for protection based on Aboriginal religious or spiritual beliefs should be rejected because those beliefs were illogical or improbable. It was also contended that applications or submissions made at a late stage of the process were mere fabrications for the purposes of preventing development. I turn therefore to these two issues, alleged improbability or lack of logic and alleged fabrication.

Alleged improbability or lack of logic

In the *Broome Crocodile Farm* case, counsel for Western Australia submitted that some of the Aboriginal stories, such as the two snakes dreaming story, were illogical and improbable and should be rejected on that ground alone. In the *Hindmarsh Island Bridge* case, secret women's business was widely lampooned in the media. One of the grounds on which the Hindmarsh Island Bridge Royal Commission found the 'women's business' was fabricated was its alleged irrationality:

> The beliefs said to constitute the 'women's business' and Dr Fergie's elaboration of it, that is, the cultural significance of the area according to Ngarrindjeri tradition, and the threat of injury or desecration said to be posed by the construction of the bridge, are not supported by any form of logic.[79]

In the Federal Court, Von Doussa J did not share this perspective:

> In terms of eurocentric thinking and logic, the explanation proffered does not provide an understandable explanation why the linking of Hindmarsh Island to the mainland would have the forecast devastating consequences for Ngarrindjeri society and culture. The restricted women's knowledge describes what is said to be a spiritual belief associated with creation and procreation. Spiritual beliefs do not lend themselves to proof in strictly formal terms. Their acceptance by true believers necessarily involves a leap of faith. To use lack of logic as a test to discredit those asserting a particular spiritual belief is to pose a test that is both unhelpful and inappropriate. I expect that non-Aboriginal people generally may have difficulty understanding many Aboriginal spiritual beliefs that are of profound importance to Aboriginal people. The asserted belief in this case is no different.[80]

[79] Royal Commission Report, p 241.
[80] *Chapman* v. *Luminis Pty Ltd (No 5)* [2001] FCA 1106, [391].

> The reason why the construction of the bridge would constitute a use or treatment of the area in a manner inconsistent with Aboriginal tradition is stated: the permanent link is an affront to that tradition. At this point, the clash of cultures interrupts further understanding of the reason why in a manner that can be shared by non-Aboriginal minds. At this point, the reason why becomes the subject of spiritual belief, and unless one holds the belief the reason why is likely to be incomprehensible.[81]

It will be apparent that some of the reasons why places are significant for Aboriginal religions may have little or no parallel with mainstream, non-Aboriginal, religious beliefs. That is no reason not to respect those beliefs. As counsel for the minster[82] in the *Broome Crocodile Farm* case submitted, in response to argument on behalf of the State of Western Australia that the Aboriginal belief was illogical and improbable, many Aboriginal and non-Aboriginal people may see aspects of mainstream religious beliefs as improbable and lacking in logic. For many people, belief in virgin birth, miracles, apparitions, life after death, reincarnation and other features of widely held religious beliefs is equally improbable and lacking in logic. Religious belief is founded on faith, not probative evidence of the validity of the belief. Acceptance of the truth of a particular religious faith should not be a precondition for respect for those who adhere to that view.

Alleged fabrication

Another common criticism of applications for protection of Aboriginal sacred sites is that information about the significance of a site and the reasons for its significance may not emerge until a very late stage of consideration of development proposals. Late emergence of claims of significance leads to claims of fabrication for the purposes of frustrating development. Yet late emergence of knowledge of Aboriginal sacred sites is often an inevitable consequence of the very reason the site is sacred, namely the secret nature of the knowledge concerning the site and the consequential reluctance of Aboriginal people to speak about it until they face the most serious threat of imminent destruction.

There is obviously a massive cultural gap between mainstream and Aboriginal attitudes to the acquisition and dissemination of knowledge concerning religious beliefs and sites of religious importance. Mainstream religious beliefs are very much in the public domain. They are recorded in written texts. Believers seek to inform others about them. Indeed, many

[81] *Ibid*., [392]. [82] Willheim.

mainstream religions have as one of their objectives the dissemination of those beliefs and 'conversion' of non-believers. If a particular site is believed to be a site of religious significance, for example the site of a vision or miracle, that site and its significance are publicly proclaimed.

For Aboriginal people, in contrast, religious knowledge is communicated by oral narrative, song, art and dance. Much of it is inherently secret. It may even be secret within a particular community. Religious knowledge may be linked with the status of particular members of the community. Thus, particular knowledge may belong to key individuals and may be communicated only in limited circumstances. Others in the community may have some general awareness of restricted knowledge but may be unable to speak about it. Only the right people may be able to speak with authority about particular religious traditions. To reveal religious knowledge to persons not entitled to it may itself be a kind of desecration.[83] That is why Aboriginal people may be reluctant to discuss a site until a development proposal is well under way. Bound by traditional secrecy requirements, they will prefer not to mention the existence of a site, let alone its significance, until it is plain that disclosure is the only way open to secure protection.

The reluctance of Aboriginal people to reveal the existence of a site or to discuss its significance until it is almost at the point of being destroyed can be very frustrating for developers. The very idea that disclosure of religious knowledge may be forbidden, that disclosure may be dangerous and may have adverse consequences for a community is at complete odds with mainstream attitudes to dissemination of religious belief. As one Federal Court judge put it:

> To the eurocentric mind accustomed to the open exchange of information, the late disclosure of an important claim or explanation which supports the interests of the discloser will be viewed with suspicion. However, it is now well recognised in this Court and I think widely in the community, that under Aboriginal custom not all information is open. Much cultural information is surrounded by restrictions on disclosure. Some cultural knowledge relating to sacred beliefs is highly secret. Some, though sacred, may be revealed in part. The concept of graded secrecy, that is layers of knowledge is recognised, where outer layers may be widely known, but inner layers, including knowledge as to the significance of the belief to the culture may be known to only a very small number of senior people in the clan who are considered to be its custodians. The transmission of restricted cultural knowledge is likely to be

[83] Wootten, *Junction Waterhole Report*, para 7.1.9.

> strictly governed by traditional customs and a system of respect which delineate by whom, to whom and in what circumstances the knowledge may be revealed.[84]

Lack of understanding of Aboriginal culture, in particular, of the Aboriginal requirements for protection of secret knowledge, leads to claims of fabrication, that Aboriginal people invent sites and stories only after development proposals are announced. Wootten made the point succinctly in the *Junction Waterhole Report*:

> The cultural gulf between European and Aboriginal attitudes to the acquisition and spreading of knowledge often makes it difficult for Europeans to appreciate why Aborigines appear loath to discuss a site until a development proposal appears to be well under way. Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating and, because they do not understand it, claim that Aboriginal people find sites only after development proposals have been announced. From the Aboriginal point of view this appears to be a surprising attitude since Aborigines know that they must maintain secrecy unless … the release of that knowledge is perceived, ultimately, to be the only way to protect an area.[85]

The Act fails to accommodate the secret nature of Aboriginal religious belief

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* seeks to protect places and objects of spiritual significance to Aboriginal people but fails to accommodate this fundamental feature of Aboriginal religious belief, the secret nature of so much Aboriginal religious knowledge. This paper argues that the Australian federal system for protection of sites of religious significance to Aboriginal people has failed. It has failed Aboriginal people. It has also failed non-Aboriginal people. It has failed Aboriginal people because it does not give adequate recognition to Aboriginal restrictions on disclosure of secret knowledge or provide adequate protection for secret knowledge, leading to secret Aboriginal religious beliefs being exposed to intensive public scrutiny. Aboriginal people should not be forced to break their law, their religion or their culture to prove to

[84] *Chapman* v. *Luminis Pty Ltd (No 5)* [2001] FCA 1106, [333], per von Doussa J.
[85] Wootten, *Junction Waterhole Report*, p 31.

non-Aborigines that their law, religion or culture exists. It has also failed Aboriginal people because the basic processes for establishing the significance of Aboriginal sites is a non-Aboriginal process, and therefore inherently offensive to Aboriginal people. If Australian law is successfully to protect Aboriginal religion, it must find a way that accommodates the inherent characteristics of that religion, including the restrictions on disclosure. Ironically, the system has also failed non-Aboriginal people because the very processes which cause such difficulty for Aboriginal people, in particular, the inevitable consequence that under current full disclosure requirements claims are not articulated until a very late stage in the development approval process, have given rise to uncertainty, delays and massive legal expenses. Developers deserve something better than a process under which obstacles to development emerge only at the very last minute.

Proposals for reform

How are these difficulties to be resolved? The remaining parts of this paper address possible directions for reform.

First, it needs to be recognized that natural justice or procedural fairness principles are fundamentally incompatible with protection of secret religious beliefs. Second, it needs to be recognized that the current public inquiry process is inherently offensive to Aboriginal people.

A separate, Aboriginal, process for authentication of claims

My first and fundamental proposal is that the question whether a place or an object is of special religious or spiritual significance to Aboriginal people should be separated from assessment and weighing of Aboriginal and competing non-Aboriginal interests. Authentication of claims relating to Aboriginal religious or spiritual beliefs should be undertaken by Aboriginal people according to an Aboriginal process. That process should have a specific and limited purpose, determination whether a place or object is of special religious or spiritual significance to a group of Aboriginal people. If the outcome of that process is that the claim of significance is not sustained, that should be the end of the matter. If the outcome is that the claim is made out, further investigation of conflicting interests and consideration of the question whether a declaration should be made should proceed according to a separate, and public, process.

This should not be seen as a radical proposal. Would a Christian community find acceptable a decision-making process where non-Christians

determined whether a place or object was important to the Christian community? Assume a Christian group claimed that the site of a proposed shopping centre was sacred to Christians because they believed it was the site of a miracle, or the site of a vision of the Virgin Mary. Would that Christian group find acceptable a decision-making process where the very existence of the alleged belief was investigated by an atheist or by a Muslim and the investigator reported that belief in miracles or visions was inherently improbable? Surely Christians would find such a process fundamentally offensive.

Why should a different view be taken in relation to Aboriginal religious beliefs? Is the problem that the public does not trust Aborigines? Are we unable to distinguish determination of the existence of an Aboriginal belief from assessment of the weight to be given to other competing interests? In a recent native title case, French J accepted that the testimony of Aboriginal witnesses about their traditional laws and customs and their rights and responsibilities with respect to land and waters, deriving from them, 'is of the highest importance. All else is second order evidence.'[86] As Wootten wrote in the *Junction Waterhole Report*:

> The issue should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional cultures and beliefs.[87]

Investigations of possible Aboriginal sites also need to be gender sensitive and sensitive to Aboriginal traditions. A site which as been cleared by men may be sacred to women and a site that has been cleared by women may be sacred to men. Junior members of a community may be more articulate in English but may not be able to speak with authority. It is therefore essential that the appropriate traditional custodians, of both genders, be identified. An Aboriginal process, conducted by Aboriginal people, will be sensitive to these considerations.

If the law is to provide protection of sites that are significant according to traditional Aboriginal religious belief, that can be achieved only if the law recognizes that secrecy, restrictions on who has access to knowledge about the relevant religious belief and restrictions on disclosure of that knowledge

[86] *Sampi* v. *State of Western Australia* [2005] FCA 777 (10 June 2005), [48]. Earlier, In *Yarmirr* v. *Northern Territory* (1998) 156 ALR 370, Olney J said '… what really matters is the evidence of the Aboriginal claimants' (at 400).

[87] *Junction Waterhole Report*, para 7.1.13.

may be integral to the religious significance of the site. Disclosure contrary to those restrictions may be a breach of religious law, may according to Aboriginal religion be dangerous and may have adverse consequences for an Aboriginal community. The legal system for protection must therefore be able to accommodate those restrictions, otherwise it will not achieve its stated purpose. The need for public disclosure should be limited to only so much as is necessary to establish a legal regime for protection of a site.

In the *Warumunga Land Claim*, the Aboriginal Land Commissioner, Maurice J, said 'if Aboriginal people want the protection of this legislation … they must be prepared to come forward and reveal sufficient about their sites'.[88] There is some force in that. This writer was once asked to prepare a declaration protecting a site identified by the description 'the bend in the (named) river with the red river gums'. Inquiries quickly established that the river had many bends and many red river gums. Clearly, protection pursuant to a legislative scheme requires accurate description of the area to be protected, usually by a metes and bounds description. That in itself may be painful for Aboriginal people but if Aboriginal people want legal protection of a site they must be willing to identify the site to be protected. To that extent, Aboriginal people must choose whether to disclose the site as the price for obtaining protection. It does not, however, follow that Aboriginal people must also disclose to the world the full content of the religious beliefs that make the site important where that would require disclosure of a belief that according to Aboriginal tradition must not be disclosed. Once an Aboriginal process has established the authenticity of the claim of significance, Aboriginal people should not be forced to break their own law to prove to non-Aborigines that their law still exists.[89]

A separate, public, process for investigation of conflicting interests

So much for establishment of significance. That in itself is not enough. No one has an absolute right to protection of their interests. The Aboriginal interest in protection of a sacred site may conflict with other interests, the interests of miners, developers and so on. It is entirely appropriate that any adverse impact on other persons be taken into account. Investigation of conflicting interests and weighing those interests should be a separate

[88] Cited in *Aboriginal Sacred Sites Protection Authority* v. *Maurice; re the Warumunga Land Claim* (1986) 10 FCR 104, 124.

[89] Cf, Wootten, *Junction Waterhole Report*, para 7.4.3.

process from establishment of significance. There needs to be community confidence in the process. There is a particular need for a proper opportunity for the broader community to be able to put forward their concerns about the possible impact of protection measures. But it does not follow that there must be full disclosure to the broader community of confidential religious beliefs. Those who would be adversely affected by a protection declaration should have full opportunity to put forward their claims. But their rights should not ordinarily extend beyond the opportunity to explain how their interests would be adversely affected. Opponents of a declaration should not have an automatic right of access to the reasons why a site is significant or the right to dispute significance. The weighing process should proceed on the basis that, once significance is established by a separate and independent Aboriginal process, significance is a given.

Ultimately, decisions will be taken in the national interest. Protection of Aboriginal religious tradition is itself a major element of the national interest. It is important that legislation make this clear. Indeed, there should be a presumption in favour of protection. Only where other, even greater, national interests are established should protection be refused. The weighing of other conflicting interests must be a matter for political decision. The decision not to allow mining at Coronation Hill was ultimately taken at the highest level. The Jawoyn Aboriginal people believed mining could disturb the spirit Bula who they believed inhabited the Coronation Hill. Some denigrated the Aboriginal religious belief. Others argued the economic benefits of mining a valuable ore body outweighed the significance of the Aboriginal belief. The Cabinet, apparently influenced very much by the Prime Minister, decided that the Aboriginal objection to desecration of the site should be sustained. This was a prime example of the need for decisions on competing interests to be taken at the highest political level.

These proposals are neither radical nor novel[90]

These proposals for an Aboriginal process for authentification of claims and for separation of assessment of conflicting interests are neither radical nor novel. For example, the *Northern Territory Aboriginal Sacred Sites Act* provides for the establishment of the Aboriginal Areas Protection Authority[91] comprised of twelve members, of whom five are

[90] The writer is indebted to Mr Graeme Neate, President, National Native Title Tribunal, for drawing attention to the provisions referred to in this section.

[91] *Northern Territory Aboriginal Sacred Sites Act*, s 5.

to be Aboriginal male custodians chosen from a panel nominated by the Land Councils and five are to be Aboriginal female custodians similarly chosen.[92] The functions of the Authority include establishment of a Register of Sacred Sites and evaluation of claims to have sites registered.[93] Under the *Aboriginal Land Rights (Northern Territory) Act 1976*, the Aboriginal Land Commissioner reports to the minister whether Aboriginal applicants are the traditional Aboriginal owners of land.[94] The Commissioner is required to comment on the detriment to persons or communities if the land claim were acceded to.[95] Weighing competing interests and deciding whether the land should be granted is a matter for the minister.[96] Assessment of significance according to an Aboriginal process and a separate public process for investigation of conflicting interests is both desirable and achievable.

Statutory protection for secret Aboriginal spiritual beliefs

Changes are also required to our laws to enable greater protection of Aboriginal secret beliefs in courts and tribunals. This also should not be seen as novel. Earlier in this paper, reference was made to orders by courts and tribunals which afforded some protection against disclosure. In the *Warumunga Land Claim* appeal,[97] two members of the court were prepared to recognize Aboriginal claims to secrecy. Bowen CJ held the Sacred Sites Authority was entitled to object to disclosure on the ground of public interest immunity.[98] Woodward J held that a fresh category of public interest immunity should be recognized, covering secret and sacred information and beliefs.[99] These decisions are to be welcomed. They do not provide any guarantee of confidentiality. Judges sympathetic to Aboriginal claims of public interest immunity may nevertheless seek to accommodate opposing interests in a manner unacceptable to Aboriginal beliefs.[100] To avoid doubt and uncertainty, there should also be statutory protection. The Christian religion already enjoys such protection. For many Christians, special significance is attached to the

[92] *Ibid*., s 6. [93] *Ibid*., ss 10, 20 and 27.
[94] *Aboriginal Land Rights (Northern Territory) Act 1976*, s 50(1)(a).
[95] *Ibid*., s 50(3). [96] *Ibid*., s 11.
[97] *Aboriginal Sacred Sites Protection Authority* v. *Maurice; re the Warumunga Land Claim* (1986) 10 FCR 104.
[98] 10 FCR 110. [99] 10 FCR 114–15.
[100] Cf, *Western Australia* v. *Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144, above, and *Clarrie Smith* v. *Western Australia* [2000] FCA 526 (20 April 2000), where Madgwick J granted limited release of anthropological material.

secrecy of the religious ritual of confessing wrongdoing, or sins, to clergy. The *Evidence Act 1995* protects clergy from disclosure of religious confessions.[101] The protection extends to concealing the making of a religious confession as well as the contents of the confession. The protection is absolute and unqualified. It protects clergy from disclosure of confessions of serious criminal conduct. This would even extend to confessions of plans for a major terrorist attack. No corresponding statutory protection is provided for secret Aboriginal spiritual beliefs, rituals or ceremonies. For Aboriginal people, the secrecy attached to sacred sites and sacred objects is no less significant than the significance some Christians attach to the secrecy surrounding the confessional. Courts may already have some inherent powers to hear evidence in camera and to make orders suppressing the publication of evidence. Tribunals may not always have the same powers.[102] The importance of protecting the confidentiality of Aboriginal spiritual beliefs, rituals and ceremonies should be given statutory recognition by conferral of similar protection to that now afforded to religious confessions. Information relating to secret Aboriginal spiritual beliefs, rituals and ceremonies held by public authorities should also be protected from disclosure under freedom of information legislation.

In summary, therefore, the procedures for protection of Aboriginal religion need to be reformed, to establish an Aboriginal process for investigation of Aboriginal claims for protection; that process must respect the confidentiality of secret spiritual beliefs. A separate public process should be established for the investigation of other, competing, interests, with ultimate decisions to be taken at the political level. Statutory protection should be provided for Aboriginal spiritual beliefs.

[101] *Evidence Act 1995*, s 127.

[102] In some cases, discretionary power has been conferred by statute. Section 154 of the *Native Title Act 1993* provides that the National Native Title Tribunal may direct that a hearing or part of a hearing be held in private and in doing so 'must have regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders'. Sections 110 and 111 of the *Aboriginal Land Act 1991* (Qld) gives the Queensland Land Tribunal power to hold a hearing in private or to prohibit or restrict the publication of evidence on the basis of 'any applicable Aboriginal tradition'.

11

Secular and religious conscientious exemptions: between tolerance and equality

YOSSI NEHUSHTAN*

Introduction

The main argument of this paper is that conscientious exemptions, whether religious or non-religious ones, are better understood as the outcome of tolerance than as a way of applying the principle of equality.

This argument can be read in two different ways. Firstly, it is an analytical argument according to which almost all cases of conscientious exemptions, and surely all central and paradigmatic cases fall within the scope of the principle of tolerance, as I understand the concept. Secondly, not only is tolerance the best way to describe our attitude when we grant conscientious exemptions but in many cases tolerance is also the desirable moral basis for it. This is a normative argument that complements the analytical one. The following discussion will focus on the analytical argument but will also refer to the normative one although without putting forward a detailed reasoning for the latter.[1]

This argument calls for three preliminary notes. The first is about the scope of the concept of 'conscientious exemptions'. The second is needed for explaining how this paper's argument applies in similar strength both to religious and non-religious conscientious exemptions and the third explains why this argument matters.

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[1] Suffice it to say that I perceive the principle of tolerance as a desirable substitute to neutral liberalism and as an inevitable outcome of what can be called perfectionist liberalism in its radical form.

The scope of the concept of 'conscientious exemption'

Granting conscientious exemption is merely one of many ways of protecting freedom of conscience and religion.[2] It is also merely one of many kinds of exemptions that can be granted from the demands of the law. A preliminary inquiry is called for then, for differentiating conscientious exemption from other kinds of exemptions.

