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Larry Alexander

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Liberalism, Religion, and the Unity of Epistemology

LARRY ALEXANDER*

I. INTRODUCTION

Any comprehensive normative theory must deal with the problem of how to regard and deal with those who reject the theory itself. Preference utilitarianism, for example, must consider whether to count as part of the total utility to be maximized the disutility caused those who reject utilitarianism and prefer public adoption of nonutilitarian principles. Similarly, welfare egalitarians must consider whether to count welfare losses due to frustration of preferences for racist and hence nonegalitarian policies. This theoretical problem of how a theory should treat its own rejection, because it involves self-reference, leads not unexpectedly to a mine field of potential paradoxes. The welfare egalitarian or utilitarian may only succeed in producing the state of affairs demanded by the theory by aiming at a state of affairs proscribed by the theory. Paralyzing paradoxes are avoided only by separating the truth of the theories from whether their direct implementation or even their acceptance as true would be self-defeating.

Liberalism as a normative theory is not exempt from the problem

* Professor of Law, University of San Diego.
2. An enormous amount of material has been written on direct application or acceptance of a theory being self-defeating. For one review of this material, see Larry A. Alexander, Pursuing the Good — Indirectly, 95 ETHICS 315 (1985). See also Frank Jackson, Decision-Theoretic Consequentialism and the Nearest and Dearest Objection, 101 ETHICS 461 (1991); Neera Badhwar Kapur, Why It Is Wrong To Be Always Guided by the Best: Consequentialism and Friendship, 101 ETHICS 483 (1991).
of “foreign policy,” the problem of how to treat nonliberal views and their proponents. Liberalism, however, tries to minimize the problem by purporting to limit its jurisdiction to the moral issues of physical and psychological harm and the just distribution of resources. Religious concerns and other moral concerns — questions of “the Good” — are beyond the scope of the theory.

This jurisdictional limitation holds, however, only if liberalism and its treatment of matters within the realm of its concern are not just one sectarian position vying with other versions of the Good. Accordingly, liberalism purports to occupy a different theoretical level from that occupied by comprehensive religious views and views of the morally good life and morally virtuous person.

I want here to register my doubts about liberalism’s attempt to occupy the high ground above sectarian battles. I am surely not the first to do so. However, many who join me in denying liberal neutrality, and who, like me, are fundamentally committed to the characteristic policies of liberalism — substantial freedom of speech and religion, personal privacy, a relatively free market, democratic political structures, and official endorsement of equality of moral worth — seriously underestimate the theoretical implications of repudiating liberalism’s claims to neutrality and to occupying a plane above that on which disputes over God and Good are fought. If I am correct in my critique, then the liberalism I endorse is itself just a sectarian view on the same level as the religious and other views that it purports to be neutral about and to tolerate.

In what follows, I shall focus on the relation between liberalism and religion. My argument, however, extends beyond religion and encompasses all views of the Good that have implications for public policy.

I shall proceed by first showing in Part II that liberalism is inconsistent with — and thus a rejection of — all illiberal religious tenets. This inconsistency seriously weakens liberalism’s case for toleration of illiberal religions. I shall then argue in Part III that liberalism cannot make out its case for excluding religious arguments from shaping public policy. Not only does “secular” reason undermine specific public policy issues, such as abortion, animal rights, etc., but unsupplemented by theories of the Good, it cannot resolve such basic issues as the nature of what is to be distributed by liberal justice (resources, objective welfare, subjective welfare, etc.).

4. On the relation between a theory of the Good and what is to be distributed by liberal justice, see WILL KYMMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 36-40 (1989).
More fundamentally, liberalism cannot claim as a ground for excluding religion from public policy questions a superior or even a different epistemology from that of religion. In other words, the truth of liberalism (and falsity of illiberal religions) cannot rest on an epistemology that is a different and, for public policy issues, better epistemology — because it is fairer, more reasonable, more respectful of autonomy, more consistent with our being free and equal, etc. — than the epistemology employed to support religious claims, including the claims of illiberal religions. No point of view exists other than religious skepticism from which basing public policy on religious views is unfairly nonimpartial. To the extent liberalism is defined by or rests on the insulation of public policy from religious views, liberalism is undermined by its failure to find convincing grounds for that insulation. Religious arguments about public policy must be rejected retail, not wholesale, as would the versions of liberalism at issue.

II. LIBERALISM AS THE REJECTION OF ILLIBERAL RELIGIONS

Religion and liberalism are both historically and conceptually related. Although both religion and liberalism are "essentially contested concepts," one surely would not accept a normative theory as "liberal" unless it prescribed at least a certain level of religious tolerance. Religious tolerance can range from the bedrock "no one shall be punished merely for believing a certain religious tenet" to the neutralist liberal positions of Ackerman and Nagel that ban religious-based arguments (other than the potentially null set of those accepted by everyone) from influencing coercive public policy. Of course, many interpretations of religious tolerance and religious freedom lie in between these polar positions. My modest, and I believe uncontroversial, point is that a theory that does not endorse at least


6. I am dealing primarily with liberal arguments rather than liberal constraints on state action, though the former have strong implications for the latter. Those implications result from the fact that the liberal theories of the state with which I am concerned entail that certain state actions are neither inherently legitimate nor inherently illegitimate, but derive their legitimacy from the legitimacy of the arguments that support them.


one of these religiously tolerant positions cannot claim to be a version of "liberalism."

If liberalism is true as a normative theory, then it follows that any religious views that deny liberalism's tenets are false.9 If religion X teaches that government should punish those who refuse to accept the truth of religion X, then, if liberalism is true, that tenet of religion X is false. If religion Y teaches that government should tax citizens to support religion Y, then, if liberalism rejects governmental support of religion, and is correct in doing so, religion Y's teaching is false.

Further, if liberalism is true, then, paradoxically, the liberal case for tolerating illiberal religions weakens. No case is sufficient for tolerating coercive illiberal acts advocated by those religions. As for their illiberal advocacy and beliefs, liberalism's case for toleration cannot, without contradiction, rest upon the possibility that the advocacy is justified and the beliefs true. Just as freedom of speech cannot rely on the search for truth as its basis for tolerating advocacy of the repeal of freedom of speech10 — but must rely on a value that outranks the search for truth — so too must the case for tolerating illiberal religious advocacy and belief rest on some value that outranks the search for truth.11 Liberalism can rest on agnosticism re-

9. On one liberal's (Rawls') attempt to escape this implication by denying that liberalism is "true," see Raz, supra note 3, at 15-16, 21-22. Raz argues that Rawls' argument fails. Rawls' argument is found in John Rawls, The Idea of an Overlapping Consensus, 7 OXFORD J. OF LEGAL STUD. 1 (1987), and John Rawls, Justice as Fairness: Political Not Metaphysical, 14 PHIL. & PUB. AFF. 225 (1985). For another attempt to deny this implication of liberalism, namely, that illiberal religions are false, an attempt that looks very much like the attempt by Raz that Raz attacks, see KENT R. GREENAWALT. RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 55-56 (1988); see also MICHAEL J. FERRY, LOVE AND POWER 16-22 (1991). The more common liberal attempt to deny this implication is to argue that liberalism's "truth" is on a different epistemological level from illiberal religions' "truth." See NAGEL, supra note 8, at 155-56.

Some "liberals" wish to deflect this claim by arguing that neither liberalism nor illiberal religions are "true." For example, Rorty repudiates all metaphysical claims that might ground religious or other conceptions of the Good — or even ground liberalism itself — but emphasizes with self-conscious "irony" the importance of protecting a private sphere for individuals freely to seek the Good. See RICHARD RORTY, CONTINGENCY, IRRONY, AND SOLIDARITY xiv-xv, 84-85, 120, 198 (1989).

In support of this paragraph's claim, see Steven Macedo, The Politics of Justification, 18 POL. THEORY 280, 289 (1990).


garding some truths, but not regarding its own truth.12 Toleration of illiberal religions may rest on the value of autonomy (so long as those religions do not threaten autonomy),13 or toleration of illiberal religions may rest on a prediction that intolerance would provoke a backlash that would threaten liberalism to a greater extent than toleration. The case for toleration of illiberal religions, however, cannot rest upon their possible truth without self-contradiction.14

III. LIBERALISM AND THE EXCLUSION OF RELIGIOUS ARGUMENTS IN FORMULATING PUBLIC POLICY

As I said, the above argument should be uncontroversial. If liberalism or the set of propositions to which it can be reduced is true, then religious tenets that conflict with the propositions of liberalism are false. Liberalism is in this respect just one more sectarian position, and those who deny the “religion” of secularism that they find characteristic of modern liberal societies have surely affixed the correct label to their concern, even if what disturbs them is something they should instead welcome. If, however, liberalism is a sectarian position, then is it in fact better justified than its competitors?

The problem arises with respect to religious and other comprehensive theories of the Good that are nonindividualistic or other-regarding in nature.15 According to such theories, an individual’s good is


15. These theories of the Good are, at bottom, inconsistent with the high value liberals place on autonomy with respect to religion, lifestyle, etc. For the liberal, autonomous choices must be respected so long as doing so does not conflict with granting a like domain of autonomy to others. For those who believe in other-regarding theories of the Good, choosing for oneself entails choosing for others, though choosing what others would also choose were they fully enlightened and properly motivated. See Martin E. Manty & R. Scott Appleby, Fundamentalism & the State 24-25, 28-29 (1993); Jeffrey Reiman, Justice and Modern Moral Philosophy 207-08 (1990). Even theories of the Good that give pride of place to individual autonomy are inconsistent with
inextricably dependent upon the good of others, such as the salvation of their souls or their adherence to norms regulating behavior not directly harmful to others. Because an individual's good is dependent on others in this way, the individual can be just as harmed by others' failures to attend to their souls or their virtue as by direct physical assaults, theft, deception, or sensory offense. And just as an individual may legitimately employ the coercive apparatus of the state to protect against physical harm, theft, and offense, so too on these views of the Good may the individual employ that coercive apparatus to save souls, enforce virtue, and so forth.

The liberal tries to refute these views. The liberal, however, does not face these views head on and show that the salvation of souls is meaningless or incapable of being accomplished through force, or that no one is harmed in any way other than through physical assault, theft, deception, or offense. Instead, the liberal argues that even if these views are correct, enforcing them against those who reject them is unfair or nonimpartial in some trumping sense. For even those who hold such views can see that those views could be reasonably rejected by others and, therefore, should not be enforced.

