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Brian Leiter

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THE LAW OF RELIGIOUS LIBERTY IN A TOLERANT SOCIETY

Brian Leiter

bleiter@uchicago.edu

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Let us briefly recap the conclusions of the arguments of the preceding chapters. Kantian and utilitarian traditions of moral thought generate compelling support for the conclusion that the state should protect liberty of conscience under the rubric of principled toleration. But there appears to be no equally principled argument that picks out distinctively *religious* conscience as an object of special moral and legal solicitude. If *liberty of conscience* is morally important, then what should we do with respect to the extant law of religious liberty, which treats *religious* conscience as more important than any other kind—sometimes, as in America, *de jure* and always, as in every other Western democracy, *de facto*?

Remember, of course, what is at stake in this question. The constitutional and statutory provisions that encode religious toleration provide that individuals with claims of religious conscience can request, and sometimes secure, exemptions from generally applicable laws, an opportunity unavailable to the individual with a “merely” secular claim of conscience. Given the lack of any good moral reason for treating the non-religious unequally with regard to claims of conscience, one obvious solution would be to extend the breadth of exemptions from generally applicable laws to all claims of conscience, religious or not. If a boy’s Sikh religion requires him to bring a knife to school, then he should be eligible for an exemption from the law forbidding students from carrying potential weapons. But if another rural boy’s family tradition, going back five generations, passed down from father to son as a sacred rite of passage to manhood, demands that a young man after reaching puberty must always carry his hunting knife with him,

then that boy too should have a colorable claim for exemption from the ban on weapons in school. And what then of the lone eccentric, who for reasons known only to him, feels a categorical compulsion, as a matter of the deepest personal integrity, to always have a knife nearby—does he too have a claim for exemption as a matter of liberty of conscience?

Universal Exemptions for Conscience: Four Objections

From a principled point of view, there may be no difference among all the preceding claims of conscience,¹ but it is a virtual certainty that no legal system will embrace this capacious approach to liberty of conscience which would involve according all these claims of conscience equal legal standing. In the first instance, it would be tantamount to constitutionalizing a right to civil disobedience,² a posture it is hard to imagine any legal system adopting. What legal system will say: this is the law, but, of course, you have the right to disregard it on grounds of conscience? This would appear to amount to a legalization of anarchy!

Yet the very possibility of a legal system that constitutionalizes civil disobedience is--as the phrase “legalization of anarchy” suggests--probably conceptually incoherent.³ It is a truism of modern legal philosophy that all law claims authority, that is, it claims the right to tell its citizens what they must do with respect to the matters about which the law speaks.⁴ On Joseph Raz’s influential account, this means that the law tries to *preempt* other kinds of considerations

¹ The Rawlsian and Millian arguments for liberty of conscience (considered in Chapter 1) might diverge in their treatment of these cases. Mill’s emphasis on the utilitarian value of different “experiments in living” is going to countenance a wider swath for claims of conscience than the Rawlsian approach, which arguably requires that the claims be backed by sufficiently serious moral and political reasons. But even the character I call the “lone eccentric” might have such reasons (arguably Thoreau was such a ‘lone eccentric,’ though not one specifically interested in knives!).

² I owe this way of putting the point to Michael White.

³ I hear bracket my official skepticism about “conceptual incoherence” as an argumentative strategy in philosophy, on the ground that I can see no *a posteriori* considerations that would favor countenancing the revisions to the concept of law that would be required. See my *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007), pp. ____-____.

⁴ See generally, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

about what ought to be done, which would include any considerations that might be deemed “reasons of conscience.”⁵ The law says, “Do not carry a weapon into school,” it does not say, “Do not carry a weapon into school, *unless you have a really important reason for doing so*,” such as a demand of conscience. Obviously the law may include explicit exceptions to the prohibition in question--for example, for law enforcement officers--but concrete exceptions to a general rule are very different from a generic “opt out” clause that “constitutionalizing” civil disobedience would provide. The problem with the proposed broad “exception for conscience,” given the Razian account of authority, is that it would no longer be intelligible what the law requires, since every legal command would be of the form, “Do X, unless you have a conscientious [or very weighty] reason not to.” Rather than the law being what Raz calls an “exclusionary” (or preempting) reason for acting one way rather than another, it would become merely an invitation to deliberate about what ought to be done. The law’s claim of authority is often not justified, to be sure, but that is not the issue here. The issue, rather, is that it is central to the very idea of a legal system that it *claims* authority, and to claim authority is to claim the right to say what ought to be done, not to invite a dialogue with every individual’s conscience about what ought to be done. A constitutional right to civil disobedience is tantamount to a denial of the law’s claim to authority, that is, to its very claim to be law. It would not only *invite* anarchy, it would be an effective admission that there is no law, that the rule of individual conscience is the *status quo*.

Notice that the existing regime of exemptions for claims of religious conscience in most Western democracies does not pose a similar problem because *religious* reasons for not complying with a law are only a subset of *all the reasons* that might bear on what we ought to

⁵ We can set the bar for what counts as genuine “reasons of conscience” as high as we like, that does not affect the argument.

do, the latter being the reasons that the law tries to preempt in claiming the authority to tell us what we ought to do. A law that says, “You must do X, unless you have a *religious* reason of conscience not to” is still quite intelligible, except perhaps in the odd case where the law rests only on religious reasons. Yet even in that latter case, it will *still* be intelligible what must be done assuming the law *includes* (legislatively or through judicial decision) a specification of what counts as “religious” reasons of conscience (much as the law against carrying a weapon in school is not rendered unintelligible because there is an exception for law enforcement officers, a category that is otherwise defined⁶). By contrast, in a scheme of universal exemptions for “reasons of conscience” (however weighty we imagine they must be), every law is literally meaningless, since every reason for acting the law might preempt is, in fact, available as a ground for acting otherwise to a person of “conscience.” It is possible, of course, that a particular legal system might *define the scope* of reasons of conscience in such a way that a system of putatively universal exemptions for conscience became more like a regime of exemptions for matters of religious conscience. But in that scenario, there is not, really, a general exemption for claims of conscience, but only for some subset of those claims that the law chooses to recognize.

The preceding may be jurisprudentially interesting points about the nature of law, but there is a far more mundane, practical reason why no legal system is going to embrace a “constitutional right to civil disobedience” in the form of a general liberty of conscience, whatever its pedigree or character. Claims of conscience present hard evidential issues for

⁶ Something similar can be said about the exception to the rule against the use of deadly force in cases of self-defense. Notice, first, that self-defense is only justified against *illegal* use of force, whereas those claiming an exemption for reasons of conscience are claiming that against lawful action. Second, the self-defense exception is also *defined* in most jurisdictions, and not simply a matter “up for grabs” in reasoning about what ought to be done: it is more like the exception for “law enforcement officers” with respect to carrying weapons in school than it is like a generic exemption from every law if there is a reason of conscience.

courts, and their correct resolution is important since what is at stake is the very ability of the community to enforce its laws of general applicability. From the epistemic standpoint, the great virtue of claims of *religious conscience* is that they typically provide evidential proxies for conscience that are much easier for courts to assess. A claim of conscience is, after all, a claim about what one *must* do, no matter what--not as a matter of crass self-interest, but because it is a kind of moral imperative central to one's integrity as a person, to the meaning of one's life. But how are courts to determine whether someone's claim to defy the law is *really* a claim of conscience? That is the specter that haunts any legal regime governing liberty of conscience, and the great practical advantage of a regime which privileges liberty of *religious* conscience is that it gives courts a more robust evidential base for their determinations. After all, a litigant who asserts a claim of religious conscience must reference a *religion*. Religions typically have texts and doctrines and commands, either written or passed down orally among many adherents. Membership in the religion in question usually depends (as Durkheim's account of religion correctly noticed⁷) on participation in *practices* and *rituals* and *ceremonies*. All of this gives the courts a rich evidential base for assessing the genuineness of a claim of conscience. Rather than trying to peer into the depths of a man's soul, the court can simply weigh oral and textual evidence about the religion's doctrines and its requirements, as well as the evidence that the claimant in question really was a member of the religion, as reflected in his participation in the relevant practice and rituals.⁸

⁷ See the discussion in Chapter 2, *supra* pp. ____-____.

