



Introduction

Religious freedom is not just one liberal freedom among others. As Rex Ahdar and Ian Leigh remind us, it is the prototypical liberal freedom, a cornerstone of modern political rights.¹ At the same time, however, its nature is disputed. Exactly when should we say that people possess religious freedom? When should we say that the freedom has been denied? Importantly, how does it relate to modern notions of secularism – and to other key freedoms such as freedom of speech?

Each day, we see passionate struggles over the concept. Patients refuse life-saving medical care – for themselves or their children – and invoke religious freedom in their defense. If a sick child dies after her parents deny her standard treatment, should the parents be criminally liable? Rival litigants strive to keep evolutionary biology out of the high-school science curriculum, or try to make sure it is taught. Strangely enough, *both* sides to this dispute invoke freedom of religion. Heated debates take place over concepts of blasphemy, over female dress, over religious displays on public land, over laws that enforce religious moralities. Churches seek exemptions from urban planning codes, claiming a freedom that others construe as religious privilege. Indeed, the very same churches and communities that claim to be marginalized can be seen by others as powerful and oppressive.

If religious teachings encounter severe criticism, or religious leaders receive scorn or mockery from their opponents, is that an *exercise* or a *violation* of religious freedom? What if a government tries to disarm a violence-prone apocalyptic sect? Is this a legitimate activity to protect citizens from harm, or an illegitimate encroachment on religious exercise?

2 *Motivation and Overview*

What if a government agency or a private corporation prevents its employees from wearing turbans on the job – or burqas, or yarmulkes, or conspicuous crosses? In all these situations, both sides of the debate may claim that they favor “true” religious freedom. Neither side will admit to being opposed to freedom of religion, but surely both cannot be right. Religious freedom can’t be all things to everybody, yet quite opposed policies are often pursued in its name.

In what follows, I consider religious freedom in historical and philosophical perspective. Somewhere at the core of the concept lies the fear of overweening government power, used to impose a favored understanding of the world – or another, transcendent, world – or to persecute those with a different understanding. As John Locke complained in the seventeenth century, the secular sword of government has been wielded to destroy unwanted doctrines, faiths, and sects. As Locke knew well, many heretics have been imprisoned, tortured, and often burned at the stake.

Historically, disagreement with the state’s preferred religion has often been met with ruthless force. As we look back, we see that this was sometimes successful; other times, it proved to be futile. Inevitably, it brought human costs, and in many times and places these were on a grand scale, as with the thirteenth-century Albigensian Crusade, in which hundreds of thousands of people died, many of them openly massacred. Even this was dwarfed by the European wars of religion in the sixteenth and seventeenth centuries. For the sake of one or another religious orthodoxy, men (and sometimes women) have been driven to terrible acts of destruction and cruelty.

Finally, around the seventeenth century, Western governments began a long process in which they slowly stepped away from religious impositions and persecutions. Here, then, is the beginning of religious freedom – in essence a freedom from persecution or the imposition of another’s religion. From this process grew the modern secular state and the turn toward liberalism.

Liberal Democracies

The process continues, and the outcomes to date have been patchy. The concept of religious freedom is still fiercely contested, even in the relatively secular nations of Europe, North America, and the developed world in general. Many citizens of those countries argue, on various grounds, that their freedom of religion is endangered or incomplete. In others, such as prominent nations in the Middle East, Western ideas of religious freedom, including the freedom to change religions or reject religion entirely, are not even given lip service.

I do not aim, in this study, to investigate freedom of religion on a global scale. That is a huge topic, and I can do no more than touch on some aspects here and there, where relevant. Perhaps another occasion will arise. Instead, I shall focus on the intersection of religion, law, and politics in contemporary liberal democracies. In particular, I will explicate a concept of the secular state, revising and updating John Locke's views from the seventeenth century. Even this limited task has endless ramifications, and it's not helpful that the concept of liberal democracy is itself a blurred and contested one.

On some strong conceptions there may be no pure liberal democracies. A conception like that will be far too narrow for my needs, but we can identify some necessary features. The concept includes at least some system of popular elections, together with various protections from the arbitrary or oppressive exercise of government power. Though governments are elected and responsive to the views of the people governed, that does not entail that they exercise a tyranny of the majority. Rather, there are limits to what governments may legitimately do, even with majority support: limits that offer a zone of protection for minority interests. These limits or protections may include written constitutional provisions, but the strongest may be rather less formal. They may involve widely understood political principles that guard the liberty of citizens. For example, there is a principle in modern Western societies that punishments should not be inflicted arbitrarily, but solely in accordance with generally applicable laws that are enforced through procedurally fair processes.