To assess the justifiability of liberalism as it relates to religious views, let me move from the abstract treatment of liberalism's logical implications and look at a concrete case. Ann has been brought up in a religion within the Judeo-Christian family of religions. She believes in the existence of a God, whom she pictures vaguely as a person, and in the moral authority of the leaders of her church. She perhaps also believes in the divinity of the biblical Christ. Although Ann first came to these beliefs by accepting the teachings of her parents, she now holds these beliefs based on what she views as independent and superior reasons. For example, she believes most of the accounts of God's and Christ's miraculous deeds in the Old and New Testaments are credible. She holds these beliefs based on the number of witnesses, their independently tested reliability, and the number of intelligent people who accept these accounts as true. The miracles for her establish the authority of the moral teachings in the

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16. For example, that all religious views are incorrect, or that correct religious views support liberalism. Liberalism, while inconsistent with illiberal religious views, attempts to avoid head-on refutation of them by purporting to operate at a different epistemological level. This attempt is what I wish to repudiate. See also Kai Nielsen, The Burden of Ideological Masks in Ideologiekritik: On Trying to View Faith Scientifically, 23 Metaphil. 251, 255-56 (1992).
Bible, which are in turn independently verified by their consonance with her own feelings about moral issues and with the teachings of people she finds admirable. Moreover, these mutually reinforcing beliefs for Ann make sense of human existence in general and her own life in particular.

The purpose of this portrait of Ann is to show how continuous Ann's religious epistemology is with her epistemology in general, and how all of her beliefs, criteria of evidence, and methods of reasoning cohere. Ann's religious beliefs are supported in exactly the same way as are her beliefs that Washington was the first president, that Kinshasha is the capital of Zaire, that Maris hit sixty-one home runs, and that the speed of light is constant. She does not believe any of these things based on first-hand observation, and the last item she finds counter-intuitive and impossible to conceptualize, though she believes it to be true, nonetheless.\textsuperscript{18}

Further, no reason exists for not portraying Ann as a person who entertains the possibility that many of her beliefs, including her religious beliefs, might be wrong (though, of course, she does not currently believe they are wrong, or else they would not be her beliefs). Ann may worry about the veracity of biblical sources, or about the coexistence of a benign, all-powerful God with evil. She may wonder why the truth of Christianity was revealed at a particular time and place in a manner that could not fail to make its acceptance local, or whether, had she been reared in Tehran, she would believe in Islam even if given all the evidence of Christianity's truth.

I have written thus far about Ann's beliefs and the reasons she has for holding them. I have not mentioned faith, much less contrasted it

\textsuperscript{18} See generally John Hardwig, The Role of Trust in Knowledge, 88 J. Phil. 693 (1991) (knowledge rests on trust).

Greenawalt, in defending a role for religious argument in a liberal democracy against those whom I call "pure" liberals, points out how religious beliefs can rest on the same kinds of evidence and reasoning as other beliefs. See Greenawalt, supra note 9, at 57-76, esp. 71-75; Kent R. Greenawalt, Religious Convictions and Political Choice: Some Further Thoughts, 39 DePaul L. Rev. 1019, 1029-33, 1042 (1990). Greenawalt seems quite ambivalent in these passages, on the one hand pointing out how similar religious beliefs are to other beliefs, but on the other hand stating that religious beliefs are for the most part interpersonally inaccessible. Greenawalt does not explain how religious beliefs are inaccessible in a way different from observations of historical events or foundational ethical beliefs, both of which secular liberalism deems admissible. See C.A.J. Coady, Testimony 6-9, 12-13, 16-17 (1992). For further discussion of the inaccessibility of religious and other beliefs, see infra text accompanying notes 40-42.
with reason. For one thing, I am not sure how to make an epistemological distinction between faith and reason. Ann has "faith" in modern physics, in her personal physician, and in her husband's fidelity. Of course, her faith in these is grounded in reasons she has. Likewise, Ann's religious faith is not just a faith in anything. She does not believe she could have faith in whatever she wants to believe, religiously or otherwise. Her "faith" is, for her, a product of reason.

Ann holds various views on public policy that rest in part on her religious beliefs. She believes that fetuses are morally protectable and have a right to life that trumps women's rights regarding reproduction. She believes that animal life is worthy of protection, and that meat-eating and vivisection should be illegal. She believes that pornography is blasphemous because it degrades sexuality that God intends be ennobled; she, therefore, wants pornography legally banned. She believes that public money should be used to support the private schools that teach her religious beliefs.

As I have said, there are various versions of liberalism, and not all of them would find all of Ann's public policy recommendations illicit. Versions that I shall label "purist" — the versions endorsed by Ackerman, Dworkin, Larmore, Nagel, and Rawls would reject all four of Ann's policy recommendations if they can be "justified" only by Ann's religious beliefs. "Impure" liberalisms, such as Greenawalt's, would reject only the latter two, because "secular" reasoning can reach no conclusions regarding issues like abortion and animal rights. Both pure and impure versions of liberalism are subject to my critique.

19. For discussions of the distinction or lack of distinction between faith and reason, see FAITH, REASON, AND SKEPTICISM: ESSAYS BY WILLIAM P. ALSTON (Marcus Hester ed., 1992).


22. See GREENAWALT, supra note 9.
A. Impure Liberalism

The impure liberal would allow religious arguments to shape public policy whenever secular arguments cannot resolve the issues at stake. Greenawalt argues that two of Ann's concerns, abortion and animal rights, raise issues that secular reasoning cannot resolve. Thus, liberalism must permit religious views to shape the resolution of these issues.23

Impure liberals like Greenawalt seriously underestimate the degree to which religion's nose is inside the liberals' tent on their account of impure liberalism.24 Greenawalt at times appears to believe that only a modest number of issues lying at the periphery of liberalism's agenda will be incapable of secular resolution, and that, therefore, religion's influence on public policy will be, in principle at least, limited and well-defined.25 Greenawalt, though, does recognize that core issues, such as the just distribution of wealth, seem to involve not only "secular" reasons that are "neutral" regarding theories of the Good, but also reasons that are partisan regarding the Good. "Neutral" reasons are incapable of adjudicating whether resources, objective welfare, subjective welfare, or something else is the object of liberal distributive policies.26 Moreover, among partisan


24. See Perry, supra note 9, at 19-20. Perry notes that the line between secular and religious will be a hard one for Greenawalt to draw. Id. at 19. If religious and secular epistemologies are but a single epistemology, then it follows that the line between "secular" and "religious" will be arbitrary and at best a matter of convention.

25. Thus, to illustrate his thesis that religious arguments may sometimes be resorted to in a liberal democracy to determine public policy, Greenawalt points to issues of moral status that he labels as "borderline" issues - for example, the issues of abortion and animal rights. See Greenawalt, supra note 9, chs. 6, 7.

26. Id. at 173-87.

On neutrality and the issue of what should be the liberal's distribuendum, see Donald H. Regan, Authority and Value: Reflections on Raz's Morality of Freedom, 62 S. Cal. L. Rev. 995, 1042-43 (1989). Regan points out that what people want is not satisfaction of their desires, or even their own well-being as such, but the success of projects that are in fact valuable. See also Will Kymlicka. Contemporary Political Philosophy 203, 208-10 (1990). People do not want neutrality regarding the Good, but fulfillment of what is truly Good. For Regan, this implies that government should aim not at neutral fulfillment of well-being, but at accomplishing the truly Good. Of course, government may be less competent at answering some moral questions than others, and religious questions may be among them. Only a thoroughgoing religious skeptic or an adherent of a liberal religion, though, could argue as a matter of principle to exclude religious arguments from the realm of public policy.
reasons, Greenawalt does not distinguish between the secular and the religious, much less favor the former over the latter.27

Regan’s point about the Good can be put as follows: autonomy cannot be the only value, because without values (the Good) for autonomy to aim at, autonomy is worthless. On the other hand, if an objective Good exists, it and autonomy will be in tension with each other, especially if autonomy is regarded by the liberal as a side-constraint rather than as one value among others to be furthered. See also William Galston, Liberal Purposes 86-89 (1991).

For a view of autonomy opposed to Regan’s, see John Christman, The Humanist Basis of Egalitarianism 21, 28 (1990) (unpublished manuscript, on file with author). Christman does not deny other objective values, but he views autonomy and equality as trumping values for public policy, even if no one aims at autonomy as an end in itself.

The discussion in this footnote is meant to illustrate how religious and other views of the Good permeate those issues of just treatment that liberals might wish could be insulated from such sectarian claims. While I tend to side with Regan in doubting whether respect for autonomy is sufficient for grounding distributive justice — see Larry Alexander & Maimon Schwarzschild, Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources, 16 Phil. & Pub. Aff. 85 (1987) — Christman’s opposing view has powerful allies. See, e.g., Ronald M. Dworkin, Unenumerated Rights: Whether and How Roe Should Be Overruled, 59 U. CHI. L. REV. 381, 414 (1992). The important point, however, is that even if Christman and Dworkin are correct that equality of respect for autonomy suffices as a basis for distributive justice, that value is no less “metaphysical” or “religious” than the more particular values that Regan and I think are necessary. It is not neutral among theories of the Good; it is a theory of the Good, or at least on the same epistemological level as such theories.

27. See Greenawalt, supra note 9, at 191-92. For an attack on Greenawalt’s impure liberalism from a more purist direction, one arguing that “secular” beliefs are capable of resolving all of Greenawalt’s hard issues, see Peter S. Wenz, Abortion Rights as Religious Freedom 112-13, 119-31, 135-39 (1991). Wenz distinguishes secular from religious beliefs as follows:

Religious beliefs are those that cannot be established by appeal merely to secular premises and methodologies. Secular premises and methodologies include what passes for common-sense knowledge in our society (e.g., fire burns people, punishment deters crime), the scientific beliefs that underlie our technology (e.g., electrons and bacteria exist), the methodology accepted in our society for the generation of scientific and technological knowledge (e.g., observation, microscopes, carbon dating, and mathematical calculations can be useful), and the values considered essential to society (e.g., peaceful coexistence among its members, limits on assault and murder) or essential to our type of society (e.g., individual liberty, private property, pluralism, and hard work). More generally, secular premises are drawn from secular beliefs. I term “secular beliefs” all those agreements of belief, thought, and practice that are the basis of the cooperation and mutual understanding needed among people to maintain and perpetuate our society.

Religious beliefs are those that cannot be supported cogently with arguments or demonstrations whose premises include only secular beliefs. What is more, for First Amendment purposes, all religious matters are religious because of their relationship to religious beliefs. For example, “creation science” is religious because it results from an interpretation of the Bible. The Bible is a religious text because of its relationship to belief in the existence of God, whose actions in history it is supposed to record. Belief in the existence of God cannot be supported cogently by the use of common sense, science, technology, or accepted scientific methodologies, so it is a religious belief.

I call this the epistemological definition of religion because religion is defined in terms of how we gain knowledge and how we support our claims to knowledge.

