

“Is There a Right to Religious Freedom?”

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Note: I am working on a book, Religion Without God; the material I offer for the Workshop is Chapters 3 of that proposed book. In Chapter 1 I describe what I call a basic religious attitude. I define this as the conviction that there is objective value in human life and across the universe in which that life is lived. I argue that theistic religion is only one manifestation of that basic religious attitude, and that we must recognize atheistic religion as well. (I offered a version of that argument in a lecture at UCLA last year.)

Introduction: Interpretive Concepts

Religion figures in political constitutions and human rights conventions across the world. Though the preamble to the Swiss Constitution declares that it is written “In the name of Almighty God,” the constitution itself declares that “Freedom of religion and conscience is guaranteed,” that “Everyone has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others.” Article 18 of the United Nations Universal Declaration of Human Rights declares that “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 teaching, practice, worship and observance.” The European Convention on Human Rights offers the same guarantee, and adds that “Freedom to manifest one’s religion or beliefs 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 the protection of the rights and freedoms of others.” The First Amendment to the United States Constitution prohibits government from either “establishing” a religion or restricting the “free exercise” of religion.

These various provisions are everywhere understood to have important political consequences. They unambiguously prohibit government from penalizing membership in any religion or membership in none. They are often, though not universally, understood also to forbid government

to declare any religion an official state religion, or to support one religion or all religions through subsidies or other special privileges, or to permit legal constraints of any sort that assume that one religion or religion is preferable to others or to none. It makes a considerable practical difference what counts as a religion for purposes of these provisions. Is religion limited, for these documents, to opinions about the existence or nature of a god? Or does religion include all religious convictions including those that, if I am right, an atheist may hold? If free exercise of religion is limited to the practice or denial of theism, then it would not protect abortion rights, for instance. True, much of the opposition to abortion assumes that a god has forbidden that act. But not all opposition is based on theism, and few women who want an abortion believe that a god has ordered them to abort. If, on the contrary, freedom of religion is not restricted to opinions about a god, then it might be thought an open question whether the right to abortion is a religious issue.

I have argued, in earlier chapters, that it makes sense, and is illuminating, to recognize religious atheism. Our question now is different, however: it is a question of interpretation. References to “religion” in constitutional documents would be understood by most people, I believe, as pointing to institutionally organized churches or other groups worshipping some form of god, or something, like a Buddha, close to a god. Certainly the original battles for religious freedom were fought to secure freedom to choose which such group to join in heart and practice. John Locke, one of the earliest champions of religious freedom, was careful to exclude atheists from its protection: atheists, he said, should not be allowed rights of citizens. Later, however, the right to religious freedom became understood to include not only freedom to choose among theist religions but to choose no such religion: atheists fell under its protection. But the right was still understood as the right to make one’s own choice about the existence and nature of a god. I will soon describe decisions by the Supreme Court and other courts that extended the protection to groups that did regard themselves as religions without god – the Ethical Culture society in the United States, for example. But historically, and for most people still, a religion means a belief in some form of god. Should this fact of common understanding be decisive in determining who is entitled to the protection the various documents declare?

No, because the idea of religion functions in our constitutional, legal and social life as an interpretive concept. I must pause to explain what I mean. We cannot agree or disagree about anything unless we share the concepts in which our agreement or disagreement is framed. You and I cannot agree or disagree about whether France is a continent if we have very different ideas about what a

continent is. But we share different kinds of concepts in different ways. We share some concepts because we agree, at least in most cases, on decisive tests for their application. We share the concept of a bachelor because we agree almost entirely on decisive tests for its application. We agree that a bachelor is an unmarried man. If our tests are slightly different – if you would count an unmarried sixteen-year-old boy as a bachelor – then we cannot genuinely disagree within the range of that difference. We say that we are not really disagreeing about that boy's status; that our apparent disagreement is only verbal.

We share other concepts in a very different way, however. You and I may not agree, even roughly, on a decisive test for deciding whether a particular political institution is just or unjust. But we nevertheless share these concepts because we agree that their correct application has important personal and political consequences and that they should therefore be understood in whatever way best justifies those consequences. We agree that if an act or institution is unjust it should be changed but we do not agree about what makes an act or institution unjust because we do not agree on a more specific account of justice. Some people think that justice requires forcing rich people to pay taxes for redistribution to the poor: others that this political practice is deeply unjust. Our disagreements about justice are certainly not just verbal: we genuinely, radically disagree not only in spite of but because we have different theories of justice. We contest ideas of justice not by looking in a dictionary to see how justice is defined there, but by offering rival theories hoping to show how justice must be understood in order to suppose that we owe allegiance to just states or that unjust states should be reformed, for instance.