There are numerous types of exemptions that can be granted from a general legal rule and numerous ways of classifying these types. I will set forth only three types of exemptions which are by no means exhaustive or even useful for other purposes. They are merely more relevant for clarifying the scope of the concept of conscientious exemption and consequently the scope of this paper.

The first type is an exemption from a legal rule that is decided for any reason whatsoever and incorporated in the law itself, i.e. the law determines the general rule and its exemptions. For example, the law can create the duty to pay for one's television licence and exempt certain groups from that duty (e.g. students, the elderly, poor people, deaf or blind people and so on). These exemptions are widespread and normally do not raise any important questions apart from general problems of equality.

The second type is what is often called 'constitutional exemptions'. This term refers to exempting an individual or a group from a valid legal norm when the exemption is called for under constitutional rights or principles (whether written or not). In other words, in these cases the ruler is under a constitutional duty to grant an exemption from the demands of a legal rule. To take one example, if access to justice is a constitutional right, then poor people may have a constitutional right to be exempt from the duty to pay court fees when filing a lawsuit.

A constitutional exemption can be a statutory one, i.e. a special case of the first type of exemptions. It could also be a judicial remedy, i.e. to be granted by the court from a law that failed in incorporating it.

[2] I will use the phrase 'granting exemptions' in various ways throughout this paper, yet it does not implicate that the conscientious objector does not have a right to be exempt from the law. By using the word 'grant' all I mean is that the ruler has to act rather than not to interfere when it wishes to respect or tolerate one's conscience by exempting him from the demands of the law. For other techniques for protecting freedom of conscience within the criminal process see: K Greenawalt, *Conflicts of Law and Morality* (1989) chapter 15 (e.g. non-prosecution, nullification, sentencing and pardon).

The third type is what I will refer to as conscientious exemption. As will be noted shortly, this kind of exemption includes religious-conscientious as well as non-religious exemptions.

Conscientious exemption is called for when a deeply held belief that is based on deeply held moral values of a group or an individual runs into the demands of a specific law. In other words, the conscientious objector seeks an exemption from the law not because of his status (as is generally the case regarding constitutional exemptions) but because he holds an alternative set of basic values or an alternative way of balancing basic values – which are all part of his conscience, or the result of it – that conflicts with the ends, the means or the values of a specific law and ultimately contradict the demands of that law.

Conscientious exemption can be perceived as a special case of constitutional exemption only if there is a constitutional right to be granted conscientious exemption. However, this is not always the case.

Secular and religious conscientious exemptions

There are meaningful differences between secular and religious conscientious objection. Nevertheless, meaningful similarities between the two can also be found. One way to perceive conscience and religion is to see them as different kinds of sources of 'higher demands' that a person sees himself as subordinate to. For the purposes of this paper, identifying the exact source of the higher demand is of little importance. What matters is the existence of such a demand that may contradict the demands of the law. Indeed, respecting a person's obligation or merely will to obey this higher demand by accommodating his objection to obey a legal norm always reflects respect for his autonomy and personhood.[3] For the purpose of this paper this similarity is sufficient for seeing the two types of objections as one.

Thus, I will ignore the differences between secular and religious conscientious exemptions, and unless stated otherwise I will use the concepts of conscientious objection and exemption as incorporating religious objection and exemption.

Accordingly, when I present the argument about the connection between conscientious exemption, tolerance and equality I will use

[3] Note, however, that respecting one's obligation or will to follow one's conscience does not always have to be part of the reasons for granting conscientious exemptions. As will be argued shortly conscientious exemptions can be granted also out of pragmatic considerations.

examples of both secular and religious exemptions, as both are equally relevant to any argument put forward in this paper.

The implications of the argument and its importance

Granting conscientious exemptions is only one possible way of accommodating conscientious objections. I chose to concentrate on this specific tool because it seems to be the most common or the paradigmatic way of accommodating conscientious objection, and because of the special theoretical and analytical difficulties this tool gives rise to.

The best-known example of granting conscientious exemptions is the common exemption from compulsory military service, usually granted to religious or secular pacifists. However, conscientious exemptions are given or at least are demanded from many other laws that deal with, for example, equal treatment; drug use; dress codes in schools, jails and the armed forces; animal slaughter; official day of rest ('Sunday laws'); taxes and so on.

In my opinion we should expect a growing demand, both from groups and individuals, to be granted conscientious exemptions. There are various reasons for that. Firstly, the fact that the modern state regulates the public and the private sphere more than ever; secondly, increasing sensitivity to the discourse of human rights and the increasing use of it amongst individuals, organisations and communities; and thirdly, the great movement in Western democracies from the cultural model of a relatively homogeneous nation state to a far more heterogeneous, multicultural one.

If that is true then the need to understand the nature of conscientious exemption becomes even more important, both from the theoretical and the practical points of view.

Many scholars perceive the nature of conscientious exemption (religious and non-religious) and its underlying justifications in various ways. Some of these ways may be contradictory while others may be compatible or cumulative.

One can find in the literature arguments for seeing conscientious exemption as a communal right,[4] as a minority right[5] or as a way of

[4] LM Hammer, *The International Human Right to Freedom of Conscience* (2001) 243–4.

[5] W Kymlicka, *Multicultural Citizenship: a liberal theory of minority rights* (1995) 37–8; DE Steinberg, 'Religious Exemption as Affirmative Action' (1991) 40 Emory LJ 77; Hammer (n 4) 246.

implementing affirmative action.[6] Such explanations fail as they exclude the conscience of the secular individual who is not part of a distinct group or community. They fail also because they ignore the individual religious conscience or individual interpretations of religious values or demands. Other scholars perceive conscientious exemption as an individual right but this explanation, much like the former, also fails since in some cases there is no right, moral or legal, communal or individual to be granted an exemption.[7]

In this paper I will ignore these possible ways of understanding the nature of conscientious exemption. I will explore two other ways of understanding what a conscientious exemption actually is, namely seeing it as the outcome of tolerance and seeing it as an application of the principle of equality. I will argue that conscientious exemption is better understood not just as an aggregation of compatible justifications for granting it, or as a result of the principle of equality, but as a paradigm of tolerance.

It is interesting to note that whereas identifying conscientious exemption as tolerance is quite rare in academic writings, and to the best of my knowledge has never been suggested in a straightforward and comprehensive way, it is even rarer in courts' decisions. In the United States where one can find more (mostly religious) conscientious objection and exemption cases than in any other jurisdiction, the common discourse involves freedom of religion, freedom of conscience, pluralism, equality and so on – but not tolerance.[8] The same can be said about other English-speaking jurisdictions and the European Court of Human Rights. I will not try to explain here this odd omission. I will only say

[6] Steinberg (n 5); and in the context of the First Amendment: M McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul L Rev 1, 9–10.

[7] For a description of the judicial practice in the United States of granting religious exemptions while relying on individual or on classic liberal rights rather than religious-communiterian ones, see: S Carter, 'Evolution, Creationism, and Treating Religion as a Hobby' (1987) Duke LJ 977, 985; M McConnell, 'Accommodation of Religion' (1985) Sup Ct Rev 1, 19; M Tushnet, 'The Constitution of Religion' (1986) 18 Conn L Rev 701, 734. See also: CL Eisgruber and LG Sager, 'Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct ' (1994) 61 U of Chi LR 1245, 1248, 1268, 1291–6.

[8] For a good survey of the justifications for granting exemptions in the United States see: WP Marshall, 'What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Non-religion in the First Amendment Jurisprudence' (2000) 75 Ind LJ 193, 204.

that failing to discuss tolerance and its limits while discussing conscientious exemptions is not merely a conceptual falsity but it might also affect important decisions regarding when to grant conscientious exemptions, how and by whom.

If, as I suggest, granting conscientious exemptions is almost always the outcome of tolerance, then when asking ourselves when it is justified to grant or to refuse to grant conscientious exemptions we should engage with the complex and yet to be resolved question of the limits of tolerance.[9] Accordingly, when asking how conscientious exemptions should be granted and by whom, we should find out which authority is most likely to tolerate conscientious objections in the best way and in the right cases and which technique of granting exemptions is preferable in order to effectively tolerate conscientious objections whilst minimising undesirable side effects.[10]

In practice the question will often be if and to what extent we should tolerate *religious* objections since in practice most of the claims to be granted conscientious exemptions are based on religious conscience.[11] Moreover, and this is a regrettable fact, claims for religious conscientious exemptions are usually more likely to be accepted than claims for secular conscientious exemptions.[12] Thus, the general argument about the nature of most conscientious exemptions is, in practice, an argument for seeing religious conscientious exemptions as the outcome of tolerance. As a result, deciding when to grant these exemptions is a decision about the justifiable limits of tolerance.

In the following discussion I will describe the argument for seeing conscientious exemptions as tolerance and will go on to explain why the principle of equality fails in explaining the nature of conscientious exemption in many central cases.

[9] For my account of the limits of tolerance see: Y Nehushtan 'The Limits of Tolerance: A Substantive-Liberal Perception' (2007) 20(2) *Ratio Juris* 230–57.

[10] For my attempt to answer these questions see: Y Nehushtan 'Conscientious Exemptions: How They Should Be Granted and By Whom' (forthcoming 2008).

[11] But compare with CC Moskos and JW Chambers (eds), *The New Conscientious Objection – From Sacred to Secular Resistance* (1993) chapter 1, 16. In short, it seems that the title of this collection is true only in regard to conscientious objection to compulsory military service.

[12] As for the American case see Hammer (n 4) 146; As for the European case Hammer claims that it might be that according to European law there is no right to act upon one's conscience unless it is a religious one: Hammer (n 4) 139–42.

The nature of tolerance[13]

Linguistic and historical origins

Before arguing for seeing conscientious exemption as tolerance, a clear understanding of the nature of tolerance is called for. In order to understand fully the meaning of a concept one should first examine its history and its linguistic aspects. This is not to say that linguistic or historic origins of a concept always determine its current meaning. Yet, in our case, it appears that the historical and linguistic origins of 'tolerance' do help to understand its modern meaning and to differentiate it from other concepts such as pluralism, indifference and respect.

The origins of the term 'tolerance' are rooted in the Latin word *tolerabilis*, which means carrying or lifting an object. Both tolerance and *tolerabilis* linguistically imply the existence of a burden, originally a physical one and later on a mental one.

It is common to see the religions wars in Europe in the sixteenth and seventeenth centuries as the historical origins of the relatively modern concept of tolerance. More than a thousand years went by from St Augustine's position of extreme religious intolerance[14] until Christian religious tolerance emerged and, perhaps ironically, set the basis for secular liberalism, freedom of conscience and freedom from religion. In an almost evolutionary development, tolerance was first applied in the intra-Christian sphere,[15] then in the inter-religious sphere[16] and finally in the public-secular sphere.[17] Throughout this journey the understanding of tolerance as a burden that lies on the tolerant person's shoulders has not changed.

[13] Although some claim to differentiate between *tolerance* (the virtue) and *toleration* (the act of tolerating), I will use the terms indiscriminately. Parts of the following discussion about the nature of tolerance and the motives for tolerance are taken from my detailed account of this matters as was published in Nehushtan (n 9).

[14] St Augustine, 'Epistle to Vicentius' in *Augustine The Confessions and Letters of St Augustine I* (408) 389.

[15] Just before the religious wars, an attempt to reconcile the Catholic and Protestant dispute was made by Erasmus in 1533, as one of the earliest calls for religious tolerance: Erasmus, 'On Mending the Peace of the Church' in JP Dolan (ed), *The Essential Erasmus* (1964) 327.

[16] The most important and quite innovative promoter of religious tolerance at that time was Sebastian Castellio who, in 1554, more then a century before John Locke, acknowledged that coercion is not an effective means to determine people's beliefs and that humans are authorised to punish only diversions from the core of religion, that is a diversion from believing in (any) God: RH Bainton (ed, tr) SCastellio *Concerning Heretics* (1965) 104–6, 121–35, 141–54, 169–83.

[17] JSt Mill's *On Liberty* (1859) is unanimously considered as the milestone of modern liberal tolerance. This short survey is not exhaustive and does not describe developments

The nature of tolerance

Both the linguistic and the historical origins of tolerance capture the essence of the concept, that is, the existence of a burden and a restraint. More specifically, tolerance is to be understood as not harming another although the tolerant person thinks there are good reasons for harming the other because (a) the other's values or way of balancing values as expressed in his behaviour, way of life or speech, seem to the tolerant to be 'wrong', i.e. dangerous, evil, immoral, unjust, useless, irrational and so forth, *or* (b) because the other's personal characteristics (colour of skin, sex, manners, physical appearance, physical disability and so forth) seem to the tolerant to be repulsive or disgusting, or these characteristics imply the other's inferiority in the eyes of the tolerant.[18] This is a complicated description of a complicated concept and some clarifications must be made.

Firstly, by saying that being tolerant means not harming the other, I refer to a broad definition of harm (or offence) that may include any negative approach towards the other. This harm can be emotional, mental, physical or economic, and can be caused by condemning the other, insulting him, making him feel uncomfortable, avoiding his presence, discriminating against him and so forth. Although Feinberg, for example, calls some of the above 'evils of another kind than harm',[19] I believe using the above broad definition of 'harm' may be more appropriate when describing the nature of tolerance.

Naturally, defining 'harm' is crucial for understanding the nature of tolerance, for identifying the intolerant and presumably also for deciding the limits of tolerance. Some may agree, for example, that one should not tolerate only harmful acts or speech as opposed to 'evils of another kind

in formal policies. Its only aim is to portray in general lines changes in philosophical writings and thinking about tolerance. To take one example that does not fit into the rough chronology of tolerance as I have just described, the Catholic Church, before Vatican II, did teach that sometimes governments can and should tolerate non-Catholic manifestations of belief; but as recently as 1953 Pope Pius XII affirmed that religious error has 'no objective right' even to exist, much less to be propagated publicly: *Address to Italian Jurists, Ci Riesce, 6 December 1953. Acta Apostolicae Sedis*, 45 (1953) 798. Only in 1965 at the Second Vatican Council (Vatican II) did the Catholic Church formally state that 'the human person has a right to religious freedom' and that this right 'is based on the very dignity of the human person as known through the revealed word of God and by reason itself'. This declaration reflects a perception of tolerance as a human right, although mostly within the religious sphere.

[18] See also: J Raz, *The Morality of Freedom* (1986) 401–2: 'Typically a person is tolerant if and only if he suppresses a desire to cause to another a harm or hurt which he thinks the other deserves (for a more complex and detailed description of tolerance, see also 402).

[19] J Feinberg, *The Moral Limits of the Criminal Law – Harm to Others* (1984) 215–16.

of harm' but without an agreement about what constitutes harm no real agreement about the limits of tolerance can be achieved. Putting aside the question about the limits of tolerance, I believe intolerant behaviour is not to be regarded as such only when a specific quantitative line of negative attitude is crossed or when a specific kind of negative attitude is being held by the intolerant person. Rather, intolerant behaviour can come in various forms and degrees and it is intolerant as long as it consists of any kind or degree of negative approach towards the other.

Secondly, the first part of the above description of tolerance, (a), is about disapproval. The second part, (b), is about dislikes. Hence tolerance can be 'value-based', which is more relevant when dealing with conscientious exemptions, but it can also be 'personally based'.[20]

Thirdly, it is quite clear that tolerance can be the state of mind or the behaviour only of those who hold a negative opinion about another as such or about the other's values or about the other's way of balancing values and reasons. Therefore indifference and pluralism, which do not involve restraint from harming the other, cannot be understood as tolerance, though the pluralist's behaviour can be identical to that of the tolerant. This is true whether one defines pluralism broadly (stating, for example, that 'there is no one truth or finite set of goods; therefore every opinion and way of life should be treated with the same respect') or narrowly (stating, for example, that 'there is – or can be – a truth; but that in order to find it – if we are ever to find it, or in order to constantly examine our beliefs – every opinion and way of life should be treated with the same respect'). This point is worth mentioning as the notion that tolerance can be understood as pluralism or indifference was, and is still too widely accepted among leading scholars who dealt with various issues regarding moral and political tolerance.[21]

Different motives for tolerance[22]

Tolerant behaviour can be the result of different motives. Different people can be tolerant in the same way, i.e. apply the same degree and

[20] See also: S Mendus, 'My Brother's Keeper: The Politics of Intolerance' in S Mendus (ed), *The Politics of Toleration* (1999) 3.

[21] R Niebuhr, *The Children of Light and The Children of Darkness* (1944) 130; T Scanlon, 'The Difficulty of Tolerance' in *The Difficulty of Tolerance* (2003) 192; B Ackerman, *Social Justice in the Liberal State* (1980) 162, 302; MJ Sandel, 'Judgmental Toleration' in RP George (ed), *Natural Law, Liberalism, and Morality* (1996); M Walzer, *On Toleration* (1997) 10–11.

[22] The following discussion differentiates between tolerance as a right and pragmatic tolerance. Whereas the former is a *reason* to tolerate, the latter refers to various *motives*

mode of tolerant behaviour but the reasons for their behaviour may vary. We can identify three reasons for tolerance or three kinds of tolerance.

Firstly, there is tolerance as a right (or, more accurately, a right to tolerance), meaning that a person has a right to be tolerated. In this case the tolerant person puts up with the wrong or the repulsive because the other has a right to do the wrong thing or because the other has a right not to be harmed in spite of his repulsive features or manners. Without elaborating this point I will simply endorse in full Raz's view that the main justification for this kind of tolerance is autonomy.[23] Other related justifications might be human dignity; freedom of speech; freedom of religion and conscience; a right to culture (any culture or a specific one) and so on, all according to the circumstances and as far as they promote, protect or at the very least do not harm one's autonomy.

The absence of equality from this list is not accidental. There is an interesting relation between the principle of equality and that of tolerance. I will elaborate this point when I discuss the possibility of seeing conscientious exemption as a way of applying the principle of equality.

The second kind of tolerance is pragmatic tolerance. Here, the tolerant person tolerates the other because he thinks that in given circumstances it is in his or society's best interest to do so.

Numerous reasons can lead to pragmatic tolerance. The tolerant person may think that persecution is too expensive; that he does not have enough power to succeed fully in his persecution; that the harm to society as a whole, as a result of the persecution, will exceed the harm caused by the (intolerable) other; that recognising the state's power not to tolerate will lead to its misuse; that coercion is not effective in changing intolerable values or beliefs; that tolerating today's minority increases a person's chance of being tolerated if he finds himself in tomorrow's minority, and so forth.

The main feature of pragmatic tolerance is its contingent nature. It is all a question of risks and opportunities in a given time and place. Nevertheless, this kind of tolerance is not to be taken for granted. Although it may seem as a second best because it is contingent and because it is not grounded in human rights, its outcome is still peace.

The third kind of tolerance is *tolerance out of mercy*.[24] One can tolerate other people's physical or mental limitations just out of mercy

to tolerate. For the sake of simplicity I will ignore this conceptual point and will refer to motives and reasons for tolerance indiscriminately.

[23] J Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed), *Issues in Contemporary Legal Philosophy* (1987) 313.

[24] Raz (n 18) 402.

although one finds them repulsive and would like to avoid their presence. An authorised officer can grant a pardon to a convicted felon because of the felon's health condition. The felon does not have a right to a pardon and it is hard to think of any pragmatic reason to justify it. Mercy is an accurate explanation of this kind of tolerance.

Putting forward these different motives for tolerance it should be noted that the idea that the nature of conscientious exemption is first and foremost that of tolerance reconciles any disagreement there may be about seeing conscientious objection as a right or any disagreement about the limits of that right. This is so because the principle of tolerance contains or covers cases where one has a right to be tolerated (by being granted conscientious exemption) as well as cases where no right exists, hence the ruler has a discretion whether to tolerate the objector out of pragmatic reasons or out of mercy. In other words, the question whether there is a general right to be granted conscientious exemption is in many aspects irrelevant for the argument of this paper for even if there is such a right it is in fact no more than a right to be tolerated.

Conscientious exemption as tolerance

The general argument

The above description of the nature of tolerance and its motives makes it clear why conscientious exemption can sometimes be understood in different ways but almost always as the outcome of tolerance.

The very fact that a conscientious exemption is granted from a general legal rule presupposes that the ruler does not share the conscientious objector's values or his way of balancing between values, and considers that it would be unbearable and indeed intolerable if everyone shared the objector's kind of conscience and reasoning; otherwise the exemption would have been the general rule rather than the exemption to it. Indeed, from the point of view of the ruler, tolerance is almost always the justification for granting conscientious exemptions.

The general argument: some clarifications

The general argument that granting conscientious exemptions is almost always the outcome of tolerance needs a few clarifications. Most of them merely explain the argument in more detail. Two of them, however describe the only two cases (albeit quite marginal ones) where the argument does not apply.