Again, whether by constitutional provisions, political principles, or a mix of both, the reach of government power may be limited in various respects. In particular, it may be established or understood that only certain kinds of justifications ought to be offered for coercive laws. At one extreme, it might be thought that no society is truly a liberal democracy unless it enacts coercive laws only in compliance with John Stuart Mill's harm principle. This is essentially the idea that an individual's liberty may rightly be abridged, through the exercise of social or political power, only in response to acts that cause certain kinds of harm to others.² At a later point, I'll elaborate and defend the harm principle, or at least a version of it that seems faithful in spirit to Mill's account. However, no country in the world would be a liberal democracy if this required rigorous adherence to the harm principle. All jurisdictions enact at least some coercive laws that are justified to the public on other grounds – even if those laws and grounds are controversial within the jurisdictions concerned.

Strict application of the harm principle would be too purist as a necessary condition for liberal democracy. Nonetheless, the latter idea involves at least some acceptance of reasonable social pluralism by those with the power to enact or enforce coercive laws. The “liberal” part of “liberal

democracy” implies a degree of restraint by the apparatus of the state. It will be reluctant to impose any template, or narrow set of templates, for the good life. Instead, the assumption is made that many ways of life are at least tolerable, and perhaps even valuable. No attempt should be made to suppress them by means of fire and sword, as Locke would have put it: that is, by the state’s coercive power. While the governmental apparatus of a liberal democratic society will be used for a variety of ends, including the deterrence of certain behavior, most ways of life are accommodated to the extent that social peace allows.

Thus, even though no modern society adheres strictly to the harm principle, not just any society qualifies as a liberal democracy. To do so, it must combine a democratic process for choosing the government of the day with significant reluctance to restrict the liberty of citizens (and others legitimately resident in the jurisdiction) to act as they wish with the resources available to them. Moreover, where individuals’ personal lives and life plans are at stake, including their ability to express themselves freely, have consenting sexual relations, and make reproductive decisions, the state apparatus of a liberal democracy is particularly solicitous of freedom of choice, unless a compelling reason can be found to do otherwise.³ Whereas many other political arrangements involve the coercive imposition of a comprehensive view of reality favored by the state, liberal democracies aim to provide a framework in which people with many differing views can live in harmony, or at least with mutual forbearance.

It seems to follow that no political formation meeting the minimal requirements to qualify as a liberal democracy would be motivated to persecute citizens (and relevant others) on the ground of religion. But as I’ll explore in the following chapters, life is not so simple.

What is Religion, Anyway?

To this point, I have been using the words “religion” and “religious” as if they are unproblematic, but that is not so. We may question whether what we know as religion is a unitary phenomenon: is Christianity really the same sort of thing as Buddhism, for example, and are non-literalist forms of Christianity the same sort of thing as those which treat the Bible as historically and scientifically accurate? Are any of the well-known modern religions really the same kind of thing as ancient polytheism, or even more ancient forms of spirit worship? Do theistic religions and non-theistic ones really belong in the one category?

Many scholars and courts of law have struggled with the concept of religion, and there is no perfect definition either for the purposes of the law or for those of scholarly fields such as anthropology. In Lecture II of the

series that constitutes *The Varieties of Religious Experience*, William James doubted that an exact definition was possible,⁴ while Frieder Otto Wolf has recently suggested that the concept of religion is “most deeply imbued and tainted by Euro-centrism and naïve assumptions derived from an often unilaterally simplified Christian tradition.” He adds:

It is, indeed, doubtful that there is any meaningful common denominator between the “everyday magical practices” of an indigenous tribe, Judaic obeisance to the commandments of God to be found in the Tora, the practice of Sunni Islam based on the Qur’an, of Sufi mysticism, of Jainism, of Shintoism, or of Buddhism.⁵

Robert Wright indicates that there is (arguably) no specific concept of religion in hunter-gatherer societies, since their various spirits and gods are seamlessly continuous with the observed phenomena of nature. Such societies’ “religious” beliefs and rituals are tightly interwoven into everyday thought and action, and are not clearly distinguished from a non-religious sphere of activity.⁶ Charles Taylor makes essentially the same point: in the oldest societies, religion was so ubiquitous that it was not even noticeable as a separate sphere.⁷

Does this mean that “freedom of religion” is a meaningless expression (along with such expressions as “secularism,” which seem to contrast with religion in some way)? If so, what were the historical disputes about – the struggles between monotheistic religions and pagan polytheism, for example, or those within Christianity? Untold millions of people have fought, killed, or died, tortured or been tortured, in the name of religious correctness. Or so it appears. Was there nothing that these events had in common? More generally, should we confess that that we don’t know what we’re talking about when we use such words as “religion” or such expressions as “religious persecution,” “religious freedom,” and even “comparative religion”? Surely that can’t be right.

No matter what definition is adopted, there will probably be marginal cases. Still, the concept is not so vague as to be useless for the practical purposes of social and legal policy in contemporary liberal democracies. James’s efforts in *Varieties of Religious Experience* provide one good starting point, and a more modern one can be found in Taylor’s monumental study, *A Secular Age*.