My argument for religious atheism assumed that religion, like justice, is an interpretive concept. I argued that whether religious atheism makes sense is not settled by any dictionary definition, but is rather a matter of how best to account for and justify what people believe, claim and do in the name of religion. On that test, I said, religion cannot be confined to theism. I did not formally introduce the idea of interpretive concepts in that argument because the importance of such concepts is more vivid in this one, when we are considering the very practical consequences that flow from taking one view rather than another of what a religion is. When the concept of religion appears in legal documents and moral principles it appears as an interpretive concept. We agree that people have a basic right to religious freedom, but we disagree, sometimes profoundly, about what to count as a religion in fixing the character and scope of that right.

We can defend a particular interpretation of an interpretive concept only by setting out some argument, which must normally be a moral or political argument, as to why the concept must be understood in one way rather than another if it is actually to license the further judgments or actions it is understood to license. So a conception of the concept of justice – a theory of justice – that holds taxation unjust must be backed by an argument that we must understand justice to include the kind of freedom that is violated by coercive taxation. We must apply the same protocol to the concept of religion. How must religion be conceived if people are to have a protected freedom for their religious choices and activities that they do not enjoy in other aspects of their lives?

Is Religious Freedom Only About God?

Policy

Now we may return to the question whether human rights documents give special privileges and status only to theistic religions. Can we construct a plausible justification for a conception of religious freedom that has that exclusive force? Can we find a persuasive reason why a special concern should extend to choices among godly religions, including a choice to reject them all, but no further? Here is one suggestion: the history of religious war and persecution shows that the choice of which gods to worship is a matter of special, transcendental importance to billions of people. They have shown themselves willing to kill other people who worship different gods or the same gods in different ways, and also to be killed rather than abandon their kind of worship of their own gods. That passion was the cause of the terrible religious wars in Europe that made religious toleration imperative there. It continues to cause murder in our time in Northern Ireland and the Middle East, for example. No other issue arouses that intensity of emotion, and the world has had and continues to have that reason for guaranteeing religious freedom in political constitutions and international conventions.

These striking facts certainly help to explain the birth of the idea of religious freedom and its rapid growth in popularity: why people in seventeenth century Europe, for instance, sensed its importance in securing peace. But they do not explain why a special right is needed to protect only godly religions now in the large parts of the world where religious wars are anyway not on the cards. The sects that benefit from freedom of religion in those countries are unpopular minority faiths whose members could not produce effective rebellion if their freedom were denied. In any case, moreover, religious freedom is very widely regarded as a human right, not just a useful legal

construction, and policy arguments about the need for peace are inadequate to justify a basic right. We need a different kind of argument to defend a conception of religious freedom. We need to identify some particularly important interest people have, an interest so important that it deserves special protection against official or other injury. So our immediate question must be: can we identify any special interest that people have in virtue of a belief in god that they do not have because, like Einstein and the others I mentioned, they subscribe to a religion without god?

Principle

The science of many theistic religions declares that a god can and will destroy populations or send people to a Hell in anger at their disobedience. That divine power was once widely thought to argue for forcing people to worship in a particular sect. It hardly argues for a freedom that permits people to worship in ways that will make such a god angry. Suppose we say, then, that people who fear damnation live in a kind of terror that atheists do not, and that they require a special protection on that account? So explained, the right is over-inclusive because many people who belong to orthodox religions do not believe in an after-life of reward or punishment. It is also over-inclusive in a different way: it protects atheists from prosecution and tolerating atheists can lead only to a god's anger. In any case, people have many fears. Some tremble at the possibility that a new particle accelerator will destroy the planet. But government is required to protect people only from fears it believes realistic, and it cannot declare a fear of Hell realistic unless it endorses a particular set of religious beliefs, which the right to religious freedom is generally thought to prohibit.

If we are to limit the protection of religious belief to godly religion, we must find our justification not in the science department of orthodox religions but rather in their other department, in the values they sponsor. Religions impose serious duties and responsibilities, including not just duties of worship and diet but also social responsibilities. A government that prohibits people from respecting those duties profoundly insults their dignity and their self-respect. It may of course be necessary for government to prohibit what religion demands: some religions purport to impose duties on the faithful to kill unbelievers. But when the prohibition cannot be justified as protecting the rights of others, but only reflects disapproval of the religion that imposes the duty in question, government has violated the right to free exercise.