Id., at 112-13.
Indeed, the impure liberal's notion of what issues are underdetermined by "secular" arguments, and thus the legitimate subjects of religious ones, threatens to bring the entire liberal tent crashing down. The impure liberal seems to take controversy among self-proclaimed liberals as a sign that secular reasoning has gone as far as it can go and must be supplemented by alternative brands of reasoning, such as religious reasoning. Abortion, animal rights, and what is to be distributed are highly controversial among liberals, none of whom has committed an error of syllogistic inference or has relied on incorrect accounts of empirical facts. Therefore, according to the impure liberal, these are issues that can only be resolved by recourse to sectarian views. If, however, the impure liberal is correct about this, then the dam of principle holding back thoroughgoing religious influence on policy making is completely breached. For on almost every policy issue -- the meaning and scope of freedom of speech, economic freedom, privacy, free exercise of religion, equal treatment, community self-determination, the justification of punishment, procedural rights, and so on -- self-proclaimed liberals are deeply divided. Although one cannot be a "liberal" if one rejects all conceptions of free speech, privacy, etc., no liberal party line exists on any aspect of liberalism. Impure liberalism as a theory is too skeptical about the power of secular reasoning to resolve issues that are controverted among liberals to provide a convincing argument against wholesale admission of religious arguments in policy making.

Wenz's distinction between "secular" and "religious" is unconvincing, both as to matters of material fact and as to matters of value. Both common-sense and scientific factual knowledge, as well as common moral beliefs, rest ultimately on undemonstrable metaphysical views. As Ronald Dworkin puts it, "[Wenz's] test is not acceptable, because government must make and impose decisions on a wide variety of moral issues about which people disagree profoundly, and which cannot be decided on empirical grounds or by appeal to any convictions shared by everyone or by methods that are in any other way 'integral' to any collective way of life." Dworkin, supra note 26, at 421-22 n.60. For a position that supports Wenz's distinction between religious and secular arguments, though not Wenz's conclusion regarding the primacy of the latter, see Carter, The Religiously Devout Judge, supra note 20, at 938-39.

Moreover, Wenz is forced by his own argument to declare all religious beliefs unwarranted because they make claims to truth regarding the same matters that "secular" beliefs concern. But then freedom of religion, which claims to be truth-seeking, does not merit the liberal's concern beyond the psychological effects on religion's adherents.

28. See Raz, supra note 3, at 42.

29. See generally, id. at 23, 42-43; Winston, supra note 23, at 137-41. See also Thomas Spragens, Jr., The Irony of Liberal Reason (1981). Spragens argues that liberalism has been undermined by its celebration of technological conceptions of reason and its value noncognitivism. Enlightenment-based animus to religious authority may
Finally, and perhaps most importantly, the impure liberal's breach of the dam barring religious arguments fails to take into account the interconnectedness of beliefs. For if religion can "get it right" about, say, abortion, why can it not "get it right" about such things as, say, sin, or other matters that the impure liberal would make the exclusive province of the secular? The grounds that support accepting a religion's view on one issue are quite likely to support accepting its views on other issues. Put differently, one cannot buy religious views at retail, specific issue by specific issue; they are available only at wholesale.

B. Pure Liberalism

The pure liberals — Ackerman, Dworkin, Larmore, Nagel, and Rawls — believe that secular reasons should resolve all issues in the public sphere, including how the line defining that sphere is to be drawn. The issues of abortion and animal rights can and must be resolved without recourse to religious views, just as the impure liberal, Greenawalt, would resolve issues of, say, the criminalization of self-regarding vices. The pure liberal would find all of Ann's policy recommendations unjustifiable to the extent that they are based on the arguments Ann provides for them.

What grounds does the liberal have for finding Ann's policy recommendations unjustifiable except for competing religious beliefs or beliefs that all religious beliefs are untrue, or at least unjustifiable? The liberal's rejection of religious-based policies suggests some sort of epistemological divide or discontinuity between what we can claim justifiably to know secularly, so to speak, and what we can claim justifiably to know religiously, the latter being an inferior form of knowledge for purposes of public policy, though perhaps not for other purposes. No such epistemological divide exists, however, that will give liberalism its justification for rejecting the legitimacy of Ann's proposals.

It is easy to dispose of one possible basis for rejecting Ann's policies, namely, that the religious beliefs she relies on are not empirical. Without entering the epistemological thicket surrounding the status of empirical knowledge and its connection to theories that ultimately rest, in part, on nonempirical norms, it is obvious that liberalism cannot avail itself of any empirical/nonempirical divide. For the propositions of liberalism are not empirical, but metaphysical and

have resulted in placing technocratic "reason" in an exalted status; "reason's" failure to resolve value disputes may have left liberalism vulnerable to attack.

30. See supra note 21.
normative.\textsuperscript{32} More likely the liberal will want to argue that religious beliefs are less subject to reasoned assessment than moral beliefs, such as those of liberalism. If this argument is not just another way of rejecting the justifiability of religious beliefs altogether, which itself would require that other religious beliefs — skeptical ones such as agnosticism or atheism — are justifiable, then the argument is implausible. Moral reasoning rests either on nonempirical premises or on inferences that are not matters of logical entailment. This is surely the case with liberalism. Reason in the narrow sense that might be employed to discredit religious arguments equally discredits normative arguments.\textsuperscript{33} And reason in the broader, reflective equilibrium sense, that might make one moral view more reasonable than another, seems just as applicable to religious views.\textsuperscript{34}

Liberals attempt to disenfranchise religious arguments on other grounds. Some, like Ackerman and Nagel, believe that reliance on religious arguments, like Ann's, to establish public policy is inappropriately nonneutral or nonimpartial, i.e., "unfair" to those who do not share Ann's religious views.\textsuperscript{35} This tack is question-begging at two levels. First, to repeat an earlier point, the demonstration that the Ackerman/Nagel conception of fairness trumps religious grounds would require arguments for that conception and against the competing religious grounds that liberals such as Ackerman and Nagel fail to make. How could they make them, though, without doing theology as well as moral philosophy?\textsuperscript{36} Second, Ann would dispute the claim that acting on her religious views in effecting public policy is in any way unfair to those who reject her religious views. Fairness, neutrality and impartiality are

\textsuperscript{32} See, Austin, supra note 20, at 36-37.
\textsuperscript{33} See Galston, supra note 26, at 111-12; Perry, supra note 9, at 19, 120-21; Michael J. Perry, Toward an Ecumenical Politics, 20 CAP. U. L. REV. 1, 30 (1991). Both Greenawalt and Wenz fail to appreciate that the reasons for holding religious beliefs are no more inaccessible to others than are the reasons for holding those secular moral and factual beliefs that they would deem admissible on public policy matters. See Greenawalt, Religious Convictions, supra note 18, at 1032-33, 1041; Wenz, supra note 27, at 119-31.
\textsuperscript{34} See Gedicks, supra note 31, at 693-94. Cf. Winston, supra note 23, at 132, 136-37 (arguing for ability of "secular" moral reasoning to go further than Greenawalt thinks it can, but not distinguishing religious reasoning in this respect).
\textsuperscript{35} See Ackerman, supra note 21, at 44, 110-11; Nagel, supra note 8, at Ch. 14; Thomas Nagel, Moral Conflict and Political Legitimacy, 16 PHIL. & PUB. AFF. 215, 218 (1987).
concepts, like equality, that are empty vessels for substantive norms. If abortion is the killing of a being that should be legally protected, then in what sense is it unfair to those who reject this truth to outlaw abortion? If fairness requires placing legal duties on persons only if those duties are truly morally required, then from Ann's perspective, passing laws against abortion is not unfair. Of course, from the perspective of those who disagree with Ann, such a law is unfair, but its unfairness lies in its error and not its source. This conflict of views about fairness is, therefore, inevitable. Unless Ackerman/Nagel liberals advocate, in the name of fairness, a unanimity requirement for public policy — and why is that "fair" (and what public policies are the default policies in case no unanimity exists, anyway?) — then public policies are fair if they are morally correct. Moral correctness may truly be the function of some forms of equal treatment or equal regard, but if Ann's views are correct, then it follows from their correctness that they already incorporate the correct conception of equal regard.37

The Ackerman/Nagel liberal is arguing that Ann's views are incorrect, at least the component of them that dictates that they be coercively imposed. The liberal is using the unfairness of the coercive imposition as grounds for claiming Ann's views are incorrect. I have shown that some senses of unfairness fail to support the liberal's argument.

Nagel, for example, argues that coercive imposition of norms is unfair (in a morally overriding sense) if such norms are reasonably rejectable. Norms are reasonably rejectable in this disqualifying sense if they rest on grounds that are not publicly accessible. Religious grounds are not publicly accessible to those who are outside the religion. Therefore, it is morally true — contrary to the teachings of Ann's religion — that it is morally wrong for Ann to seek to impose coercively her views on abortion, support of religious schools, etc.38

37. See Greenawalt, Religious Convictions, supra note 18, at 1037.
38. See Galston, supra note 26, 108-09. See also Greenawalt, supra note 9, at 55; Winston, supra note 23, at 136.
39. Nagel's position was first put forward in Nagel, supra note 35. He revised that position slightly in Nagel, supra note 8:

[Religious values]...are not just values on which persons who are not grossly unreasonable or irrational may disagree, but values of such a type that a person cannot reasonably be expected to agree to a system which authorizes the use of political power to enforce or promote values opposed to his own, just because the majority accepts them.

This depends on the assumption that one may be justified in holding a belief about something of fundamental importance without having to conclude that those who do not share it are irrational or unreasonable, even though they have been presented with the same reasons or evidence that one has found compelling. It is not easy to say what distinguishes cases like this from others in which

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Let me skip the question of whether Nagel's reasonable rejection conception of fairness fails its own test, i.e., whether someone like

the recalcitrance of those who are not convinced can be dismissed as unreasonable. It seems to me clear that as things now are, those who do not accept the truth of a particular religion (or of atheism) ought not to be judged unreasonable by those who do, and that anyone who today is unconvinced by the germ theory of disease must be judged irrational. This is to reject the position that it is reasonable to believe something only on grounds which make it unreasonable or irrational not to believe it. That would make any reasonable belief an adequate ground for coercion, because those who did not accept it after being given those grounds could be coerced on grounds that it was unreasonable for them to reject. Likewise it would be unreasonable to hold any belief that others could reasonably reject and that was therefore not a possible basis for coercion.

I just don't think belief is like that: There is a substantial middle ground between what it is unreasonable to believe and what it is unreasonable not to believe (where belief and non-belief are taken as exhaustive — so non-belief is not belief). Belief is reasonable when grounded on inconclusive evidence plus judgment. In such a case one usually acknowledges the possibility of some further standard to which impersonal appeal can be made, even though it cannot settle existing disagreements at the moment. But even without such a standard, belief may not be unreasonable. In any case, it would be absurd to claim that individuals should decide what to do in their own lives only on grounds which they believe would be unreasonable for anyone else to reject, including grounds having to do with fundamental values they believe to be objectively correct.

But in the political realm we have to find a more objective form of justification. If those whom we propose to subject to political coercion cannot be expected to accept the values we wish to further by it, we will be justified only if there is another description of the grounds of coercion that they can be required to accept. Sometimes, "You lost the election" will serve that purpose, but not always. It depends on whether the issue is one which it is reasonable to require everyone to put to decision by vote.