⁸ It is true that in the United States, the Supreme Court has held that, "The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect," *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981), and has affirmed that the "sincerity" of the belief is ultimately decisive. Yet even *Thomas* involved someone who was clearly a Jehovah's Witness, though one whose faith happened to demand of him actions that other Jehovah's Witnesses did not view as mandatory. Of course, we saw something similar in the Canadian case of *Multani*: not all Sikhs thought it was essential to carry a *real* knife, yet the Canadian Supreme Court upheld the exemption for those Sikhs who thought the actual knife essential to religious observance. In these, and similar cases, the courts still rely on evidence of an organized religion, and its

These evidential considerations might suggest a compromise posture, short of extending exemptions from generally applicable laws to *all* claims of conscience, no matter how individual (or idiosyncratic). Recognizing the epistemic problem—that courts must adjudicate whether a claim of conscience *is really a claim of conscience*—perhaps we should simply extend legal protection for liberty of conscience *only* to claims of conscience that are rooted in *communal* or *group* traditions and practices that mimic, from an evidential point of view, those of religious groups?⁹ Think of the vigorous and vocal groups now common in affluent capitalist societies that promote veganism or animal rights. Many vegans, for example, regard the appropriation and consumption (as food or otherwise) of non-human animals as morally odious, akin to the chattel slavery of humans.¹⁰ Organized as these individuals are into ideological and advocacy (and even sometimes revolutionary¹¹) groups, it is easy enough to find many of the same kinds of evidentiary markers of a genuine claim of conscience as in the case of a religious claimant. So why not give the vegan prisoner, with *bona fide* involvements in the animal liberation “movement,” legal standing to claim exemption from dietary and/or prison work regimens that would violate his conscientious objection to the exploitation of non-human animals?

requirements (even if not universal), in assessing the validity of the claims. We see something similar at work in the U.S. Supreme Court decision in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), notwithstanding the surface rhetoric of the opinion affirming that a claimant need not attach his claim of conscience to any particular religious sect and its doctrines. Yet Mr. Frazee did affirm that he was a “Christian” and he sought exemption in connection with his observance of the familiar Christian Sabbath, Sunday. On both fronts then, his claim was easily recognizable as a religious one in a Christian-majority society like the United States.

⁹ Other epistemic devices are, of course, also possible, to try to better calibrate exemptions with those who have genuine claims of conscience. Laws, for example, might impose different burdens on those seeking exemptions, as a way of identifying those with a *genuine* claim of conscience (e.g., someone seeking an exemption from one year of military service might have to undertake, instead, two years of alternative civil service). It seems unlikely, of course, that any alternative measures are going to resolve the epistemic problem, and they will still be vulnerable to the Rousseauian worry discussed, below.

¹⁰ See, e.g., Gary L. Francione, *Animal Rights and Animal Welfare*, 48 Rutgers L Rev 397 (1996).

¹¹ See, e.g., Christine M. Jackson, *The Fiery Fight for Animal Rights*, Hastings Center Report 19, no. 6 (1989): 38 (discussing the radical tactics of certain animal rights groups, including the Animal Liberation Front).

Notice, of course, that there is no principled reason for expanding exemptions this way; the proposal is motivated entirely by the practical and epistemic worries noted above. This approach would have the virtue of not treating only claims of religious conscience as legally special, when there is no good moral reason to do so. But it would also have the unwelcome consequence of treating genuine claims of conscience unequally before the law, simply based on how practicable it is for courts to adjudicate their genuineness, and nothing else. Organized vegans would have legal standing, but not Henry Thoreau or his 21st-century analogue.

Is the unfairness of such inequality justifiable? Should we not simply concede that the success of *any* claim at law depends on the ability to prove one's entitlement, and leave it at that?¹² Some accused are wrongfully convicted of crimes, but that does not mean that the right of criminal defendants to prove their innocence constitutes an injustice. If everyone at least has a right to establish a claim of conscience demanding an exemption, why should it matter, morally, that not everyone can prove the genuineness of his or her claim equally well (or equally easily)?

We may put the challenge even more starkly. Those innocent of a crime with which they are charged are entitled to be acquitted, and it is an injustice if they are convicted instead. But that injustice does not entail that it is unjust (because unequal) to establish a system of criminal justice administration in which defendants must try to prove their innocence. Those with a genuine claim of conscience are also entitled (in a legal regime with universal exemptions for claims of conscience) to an exemption; it is an injustice if they are denied the exemption, but that does not mean the system of universal exemptions is morally objectionable. Is there any pertinent difference between the two cases?

¹² I am grateful to David Strauss for pressing a version of this objection.

The difference turns, I suspect, on matters of degree regarding the ease, or difficulty, of proof. If it were extremely difficult for most of those charged with certain kinds of crimes to prove their innocence, such that many innocent defendants were regularly convicted despite their lack of culpability, then a complaint about unequal treatment seems to me to have moral force. The objection then would be that the standards of proof had been calibrated in such a way to entail unequal treatment of too many defendants similarly situated in terms of culpability. This will entail a judgment about matters of degree, to repeat, and it is possible that a scheme of universal exemptions for claims of conscience, with suitable evidential standards, might do well enough to blunt the inequality objection. In that event, the inequality of treatment of claims of conscience is not *necessarily* fatal to a scheme of universal exemptions for claims of conscience.