However these observations do not justify a freedom that is limited to the exercise of orthodox, godly religions, because atheists often have convictions of duty that are for them equally imperative. Pacifism is a familiar example: the American Supreme Court properly held that Daniel

Andrew Seeger could not be denied the status and privileges of a conscientious objector to war just because he was an atheist. In the first chapter of this book I described a more abstract conviction that I count as a matter of religious faith: that each person has an intrinsic and inescapable ethical responsibility to make a success of his life. That responsibility is part of the religious attitude that both believers and atheists can share. It includes a responsibility of each person to decide for himself what kind of life would be most successful in his circumstances. A state violates that right whenever it prohibits or burdens that decision or that life: when it declares homosexual sex illegal, for instance. So this justification of religious freedom – that self-respect needs special protection – provides no ground for limiting that freedom to orthodox religions of believers.

In the United States, the establishment clause of the First Amendment prohibits government from designating one religion or sect as the official faith of the country, as the Church of England is the official faith of Great Britain. But it has been understood to prohibit much more than that: it has been understood to ban prayer in public schools, crèches at Christmas on public square, replicas of the Ten Commandments on courthouse walls and the teaching of allegedly faith-based science in state schools. These banned displays and practices are all regarded as ways in which government takes sides, or at least might be seen as taking sides, among religions or between believers and atheists. But is there any reason why taking sides between orthodox theistic religions should be thought wrong, but not taking sides between alternate views of what counts as living well? Not taking sides, for instance, between alternate views of good sexuality?

It is sometimes said that when government takes sides about god – for example by declaring Calvinism the official faith of the nation – it declares that those who worship a god in some other way, or who worship no god at all, count as less than full citizens. So providing a period for prayer in state schools, or teaching that the creation of the universe is the work of an intelligent designer, offers less than equal respect to those who have no god to pray to or to credit with creation. It uses state or national funds, collected in taxes in part from them, to affirm a national identity that excludes them. But now consider the position of a homosexual in a state that praises and protects the institution of marriage in a variety of ways, and provides arrangements and officials to marry men and women, but excludes homosexuals from marriage? Or, for that matter, consider a committed monarchist who is surrounded by official declarations of the nation's commitment to democracy. I do not mean to suggest – I will very soon deny – that religious freedom grants

monarchists immunity from public endorsement of democracy. I mean only that we cannot deny them that immunity just because they do not draw their opinion from some conception of a god.

Two Problems

We have not discovered a justification for offering religion a right to special protection that is exclusive to theistic religions. So we must expand that right's scope to reflect a better justification. How? The answer might seem obvious: we must extend the right to religious freedom to all forms of religion, including godless religions. But that suggestion encounters two problems each difficult to overcome

Defining a Religious Attitude

The first is a problem of plausibility. Earlier in the book I said that a religious attitude has two dimensions: a set of characteristic convictions and appropriate emotional responses to those convictions. I said that religious convictions include a belief that life has meaning, and that the emotional response appropriate to that conviction is a sense of responsibility for making one's own life a success. But we must not define a religious attitude by restricting what can count as an acceptable conception of a successful life: someone who is religious may sensibly think that that decision is part of his own responsibility. We know, moreover, that people hold a great variety of ethical convictions, some of them unattractive. Many people, in the popular phrase, "worship" Mammon. They subscribe, perhaps passionately, to the conviction that a successful life is one full of material success. They treat this goal as one of transcendent importance. They are wracked with remorse at bad investments or missed financial opportunities. But we cannot think that religious freedom for such people therefore includes exempting them from income tax. So if we decided that all religious attitudes are entitled to special protection we would need a more restrictive definition of a religious attitude than I provided.

We might choose between two kinds of stricter definition: a functional definition that fixes on the role of the putative conviction in a person's overall personality or a substantive definition that designates certain convictions as essentially religious in character. The Supreme Court provided a functional definition in response to Daniel Andrew Seeger's claim that he was entitled to conscientious-objector status in the Vietnam War even though he was an atheist. He relied on the following language in the statute authorizing the draft.

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

In spite of the statute's reference to "a Supreme Being," the Supreme Court upheld Seeger's claim. It assumed that Congress would not have wanted to discriminate among religious convictions, and offered this account of what these are:

The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.¹

It is difficult to parse this requirement, however. In what way is a belief that war is wrong "parallel" to a belief in God? However we answer that question we might worry that a serious worshipper of Mammon meets the test.