Firstly, more can be said regarding the distinction made above between the case in which the ruler does not share the conscientious objector's values and the case in which the ruler does not share the conscientious objector's balance of values or balance of reasons. This distinction stresses that conscientious exemption is the outcome of tolerance even when the ruler and the conscientious objector share the same values and differ only in the weight they give to these values (or reasons). Moreover, the ruler and the objector may differ only in evaluating factual circumstances that affect the weight that is or should be given to certain values (or reasons). Either way, the right discourse is still that of tolerance.

Secondly, the argument that granting conscientious exemption is almost always – and in all central, common and paradigmatic cases – the outcome of tolerance might be seen as too broad and too ambitious to be true. Are there not some important cases, one may ask, in which granting conscientious exemption has nothing to do with tolerance? I suspect that there are not, subject to two marginal exceptions that will be discussed shortly. In the following paragraphs I will analyse some specific cases of granting conscientious exemptions that may appear to have nothing to do with tolerance. Nevertheless, I shall argue that tolerance can be found in these cases as well.

Granting conscientious exemption is an act of tolerance even in cases where the legislature has not foreseen the harm caused to freedom of conscience. This could happen when the legislature fails to anticipate the impact of a specific law on one's conscience, when the harm is caused because of a change in the circumstances, or when the harm is a result of an unanticipated demand created by various laws operating together, and so on. In all these cases the fact is that the law now demands what the conscientious objector does not want to do and in a way cannot do. The legislature now has three options: to change the general demand of the law in a way that granting conscientious exemption would not be necessary; to leave the general demand intact but to add a statutory conscientious exemption to it, or to do nothing. By choosing the second option over the first the legislature implies that whatever the reason for the clash between the demand of the law and the conscientious objector's conscience, now that the clash is clear the general rule should not reflect the objector's conscience. That alone shows that – at least to some degree – the attitude of the legislature is that of tolerance.

Granting conscientious exemption is an expression of tolerance also in cases where the exemption is granted to anyone who claims it, i.e. to

anyone who declares himself as a sincere conscientious objector. Take, for example, the duty to take a religious or a religiously-oriented oath whenever one testifies in court. Even when an exemption is granted from that duty to anyone who claims it, the fact remains that the general rule demands a religious oath and not simply any oath or affirmation. One may argue that such an exemption reflects a pluralistic approach or mere indifference. In my opinion this is a case of what can be called 'symbolic intolerance' on the one hand and 'de facto tolerance' on the other hand. Symbolic intolerance – because the law reflects symbolic preference for religious values and by definition rejects non-religious values. De facto tolerance, because no harm (other than symbolic) is caused to the objectors' conscience.

More generally, when the law sets a rule, e.g. a duty to vaccinate one's child, and explicitly exempts from the rule any sincere conscientious objector, it is plausible to assume that this model of granting exemptions would be applied only as long as the anticipated number of the objectors will not jeopardise the rationale of the rule itself. In other words, since the objectors will be granted exemptions only up to a certain quota, i.e. since the ruler would not want to face too many people who hold an 'anti-vaccination conscience', there is at least an implicit notion of tolerance at the basis of this kind of exemption as well, although in a weaker sense than the one we can find in typical cases of conscientious exemption.

Finally, granting conscientious exemption can be understood as an expression of tolerance even when it may be perceived at first sight as favouritism, such as in cases where the exemption is granted only to one kind of conscientious objectors, e.g. to religious objectors. Take for example the Israeli case (which is now under re-evaluation) in which all orthodox-religious students ('Yeshiva students') are exempted from compulsory enlistment in the army, whereas secular students as such, and secular-conscientious objectors who are not pacifists, are not.[25] One can argue that limiting the scope of the exemption to religious reasons has nothing to do with tolerance but with favouritism or perhaps with

[25] Although it is less a religious-conscientious exemption and more a religious-cultural one, the example is still relevant to our argument. It is worth mentioning though that this specific exemption can also be perceived as a cultural-conscientious one. In other words, we can describe three kinds of conscience. The first kind is a personal-secular conscience, the second is a religious conscience and a possible third, that I will not explore here, is a cultural one, in which the perception of norms is governed by social conventions. For this perception of 'cultural conscience' see: G Grisez, *The Way of the Lord Jesus: I: Christian Moral Principles* (1983) 73–96.

substantive equality. Nevertheless and as a matter of fact, this exemption is granted because the ruler believes it does not result in significant compromise of important state interests (e.g. national security). The ruler may sympathise and even identify with the religious values and culture that are the reasons for granting the exemption, and may even see them as more valuable than non-religious ones; but as long as compulsory enlistment to the army is the general rule it is clear that this religious exemption will be granted only up to the point at which the purpose of the law will be diminished. In other words, assuming the government believes in the necessity of compulsory enlistment to the army, it surely hopes that the religious values and culture that dictate absolute objection to obey the general rule will not be held by too many people in society. Regardless of how valuable the government thinks these values are, it would not want them to be held by the state itself. Thus, the willingness to grant the exemption does reflect an attitude of tolerance, although it is a much weaker notion of tolerance than the one that can be found in other cases of granting conscientious exemptions and although it is indeed mixed up with what may be called pluralism or even favouritism.

The same line of argument can be taken in regard to other cases, such as exempting the Amish from mandatory educational requirements and exempting religious minorities from Sunday laws. In the well-known *Yoder* case,[26] where an exemption was granted to members of the Amish community from a compulsory education law, the court clearly favoured a religious way of life over non-religious ones, at least in the constitutional context of granting conscientious exemptions, when it stated that 'a way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations'.[27] Moreover, the court praised the Amish way of life, was clearly sympathetic towards its unique culture and even referred to their way of educating their youth as equally valuable.[28]

Nevertheless, the Amish community presents a very special case. They are a powerless minority, very small in numbers, have no aspiration to gain political power or to influence the public sphere, and actually are not likely to gain sufficient power to threaten the majority in any way. One may claim that these characteristics lead to a conclusion that in fact the majority does not carry any burden by granting the exemption; that there was no need to exercise restraint from harming the Amish in this case; and thus that it is not right to describe the court's attitude as tolerant.

[26] *Wisconsin* v. *Yoder* 406 US 205 (1972). [27] *Ibid*. 215. [28] Cf. (n 26) 222–3.

I believe, however, that by taking these characteristics into consideration there is an element of tolerance in the ruler's attitude. Unless the ruler would not mind if the Amish culture became dominant in the United States, and provided the ruler is willing to grant the exemption precisely because there is no chance for the Amish culture to be dominant, there is a small element of tolerance in its attitude, although indeed mixed up with sympathy and respect.

The same can be said about religious exemptions from compliance with Sunday observance laws. Firstly, the choice of Sunday as the official day of rest is clearly not the result of a neutral choice as to the 'right' religion, even if religion is perceived merely or mainly as a cultural phenomenon. Secondly, and as I see it, religious exemptions from Sunday observance laws are always granted on the assumption that the number of the religious objectors is relatively low. Moreover, there is always the hope, even if only a hidden one, that their numbers will not go up – at least not significantly. Once again, whatever other attitudes one can find in this case, the attitude of tolerance would also be found.

Until now I have described how and why the principle of tolerance explains the nature of conscientious exemption. I have argued that granting conscientious exemption almost always reflects an attitude of tolerance. I also mentioned that this argument has two exceptions.

According to the first exception, granting conscientious exemption does not have to be the outcome of tolerance when the exemption is granted from compliance with a law that has ends, and uses means to achieve those ends, which have nothing or very little to do with the values the legislature holds or wishes to promote or when in it is highly unlikely that these values would be disputable.

Perhaps the clearest example of such a law is one the sole purpose of which is to coordinate behaviour. I do not mean a law that coordinates behaviour as a means to an end that may itself be disputable as a matter of conscience or values (e.g. income tax laws). Rather I mean a law that coordinates people's behaviour for purposes that have nothing or very little to do with morality or deeply held beliefs.[29] Such laws typically protect personal or public safety, for example laws that provide that there should be traffic lights, or stipulate the colours that signal cars and pedestrians to go or to stop, or stipulate the side of the road on which to drive; safety laws that, for example, set a limit on the number of people

[29] Here I wish to set aside the argument that coordinating behaviour is itself a moral virtue of the law.

that are allowed on a plane, or in a car, lecture room and so on; laws that decide when an agreement amounts to a binding contract and so forth.

The reason why granting conscientious exemptions from such laws does not have to be, and presumably will almost never be, an act of tolerance is quite clear. Although these laws might contradict the conscience of some, the fact that these laws merely coordinate behaviour, and anyway do not reflect any significant moral decision made by the legislature, means that granting a conscientious exemption from them can – but does not have to – entail any negative judgment about the objector's conscience.

This exception to the general argument does not affect its strength since in fact it is hard to imagine an example of conscientious objection to laws that merely coordinate behaviour. As was noted, these kinds of laws are extremely unlikely to be disputed as a matter of conscience.[30] Indeed, this exception is close to being a hypothetical one or at least presents no more than a peripheral case that should not affect the general way of understanding what a conscientious exemption is.[31]

The same can be said about the second exception to the understanding of conscientious exemptions in terms of tolerance. Up till now I assumed that conscientious exemptions can be given and are given from legal demands, duties or prohibitions. Whereas this is indeed the usual case one can think of other cases in which conscientious exemptions are or can be given from a law that does not impose duties or prohibitions but grants what the ruler perceives as a right or a benefit.

Take for example a law that states that a person, who, as a result of injury or illness, lacks the ability to consent to medical treatment, is deemed to consent to life-saving or simply beneficial medical treatment

[30] But see for example in *State* v. *Hershberger* 462 NW2d 393 (Minn 1990), where the law in Minnesota required an orange and red triangular slow-moving vehicle sign to be displayed on buggies and wagons. Some Amish residents, however, believed the bright colours of the sign and the symbol itself would put their faith in 'worldly symbols' rather than in God. As a result some of them preferred to display a black triangle, whereas others refused to use any sign and instead outlined their buggies with silver reflective tape. The court did exempt the Amish from the specific requirement of displaying the orange and red sign. It is quite clear that in this case no negative judgment of the Amish values or beliefs or of their way of balancing values or reasons has to accompany the granting of the conscientious exemption. This is so because the question of the exact shape and colour of warning signs is not a question that usually underlies moral or political disagreement and in any case did not reflect a moral decision of the legislature.

[31] For the general approach in jurisprudence of identifying the central meaning of a concept while putting aside whatever represents peripheral cases that do not affect the focal meaning of that concept, see: HLA Hart, *The Concept of Law* (2nd edn, 1994) 3–17.

administered by state authorities. Some may object to this presumption of consent on religious grounds. Jehovah's Witnesses, for example, may do so in relation to blood transfusion. Exempting Jehovah's Witnesses from the application of the presumption (for the sake of the argument I ignore expected administrative difficulties) may reflect an attitude of tolerance (in cases involving minors or if the state itself has an interest in granting medical treatment to its injured or ill residents), but equally may not. However, much as in the former case, claiming conscientious exemption from laws that do not impose duties or prohibitions is rare and are no more than a marginal exception to the general argument for seeing conscientious exemptions as first and foremost acts of tolerance.

To sum up, it is right to view accommodating conscientious objections by granting conscientious exemptions as a paradigm of tolerance for two main reasons. Firstly, in almost all cases, and in all the typical ones, it describes the attitude of the state in the most accurate way. Secondly, the concept of tolerance, however narrow in some aspects, is wide enough to describe conscientious exemption and its essence in almost all cases, and to be capable of accommodating various other – even non-compatible – ways of understanding it. More specifically, the idea of seeing conscientious exemption as tolerance is no less valid or strong because one thinks there is a right to be granted conscientious exemption or that it is a matter of the state's discretion or grace; or depending on whether one sees conscientious exemption mainly as a communal right or as an individual right. Conscientious exemption may be perceived as any of the above ways in particular cases but still typically reflect tolerance.

In the following I will argue that the principle of equality fails to explain the nature of conscientious exemption, at least in some central cases, and therefore cannot be seen as a general explanation for it. The following argument will illustrate the accuracy of seeing conscientious exemption as a paradigm of tolerance and will also try to remove some conceptual inaccuracies and ambiguities regarding the principle of equality.

Conscientious exemption as equality

I will discuss only some relevant features of the principle of equality and will contrast this principle with that of tolerance to produce a better understanding of the nature of conscientious exemption.

At first sight it seems that granting conscientious exemption is all about equality. It can be argued that a justifiable conscientious exemption is one that is granted only to those who are different from the

non-objectors or from the not-conscientious objectors in some relevant way. However, things are more complicated than that. There are some deficiencies and ambiguities in the principle of equality that make it a less suitable candidate than the principle of tolerance for explaining the nature of conscientious exemption.

Firstly, there is the well-known view about the 'emptiness' of the principle of equality. If this view is true then there is little sense in describing a concept or explaining a practice by turning to an 'empty idea'. The emptiness of equality can be described in two different ways.

Firstly, by arguing that the entitlements people attribute to the idea of equality derive from external substantive rights which are valuable for independent reasons.[32] Secondly, by arguing that the proposition that 'people who are alike should be treated alike' is tautological. If these arguments are sound, equality will provide no meaningful and independent foundation for rights and will not be a good candidate for explaining the nature of conscientious exemption.

The first argument about the emptiness of equality may be true only when rights, as opposed to benefits, are involved. When F has a right to G, his right to G is indeed an independent reason to grant him G regardless of whether or not others have G.

Raz gives the example of a father who deceives one of his children but not the others, as an example of what he identifies as a misuse of the principle of equality. Raz argues that accusing the father of unequal treatment misses the nature of the wrong for the same wrong (deceiving one's child) can exist in situations involving no inequality.[33]

Nevertheless, one should be aware that equality does have a role even in this kind of cases. In my opinion, Raz's example presents two wrongs. The first is deceiving one's child and the second is deceiving only one child and not the other(s). The deceived child has two separate rights: not to be deceived and not to be the only one who is being deceived.[34] Discrimination is a separate and additional wrong which causes additional harm. In some cases, discrimination – which is more than simply not respecting one's 'substantive' rights – results in humiliating the right-holder. It is one thing not to be granted conscientious exemption in a state where conscientious exemptions are denied to all conscientious

[32] Raz (n 18) 240. [33] *Ibid*. 228–9.

[34] This is not to say that it would have been better had the father deceived all his children. The cases I am comparing are the case where a father deceives his only child and a case where he deceives only one of his children.

objectors (or when one is the only conscientious objector), but another to live in a state that does grant exemptions, and not to be granted an exemption because the ruler despises one's particular conscience with no good reason.

Moreover, although the above argument about the emptiness of equality is valid (in part) only when rights are involved, it is not valid every time rights are involved. More specifically, it is not valid when human rights are involved. If F has a right to G simply by the virtue of F being human (i.e. G is a human right) then equality of human beings is the reason why any F has a right to G to begin with. Thus, even in cases where F has an independent right to G, equality may still play a role in supporting F's right to G. In the present context it might be argued – and I will refrain from exploring this point – that in some cases being granted conscientious exemption or being tolerated amounts to a human right.

When F does not have a right to G, a right to G is created when G is given to other Fs by the ruler. In this case, although no F has a right to G, when G is given to some Fs – as a matter of grace – then all Fs acquire a right to G as a direct result of the principle of equality. Therefore, even if there is no right to be granted a conscientious exemption, when conscientious exemptions are given to some, as a matter of grace, that alone may give other conscientious objectors a right to be granted such exemptions.

Thus, equality does matter. F can have a right to G when no equality considerations are involved. F can also have a separate or additional right to G that derives solely from the principle of equality.

Raz himself acknowledges the above when he puts forward some 'strictly egalitarian' principles such as 'In scarcity each who has equal entitlement is entitled to an equal share' and 'All Fs who do not have G have a right to G if some Fs have G.'[35] However, Raz, like many others, does not explain how we are to decide exactly who are those who have equal entitlement or how can we identify Fs and distinguish them from non-Fs. This is not surprising since this explanation, which lies at the heart of the principle of equality, cannot be given without assuming the validity or the strength of some values and the invalidity or the weakness of others. Even when an agreement is achieved as to the validity and the weight of a certain value, a need to balance valid values may arise. The result of the balancing process will depend, again, on the weight one gives to changing factual circumstances, which is also a moral decision. As a

[35] Raz (n 18) 223–7.

result, it is virtually impossible to stipulate a general principle or firm guideline for deciding when one is different from another in a way that justifies non-equal treatment.

Bernard Williams argues that 'for every difference in the way men are treated, a reason should be given' and that that reason should be 'relevant'.[36] I believe there is no doubt that this is true. However, all too often, there is no agreed way to decide when one is relevantly different from the other. All too often it is merely a question of unshared values or balance of reasons. Therefore, these values or reasons should be our main concern and not the principle of equality. In other words, when two sides disagree about what exactly the principle of equality requires, their disagreement is not about the concept of equality but about other substantive values.

Therefore, equality is indeed an empty idea but only in part. In many cases the main question – who is equal and who is not – remains open as in most important cases no meaningful guidelines can be given to answer it.[37]

The idea of tolerance fills this emptiness with some content. As was mentioned earlier, there is an interesting relation between equality and tolerance. In short, while tolerating someone and treating him equally (i.e. granting him equal treatment) can involve identical behaviour or lead to the same result, there are important differences between these concepts that are sometimes overlooked.

Although the result of tolerance is usually identical to the result of an equal treatment approach, the tolerant person, while comparing himself to the other, either thinks of himself as superior or thinks that his values are superior or that his manners are more appropriate and so on.[38] Nevertheless, he treats the other equally because the other has a right to be tolerated (in the name of autonomy) or for pragmatic reasons or because of mercy. It can be said that the tolerant person treats equally things he regards as unequal. Equality as such is not a justification or an explanation for the 'tolerance as a right' approach. It is not sufficient to say that the tolerated person has a right to be treated equally. The real

[36] B Williams, *Problem of the Self* (1973) 241.

[37] See also HLA Hart, 'Are There Any Natural Rights' in A Quinton (ed), *Political Philosophy* (1967) 65: '*any* differences between men could … be treated as a moral justification for interference and so constitute a right, so that the equal right of all men to be free would be compatible with gross inequality'.

[38] I wish to ignore the hard and unusual case of a self-hating person who tolerates (or does not tolerate) others not because he thinks they or their values or manners are inferior but because he sees in them what he hates about himself. This example also suggests that one can tolerate oneself (or not, i.e. harm oneself). I will not elaborate on these points except to say that they can be seen as rare exceptions to the general notion of tolerance.

question is why he should be treated equally. The answer (and therefore the essential justification) is that he sometimes has a right to be treated equally, even though he or his values are not equal, because he has a limited right to personal autonomy or to human dignity. The substantive rights of personal autonomy and human dignity that ground tolerance (as a right) fill the 'empty idea' of equality with some content.

Equality of persons or their values cannot be the basis for tolerance for the simple reason that tolerance entails a negative judgment of the other or his values. If I, as a man, treat women equally because I do not see any relevant differences between men and women, I cannot be regarded as tolerant. If I, as an atheist, treat religious beliefs and practices in the same way as I treat non-religious ones because I see them as equally worthy, I again cannot be regarded as tolerant. The tolerant person does not grant equal treatment to others or avoid harming others because they are equal but despite his belief that they are not equal.

It is one thing to think 'I will treat you equally because there are no relevant differences between us, our values and so on' and another to think 'I will treat you equally although you (or your values and so on) are different and inferior in relevant aspects, since otherwise your personal autonomy or human dignity will be harmed or because you have a right not be harmed despite your inferiority'. The latter reflects tolerance more accurately than the former.

If we follow Raz's argument about the principle of equality, then the very fact that we are discussing tolerance as a right implies that equality is of little importance for us. When F has a right to G (to be tolerated), his right to G is an independent right that has nothing to do with equality. F has a right to be tolerated regardless of other Fs being tolerated. Only when one sees tolerance as grace can one argue that equality matters since now F has a right to be tolerated only if other Fs are being tolerated in relevantly similar circumstances.

It is also quite clear that pragmatic tolerance, i.e. tolerance as a result of pragmatic reasons, as well as tolerance as grace, has nothing to do with respecting the other or thinking of him as an equal.

Thus, whether there is a right to be granted conscientious exemption or whether it is a matter of the ruler's discretion (because he may decide to grant it for pragmatic reasons or as a matter of grace), tolerance is, again, a wide enough, and the most accurate way, to explain the nature of this exemption. Although the principle of equality may be important for understanding the nature of conscientious exemption, it does not capture its essence and cannot explain it in all circumstances.

All the above might lead to rethinking the concept of equality or its common definition. Equality is usually explained as 'treating equals equally' or as a demand that 'people who are alike should be treated alike'. Accordingly, people who are not alike should be treated differently. However, the discussion above shows that one can have good and overriding reasons to treat equally people who are not alike in his view. He can do it out of tolerance, i.e. out of a negative view of the other, or out of neutrality, i.e. out of refraining from making any judgment about whether the other is equal, or out of indifference, i.e. out of lack of a relevant opinion about the other being equal.

