

The Inaugural Development  
Fund Lectures:  
Scientific Liberalism,  
Scientistic Law

I

LECTURE TWO: THE ESTABLISHMENT CLAUSE MESS

Tonight's lecture is entitled The Establishment Clause Mess. Before I get into it too deeply, I would like to sketch out two distinctions: one descriptive, one normative. The descriptive point that I would like to make is that to call the establishment clause a mess—as I believe that it is—is to make an analytical claim. My intention is to criticize establishment clause jurisprudence, and you will hear me do so. But that is not the same as saying that no establishment clause is needed. The distinction is between referring, on the one hand, to *an establishment clause*, the theoretical argument for a form of separation of church and state, and, on the other hand, to *The Establishment Clause*, capital T, which is shorthand for the particular doctrinal baggage with which our establishment clause has been saddled. That is my descriptive distinction.

The normative distinction that I want to draw is really by way of laying out my own interpretive position. I am quite certain that the first amendment's establishment clause should be read at a minimum to prohibit certain entanglements between government and religion (it is unnecessary at this point to specify which) and, in particular, that the clause outlaws efforts by government to coerce religious belief.<sup>1</sup> That explains, for example, why the Supreme

---

\* Professor of Law, Yale University.

<sup>1</sup> For a broader statement of this thesis, not all of which I necessarily accept, see McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

Court's decisions forbidding public schools to conduct organized classroom prayer led by a teacher<sup>2</sup> are plainly right, even though most Americans continue to oppose them.<sup>3</sup> But to say that *an* establishment clause is necessary is not the same as saying that the one we have—that is, the one that the federal courts have given us—is the one that we need. I shall argue tonight that it is not.

The link between last night's lecture and tonight's has to do with the epistemology of liberal constitutionalism. I ended last night's lecture with a question regarding the refusal of Jehovah's Witnesses to accept blood transfusions. The Witnesses, you will recall, believe that accepting a transfusion is contrary to God's will, and, in particular, that it violates the Old Testament injunction against eating human flesh. Eating human flesh, say the Witnesses, even if the act is unwilling, will lead to perdition. The courts, I noted, will routinely order a transfusion for a Witness who is unconscious or who is a minor when, in the opinion of medical personnel, the Witness will die without the transfusion. The question with which I ended is this one: Is the statement "If I am transfused, God will refuse me eternal salvation" a statement of fact or a statement of a value?

The answer, of course, depends on where you happen to be standing. To the Witness, the statement is factual; it may even be verifiable. But liberal theory, because of its relentlessly materialist focus, cannot consider the statement factual. And in that simple conflict lies much that is wrong with the way our constitutional jurisprudence resolves conflicts between law and religion in general, but scientism and religion in particular.

### A. *Empirical Morality and Religious Morality*

Contemporary liberalism, as I explained last night, rests centrally on the proposition that the boundary between facts and values is relatively clear and reliable. The liberal state is supposed to be neutral as between competing conceptions of good. And liberal law in general, but liberal constitutionalism in particular, needs a fact/value distinction because the liberal judge is not supposed to enforce her own values. Rather, the judge is supposed to enforce public values, as enacted in law, on a particular set of facts.

I further argued last night that liberal legal dialogue is tilted to-

---

<sup>2</sup> See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>3</sup> See, e.g., THE GALLUP REPORT NO. 217, at 17-19 (Oct. 1983) (strong majority in favor of constitutional amendment to allow voluntary classroom prayer).

ward *empirical morality*, that is, toward moral propositions that can be stated in ways that imply testable factual propositions. I hinted toward the end of that first lecture that the preference for empirical morality entails a suspicion toward epistemological positions markedly different from what one might think of as materialistic empiricism. What I mean is that liberal law is by necessity suspicious of epistemologies that generate statements styled as facts but not readily testable by materialistic means.

Think for a moment of what used to be called miracles, until Hume told us not to trust them, and what are now considered supernatural stories believed only by the superstitious. Even today, many religious faiths are centered on miracles and mysteries (although to be sure, except perhaps for Barth, twentieth century Christian theology has been largely a march away from both). But no matter how widespread the belief in the truth of any particular miracle might be, post-Enlightenment dialogue does not admit any serious possibility that the miracle is true. Nor is that position limited to philosophers of religion or ethicists. Were I to tell you now, from this lectern, of a dream in which I received a revelation from God, and of a miraculous event that accompanied it, most of you would no doubt cease to think of me as a scholar and dismiss me as a superstitious fanatic.