It bears noticing, however, that a fourth difficulty with such a scheme of exemptions looms, one that is quite independent of the question of proof.¹³ For exemptions from generally applicable laws often impose burdens on those who have no claim of exemption. Think of mandatory military service: if those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or can not successfully establish their conscientious claim. Let us call this, for ease of reference, the “Rousseauian” worry about exemptions. If general compliance with laws is necessary to promote the “general welfare” or the “common good,” then selective exemptions from those laws is a morally objectionable injury to the general welfare. To be sure, not every law from which exemptions might be sought will impede the lawful pursuit of the general welfare, but most will--whether it is exemptions from zoning regulations for

¹³ Here I am indebted to Ben Laurence.

religious institutions, exemptions from mandatory vaccination schemes, or exemptions from a ban on knives in the schools.¹⁴

The “No Exemptions” Approach--and Its Problems

There is, to be sure, an alternative route suggested by the argument of the preceding chapters. If there is no good moral reason to treat *religious* conscience as special, indeed, no reason (except practical and evidential) to treat *communally-sanctioned* claims of conscience as special, and if there are Rousseauian reasons pertaining to the general welfare for the state to enact and enforce its laws, then perhaps we should simply abandon the idea that there should be exemptions from generally applicable laws? To be sure, the state may not pass laws whose aim is to suppress claims of conscience—that would be inconsistent with principled toleration—but the state may, of course, pursue neutral objectives like the safety, health, and well-being of the populace.¹⁵ If we are not to unfairly privilege religious claims of conscience by allowing their adherents to opt out of neutral legal requirements, while non-religious conscientious claimants must bear the burden of defeat (or sanction, should they resist), and if we are not to impede realization of the general welfare by permitting some to opt out of societal burdens, then perhaps it is time to say: the law is the law, and there will be no exemptions for claims of conscience, religious or otherwise? (This does not prejudge the possibility that sometimes civil disobedience will be the morally appropriate response to the law, but that is a different issue.)

¹⁴ The Rousseauian concern would also count against Kent Greenawalt’s *prima facie* attractive proposal that exemptions should depend on how serious the violation of conscience would be for the claimant. So, e.g., being forced to kill in war over one’s conscientious objections seems more serious than denying an exemption for use of an otherwise illegal drug in a religious ritual. See, e.g., _____. Assuming, again, that we can reliably resolve the epistemic problem of calibrating something like “degrees” of seriousness of a claim of conscience,

¹⁵ We will return to the question of what state purposes are actually neutral and permissible, below.

Now eliminating all exemptions would, as Martha Nussbaum emphasizes,¹⁶ impose a burden on matters of minority conscience, since, for obvious reasons, societies are unlikely to create legal prohibitions that burden widely accepted demands of conscience, religious or otherwise.¹⁷ Insofar as there are more religious claims of conscience than non-religious claims—a distinct possibility in many societies—then imposing a No Exemptions regime will undoubtedly burden religious claims of conscience more than non-religious ones, and will burden minority claims of conscience, religious or otherwise, more than majority claims of conscience, religious or otherwise. That certainly seems unfortunate and unfair, but is it more unfair than limiting the burden to minority claims of conscience that can not claim any religious authority on their behalf? At least generally applicable laws *unintentionally* burden minority claims of conscience, whereas a regime of exemptions *intentionally* privileges religious claims of conscience, to the exclusion of others, even though there is no moral reason to do so. If it is liberty of conscience *simpliciter* that has moral standing, then it is hard to see the moral force of a demand for purportedly equal treatment that arbitrarily selects some subset of claims of conscience for special consideration.¹⁸

We can also now see quite clearly the practical import of the issue raised in Chapter 4, that is, of deciding whether the moral foundation of liberty of conscience is toleration (what we there called “minimal respect”) or something more affirmative, like Appraisal Respect. Those

¹⁶ See Nussbaum, *Liberty of Conscience*, pp. __-__.

¹⁷ This will be true even in non-democratic societies, since the costs to an authoritarian society of controlling the population will prove overwhelming if it deviates to widely from accepted conscientious norms in the population.

¹⁸ Notice too that adopting a strong anti-establishment principle, along the lines of French *laïcité*, would not obviate the problem, which results not simply from government efforts to promote particular religions, but from the way in which the other regulatory actions of government will be insensitive to infringements upon matters of minority conscience, religious or otherwise. But perhaps such burdens are the price of not treating religious conscience as special, when no principled argument could support that practice? We return to the special problems posed by *laïcité*, below.

practices which are proper objects of Appraisal Respect often do command exemptions from generally applicable laws. Think of the tax-exempt status of charitable (including religious) organizations in American law.¹⁹ Because American society highly appraises charitable activities (a legal posture that has obvious ideological benefits in an economic system predicated on greed), they are exempt from the general rules pertaining to taxation. More generally, we might think that attitudes and practices that warrant Appraisal Respect ought to command governmental solicitude and support, as opposed to “mere” toleration. If religious claims of conscience were proper objects of Appraisal Respect—a thesis we rejected in Chapter 4--then a broad claim for exemptions would have more force than it does. But if the only claim of conscience is for toleration, then it is not obvious why the state should subordinate its other morally important objectives—safety, health, well-being, equal treatment before the law—to claims of religious conscience.

The argument so far, may seem to have pressed towards the No Exemptions approach to claims of conscience, yet surely we must bear in mind that a regime of religious toleration also demands that the state not single out particular religions for persecution or coercive burdens. To the extent burdens on conscience are incidental to the pursuit of legitimate state objectives, the No Exemptions approach poses no obstacle. But if we adopt the No Exemptions approach as a matter of fairness—because religious claims of conscience have no greater entitlement to exemptions than non-religious claims of conscience—and because of Rousseau’s concerns about the general welfare, then surely we open the door to state conduct motivated by anti-religious animus, but under the pretense of legitimate, neutral objectives. Are not sectarian bias and

¹⁹The Internal Revenue Code states that “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable scientific, testing for public safety, literary, or educational purposes . . . and which does not participate in . . . any political campaign on behalf of (or in opposition to) any candidate for public office” is exempt from Federal income taxes. I.R.C. § 501(c)(3).

prejudice likely to co-opt principled arguments for unprincipled ends, a concern which seems particularly acute in the domain of religious liberty?²⁰

Consider the controversy over the French ban on ostentatious religious symbols—such as the Muslim head scarf, or the Jewish skull cap, or large Christian crosses—in the public schools.²¹ Its purpose was one wholly consistent with French *laïcité*,²² namely, to preserve the public sphere as a secular one, in which persons interact as equal citizens without regard to sectarian identities, religious or ethnic. Yet given the political context,²³ and obvious French antipathy towards Muslims (not to mention the history of French anti-semitism), it is tempting to think of this law as a surreptitious assault on the basic protections of religious toleration. But

²⁰ That fact might be thought to lend support to the Eisgruber and Sager argument discussed earlier (*supra* n. ____). But the question there was whether *vulnerability to discrimination* was adequate to mark out religion as deserving *special* legal protection, and the answer to that question is unaffected by the fact that religion, like so many other kinds of human beliefs and practices, may be susceptible to discrimination: what matters for the point in the text is that religion is vulnerable to discrimination, *not* that it is *especially* or *uniquely* so vulnerable.

²¹ Law No. 2004-228 of March 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 17, 2004, p. 5190; *see also French Scarf Ban Comes Into Force*, BBC NEWS EUROPE, September 2, 2004, <http://news.bbc.co.uk/2/hi/3619988.stm> (last visited December 5, 2010).

²² The 1958 French Constitution provides in Article 1 that, “France shall be an indivisible, secular, democratic and social Republic” [cite], while the French Law of 1905 makes clear in Article 1 that “free exercise of religion” is guaranteed, “under restrictions prescribed by the interest in public order” and Article 2 provides that the Republic “does not recognize, remunerate, or subsidize any religious denomination.” See generally, Mukul Saxena, *The French Headscarf Law and the Right to Manifest Religious Belief*, 84 U. DET. MERCY L. REV. 765, 769 - 71 (2007).