A substantive definition therefore seems more appropriate. This identifies a genuinely religious conviction through its subject matter not the fervor with which it is held. In 1992, I tried to provide a substantive definition as part of an argument for a First Amendment approach to the abortion question. I said "Religions attempt to answer the deeper existential questions by connecting individual human lives to a transcendent objective value." I quoted a statement of an Ecumenical Council: "Men expect from the various religions answer to the riddles of the human condition: What is man? What is the meaning and purpose of our lives." I said that the question whether the United States' Constitution protects a woman's right to an early abortion is therefore a question about the reach of its First Amendment's religion clauses. "I can think of no plausible account of the content a belief must have in order to be religious in character," I said, "that would rule out convictions about why and how human life has intrinsic objective value..."²

In their opinions in a Supreme Court decision later that year, confirming that women have a constitutional right to an early abortion, three Supreme Court justices offered a similar substantive account of choices they said the Constitution protects:

“[M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³

Other judges and courts have emphasized a further limitation: that a religious conviction must be part of and drawn from a general, sincere, coherent, integrated and comprehensive account of why it is important for people to live well and what it is to live well.⁴ People who hold a religious conviction according to that heightened standard need not be able to identify that larger more comprehensive view in any articulate or self-conscious way. It is rather a matter of interpretation whether the explicit convictions for which someone seeks protection fit sufficiently comfortably into some recognizable comprehensive view of that kind, and whether his life and other opinions are reasonably consistent with that more comprehensive view. Members of some established church fit the description unless their behavior shows only an insincere commitment to its tenets. They may not be familiar with much of their religion’s dogma, but they hold their specific understanding of religious duties under the assumption that these do flow from a more general comprehensive religious view. So this account of a religious conviction easily accommodates genuine theism. But it can also comfortably embrace non-theistic convictions – about pacifism or the permissibility of abortion, for instance. In its *Torcano* decision, the Supreme Court listed, among religions meeting the test it had in mind, humanist societies that are explicitly atheistic.

These substantive accounts of a religious conviction are all appealing. But their plausibility relies on an assumption: that people who profess to locate their selfishness in a general theory of religious dimension are insincere. Consider, again, the passionately devout materialist. Does his greed not play the role in his personality that more attractive ethical convictions play for believers? Does greed not define his own concept of the point of human life? We may well think that his convictions fail the sincerity test: they are not drawn from any general and abstract thesis about the value and meaning of human life. But suppose he is an avid student of Nietzsche? Once we break the connection between a religious conviction and orthodox theism, we have no firm way of excluding even the wildest ethical eccentricity from the category of a protected faith.

Conflict Within the Right

We have, moreover, a second reason for worry that simply de-coupling religion from god would not produce a satisfying new account of religious freedom. Even when we restrict religion to theism –

but particularly when we do not – the right to religious freedom, as traditionally conceived, often seems self-contradictory. The right requires government, we suppose, to exempt people from general regulations that prevent the exercise of their faith. The right also charges government not to discriminate in favor of any religion over others. But an exemption for one faith from a constraint that people of other faiths must accept discriminates against those other people on religious grounds. American constitutional lawyers are well aware of this conflict. There are two “religion” clauses in the First Amendment: one prohibits government from infringing the “free exercise” of religion; the other prohibits it from “establishing” a religion – that is, giving it special official recognition or protection. The lawyers say that the first of these clauses often conflicts with the second.

The Native American Church uses peyote, an hallucinogenic drug, in its religious rituals. The drug is generally banned because it is dangerously addictive. If an exception is made for a tribe because the drug plays a role in its rituals, then the law discriminates on ground of religion against, for instance, followers of Aldus Huxley who believe that the best life is lived in a trance. If the law therefore recognizes godless religion, and exempts everyone who thinks that hallucinogenic drugs allow special perception into the meaning of life, then the law discriminates, also on religious grounds, against those who only want to get high.⁵

Another example. The Catholic Church does not permit the many adoption agencies it operates to assign children to same-sex couples. The government refuses to fund agencies that adopt that policy. The Church insists that since its tenets forbid same-sex unions, the government’s policy discriminates against them on religious grounds. The government replies that an exemption from its rules for the Church would discriminate in the Church’s favor against other agencies that might have their own reasons, not grounded in theistic religion, for refusing adoption to same-sex couples.⁶

Now consider a more complex and revealing example. The principle that government may not “establish” any religion means that the religious doctrine of one particular religion may not be taught in public schools as truth. But, as I said in an earlier chapter, each religion has a science department and so the question arises whether and how far its science may be taught, just as science, in public schools. This has become a particular problem for biology classes in America. A Pennsylvania school district ordered teachers to mention theories about the origin of life that reject Darwin’s random-mutation theory of evolution and claim to provide evidence that human beings were created by a supernatural intelligence. A federal court judge declared the order

unconstitutional under the “establishment” clause. He said that the school board’s decision was based on religious conviction not scientific judgment.