This is really a problem of how to interpret the familiar role-reversal argument in ethics: "How would you like it if someone did that to you?" That argument invites the further question, "How would I like it if someone did what to me?" Since there is more than one true description of every action, the selection of the morally operative one is crucial. If someone believes that by restricting freedom of worship he is saving innocent people from the risks of eternal damnation to which they are exposed by deviation from the true faith, then under that description he presumably would want others to do the same for him, if he were in spiritual danger. But under the description "restricting freedom to worship," he wouldn't want others to do it to him, since in light of the fact that his is the true faith, this would be to hinder his path to salvation.

For purposes of political argument we have to exclude the description of what is done in the contested terms of a particular faith, and find instead a way of applying the role-reversal argument in terms of descriptions and values that must be accepted by all reasonable parties, as a basis for regulating or handling those disagreements that reason cannot eliminate.

Legitimate government would be impossible if it were never legitimate to impose a policy on those who reasonably rejected the values on which it was based. It is not in general a valid role-reversal argument to ask, "How would you like it if someone did something to you that you reasonably didn't want him to do?" The reply is that you might not like it, but might nevertheless be
prepared to accept it, depending on the nature of their reasons and the institutions or procedures under which they were empowered to act on them in opposition to your preferences. The legitimacy of democratic government depends on its ensuring that we can all countenance, even if we don't like, what it may impose on us against our wills. But this means that it is legitimate only if those impositions that we should not be asked to countenance are kept beyond its power.

Why should I not accept the efforts of others, if they can muster the necessary political strength, to ensure my eternal salvation as they understand it by preventing the spread of heresy and atheism? Why is this so different from accepting what I may believe to be deeply misguided policies on public health, national defense, or education, if they are democratically adopted?

The answer here cannot be just in terms of the priority of my interest in basic personal autonomy over other people's interest in promoting what they regard as a desirable moral environment, since we are dealing here not with a conflict of interests but with a conflict over what my most fundamental interests are. Those who wish to limit my religious freedom are doing so, in the case under consideration, with my own best interests in mind. They believe that eternal salvation has priority in any person's good even over basic personal autonomy, and if I shared their views I would have to agree with them. The question is why my conception of my good should block the use of their conflicting conception in the justification of political control over me in this case, but not in theirs.

I think the problem is that there is no higher-order value of democratic control or pursuit of the good abstractly conceived which is capable of commanding the acceptance by reasonable persons of constraints on the pursuit of their most central aims of self-realization — except for the need to respect this same limit in others. Ethics does not license an unmediated universal altruism, precisely because that leads in ordinary circumstances of disagreement over the nature of the good to inevitable conflict rather than possible unanimity.

*Id.*, at 161-64 (footnotes omitted).

Nagel's position is based upon his conception of Kantian respect, which he regards as correct, and which is inconsistent with many conceptions of the Good, conceptions which Nagel must regard as incorrect. See *id.*, at 168 (expressing the hope that conceptions of the Good that reject Nagel's conception of Kantian respect — “fanaticism” — will eventually die out).

William Galston indicates how Rawls has moved from viewing liberalism's neutrality as based on a conception of justice that transcends and is normatively prior to all theories of the Good to viewing it as a product of the overlap among particular theories of the Good and thus incapable of providing reasons for acting to adherents of illiberal theories. See GALSTON, supra note 26, at 143-49. (For a good discussion of the difficulties of Rawls' current position, see *id.*; Raz, supra note 3, at 4-31.)

For a good description of the puzzlement someone like Ann must feel at being told by liberals such as Nagel that her views may well be true but cannot be acted upon, see Wieseltier, Two Concepts of Secularism, in ISAIAH BERLIN: A CELEBRATION 80-99 (Edna Margalit & Avishai eds., 1991):

The believer is less puzzled to be told that his belief is false than he is to be told that his belief is beside the point. Hard secularism met the believer on his own ground; it shared, even in its opposition to metaphysics, a metaphysical urgency; and it agreed that the relationship of faith to power should be decided by a consideration of its truth. In the hard secularist world, the believer who lost the struggle for the identity of the society could feel martyred, physically or symbolically, and await the day when his account of the world is finally accepted. In the soft secularist world, by contrast, in a world of perfect tolerance, the urgency of ultimate issues has vanished from the public sphere of life, and the discussion has been curiously relaxed. There is no martyrdom, there is only marginality. Religious arguments about the public sphere of life will be neither accepted nor rejected, since all the arguments of all the religions about
Ann could reasonably reject it, or find the arguments for it inaccessible given her religious beliefs. Assume Nagel’s test is not self-undermining in this way. Does it render illegitimate Ann’s policy

the public sphere of life have lost interest, have been discarded as an indifferent subject for political conversation. Absolutes are not destroyed by democracy. They are disarmed by it. They may swell within the souls of individuals, and within the fellowship of individuals, who prefer not to live thoughtlessly, who have given over to the protections of secularism their public lives, not their private lives; but beyond a particular point the storm must subside, the agitation must abate.

. . . The religious citizens of an open society may vigorously propound their views on the questions of the day, but they must understand that in this sphere some of their reasons will fail to persuade — that their most compelling reason for their views, God’s will, will not commonly compel. They will have to argue for their views on other grounds. That is, they will have the exasperating experience of having others treat as opinion what they treat as truth.

Id., at 97-98.

See also Galston, supra note 26, at 117; Margaret Moore, Book Review, 26 Nous 548, 549-50 (1992).

40. Nagel is aware that one might argue that rejection of the reasonable rejection test itself is, in fact, reasonable.

To restate the apparent paradox: Liberalism asks that citizens accept a certain restraint in calling on the power of the state to enforce some of their most deeply held convictions against others who do not accept them, and holds that the legitimate exercise of political power must be justified on more restricted grounds — grounds which belong in some sense to a common or public domain.

But it is not clear why this restricted form of justification should be the standard of political legitimacy at all. To put the argument against: Why should I care what others with whom I disagree think about the grounds on which state power is exercised? Why shouldn’t I discount their rejection if it is based on religious or moral or cultural values that I believe to be mistaken? Isn’t that being too impartial, giving too much authority to those whose values conflict with mine — betraying my own values, in fact? If I believe something, I believe it to be true, yet here I am asked to refrain from acting on that belief in deference to beliefs I think are false. It is unclear what possible moral motivation I could have for doing that. Impartiality among persons is one thing, but impartiality among conceptions of the good is quite another. True justice ought to consist of giving everyone the best possible chance of salvation, for example, or of a good life. In other words, we have to start from the values that we ourselves accept in deciding how state power may legitimately be used.

And it might be added, aren’t we doing that anyway, if we adopt the liberal standard of impartiality? Not everyone believes that political legitimacy depends on this condition, and if we impose political institutions on others in our society because they do meet it (and block the imposition of institutions that do not), why aren’t we being just as partial to our own values as someone who imposes a state religion? It has to be explained why this is a form of impartiality at all. Nagel, supra note 8, at 158-59.

See also Richard W. Miller, Moral Differences 287-88 n.2 (1992); Carter, Evolutionism, supra note 20, at 987 (is neutrality “neutral”?) ; Fred D’Agostino, The Idea and the Ideal of Public Justification, 18 Soc. Theory & Prac. 143, 158 (1992) (public justification is recursive in nature). One upshot of my argument against Nagel is that Ann can reasonably reject Nagel’s reasonable rejection test because no conception of it provides Ann with reasons to do what Nagel claims the test requires her to do (withdraw
recommendations if we assume the absence of unanimity, and if we
prescind the question whether, as matters of substantive morality
and religious truth, abortion, pornography, etc. should be
condemned?

Two senses in which grounds and arguments might be reasonably
rejectable or publicly inaccessible exist. One sense is too strong to
help Nagel, the other too weak. In the strong sense, Ann's beliefs are
reasonably rejectable and publicly inaccessible if we can understand
why others do not share those beliefs. Ann has had a unique life,
with unique experiences. She, but not others, witnessed certain
events from a certain point of view. She, but not others, was taught
certain things by particular people. Her particular beliefs — on all
sorts of matters — are as reasonably rejectable by and inaccessible
to others as, say, our beliefs about air travel, television, and the his-
torical Christ are reasonably rejectable by and inaccessible to Stone
Age tribes in Borneo who have never seen an airplane, a television
show, or a Christian.

This sense of reasonable rejectability/public inaccessibility is obvi-
ously too strong to serve Nagel's purpose, for it rules out imposition
of any norms whose rejection is understandable in this way. We can
surely understand how a "reasonable" slave owner in the Antebel-
lum South could reject imposition of a norm of racial equality. From
his perspective — given the web of his other beliefs — blacks were
inferior human beings. Nonetheless, Nagel would surely not think it
illegitimate to eradicate slavery coercively in the face of opposition
by such "reasonable" slave owners.41

The other sense of reasonable rejectability/public inaccessibility is
too weak to serve Nagel's purpose. That sense would exclude the
imposition of only those norms that can be reasonably rejected by
someone after being privy to all the experiences, etc., of those who
accept the norms. Clearly, Ann will not accept rejection of her
norms as reasonable in this sense; her acceptance means that she
thinks acceptance is reasonable and rejection unreasonable. From
the point of view of the one whose norms they are, no accepted
norms can be reasonably rejected.42
One gets the same results if one substitutes some sort of dialogic test for the reasonable rejectability/public accessibility test, i.e., if one allows coercive imposition of only those norms accepted through dialogue among all the affected parties. Dialogic tests for the legitimacy of coercive imposition of norms come in two types: those requiring actual dialogue among the affected parties, and those that coercion will be self-defeating or to skepticism. Interestingly, Nagel treats religious revelations as publicly inaccessible, but he fails to distinguish them from other types of similarly inaccessible sources of knowledge, e.g., personal observations and other personal experiences.


For other attempts, similar to Nagel's, to locate a sense of reasonable rejectability that is neither too strong nor too weak, see Steven Macedo, Liberal Virtues 47-49 (1990); Samuel Freeman, Original Meaning, Democratic Interpretation, and the Constitution, 21 Phil. & Pub. Aff. 3, 23-24, 31 (1992); Rawls, Justice As Fairness, supra note 9, at 243-49; Lawrence B. Solum, Pluralism and Modernity, 66 Chi.-Kent L. Rev. 93, 96-99 (1990). Richard Arneson agrees that my position is correct if one is not a skeptic regarding religious claims, but he ultimately endorses skepticism (subjectivism). See Richard Arneson, Neutrality and Utility, 20 Can. J. Phil. 215, 234-36 (1990).