With considerable misgivings, James settled on a loose definition, for his purposes, referring to the feelings, acts, and experiences of individuals in solitude “so far as they apprehend themselves to stand in relation to whatever they may consider the divine.”⁸ As he acknowledged, this definition then raises a question about what is meant by the word “divine.” “The divine,” he concluded, “shall mean for us only such a primal reality as the

individual feels impelled to respond to solemnly and gravely, and neither by a curse nor a jest.” He then felt it necessary to add that religion involves a special kind of “happiness in the absolute and everlasting.”⁹ Moreover, even this is somewhat vague, and James took a slightly different tack at the beginning of Lecture III, where he characterizes the “life of religion” in its “broadest and most general terms” as consisting in “the belief that there is an unseen order, and that our supreme good lies in harmoniously adjusting ourselves thereto.”¹⁰

Writing mainly of the Abrahamic traditions of the West, but with perceptive comparisons to Buddhism, Charles Taylor explains religion in terms of belief in an agency or power that transcends the immanent order – by which he means the operations of the natural world. For Taylor, religion relates to “the beyond,” to an otherworldly order of things, but not in just any way. He posits three specific dimensions. First, religion asserts that there is some higher good or ultimate end beyond ordinary human flourishing. Second, it includes the possibility of personal transformation, to ensure that the higher good is achieved. This, in turn, involves the existence of a transformative and transcendent power. Third, the religious account of our possible transformation involves a sense of human life extending beyond “this life.”¹¹ Taylor’s analysis is easily applied to Christianity, where the crucial transformation involves salvation through Jesus Christ (however this is explained by different theological systems).

Taylor claims that the political organization of pre-modern societies was connected to, based upon, or guaranteed by some kind of adherence to, or faith in, the otherworldly order. As far as it goes, this is plausible, though it needs to be qualified (and soon will be). His project is to describe and explain the historical change from political and social structures founded on religion to the modern Western state, where religiosity (or otherwise) is largely private, and governments pursue goals that are purely worldly or secular (I’ll use these words interchangeably); where religious belief is, at least to some extent, in decline; and where, in any event, religion is neither forbidden nor compulsory.

For Taylor, the central issue is how religion became a mere *option*, a sort of menu item, after such a long history of dominance in societies where disbelief seemed virtually unthinkable. By contrast, I am concerned with neither the intrinsic plausibility, or otherwise, of religion nor how irreligion became a live alternative; my real concern is the relationship between religion and state power. Nonetheless, I find Taylor’s understanding of religion useful. We can work with its key ideas: an otherworldly order of things and an otherworldly dimension to human lives; an ultimate good that transcends worldly kinds of flourishing; the possibility of spiritual transformation, such as the Christian idea of salvation; and the existence of transcendent and transformative powers, such as the Abrahamic God.

As already mentioned, this conception of religion is very apt as a description of Christianity, so much so that Wolf might consider it tainted by Christian thinking. It might prove less useful when applied to certain other religions that have a presence within liberal democracies. However, most of the dimensions described by Taylor are recognizable in the well-known religions of ancient and modern times. In particular, the well-known religions seem to involve an order that transcends the natural, or immanent, one, something *otherworldly*. Again, they involve some kind of power connected with this otherworldly order, as well as a relationship between the otherworldly order and our own lives and conduct. This is not unlike James's ideas of "happiness in the absolute and everlasting" and harmonious adjustment to the unseen.¹²

Note, however, that much in the ancient polytheistic traditions deviates from Christianity. Not only was pagan polytheism syncretic and, in its fashion, tolerant; it often placed far less emphasis on personal transformation. Jonathan Kirsch explains this well in the context of ancient Rome, where the priestly ceremonies were never intended to meet the citizens' "intimate spiritual needs." Instead, they were meant to earn divine favor: "the life and health of the emperor, the safe arrival of grain ships from Africa and victory in battle for the Roman legions against the barbarian tribes threatening the border provinces of Western Europe and the armies of the Persian Empire." Thus, the ruling classes of Rome regarded the traditional religious rites "as a civic duty and an essential component of statecraft."¹³ Though otherworldly powers and agents were invoked, it was for communal purposes, rather than to enhance the spirituality of the individual. This is typical of the ancient state religions, though not of the various mystery cults that multiplied and prospered in antiquity.

Accordingly, it is something of a distortion to think that ancient Rome was founded on faith in an otherworldly order. There was certainly a connection, but transcendent powers were invoked by the state mostly as an adjunct to its concern with success and prosperity in this world.