Thomas Nagel has provided an illuminating analysis of the issue. He points out that someone’s judgment on the question whether divine authorship or random mutation provides a better explanation of human life is crucially influenced by his prior beliefs about whether a god exists. An atheist will from the start rule out divine creation: even if the chances that random mutation and selection would produce human life are antecedently small, intelligent design is not an alternative. But a theist may well find, given his prior belief that a god exists, that it is much more likely that that god, rather than chance, is responsible for the marvelously complex animals, including us, that populate our planet. The two assumptions – that a god does or does not exist – seem on a par from the perspective of science. Either both count as scientific judgments or neither does. If relying on one judgment to mandate a curriculum is an unconstitutional establishment of a religious belief, then so is relying on the other. In this situation, therefore, appealing to students’ or parents’ special right that government must not choose among religions seems of no use. A school board, it might seem, cannot avoid selecting one religious opinion and rejecting another whichever decision it makes. In cases like this one the constitutional requirement that government not choose defeats itself.

Is There a Right to Religious Freedom?

Two Facets of Liberty

I began this chapter by reporting a very popular assumption: that people have a distinct, basic, indeed human, right to religious freedom. That is what all the constitutions, documents and conventions I listed proclaim. We now have reason, however, at least to question that assumption. If there is such a right, its protection cannot be limited to godly religions. But we find difficulty in constructing any other useful definition of the supposed right’s scope. And we find paradox in the two main components of that right: that government may not burden the exercise of religion but also must not discriminate in favor of any religion. It is time to consider a rather different approach. We need some background, however, to describe what I have in mind.

In *Justice for Hedgehogs* I described two facets of liberty. A just state, I said, must recognize both a very general right to what I called ethical independence and special rights to particular liberties. These are different kinds of rights in this important way. Government needs a rational justification for any constraint it places on individual freedom. Ethical independence means that government

must not rely on any such justification that directly, indirectly or covertly supposes that one opinion about what a good life requires – one ethical conviction defined in that very broad way – is in itself better or worse than another. Government must not rely on any such assumption directly, by proposing and justifying some regulation on that assumption, or indirectly by relying on the fact that a majority or some other group within that community holds that view, or covertly by failing to treat citizens who do embrace that opinion with equal concern by ignoring the special importance of some issue to them. Government may not forbid drug use because drugs are shameful, for example; it may not forbid logging because people who do not value great forests are despicable; it may not levy highly progressive taxes because materialism is bad.⁷ But ethical independence does not prevent government from interfering with people’s chosen way of life for other reasons. It may levy taxes to finance roads and aid the poor, forbid drugs to protect the community from the social costs of addiction, and protect forests because forests are in fact wonderful.⁸

Special liberties place a much stronger constraint on government. It must not infringe a special right unless it has, not just a rational justification that respects the general right of ethical independence, but what American lawyers have come to call a “compelling” justification. The right to free speech is a familiar example. Speakers may not be censored because what they wish to say is officially deemed obnoxious or unseemly, or because it is offensive to some group within the community. But neither may speakers be censored because they advocate forest despoliation or because it would be expensive to protect them from an outraged crowd. The right to free speech can be abridged only in emergencies: only to prevent, again in a phrase beloved of American lawyers, a clear and present – and, we might add, grave – danger. (Of course, declaring a special right requires a careful delineation of that special right’s scope: we must take care to limit that scope to fit the grounds we have for making the right special. Recent Supreme Court decisions denying government the power to limit election expenses, on the ground that such limits invade free speech, are a minatory example of the perils of ignoring that obvious requirement of rationality.⁹)

The twin problems we encountered in freedom of religion flow from trying to retain that right as a special right while also decoupling religion from a god. We should consider, instead, abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition. We should consider instead applying, to the traditional subject matter of that supposed right, only the more general right to ethical independence. These two approaches pursue importantly different strategies. A special right fixes

attention on the subject matter in question: a special right of religion declares that government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary, fixes on the relation between government and citizens: it limits the reasons government may offer for any constraint on a citizen's freedom at all. We should ask: are the convictions we want to protect sufficiently protected by the general right to ethical independence, so that we do not need a troublesome special right? (I must emphasize that this is not to ask whether that latter right would provide a good interpretation of Supreme Court jurisprudence in this area.)

The general right protects the historical core of religious freedom. It condemns any old-fashioned, explicit discrimination or establishment that assumes – as such discrimination invariably does assume – that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or that atheism is father to immorality.¹⁰ Ethical independence protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination. Is that protection enough? Do we need a special right requiring not just a neutral but a compelling justification for any constraint?