²³ T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 B.Y.U. L. REV. 419, 456 -57 (noting that “the headscarf is increasingly seen as the symbol of a foreign people—with a foreign religion—who have come to France, but who do not wish to integrate themselves fully into French life or accept French values,” and that “just before the events in 2003 that raised the headscarf to a sensational media issue, some leading French legal scholars suggested the possibility that the real concern regarding the Islamic headscarf may not be related to high principles of a neutral republican education in public schools, but a deeper unease about Islam.”). *See also* Daniel Williams, *In France, Students Observe Headscarf Ban*, WASH. POST, Sept. 3, 2004, at A11 (“Critics condemned the law as an attack on religious freedom and said it would stigmatize the estimated 5 million Muslims in France. Some Muslim groups pledged further protests, calling the restriction anti-Islamic.”); Elaine Sciolino, *Ban on Head Scarves Takes Effect in a United France*, N.Y. TIMES, Sept. 2, 2004, at A8 (“Although the ban on ‘conspicuous religious symbols also applies to Jewish skullcaps and large Christian crosses, there was never any doubt that it was primarily aimed at France’s five million Muslims and what is widely perceived as creeping fundamentalism in their midst.”).

notice—and this might seem, at first blush, the important point here—that such an assault would be effectively defeated by a legal regime that recognized religious exemptions from generally applicable laws.

Of course, it is precisely the point of the French conception of *laïcité* to reject such exemptions, in favor of an ideal of equal citizenry of *persons qua persons*. But more importantly, the real objection here is not to the absence of exemptions for claims of religious conscience from generally applicable laws, but rather to the fact that the law in question *seems* a mere subterfuge for a morally impermissible motive or purpose, namely, the motive or purpose of *not* tolerating a particular religion, namely, Islam. If there are good moral arguments for liberty of conscience—precisely the view defended in Chapter 1—then those arguments must surely rule out the persecution of particular claims of religious conscience, not because they are religious, but because they are claims of conscience. The only question about the French law banning head scarves then is whether it is animated by intolerance towards Islam, not whether it reflects the drawbacks of a system that lacks exemptions for claims of religious conscience.

Can we dismiss the preceding concerns quite so easily? The argument for liberty of conscience, to repeat, demands toleration of claims of conscience, but the No Exemptions approach says that the law need not carve out exemptions from generally applicable laws for claims of conscience. The worry, then, is that the requirement of toleration will amount to little in practice. Could not the state simply burden *any* disfavored claim of conscience under the guise of pursuing a general objective? In the case of French *laïcité*, the problem is even worse than that, since the *general* objective in question is one that is *not* neutral about religion, but specifically deems religious attributes ones that do not belong in the public sphere. Is not exclusion from the public sphere in this manner itself a pernicious *burden*?

It is important to keep the two issues separate. One worry (the focus so far) is that a No Exemptions approach makes it too easy for states to burden conscience under the guise of pursuing neutral objectives. The second (and new) worry is that the objective of excluding religion from the public sphere (in the manner of French *laïcité*) is, itself, inherently intolerant, and so impermissible.

The first worry raises only an epistemic or evidential issue. After all, it has been the baseline premise of the argument of this book that *of course* state action whose aim is to burden particular religious claims of conscience is inconsistent with the moral requirement of toleration! Any prohibition, in any area of law, on particular state purposes will raise evidential questions about how to identify cases where the forbidden purpose is really at work. On its face, it seems odd to think that the correct response to an evidential problem is an exemption from the law that is not otherwise morally justified. To be sure, if we thought the evidential problem were insurmountable—that is, if we had reason to think that it will be impossibly difficult to discriminate between the *façade* of neutral purpose and *actual* neutral purpose in legislation that burdens religion—then we might think exemptions for religious claims of conscience the preferable approach, notwithstanding the inequality such an approach entails and notwithstanding the burden on the general welfare. But notice that this style of argument could equally well propel us back to general exemptions for claims of conscience, to the extent we thought the *façade* of neutral purpose could regularly cover over the attempt to persecute non-religious claims of conscience as well.

What, then, of the second worry? Is French *laïcité* in its very nature impermissibly *intolerant* by excluding religion from the public sphere? Does not the legal judgment that, in the public square, the equality of *persons qua persons* demands that they shed the visible indicia of

their religious identities constitute intolerance of religion inconsistent with the arguments of Chapter 1? The immediate answer might seem to “no,” since the Rawlsian and Millian arguments of Chapter 1 only established that there is a good moral case for liberty of conscience, not that such liberty could only be realized in the public arena. It is one thing for the state to criminalize a particular religion and its practice, quite another for the state to say that the religion and its practices do not belong in the public schools. Is not my liberty of conscience intact if I may proselytize my neighbors and teach my children the purported truths of dialectical materialism or Hayekian free market utopianism, for example, even though I may not usurp the public school curriculum for the same philosophical program?

Of course, that is not quite the burden involved in French *laïcité*. The more precise analogue would be the situation where the state declares that one may not even act or dress in such a way in the public schools as to evince one’s allegiance to the forbidden ideologies, whether Islam or Christianity, Leninism or Hayekianism. No veils, no yarmulkes, no ostentatious crosses, and no hammer-and-sickle or “greed is good” T-shirts: *that* would constitute the relevantly analogous regulation. Would such a prohibition constitute impermissible intolerance?

What *Precisely* Does Toleration Require?

This question brings to the fore an important issue so far unaddressed explicitly in the argument of the book. The intolerant want to “stamp out” disfavored beliefs and practices, and we have adduced, in Chapter 1, moral arguments against intolerance (limited, of course, by the Harm Principle). But is the protection against intolerance exhausted by a mere prohibition on annihilation or imprisonment of those with the disfavored beliefs and practices? Does the state discharge its obligation of toleration if it simply refrains from murdering or jailing those in the

grips of “disreputable” claims of conscience? Surely there are other ways for a state to be intolerant, but this gets us to the real challenge posed by French *laïcité*.

Let us shift our focus, for a moment, from religion to political speech. The French, like many European countries, impose legal restrictions on public (and even private) advocacy of and displays of Nazism.²⁴ Wearing Nazi regalia in the public schools, or anywhere in public, would quite clearly incur legal sanction in most of the countries that survived the horrors of the Nazi era. These laws are quite clearly “intolerant” of Nazism, and, equally clearly, they infringe on matters of conscience, albeit matters of depraved conscience. One need only recall Hitler’s conduct towards the end of World War II—when he insisted on diverting manpower and resources to the extermination of the Jews, rather than freeing the manpower up to fight the war and utilizing the Jews as slave labor²⁵—to realize that Hitler was a man of principle, who pursued the objectives he thought morally correct and obligatory, notwithstanding the consequences. Moral philosophers have recently called attention to the extent to which the street-level perpetrators of Nazi horrors were men (and sometime women) of conscience, also acting in accordance with their sense, however warped, of moral duty.²⁶

If people act on the basis of their “Nazi conscience,” does liberty of conscience require us to acquiesce? It quite obviously does not, for reasons that we emphasized in Chapter 1: namely,

²⁴ See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 379 F.3d 1120, 1121 (9th Cir. 2004) (“Section R645-2 of the French Criminal Code bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing such material.”); see also ROBERT A. KAHN, *HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY*, 15 (Palgrave Macmillan 2004) (describing Germany’s prohibition against forms of Nazi speech).. The United States is, of course, an outlier among Western democracies in this regard. Perhaps, given the U.S.’s unusually reactionary public culture and the plutocratic character of its political system, this is fortunate and a necessary condition for toleration in practice. But the discussion in the text takes for granted that principled toleration is compatible with measures like restrictions on Nazi speech.