There is a point to this. Jeffrey Stout, in the book that I mentioned last night, quotes a bit of Tom Stoppard by way of discussing the role of religion in society after the Enlightenment. According to a character in one of Stoppard's plays, there came "a calendar date—a *moment*—when the onus of proof passed from the atheist to the believer, when, quite suddenly, the noes had it."<sup>4</sup>

Now, let's think about that quotation for a moment. Suddenly, says Stoppard, the noes had it. Is he right? Do the noes have it? Nietzsche, you will remember, thought God was dead, that philosophy and perhaps experience had destroyed divine authority. And when one looks at contemporary liberal dialogue in general, and liberal constitutional dialogue in particular, one cannot help thinking that Stoppard—as interpreted by Stout—has a point, at least about epistemology. Faith-based epistemologies are not merely suspect when offered in public debate; they are practically outlaws. So perhaps the noes really do have it.

Recall for a moment our discussion last night of the recent furor

---

<sup>4</sup>J. STOUT, *THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY AND THE QUEST FOR AUTONOMY* 150 (1981) (quoting T. STOPPARD, *JUMPERS*).

over the Ayatollah Khomeini's death sentence of author Salman Rushdie for what was described as an act of blasphemy. The principal problem, from the liberal standpoint, was not the death sentence itself; for lots of people are sentenced to death, sometimes by liberal political communities. So what was the problem with the Ayatollah's act? A number of commentators seemed to think that the problem was a religious fanatic sentencing a writer to death on the basis of a book, so the critics kept reminding us, that he had not even read. Well, the critics were right to condemn the Ayatollah for sentencing Rushdie to death for views expressed in a book; it is unacceptable behavior. But what possible difference can it make whether the reasons for the sentence were religious or not and whether the Ayatollah had read the book or not? Had the Ayatollah read the book and issued the death sentence because he was personally insulted, would the moral question have been different? Suppose the Ayatollah had decided to kill Rushdie not for religious reasons but because the book indicated that Rushdie was a threat to his nation's security?

I would suggest that in our dominant liberal dialogue, these last two possibilities would indeed stand on a different footing, because, whatever the Ayatollah might be up to, he would not be acting as a religious leader. After all, as I pointed out last night, people around the world die for their political views every day and not all of them become media heroes because of it. No, the religious component of the Ayatollah's justification—in short, the epistemology—is an essential part of the liberal story of the horror confronting Rushdie. To punish someone for his or her views is illiberal and deserving of condemnation. But apparently deserving of more condemnation when the punisher acts on religious grounds than when the punisher acts on commonly accepted political grounds. Only a fanatic would use God's will rather than man's politics as a justification for murder. In short, the noes have it.

It is not my intention, obviously, to defend the Ayatollah; I am only questioning the rhetoric of some of the critics. I feel much the same way about the criticism that emphasizes the religious aspect of the sentence on Rushdie as I do about the opposition to the teaching of scientific creationism on the ground that it is a *religious* teaching. I take the critics of the religious aspects of creationism to mean that most, maybe all, adherents of creationism reached their views through a world view that holds particular aspects of God's word unchallengeable (in this case, the account of creation set forth

in the opening chapters of Genesis). Again, please note that the attack is epistemological; the claim is that the creationists are using the wrong methodology to learn facts about the world.

If you think back to last night's example of the Circular Area Bill, the problem was not epistemology but error; the legislators just messed up. But creationists have done more than just mess up. The principal complaint against their science is not that it is in error but that it is not really science; and, the reason that it is not really science is epistemological. Creationism, say the critics, to the extent that it is analytical at all, generates few if any hypotheses that are testable in the natural world. Creationism, in short, lacks a materialist theory. But this is scarcely surprising, the critics continue, because creationism does not rest on observations in the natural world but on an interpretation of a sacred text.<sup>5</sup> The relative sophistication of that interpretation is, for most critics, hardly the point. (Some critics dismiss it casually as "literalism," as though no non-fanatic could ever take a religious text literally). But what really matters to the critic is what is being interpreted. To rely for one's world view on the book of scripture rather than the book of nature isn't simply unscientific, it is actually illiberal. And in the liberal account, it leads to a morality that is fanatical rather than empirical, because its adherents are unlikely to change their views based on what liberal theory is accustomed to calling "facts." A religiously based proposition, in the liberal account, is by definition not a fact. It is simply a metaphysical belief, and not a belief to be taken seriously by any person of true learning. So here, once again, the noes have it.