It can be argued that whenever a person treats another equally then at least in one aspect he sees him as equal. I think this is misguided. In my opinion, the tolerant person always holds a negative judgment of the other even when he treats him equally. If that is true then the above definition of equality is not completely accurate since one can have good reasons to treat equally people who are not alike in his view; and despite the common view that equal treatment towards people who are not alike is actually unjustified discrimination, it does not have to be so.

The principle of equality has an interesting role (that demonstrates nicely its drawbacks) in cases where exemptions can be granted up to a specific quota which is less than the number of conscientious objectors. If equality (within the group of conscientious objectors) is the governing principle in these cases then there is no escape from levelling down the entitlement so that no one is granted the exemption. If freedom of conscience is the governing principle in these cases – as I think is the case – then one should find the solution that would maximise the protection given to conscience (or to autonomy) without giving up the rationales of the justified general legal rule, namely granting exemptions only to some objectors. The choosing process can be a result of a ballot that, however arbitrary, reflects equality of opportunities. Indeed, the principle of equality is not and should not be ignored completely.

Note that it can be claimed that granting exemptions only to some objectors can be derived from the principle of equality as well. If we compare not the objectors who got the exemptions and those who did not, but the objectors and the non-objectors, it can be argued that not granting exemptions to anyone would cause greater discrimination between objectors and non-objectors than of granting exemptions to only some objectors. I will refrain from discussing this argument further since I believe that equality is in any event not the governing principle in these special cases.

The governing principle should be that of tolerating the maximum freedom of conscience that it is justifiable to tolerate. In short, freedom of conscience is not different from other goods that can be distributed only to some who are relevantly equal to others and have equal entitlements to these goods, or indeed, rights. If a local government body can finance shelters that can accommodate 200 homeless people, but there are 300 of them in its jurisdiction, there is not much sense in not accommodating any of them in the name of equality. If the distribution process itself is fair – as in the case of a ballot – the claim to equality loses much of its strength and cannot justify denying the goods to everyone. Regarding conscientious exemption, no doubt its main concern should be tolerating conscience as much as possible, and not as equally as possible, when both aims cannot be achieved simultaneously.

A final counter argument regarding the importance if equality should be addressed. It can be argued that as far as there is a right to be granted conscientious exemption, the concept of equal respect, and not that of tolerance, is more helpful in understanding the nature of conscientious exemption. One can understand the concept of equal respect in several ways. None of them, however, succeeds in explaining the nature of conscientious exemption or in describing the rationales for granting it in all cases.

Two influential liberal writers who put 'equal respect' at the basis of their political theories are Rawls and Dworkin.

According to Rawls, people have a right to equal concern and respect in the design of political institutions. This is a natural right which is held by humans because they are humans and as long they are moral persons who have the capacity to make plans and give justice. When discussing the basis of equality Rawls uses 'equality' and 'justice' indiscriminately and sees equality as what underlies human rights, including the Rawlsian list of basic liberties.[39]

Dworkin argues that the right to be treated as an equal (which is different from the right to equal treatment) is 'the right to equal concern and respect in the political decision about how … goods and opportunities are to be distributed'.[40] According to Dworkin, 'individual rights to

[39] J Rawls, *A Theory of Justice* (1971) 504–12. For Rawls' 'equal-liberty' see especially 62, 124, 392.

[40] R Dworkin, *Taking Rights Seriously* (1978) 273. Dworkin emphasises the priority of equality over liberty by focusing on equal concern and respect (i.e. treatment as equals) as the core of human rights.

distinct liberties must be recognised only when the fundamental right to treatment as an equal can be shown to require these rights'.[41]

I will not discuss the similarities and differences between Rawls' and Dworkin's concepts of 'equal respect'. I shall concentrate on one ambiguity in the general demand for equal respect – that is the difference between respecting people's values, opinions or conscience, and respecting people qua people. I will also argue that regardless of what 'equal respect' actually refers to, it cannot explain the nature of conscientious exemption in all cases.

Thomas Scanlon's argument about the principle of tolerance demonstrates the ambiguity in 'equal respect'. When discussing the proper response to intolerant persons who by definition hold intolerant views, Scanlon argues that we should not regard those views as entitled to be heard in the public sphere. However, he then argues that we must distinguish between intolerant opinions and their holders, and as a result 'it is not that their *point of view* is entitled to be represented but that *they* … are entitled to be heard'.[42] This entitlement, according to Scanlon, derives from them being fellow citizens who have an equal place in society.

Now, if we put together the concepts of equal respect and that of conscience, is granting conscientious exemption a way of respecting one's conscience, one's personality or one's 'equal place in society' or none of those?

I already rejected the view that granting conscientious exemption implies respect for the content of one's conscience. On the contrary, it implies first and foremost a negative view of one's conscience. If so, does granting a conscientious exemption imply respecting the conscience-holder rather than the conscience itself?

Here again the answer is no. Granting conscientious exemption is not always the result of equal respect. It may be a result of pragmatic tolerance. Conscientious exemption can be granted to a group of intolerant people out of pragmatic reasons even though we despise them and believe their conscience to be highly immoral, and thus believe that in principle they and their values do not deserve an equal place in society. It may also be justifiable to do so when, on the one hand, granting the exemption will result in minor 'symbolic harm' rather than actual harm to public policy or to rights of others; and when, on the other hand, not granting the exemption will lead the intolerant group to cause actual and meaningful harm to others and when preventing this expected harm is

[41] *Ibid*. 273–4. [42] Scanlon (n 21) 197.

too expensive. In other words, conscientious exemption can be justifiably given to people who do not deserve any respect, if doing so is the best way to protect rights of others or important public interests.

Therefore, granting conscientious exemptions, even justifiable ones, does not always rely on equal respect. Again we see how tolerance captures the nature of conscientious exemption in all cases whereas equality – and this time the more specific concept of equal respect – does so in only some of the cases.

Conclusion

In this paper I explored two different ways of understanding the nature of conscientious exemption, whether religious or non-religious.

I suggested that the principle of tolerance solves the difficulties of other explanations and successfully describes the nature of conscientious exemption in almost all cases. It offers the best description of the state of mind and the behaviour of the ruler and it is wide yet precise enough to accommodate all the other – however contradictory – explanations. Whether there is a right to be granted conscientious exemption and whether conscientious exemption is a matter of grace or discretion; whether it is an individual right or a communal one; whether it protects minority rights or not; whether it reflects equal respect or not – tolerance succeeds in capturing and describing the nature of conscientious exemption better than any other legal, moral or political principle or idea.

The argument that conscientious exemption should be understood as the outcome of tolerance is not merely a conceptual argument although analytical jurisprudence in general and in this case in particular does have its independent value. This is also an argument that leads us to discuss the right cases in which to grant conscientious exemptions in terms of the general question of the limits of tolerance and more specifically – the limits of tolerance of objections to obeying law based on religious or secular values. This question remains to be addressed.

12

Law's sacred and secular subjects

NGAIRE NAFFINE*

In modern law we exist as a plurality of persons. This is essentially my thesis, starkly put: that we are plural not unitary beings in law and that necessarily our law is, in this sense, pluralistic. Each one of us inhabits our legal world as multiple beings, as multiple subjects, as it could be said we do in life.

The legal world that forms the focus of this paper is that of modern centralised Anglo-American-Australasian state law. Adopting the usage of Peter Cane, I will call this 'Anglian' law and thus refer to 'legal systems the conceptual structure of which is derived from that of English law'.[1] It is within this formal legal arena – its doctrines, its principles, its interpretations – that I wish to examine our plurality of being. We exist, of course, as all sorts of persons outside this formal state-institutionalised law. In the many extra-legal roles we perform (within the family, at work, socially and so on)[2] and in the various cultures we inhabit (be they religious or sexed or sexual or indigenous or whatever), our very persons may be said to transmogrify or multiply. And indeed our extra-legal lives may assume such practical and symbolic importance that our legal personalities may seem to pale in comparison. Some might even say that these other ways by which we order, regulate and make sense of our lives represent rival laws or even rival legal systems.

But here my intention is not to enter a larger debate about the nature of legal pluralism.[3] My more modest point, though still a substantial one,

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[1] P. Cane, *Responsibility in Law and Morality* (Oxford: Hart, 2002) 7. Cane also refers helpfully to 'a family of legal systems the conceptual structure of which is based on English law' (10).

[2] All of which may have their legal counterparts.

[3] For a recent critical account of the variety of theories of legal pluralism, see B. Tamanah, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

is that plurality of personality *also* characterises our legal life *within* centralised Anglian state law. This plurality of personality, I will suggest, allows us to possess both a sacred and a secular legal nature, sometimes at the same time, setting up a dynamic tension within our legal being and posing, at times, perplexing problems of legal adjudication.

This is not the received view of how we are in our modern state law (which is, from now on, the law I am describing). The most influential *political* story of our nature in law, I suggest, is that we are unitary rational contractual individuals. This is the Lockean story of contract and of the rise of the modern autonomous individual. In this view we are rational self-interested choosers. Our nature is integrated by reason and by a rational desire to self-maximise in the choices that we make.[4] We are fitting legal subjects who can assume rights and duties because of our defining capacity for reason which enables us to engage in rational choices and to be held to account for those choices.

The most influential *legal* story of our nature in law is rather different. It is that we exist in law as purely legal abstractions of shifting rights and duties. This is a strictly positivist and technical view, that we are brought into legal being only according to legal purposes (which can be highly variable) and that we exist in law *only* in contemplation of law. In this highly orthodox and *legalistic* story, we enter law not as full rich natural or political or social beings, with all our personalities and physicality intact, but purely as abstractions: as right and duty bearing units. The legal person is this view is a piece of legal artifice. These are the two dominant versions of our legal natures: the liberal political and the legalistic.

I will argue, further, that in law we appear in at least two other guises, which co-exist most uncomfortably with these two more orthodox accounts of our legal natures. Moreover, I will suggest that the discomfort is borne more by some than by others. In law – in legal doctrine and also in legal theory – we can also be endowed with a *religious* nature as supposedly sacred beings and this sanctity is seen, by some, to start with conception[5] and proceed to death. My point here is that a religious understanding of our persons is to be found *within* formal state law,

[4] Note that this is the story boldly and concisely told, which inevitably is subject to qualifications and modifications in different renditions. Nevertheless, it remains highly influential.

[5] The view that our human sanctity begins at conception is most associated in legal scholarship with the work of John Finnis. For a recent endorsement by Finnis of this view, see J. Finnis, '"The Thing I Am": Personal Identity in Aquinas and Shakespeare' in E. F. Paul, F. D. Miller Jr and J. Paul (eds.), *Personal Identity* (Cambridge University Press,

which is more typically rendered as secular in orientation.[6] We are, further, accorded a *natural material* embodied nature: as the sort of beings that the physical and biological sciences understand us to be.[7]

In short we have multiple identities in law, but they tend not to be explicitly and mutually recognised or countenanced, all at the same time, because they tend to contradict rather than to re-enforce or complement one another. They are in parts incommensurable. They can represent quite different and contradictory ways of interpreting our legal nature. For example, the modern liberal political understanding of us as autonomous moral individual agents is in tension with a more traditional understanding of us as God's creatures and as deriving our value and nature from his act of creation, rather than from our human capacity to reason. A traditional Christian understanding of us as sacred spiritual beings, made in God's image, is in tension with a more modern biological, naturalistic and typically secular understanding of us as material beings, possessed of a physical animal nature and made in no one's image. And of course a legalistic view of our personalities in law eschews both Christian and naturalistic understandings: for the idea is that law can and implicitly should retain its conceptual autonomy and should rely purely on legal technique; and so the concept of the person *in law* should not be confused with its political or spiritual or biological counterparts.

Some persons experience their multiplicity of legal identity in more pronounced, more confusing ways than others. Pregnant women, I will suggest, have particularly felt the force of these contradictions and so they make especially useful case studies of multiple personality in the one individual. They are assumed to be rational agents and legal subjects, but they are also the custodians of, to some, a sacred foetus which appears to diminish their natural capacity for autonomy and to divide their physical natures, generating a curious responsibility for another who is not legally another.

There are active and influential representatives of each legal view of us: the legalistic, the political, the religious and the naturalistic. They are to be found in the academy, the courts and the legislature. Advocates of the

2005) 250. See also J. Finnis, 'The Priority of Persons' in J. Horder (ed.), *Oxford Essays on Jurisprudence* (Oxford University Press, fourth series, 2000) 1.

[6] The recent case of *Kitzmiller* v. *Dover*, to be discussed below, represents a strong clear statement about the importance and meaning of the constitutionally mandated separation of Church and state in the United States.

[7] There are still other natures. Our racial nature may be said to represent another strong persona, for example. So too may our sexed nature. But these are the natures I have chosen to focus on.

Christian view of us as sacred subjects can be liberal and moderate or fundamentalist. Christian fundamentalists have been conspicuous of late, pressing their views of creation,[8] of embryonic and foetal sanctity[9] and of the sanctity of the dying,[10] and demanding that law directly reflect their credo: that their conception of sacred humanity be directly reflected in law's understanding of its person.[11]

I have some sympathy for the legalistic (that is, strictly legal) view of our legal natures, as rights and duty-bearing units. And yet I accept that it can be an arid, unattractive lawyerly understanding of our legal lives, which leaves out too much. It helps to accentuate the technique of law which produces right and duty-bearing units: that is strictly legal persons. But it fails sufficiently to recognise the many ways in which the other understandings of what we are – the liberal political, the religious and the naturalistic – find their way into law and shape, indeed force, our legal natures by influencing the distribution of legal rights and duties.

To proceed with my thesis, I need first to give a brief account of each of the persons I believe we can find in law: the legalistic, the political, the sacred and the naturalistic.

A strictly legal view of our legal nature

Legal persons, according to John Salmond, are simply those 'beings' whose attributes are rights and duties. 'It is *only* in this respect that persons possess juridical significance, and this is the *exclusive* point of view from which personality receives legal definition.'[12] (my emphases) In other words, the only attributes of legal persons are their legal rights and duties. In a similar vein, Hans Kelsen has contended that 'A legal

[8] As in the *Dover* case, to be discussed below.

[9] As in the recent Australian debate about the 'abortion drug', RU486. Catholic Australian Health Minister, Tony Abbott, staunchly opposed use of the drug. On a conscience vote by the Parliament, it was decided that the availability of the drug should be determined by Australia's therapeutic drug regulatory body, the Therapeutic Goods Administration (TGA). See M. Thornton, 'Canberra Commentary: RU486 Sparks a Debate' (2006) 25, 3 *Australian Pharmacist* 199.

[10] As in the case of *Terri Schiavo* on the legality of withdrawal of hydration and nutrition from a person in a persistently vegetative state. Government intervention in the judicial process, on religious grounds, is well documented. For a timeline of social, political and legal events related to this case, see L. O. Gostin, 'Ethics, the Constitution, and the Dying Process' (2005) May *Journal of the American Medical Association* 2403.

[11] John Finnis has been most explicit in this demand: see Finnis, 'The Priority of Persons' 1.

[12] J. Salmond, *Jurisprudence*, 10th edition by G. L. Williams (London: Sweet & Maxwell, 1947) 318.

person is the unity of a complex of legal obligations and rights. Since these obligations and rights are constituted by legal norms (more correctly: *are* these legal norms), the problem of the "person" is in the last analysis the problem of the unity of a complex of norms … The so-called physical person, then, is not a human being, but the personified unity of the legal norms that obligate or authorise one and the same human being. It is not a natural reality but a social construction created by the science of law – an auxiliary concept in the presentation of legally relevant facts.'[13]

Legal persons, in this view, are purely legal abstractions. They consist of purely legal norms. Legal persons do not have the innate capacity to reason or human souls; they do not have arms and legs or bodies or even a sex. The possession of any of these attributes is extra-legal and so necessarily extraneous to any definition of law's person, strictly conceived. The legal person is a pure creation of law, a purely legal concept. As Alexander Nekam insists, 'those to whom the law attributes such a legal personality possess it entirely by the force of the law and not by nature'.[14] Indeed 'There is nothing in the notion of the subject of rights which in itself would, necessarily, connect it with human personality, or even with anything experimentally existing.'[15]

Bryant Smith is another who presses for this legalistic view of personality: a view that vigorously asserts the conceptual autonomy of law. Legal personality, for Smith, is a formal '*capacity* for legal relations';[16] it is 'an *abstraction* of which legal relations are predicated, or … a name for the *condition* of being a party to legal relations'.[17] (emphases added) Clearly he is trying to get flesh-and-blood people and their dignifying or debasing characteristics out of the picture. It is only as rights-holders or duty-bearers that legal persons exist and relate to one another. Rights and duties are therefore the building blocks of legal relations and the sole constituent parts of legal persons. Legal personality, Smith asserts, is 'one of the major abstractions of legal science, like title, possession, right and duty'.[18] It is the ability to participate in legal relations and 'without the relations … there is no more left than the smile of the Cheshire Cat after the cat had disappeared'.[19]

[13] *Pure Theory of Law* (1934 German edition Leipzig and Vienna: Deuticke) 173–4.
[14] A. Nekam *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press) 24.
[15] *Ibid*. 26. [16] B. Smith, 'Legal Personality' (1928) 37 *Yale Law Journal* 283.
[17] *Ibid*. 284. [18] *Ibid*. 293. [19] *Ibid*. 294.

Jurists who hold this stringent legalistic view of the person tend to assert the complete separation of legal persons from other senses of the person, be they sacred or secular. As David Derham, for example, has expressed this abstract quality of persons:

> Just as the concept 'one' in arithmetic is essential to the logical system developed and yet is not one something (eg apple or orange, etc), so a legal system (or any system perhaps) must be provided with a basic unit before legal relationships can be devised … The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure 'concept' as 'one' in arithmetic. It is just as independent from a human being as one is from an 'apple'.[20]

The liberal political story of the legal individual

A second highly influential story of the person in law is essentially liberal and political rather than legalistic and conceptual. It is the story of the rise of modern Anglo-American law, often rendered as a political tale of liberation and enlightenment, of coming to see the world in the light of human reason and so prevailing over the darker forces of nature. It is an account of human progress, of a loosening of the constraining ties of custom and the embrace of efficient and productive human relations of choice. It describes a movement away from inegalitarian natural relations to social relations formed freely through the mechanism of contract. The legal being who emerges from this process of modernisation is often depicted as rational, self-determining and autonomous.

The master teller of the creation story of our modern contractual society and of modern law is Sir Henry Maine.[21] Taking a broad historical sweep, from the medieval to the modern period, he described a shift from a hierarchical or vertical society, based on customary status, to an equal or horizontal society, based on personally chosen contracts.[22] This was a movement distinguished by the loosening of family ties and the gradual emergence of the autonomous modern individual, unencumbered by domestic and community obligations. In the medieval world,

[20] D. P. Derham, 'Theories of Legal Personality' in L. Webb (ed.), *Legal Personality and Political Pluralism* (Melbourne University Press, 1958) 1, 5.

[21] On the strong contemporary influence of Maine on our understanding of modern Anglian law and the modern legal actor, see Brian Tamanah *A General Jurisprudence of Law and Society*.

[22] H. Maine, *Ancient Law* (London: John Murray, 1930) 180.

persons in law were assumed to be interdependent. Each person took their nature and their social role from a place they were assigned by custom, not by choice. Within the medieval household, as Gray and Symes observe, human relations were 'mediated by principles of love and duty … It was a family-oriented, status-dependent form of association'.[23] With the shift to contract '[t]he individual [was] steadily substituted for the Family, as the unit of which civil laws take account'.[24]

Major social theorists have also depicted this change. Max Weber saw it as the shift from a society characterised by fraternal bonds to relations defined by purposive contracts.[25] Ferdinand Tonnies interpreted the move as one from social relations of *Gemeinschaft* (community) to relations of *Gesellschaft* (association).[26] The shift to contract meant an extraction of the individual from obligatory customary social roles, determined at birth, and thought to arise from nature. Human relations were now to be established by rational choice and were to assume a contractual form.

The story of contract could be said to be the official political creation story of the modern person in law, with its intellectual roots in the writings of Locke and Kant. Here we have delivered to us the rational individual facing law and society as an agent in contractual negotiation. Or as Lawrence Friedman recently put it: 'Modern law presupposes a society of free-standing, autonomous individuals.'[27] We have the modern political individual in whom rights can be invested and who can be held properly to account as a rational agent for his plans and his promises and who can be fairly blamed for his wrongdoings.