²⁵ See generally IAN KERSHAW, *HITLER, THE JEWS, AND THE FINAL SOLUTION* 92 (Yale University Press, 2008).

²⁶ Herlinde Pauer-Studer and J. David Velleman, “Distortions of Normativity,” *Ethical Theory & Moral Practice* (forthcoming).

that a principle of toleration operates under the side-constraints imposed by something like the Harm Principle.²⁷ The state is under no moral obligation to tolerate acts of conscience that cause harm to other persons. But that does not get us very far with the current question, since typical European restrictions on “Nazi speech” are blanket bans on *speech and symbols*, not simply on actions. The European legal restrictions on even the *expression* of Nazism reflect some combination of the judgments that: (1) such expressions run too great a risk of harm to humans, and (2) Nazism is akin to the denial of geometrical truths (to borrow the preferred Millian analogy²⁸), that is, it represents a set of ideas about which (to quote Mill) “there is nothing at all to be said on the wrong side of the question. The peculiarity of the evidence...is that all the argument is on one side,”²⁹ which is to say, *not* the Nazi side. I shall refer to the first consideration justifying a limitation on liberty of conscience as the “Risk of Harm” consideration; and I shall refer to the second as the “Falsehoods Need Not Be Heard” consideration (though really we are talking only about *clear* or *obvious* or *indisputable* falsehoods only). Does either consideration have any bearing on whether a regime like French *laïcité* constitutes morally impermissible intolerance of religion?

The actually existing French regime of *laïcité* obviously can not be justified on the grounds that Falsehoods Need Not Be Heard, since that would require a much more far-reaching set of restrictions on religious expression, that go well beyond the desire to preserve the public sphere as one in which citizens interact as equal citizens, without regard to sectarian identities. If burdens on Islamic headscarves and Jewish skull-caps were to be justified on the grounds that Falsehoods Need Not Be Heard, then Catholic Churches, Islamic Mosques, and Jewish

²⁷ Even the Rawlsian theory of justice operates under a similar side-constraint, as argued in Chapter 1.

²⁸ See the discussion in Chapter 3, *supra* pp. ____ - ____.

²⁹ *On Liberty*, p. 35.

Synagogues would obviously need to be shut down as well, and Bibles, Korans, and Torahs would need to be confiscated, but that is no part of the program of French *laïcité*.³⁰

That means the only colorable defense of French *laïcité*, from the standpoint of principled toleration, is one based on Risk of Harm considerations. If religious expression is to be treated like Nazi expression in the public sphere (consistently with the constraints imposed by the principle of toleration), then it must be because the risk of harm associated with religious expression is on a par with the risk (if not the harm) associated with religious expression. It bears emphasizing at this point that there are two components to what is at issue here: the risk *and* the harm. The harm in question is the transformation of the public sphere from one in which persons interact *qua* persons, to one in which they interact on the basis of religious identities. That risk is *very* real, as experience in the United States would suggest--where, for example, the vast majority of the population reports that they would never vote for an atheist for elective office, but express much higher levels of tolerance for (i.e., willingness to support for elective office) gay men and women, Moslems, and Jews.³¹ Yet even in the U.S., this antipathy towards atheism does not manifest itself (at least not yet) in the burnings of heretics or the legal persecution of non-believers. Yet lesser, but still real, harms are apparent from the hyper-religiosity of the United States, such as the assault on science curricula in the public schools. (As we will argue below, the state can, quite consistently with principled toleration, disestablish religion from the public schools.)

³⁰ It is possible, to be sure, that French *laïcité* makes no moral sense, and that it should either encompass a general ban on religious expression, comparable to the ban on Nazi expression, or it should be relaxed so as to accommodate religious expression in the public spheres. The former seems to me an approach of dubious merit on Millian grounds, since even if we assume that many religious beliefs are false, not all of the beliefs associated with religion are, and even the false ones may still have the salutary effect of forcing those who reject them to clarify their reasons for doing so. See the discussion, *supra* Chapter __, pp. __-__.

³¹ Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOCIOLOGICAL REV. 211, 215 (2006) (Noting that "the gap in willingness to vote for atheists versus other religious minorities . . . is large and persistent," and that in surveys fewer than half of respondents expressed willingness to vote for an open atheist).

Remember, of course, that the moral magnitude of the harm still remains at issue. No one doubts that those in thrall to Nazi claims of conscience will act, to the extent they can, in ways that really harm human beings. The harm at issue in the case of religious invasion of the public sphere is far different: not ordinarily to physical well-being, but, in the first instance, to a moral ideal of equal citizenship. The denial, *de facto* if not *de jure*, of full equal citizenship might lead to more tangible blood-and-flesh harms, but the prediction that it will do so is considerably more speculative, and not obviously adequate to support a Harm Principle argument in the spirit of Mill (even allowing for the ambiguities of what constitutes “harm” in a Millian framework). The only Risk of Harm to which the French approach can reliably advert is the risk of increased false belief, but that, as we have already seen in Chapter 4, is not obviously a harm, since false beliefs often have salutary effects (they are, as Nietzsche says, sometimes conditions of life itself), both for their adherents and sometimes for others.

The conclusion, then, seems clear: French *laïcité* is, in fact, a case of impermissible intolerance of religion, unless one were to assume, contrary to reality, that most religions burdened by it were akin to Nazism. But that also means that the No Exemptions approach to principled toleration is incompatible with a regime like that of French *laïcité*. In fact, this should not be a surprising conclusion, since the central contention of the No Exemptions approach is that there do not need to be exemptions for claims of conscience from laws *with neutral objectives*. The “neutrality” of objectives required, it now seems, requires neutrality as to dictates of conscience that do not violate the Harm Principle.³² Since it can not be maintained

³² In the next section, we shall return to an important qualification of this claim. It is one thing to be *neutral* with respect to the objective of suppressing or burdening a particular claim of conscience (unless doing so would be justified on Harm Principle grounds), it is quite another to be neutral about *what ought to be done*, where what ought to be done may reflect what I will call a “Vision of Conscience.” The state can not be neutral as to the latter, except if it stops being a state.

that religious dictates of conscience, *in general*, violate the Harm Principle, a general ban on the expressions of such claims of conscience in the public sphere can not be justified. (More carefully tailored bans on particular claims of religious conscience might be justified, but that is a different question.) It is not enough for toleration of conscience that the state not jail or annihilate the adherents of the disfavored claims of conscience; the state must also not directly target or coercively burden their claims of conscience, unless they run afoul of the Harm Principle—more precisely unless they pose Risk of Harm or constitute Falsehoods That Need Not Be Heard. These points, however, are no objection to the No Exemptions approach except in the unusual circumstances in which we think the *evidential* question about whether the state is really pursuing permissible, *neutral* purposes can not be answered, in which case the default position would be suspicion of any law that burdens conscience. But that does not appear to be our world—at least not yet—and so the No Exemptions approach stands, even if it is not compatible with French *laïcité*.