For general support of the position I am taking opposing Nagel's position, see Galston, supra note 26, at 108-09, 111-12; Scott C. Idleman, The Role of Religious Values in Judicial Decision Making, 68 Ind. L.J. 433, 445-48, 464-67, 482-84 (1993); Moore, supra note 39, at 548-49; Raz, supra note 3, at 36, 39-40. See also Carter, Evolutionism, supra note 20, at 992-93; Greenawalt, Religious Convictions, supra note 18, at 1042-43.

Suppose someone in control of the coercive apparatus of government encounters aliens from another planet who warn him, based on research that is beyond human capacities, that the Earth faces annihilation if nations do not disarm. (See The Day the Earth Stood Still, 20th Century Fox, Farmington Hills, Mich., 1951.) Would it be "illiberal" in Nagel's sense for him to rely on this knowledge, given that others are universally skeptical when he tells them about the encounter? His claims are reasonably rejectable in the strong sense I have identified, though not in the weak sense. Which sense should govern his actions, and does some third sense exist that is intermediate between the two I've identified? Is his encounter with space aliens any less accessible to others than his knowledge of any nonreplicable historical event, such as that a spider crawled upon his bathroom mirror at 2:15 p.m. Tuesday? If not, may he rely upon his knowledge of such historical events, and what if they are "miraculous"?

Note that impure liberals like Greenawalt, while they would allow Ann to consult her religious views on some issues, nonetheless require that she be able to distinguish those views from purely secular ones. For Greenawalt, the latter are to govern decision making on most issues and are to govern public argument on all issues. See Greenawalt, supra note 9, at 215-28. How is Ann, though, to distinguish her religious views from her secular ones? No sharp divide separating one set of her beliefs from another exists, and why would it matter whether she is influenced by Aristotle or by Christ? And where does Aquinas fit? It looks like "secular" can only be distinguished from "religious" using criteria like Nagel's "publicly accessible reasons." However, I have argued these criteria do not work because they are either too strong or too weak.
requiring a hypothetical, idealized dialogue. An actual dialogue test is, in effect, a requirement of unanimity. Requiring unanimous acceptance of coercive norms, however, cannot be morally justified for two reasons. First, the reasons for failure of unanimity can include antisocial motives, ignorance of factual matters, illogic, deception, misunderstanding, immaturity, fatigue, linguistic incompetence, and a myriad of other factors that should discredit the objector. Second, and more fundamentally, an actual dialogue/unanimity requirement requires some sort of default position, coercively imposed (as well as an allocation of resources to maintain the actual dialogue, collected from someone), to govern the parties unless and until they unanimously agree on a new set of coercively imposed norms. Yet, no set of default norms has itself passed the test of unanimity in actual dialogue. Requiring a dialogue about the default position, therefore, leads to an infinite regress of default positions and dialogues.

43. Actually, although all of these factors may prevent achievement of unanimity, some of them will vitiate the results of unanimous agreement even if unanimity is achieved.

The problem, pointed out by Walzer, is how to constrain actual dialogue to obviate these problems without at the same time leaving the parties to the dialogue with nothing left to discuss:

- For the rules of engagement are designed to ensure that the speakers are free and equal, to liberate them from domination, subordination, servility, fear, and deference. Otherwise, it is said, we could not respect their arguments and decisions. But once rules of this sort have been laid out, the speakers are left with few substantive issues to argue and decide about. Social structure, political arrangements, distributive standards are pretty much given; there is room only for local adjustments.

Michael Walzer, *Moral Minimalism*, in *From the Twilight of Probability* 3, 11 (William R. & Antonio Spadafora eds., 1992). See also Richard Rorty, *The Advantages of Moral Diversity*, 9 Soc. Phil. & Pol'y 38, 53 (1992) (“[T]he conditions that are necessary to assure just and fair debate in the public sphere appear to presuppose the happy outcome of just those debates.”) Put differently, we have to know how the dialogue should come out substantively in order to know how to constrain it procedurally.


That a moral proposition is accepted in a dialogue occurring in the “ideal speech situation” is usually conceived of, not as definitive of its moral truth, but as the best justification of the belief that it is true. In other words, the dialogic test is epistemological, not metaphysical. See also Carlos S. Nino, *The Epistemological Moral Relevance of Democracy*, 4 Ratio Juris 36, 42-43 (1991).


46. Another reason why dialogue might fail to produce correct moral beliefs, even if it produces unanimity, is that the language of the participants privileges some moral beliefs and forecloses others. This would appear to render impossible that any actual dialogue could occur in an “ideal speech situation.” See Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L.
For these reasons most dialogic tests for justifying coercive imposition of norms rely on a hypothesized and idealized dialogue among parties who are rational, well-motivated, and dialogically constrained in certain ways. Because such dialogues are hypothetical, they can be replicated monologically without devoting resources to bringing parties together, ensuring actual communication, and sustaining a dialogue over time. Moreover, the results of the monological exercise can be known virtually instantaneously, thus obviating the need to have, and thus to justify, a coercively imposed default position. The key to how to imagine the idealized hypothetical dialogue lies in what types of knowledge, reasoning ability, emotional responses, motivations, etc. one envisions the parties to the dialogue possessing. If one allows for differences among the parties, then one faces the possibility that they would not agree to any particular set of norms. A dialogic test that allows for differences is functionally like the strong reasonable rejectability/public accessibility test. One — and Ann — can understand why those who have had different experiences from Ann's would disagree with her norms were they to engage in dialogue. One can also understand, though, why slave owners would disagree with norms of racial equality.  


47. Moreover, not only do constraints that preserve differences make too many political outcomes reasonably rejectable, but the nature of the constraints themselves must be "reasonable" in some non-question-begging way. For example, a constraint excluding religious arguments from the actual dialogue would be question-begging in the context of my disagreement with the pure liberals. See H. Jefferson Powell, Reviving Republicanism, 97 Yale L.J. 1703, 1709 (1988). Ackerman, for example, argues that neutral dialogue precludes asserting that one's conception of the Good is superior to others'. ACKERMAN, supra note 7, at 37. If, however, someone argues that her conception of the Good is superior and gives evidence of its superiority, is she violating this constraint? See Perry, supra note 9, at 10. If not, then the dialogic test doesn't exclude religious arguments. If so, then the dialogic test rejects political positions that no one would want rejected.

On the indeterminacy of dialogic tests generally, see George W. Dent, Jr., The 'Tensions' of Liberalism, 38 Phil. Q. 481, 484-85 (1988):

The liberal says: nothing I propose for a rule of social (political) life is to be considered legitimate unless it receives the agreement of every last individual. However, the disagreement of those individuals who refuse their agreement on the basis of their allegiance to principles which are illiberal is not to be counted as invalidating the legitimacy of my proposal. (The disagreement of those who are insane, have defective or impaired rationality, is also not to be counted; but I have put this aside.) How does this substantially differ from the same saying in the mouth of a fascist, communist, National Front supporter, religious imperialist, or whoever, with the appropriate substitutions (for example, 'the communist says . . . principles which are anti-communistic . . .' etc.)? The only difference that emerges on this account, between 'the liberal' and his social/political opponents, is over the admissible attitudes and self-conception which
If one assumes complete interpersonal transparency among those in the hypothesized dialogue, then Ann’s experiences are everyone’s. This type of hypothesized dialogue is no different from the monologue of the solitary thinker and the weak sense of reasonable rejectability/public accessibility. If Ann conducts this imaginary dialogue, she will conclude that her norms would be unanimously accepted, for everyone would share her experiences and thus her (from her view reasonable) beliefs.

must be operative in grounding the agreement of anyone whose agreement it is going to be proper to take into account as one of the conditions of identifying a social proposal as legitimate, or in grounding the dissent of anyone whose dissent is going to provide a proper reason for querying the legitimacy of it. The liberal says it is all, but only, those who figure themselves and others basally, and politically decisively, as nothing more than instances of the type ‘seeker after some good life or other’ whose agreement to a social proposal is requisite to its legitimacy, or whose dissent from it throws doubt on that. The agreement of no one else who is to live under its requirements is necessary, since their disagreement rests on improper and illegitimate (illiberal) grounds, and therefore, implies no proper basis for the withdrawal of the proposal. The communist speaks in just the same form; the matter of his utterance is, of course, different.

Thus liberal social proposals, just as any social proposals of any kind save those that involve nothing at all beyond violent brute-forced subjugation, claim their legitimacy because they are held to be abstractly right on their own theoretically preferred basis, and are held to be agreed to by their own theoretically generated appropriate audience, not because they win actual agreement. For the objections of those that actually disagree will (often) be deemed immaterial and invalid, since grounded in principles which are inadmissible under the conditions of the proposal. What must set liberalism apart from other political theories cannot be its legitimation procedure: it shares the same form of that procedure with all political theories. The real ground of difference is this. Liberal social proposals are, by contrast with, say, fascist or religious imperialist ones, more permissive and accommodating to variety (as Waldron stresses; this is, of course, precisely why many people find them so exceptional. They are, in short, liberal proposals. They take their grounding only in each person’s desire to make some good life or other for himself, not some more or less particular good. If they are, in any way permissive, and if enough people are fairly permissive in their stance towards the ‘life-styles’ of others, fairly widespread actual agreement to them may be expected; they will find fairly widespread acceptance. But the likelihood of widespread actual consent is simply a consequence of these pre-existing attitudes and modes of mutual regard, and plays no de jure role in establishing legitimacy. It is the liberal’s openness to variety which sets him apart; it is not his affording a larger, or different, role to agreement and consent in the legitimation of political and social rules.


48. See David Estlund, Book Review, 20 Pol. Theory 694, 696 (1992). If one is to imagine a dialogue that is without limits on time, the participants in which are all similarly motivated, and in which all information — including the personal experience kind — is equally available, then one will envision a convergence of beliefs. Religious beliefs will be no different in this respect from other beliefs, including (self-referentially) the belief that normative truth is what emerges from such an interpersonally transparent dialogue regarding what ought to be done. See Nagel, supra note 8; see also Richard Arneson, Socialism as the Extension of Democracy, 10 Soc. Phil. & Pol’y 145, 170-71
Nagel wants to deny the epistemological continuity of religious beliefs and those beliefs that should govern public policy. He argues that there are some beliefs, most notably religious beliefs, that are reasonable for someone to accept who at the same time recognizes that rejection of those beliefs by others is also reasonable. As I pointed out above, however, in saying that it is reasonable for others to reject what one believes, one is only saying that one can understand how others, possessed of reason, have fallen into error. One does not conclude from this that it is reasonable for the world to be ruled by error.

(1993) (arguing that dialogic tests are really just monologic counterfactual thought experiments regarding what all rational, informed, etc., people would agree to).

The tendency among followers of Habermas is, indeed, to build all of the substantive positions they themselves accept as correct into the preconditions for the idealized dialogue. See Walzer, supra note 43, at 11. The “dialogue” then will produce “agreement” on precisely those substantive positions. How could it not do so? In the end, this merely shows that however much we acknowledge that points of view exist different from our own, points of view that are in some way reasonable for those whose points of view they are, we are stuck inside our own point of view, which for us is the measure of truth of all other points of view. Even the “postmodern” recognition that our point of view is just that—a point of view—and that it has been socially constructed, has no practical consequence for us. No available alternative to our point of view exists.