The sacred person and the material person

The Christian story, I suggest, supplies a third and quite different understanding of our natures in law. Its creation story is about the sacred (rather than the political or legalistic) person who is created by God and

[23] K. J. Gray and P. D. Symes, *Real Property and Real People: Principles of Land Law* (London: Butterworth, 1981) 15.
[24] Maine, *Ancient Law* 168.
[25] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (New York: Bedminster Press, 1968) 673.
[26] F. Tonnies, *Community and Association*, translated by C. P. Loomis, (London: Routledge, 1955).
[27] Lawrence Friedman 'Is there a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117 at 125 and as quoted in Tamanah, *A General Jurisprudence of Law and Society* 120.

in his image and for whom God is a personal God. In its turn, the Christian story stands in strong contrast with the modern scientific and biological view of the naturalists that we are material beings brought into an impersonal universe by the morally neutral forces of random variation and mutation, by way of adaptation to circumstances.

Recently there has been a highly public dispute, played out in a Pennsylvania court of law, between advocates of a fundamentalist Christian view of our nature and exponents of naturalism. The case serves well to introduce us to these two different understandings of the person.

In October 2004, the Dover Area School Board of Directors in the American State of Pennsylvania resolved that 'Students [would] be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design.'[28] In November the Board announced to the press that, from January 2005, ninth-grade biology teachers at Dover High School would be required to read to their students a statement to the effect that 'Darwin's *Theory of Evolution*' must be taught, and would be examinable. But 'Because Darwin's Theory [was] a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist.' Further that 'Intelligent Design is an explanation of the origin of life that differs from Darwin's view' and that 'students are encouraged to keep an open mind'.[29] Students were then directed to read *Of Pandas and People* written by acknowledged creationists and published by a religious publisher.

Tammy Kitzmiller was the mother of a ninth-grade student. Together with a number of other concerned plaintiff parents, Kitzmiller sued the Dover Area School Board and the School District, 'challenging the constitutional validity of a Board policy that required presentation of the concept of intelligent design (ID) in ninth grade biology classes, claiming that it constituted an establishment of religion prohibited by the First Amendment'.[30]

[28] *Tammy Kitzmiller* v. *Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 p5.

[29] *Ibid.* p6.

[30] From Case summary: Procedural Posture. The establishment clause of the First Amendment of the United States Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The Fourteenth Amendment then applies the establishment clause to the states.

In December 2005, the United States District Court for the Middle District of Pennsylvania in essence agreed with Kitzmiller. The court decided that the Board's policy did offend the religious establishment clause of the American Constitution. The court declared that 'The religious nature of ID would be readily apparent to an objective observer, adult or child.'[31] 'The overwhelming evidence at trial established that ID is a religious view, a mere re-labelling of creationism, and not a scientific theory.'[32] ID was not science as it purported to be;[33] it was ineradicably religious and the advocates of ID, who clearly formed a majority on the Dover School Board, thereby sought to change 'the ground rules of science which require testable hypotheses based upon natural explanations'.[34] While proponents of ID 'occasionally suggest that the designer could be a space alien or a time-travelling cell biologist, no serious alternative to God as the designer has been proposed by members of the IDM'.[35] And indeed that God is 'the God of Christianity'. The state school's policy therefore created 'an excessive entanglement of the government with religion'.

The *Dover* case could be said to stand for several propositions. First, and perhaps most narrowly, Darwin's theory of evolution is accepted science and intelligent design is not and could never be accepted science and thus has no place in biology classes in state schools. To require the teaching of ID in science, as a plausible alternative theory to Darwin, is to offend the religious establishment clause of the United States Constitution which asserts a division or separation between Church and state. The Dover court also asserts a division between the religious and the scientific and seeks to preserve the scientific from religious encroachment – and this despite a sustained campaign by 'Christian Fundamentalists'[36] to combine the religious with the scientific in public

[31] From overview. [32] *Tammy Kitzmiller* v. *Dover Area School District* p18.

[33] ID was not science because it 'violates the centuries-old ground rules of science by invoking and permitting supernatural causation' and 'ID's negative attacks on evolution have been refuted by the scientific community'. Moreover 'ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research.' (p24).

[34] *Tammy Kitzmiller* v. *Dover Area School District* p29. Further the court said that 'ID is reliant upon forces acting outside of the natural world, forces that we cannot see, replicate, control or test … such forces … are simply not testable by scientific means and therefore cannot qualify as part of the scientific process or as a scientific inquiry'. (29).

[35] *Ibid*. p13.

[36] This is the term used by the court to refer to the evangelical Protestants who led the charge against the teaching of Darwin for much of the twentieth century.

education. There is a legal statement to the effect that science accepts evolutionary biology as good science and that our existence on Earth is best explained in terms of random variation and mutation, not by any grand design of a supernatural being. We are part of the animal kingdom; created from animals (as Darwin himself expressed it)[37] and to suggest otherwise, as a scientific proposition in education, is unacceptable. It follows also from *Dover* that the state should be religiously neutral in its understanding of what we are; of what makes us human. Stated in a specifically legal manner, state law should be religiously neutral in its conception of its most basic unit: the person.

The *Dover* case represents a very public legal battle between scientific naturalists and Christian fundamentalists. In this case, the scientific naturalists prevailed, as they were seen to have Constitutional support for their position. And yet it can be argued, and I do, that despite the various propositions advanced in *Dover* about the need for religious neutrality and for Church and state to be kept separate, that in fact our law is not secular, that Church and state are entangled, and more particularly, that a broadly Christian view of the person still has a strong presence in state law and legal thinking. Moreover this Christian understanding of our natures is not only antithetical to the sort of biological naturalism accepted in *Dover*. It is also in tension with the political creation story of modern law, as that of the emergence of the rational-choosing, self-directed individual. In the Christian view, the human person's nature and value derive from a supernatural being, rather than from the human capacity to reason or human endeavour or from our species being.

My suggestion is that the idea of the sacred person – sometimes described as the human of intrinsic value,[38] or as simply 'inviolable[39,40]– provides an important legitimating principle of a broad range of laws but

[37] In his notebooks, Darwin reflected that 'Man in his arrogance thinks himself a great work worthy of the interposition of a deity. More humble and I think truer to consider him created from animals.' *Charles Darwin's Notebooks*, 1836–1844, translated and edited by P. H. Barrett *et al.*, 2 vols. (University of Chicago Press, 1977) 300.

[38] For Dworkin 'The hallmark of the sacred as distinct from the incrementally valuable is that the *sacred* is *intrinsically* valuable because – and therefore only once – it exists. It is *inviolable* because of what it represents or embodies.' R. Dworkin, 'What is Sacred?' in *Life's Dominion* 73–4 (my emphases).

[39] John Keown, for one, uses the terms 'sanctity' and 'inviolability' as synonyms. Thus he asserts that 'The Western world is undergoing a legal revolution. For centuries, the law in both common law and civil law jurisdictions has stoutly upheld the principle of the "*sanctity of life*." Over the past thirty or so years, however, courts and legislatures across

is especially conspicuous in laws governing the treatment of humans of impaired reason, children or adult. It is their intrinsic/sacred/inviolable human value, their supposedly inherent human dignity, rather than their personal capacity for rational agency (which is conspicuously absent), which is said to demand respect and protection. The Australian High Court expressed this idea of innate human dignity, regardless of mental capacity, clearly in the case of *Marion* concerning the proposed sterilisation of a profoundly physically and mentally disabled girl. Despite her profound cognitive deficiencies, it was said that she remained a being of intrinsic value. This view was most strongly and influentially expressed by the Catholic judge, Brennan J, who endorsed the Blackstonian assertion that 'every man's person [is] sacred'.[41]

It is probably not drawing too long a bow to say that the idea of the sacred implicitly forms the basis of all human rights law, generally, for the underlying idea is that human life is innately precious. It is enough that we are human. This idea is sometimes expressed as innate or inherent human dignity or human inviolability, but the message is largely the same.[42] The opening statement of the parent human rights' document, the Universal Declaration of Human Rights, for example, declares that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace'.

As chairman of the Declaration's drafting committee, Eleanor Roosevelt voiced the need for the Declaration in these terms: 'the conditions of our contemporary world require the enumeration of certain protections which the individual must have if he is to acquire a sense of

the Western world have seriously compromised that principle. Respect for life's *inviolability* has been eroded increasingly by efforts to promote largely unbridled individual autonomy and the notion that only some human lives, those which pass a certain "Quality" threshold, merit protection.' J. Keown, 'The Legal Revolution: From "Sanctity of Life" to "Quality of Life" and "Autonomy"' (1998) 14 *Journal of Contemporary Health Law and Policy* 253, 253–4 (my emphases).

[40] Raimond Gaita has suggested that these are merely (slightly inadequate) synonyms for the more explicitly religious term. See R. Gaita, *A Common Humanity: Thinking About Love, Truth and Justice* (Melbourne: Text, 2000) p23.

[41] *Marion's Case* 175 CLR 218, 266. Although Brennan J was a dissenting judge, his judgment has been highly influential and has come to stand for the principle of bodily integrity.

[42] Indeed *Roget's Thesaurus* provides as synonyms for 'inviolable': Synonyms: adored, beatified, consecrated, divine, enthroned, exalted, glorified, hallowed, holy, inviolable, redeemed, religious, resurrected, revered, rewarded, sacred, sacrosanct, saved, spiritual, unprofane. Antonyms: condemned, cursed, damned, disapproved, unholy.

security and dignity in his own person'.[43] For Roosevelt it was the human spirit – an assumed universal human faculty – which had to be preserved and permitted to flourish. Roosevelt was an avowed Christian. When she summed up the attitude of the framers of the Declaration, in her General Assembly speech of December 1948, she said that it 'is based on the *spiritual* fact that man must have freedom in which to develop his full stature and through common effort to raise the level of human dignity'.[44] (emphasis added)

Roosevelt believed in a creator of this inherently valuable human nature, this creature of innate dignity, but she did not insist that the creator be given a formal role to play in the Universal Declaration. She was not a fundamentalist. Hers was a pragmatic and ecumenical and yet explicitly Christian attitude of tolerance to those of all faiths and convictions. The reason that the creator was not explicitly mentioned is that it allowed the Declaration to speak for and to a broader community of belief.[45] The particular wording of the Declaration, she said, 'left it to each of us to put in our own reason, as we say, for that [human] end'.[46] She permitted the idea of inherent human value to be expressed in a manner which did not rely explicitly on a Christian theology – and yet it was perfectly consistent with it and was no doubt founded on it, in her view.

Or as leading American bioethicist, Leon R. Kass, has recently argued the relation between the terms 'sanctity of life' and 'human dignity'(from a Christian perspective), 'Each rests on the other … they are mutually implicated, as inseparable as the concave and the convex.'[47]

[43] E. Roosevelt, 'The Promise of Human Rights' in *Foreign Affairs* (April 1948) 470 quoted in M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) 236.

[44] 'Statement by Mrs Franklin D Roosevelt', *Department of State Bulletin* December 1948 751, quoted by Glendon, *A World Made New* at 231.

[45] This indeed was essential in view of the constitution of the Declaration's Drafting Committee. It included the influential Chinese delegate, Peng-chun Chang, who referred often to the teachings of Confucius. It also included Lebanon's Charles Malik, as rapporteur and secretary. Compromise about the sources of human value was essential for agreement to be reached. The complex politics of the committee are described in some detail in Glendon, *A World Made New*.

[46] E. Roosevelt, 'Making Human Rights Come Alive' in A. Black (ed.), *What I Hope to Leave Behind: The Essential Essays of Eleanor Roosevelt* (Brooklyn: Carlson, 1995) 559 quoted in Glendon, *A World Made New*. 147.

[47] *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco, CA: Encounter Books, 2002) 243.

Conversely, in the law governing the treatment of animals, it is again the purportedly intrinsic/sacred nature of humans – rather than our human biological nature or our capacity to reason – which ensures that animals fall into the legal category of property, humans (of all capacities) into the category of person. In the Christian view, it is only humans who possess sanctity; animals do not have souls.[48] If the Darwinian view of us as evolved from animals, as on a continuum with other creatures, but certainly very clever animals, had become well accepted in law, then I think that our law on humans and animals would by now have altered, quite dramatically, in consequence. One hundred and fifty years after Darwin, and his fundamental rethinking of the origin of species, there would be less emphasis on the innate specialness of human beings, whatever their powers of reason and whatever their capacity for choice.[49]

What I take to be a deep cultural and legal resistance to the Darwinian idea that we are a part of the animal kingdom, part of nature, and conversely a strong Christian acceptance of the idea that we are special and sacred carries great legal normative significance. It is a way of thinking about human beings which is at the heart of our law. We are not treated in law as if our difference from animals were a difference of degree, as Darwin and the scientists who bore witness in *Dover*, thought it was, though admittedly a great degree. Rather the difference is treated as one of kind – as a radical categorical difference. Humans as persons are intrinsically special; animals are mere things, mere property. This division, in my view, is largely legitimated by the religious view that we are sacred and that (somehow) we are not animals.

[48] This is not a view which is exclusive to the Christian tradition, but it is the Christian tradition which informs *our* law and which continues to be the dominant religious influence on our legal conception of humans and animals.

[49] This is a point well elaborated by animal rights lawyers such as Steven Wise and Gary Francione whose recent positions are expounded in C. Sunstein and M. Nussbaum (eds.), *Animal Rights: Current Debates and New Directions* (New York: Oxford University Press, 2004). So too has philosopher James Rachels. Rachels maintains that we should reject the Christian idea of species-sanctity and instead assign value and interests and rights according to the actual particular characteristics of each individual, animals included. He calls this moral individualism and it has a strong resonance with the story of the rise of modern (contract) law.) See J. Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford University Press, 1990). However, the public intellectual who has done more than any other to ruffle our prejudgments about the relative status of humans and animals is Australian ethicist, Peter Singer. In *Animal Liberation* (New York: Avon Books, 1975), Singer took a bead on the species divide, declaring species to be morally and therefore legally irrelevant. The species distinction in morality and in law, he said, was arbitrary and unjustifiable. It was equivalent to the distinctions once made about race and sex. It had no good foundation.

According to our Western religious tradition, and also according to our law, 'the world is intended for [our] habitation'. All else is intended for our use.[50] This is what James Rachels calls:

> the central idea of our moral tradition [which] springs directly from [a] remarkable story. The story embodies a doctrine of the specialness of man and a matching ethical precept. Man is special because he alone is made in the image of God, and above all other creatures he is the object of God's love and attention; the other creatures, which were not made in God's image, were given for man's use … The matching moral idea, which following tradition we call 'human dignity', is that human life is sacred, and the central concern of our morality must be the protection and care of human beings, whereas we may use the other creatures as we see fit.[51]

The idea that it is the human capacity to reason and to choose a life for oneself that provides the source of human value, the story of contract, certainly has a place in law. But it co-exists with, and is in tension with, this very powerful Christian idea of ourselves, not as essentially self-made rational beings (self-biographers) but as God's creatures whose value does not primarily derive from our personal capacities but from his investment in us.

There are prominent Anglian legal scholars who advocate vigorously this legal endorsement of the idea of human sanctity: in different ways we see it in the writing of John Finnis,[52] Ronald Dworkin[53] and John Keown.[54] These are jurists who support what is essentially a Christian religious paradigm: and more importantly, they believe that the idea of the uniqueness and sanctity of human being demands that law directly reflect this human sacred nature.[55] This Christian religious view is also to be found in the legal idea of

[50] Rachels, *Created from Animals* 86. [51] *Ibid.* 87.

[52] The idea of human sanctity runs implicitly through much of the work of Finnis and provides the moral basis of his opposition to abortion and to euthanasia. To Finnis, 'the essence and powers of the soul seem to be given to each individual complete … at the outset of his or her existence as such'. The soul, and its powers, are therefore at 'the root of the dignity we all have as human beings'. For Finnis, these are the metaphysical truths and 'the "natural facts" which should inform juristic thought about the persons whom law exists to serve'. Finnis, 'The Priority of Persons' 1, 14.

[53] See especially R. Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993).

[54] 'The Legal Revolution' 253–4. J. Keown, 'The Case of Ms B: Suicide's Slippery Slope?' (2002) 28 *Journal of Medical Ethics* 238–9.

[55] Dworkin is interesting in that he tries to reconcile the idea of human sanctity with the modern liberal contractual idea of the self-made and self-choosing person. He also argues that sanctity can have a secular as well as a religious meaning. See especially *Life's Dominion*.

the sanctity of foetal or even embryonic life[56] and in the correlative idea that non-human life is not sacred and does not have intrinsic value; it only has value to human beings and then only to the extent that it advances our interests. This is in dramatic contrast with the Buddhist or Hindu attitude to animals. Still quite alien to our Anglian tradition is, say, a Buddhist conception of life in which moral respect is owed to all living creatures.

Persons in action

I began the paper by saying that the strictly legal view of the person remains the most influential legal one. In this legalistic view, legal persons are abstractions comprising various rights and duties which arise within variable legal relations for essentially legal purposes. Law need not import into itself metaphysics, science or theology and indeed it is important that the conceptual autonomy of law be preserved. I then argued that notwithstanding this vigorously positivist endeavour to keep the legal legal, to retain the legal person as a legal abstraction, other views of the person co-exist in the law – notably a Christian idea of the sacred person – and that these extra-legal views are highly influential, even though they can be mutually contradictory.

It now remains to demonstrate both the continuing endeavours of jurists to quarantine law's person from other non-legal conceptions of ourselves, be they religious or scientific or political, and then to show, with some degree of specificity, how the strictly legal jurists are being thwarted in their bid for legal purity and how religious ideas of the person are infiltrating and informing the legal concept. I have chosen to focus on a small body of jurisprudence on foetal status because it is so rich in material about the legal nature of persons. Here all views about our legal natures as persons are conveniently represented: the strictly legal, the liberal political, the religious and the scientific. And right at the heart of these cases are some real women, no doubt trying to make sense of it all.

Keeping the legal legal

In the cluster of cases that immediately follow, Australian, Canadian and New Zealand courts can all be seen asserting the autonomy of law from

[56] This idea of the moral/sacred value of the embryo is implicit in the extensive statutory protections of the embryo in ART legislation and it is explicit in the debates which generate such laws and which invoke the intrinsic value of all human life.

religious and scientific and other meanings, in their determinations of foetal status.

In 1996 the Tasmanian Supreme Court in *Estate of K*[57] was asked to consider whether a frozen embryo could inherit. To Slicer J, 'The Court is not concerned with any philosophical or biological question of what is life since the question relates solely to the status recognised by law and not to any moral, scientific or theological issue.'[58] The court then acknowledged that through the cloak of a legal fiction – not through any determination of their metaphysical nature – the law of inheritance deemed the foetus to be born as of the date of death and that this rule should be extended to frozen embryos. The court was therefore acknowledging a purpose-specific legal personification designed to confer a property right. Thus 'if a child en ventre de sa mere is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded an embryo'.[59]

In 1989 the Canadian Supreme Court employed similar reasoning in *Tremblay* v. *Daigle*.[60] The so-called 'father' of a foetus had successfully sought an injunction from the Quebec Supreme Court to restrain a pregnant woman from having an abortion. Viens J had declared that the foetus was a human being and therefore had a right to life under the Quebec Charter. He also inferred from the Quebec Civil Code that foetuses were legal persons because they had the right to inherit. The woman unsuccessfully appealed to the Quebec Court of Appeal, and then to the Supreme Court, which allowed her appeal. In a joint judgment, the court conceded that 'Metaphysical arguments … are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry.'[61] Personality was not to be determined by either a moral or scientific assessment of whether the foetus had achieved a certain human status from which rights could then be derived. The court declared that 'The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personality to a foetus in law is fundamentally a normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification.'[62]

In 1997 the Canadian Supreme Court reaffirmed this approach in *Winnipeg Child and Family Services* v. *G*.[63] Here the issue was whether

[57] *In Re the Estate of K* (1996) 5 Tas R 365. [58] *Ibid*. 371. [59] *Ibid*. 373.
[60] *Tremblay* v. *Daigle* (1989) 62 DLR (4th) 634, 660. [61] *Ibid*. [62] *Ibid*.
[63] *Winnipeg Child and Family Services* v. *G* 152 DLR (4th) 193.

a court order could be issued detaining a pregnant woman against her will in order to protect her foetus. McLachlin J declared that the decision was not driven by science or theology. 'The issue', she said, 'is not one of biological status, nor indeed spiritual status, but of legal status.'[64]

In 2003, the New Zealand Court of Appeal in *Harrild* v. *DPP*[65] had to decide whether harm to a foetus could be regarded as harm to the pregnant woman for the purposes of no-fault accident-compensation legislation. If the foetus were deemed to be a separate entity, and not part of the mother, she could not recover under this statute. Elias CJ took the view that, at law, the foetus could be treated both as part of the mother and as a separate entity. The law did not have to rely on a single status. Keith J similarly emphasised 'the critical importance of the particular legal, statutory and policy contexts'.[66] A third majority judge, McGrath J, confirmed that 'in the end it is the nature of the rights under the relevant statute that must be ascertained'.[67] And here it would be wrong to deny the right of the mother to claim compensation for her injury to herself by a finding that the foetus was not part of her. And yet the same court understood the logic of another New Zealand decision, of the same year, *Re an Unborn Child*,[68] in which it was decided that a foetus could be treated as a distinct legal person and thus appointed a guardian, as if it were a child, in order to protect it from the mother's determination to make a pornographic film of its birth. Here the court drew assistance from the UN Convention on the Rights of the Child which it felt had a direct bearing on their decision.