Religious Toleration and Religious Establishment

Our primary focus so far has been on the interaction between the requirements of a principle of toleration and exemptions from generally applicable laws that infringe on claims of conscience—what, in the United States, would be known as “free exercise” issues. But any conception of religious liberty must also address issues of religious *establishment*, that is, issues about the state endorsement of a particular religion, or of religion as against non-religion, or even of non-religion as against religion. How does religious establishment interact with religious liberty and with the moral requirements imposed by a principle of toleration?

We have already broached this issue, in part, through the preceding discussion of French *laïcité*. French *laïcité* represents a particular kind of disestablishment of religion, excluding, as it

does, religious expression and symbols from much of the public sphere--an exclusion that, as we argued above, can not be justified on Harm Principle grounds, and thus seems to constitute a burden on conscience inconsistent with principled toleration. But it does not follow from this that disestablishment of religion in favor of non-religion is inconsistent with principled toleration. After all, liberal states necessarily disestablish all illiberal claims of conscience by putting the imprimatur of the state on equality, on democracy, on liberty, and so on—though they do not go the intolerant step further of forbidding all expression in the public sphere of illiberal ideas, except when those ideas are likely (perhaps imminently likely) to result in actions that violate the Harm Principle.

But most liberal states go a step beyond that, also putting the imprimatur of the state, for example, on science as a reliable source of knowledge about the natural world, as reflected in the curricula of the public schools, or by using public monies to fund medical research and procedures to which some taxpayers object “as a matter of conscience.”³³ I shall argue that, consistent with a principle of toleration, the state may indeed put its imprimatur on values and world-views that are inconsistent with the claims of conscience of some of its citizens (as long as its objective in doing so is *not* to suppress or coercively burden those claims of conscience but to achieve some conception of the good—a point to which we shall return). The state, consistent with the principle of toleration, may even disestablish religion, though not in the manner of

³³ The United States is, to be sure, somewhat unusual among the developed Western democracies in sometimes restricting access to public money for well-established medical procedures and research because it offends sectarian religious claims of conscience. See, e.g., Omnibus Appropriations Act of 2009, H.R. Res. 1105, 111th Cong. § 507 (2009) (prohibiting federal funding for any abortion or health benefits coverage that includes coverage of abortion); Balanced Budget Downpayment Act of 1996, H.R. Res. 2880, 104th Cong. § 128 (1996) (banning federal funding for “research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero . . .”); see also Press Release, Office of the Press Secretary, White House, *President Discusses Stem Cell Research* (Aug. 9, 2001), available online at <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010809-2.html>>. See also O. Carter Snead, *Public Bioethics and the Bush Presidency*, 32 Harv. J.L. P. Pol’y 867, 886-87 (2009) (noting that the first two vetoes of George W. Bush’s presidency were used to prevent Congress from liberalizing embryonic stem cell funding policies, and the legislative successes and failures of the Bush Administration in attempting to curtail federal funding of embryonic stem cell research).

French *laïcité*. These conclusions will no doubt be congenial to religion skeptics, but it bears emphasizing that the arguments apply equally well in a different direction: nothing in the principle of toleration is incompatible with state establishment of religion, as long as it is done in such a way that it does not burden non-religious claims of conscience--except, of course, to the extent that such coercive burdens can be justified on Harm Principle grounds (either because of the Risk of Harm or because of the Falsehoods Need Not Be Heard rationales³⁴).

Let us start with establishment of religion. Many Western democracies, such as England and Germany, have established religions, and yet have robust regimes of liberty of conscience, in which a range of moral and political views find expression in the public sphere that are unknown in countries like the United States, which do not establish any religion. (Such natural experiments should perhaps serve as cautionary notes to anyone who thinks a legal regime plays a significant causal role in constituting the moral culture of a nation.) What we learned from consideration of the case of French *laïcité* is that establishment of what I will call henceforth “a Vision of Conscience”--a vision, broadly speaking, of what is good and worthwhile³⁵--is compatible with toleration, as long as it does not have as its purpose to burden coercively minority claims of conscience, beyond what would be licensed by the Harm Principle. The problem with French *laïcité* is that it wants to establish a particular Vision of Conscience—of persons as equal *qua* persons, without regard to religion or ethnicity—through coercion of those with minority claims of religious conscience, and in a way that can not be justified on Harm Principle grounds. Religious symbols worn by students in the public schools simply do not undermine democratic equality, except on fantastically paranoid assumptions about human

³⁴ See the discussion *supra* pp. ____-____.

³⁵ It is important to bear in mind that when governments endorse a vision of what is “true” and “real,” they are almost always doing so because of practical considerations, i.e., because they believe (correctly, in this instance) that a scientific view of the world is practically useful, and so students should learn scientific truths in school, not religious ones. We return to the issue *infra* n. ____.

psychology and sociology, and that is true even if the French state might be quite justified, consistent with a principle of toleration, in, for example, suppressing the hate speech of an Imam who claimed that all non-Muslims were infidels who should be murdered.³⁶ Without a doubt, it would be consistent with principled toleration for the French government to teach secularism in the public schools, to affirm the secular character of the Republic in its public pronouncements, and to allocate its resources in a way consistent with these objectives. What it can not do, consistent with principled toleration, is try to shut down private citizens who would express a different Vision of Conscience.

British establishment of Anglicanism provides the natural counterpoint to French *laïcité*, as an example of an establishment of a *religious* Vision of Conscience that does not impinge on the principle of toleration. Anglican Christianity is the “official” religion of Britain—it is literally “the Church of England”—which means Anglican prayers and liturgies are customary features of public life, and at least the royal family still professes allegiance to the Church. But no one can doubt that modern Britain adheres to principled toleration when it comes to other religions: there are no religious tests for the holding of public office; sectarian religious schools in non-Anglican traditions actually receive public funding; other religious traditions are guaranteed the right to practice their religions; and no non-Anglican religious practices are criminalized or otherwise suppressed. Perhaps this is a peculiar artifact of English culture—after all, as my English friends like to point out, it’s not really clear that the Archbishop of Canterbury even believes in God—but even so, it is a clear case of religious establishment that seems fully compatible with the requirements of toleration of non-established religions.

³⁶ It is almost certainly justifiable for a state to prohibit school teachers from wearing religious garb, as Germany does. See _____. And see the discussion, below, regarding what it means for the state to endorse a Vision of Conscience.

If religious establishment can be compatible with principled toleration, so too can religious disestablishment, as long as it does not target for suppression or coercive burdens religious or non-religious claims of conscience—except, to repeat, when warranted by the Harm Principle. The state may endorse a Vision of Conscience according to which religious explanations for the origin of human life are mythologies that have no place in the public schools, but what they may not do is prevent the creationists and Intelligent Design proponents from articulating those views in private and in public (if not in the state schools). The French state could even endorse the ideal of citizens interacting as equals *qua* citizens, without regard to race or religious or ethnicity, but what it can not do is prevent citizens from displaying their religious convictions in public (as little as it would be justified in preventing them from displaying their ethnicity or race in public).