The uneasy truth, but one that we all must face, is that liberalism routinely bars people whose moral judgments have religious roots from public moral debates. They are kept at bay with epithets—"fanatic" once more comes to mind—as well as with more sophisticated charges, such as the claim that they are trying to impose their narrow sectarian beliefs. Most other sources of moral understanding seem to be legitimate in the public dialogue that liberalism demands—but not religion. Quite apart from the first amendment, religious morality is trivialized, insulted, ignored. The noes have it.

---

<sup>5</sup> Creationists deny that their science has no basis in observations about the natural world. One of the most widely misunderstood or mischaracterized aspects of Christian fundamentalism is its strong tradition of insisting on reason as the path to both religious and factual knowledge. For an interesting discussion of this characteristic, and of public ignorance of it, see H. COX, *RELIGION IN THE SECULAR CITY: TOWARD A POSTMODERN THEOLOGY* 72-82 (1984).

Or do they? I mentioned that Stout quotes Stoppard. I didn't mention what Stout says about the quote, and I would like to do so now. "If so," says Stout, meaning *if the noes had it*, "it was not a matter of majority rule." He then adds, in a tantalizing parenthetical, "In that sense the noes have probably never had it."<sup>6</sup> The ironic point of Stout's comment is that this refusal to countenance a role for frankly religious expression in public moral debate arises in a nation that, so the pollsters tell us, is about as religious as any in the Western world.<sup>7</sup>

Now of course, that might be the reason for the ban, for the United States not only is religious but represents a rich and remarkable diversity of religious faiths. To allow openly religious views in public debate, so the traditional theory goes, would at best cause cacaphony, as we all talked past one another, and at worst, should one set of views begin to prevail, cause a dogmatically religious authoritarianism.

Well, what about the point that we are as morally diverse as we are religiously diverse, and yet we allow all sorts of moral views to be expressed and even imposed? How is religion different? There are two standard answers to this. The first is that people of strong religious sentiment are far less open to reason than people of other strong moral sentiments and are, therefore, more of a threat to liberal dialogue. I will have a bit more to say about this point toward the end of the lecture. For the moment, I would simply like to point out that the proposition that the moralist whose views are based on faith is more closed-minded than the moralist whose views have other roots is an empirical proposition, one that is usually assumed, occasionally argued for (albeit weakly) but, as far as I am aware, never tested. It is also profoundly insulting to the religiously devout—which leads to the second standard answer.

The second standard answer to the question of why religious views are treated differently in public debate than other moral views is that religion is more important, a more fundamental aspect of the human personality. Therefore, we must be more sensitive to the possibility of official displacement of religious belief than to the possibility of official displacement of belief systems of other kinds. In the official story, it is precisely to protect religion, not to disable it, that the establishment clause exists.

---

<sup>6</sup> J. STOUT, *supra* note 4, at 150.

<sup>7</sup> Part of the following discussion is anticipated in Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

One problem with this response is that it potentially turns in upon itself. If religious beliefs are truly more fundamental in the sense of being more ingrained, then presumably we need worry less about official intrusion on them, for they are far less likely to be susceptible to pressure. But that is only an internal critique. I fully recognize that the problem of intruding officially on religious beliefs is one of considerable complexity, and that permitting a religious voice in secular dialogue can be a profoundly isolating, even alienating, experience for dialogic losers whose religious views are quite different from those that have carried the day. I will have a bit more to say about this problem in a moment, but I hardly expect to resolve it for all purposes here tonight.

No, my main problem with the answer that we keep religion out of public debate because we cherish it so is that the answer is false. The evidence of cases interpreting the establishment clause as well as leading theories expounded to support those decisions illustrates that far from cherishing religion, we are moving toward a society in which religion is treated as a sort of public embarrassment, something not fit for polite company. This is what I have called elsewhere "treating religion like a hobby."<sup>8</sup>

My claim is that an unhappy corner of contemporary establishment clause jurisprudence, as well as what might represent the mainstream legal scholarship in the field, gives lip service to the principle of government neutrality but in actual effect leads to inferior treatment; that is, our establishment clause requires the government to treat religious groups and individuals *worse* than it treats other groups and individuals.

When I say that the establishment clause has brought about a situation in which religious organizations are treated worse than, not the same as, organizations of other kinds, I mean that legal privileges available to other organizations are denied to groups that are openly religious. Let me offer an example from my other principal field of scholarly endeavor, intellectual property. As you may know, there are two ways of obtaining a copyright. First, the applicant may comply with the requirements of the Copyright Act. Second, the applicant may persuade Congress to grant the copyright through a private law. Now suppose that the applicant is a religious organization, Faith A, and the work on which the copyright is sought is a religious text, Text Z. Faith A might avail itself of the

---

<sup>8</sup> See Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

statute, or, if the statute proves inconvenient, Faith A might do what any other group might do—obtain the copyright through a private law.