In *R* v. *King*[69] the New South Wales Court of Criminal Appeal reflected on both New Zealand cases in considering whether the death of a foetus could amount to the criminal offence of grievous bodily harm to the mother and decided it could. The father of the foetus had kicked and stomped on the stomach of the mother. The court decided that 'there is no clear rule, applicable in all situations, as to whether the mother and foetus must be considered as one or separate. The answer will turn on the incidents of the particular legal situation under consideration, where relevant, the scope, purpose and object of a particular statutory regime.'[70] Here it was appropriate to treat the foetus as part of the woman because this would properly 'reflect the community's legitimate concern to control violence between persons'.[71] In other words 'the purposes of the law

[64] *Ibid*. 202. [65] *Harrild* v. *DPP* [2003] 3 NZLR 289. [66] *Ibid*. at 297. [67] *Ibid*. at 312.
[68] *Re an Unborn Child* [2003] 1 NZLR 115. [69] *R* v. *King* [2003] NSWCCA.
[70] *Ibid*. para 87. [71] *Ibid*. para 96.

is best served by acknowledging that, relevantly, the foetus is part of the mother'.[72]

In all of these decisions, we are witnessing a quite self-conscious assignment of rights and duties according to the particular purpose of the law, not according to the supposed properties of the foetus, be they natural or supernatural. The courts are making clear that their determination of foetal status need not entail a resort to religion or to philosophy or science. Rather, their decisions are guided by legal circumstance which is highly variable. In this line of cases, we have the judiciary declaring the feasibility and desirability of effecting a clear separation between metaphysical understandings of the person and the legal concept. They are declaring the conceptual autonomy of law, even in such a morally heated area as foetal status.

Feeling the force of the contradictions

I want now to move to a related jurisprudence in which the judges reasoned rather differently. Again the cases in question are ostensibly about the legal nature of the foetus, but now with the woman and her rights and duties more obviously to the fore. And it is in these cases that we find women well exposed to law's contradictory expectations about legal persons. Here (pregnant) women are regarded, simultaneously, as reasoning contractual individuals and as curiously non-individualised organisms with a double nature. They are gender-neutral, abstract legal subjects, who could just as well not be pregnant, and they are essentially embodied women. Their inviolability is vigorously asserted at the same time as they are viewed as the bodily custodians of a sacred 'unborn' child who has the legal misfortune still to be located inside an autonomous legal subject.

In *Re MB (Medical Treatment)*,[73] the English Court of Appeal was faced with a pregnant woman who refused a medically indicated Caesarean section because of her fear of needles. The court affirmed the general principle that a 'mentally competent patient had an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all'.[74] However MB was found to be *temporarily* incompetent and thus the right was forfeited. The court approved a judicial declaration to proceed with a Caesarean against her wishes, with the use of force if necessary.

[72] *Ibid.* para 97. [73] *Re MB (Medical Treatment)* [1997] 2 FLR 426. [74] *Ibid.*

In *MB* the court conceded that it did not have 'the jurisdiction to take the interests of the foetus into account in a case such as the present appeal and the judicial exercise of balancing those interests does not arise'.[75] In other words, the foetus was not a legal person with rival legal interests that could be recognised. But in the next sentence 'the foetus' is described as 'an unborn child' (there is a subtle shift towards the idea of a moral individual) and soon after it becomes 'an unborn child at risk' because a Caesarean section is being refused by a legal person who (when competent) has the absolute legal and moral right (to inviolability) to refuse it. Still the court's hands are tied in the sense that it cannot recognise 'the child'.

Designated a 'child', the foetus is implicitly cast as a distinct intrinsically valuable young human, but whose interests cannot be recognised. It is only the location of this 'child' which prevents the courts from doing more for it; 'the child's' interests are admitted to exist but they must be trumped by those of the one legal individual who can be recognised: the woman. Implicitly, this 'child' is a person trapped inside a person – a way of being which has no coherent legal rendition or translation.

In *St George's Healthcare NHS Trust* v. *S*[76] the English Court of Appeal disapproved a judicial declaration dispensing with the woman's consent to a Caesarean section (the judge who issued the declaration deemed her incompetent despite a highly articulate written and verbal refusal of consent), but only after the Caesarean had been performed. Here the court openly strains to make sense of the competing understandings of the person that seem to be embedded within the jurisprudential problem before it. It recognises the unqualified autonomy of the woman as a competent, rational legal agent. But then it says that 'It does not follow … that this entitles her to put at risk the healthy viable foetus which she is carrying'[77] and refers to 'the sanctity of human life' as another consideration.[78] The court then employs a naturalistic biological understanding of the foetus: 'Whatever else it may be a 36-week foetus is not nothing: if viable it is not lifeless and it is certainly human.'[79]

Shortly thereafter the court poses the Christian question, 'If human life is sacred, why is a mother entitled to refuse to undergo treatment if this would preserve the life of the foetus without damaging her own?'[80] The court can find no satisfactory answer to this question. It seems genuinely puzzled. After a brief review of the English and American

[75] *Ibid*. at 440. [76] *St George's Healthcare NHS Trust* v. *S* [1998] 3 WLR 913.
[77] *Ibid*. at 951. [78] *Ibid*. at 952. [79] *Ibid*. at 952. [80] *Ibid*. at 952.

case law on foetal status, the court asserts that 'pregnancy increases the personal responsibilities of a woman' (though it remains entirely unclear how these are to be made manifest in law), but these maternal responsibilities do 'not diminish [the woman's] entitlement to decide whether or not to undergo medical treatment'.[81] Because the 'unborn child' has failed to achieve separation 'from its mother [i]ts need for medical assistance does not prevail over her rights'.[82]

The courts in these two, much-discussed, English cases, understandably, regarded the foetus as a human life of intrinsic value, which should somehow be saved. In *St George's Health Trust* the court was particularly sensitive to the variety of competing and irreconcilable understandings of the person. It was well aware, though grudgingly so, that the foetus could not receive independent legal recognition as a rights-bearing person (as a legal person), if the woman were to be permitted to exercise her own autonomy as a person, as a moral agent (as a liberal autonomous person) and affirmed this law. But it did not want the foetus to be regarded as devoid of interests; to be regarded as 'nothing'. The 'sanctity of life' was a powerful guiding moral and legal consideration (the religious person). And yet the court resisted the temptation to resort to a full biological or medical model of foetal development and declare the foetus to be a baby, though it came close to it (the foetus was not nothing). This would too obviously compromise the liberal political idea of the woman as a choosing individual.

MB and *St George's Trust* provide valuable case studies of the co-existence of incommensurable ways of legal thought about what we are. There is the endorsement of human value and human sanctity which well precedes birth. There is the endorsement of the primary value of the human person as rational chooser whose basic human interests cannot be made subordinate to the interests of another. These cases show particularly well how the idea of human sanctity can threaten what is generally regarded as the most fundamental legal ideal that human beings, whichever their sex, should all be treated as contractual individuals. And both cases stand in dramatic contrast with the more strictly positivist and anti-metaphysical approaches adopted in the cases analysed above.

Conclusion

Strict legalists purport to exclude extra-legal, metaphysical considerations from their analysis of law's person. They try to keep the legal legal.

[81] *Ibid.* at 957. [82] *Ibid.* at 957.

But can they succeed? Is theirs a realistic endeavour? My conclusion is that they cannot succeed because, one way or another, community and even sectarian beliefs about what makes a person a person find their way into law. The beliefs can be religious, political or naturalistic. Often these understandings of the person are in tension with one another, complicating the task of adjudication because they place before the judge an array of potentially discordant personalities.

These beliefs about what makes us what we are – about what it is about us that makes us matter – can enter law at different stages. As we saw in the foetal status cases, these beliefs and evaluations may become a prominent feature of legal adjudication from the outset, if the judge feels it is appropriate to commence her deliberations with a sort of metaphysical endeavour to work out the 'true' nature of the entity under consideration before deciding what to do with it as a matter of law. The judges in *MB* and *St George's Trust* found it appropriate to reflect on the 'true' nature of the foetus, with the result that religiously inflected beliefs about human value and sanctity entered judicial reasoning early on.

By contrast, the more legalistic judges in the cluster of cases considered above tried hard to stick to their legal last and to desist from 'metaphysical' speculation. They pointed out, quite rightly in my view, that they were not bound to adopt a singular view of the foetus (or any being for that matter), one that would prove constant across all laws. Foetal legal status could adjust to legal purpose and the flexible nature of the distribution of rights and duties, from law to law, permitted this fluidity of legal identity. Legal purpose was not driven by a single uniform characterisation of foetal nature: by the foetus's supposed one true nature.

The legalist judges emphasised the practical nature of legal meaning. Certain laws practically permitted the foetus to do certain things; other laws permitted it to be treated in certain ways; still other laws permitted it virtually no existence. All of these *legal* practices added up to its *legal* meaning. The legal meaning of the foetus was not to be morally intuited or to be obtained from a sustained search for its essence but was to be found in the diverse practical operations of law.

But it could also be said that this deference to legal purpose and practice, this commitment to legalism, only delayed the moment of reckoning – the moment at which the court was bound to attend to prevailing beliefs about why a foetus matters at all, which are, *inter alia*, religious as well as scientific. The reason why adjudication necessarily

calls for reflection on these big existential questions is that adjudication is a normative exercise and at a number of levels. There must always be a determination about the applicable legal norms, and then the norms applied to the case at hand will always contain social evaluations about who and what are the appropriate bearers of the rights and obligations comprising those norms.

With the foetus, an entity or being (depending on your belief system) of hotly contested status, these evaluations are not difficult to identify because they are often made quite explicit and are the subject of intense debate. What tends to be more muted is frank and open discussion of the variety of personalities imposed on pregnant women, as a direct consequence of the variable personality of the foetus. There is a remarkable tendency among many of the contributors to this debate to imagine the foetus as a free-standing sacred or biological being – a considerable feat of the imagination and yet one commonly achieved. To state what should be obvious, but is often overlooked: for every foetus that is regarded as a sacred person there is a woman whose status as an autonomous contractual person is in jeopardy. Of course the reply to this is that for every autonomous choosing pregnant woman, there is a sacred foetal life at stake. Wherever one stands in the normative debate, the tension between the two understandings of the person, both of which are present in law, creates problems.

With other sorts of being of less controversial status (such as animals), these social evaluations are still present; they are just harder to see. Thus the property status of animals, with its underpinning assumption that animals are not sacred – that only humans have sanctity – is rarely a matter of legal contention.

The legalistic endeavour to stick to legal purpose (and to avoid metaphysical musing) still requires the judge to reflect on the nature of that legal purpose – about what that law is trying to achieve and for whom and why. Legal norms are therefore always infused with particular (though not necessarily consistent and not necessarily explicit) understandings of what and who we are and who matters and why. Law cannot be purged of these existential considerations.

It could be said that the judge who defers to legal purpose, in an effort to remain robustly positivistic, only puts off the moment of judicial reflection on who and what a given law is for. This reflection can be more and less explicit. In the case of *Re An Unborn Child*, for example, it was reasonably explicit: the court linked the relevant legal purpose to the protection of the universal rights of children and thus the idea of human sanctity, which imbues those rights, was brought into play.

Perhaps the critical task of the reflective judge and scholar is to attend quite openly to the beliefs, religious and otherwise, that enter and shape law, especially those beliefs about our very being which are multiple and often in tension. The burden is to consider the precise nature of those beliefs as well as their logic, their degree of congruence, their contemporary relevance, their representativeness, their practical implications for all the different parties affected and perhaps most importantly their compatibility with justice.

13

Freedom of religion and the European Convention on Human Rights: approaches, trends and tensions

MALCOLM D. EVANS*

Introduction

The purpose of this chapter is to offer an overview of developments within the jurisprudence of the European Court of Human Rights relating to the freedom of religion which are giving rise to difficulties, and to offer some general suggestions for how they might be resolved. The underlying message is that human rights law regarding the freedom of religion in Europe today is developing in a fashion which is as likely to hinder as it is to assist the realisation of the goals of tolerance and religious pluralism which are said to be what it is seeking to achieve. The reason for this is that the European Court has shifted its focus away from the right of the individual and towards the role of the state in matters of religion, and in the process has endorsed a form of 'neutrality' which is potentially at odds not only with aspects of religious liberty itself but also with long-established models of church-state relations. It is not, however, a case of 'either/or'. In its more recent judgments both tendencies continue to interact with each other, but it seems that the court is not yet getting the balance right and this will continue to cause difficulties unless or until the problems are identified, analysed and corrected.

After exploring a number of preliminary issues, the second section of this chapter will look at what might be called the 'individual' approach to the freedom of religion. The third section will look at the emergence of the more 'state-oriented' approach whilst the fourth section will look in brief at how these approaches and associated tendencies have played out in the context of two high-profile issues, that of religious symbols in

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educational settings and the registration of religious communities. The final section will offer some general reflections on the resulting position.

The ECHR and the freedom of religion or belief: the 'individual rights' focus

The principal legal binding human rights instruments all adopt an individual rights approach in a substantially common form[1] exemplified by Article 9 of the European Convention on Human Rights (ECHR) which provides:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance.
> (2) Freedom to manifest one's religion shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

This is a classic human rights formulation setting out what appears to be a very clear right which is to be enjoyed by the individual, whilst subjecting it to a range of potential limitations intended to safeguard the interests of other individuals or a variety of community interests and is a formulation found in all of the principal human rights instruments. In fact, it is rather more complex than it appears at first sight. The first element of Article 9(1) does indeed provide 'that everyone enjoys the freedom of thought, conscience and religion' but this is generally understood in a very limited, almost literal, sense and permits little more (if anything) than the freedom to believe what one wishes. It is seen as relating to the *forum internum*, a sphere of 'inner belief' which is considered to be inviolable. When it comes to doing something on the basis of one's religion or beliefs, then a series of other hurdles have to be overcome. The question is whether the person genuinely is an adherent of the belief system in question. Usually this can be taken as read, but if a

[1] For an analysis of the international instruments as evidencing a common approach as opposed to a single standard, see Evans, M., 'Human Rights, Religious Liberty and the Universality Debate' in O'Dair, R. and Lewis A., *Law and Religion* (Oxford University Press, 2001).

person is claiming that they have been unable to take advantage of a privilege or exemption which is available only to adherents of a particular religious tradition then the question might legitimately arise. For example, in *Kosteski* v. *FYROM* the applicant argued that his *forum internum* had been violated by the authorities requiring him to prove his status as a practising Muslim before he could take advantage of the right enjoyed by Muslims to absent himself from work in order to attend a religious festival. The court accepted that 'the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions', but said that 'it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when the claim concerns a privilege or entitlement not commonly available'.[2] This is fully consonant with the approach adopted in cases concerning conscientious objection to military service and appears on the face of it to be unobjectionable. However, as the court itself accepted, compelling a person to prove their religious allegiance might indeed become oppressive, and is certainly oppressive if the 'privileges' in question are those intimately connected with the practice of one's belief. Indeed, in *Kosteski* itself the court seems to question whether attendance at a religious festival amounted to a manifestation of religion or belief, commenting that 'there is no right as such under Article 9 to have leave from work for particular religious holidays'.[3] What this case does make clear is that the *forum internum* is very much a sphere of inner personal conviction and offers little by way of substantive protection to those seeking to protect the lifestyle generated by their beliefs from the intrusions of the state.[4]

Another question which needs to be asked – though it is rarely addressed on the face of the court's decisions – is whether the pattern of thought or conscience in question really is a form of 'religion or belief' which attracts the protection of the remainder of the article. Once it is concluded that such a belief is indeed at issue, it will only attract protection to the extent that it might be a protected form of 'manifestation', four of which are listed in Article 9, these being worship, teaching, practice and observance. The European Court of Human Rights has not wavered from the view, first expressed by the European Commission on Human Rights in its decision in

[2] *Kosteski* v. *FYROM*, no. 55170/00, para 39, 13 April 2006. [3] *Ibid*., para 44.

[4] For a spirited attempt to argue for an expanded notion of the *forum internum* see Taylor, P., *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005), chapter 3.

Arrowsmith v. *UK* back in 1981, that not all actions which are motivated by a belief are protected as forms of manifestations of that belief.[5]

Although these are, in principle, quite different questions, there is a marked reluctance by the court to consider what forms of religion or belief might benefit from the protections offered by the freedom of manifestation and where it has done so the results have often been unsatisfactory. For example, one case in which this matter has been considered openly was that of *Pretty* v. *UK*. Dianne Pretty suffered from a terminal illness and wished to die. In order to do so, she needed the help of her husband which he was willing to provide. However, it was a criminal offence to assist a person to take their own life and it was argued that to place him at risk of criminal prosecution for assisting his wife in ending her life was, *inter alia*, a breach of Article 9 in that Mrs Pretty 'believed in and supported the notion of assisted suicide for herself'.[6] The court took the view that 'not all opinions or convictions constitute beliefs in the sense protected by Article 9(1) of the Convention' but rather than simply saying that a belief in assisted suicide was not a protected form of belief, it observed that 'Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph.'[7] Thus in order to determine whether a form of belief *is* a religion or belief for the purposes of Article 9, the court looked not to the nature of those beliefs but to the narrower, second order question of the nature of the manifestation. This is utterly illogical since it could yield a different answer depending on the activity in question. For example, in *Arrowsmith* itself the Commission thought that whilst pacifism 'qualified' as a form of 'belief' for the purposes of the second sentence of Article 9, the act in question – the distribution of leaflets to servicemen informing them how to evade service in a zone of conflict in Northern Ireland in the late 1970s – had not been a 'manifestation' of her beliefs as a pacifist, but was 'merely' motivated by them and so was not a protected act. Whatever one might think of the distinction, it is at least a cogent approach that respects the structure of the article. If the reasoning in *Pretty* has been applied in *Arrowsmith*, however, pacifism would not have been considered to be 'protected' at all by the second element of Article 9(1) simply because the nature of the act in question was not a manifestation on the facts of the case.

[5] *Arrowsmith* v. *UK*, no. 7050/77, Commission decision of 12 October 1978, Decisions and Reports 19, p. 5, para 71.

[6] *Pretty* v. *UK*, no. 2346/02, para 80, ECHR 2002-III, 35 EHRR 1.

[7] *Ibid*., para 81.

Does this matter? Clearly, it does not make much difference to the outcome of the particular case if the reason for its rejection is that the form of belief does not attract the protection of Article 9 or that the act in question is not a manifestation of a belief that does: in both situations the outcome is the same. But it does make a difference to the manner in which that pattern of belief is viewed more generally. Ever since *Arrowsmith* it has been asserted that the ECHR adopts a broad, inclusive approach to the question of what 'counts' as a religion or belief for the purposes of the second sentence of Article 9(1)[8] and this has, perhaps, encouraged a fairly restrictive approach to the determination of what 'counts' as a manifestation. If it were to become the case that a 'narrow' approach to the question of manifestations was itself an indicator that the very inclusion of a belief system within the scheme of protection offered by the article might be at issue, then this would indeed matter greatly.[9] It should be said at once that the court does not seem to go quite this far, but it does appear to be taking a progressively narrower view of what amounts to a manifestation. This can be observed in cases such as *Kosteski* v. *FYROM*, where, as has already been seen, the court seems to have declined to accept that taking time off work to attend a religious festival amounted to a manifestation of the applicant's Islamic faith for the purposes of Article 9, whilst fully accepting that it was motivated by it.[10]

Assuming that the individual has been 'manifesting their religion or belief' the next question is whether there has been an 'interference' with that manifestation in a fashion which is attributable to the state. This too can present a surprisingly onerous hurdle and the court, as before it the commission, has been prepared to take a fairly surprisingly literalist view of this at times. For example, in *Stedman* v. *UK* the applicant complained that her Article 9 rights had been violated as she had been dismissed from her work following a change in her conditions of employment which meant that she was expected to work on a Sunday. The commission took the view that there had not been any interference with her freedom of religion since 'the applicant was dismissed for failing to agree to work

[8] See, for example, Ovey, C. and White, R., *Jacobs and White: The European Convention on Human Rights*, fourth edition (Oxford University Press, 2005), p. 303 and the cases cited there.

[9] Cf. the consideration of *Leyla Sahin* v. *Turkey* [GC], no. 44774/98, 10 November 2005; 41 EHRR 8 at p. 306 below.