There will remain, to be sure, fuzzy boundary cases involved in the idea that the state may endorse a Vision of Conscience but not suppress the expression of contrary visions. Some state endorsements may crowd out private expressions of contrary visions, for example, a worry that may be especially serious where the media of communication are under state control. (On the other hand, Britain is, again, a counter-example to this concern.) But even allowing for hard cases, it seems clear that, in principle, there is no incompatibility between state endorsement of a Vision of Conscience—religious or irreligious—and the demands of principled toleration.³⁷

Principled toleration requires the state not to persecute or target for special burdens particular

³⁷ A state might, of course, endorse a Vision of Conscience that demands more than principled toleration. Consider what Nussbaum calls “the Madisonian ideal” of “equal respect” (*Liberty of Conscience*, pp. __-__), which prohibits branding, symbolically or otherwise, certain citizens as “outsiders.” Such a Vision could, conceivably, *demand* exemptions from generally applicable laws as the price of sustaining a kind of equality in public life. I think it is doubtful, though, whether any state could really embrace as stringent an “equal respect” criterion as Nussbaum contemplates, as suggested by some of the astonishing accommodations her view imagines: e.g., children being able to opt out of a proper physics or biology class because as “a matter of conscience” they believe God created the universe and human beings, in a way consistent with the “Big Bang” and the theory of evolution by natural selection. [add cites and discussion of MN’s view on this here].

claims of conscience; it does not require the state to cease being a state, i.e., to cease promoting a Vision of Conscience, of the public good, social welfare, or human fulfillment.³⁸

American constitutional law has recently confronted a version of this problem in the context of the “viewpoint discrimination” revolution in Establishment Clause jurisprudence. The U.S. Supreme Court had, for some time, interpreted the constitutional prohibition on an “establishment” of religion as forbidding laws requiring “excessive entanglement” with religion.³⁹ The meaning of that prohibition was also for a generation or so moderately clear: it meant that state-supported schools could not, for example, let their facilities be utilized by sectarian religious groups promoting a sectarian, religious message. This was a kind of disestablishment: it said that state schools were off-limits to those who would promote religion. This disestablishment co-existed, of course, with secure protections for both religious expression in private life and the advocacy of religious claims in other public spaces, such as the media and the proverbial “public square.”

In the 1980s, conservative religious groups began litigating against such prohibitions, arguing that they were unconstitutional “viewpoint discrimination” by the state: if state schools open their after-school facilities or otherwise offer support to various viewpoints (e.g., the animal rights group, or the College Republicans, or the local chapter of the Socialist Workers Party), then it is an unconstitutional violation of freedom of *speech* to prohibit religious groups from

³⁸ I am here aligning my view with that of the so-called “perfectionists” in political theory, like Joseph Raz and Steven Wall. Rawlsian political liberals think a state can actually abstain from promoting a Vision of Conscience that isn’t generally accepted, though it seems to me that they just denominate as “unreasonable” anyone who has a Vision of Conscience incompatible with the Rawlsian vision.

³⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). *Lemon* has, of course, been eviscerated in some measure by subsequent U.S. Supreme Court decisions, but the “viewpoint discrimination” revolution discussed below, in the text, did, in my view, the most damage to the principle.

utilizing those facilities *on the grounds that their viewpoint is religious*.⁴⁰ But if the preceding argument of this chapter is correct, then disestablishment of religion by barring the use of public schools by religious groups is morally consistent with principled toleration. The state can establish a Vision of Conscience which does not include religion, meaning that state schools need not accommodate religious expression, contrary to the wrong turn taken by the U.S. Supreme Court; what the state can not do, consistent with a principle of toleration, is deny individuals the opportunity to express in other aspects of their life a religiously-grounded Vision of Conscience.

But what precisely is the difference between saying, “You may not use public school facilities to teach a particular religious dogma” and saying, “You may not appear in a public school wearing clothing that reflects your religious beliefs”? After all, French *laïcité* targets the latter, as well as the former, but now it appears we are claiming there is a morally pertinent difference between the cases. And, indeed, there is, though, as in all these cases, some of the differences are ones of degree, rather than kind. The argument so far has been that the state must, of course, express a Vision of Conscience, and that it can do so consistent with principled toleration as long as its aim is not to suppress or coercively burden individual claims of conscience. But why does it constitute an impermissible burden on my religious Vision of Conscience to forbid me from wearing a Jewish skull-cap in the public school, but it does not constitute an impermissible burden on my religious Vision of Conscience to forbid me from teaching the truths of the Torah in the public schools?

If states can—indeed, must—promote Visions of Conscience, then states must be able to manifest their endorsement of the Vision. One way in which all states do so is through their

⁴⁰ For representative cases, see *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995).

educational systems, and through what can and can not be taught to the students in the system.

Suppose a particular sect believed that the sun revolves around the earth, and that it would offend the dignity of God, who made man in his image, to claim otherwise. If the state turns its science classrooms over to the teaching of this view—even as one view among many that students might consider—it would, on any reasonable, interpretation undermine its endorsement of the Copernican vision of the solar system. Words matter, and words spoken by agents of the state matter, at least insofar as they communicate, quite clearly, the Vision of the Conscience the state endorses.

But suppose our anti-Copernican sect issued a distinctive shirt to its adherents, say, one with a picture of the solar system with the earth in the center. If the state permits students in the public schools to wear that shirt, would anyone reasonably infer that the state endorse the anti-Copernican vision of the world? It is hard to see how that conclusion would be warranted, when the school as a whole—its curriculum, its books, and its facilities—are given over to teaching the Copernican conception.

This argument depends, of course, on background assumptions about the significance of different forms of expression, verbal and sartorial. One could imagine local cultural norms sufficiently different from ours such that if the public schools permitted someone to appear wearing a Jewish skull-cap, it was tantamount to the state endorsing Judaism. But at least in the Western democracies, that does not appear to be the status quo with respect to our background norms. Conversely, one could imagine a society in which cultural norms view the public schools not as the agents of state endorsement, but as akin to public parks, and so the fact that after-school facilities were turned over to the anti-Copernicans would not in any way be inconsistent with the state's endorsement of the Copernican vision. Any plausible conception of which

regulations impermissibly *coerce* or *burden* claims of conscience must be similarly attuned to local cultural norms.

It may be worth pausing to consider the contrary scenario to the American one *prior* to the “viewpoint discrimination” revolution—that is, a scenario in which the state, instead of disestablishing religion in the public schools, rather endorses a particular religion, say, Catholicism, and thus declines to let funding for public education be utilized for supporting Hinduism or atheism. Thus, in this alternative scenario, public school facilities would be available to the Catholic Student Society, but not to the Hindus or the atheists or perhaps even to the Republicans!⁴¹ Can a state promote a Catholic Vision of Conscience this way consistent with the demands of principled toleration?

Let us assume that the background cultural norms are the same, in the sense that public schools which permit students to wear sectarian clothing of any kind are not understood to endorse that sect, and in which the content of the public school curriculum, by contrast, is generally understood to reflect the state’s endorsement of a Vision of Conscience. And let us suppose that our counterfactual society permits the public expression of Hinduism, atheism, Calvinism; indeed, permits parents to send their children to appropriate sectarian schools in lieu of the public schools; indeed, in the manner of Britain, funds these ‘alternative’ schools. It is hard to see how such a society could be deemed to run afoul of the requirements of principled toleration.⁴²

⁴¹ We will suppose these are Jesuits who are “establishing” Catholicism.