Return to peyote and ritual. When the Supreme Court held that the First Amendment does not require an exemption for the Native American Church, Congress, outraged, passed the Restoration of Religion Act, which insisted that the Court's decision was wrong. Was Congress right? Not if we test the Court's decision against the general right of ethical independence. The general right does not protect the religious use of a banned drug provided, of course, that the ban is not intended to disadvantage those who use it or to reflect less than equal concern for them. Since the purpose of the prohibition was to protect everyone from damage, there was no compromise available that would not have subverted its purpose. So Congress's statute reversing the Court's decision was, in effect, a declaration that religion needs more protection than general ethical independence offers. No regulation that interferes with a religious practice is permitted, Congress declared, however innocent and non-discriminating its purpose, unless there is a "compelling" rather than simply an ordinary need for regulation – unless, that is, the regulation is necessary to prevent some emergency or grave danger. The Act was wildly popular.¹¹ But the Court was right as a matter of political morality and Congress wrong. If the Native American Church is entitled to an exemption

from drug-control laws, then Huxley followers would also be entitled to an exemption, and skeptical hippies would be entitled to denounce the entire drug-control regime as a religious establishment. If we deny a special right to free exercise of religious practice, and rely only of the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, non-discriminatory laws that do not display less than equal concern for them. Does that shock your conscience? The last of these requirements – equal concern – requires a legislature to notice whether the activity it proposes to prohibit or burden is regarded by any group as a sacred duty. If it is, then the legislature must consider whether equal concern for that group requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception. Financing Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, might be justified in that way, provided that enough of the latter are available so that neither babies nor same-sex couples seeking a baby are injured. But if, as in the peyote example, an exemption would put members of that group at a risk that it is the purpose of the law to avoid, refusing an exemption does not deny equal concern. That priority of non-discriminatory collective government over private religious exercise seems inevitable and right.

The New Religious Wars

We must put our hypothesis – that the general right to ethical independence gives religion all the protection appropriate – to a more concrete test by considering a variety of heated contemporary controversies in its light. These are not battles between different organized religions; they are wars between the religious and the secular. In many nations it is now a particularly divisive issue whether emblems of political faith may be worn in public schools, governmental offices and buildings, and public space. There have been acrimonious and sometimes violent battles, for instance, about whether public schools may set aside time for private silent prayer during a school day, whether the Ten Commandments may be placed on a courthouse wall, whether a city or town may place a crèche on a public square at Christmas, whether headscarves or burkas may be prohibited in schools or on the streets, and whether minarets can be built in Swiss cantons. Some of the practices on this list seem to raise mainly issues of free exercise and others of religious establishment but we may ask, of them all, how they must be resolved if the only pertinent political right is the general right of ethical independence.

Ethical independence does condemn official displays of the insignia of organized religions on courthouse walls or public streets unless these have genuinely been drained of all but ecumenical cultural significance – like city Santa Clauses visiting orphanages, for instance. Otherwise such displays use state funds or property to celebrate one godly religion, or godly religion in preference to godless religion or no religion. Headscarves and burkas are very different, however: these are private displays. What justification can a state provide for prohibiting anyone from wearing them anywhere?

It is sometimes said that a nation's law may properly aim to instill a sense of a shared secular identity of citizens that would be undermined by divisive badges of religious identification. But that assumes, in violation of the right of ethical independence, that one kind of identification is more admirable than another, or that, contrary to what many citizens think, religious identification is not sufficiently important to trump all patriotic identifications. A state may invent other justifications for such prohibitions that are not on their face violations of ethical independence. It may claim, for instance, that when some students wear badges of a particular religion other students feel compelled to protest, out of a sense of duty to their own faith, and academic discipline and quality suffers. But there is no evidence for this and so it appears to be rationalization. Banning headscarves has long been a very divisive issue in Turkey; the long-standing ban has provoked rather than prevented much violence there. Turkey is also the clearest example of why the ban offends ethical independence: it was a central part of Kemal Ataturk's campaign to change what Turks considered a responsible way to live their lives: to switch their culture from devout observance to reflex secularism.

Public school prayer is a more complex matter. Near one extreme is the British practice of requiring a daily Christian prayer in all except a few schools. Near the other is the French flat prohibition of any religious moment in public schools. In the United States, after an extended debate structured by several Supreme Court decisions, practice is apparently gravitating toward permitting schools to adopt what is called a "moment of silence" in which students are free to pray or, as it is frequently put, "meditate" as they wish. Or simply to rest their eyes. Ethical independence is, I think, satisfied by this practice unless the legislative record displays an intention specifically to benefit theistic religion.¹² On its face, providing a moment of silence is neutral among godly and godless religious convictions, and neutral between them and students who believe they have nothing to meditate about.