[10] *Kosteski* v. *FYROM*, no. 55170/00, para 39, 13 April 2006.

certain hours rather than her religious belief as such and was free to resign and did in effect resign from her employment'.[11]

It is not at all obvious why the court takes the view that the freedom of religion can, in essence, be 'contracted away' in this fashion. It is unlikely that it would take a similar view of, say, the failure by the state to provide means of redress in respect of discrimination against homosexuals in the workplace. Nevertheless, this approach has an enduring attraction, since it casts the applicant – who believes themselves to be asserting their right – as the author of their own misfortune, and sees the remedy as lying in their own hands. The judgment of the House of Lords in *Begum* v. *Denbigh High School* is an excellent example of this technique. The appellant was a fourteen-year-old girl who had not been allowed to attend the respondent school whilst wearing a *jilbab*, a full-length loose body covering, which was not in accordance with its policy on uniforms. The majority in the House took the view that her freedom of religion had not been interfered with *at all* in the sense of Article 9 since she remained free to attend other schools where she might do so[12] and, as Lord Hoffman put it 'people sometimes have to suffer some inconvenience for their beliefs'.[13] Lord Bingham accepted that there were other lines of authority on which the House could draw,[14] but concluded that 'The Strasbourg institutions have not been at all ready to find an interference

[11] *Stedman* v. *UK*, no. 29107/95, Commission decision of 9 April 1997, 23 EHRR CD 168. Other applications decided in this fashion include *Konttinen* v. *Finland*, no. 29494/94, Commission decision of 3 December 1996, where the Commission rather bluntly said that 'having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion.'

[12] Cf. *Kose* v. *Turkey*, no. 26625/02, 24 January 2006, in which the European Court also expressed some doubt as to whether there has been any interference with the freedom to manifest religion or belief when pupils were required not to wear headscarves, though its decision that the application was manifestly ill-founded under Article 9 was seemingly based on the ground that the rule was applied in a non-discriminatory fashion, irrespective of religion. Unlike the House of Lords, it did not consider the relevance of whether or not there were other schools available to the student where she could wear the headscarf (and there were not).

[13] *Begum* v. *Denbigh High School* [2006] UKHL 15 (22 March 2006), Lord Hoffman, para 50 (and see also at para 54). See also Lord Bingham, n. 24 below and Lord Scott, para 89. Cf. *Kurtulmus* v. *Turkey*, no. 65500/01, 24 January 2006, where the European Court stressed that the applicant had chosen to become a civil servant and so had to accept the consequences in terms of her manner of dress.

[14] These include *Copsey* v. *WWB Devon Clays Ltd* [2005] EWCA Civ 932 and *R (Williamson)* v. *Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion or belief.'[15]

Even if all these hurdles be passed, protected forms of manifestation may be trenched upon by the state, provided that its actions are prescribed by law,[16] are necessary in a democratic society for the safeguarding of the interests set out in Article 9(2) and are proportionate in the manner in which it does so. As the court has made clear on many occasions, the state is accorded a margin of appreciation in determining the legitimacy of such interferences, whilst all the time insisting that the state's exercise of it margin of appreciation is subject to European oversight.[17] The manner of such oversight will, however, vary depending upon the nature of the right in question and the degree of pan-European consensus that surrounds the subject-matter of the issue in dispute. It is beyond the scope of this chapter to consider the scope of the margin of appreciation in detail – though aspects of its method of application will be considered further below. All that needs to be said at this point is that in the context of Article 9[18] the court's approach remains anchored in the points it made in the mid-1990s in two cases concerning the interplay between the freedom of expression under Article 10 and the claim that believers had a right not to be exposed to material offence to their beliefs. In these cases the court took the view that 'it is not possible to discern

[15] *Begum* v. *Denbigh High School* [2006] UKHL 15, Lord Bingham, para 23. He accepted (para 25) that in doing so 'the Strasbourg institutions have erred on the side of strictness' but he was not minded to seek to depart from so strict an approach, albeit that this was not the approach adopted in the lower courts in the case.

[16] See, for example, *Kuznetsov* v. *Russia*, no. 184/02, paras 73–4, 11 January 2007, where the court decided that the actions of a regional human rights commissioner in breaking up a meeting of Jehovah's Witnesses had no legal basis and had been in pursuit of her private ends, despite the presence of police officers which 'gave her intervention a spurious authority'. As such it was not 'prescribed by law' for the purposes of Article 9(2).

[17] For an in-depth analysis, see generally Arai-Takahashi, Y., *The Margin of Appreciation Doctrine, and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002). But cf. the convincing argument of Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), pp. 222–6 who maintains that this is a 'secondary constitutional principle' and that in the exercise of this doctrine, the state is constrained by an overarching primary principle of ensuring that there is 'a priority to rights' (on which see *ibid*., pp. 203–13).

[18] For an insightful analysis of the court's approach to the margin of appreciation in relation to Article 9(2), see Lewis, T., 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395.

throughout Europe a uniform conception of the significance of religion in society'[19] and, in consequence, 'Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.'[20] The combined effect of these propositions, which continue to be reiterated and reinforced by the court, is to accord the state a very considerable discretion in determining the degree to which it is permissible to intrude upon the manifestation of religion or belief in accordance with Article 9(2).[21]

Whilst this may be the formal structure within which freedom of religion is addressed as a human right, that structure does not predetermine any particular outcome. A principal argument underpinning the overall argument of this chapter is that there has been a fundamental shift in the approach of the court to the freedom of religion and this is now having the effect of legitimating an interventionist and restrictive approach in those states which choose to follow this path. There has always been a tension concerning the role of the state in relation to the freedom of religion, and the very first case in which the European Court of Human Rights considered Article 9 illustrates the point. *Kokkinakis* v. *Greece* concerned the legitimacy of a Jehovah's Witness being convicted in Greece for the criminal offence of improper proselytism. In this case the court set out what remains its fundamental statement concerning the freedom of religion, emphasising that:[22]

> freedom of thought, conscience and religion is one of the foundations of a 'democratic' society within the meaning of the Convention. It is, in its

[19] *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A no. 295-A, 19 EHRR 34, para 50.

[20] *Wingrove* v. *UK*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, 24 EHRR,1 para 58.

[21] This latitudinous approach under Article 9(2) should be contrasted with the approach of the court in *Moscow Branch of the Salvation Army* v. *Russia* in which the court considered a claim that a failure to register the applicant as a religious association had violated its rights of freedom of association under Article 11 of the Convention. In considering cases under Article 11 the court said that 'The exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. In determining whether a necessity within the meaning of paragraph 2 of these Convention provisions exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision.' See *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 76, 5 October 2006.

[22] *Kokkinakis* v *Greece*, judgment of 25 May 1993, Series A no. 260-A, 17 EHRR 397, para 31. For a recent reiteration, see *Kuznetsov* v. *Russia*, no. 184/02, para 56, 11 January 2007.

> religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

But can one restrain the proselytising activities of a religious believer without undermining the foundations of freedom of religion itself? As the court acknowledged, 'Bearing witness in words and deeds is bound up with the existence of religious convictions.'[23] Viewed from the perspective of an individual right, the argument that Mr Kokkinakis should be prosecuted for trying to win converts to his faith through his missionary activities appears as the antithesis of the freedom of religion. How can it be 'necessary in a democratic society' to prevent a person abandoning their religion for another? Does it not inevitably result in the taking of sides which runs the risk of unsettling that pluralism itself? In the context of the case, the court tried to avoid 'taking sides' by retreating into proceduralism,[24] emphasising the failure of the domestic court to apply the domestic law properly since it had not spelt out sufficiently clearly how the applicant had committed the elements of the offence of 'improper proselytism'. Individual judges saw the matter rather more starkly, Judge Martens arguing that this was a matter from which the state should retreat as far as possible, and that it should leave contestation on matters of religion to religious believers. On the other hand, Judge Valticos firmly upheld the right of the state to prevent the religious beliefs of its citizens from being disturbed by the proselytising activities of others. Subsequent cases have tended to support the right of the state to protect believers from forms of expression which failed to evidence 'respect' for the views of others (and particularly when such a lack of respect involved offensive portrayals of objects of religious veneration),[25]

[23] *Kokkinakis* v. *Greece*, *ibid.; Kuznetsov* v. *Greece*, *ibid*. See also *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, para 114, ECHR 2001-XII, 35 EHRR 3.

[24] *Ibid*., para 49.

[25] See, e.g. *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A no. 295-A, 19 EHRR 34, para 47: 'The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.'

but did not require them to do so.[26] What was required of them was that they ensure a 'level playing field' between those who seek to present their views and those to whom those views are expressed.[27]

From respect for religion to 'respectful' religions?

Looking back at these cases, we can see that they all proceed from an assumption that the state had no direct role to play in the religious life of believers. The bulk of the cases concerned claims by individuals that their ability to act in accordance with their beliefs had been negatively impacted upon by the actions of the state in some fashion, or that their capacity to enjoy their religion had been disturbed by what others had said about them. The role of the court was to ensure that in such cases, the boundaries of proper respect had not been crossed, bearing in mind the situation in which the issue arose and the rights and freedoms of others that might be at stake.

A major shift in approach has, however, now taken place which at least in part can be attributed to the expansion of the Council of Europe to embrace the countries of central and Eastern Europe,[28] although this probably served only to hasten an outcome which was already latent in the existing case law. If decisions in cases such as *Kokkinakis* and *Larrisis* tended to emphasise that the state could only intervene to ensure a level playing field between believers, it was perhaps inevitable that the court would come to see the role of the state as being to ensure that the playing fields were level in the first place. This change in emphasis can be traced

[26] See, for example, *Choudhury* v. *UK*, no. 17439/90, Commission decision of 5 March 1991 (1991) 12 HRLJ 172 in which the European Commission on Human Rights concluded that there was no violation of the freedom of religion where the state did not step in to prevent forms of expression which the applicant considered disrespectful to his beliefs. In extreme cases there might be such a need, however: see *Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A no. 295-A, 19 EHRR 34, para. 47 'In extreme cases the effect of particular method of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.'

[27] See, e.g. *Larrisis* v. *Greece*, judgment of 24 February 1998, *Reports of Judgments and Decisions*, 1998-I, 27 EHRR 329.

[28] See, for example, Council of Europe Recommendation 1556 (2002) *Religion and Change in Central and Eastern Europe*, adopted 24 April 2002 and the accompanying Report of the Committee on Culture, Science and Education, *Religion and Change in Central and Eastern Europe*, Doc 9399, 27 March 2002 (the 'Baciu Report'). The range of issues and challenges created by the eastwards expansion of the Council of Europe are explored in Greer, S, *The European Convention on Human Rights*, pp. 28–30 and 105–31.

back to a series of cases concerning the manner in which the state engaged with religious organisations, rather than with individuals who were claiming that their individual rights had been interfered with. Thus in parallel with the cases concerning the rights of individuals, the court was also facing a series of cases concerning the registration and official recognition of religious leaders, communities and churches.

This line of cases has spawned a very different approach, exemplified by *Hasan and Chaush* v. *Bulgaria* in which the applicants claimed that the state had violated Article 9 by involving itself in the leadership dispute between rival leaders in that it had refused to accept an application for registration submitted by the applicants on behalf of a section of the Bulgarian Muslim community since it (the government) supported the candidacy of a rival leader to leadership of the community as a whole.[29] The court concluded:[30]

> that facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention.

In some ways, the leading case is the *Metropolitan Church of Bessarabia* v. *Moldova*. In this case the court synthesised a number of previous judgments into a coherent statement of the role of the state in relation to the organisation of religious life. It accepted that, on the facts of the case, failure to register the Metropolitan Church of Bessarabia had the practical effect of nullifying the freedom of religion of its adherents as it rendered their religious activities unlawful.[31] This clearly amounted to an interference with their freedom of religion. The question was whether this refusal was justified. The dilemma was acute, since no one could

[29] *Hasan and Chaush* v. *Bulgaria* [GC], no. 30985/96, para 82, ECHR 2000-XI, 34 EHRR 35, 'Their effect was to favour one faction of the Muslim community, granting it the status of the single official leadership, to the complete exclusion of the hitherto recognised leadership. The acts of the authorities operated, in law and in practice, to deprive the excluded leadership of any possibility of continuing to represent at least part of the Muslim community and of managing its affairs according to the will of that part of the community. There was therefore an interference with the internal organisation of the Muslim religious community and with the applicants' right to freedom of religion as protected by Article 9 of the Convention.'

[30] *Ibid*., para 78.

[31] *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, para 105, ECHR 2001-XII, 35 EHRR 3: 'not being recognised, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practise their religion and, not having legal personality, it is not entitled to judicial protection of its assets'.

accuse the Moldovan authorities of a lack of candour in their argument, which, as it appears in the court's judgments, bears setting out in full. They argued that:[32]

> the refusal to allow the application for recognition lodged by the applicants was intended to protect public order and public safety. The Moldovan State, whose territory had repeatedly passed in earlier times from Romanian to Russian control and vice versa, had an ethnically and linguistically varied population. That being so, the young Republic of Moldova, which had been independent since 1991, had few strengths it could depend on to ensure its continued existence, but one factor conducive to stability was religion, the majority of the population being Orthodox Christians. Consequently, recognition of the Moldovan Orthodox Church, which was subordinate to the patriarchate of Moscow, had enabled the entire population to come together within that Church. If the applicant Church were to be recognised, that tie was likely to be lost and the Orthodox Christian population dispersed among a number of Churches. Moreover, under cover of the applicant Church, which was subordinate to the patriarchate of Bucharest, political forces were at work, acting hand-in-glove with Romanian interests favourable to reunification between Bessarabia and Romania. Recognition of the applicant Church would therefore revive old Russo-Romanian rivalries within the population, thus endangering social stability and even Moldova's territorial integrity.

Against this background, it is not difficult to see why the court should, once again, choose to draw on cases such as *Hasan and Chaush* and emphasise that the role of the state is not to 'takes sides' by endorsing one religious community at the expense of another but is to act in an even-handed fashion, believing that 'in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial'.[33]

[32] *Ibid*., para 111.

[33] *Ibid*., para 116. Perhaps surprisingly, acting in a neutral and impartial fashion does not mean that the state is to remain aloof from the internal affairs of religious bodies. In the later case of *the Supreme Holy Council of the Muslim Community* v. *Bulgaria*, the court, whilst accepting that 'State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion' also agreed with the respondent that they 'were under a constitutional duty to secure religious tolerance and peaceful relations between groups of believers' and that 'discharging it may require engaging in mediation. Neutral mediation between groups of believers would not in principle amount to State interference with the believers' rights under Article 9 of the Convention, although the State authorities must be cautious in this particularly delicate area.' See *Supreme Holy Council of the Muslim Community* v. *Bulgaria*, no. 39023/97, para 77, 16 December 2004; 41 EHRR 3.

Appealing though this may seem, it amounts to an attempt to brush aside the reality of church-state relations and with it a foundational element of national identity in many member states of the Council of Europe. In these cases, the court conceptualises the role of the state as being the 'neutral organizer of religious life within the state'.[34] This has profound implications. At one level, such an approach might appear to be wholly benign since it is still built on the same ideas of ensuring respect, pluralism and tolerance which, according to *Kokkinakis* and all subsequent cases remains the overriding imperative. However, it has become increasingly apparent that this is no longer understood to mean so much as respect by others *for* religion but respect *by* religions for others. The result is that religious manifestation is seen as permissible only to the extent that this is compatible with the underpinnings of the ECHR system, these being democracy and human rights. The court today seems to identify democracy and human rights with tolerance and pluralism,[35] and is apt to construe any forms of religious manifestation which do not manifest those virtues as posing a threat to its core values.

This tendency is not restricted to cases concerning the freedom of religion. Indeed, Article 17 of the Convention expressly seeks to prevent its provisions being used to undermine essential Convention values[36]

[34] See, e.g. *Leyla Sahin* v. *Turkey* [GC]. no. 44774/98, para 107, 10 November 2005; 41 EHRR 8, citing a long list of authorities dating back to 1996.

[35] The court frequently reiterates its view that democracy is the only political model compatible with the Convention and that, 'the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from "democratic necessity"', whilst democracy itself is founded on pluralism. See, for example, *United Communist Party of Turkey* v. *Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, paras, 21–2, and 45; 26 EHRR 121; *Refah Partisi (the Welfare Party)* v. *Turkey*, nos. 41340/98, 41342/98. 41343/98, 41344/98, paras 86–9, ECHR 2003-II, 37 EHRR 1; *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, paras 60–1, 5 October 2006. For an interesting application of this approach, see *Carmuirea Spirituala a Musulmanilor din Republica Moldova* v. *Moldova*, no. 12282/02, 14 June 2005, where the court said that 'The applicant organisation was denied registration due to its failure to present to the Government a document setting out the fundamental principles of their religion. Without such a document the State could not determine the authenticity of the organisation seeking recognition as a religion and whether the denomination in question presented any danger for a democratic society.' 'The Court does not consider that such a requirement is too onerous and thus disproportionate under Article 9 of the Convention.'

[36] Article 17 provide that 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

although the threshold to be reached before it becomes applicable is very high.[37] Nevertheless, a similar approach has been taken when applying the limitation clauses under other articles of the Convention and in numerous cases concerning the freedom of association, the court has affirmed the right of contracting parties to prohibit the activities of organisations which threaten key convention principles.[38] Whatever the merits of this approach, it seems difficult to deny that it takes on a more problematic twist when juxtaposed upon associations espousing religious beliefs or religious values, since no matter how rooted in Convention principles that approach may be, it is certainly likely to be seen to be impinging on the freedom of religion or belief in a fashion which believers may consider oppressive. The most dramatic example of this danger remains the decision of the Grand Chamber of the court in the case of *Refah Partisi* v. *Turkey* in which the it expressly asserted the view that whilst secularism is compatible with democracy and human rights, some forms of religious expression simply are not. The Grand Chamber said that 'The Court concurs in the Chamber's view that sharia is incompatible with the fundamental principles of democracy, as set

[37] See, for example, *Norwood* v. *UK*, no. 23131/03, ECHR 2004-XI, in which the court said that 'The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention.' Interestingly, this case concerned the display of a poster by a member of an extreme right-wing party, the National Front, which sought to identify Islam with the attacks of 11 September 2001. The court found that this 'vehement attack on a religious group [was] incompatible with the values proclaimed and guaranteed by the convention, notably tolerance, social peace and non-discrimination'. The court therefore concluded that the act of displaying the poster fell within the orbit of Article 17 and thus did not enjoy the protection of Article 10 (freedom of expression). The author is unaware of any cases in which the articulation of religious views has been found to cross the threshold of Article 17 and so deprive the applicant of the benefit of Article 9, but the *Norwood* case certainly indicates that this might offer an alternative means of restricting forms of manifestation, and increasing the stigma to be associated with religiously provocative acts by religious adherents.

[38] A example of this approach is found in *Gorzelik* v. *Poland* [GC], no. 44158/98, 17 February 2004, 40 EHRR 76 in which the court upheld the refusal to register a 'cultural association' since one of its articles of association referred to it as 'an organisation of the Silesian national minority', the existence of which the government denied, and which, if registered as such might have paved the way for its achieving the electoral advantage as a national minority under electoral laws. The Grand Chamber (para 103) took the view that it was legitimate since it was intended to 'protect the existing democratic institutions and election procedures in Poland and thereby, in Convention terms, prevent disorder and protect the rights of others'. Of course, those who claimed to be members of the 'non-existent' nation of Silesia might be expected to see matters rather differently.

forth in the Convention'[39] and quoted with approval the Chamber's judgment where it said that:

> the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts … In the Court's view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

Although the *Refah Partisi* case did not concern a religious organisation per se, it is easy to see how such statements from the Court of Human Rights are not likely to encourage those seeking to find space for the expression of faith in the political society of which they form a part. It suggests, once again, that the human rights approach is to ensure that believers might believe as they wish and that they might be free to practise the rituals of their faith provided that this is compatible with the general public good, but the state is to rise above religion, ordering and policing its practice, neither embracing nor reflecting particular tenets of belief, and all the while seeking to preserve the space for private pluralism by encouraging public secularism. This is in marked contrast with what might be termed the 'individualist' rights approach which did not prevent the privileging of a form of religion in the public life (or of excluding all religions from public life) provided that all individuals were in fact capable of enjoying their freedom of religion or belief, a model that has been aptly described as 'liberal secularism'.[40] It is, however, difficult

[39] *Refah Partisi (the Welfare Party)* v. *Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, para 123, ECHR 2003-II, 37 EHRR 1,quoting the judgment of the Chamber, para 92, 31 July 2001.

[40] See Plesner, I., 'The European Court on Human Rights: Between Fundamentalist and Liberal Secularism' available at www.strasbourgconference.org.

to accommodate this model within an approach which focuses on the neutrality of the state in matters of religion, and endorses secularism as a tangible manifestation of neutrality.

Getting the context right: the missapplication of the 'neutrality' paradigm in the 'individual' setting?