Suppose, however, that Faith B then wants to use the same religious text, Text Z, in its worship. Faith B might purchase copies of Text Z from Faith A, or it might pay Faith A for a license enabling it to print copies of Text Z itself. Because Text Z is a religious text, however, and Faith A is a religious organization, another option is available. Faith B might challenge the private law as a violation of the establishment clause. And, because of the prohibition on excessive entanglements, Faith B might well prevail.

I hope that this example does not seem farfetched, because I have in mind a specific case, *United Christian Scientists v. Christian Science Board of Directors*,<sup>9</sup> a decision by the Court of Appeals for the District of Columbia Circuit. The author of the decision was Spottswood W. Robinson, III, a truly outstanding and inspiring judge for whom I was privileged to serve as a law clerk some years back. I hold, and have always held, the highest regard and admiration for Judge Robinson. I have fond memories of the hours we spent arguing—arguments that I generally lost, and with reason. This time, however, I think that Judge Robinson got it wrong.

*United Christian Scientists* involved the constitutionality of Private Law 92-60, which granted a copyright on *Science and Health with Key to Scriptures*, the central text of the Christian Science faith, to the Christian Science Board of Directors of the First Church of Christ, Scientist. A dissenting group of Christian Scientists, known as United Christian Scientists, challenged the copyright, arguing that the private law violated the establishment clause. The court of appeals agreed.

The court acknowledged that religious works are eligible for copyright protection, but suggested that “Private Law 92-60 confers upon a religious body an unusual measure of copyright protection by unusual means,” and pointed out that but for the private law, the underlying work “would now be in the public domain.”<sup>10</sup> That much, of course, does not differentiate the First Church of Christ, Scientist, from any other beneficiary of a private law copyright, although it is true that there haven’t been so many. In fact, it makes the First Church of Christ, Scientist, very much like the United States Olympic Committee, whose special trademark rights,

---

<sup>9</sup> 829 F.2d 1152 (D.C. Cir. 1987).

<sup>10</sup> *Id.* at 1159.



also granted by special statute, were recently sustained by the Supreme Court.<sup>11</sup> But, the panel held, there is also an important difference: the establishment clause prohibits entanglements between government and religious organizations, and the First Church of Christ, Scientist, is a religious organization. In granting the copyright by statute, the Congress “unequivocally and unqualifiedly endorsed First Church as first interpreter and guardian of that work.”<sup>12</sup> And that, the court concluded, constituted an “impermissible message of sectarian endorsement.”<sup>13</sup>

The appeal of this approach is plain. The presence of the establishment clause makes the notion of government selection among competing claimants to the same religious text a rather unpleasant one. And yet, there remains the simple difficulty that, had the First Church of Christ, Scientist been a non-profit organization with some non-religious purpose, the case would have come out the other way. Any group but a religious group can choose which copyright option to pursue. For a religious organization, however, the options are circumscribed. In that narrow sense, a religious organization is treated worse.

I don't think the *United Christian Scientists* case is unique. Think for a moment about the recently enacted federal Equal Access Act, the constitutionality of which was the subject of heated academic debate.<sup>14</sup> The Act provides, in relevant part:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.<sup>15</sup>

On its face, this statute would seem to promote liberal dialogue by prohibiting schools from discriminating among student organizations based on their ideas, and in that sense, the law is a logical extension of *Widmar v. Vincent*,<sup>16</sup> wherein the Court ruled (quite correctly, in my view) that a state university that opens its facilities

---

<sup>11</sup> See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

<sup>12</sup> *United Christian Scientists*, 829 F.2d at 1170.

<sup>13</sup> *Id.* at 1171.

<sup>14</sup> The Supreme Court has recently resolved the debate, sustaining the constitutionality of the Act. See *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990).

<sup>15</sup> 20 U.S.C. § 4071(a) (1988).

<sup>16</sup> 454 U.S. 263 (1981).

to student groups cannot exclude those groups that meet for religious purposes.

Some commentators, however, have argued that the Equal Access Act is an unconstitutional entanglement of church and state,<sup>17</sup> and at least one federal court has so held.<sup>18</sup> Whatever the theoretical justification for that result (I do not want to pursue the matter here, although I will return to it in a moment), the one unambiguous result is that the establishment clause is being read to deny to religious organizations privileges that organizations of other sorts regularly enjoy. So here, once again, the risk of neutrality is that the religious groups that the clause was written to protect are actually being treated worse than others.