49. See supra note 39.

50. It may be useful at this point to rehash what I am attempting to demonstrate by arguing for epistemological unity. My first point is that liberalism’s truth entails the falsity of some of Ann’s beliefs. Pure liberalism entails that all of Ann’s beliefs regarding public policy of those that we have mentioned are false. Impure liberalism entails that her beliefs regarding public support and endorsement of her religion are false, and perhaps also her beliefs that pornography should be banned. My second point is that liberalism’s claim to its truth and the falsity of Ann’s opposing beliefs cannot rest on the claim that liberalism’s supporting epistemology is different from—and fairer than, more respectful of autonomy than, more consistent with our free and equal nature than, etc.—Ann’s religious epistemology.

Liberalism asserts the moral primacy of individual autonomy, which can only be limited for the sake of others’ autonomy. See Carlos S. Nino, Moral Discourse and Liberal Rights, in ENLIGHTENMENT, RIGHTS AND REVOLUTION 155, 162-65 (Neil MacCormick & Zenor Bankowski eds., 1989). It may, but it need not, rest on general religious skepticism (it cannot rest on skepticism about all theories of the Good without being self-undermining). Under liberalism, no one may be made an involuntary resource for others’ views of the Good — see Nagel supra note 8, at 164-68; Reiman, supra note 15, at 207-08 — and views of the Good that entail the permissibility of such coercion are, if liberalism is correct, incorrect.

My point is that if liberalism is correct and illiberal religious views, therefore, are incorrect, then liberalism is correct not by virtue of its operating in a separate epistemological domain, one in which it does not have to meet the evidence supporting illiberal religious views head-on. No meta-epistemological vantage point exists from which it is possible both for illiberal religious views to be correct and also for liberalism to be correct that imposing correct religious views is unfair in some trumping way (where a component of such views is that imposing them is alright). (Rawls appears to believe in such a meta-epistemological vantage point. See Rawls, Justice as Fairness, supra note 9, at
Nagel clings to the hope that someone like Ann, with her beliefs, can see that others are reasonable in rejecting her beliefs, and that, in some trumping sense of "reasonable," not having her beliefs imposed on them is also reasonable, even though her beliefs about, say, abortion (obviously reasonable from her point of view) include the belief that they should be imposed.51 Nagel thinks erroneously that

243-45. A good response to both Rawls and Nagel is provided by Raz, supra note 3, at 238-40. See also Joseph Raz, Free Expression and Personal Identification, 11 OXFORD J. OF LEGAL STUD. 303 (1991.).

In addition to offering the reasonable rejectability/public accessibility test and the dialectic test as grounds for excluding religious positions from determining public policy, the liberal might offer the Rawlsian veil of ignorance as a conceptualization of fairness that supports such an exclusion. Would persons behind the Rawlsian veil eschew reliance on religious convictions? They would not want to have false views forced upon them, but likewise they would not want to be prevented from acting on true views. Moreover, risk aversion does not solve this dilemma, because without doing theology, one cannot meaningfully compare the two risks. One cannot determine the position regarding religious beliefs that would emerge from behind the Rawlsian veil without specifying what persons behind the veil believe religiously. Furthermore, if one so specifies, each specification will produce a different outcome. Persons behind the veil would exclude illiberal religious beliefs only if their religious beliefs were liberal, i.e., only if their religious beliefs held the beliefs' coercive imposition wrong in principle (or held to be wrong in practice because unlikely to succeed). See GALSTON, supra note 26, at 146-49.

The instinct among liberals to place religious claims on a different epistemological level is so powerful that it affects even those who expressly repudiate such a move. Marshall forcefully asserts that religion is on the same epistemological level as the political theory of liberalism but then, in the same article, argues that admitting religion into the public forum should be resisted. His reason is that religion, as the answer to humanity's anxiety over death, evokes such powerful and often dark emotions that it must not be given access to state power. Compare William Marshall, The Other Side of Religion, 44 HASTINGS L.J. 843, 845-47 (1993) with id. at 858-59, 863. Interestingly, Marshall's position assumes that religious answers to the mysteries of life and the terror of death are either false or unknowable. For his proto-utilitarian argument against religious participation in the public square is advanced from no particular point of view, and surely not the point of view of religions that deny that Marshall's dangers justify their exclusion from the public square. Put differently, even if Marshall's gloomy forecasts are well-founded, the consequentialism animating Marshall's arguments is of no higher status as an argument than religious arguments that deny the value he attaches to outcomes. He would surely fail to convince one who was willing to shed blood to save souls.

For a liberal position similar to Marshall's, see GALSTON, supra note 26, at 177-82. For an acceptance of Marshall's premise regarding the need to avoid violence, but a rejection of his estimation of the threat posed by admitting religion to the public square, see Gedicks, supra note 31, at 696 n.122.

51. At least since Kant, and pushed by Hegel and post-Hegelian idealists of various stripes, including the modern Continental philosophers, the followers of Wittgenstein, and the pragmatists, we have understood that the world presents itself to us filtered through perceptual and conceptual categories. See CHARLES TAYLOR, HEGEL 141-47, 225-31, 528-33 (1975); Allen Hance, Pragmatism as Naturalized Hegelianism: Overcoming Transcendental Philosophy?, 46 REV. OF METAPHYSICS 343, 343 (1992); Richard Rorty, Foucault and Epistemology, in FOUCAULT: A CRITICAL READER 41, 44-45 (David Couzens Hoy ed., 1986). Moreover, these categories are relative not only to humans as a species, but also to cultures and to individuals. All beliefs about the world are perspectival, and each individual's perspective will be unique. Furthermore, an individual can understand this without rejecting her beliefs or that they refer to the world and not to themselves. Although their coherence to each other may support their truth, their truth is a matter of correspondence with the world. See Philip Clayton, Two Kinds
the “reasonable” alternative to coercive imposition of Ann’s beliefs is governmental neutrality or relegation of the matter to private choice. However, given what Ann’s views are regarding abortion —

of Conceptual-Scheme Realism, 29 So. J. Phil. 167 (1991) (that conceptual schemes filter all thought and perception does not entail metaphysical nonrealism). See also CARLOS S. NINO, The Ethics of Human Rights 103-07 (1991). Religious beliefs are no different from any other beliefs in these respects.

The Hegelian, Wittgensteinian, Rortian, Fishian view that our categories are socially constructed is an “is” from which no “ought” follows. See Stanley Fish, Almost Pragmatism: Richard Posner’s Jurisprudence, 57 U. Chi. L. Rev. 1447, 1464-69 (1990); Hollenbach, supra note 13 at 92-93, 95; Steven D. Smith, The Pursuit of Pragmatism, 100 Yale L.J. 409 (1990). It surely does not entail our inability to transcend our cultural categories, only that, like the rebuilding of Neurath’s boat at sea, we cannot do it all at once, and that when we do it we do it with the tools our culture provides us for its own transcendence. The emphases on social construction, perspectivalism, and the ubiquity of “interpretation” should be no more paralyzing in the normative domains than in the scientific ones. See Thomas Kuhn, Commensurability, Comparability, Communicability, 2 Proceedings of the Philosophy of Science Association 669 (1982); Judith Lichtenberg, Objectivity and Its Enemies, 2 The Responsive Community 56, 60-68 (1991/92); Thomas Morawetz, Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging, 141 U. Pa. L. Rev. 371, 445-46 (1992); Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 n.113, 779-80 n.130 (1993); Cass R. Sunstein, Administrative Substance, 1991 Duke L.J. 607, 617-19 n.47. See also Mathew H. Kramer, Legal Theory, Political Theory, and Deconstruction 239-43 (1990); Sotirios A. Barber, Stanley Fish and the Future of Pragmatism in Legal Theory, 58 U. Chi. L. Rev. 1033 (1991); Ronald M. Dworkin, Pragmatism, Right Answers, and True Banality, in Pragmatism in Law and Society 359-88, 360-64, 380-81 (Michael Brint & William Weaver eds., 1991); Steven Knapp, Practice, Purpose, and Interpretive Controversy, in id. at 323-42. Furthermore, this view surely does not entail that religious beliefs are any more suspect than other beliefs. Indeed, if one holds a coherentist view of epistemological justification, then appeals to religious beliefs are no different from appeals to other beliefs and reflect the epistemological unity that coherentism assumes. See Stephan A. Gardbaum, Law, Politics, and the Claims of Community, 90 Mich. L. Rev. 685, 689, 705-19 (1992). See also Stanley Fish, Liberalism Doesn’t Exist, Duke L.J. 997, 1000 (1987).

Nor does the fact that our categories are socially constructed — indeed, that our “selves” are, in part at least, socially constructed — entail abandonment of respect for autonomy. See David Gauthier, Morals by Agreement 349-50 (1986); Charles E. Larmore, Political Liberalism, 18 Pol. Theory 339, 349-52 (1990); Michael Walzer, The Communitarian Critique of Liberalism, 18 Pol. Theory 6, 21 (1990).

52. See also Macedo, supra note 42, at 46-49; Rawls supra note 9, at 243-45; Solum supra note 42, at 1100-01. Nagel’s view is that some beliefs are objective in that they appeal to more than the fact that they are believed and to a common ground of justification. See Nagel, supra note 8, at 159-62 (also supra note 39). Raz points out that no one appeals to the fact of his own belief to justify the belief. Raz, supra note 3, at 37-39. Either all beliefs satisfy Nagel’s criterion of appealing to a common ground of justification, or his criterion is far too strong and rules out direct perceptions and experiences as legitimate bases for imposing beliefs. Much of science and all of morality would be excluded as legitimate grounds for coercion. See Raz supra note 3, at 45-46; Perry, supra note 9, at 12, 120. Actual consent is too strong a condition to demand for coercion, and reasonable consent makes consent superfluous: No gap exists between what is a reasonable principle and a principle to which it would be reasonable to consent. See Raz, supra note 3, at 37-39.

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or pornography, animal rights, and public funding of religious education — obviously the “neutral” or private choice position is nothing more than rejection of Ann’s views. Ann does not believe that abortion, viewing pornography, eating meat, or failing to fund religious education is wrong just for her, but that these acts and omissions are wrong for everyone. No neutral position, intermediate between Ann and those who reject her views, exists.

53. The same point can be made with respect to the education of children. Whether conducted by the state or by parents with the coercive backing of the state, education cannot be neutral regarding religion. Pure liberalism has real difficulty handling the education of children without assuming that education does not affect the later adult’s ability to choose among theories of the Good.