Religion in the Courts: The *Scientology* Case

From time to time the courts have faced the issue of what counts as a religion, or better, "What, for legal purposes, is a religion?" Not surprisingly, they have struggled to produce an uncontroversial definition. In considering the issue from an American perspective, Kent Greenawalt argues for a flexible and context-sensitive approach, though he also emphasizes that there are many systems which are indisputably religious, and that we are not without appropriate information when we make our judgments. We can start with undoubted or paradigm examples of religions, then "determine how closely

an arguable instance of religion resembles these.”¹⁴ When we identify some things as undoubtedly religious, we don’t apply a theoretical definition; rather, we look to certain elements of belief, practice, and organization:

These may include a belief in God or gods; belief in a spiritual domain that transcends everyday life; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God or gods through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations that is derived from a moral code or from a conception of a divine nature; practices involving repentance and forgiveness of sins; “religious” feelings of awe, guilt, and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.¹⁵

The High Court of Australia has provided an especially influential and oft-cited case, one which looks closely at such elements. In *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic)* (“the Scientology case”),¹⁶ five members of the court considered whether the Church of the New Faith, that is Scientology, was a “religious institution.” If so, it was exempt from pay-roll taxation in the state of Victoria. With some reservations about how the question had been framed in the lower courts, the High Court judges accepted that their task was one of determining whether or not Scientology was a religion, or at least whether the set of beliefs, practices, and observances that were in evidence on the record could be properly described as a religion.¹⁷

This, in turn, required the judges to frame a legal understanding of “religion.” In the event, all five of them held that Scientology was a religion for such purposes as pay-roll tax exemption, though they produced three separate judgments with somewhat different reasoning. Each of these drew upon decided cases from the US Supreme Court to construct a relatively expansive concept of religion, certainly not confining it to monotheism or even to belief in a god or gods. Mindful of the tolerant or syncretic practices of some actual (and incontrovertible) religions such as Hinduism, the judges did not insist that a religion, to qualify as such, must claim to be the one true faith to the exclusion of all others.

Acting Chief Justice Mason and Justice Brennan emphasized that their task was not an academic exercise in comparative religion but “an inquiry into legal policy.”¹⁸ This required them to consider the essential features or indicia of religion that had attracted legal freedom or immunity in Western countries such as Australia. They identified a legal policy of maximum freedom for citizens to respond to abiding and fundamental problems of human existence: our destiny; the meaning of our existence; and the explanation for the existence of the phenomenological universe. Having noted the availability of reason-based approaches, involving science, philosophy,

and other secular disciplines, they distinguished religious approaches to these problems:

For some, the natural order, known or knowable by use of man's senses and his natural reason, provides a sufficient and exhaustive solution to these great problems; for others, an adequate solution can be found only in the supernatural order, in which man may believe as a matter of faith, but which he cannot know by his senses and the reality of which he cannot demonstrate to others who do not share his faith. He may believe that his faith has been revealed or confirmed by supernatural authority or his reason alone may lead him to postulate the tenets of his faith. Faith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief.¹⁹

For Mason and Brennan, then, legal policy protected freedom of belief in a supernatural (or otherworldly) order, where these beliefs were used to address fundamental problems of human existence. After further discussion, their judgment settled on two criteria, which it described as "belief in a supernatural Being, Thing or Principle" and "the acceptance of canons of conduct in order to give effect to that belief." They observed that these criteria might vary in their relative importance between different religions. Indeed, the tenets of a religion might give primacy to one particular belief or one particular canon of prescribed conduct. Likewise, religions and individual adherents of a religion might differ in intensity of belief or intensity of commitment to canons of conduct.²⁰

Justice Murphy took a broad and pragmatic view of what should be accepted as a religion for legal purposes. While noting that some so-called religions were merely hoaxes, he added that this should be the legal conclusion only in extreme cases. On his approach, the categories of religion were not closed, but he provided a non-exhaustive list of sufficient, rather than necessary, grounds for an institution or other such body to be accepted as religious. Thus, any organization that claimed to be religious should be accepted as such if: (1) its beliefs or practices revived or resembled those of earlier cults; (2) it claimed belief in a supernatural being or beings, such as gods or spirits, whether they were visible, invisible, or abstract; or (3) it offered a way to find meaning and purpose in life. He specified that, "The Aboriginal religion of Australia and of other countries must be included."²¹

With some expression of trepidation, Justices Deane and Wilson sought to develop a conception of religion from empirical observation of accepted religions. They identified four or five indicia that they considered helpful in deciding whether a set of ideas or practices amounted to a religion for the purposes of the law: (1) ideas and/or practices involving belief in the supernatural (a reality extending beyond what can be perceived by the senses); (2) ideas relating to humanity's nature and place in the universe, and its relationship to the supernatural reality; (3) acceptance by the adherents that

the ideas require or encourage them to observe standards or codes of conduct, or to participate in practices with supernatural significance; (4) the adherents forming an identifiable group or groups; and possibly, (5) their perception of the collection of ideas and/or practices as constituting a religion.²²

All three judgments identified a supernatural element in religion, though Justice Murphy placed less emphasis on this: in particular, he would have been prepared to identify a religion wherever he saw an organization that considered itself religious and offered teachings about life's meaning or purpose. Perhaps he was correct, for the practical purposes of the law, to extend "religion" that far. Nonetheless, it appears plausible that the central cases of religion involve an otherworldly or supernatural order, much as described by Taylor and by most of the judges who have contributed to existing case law. If so, we can distinguish thoughts and worldviews that are confined to *this world*, however counterintuitive some of its elements and mechanisms may turn out to be when examined scientifically, from those that also describe another order of things. The latter are central to the phenomenon of religion.