⁴² There might seem to be a problem in the case of the establishment of particular religions, like Catholicism, that is not at issue in the case of the establishment of, at least, atheism. The problem pertains to the particular way in which it seems religious doctrines conjoin claims of theoretical and practical reason. Theoretical reason is concerned with what one ought to believe, practical reason with what one ought to do. Religious systems of belief, like Catholicism, typically conjoin them: one ought not abort fetuses because one ought to believe that the fetus incorporates a God-given soul, and one ought not destroy God’s creations. In consequence, the establishment of Catholicism will, inevitably, reach into private *action* in ways that increase the risk of coercive burdens on conscience: to establish Catholicism it is not enough to teach in the public schools what children ought to believe,

The U.S. Supreme Court has often emphasized, quite reasonably, the “coercive” effect of certain practices in the public schools on children,⁴³ a worry wholly consistent with the earlier emphasis on local cultural norms in assessing the coercive or burdensome significance of particular regulations. But informal social norms are all important in this context. I am reminded of a story my father, now in his late 70s, told me. Raised in a religious Jewish family, he became, notwithstanding, an atheist at the age of four, and yet was subjected to years of public schooling—in Brooklyn, New York, no less during the 1930s and 1940s—in which daily readings and prayers from the King James Bible were common. Perhaps my father was *sui generis*, but it was not like New York City became a center of Protestant revivalism in the 1950s and 1960s among former Jews. I think the explanation is obvious: the whole cultural context of these ludicrous Bible-reading rituals was guaranteed to undermine their impact. And, of course, it was not just the public schools, but the public culture of the nation as a whole that was in-your-face Protestant. And yet it all had no impact on the liberty of conscience of a youngster in New York City, where it was easier to find Trotskyites to discuss ideas with than it was to find Baptists.

but also how they ought to act, and, in particular, how they ought to act in matters far removed from anything that might otherwise be a subject of the public school curriculum. Yet atheism, on its fact, seems to only impose a demand of theoretical reason: one should *not* believe in God. But practical reason is, of course, always responsive to claims of theoretical reason, so if the state endorses a claim of theoretical reason to the effect that God does not exist that can not avoid affecting the practical reason of any citizens who think the existence of God is relevant to what ought to be done. In the end, then, I am not sure the establishment of Catholicism will really be different in kind from the establishment of atheism. There is, as Nietzsche well understood, a kind of unity of theoretical and practical reason, though not the kind Kant imagined: the overvaluation of truth characteristic of the post-Christian West means that the “truth” about matters is typically thought to be significant in practical reasoning about what ought to be done. One need only read the polemics of “New Atheist” writers like Richard Dawkins to see this clearly.

⁴³ See, e.g., *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 291 (2000) (rejecting the argument that prayer delivered over a public address system prior to high school football games is not “coercive” because attendance at the games is voluntary); *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (referring to the “subtle coercive pressures” present in prayers at a high school graduation ceremony).

But what, then, of the same youngster in Texas or Arkansas? The problem in those cases was surely the interaction of the state endorsement of religion with the local cultural norms: the dominance of Protestantism in the communities, the oppressive homogeneity of the public culture, the rhetoric of politicians and community leaders, all would serve to reinforce the message of the Bible reading, and so would turn what was slightly ludicrous and irrelevant in Brooklyn in the 1930s into something perniciously coercive. To be sure, that means if we are looking for a *national* standard for what is permissible in the public schools, then the default position, required by principled toleration, is one in which Bible readings are off limits, even if today, as then, there will be communities in which the effect of such a practice would be to encourage irreligion and ridicule of religion. So while establishment of religion or irreligion can both be compatible with principled toleration, assessing whether it is so will require case-by-case judgments in light of the prevailing cultural norms of the communities affected.

It is very important to emphasize at this stage in the argument that whether we should prefer a state that establishes Catholicism or Hinduism rather than atheism is a *wholly separate moral question*. The argument so far has only been that such establishments *can* be compatible with principled toleration. One might think that *establishment* of a Vision of Conscience, religious or irreligious, ought to turn on whether that Vision is a proper object of Appraisal Respect. As we learned in Chapter 4, however, religion *per se* is not a likely candidate for Appraisal Respect, which might be a fatal obstacle to defending any kind of religious establishment *even if* such establishment were compatible with principled toleration.⁴⁴ We have not, to be sure, made the argument that irreligion, in the form of atheism or otherwise, is in fact a proper object of Appraisal Respect, and so nothing in the preceding argument should be taken to

⁴⁴ Perhaps, though, *particular* religions are candidates for Appraisal Respect. Nothing in the argument of Chapter 4 rules out that possibility.

have made the case for the establishment of irreligion either. All we have shown, if the argument has been convincing, is that religious establishment and religious disestablishment can both be compatible, under the right conditions, with principled toleration.

A Final Rejoinder to the No Exemptions Approach: “There are *only* religious claims of conscience”

So far, we have pressed the proposition that the No Exemptions approach to claims of conscience, religious or otherwise, is the one most consistent with fairness (given the practicalities of enforcement), with the very concept of law, and with the necessity for states to endorse a Vision of Conscience. But a final worry no doubt looms: for are not religious claims of conscience especially resilient and fierce, especially likely to provoke backlash, disobedience, and the proverbial “blood in the streets”? After all, if your sense of categorical obligation—the hallmark of a claim of conscience—is also conjoined with concern for the well-being of your soul not just now, or tomorrow, but *for all eternity*, then you will not accept interference with your obligations lightly. In short, perhaps the real reason to think that principled toleration of religious claims of conscience deserve special consideration is because they are the ones least likely to accede to a No Exemptions regime?

A suitable response to this worry must start by remembering that it is not the case that the “eternal well-being of the soul” is a *distinctive* aspect of religious categorical commands—some religious sects emphasize that, some do not. So the worry that categorical commands will, necessarily, be taken more seriously by the religious than the non-religious can not be right. Indeed, the whole idea that categorical demands are taken more seriously by the religious than the non-religious is one we rejected, effectively, in Chapter 2. Recall that if one looks at horrifically oppressive political environments, like Nazi Germany in the 1930s--environments

that would seem well-positioned as ‘natural experiments’ for weeding out *real* claim of conscience (ones experienced as categorical) from the pretenders, that is, those who relinquish their “obligations” in the face of drastic consequences—what one finds is that religious believers are among those who “risk everything” to do what is right, but so too are many non-religious believers, such as communists. That certain human beings are capable of experiencing certain demands as categorical is an important psychological fact about creatures like us, to which law must be sensitive. That psychological fact, however, does not track religious belief.

So the initial worry should really be different: not that religious believers will respond to a No Exemptions approach with “blood in the streets,” but rather that in any society, there will be some conscientious individuals who will not comply with generally applicable laws that offend their conscience. That is surely right, but it constitutes no argument against the No Exemptions approach. We can as little justify exemptions from generally applicable laws to “those most likely to make trouble” as we can justify exemptions from those laws to “those who have religious claims of conscience.” Sometimes those with claims of religious conscience may be quite correct to resist the law, but that is wholly independent of the question whether the law ought to exempt them from its application. It has been the argument of this book that principled toleration does not require that we do so. Toleration may be a virtue, both in individuals and in states, but its selective application to the conscience of only religious believers is not morally defensible.