54. “Privatization” of Ann’s views — translating them from “it is wrong for anyone to abort” to “it is wrong for me to do so” — is nothing other than rejecting them. See Brian Barry, How Not to Defend Liberal Institutions, in LIBERALISM AND THE GOOD 44, 52-54 (R. Bruce Douglass et al. eds., 1990); Stephen L. Carter, The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law, 69 Or. L. Rev. 471, 519-24 (1990); Amy Gutman & Dennis Thompson, Moral Conflict and Political Consensus, 101 Ethics 67, 68, 75 (1990); Hollenbach, supra note 13, at 94-95, 104; David M. Smolin, Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry, 76 Iowa L. Rev. 1067, 1091-93 (1991); Wieseltier, supra note 39, at 97-98 (quoted supra note 39).

55. See GALSTON, supra note 26, at 117, 273-76; Barry, supra note 54, at 55-56; Greenawalt, Religious Convictions, supra note 18, at 1044-45; Neal, supra note 5, at 577-79. As Neal puts it:

Liberalism understands itself to be a political theory which permits no substantive conception of what constitutes the good life for individuals to take public, political priority over any other; it is hence neutral with regard to the question of the good. I have argued that this liberal theory of neutrality regarding the good presupposes a meta-theory of the good which is not neutral. That meta-theory holds that conceptions of the good are properly understood as the individually defined and possessed ends which separate selves pursue. Whether they are shared and pursued collectively, or dissimilar and pursued antagonistically, is a contingent question of fact depending upon what substantive ends happen to have been chosen. This meta-theory is non-neutral because it necessarily rules out any alternative meta-theory which denies that a ‘conception of the good’ can be properly understood as the ends which separate selves define and pursue. One such alternative is that I ascribed to Ralph, who maintains that ‘conceptions of the good’ are properly understood as essentially, and not just contingently, shared relations which are primarily definitive of, and not primarily defined by, individual selves. Ralph does not say conceptions of the good are chosen; he says they are recognized.

Now it is possible for translations to be carried out in the other direction, as say, when it is claimed that the liberal meta-theory of the good is in fact a rationalization of an impoverished form of life, say that of consumerist capitalism. Nothing I have said thus far provides grounds for this, or any other, normatively negative assessment of the liberal meta-theory of the good. Of course, nothing said thus far necessarily lends support to liberal meta-theory either. The choice, if choice is the proper word here, between alternative meta-theories of the good is in (at least) one key respect different from the individual choice of a conception of the good within liberal meta-theory. The choice of a conception of the good, of personal ends, within the language of liberal meta-theory leaves every other individual at liberty to do the same. It is understood as a private choice, one without public, political consequence for the choices of others. But the decision to speak the language of that meta-theory is not without public consequence; for if the good is a matter for private individual choice,
Perhaps the strongest argument the liberal might use against Ann without engaging Ann's views frontally, other than one based on practical impossibility, would be an argument that denies that we can ever be sufficiently certain about any religious beliefs, or beliefs about the Good, to justify their coercive imposition. According to this argument, we must allow diversity of such beliefs to flourish as an experiment to test which beliefs ultimately gain universal assent, the best gauge of their truth. The view is analogous to the marketplace of ideas justification of freedom of speech and has analogous theoretical difficulties. Universal assent as a test of truth of religious views is unproblematic, not because universal assent establishes truth, but because universal assent leaves no dissenters to object to its coercive imposition. Short of universal assent, we are faced with the fact that the number of possible experiments yet untested is, and always will be, infinite; yet coercive decisions are, in fact, always and inevitably being made, always potentially in error, and always foreclosing experiments that might have led to views commanding universal assent. Permitting abortion, if in error, costs millions of lives. Moreover, permitting abortion prevents us from carrying on the experiment of living in a society without abortion. More obviously, certain views of the Good requiring everyone to conform to certain norms cannot be tested in the liberal marketplace of diverse individual lifestyles. On some religious views, the costs of their not being coercively imposed are quite high (e.g., millions of innocent lives lost, millions of souls unsaved), and no "neutral" ground is available.

I come to the conclusion, then, that liberalism and religion are on the same epistemological level, and that the knowledge each claims, if it be knowledge, has the same pedigree in experience and reason.

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then it is not a matter for public political determination. There is no neutral ground here, no 'meta-meta'-theory to which further appeal in the name of neutrality can be made. If we are to speak of the good, then we have to speak; only the skeptic has the false luxury of remaining silent. Alternative meta-theories provide different languages for speaking of the good; but to speak any one of them is not to speak the others, and this is as true of the language of liberal meta-theory as it is of any other. The politics of neutrality is conducted within a language which is, like its competitors, non-neutral; those who do not speak it as a matter of course in liberal societies are provided, sometimes against their wishes, with a translator. In the last analysis, that translator is the state.

Id. at 578-79.


There are not two ways of "knowing," religious and secular/liberal; there are not both sectarian and secular/liberal "truths." As a consequence of epistemological unity, liberalism must establish its tenets by rejecting conflicting religious ones, not by the illusion of "neutrally" banishing them to the "private" realm, where they can somehow remain "true" but impotent, but by meeting them head on and showing them to be false or unjustified. Liberalism is, as many critics claim it to be, the "religion" of secularism. That does not mean that liberalism is false or that antiliberal religious views are true. What it does mean is that both liberalism and antiliberal religious views inhabit the same realm and make conflicting claims within it. Liberalism is not at a different level, where it can remain neutral and impartial with respect to religious controversy that is truth-seeking within a restricted domain, but not within the domain of liberalism.

That liberalism and religion are epistemological rivals has two basic implications. One, obvious and banal, is that the truth of those core, defining tenets of liberalism entails the falsity of all conflicting religious tenets. That much follows from the law of noncontradiction. More importantly, and the burden of the bulk of my argument, liberalism cannot establish its core tenets and its repudiation of illiberal religious ones (and banishment of religion from public debate) by claiming to inhabit a different epistemological realm from that occupied by religion, a realm whose truths not only trump those of religion, but whose truths can be seen to be reasonable even by those whose religious truths they trump. No epistemological perspective

58. See Carter, The Religiously Devout Judge, supra note 20, at 940-42; D'Agostino, supra note 40, at 159; Hollenbach, supra note 13, at 103-04.
59. See GALSTON, supra note 26, at 276-79; Raz, supra note 3, at 4.
60. See Fish, supra note 51, at 1000; Neal, supra note 5, at 577-79; Raz, supra note 3, at 40, 43. See also Barry, supra note 54, at 53-54; Greenawalt, Religious Convictions, supra note 18, at 1025.
61. Liberalism finds its most fertile soil among atheists, religious skeptics, nonfundamentalist Protestants, reform Jews, and adherents of certain mystical religions. See BRIAN BARRY, THEORIES OF JUSTICE 373-74 (1989); GALSTON, supra note 26, at 276-79; GEERALD F. GAUS, VALUES AND JUSTIFICATION 356-59 (1990); JAN SHAPIRO, POLITICAL CRITICISM 39 (1991); Barry, supra note 54, at 45-46, 53-54; Carter, supra note 54, at 477-99, 511-12; Greenawalt, Religious Convictions, supra note 18, at 1026; Fish, supra note 51, at 999-1000; Hollenbach, supra note 13, at 105; MICHAEL J. PERRY, NEUTRAL POLITICS?, 51 REV. POL. 479, 488 (1989); Smolin, supra note 54, at 1072-76; Stolzenberg, supra note 11, at 628-34. Liberal Catholics like Perry reject liberalism's exclusion of religion from the public domain, but at the same time, because of their liberal interpretation of religious truth, appear to believe that allowing religion to influence public policy will leave untouched most liberal concerns, especially those regarding religious tolerance. See, e.g., PERRY, supra note 9, at chs. 3, 9, 12, Conclusion, pp. 1-4; but see id. at ch. 7, pp. 7-9 (arguments for tolerance). Cf. SMOLIN, supra note 54, at 1074-76, 1079-85 (arguing that Perry's approach excludes fundamentalists from the public debate); Stanley Levinson, Religious Language and the Public Square, 105 HARV. L. REV. 2061, 2074-75 (1992) (same). See also GALSTON, supra note 26, at 293-99.

62. Nagel labels religious views that reject his form of liberalism and its argument

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exists from which one can simultaneously hold Ann's views and, barring a belief that to do so would be self-defeating, hold that the state should not impose them. Furthermore, to the extent that liberalism defines itself by the proposition that religious views can be "true" and important enough to protect, but cannot be fairly imposed through public policy, a public policy that draws its "truths" from a different epistemological well, to that extent the unity of epistemology undermines liberalism.
IV. EPISTEMOLOGICAL UNITY AND THE FIRST AMENDMENT

Although this Article is primarily an exercise in political/moral theory, I should briefly mention its implications for First Amendment Jurisprudence. The principal implication is that given epistemological unity, any line the courts draw between the religious and the nonreligious, the sectarian and the secular — a line on which First Amendment doctrine largely depends — will prove to be theoretically indefensible. Indeed, defining religion for purposes of applying the religion clauses has proved to be a major bugaboo for the courts and commentators.\(^6\) Frequently, courts and commentators “define” religion circularly by reference to terms, such as secular or sectarian, that are defined, in turn, by reference to religion.\(^7\)

One of the concerns that blocks finding an acceptable definition of religion is that any definition will discriminate against some “religions” that do not satisfy its criteria.\(^8\) Because nondiscrimination among religions is one of the principles that the First Amendment expresses, officially defining religion for First Amendment purposes itself paradoxically appears to violate the First Amendment. Of course, the paradox is in one sense illusory. If the First Amendment is intended to protect only religions that meet certain definitional criteria, discriminating against “religions” that do not meet these criteria cannot, by hypothesis, violate the First Amendment. Nonetheless, although defining religion for purposes of the First Amendment cannot violate the First Amendment in any literal sense, at a deeper level the discrimination that drawing the definitional line produces does seem to violate the First Amendment’s animating spirit, especially if the First Amendment is viewed, as it commonly is, through the prism of modern liberal theory, with its emphasis on religious neutrality. Moreover, given the unity of religious and nonreligious epistemology, any definition of religion — any attempt to draw a line between secular and sectarian — whether to favor or to disfavor, to privilege or to exclude, a particular side of this definitional divide — will be impossible to defend theoretically.\(^9\)

Without such a definition, however, the First Amendment’s religion clauses cannot be applied.\(^7\)

\(^{66}\) For a good survey of the literature and law on defining religion in the First Amendment, see Stanley Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. REV. 233 (1989). Ingber’s own definition is found in id. at 285-86.

\(^{67}\) Even philosophers are guilty of this. See, e.g., Paul J. Weithman, The Separation of Church and State: Some Questions for Professor Audi, 20 PHIL. & PUB. AFF. 52, 53 (1991).


\(^{69}\) See also Perry, supra note 61, at 492.