For somebody socialized in a pervasively religious society, such a distinction might not be clear, but it is adequate for the purposes of public policy in liberal democracies. Even if the hunter-gatherers described by Wright, and alluded to by Taylor, do not distinguish a specifically religious sphere of life, contemporary legislatures and courts can take note of, and attempt to protect, their belief in transcendent agents and powers.

Religion and its Conflicts

Religions are not merely systems of belief that postulate the existence of an otherworldly order, complete with transcendent agents and powers. Importantly, these agents and powers make demands and produce transformations. They typically require worship, and they often set comprehensive standards for a believer's conduct and way of life. Some religions may, admittedly, divorce everyday questions of how to lead a good life from questions of how to propitiate the gods, leaving the former to philosophical inquiry, the secular law, and shared social understandings. Such was often the case with ancient polytheisms. But most religious systems include codes of morality. These are often comprehensive and burdensome, sometimes impossibly so. Moreover, they may cause the believer difficulties if compliance with them violates the secular law, raising questions about the legitimacy and wisdom of coercing conscience. A different set of questions arises if religious believers argue that the secular law ought to enforce their moral code, even on non-adherents.

Issues relating to religious freedom stem from the combination of religion's otherworldly claims; its supernaturally mandated standards of conduct; its typical concern with the transformative power of the other world; and its rejection, or at least deprecation, of what it sees as merely worldly standards of human flourishing. These aspects can place religions in conflict with individual non-adherents, with the state, and with each other. Such conflicts defy resolution, since rival claims about another world and its manifestations in this world are not easily verified or falsified.

In observing this, I don't claim that religious beliefs lie entirely outside of scientific investigation, or that religion can always (or even usually) be reconciled with our knowledge of the immanent order. On the contrary, advancing scientific and humanistic knowledge may, over time, render some religions quite implausible. If a religion makes sufficiently specific claims about how the other world interfaces with this world, it may become open to outright scientific refutation. Science already investigates very small, very distant, and very ancient events, drawing conclusions about mechanisms that are not directly observable. In doing so, it reasons about the effects of these events on present-day, medium-sized things that fall within our sensory range. Transcendent agents or powers could be approached in the same way if enough information were offered as to how their activities are supposed to affect this world.

But in practice that's not how it usually goes. Any erosion of plausibility takes place over time. Religious beliefs are resistant to any simple, decisive refutation, and not only because otherworldly phenomena are undetectable with the ordinary senses and scientific instruments. In practice, belief is not abandoned merely because events in the natural world turn out differently from what might be predicted by secular reason if it took claims about the otherworldly order literally. Of course, major scientific theories can also be resistant to change, and the evidence for or against them can be ambiguous, as in the late sixteenth and early seventeenth centuries, when the case for heliocentrism was incomplete. In such a situation, however, an extensive body of theory may eventually be rejected as anomalies pile up to embarrass its proponents. By contrast, if transcendent powers fail to produce their warranted effects upon the immanent order, religious apologists will find many ways to avoid embarrassment. If, for example, a god or spirit fails to answer prayers as advertised, it might be explained that this is a capricious god, a god with mysterious reasons, or a god that refuses to be tested.

Accordingly, religious claims that seem highly implausible, when contemplated from outside, may be more resistant to falsification than even the most well-entrenched scientific paradigms. Even if philosophically decisive arguments can be brought against a particular religious viewpoint or doctrine, some adherents will prove to be more committed to their cherished

beliefs than to whatever canons of philosophical reason are relied upon. In all, there is no practical prospect of employing secular reasoning to produce short-term resolutions of clashes between rival religious claims. Some individual adherents may be persuaded by scientific or philosophical arguments to change their beliefs, but this is certainly not typical. There is no realistic prospect of arguing adherents out of their religion en masse.

At the same time, religious adherents may feel that much is at stake, not least their own spiritual salvation, if they defect. The upshot is that suppression of a religion will gain little assistance from secular reason, and will depend on the brutal application of force. What's more, even the most rigorous persecutions will often fail. Secular rulers would be wise to accept this as a reality that limits their options whenever conflict arises between religions or between religion and the state.

A number of related points should be noted here. First, one religion or another may make many demands of its adherents and other parties, including the state and its officials. Because religions so often look to an ultimate good that differs from, and allegedly transcends, ordinary human flourishing, they can sometimes recommend, or even insist upon, behavior that appears irrational, perhaps counterproductive, from a purely secular standpoint. That might not be a problem if the religiously motivated behavior is required only from adherents, and if it is mainly self-regarding. Obviously, however, there is room for conflict if religious adherents pursue otherworldly goals that clash with the secular goals of others, or with the goals of adherents to rival religions.