Now consider religion in public education from the perspective of the general rather than a special right. I mentioned earlier a particular issue: does a public school board violate religious freedom when it mandates the teaching of intelligent design in biology classes as an alternative to Darwinian evolution? Nagel, recall, pointed out that the assumption that intelligent design is bad science presupposes atheism, which is a religious position, so that banning intelligent design means the state taking sides on a religious matter. His point is pertinent when we understand religious freedom in subject-matter terms, as a special right requires. If we rely not on any special right, however, but on the more general right to ethical independence, we reach a more satisfactory resolution.

Godly religions appeal to members on the two levels I distinguished earlier in the book. They have a science and this includes some form of the view that a god created everything including us. They also deploy schemes of value, particularly ethical value, and of social identification and separation. The culture of religion built around those values has a powerful political influence and, at least in contemporary American circumstances, that culture can pull the science of the religion along as an engine pulls other cars. A school board's decision to mandate the teaching of intelligent design as an alternative to Darwinism may reflect not only the assumption that a god capable of creation exists, just as a strict matter of cosmic history, but the endorsement of a full set of ethical attitudes about the role of religion in a well-lived life and an ambition to inculcate those ethical attitudes in new generations. Then it is an interpretive question whether that latter ambition better explains a school board's decision than does any independent conviction its members might have in the scientific inadequacy of evolution or the archeological or biological superiority of a theory of divine creation. The opinion of the American federal court judge who declared a requirement to teach intelligent design in public schools unconstitutional relied on that interpretive test. He held that the histories, practices and statements of the majority members of the school board suggested that they were moved not just by the bare scientific claims of theistic religion but by the values and obligations that make up the ethics of religion.

This interpretive judgment is made easier, in my view, by the almost total inarticulateness of the hypothesis that a god created the universe. I mentioned this phenomenon earlier in this book, in reply to the imagined objection that I was unimaginative in supposing that divine creation was a matter of cause and effect. A scientific hypothesis must meet some basic level of articulation in order to make it plausible that that hypothesis it has exercised some independent force of

persuasion – in order to make it plausible that people came to that opinion on purely scientific grounds. We can entertain the hypothesis that some ultra-ancient society created Niagara Falls as an artistic achievement, if anyone ever suggested such a thing, because it is a sufficiently well formed scientific theory. We understand how people or animals with bodies and machines can construct waterfalls from rivers. Soon, I think, we will come to understand how people in laboratories can make life out of inorganic materials. The difficulty with the intelligent design thesis, and similar theories of divine creation, is that we do not understand what is being suggested well enough to judge it, as it were, as a piece of cosmic history. I understand that phrases like “And God created the universe” are mainly not meant literally: theists must use words they understand in ordinary contexts by analogy, to suggest rather than describe what we all lack concepts and perhaps imagination to describe directly.¹³ But this deficiency of comprehension makes it likely that people are drawn to believe in the existence of a god not by the power of faith in a purely scientific claim but because they embrace a package of ideas and traditions in which the scientific claims are not, motivationally, the strongest element.

The same interpretive question might be asked, of course, about a school board’s decision to teach the evidence for and against Darwin’s theory without mentioning the alternative of intelligent design. We might ask whether that decision reflects an ambition to persuade students away from theistic religion. That would be an implausible hypothesis in modern culture, however. The scientific and lay communities that have accepted the general theme of Darwinian evolutionary theory include a great number of people who hold to some godly religion; they believe their belief in evolution is perfectly consistent with a belief in a god. When we judge the matter from the perspective of ethical independence, we find not Nagel’s symmetry but an important asymmetry. Ethical independence condemns teaching creationism in public schools.

We come, finally, to what is undoubtedly the most divisive issue of all: sexual and reproductive morality. When the Supreme Court decided that a state lacks power to criminalize homosexual acts, or early abortions, it located its opinions doctrinally in the equal protection and due process clauses of the American constitution rather than the First Amendment’s guarantees of religious freedom. It had no choice. Opponents of homosexuality and abortion very often cite a god’s will as warrant, but not invariably, and, as I said, few men or women who want choice in these matters conceive their desire as grounded in religion. But if, quite apart from the state of American constitutional law, we treat religious freedom as part of ethical independence, then the liberal position becomes

mandatory. So does gender equality in marriage. I have argued for these claims in other work, and though even this summary statement will provoke dismay I will not repeat or elaborate on my arguments here.¹⁴