\(^{70}\) Cf. Sullivan, supra note 63, at 200-01 (distinguishing religion from philosophy, but without defining either).
My critique of liberal theory's treatment of religion explains not only the First Amendment's definitional difficulty, but also its internal doctrinal contradictions. The commonplace view is that the Establishment and Free Exercise Clauses are in tension with one another: to the extent the latter clause demands exemptions for or encourages accommodations of "religious" activities (but not "secular" activities), it seems to run afoul of the former's command that government not favor either particular religions or religions generally.

In addition to this external conflict between the Free Exercise and Establishment Clauses, conflict internal to each clause also exists. The Establishment Clause is interpreted to demand neutrality among religions and between religion and irreligion, but no neutral principle for selecting the baseline that defines neutrality has been established.\textsuperscript{1}

The Free Exercise Clause likewise lacks a neutral reading. In some sense, the Free Exercise Clause is related to acknowledgement of a higher law whose obligations are superior to those imposed by

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\textsuperscript{1} Every definition of religion for First Amendment purposes potentially entails a claim about religious truths. For example, if religion is defined deistically, this either implies the truth of deistic claims or else expresses a concern with psychological torment that deistic believers suffer (e.g., fear of damnation). However, if the latter is the concern, how do we weigh the concern against government interests in a free exercise case? Suppose, for example, someone claims that he will suffer eternal torture if he is not allowed to inflict serious pain on his child? Rejecting his free exercise claim means both that we believe his religious beliefs are false and that we are willing to let him be psychologically tormented by his fear of eternal torture rather than let him inflict a (lesser) torment on his child. Moreover, if we were to consider his psychological torment, but not his beliefs that are its source, no reason exists not to consider equal psychological torment from sources that our deistic definition ruled to be nonreligious. Ultimately, if the state outlaws an act, and someone claims a religious duty to engage in that act, either the state or the objector is in error about what are our duties. The objector may, of course, be psychologically tormented by the state's ban even if he is mistaken about his religious objection to the ban. However, if that is the source of the free exercise right, no reason has been established for preferring a relieving of psychological suffering based on false religious beliefs to a relieving of psychological suffering based on other false beliefs.

For the position that the Free Exercise Clause functions to protect nonmainstream religions whose beliefs will not get a fair hearing in public debate (because minority religious beliefs, unlike other minority beliefs, appear nonsensical to nonbelievers), see Mark F. Kohler, \textit{Neutral Laws, Incidental Effects, and the Regulation of Religion and Speech}, 40 Drake L. Rev. 225, 274-75 (1991). The author does not make out a case for nonmainstream religious beliefs differing from nonmainstream beliefs of any sort in their plausibility to adherents of mainstream beliefs.

the secular state. If such a higher law exists, then there is no need to
grant free exercise exemptions beyond those demanded by the higher
law; and everyone should get those exemptions, even those who do
not acknowledge the higher law. The latter are in error about the
demands of religion, and their views should not affect policy. Nor
should their religious liberty be respected, unless the true higher law
demands its respect.

If, on the other hand, free exercise requires that everyone’s con-
ception of the higher law is to be treated as if it were correct, then
anarchy will prevail, and surely not the correct higher law, if one
exists.

Finally, if conceptions of the higher law prevail under the Free
Exercise Clause only if exemptions according to them do not impose
substantial costs, the higher law really is not being treated as higher
law. Secular law remains supreme over religious obligation.

The failure of First Amendment jurisprudence to achieve coher-
ence both within and between the religion clauses and to defend a
secular/sectarian distinction, on which distinction the clauses de-
pend, are directly related to the liberal theory’s failure to reconcile
its high regard for religion and the freedom to seek religious truth
with its exclusion of religious-based claims from the domain of pub-
lic policy. The dominant theme most likely to emerge from the
First Amendment will be one consistent with the treatment of reli-
gious differences by those Judeo-Christian sects and religious skep-
tics whose world views are most hospitable to philosophical
liberalism: imposition of religious truths will be forbidden because
(as some believe) the attempt will undermine a modus vivendi and
prove to be self-defeating, or because (as others believe) no religious
views can be known to be true; but religion will be relegated to a
private, marginalized domain.

72. If one accepts the argument of epistemological unity, then not only will one
understand why no line exists between the religious and the secular (except one drawn by
stipulation), but one also will understand that the government does not have any action
that it can take or omit to take that will not in some eyes promote religion or in other
eyes promote irreligion, and that no law can be established that will not in some eyes
interfere with free exercise of religion without (in those eyes) serving a compelling inter-
est. See also Steven D. Smith, Foreordained Failure: The Quest for a Constitu-
tional Principle of Religious Freedom (forthcoming 1994) (pointing out that no
neutral theory of religious freedom can exist because any theory will be premised on
beliefs that contradict those of some religions or nonreligion and, thus, will not be neutral
regarding those religions or nonreligion). For a recent attempt to base the constitutional
treatment of religion on its supposed distinct epistemology, see Abner Greene, The Politi-
cal Balance of the Religion Clauses, 102 Yale L.J. 1611, 1616-23 (1993). The argu-
ment of epistemological unity undermines Greene’s claims.

73. See Gedicks, supra note 31, at 681. See also Stolzenberg, supra note 11, at
628-34 (pointing out how current religion clause doctrine tends to treat religious beliefs
as mere beliefs and not as truths and relegates religious beliefs to a marginalized, private
realm, possibly in opposition to what those beliefs affirm should be the case).
V. SUMMARY AND CONCLUSION

If liberalism is correct, then it is so for all the reasons there are, including religious ones.74

If liberalism is correct, then illiberal religions, or at least their illiberal components, are incorrect. The plausibility of any tenet of liberalism that holds religion should be excluded from influencing coercive policy decisions must rest ultimately on the claim that religious beliefs to the contrary are false, unknowable, or incapable of providing good reasons for acting.

No epistemological divide distinguishing religious and secular beliefs exists such that religious beliefs about public policy can be “true” in one sense, but irrelevant in another. Nor is it somehow fairer to rely on secular reasons because of their allegedly greater accessibility.

If we accept the existence of religious truths that bear on coercive public policy, and if as liberals we want people to be free to pursue them, we cannot argue for excluding religious claims except on the ground that in the specific-case they are wrong (and the religious views underlying them are wrong).

Perhaps the most defensible version of liberalism is Raz’s.75 The liberal knows that there are plural forms of life that are Good in modern society, as well as forms of life that are not Good. To know and to choose among the possible Goods and against the Bad, individuals must be capable of achieving autonomy, and the state must foster autonomy. Religious views may or may not be true, and if they are not, they are not among those forms of life that are Good. Moreover, if they contradict the above tenets of liberalism, they are by hypothesis untrue, though their extirpation through state coercion may be counterproductive or unwise for other reasons. Raz’s liberalism is in no sense neutral regarding religious claims; it endorses only true religion, which by hypothesis is one recognizing multiple Goods.76

74. Robert Audi argues that God would provide us with power to discern the Right and the Good apart from reliance on scripture. See Robert Audi, The Place of Religious Argument in a Free and Democratic Society, 30 SAN DIEGO L. REV. 677. This is a paradigmatically religious argument for liberalism and though it may be persuasive, it is surely religiously partisan (non-neutral). Illiberal religions would surely reject it.
76. For a discussion of Raz’s and others’ liberal perfectionism, see STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 260-62 (1993); NINO, supra note 51, at 132-37. For other perfectionist accounts of liberalism, see Steven Macedo, Charting Liberal Virtues, in VIRTUE 204, 208-10, 215-22, 223-28 (John W.
A purer form of liberalism — one stripped of the perfectionist vestiges of Raz’s liberalism — might be premised on a belief that truths about the Good, religion, etc., exist, that they may become knowable in time, but that the only thing we can be reasonably confident about is that we do not know — have justifiable beliefs regarding — these truths now. Liberalism couples this moderately skeptical premise with premises about human dignity and about the benefits of diverse living experiments in the search for truths about how to live to derive its familiar congeries of rights and liberties. Of course, if someone claims to have discovered the truth about the Good, and the truth is of a type that licenses or compels coercion of dissenters, the liberal cannot dismiss the claim out of hand; the liberal must confront the claim and its evidence head on and only thereafter rule it unpersuasive. On this version of liberalism, we do not already know that the Good, whatever it is, is consistent with liberalism’s core policies; we only believe so provisionally, as a working hypothesis.

I am a liberal (and a religious agnostic). I reject illiberal views of all sorts, and religious views, liberal or illiberal. I would support a rule outlawing reliance on any illiberal argument in setting public policy. Indeed, I would support a rule outlawing reliance on any premises I reject. The basis of such a rule is not religious versus secular, controversial versus noncontroversial, or inaccessible versus accessible. The basis is “consistent with Alexander’s beliefs” versus “inconsistent with Alexander’s beliefs.” My second best rule would be the closest rule to my first-best rule that I could gain acceptance of by others. My rule would be as accessible or inaccessible to others with religious, illiberal views as their views are to me. This is why, at the apex of one’s philosophical system, one’s own point of view is what matters, not in the postmodern sense that point of view is everything, ontologically, but in the epistemic sense that there is no other vantage point from which one can adjudicate.

Here is the complication for me. As a liberal, I hold one value to be central — autonomy. For that reason, I must support others’ freedom of thought, etc., not just insofar as this support is instrumental for me, but as an end for them. It follows, therefore, that I must support their freedom to reach what are (from my — who else’s? — point of view) erroneous conclusions; this means they must be free to reach illiberal conclusions, which by hypothesis are erroneous. And that is the danger. They — the illiberals — may become numerous enough to overturn my preferred, liberal rules. Moreover, I believe in

the value of the autonomy that permits them to reach the (erroneous) conclusion that neither my nor their autonomy has such value. That is the paradox of liberalism — send in the tanks to prevent the antiliberal Islamic party from gaining its democratic victory in Algeria;77 respect liberal democracy's rules and watch them lead to their own destruction. That paradox is why Robert Frost said of the liberal that he cannot take his own side in an argument.78

So I reject illiberal views, including religious ones. They are wrong. If I am right, though, people should be free in a way that makes their coming to hold illiberal views a live possibility. If they do come to hold illiberal views, however, there is no argument I can make — except the arguments for autonomy and against the illiberal views and their foundations, religious or nonreligious — that supports excluding their views from influencing policy. Indeed, given their illiberal premises, my liberal views will be just as inaccessible to them as theirs are to me. If they do not buy my arguments for liberalism and reject their own illiberal views, they will see no reason not to treat me illiberally. Nor will they regard imposing their (true from their perspective) views on me as unfair. No meta-position has been established that the liberal occupies above liberal versus illiberal disputes.

Ultimately, then, the only reason to exclude religious views from the realm of coercive public policy — for the liberal or anyone else — is because those views are wrong. And the liberal's particular problem is that he believes it wrong to extirpate erroneous views coercively.

In the end, the source of the liberal's regard for autonomy is that each of us has a particular point of view from which we cannot escape. The source of the liberal's dilemma is that some points of view will be closer to the truth than others, including the truth about the value of autonomy itself.