Second, the state may have many policies and programs that bring it into conflict with at least some of its religious citizens. These policies and programs may involve no persecutorial intention, yet lead to outcomes that are experienced as, or "feel like" persecution. What, for example, if devout Christian parents in the United States of America, who may be Bible literalists, find that their children, attending a state school, are being taught that the earth is billions of years old and that human beings evolved from earlier primates over a period of millions of years? This sets up a situation where the state's action is in direct opposition to the parents' efforts to teach their children the literal Genesis account of creation. This is just one example. There are countless situations where state actions that are not intended to be persecutorial may be *experienced* as if they were.

Once again, the use of scientific reason does not bring an easy resolution. If scientific reason suggests that some claims made by a particular religion are simply false, the reply may be that scientific reason is being employed in bad faith, or even that it is methodologically corrupt.

Third, many of these situations can, however, be turned around and viewed from the state's perspective. Well-established scientific findings do, indeed, contradict the Genesis narrative unless it is given some kind of non-

literal interpretation – perhaps as an allegory – or treated as a culturally significant narrative that is open to many interpretations. We all have an interest in high-quality education for children, and it might be added that children themselves have an interest in learning about the true nature of the universe in which they find themselves. If that is so, the question changes: Why should the wishes of parents stand in the way of these secular interests, when the state acts for reasons that have nothing to do with religious hostility or a spirit of persecution?

After all, decision-makers within the apparatus of the state would pursue the same educational policies whether Bible literalists existed or not. These decision-makers are not interested in imposing a comprehensive worldview, religious or otherwise, or in stamping out heresy. Their aim is to provide students with some understanding of scientific method, plus knowledge of the most important and robust findings of scientific investigation. I'll return to this example in Chapter 8.

Fourth, there are also many situations in which individuals who do not subscribe to a religion experience it as *imposed* upon them by the state, even if that is not the intention of the state's decision-makers. The latter may act for many reasons, such as enforcing traditional morality, keeping social peace, or merely allaying inchoate "public concerns." But those explanations may appear seriously inadequate to the individuals affected. Traditional morality can be inextricably intertwined with religious doctrine; social peace can be threatened by interest groups who have religious motivations; and "public concerns" may often originate from religious sentiment.

Consider laws that criminalize homosexual conduct or otherwise disadvantage homosexuals. Those who actually bear the brunt of these laws may experience them as tyrannical, no matter what the subjective motivation of the legislators might have been. The law may seem even more tyrannical if some, or many, legislative votes were based on religious injunctions against homosexual conduct. If some gay men and lesbians allege that religious doctrines – doctrines to which they don't adhere – are being imposed upon them, they are not stretching the truth very far. Similarly, it would be objectionable if a Muslim-controlled legislature banned the eating of pork and drinking of wine for all in the jurisdiction.²³ It would be natural for non-Muslims to complain that their religious freedom had been violated, that they were being forced to live their lives in accordance with a religious doctrine that they did not, perhaps could not in honesty, accept. Plainly, it would be easy to multiply such examples.

To skip ahead to Chapter 5, this may not be the sort of situation that is readily justiciable. It can't necessarily be precluded by constitutional provisions relating to freedom of religion (though other provisions, perhaps relating to equality or sexual privacy, may become relevant). Be that as it may, a situation like this is closely related to issues of religious freedom.

Even this is not exhaustive of the problems that can arise with religion within a liberal democracy. What, for example, should we make of liberal democracies, such as the United Kingdom, in which an established church continues to function? Is this an unacceptable imposition of religion, or is it merely a tolerable anachronism, or even a beneficial tradition, with no real impact on religious freedom? Perhaps it's of more concern that governments commonly enact laws to restrict freedom of speech in relation to religion, banning or constraining what is seen as blasphemy or hate speech. This might, for example, prevent Christians and Muslims from expressing certain traditional views of each other or each other's doctrines. Christians and Muslims provide an obvious example, but we can imagine religions that have a history of even greater mutual hostility (let us say, Zeusists and Mardukites). Should they shut up about each other? Should the law require them to?

From one viewpoint, blasphemy enactments and the like might be seen as *protections* of religion. It might also seem that some of the most hateful kinds of religious recriminations are no loss to society or the marketplace of ideas. Nonetheless, blasphemy enactments, or laws proscribing "hate speech," might also be experienced as unnecessary restrictions on religious speech and legitimate discussion of religion. The social effect of any such enactment will depend on its exact content and best interpretation, but there is an obvious danger to freedom of speech, and to freedom of religion itself, if (1) some religions profess doctrines *about each other*, and (2) some people are legally prevented from asserting or teaching them. If the Zeusists once broke away from the Mardukites, whom they now regard as benighted and hell-bound, shouldn't they be allowed to say so? What if their holy book contains such an anti-Mardukite doctrine? Should the holy book be prohibited? But if the Zeusists can't teach what's in their holy book, isn't this a significant restriction on religious exercise? And if that's so, what does it require to justify the restriction?