In 2009, in a referendum decision that shocked the world, Swiss citizens amended their constitution to prohibit the building of minarets anywhere in their country. The federal government and the Catholic Church, among a great variety of institutions, opposed the ban, but it succeeded by a substantial majority nevertheless. One of the main proponents of the ban argued that since the Islamic religion does not require minarets to be built at mosques, the prohibition could not be regarded as a violation of freedom of religion. The claim is a useful reminder of the point I have been emphasizing. If we conceive freedom of religion as a special right confined to religious subjects, then the fact that minarets answer to no religious duty or requirement – if that is a fact – might seem pertinent. But if we conceive of religious freedom as a central case of a more general right to ethical independence that fact becomes wholly irrelevant. No one familiar with the controversy can doubt that the referendum vote expressed an indiscriminate condemnation of the religion and culture of Islam. It declared war on the egalitarian ideal of ethical independence.

I close with a hope; indeed, if you won't object, a prayer. In this book I suggest that people share a fundamental religious impulse that has manifested itself in various convictions and emotions. For most of history, that impulse has generated two kinds of convictions: a belief in an intelligent supernatural force – a god – and a set of profound ethical and moral convictions. These two kinds of belief are both consequences of the more fundamental attitude, but they are independent of one another. Atheists can therefore accept theists as full partners in their deepest religious ambitions. Theists can accept that atheists have the same grounds for moral and political conviction as they do. Both parties may come to accept that what they now take to be a wholly unbridgeable gap is only an esoteric kind of scientific disagreement with no moral or political implications. Or at least more of them can. Is that much too much to hope? Probably.

Notes

¹ Reference to Seegar.

² University of Chicago discussion, "Unenumerated Rights," 1991. The discussion appeared in the University of Chicago Law Review: See Chapter 3 of Freedom's Law.

³ The three justices said that a woman's views about the permissibility of an early abortion fall into that category of conviction. They did not say that freedom of choice about abortion is protected by the First Amendment's free exercise clause – that would not have been possible given precedents circumscribing that clause – but their opinion suggests the possibility that but for those precedents religious freedom could be understood as protecting the kind of convictions they described.

4 Reference to ECHR decision and Letsas discussion.

5 [Footnote on Smith and the Restoration of Religious Freedom Act. Also: denying polygamy to Mormons.]

6 See Laurie Goodstein, "Bishops Say Rules on Gay Parents Limit Freedom of Religion," New York Times, December 28, 2001

⁷ This description of ethical independence incorporates what might be regarded as a separate requirement of just government: that it show equal concern for all those over whom it exercises dominion. If laws requiring Sunday closing of businesses, to the disadvantage of those who worship on another day, could achieve justifiable aims almost as efficiently by requiring that large businesses give each employee one day off though not necessarily the same day, the conclusion would be irresistible that the interests of those who worship on another day had not been taken fully into account. An obvious compromise that would have protected them at minimal cost to the aims of the regulation had been ignored. That conclusion would be especially hard to resist if a regulation not only inconvenienced people of one faith but prevented them from observing what they took to be a religious duty: prohibiting, for instance, ostensibly on economic grounds, government canteens or restaurants from offering special meals for vegans. If the expense of special meals was minimal, or if the roughly the same economy could be secured by offering only meals fit for vegans, the decision would, once again, suggest a failure to take the special concerns of vegans as fully into account as a general duty of equal concern would require.

⁸ I here distinguish between ethics and what I call impersonal value. Reference to JH.

⁹ Reference to NYRB piece on Citizens United.

¹⁰ On this test, however, Britain's "establishment" of the Church of England as official religion does not offend ethical independence if it is only an historical relic with no bite. Consider the ease with which the ancient rule that a sovereign may not marry a Catholic was abandoned. Shows that there was no discriminatory life left in the rule.

¹¹ The Smith decision outraged the public. Many groups came together. Both liberal (like the American Civil Liberties Union) and conservative groups (like the Traditional Values Coalition) as well as other groups such as the Christian Legal Society, the American Jewish Congress, and the National Association of Evangelicals joined forces to support RFRA, which would reinstate the Sherbert Test, overturning laws if they burden a religion.[11] The act, which was Congress's reaction to the Lyng and Smith cases, passed the House unanimously and the Senate 97 to 3 and was signed into law by U.S. President Bill Clinton.. Later held unconstitutional in part.

¹² See *Jeffries*.

¹³ See Nagel on Rundle.

¹⁴ See *Life's Dominion and Is Democracy Possible Here?* The abortion issue is more complex than I suggest in the text, because my opinion rests on the judgment, which I defend in those books, that a fetus does not enjoy rights of its own before an advanced stage of neural development.