All of these tendencies are evident in the case of *Sahin* v. *Turkey*, which concerned a prohibition on the wearing of headscarves and beards by students whilst attending public university classes and examinations in Turkey.[41] The court concluded that although this amounted to a restriction upon the manifestation of a religious belief, that restriction was justified in Convention terms. This has attracted considerable criticism largely, though not exclusively, for the manner in which it applied the proportionality test.[42] The court observed that:

> it is the principle of secularism, as elucidated by the Constitutional Court …. which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.[43]

Whilst it might be 'understandable' that the authorities might wish to do so, the question that needed to be addressed was whether the manner in which they did so was in accordance with the Convention. In her dissenting judgment, Judge Tulkens took issue with the court for failing to consider whether there had been a 'pressing social need' to interfere with the applicant's freedom of religion on the fact of the case, the point being that the court had not really explored the question of whether there

[41] For the most thoroughgoing presentation of the relevant material and analysis, see McGoldrick, D., *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford: Hart Publishing, 2006).

[42] See generally the collection of material on this issue available at www.strasbourgconference.org. Some critical comment argues that the judgment represents a fundamental departure from past approaches – e.g. Gilbert, H., 'Redefining Manifestation of belief in *Leyla Sahin* v. *Turkey*' [2006] *European Human Rights Law Review* 308 – although this seems to overstate its impact.

[43] *Leyla Sahin* v. *Turkey* [GC], no. 44774/98, para 116, 10 November 2005; 41 *EHRR* 8.

had been any particular need to prevent *this* applicant from wearing a headscarf *at that time* and *in that place*; rather the generalised appeal to preserve secularism was seen by the court as being sufficient in and of itself.[44] Nevertheless, the court proceeded on little more than an assertion of the need to preserve general public order and religious pluralism through the eradication of a particular form of public manifestation of religious belief in state-run institutions. As Judge Tulkens indicates, there was no attempt to demonstrate the legitimacy of this assumption, to demonstrate that the secular nature of the institutions would be undermined by the wearing of headscarves or beards, or to probe the proportionality of the absolute ban as a means of preserving their secular nature. It is as if the appeal to secularism coupled with the margin of appreciation was enough.[45]

A further troubling aspect of the judgment is that the Grand Chamber took the opportunity to reaffirm the extreme view offered in previous cases that, since 'this notion of secularism to be consistent with the values underpinning the Convention … An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.'[46] This is a serious distortion of the structure of individual protection since it suggests that failing to respect the principle of secularism might deny an activity of its very character as a manifestation. A system of human rights protection of religious belief which fails to embrace manifestations which challenge secularist approaches to public life is a truncated vision of the freedom of religion.

[44] Judge Tulkens, para 7, pointed out that a generalised assessment of this nature 'does not address the applicant's argument – which the Government did not dispute – that she had no intention of calling the principle of secularism, a principle with which she agreed, into doubt. Secondly, there is no evidence to show that the applicant, through her attitude, conduct or acts, contravened that principle. This is a test the Court has always applied in its case-law.'

[45] See also McGoldrick, *Human Rights and Religion*, p. 156 who concludes that 'the Court clearly identified secularism as the "paramount consideration", but he also argues that Turkey had framed its argument in such a way as to suggest that 'if secular principles were not upheld, Turkey would not be able to apply and give effect to the ECHR' (p. 149). Even if this were the case, it is not a sufficient reason for the court to have bowed to any such pressure, which is hardly evidence-based.

[46] *Leyla Sahin* v. *Turkey* [GC]. no. 44774/98, para 114, 10 November 2005; 41 EHRR 8. This draws on *Refah Partisi (the Welfare Party)* v. *Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, para 93, ECHR 2003-II, 37 EHRR 1 which itself draws on a line of authority articulating this position stretching back to *Kalac* v. *Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, para 27; 27 EHRR 552.

Indeed, one might be tempted to conclude that such an approach makes Article 9 as much a tool for restraining the manifestation of religion or belief as it is a means of upholding it. It is true that the court merely repeats a well-established position found in many judgments when in *Sahin* it said that the freedom of religion is 'primarily' a matter of individual conscience, when it emphasised the element of 'inner belief' by claiming that the freedom of religion merely 'implies' a right to manifest one's religion or belief,[47] and when it reiterated that not every act motivated by religion is a legally recognised manifestation of that religion. Indeed, this approach finds its origins in the *Kokkinakis* case, when the court said that 'whilst religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion"'.[48] However, in the *Kokkinakis* case the court followed this by saying that 'Bearing witness in words and deeds is bound up with the existence of religious convictions' and, as has been seen, it went on to find a violation of Article 9 in the criminal conviction of the applicant for proselytism. In other words, these words served as a preface to a broadening out of the concept and the rolling back of state intrusion into the freedom to manifest one's religion in practice. In *Sahin*, those self-same words are used by the court as a preface to a judgment limiting the freedom to bear witness, this being brought about by the stress placed by the court on the role of the state as being to 'reconcile the interests of the various groups' and to 'ensure' respect between believers and between believers and non-believers.[49] This also draws on a well-established line of reasoning in previous judgments[50] and comes close to suggesting that there is a positive obligation[51] upon the state to ensure that this comes about. No matter how well established this terminology is, the idea that the state is under a positive legal obligation to ensure that religious believers demonstrate respect for each other and for non-believers is a difficult notion to comprehend: the practical consequences of adopting such an approach

[47] *Leyla Sahin* v. *Turkey* [GC], no. 44774/98, para 105, 10 November 2005; 41 EHRR 8.
[48] *Kokkinakis* v. *Greece*, judgment of 25 May 1993, Series A no. 260-A, 17 EHRR 397, para 31.
[49] *Leyla Sahin* v. *Turkey* [GC]. no. 44774/98, para 106, 10 November 2005; 41 EHRR 8.
[50] See, for example, *Refah Partisi (the Welfare Party)* v. *Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, para 91, ECHR 2003-II, 37 EHRR 1; *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, para 123, ECHR 2001-XII, 35 EHRR 3.
[51] It is beyond the scope of this chapter to explore the concept of positive obligations in detail but for an overview of emergent Convention practice, see Mowbray, A., *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

do not appear to have been thought through[52] and appears to be fraught with dangers.[53]

The real problem, it seems, is that the court has been slow to realise that there are two different aspects of the freedom of religion which, whilst intimately and inextricably linked, nevertheless require approaching in a different fashion.[54] When dealing with cases which have at their core the question of how the state engages with religious organisations, the 'neutrality' paradigm is one of the range of options which might legitimately be resorted to, though there will naturally be debate over its appositeness and application to the set of relations at issue. When dealing with cases which have at their core the question of individual enjoyment of the Convention right, the 'neutrality' paradigm recedes into the background and the focus should rest on the legitimacy of the interference on the facts of the case, shorn of the more general questions of the nature of state-church relations. It may be that the outcome of such individual-oriented applications will point to a need – in the eyes of the state or of the court – for a change in the nature of that relationship, but unless that is the primary thrust of the case, then it should not be allowed to impact on the outcome. Admittedly, determining the primary thrust of a case often lies at the heart of a dispute[55] but the court must be open to the consequences

[52] Cf. the comments on mediation made by the court in *Supreme Holy Muslim Council* v. *Bulgaria*, considered at n. 36 above.

[53] It is certainly enough to fuel paranoia and produce exactly the problems which it is meant to forestall. In February 2006 a school teacher was denied promotion in Turkey not for wearing a headscarf in the school, but for having been seen wearing a headscarf out of school time in the street. An appeal against the rejection of a legal challenge to this decision was dismissed in May 2006, whereupon the lawyer for the appellant produced a gun and shot the judge, killing him. See *The Times*, 18 May 2006. This is of course completely unacceptable and rightly condemned in the highest terms, but the tragic outcome underlines the extent to which fear and hatred build on each other, and arguably creates a far greater threat to the secular nature of the Turkish State than the employment of a woman who wears a headscarf outside school.

[54] Cf. Ovey and White, *Jacobs and White: The European Convention on Human Rights*, p. 316 where it is suggested that 'It would therefore perhaps be understandable if, in dramatic cases, the Courts were to allow a wide margin of appreciation to place restrictions of the freedom to manifest religion or belief. However, it is in the more mundane case … that the Court has demonstrated a certain lack of empathy for the believer and has appeared only to pay lip service to the commitment to religious freedom proclaimed in such judgments as *Kokkinakis* v. *Greece*.'

[55] Thus in both the *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, para 114, ECHR 2001-XII, 35 EHRR 3 and *Leyla Sahin* v. *Turkey* [GC], no. 44774/98, 10 November 2005; 41 EHRR 8, the applicant saw the matter as a question of individual manifestation, the respondent state as a matter of national identity.

of its decision on this point and act accordingly if it is to resist the danger of proceeding on the wrong footing and bringing its jurisprudence – and itself – into disrepute.

Against this background, it is interesting to consider the recent judgments of the court in *Moscow Branch of the Salvation Army* v. *Russia*, concerning the refusal of the Moscow city authorities to re-register the applicant as a legal entity as an independent religious organisation,[56] and the case of the *Church of Scientology Moscow* v. *Russia*, concerning the refusal to register the applicant as a religious organisation at all.[57] On the face of it, the legal issue to be addressed in these cases is practically indistinguishable from that in *Metropolitan Church of Bessarabia* v. *Moldova* and in the subsequent case, also involving Moldova, *Biserica Adevarat Ortodoxa din Moldova* v. *Moldova*.[58] In these cases, the court was clear that the issues raised were to be addressed under Article 9 of the Convention, whereas in the *Salvation Army* and *Scientology* cases it chose to see the issue as being primarily one of freedom of association and considered it under Article 11 read in the light of Article 9, which it found to have been breached.[59] It is not difficult to see why the court approached the problem from this perspective in the *Salvation Army* case since it has tended to accord a greater degree of scrutiny to the application of restrictions under Article 11(2) than under Article 9(2).[60] Moreover, one of the arguments of Russia in that case was that by wearing military-style uniforms, members of

[56] *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, 5 October 2006. The Moscow branch had been registered as a separate religious organisation between 1992 and 1999, when its status lapsed in accordance with the 1997 Law of Freedom of Conscience and Religious Associations which required re-registration of existing legal entities to have been completed by that time.

[57] *Church of Scientology Moscow* v. *Russia*, no. 18147/02, 5 April 2007.

[58] *Biscerica Adevarat Ortodoxa din Moldova* v. *Moldova*, no. 952/03, 17 February 2007.

[59] The court uses the same forms of words to describe the interconnection between associative life and the freedom of religion in all of these cases (see *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, para 118, ECHR 2001-XII, 35 EHRR 3 and *Biscerica Adevarat Ortodoxa din Moldova* v. *Moldova* no. 952/03, para 34, 17 February 2007, compared with *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 58, 5 October 2006 and *Church of Scientology Moscow* v. *Russia*, no. 18147/02, para 72, 5 April 2007. There is, however, no explanation as to why the former pair of cases was considered on the basis of Article 9 and the latter on the basis of Article 11.

[60] See *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 76, 5 October 2006 and *Church of Scientology Moscow* v. *Russia*, no. 18147/02, para 86, 5 April 2007 where the court points out the 'the exceptions to the rule of freedom of association are to be construed strictly … the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision'. This is not same approach as is found under Article 9(2).

the Salvation Army were posing a threat to national security. For the court, this was little short of ridiculous and it said that:[61]

> It is undisputable that for the members of the applicant branch, using ranks similar to those used in the military and wearing uniforms were particular ways of organising the internal life of their religious community and manifesting The Salvation Army's religious beliefs. It could not seriously be maintained that the applicant branch advocated a violent change in the State's constitutional foundations or thereby undermined the State's integrity or security.

However, it is difficult to see how the argument advanced by the authorities differed in substance from that of Turkey in *Leyla Sahin*, which the court was prepared to accept at face value. Unless the court is suggesting that manifesting Islamic beliefs through wearing a headscarf is indeed undermining the essential structures of the state whereas manifesting one's adherence to the Salvation Army through wearing military-style garb is not the only way of reconciling these cases if in *Sahin* the court was approaching the question from the perspective of the overall regulation of religious life, whereas in the *Salvation Army* case it was dealing with the question from the perspective of the member's ability to manifest their faith. It is noticeable that the language of the state being the neutral and impartial organiser of religious life within the state is not to be found in the *Salvation Army* or *Scientology* judgments[62] and in assessing the legitimacy of the interference with the freedom of association under Article 11(2) in the *Salvation Army* case, the court anchored itself firmly in the 'individual rights' approach and pointed to the lack of credible evidence to substantiate the authorities' claims, a matter notably absent from the *Sahin* judgment.[63] The difficulty is that if this is indeed the case – and it is suggested that it is – then it surely would be better for the *Salvation Army* case to have been considered on the basis of Article 9 (the freedom of religion) rather

[61] *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 92, 5 October 2006.

[62] It is the language of the more general duty of neutrality and impartiality in matters of religion or belief which is found, which is more appropriate to an individual rights-oriented approach. See *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 58, 5 October 2006 and *Church of Scientology Moscow* v. *Russia*, no. 18147/02, para 72, 5 April 2007.

[63] See, for example, *Moscow Branch of the Salvation Army* v. *Russia*, no. 72881/01, para 95, 5 October 2006 where the court concluded that 'There was no evidence before the domestic courts that in several years if its existence the applicant branch, its members or its founders had contravened any Russian law or pursued objectives other than those listed in its articles of association.'

than Article 11 (the freedom of association) and the *Sahin* case decided on the basis of Article 11 rather than Article 9: and if it proves difficult to locate a case within Article 11 (as would be *Sahin*), then this is a clear sign that the court has characterised the case wrongly and is approaching the case in an inappropriate manner.[64]

Concluding reflections

The need to restrict the manifestation of religion by believers in order to secure pluralism and tolerance between religions is becoming something of a counter-intuitive mantra in human rights circles. Indeed, in adopting such a stance, the European Court is not itself acting in an even-handed fashion since it appears to be embracing a form of 'secular fundamentalism' which is incompatible with its self-professed role as the overseer of the state as the 'neutral and impartial organiser' of the system of beliefs within the state. This is deeply problematic for all religious believers since it is tantamount to elevating secularism in the name of pluralism, and achieving this by 'sanitising' public life of traces of the religious.[65]

It is also deeply problematic on another level. As has already been indicated, the court today stresses the role of the state as the neutral and impartial organiser of religious life. In many states – like it or not – religious difference is seen as a threat to public order. Many states use their laws regarding religious associations as a means to differentiate between those forms of religion which are politically welcome and those which are not. It is very difficult to explain to states that they are, on the one hand, bound to strive for religious toleration and pluralism through a policy of strict neutrality between all forms of religion and belief whilst at the same time insisting that it is quite legitimate for the state to prohibit public forms of

[64] Cf. *Metropolitan Church of Bessarabia* v. *Moldova*, no. 45701/99, ECHR 2001-XII, 35 EHRR 3 and *Biscerica Adevarat Ortodoxa din Moldova* v. *Moldova* no. 952/03, para 34, 17 February 2007, which could easily have been considered under Article 11.

[65] Although not the focus of this chapter, it might be noted that the UN Special Rapporteur has also indicated that the 'public interests' which need to be held in tension against the rights of individuals to wear religious symbols include 'the principles of secularism and equality', E/CN.4/2006/5, para 59. Although it is not pursued in this chapter the 'equality' paradigm provides another vehicle through which the substantive legal content of the freedom to manifest religion or belief is also subject to erosion, to the point of challenging its place as a right. See, for example, in this volume the chapter by Sager, L., 'The Moral Economy of Religious Freedom', which argues against the 'privileging of religion' in a fashion which is difficult to reconcile with its status as a human right (and therefore by definition privileged).

religious manifestation which the state considers to undermine its essential political foundations when many consider those foundations *to be* religious.

Where does this leave those believers from religions traditions that seek to order their life in the public space in a different way, based around, for example, the very tenets of their faith? Why should they be denied the opportunity to do so?[66] The answer that is given is that states need to order their affairs in the interests of all within their jurisdiction, rather than in accordance with the views and beliefs of some, be they a majority or minority – and tolerance, respect and pluralism are difficult values to cross swords with. Yet these values are not neutral: they are vehicles for the legitimation of a very real set of assumptions concerning the proper reach of religion in the public sphere. Moreover, it is arguable that the entire way in which we conceive of human rights has the effect of privileging certain forms of religious belief. It is clearly more difficult for, let us call them, 'fringe' religions or new religious movements to benefit from human rights protections than it is for more mainstream religious traditions to do so.[67] Beyond this, it may well be that the practical application of human rights approaches to the freedom of religion is structurally biased towards those forms of religious belief which are essentially voluntarist, private and individualist – one might say, pietistic – rather than communitarian in organisational orientation.[68] This is not,

[66] In *Refah Partisi (the Welfare Party)* v. *Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98, ECHR 2003-II, 37 EHRR 1 the court noted that 'The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy' (para 99) but did, rather grudgingly, accept that 'a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention' (para 100).

[67] Cf. *Begum* v. *Denbigh High School*, [2006] UKHL 15 (22 March 2006), Lord Bingham, para 21: 'any sincere religious belief must command respect, particularly when derived from an ancient and respected religion'. See generally Evans, *C., The Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001), pp. 57–9. Renucci, J.-C., *Article 9 of the European Convention on Human Rights*, Human Rights Files No 20 (Strasbourg, Council of Europe, 2005) notes that the word 'sect' is never used, a point noted and remarked on by Ovey and White, *Jacobs and White: The European Convention on Human Rights*, p. 204.

[68] Cf. McGoldrick, *Human Rights and Religion* who argues that 'the core of religious freedom is *obviously* that of internal religious belief' (p. 246, emphasis added). One doubts that all religious believers would understand it in this fashion, for reasons discussed at the start of this chapter.

perhaps, surprising since the more communitarian-oriented religious traditions tend to challenge the state's ordering of society in a manner which more individualistically focused religions do not. It is not an accident that Western Christianity has found it easier to cohabit plural liberal democracies than some other forms of religious traditions,[69] though it appears that this is becoming increasingly difficult as human rights thinking concerning the freedom of religion moves away from a form of liberal secularism to what has been described as a form of fundamentalist secularism.[70] This has the perhaps unexpected consequence of increasing the space for religious communities to come together in order to forge their own distinctive contribution to the realisation of the freedom of religion or belief and to do so in a fashion which seeks to challenge, rather than conform to, human rights law. In recent times religious folk have tended to leave the realisation of the freedom of religion to the application of human rights law. It may well be that it is necessary for the voice of religious believers to be better heard and better understood by the human rights community if the freedom of religion is to continue to be best pursued through the application of human rights law.

It is inevitable that there will be clashes between the practice of religion and the application of a human rights framework: the human rights framework itself implies that this be so. Thus when religious believers seek to act in accordance with the dictates of their conscience – by, for example, refusing to sell contraceptives in pharmacies in France and the legitimacy of the response of the French authorities is called into question, the result is a debate concerning the extent to which human rights thinking protects the freedom of believers to manifest their beliefs in the manner in which they run their business (in this case, it being found that there was no violation of the freedom of religion).[71] When teachers in Switzerland[72] and in Turkey[73] wish to wear headscarves whilst teaching,

[69] Cf. Robertson, H., *The Council of Europe: Its Structures, Functions and Achievements*, second edition (1961), p. 2 who lists 'the western Christian Church' as one of the six core principles underpinning the Council of Europe. (Quoted in Greer, *The European Convention on Human Rights*, p. 15.)

[70] See, e.g. Plesner, 'The European Court on Human Rights'. For a masterful analysis of the potential forms of relationships and intersections of religious and liberal values within a political society written from an avowedly Christian perspective, see Adhar, R. and Leigh, I., *Religious Freedom in the Liberal State* (Oxford University Press, 2005).

[71] *Pichon and Sajous* v. *France*, no. 49854/99, ECHR 2001-X.

[72] *Dahlab* v. *Switzerland*, no. 42393/98, ECHR 2001-V.

[73] *Kurtulmus* v. *Turkey*, no. 65500/01, 24 January 2006.

or students whilst being taught,[74] and the state, acting in the name of the rights and freedoms of others, seeks to prevent them from doing so, there is a clash of values. The key point is that in the outworking of this, the vision of the judicial body concerning the legitimate role of religion in the life of the individual and in the life of the nation is critical, and in the European context this has changed markedly over time. Whilst the traditional focus of human rights thinking has been to ensure that the interests of the individual are not engulfed by those of the state, there appears to be a danger that it is the interests of the state which are now assuming a clear priority as against the religious rights of individuals and communities – and this is not what human rights protections are meant to be about.

[74] *Leyla Sahin* v. *Turkey* [GC], no. 44774/98, 10 November 2005; 41 EHRR 8: *Begum* v. *Denbigh High School* [2006] UKHL 15 (22 March 2006).

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