Again, what should we say about practices that are currently banned, or at least not recognized by law, but are permissible within, or even encouraged by, a particular religion? A classic example is Mormon polygamy, which was crushed in the United States in the nineteenth century. *Muslim* polygamy provides a current example: how should this practice be regarded in a liberal democracy? Should it be criminalized? Given a special accommodation (as an exception to the ordinary law of marriage)? Treated as legal (with whatever benefits that might entail) without being recognized as marriage? Or what? And what about "ordinary," that is monogamous, Muslim marriages? If a marriage between two devout Muslims breaks down, should they be permitted to settle disputed issues, such as property rights and custody of children, in accordance with Sharia law? If not, why not? Where does the public interest lie in a case such as this?

These are among the many current issues relating to freedom of religion in modern liberal democracies.

The Plan

The chapters that follow consider current issues in detail, although Chapters 2 and 3 mainly provide historical context. In Chapter 2 I consider the persecutorial attitude that religion, not least Christianity, has often displayed. The main emphasis is on events in the Roman Empire and Christian Europe, leading up to the key seventeenth- and eighteenth-century debates over religious freedom. Chapter 3 then focuses more closely on the model of church–state relations developed by Locke. This includes Locke’s famous pronouncement that the state is concerned with the things of this world (hence, not with transcendent powers or spiritual transformations).

In Chapter 4 the focus is on the *imposition* of religion. Among the issues that arise here are the effects of formal religious establishments, such as still exist in many European countries, and the propriety of religious or anti-religious speech by governments. Chapter 5 deals with a related aspect: whether the state should impose moral requirements that are supported by, or entangled with, religious doctrine. In Chapter 6, by contrast, I emphasize the vexed question of *accommodating* religion. Within liberal democracies, it is seldom suggested that any religion should be persecuted, except perhaps in some extraordinary set of circumstances. However, there are many cases where state action that is not motivated by hostility nonetheless feels like persecution. When, if ever, should the state acknowledge this and be accommodating? Should it ever grant a right of conscientious objection, based on religious grounds, to laws of wider application?

Many of the cases that have occupied the time of the US Supreme Court have involved nothing like dramatic persecutions, but have generated practical difficulties and anxieties. They include, for example, the burden of city zoning regulation on religious groups. Zoning normally has a secular and non-persecutorial motivation, but it may cause sufficient inconvenience to feel like persecution. Should exemptions be built into city regulations? If not, should they be crafted by a court or tribunal with power to protect the free exercise of religion?

I turn, in Chapter 7, to the private power exercised by religious organizations and related communities. It is one thing to suggest that the state allow for freedom of association, and that it defer to the choices of individuals, including religious adherents, to arrange their own affairs freely and consensually. But is this always realistic? Should the state sometimes interfere in the seemingly “private” activities of religious organizations and communities?

Chapter 8 deals with the important relationship between freedom of religion and the interests of children. It is one thing to claim religious freedom for oneself; it's another to exercise it in a way that may harm others or negatively affect their life opportunities. When it comes to children, the state has an interest in assuring their welfare, even if this involves overriding the preferences of parents. But how far does this interest go? An obvious conflict arises if secular concepts of children's flourishing are not compatible with parents' visions of an ultimate goal such as spiritual salvation or conformity to the will of a god. How should this be resolved?

In Chapter 9 I turn to another vexed relationship, that between religion and freedom of speech. The main issue here is what can be referred to broadly as religious vilification laws: laws designed to protect believers from incitements to hatred or offense to their sensibilities. I am critical of such laws and the threat that they pose to freedom of speech on matters relating to religion.

Chapter 10 briefly draws together the threads of a complex argument. Here, I sum up my views, which take Locke's vision of a secular state to what seems like its logical conclusion. *Pace* Locke, however, there is sometimes room for accommodation of religion, even where this conflicts with the policies behind purely secular laws. At the same time, the interests of the religious must bend to a large degree, to allow the state to protect citizens' worldly interests. Exceptions to general and neutral laws must be confined closely and crafted with care, balancing the interests that may be at stake in any particular case.

I will, throughout, illustrate the issues and arguments with a mix of imaginary and real examples, commenting on decided cases where it seems helpful. Although this book is certainly not intended as a study of American constitutional law, but as a broader philosophical inquiry with implications beyond any one country, the complex jurisprudence of the US Supreme Court is a rich resource. I will draw on it frequently, but also on cases from other jurisdictions as appropriate (as with the High Court of Australia's useful discussion of religion in the 1983 *Scientology* case, considered above).

The American courts are, of course, charged with protecting the First Amendment, which includes the so-called "Establishment Clause" and "Free Exercise Clause." Together, these read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Notoriously, it is difficult to reconcile all the decided American cases – even those that are still good law. They feature striking changes in legal doctrine, fine conceptual distinctions, and puzzling divisions among the judges on the nine-member bench of the Supreme Court. Despite the impressive erudition of US judges, they have yet to develop a body of stable and reliable doctrine relating to the Establishment Clause and Free Exercise Clause.

Nonetheless, they have engaged carefully with many of the key issues. Their reasoning shows a high level of intellectual sophistication, and merits careful philosophical study, so long as this does not distract us from the larger picture.

Conclusion

Issues relating to freedom of religion are important and intransigent. Many of them are also topical and controversial. If one thing is clear, it's that religion itself is not going to wither away any time soon, despite the impact of the scientific revolution, the Enlightenment, Darwin, and the social iconoclasm of the 1960s. While church attendances declined in most Western countries during the twentieth century, and there has been some rise in the proportion of non-believers even in the relatively religious United States, many people in the West still base their worldviews, life plans, and ultimate values on faith in an otherworldly order. Religious lobbies continue to seek prohibitions on conduct that they consider immoral, whether it be abortion, stem-cell and therapeutic cloning research, or physician-assisted suicide. They also seek exemptions from many laws of general application.

Meanwhile, Western secularism is confronted by new challenges, most notably from various forms of political Islam – some with ambitions to extend Sharia law universally. The most radical forms of Islam take a hard line against secularism, modernity, and all forms of liberal thought. How should the secular state respond to opponents who deny its political legitimacy?

The issues I've foreshadowed in this chapter are a daily source of contention, often involving deep commitments and arousing strong emotions. It can be fascinating to observe how different groups line up in specific debates. The opponents are not, in all cases, religious adherents on one side, pitted against ardent secularists or atheists. There can, instead, be shifting, sometimes unlikely, alliances. For example, atheists who wish to engage in robust criticism of religion can sometimes find themselves allied with evangelical Christians in resisting laws that restrict "hate speech" or "vilification." The evangelical Christians may be prepared to accept robust criticism of their own views as a fair price for the right to preach the gospel fearlessly, including the freedom to criticize non-believers and rival religions or churches.

In the past, battles over religion were fought with swords and guns and armor, with dungeons, fire, instruments of torture, and the hangman's noose. In many parts of the world, things have not changed much, though theocratic regimes are now equipped with army tanks, explosive

missiles, and fighter planes. Within the liberal democracies of the West, conflict over such issues sometimes inspires violence on the streets. Most often, however, the opponents fight it out in courtrooms, the mass media, and the new medium of the blogosphere. There is no sign that the contention will go away, but all too often it sheds more heat than light. This study attempts the opposite, but some of its conclusions are bound to be controversial. Nobody, I expect, whether religious or secular, will be comfortable with all of them. So be it, for that's the nature of the subject matter.

To make intellectual progress, we must understand how Western liberal democracies reached this point. Let us now put the issues in a broader perspective.

Notes

- 1 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, Oxford University Press, Oxford 2005, p. 1.
- 2 J. S. Mill, *On Liberty*, 1st pub. 1859, Penguin, London 1974, p. 68.
- 3 H. L. A. Hart, *Law, Liberty, and Morality*, Oxford University Press, Oxford 1963, pp. 21–22, emphasizes the importance of sexuality to individuals. The same point can be made about other matters, such as religion, self-expression, and reproductive decisions.
- 4 William James, *The Varieties of Religious Experience: A Study in Human Nature*, 1st pub. 1902, Penguin, London 1982, pp. 26–52.
- 5 Frieder Otto Wolf, “A Voice of Disbelief in a Different Key,” in Russell Blackford and Udo Schüklenk, eds, *50 Voices of Disbelief: Why We Are Atheists*, Wiley-Blackwell, Oxford 2009, pp. 236–251, p. 250.
- 6 Robert Wright, *The Evolution of God*, Little, Brown, New York 2009, pp. 17–20.
- 7 Charles Taylor, *A Secular Age*, Harvard University Press, Cambridge, MA 2007, p. 2.
- 8 James, *The Varieties of Religious Experience*, p. 31 (emphasis original).
- 9 James, *The Varieties of Religious Experience*, p. 38.
- 10 James, *The Varieties of Religious Experience*, p. 53.
- 11 Taylor, *A Secular Age*, pp. 15–20.
- 12 James, *The Varieties of Religious Experience*, pp. 38, 53.
- 13 Jonathan Kirsch, *God against the Gods: The History of the War between Monotheism and Polytheism*, Penguin, New York 2004, pp. 93–94.
- 14 Kent Greenawalt, *Religion and the Constitution*, vol. 1: *Fairness and Free Exercise*, Princeton University Press, Princeton 2006, p. 372.
- 15 Greenawalt, *Religion and the Constitution*, vol. 1, pp. 139–140.
- 16 (1983) 154 CLR 120.
- 17 (1983) 154 CLR 120, 130.
- 18 (1983) 154 CLR 120, 133.
- 19 (1983) 154 CLR 120, 134.

20 (1983) 154 CLR 120, 137.

21 (1983) 154 CLR 120, 150–151.

22 (1983) 154 CLR 120, 174.

23 See Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, Basic Books, New York 2008, p. 343.