### *B. Empirical Morality and Religious Objections to the Public School Curriculum*

The real battleground, of course, is the schools. That is where everything is at stake, for the battle is quite literally over who shall control the future. The children, after all, are the future, and they are required by law to go to school. Most of them attend public schools, which are more directly susceptible than private schools to political control. Because control is possible to achieve, everybody wants to achieve it.

The ideal school, liberals have long argued, would be an essentially neutral forum in which students' critical faculties would be trained through an exposure to different points of view. In the words of David Richards, the school should be a place for "training in . . . neutral method[s] of critical inquiry, expressive of our capacities of epistemic rationality . . . ."<sup>19</sup> The idea sounds fine in theory. Unfortunately, as Lawrence Friedman has pointed out, the school is the one place where "pluralism can easily run up against a stone wall."<sup>20</sup> It is all very well to say that ideally the schools ought to favor no one point of view.<sup>21</sup> But, as Friedman notes, "it is impossible to give everybody a piece of the action; there are too many

---

<sup>17</sup> See, e.g., Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117 (1987); Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174 (1986).

<sup>18</sup> *Clark v. Dallas Indep. School Dist.*, 671 F. Supp. 1119 (N.D. Tex. 1987).

<sup>19</sup> D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 154 (1986).

<sup>20</sup> L. FRIEDMAN, *TOTAL JUSTICE* 122 (1985).

<sup>21</sup> Cf. D. RICHARDS, *supra* note 19; M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 213-33 (1983).

actors.”<sup>22</sup>

Among the actors most frequently cast as villains in the liberal drama are parents who are concerned that the public schools are indoctrinating their children with a “secular humanist” view of the world—a vision in which both morality and the scope of human possibility are limited by what is material and observable, a vision in which God has no place. This bestowal of villainhood seems a bit unfair. I will confess that I have as little patience as the next person with politicians who harp on the school prayer cases as “putting God out of the classroom,” but it is easy to see why fundamentalist Christian parents fear that their children are being trained to put God out of their lives. The purpose of public education is to prepare those who are educated for fruitful and productive lives in society. Some parents contend that what public education is really doing is prodding their children to reject the religious understanding that the parents have worked so hard to teach.

The work of prominent liberal theorists is full of references to education as a means for training the critical faculties so that students can learn to make up their own minds about what to accept and what to reject. The caricature version of fundamentalist parents, and other worried parents as well, is that they are simply afraid of what will happen when ordinary critical methods are turned upon their religious beliefs. But I am not sure that the matter is that simple. I would rather put it this way: the parents’ fear is rejection of their entire epistemology—an epistemology that might include, for example, a quite sophisticated hermeneutic of Biblical inerrancy.<sup>23</sup> Consequently, the problem is not that the parents doubt that their beliefs can withstand critical scrutiny; the argument is over what counts as criticism.<sup>24</sup>

Here again the pluralism problem arises. To borrow from Lawrence Friedman once more, “there are matters that cannot be reconciled. Either God made birds, bees, monkeys, lizards, woman, and man in a single week, or else they evolved as Darwin and modern biologists have it. Schools cannot fudge this question entirely.”<sup>25</sup> The modern way, of course, is not to fudge it at all unless so required by law, and if there is a law that bears on the point at

---

<sup>22</sup> L. FRIEDMAN, *supra* note 20.

<sup>23</sup> See *The Chicago Statement on Biblical Hermeneutics*, in *A GUIDE TO CONTEMPORARY HERMENEUTICS: MAJOR TRENDS IN BIBLICAL INTERPRETATION* 21 (D. McKim ed. 1986).

<sup>24</sup> For a general discussion, see Carter, *supra* note 8.

<sup>25</sup> L. FRIEDMAN, *supra* note 20, at 123.

all, a court will almost certainly hold it unconstitutional. The cases are consistent on this point: By banning evolution, or requiring that evolution be taught as theory rather than fact, or requiring equal time for scientific creationism, the state is not protecting the parents but imposing religious belief. That the establishment clause forbids. Anything else—including teaching critical approaches that might wean children from the religion of their parents—is perfectly all right. Thus, the liberal answer to this dilemma seems to come to this: “We already fought that battle, and it was called the Enlightenment, and we won, so tough luck—you lose.”

“But wait,” you might say, “Carter’s got it wrong again. The parents don’t always lose. It all turns on whether they are trying to protect their own children or impose their beliefs more widely than on their own children.”

That is indeed a distinction, and a useful one, although it is important to place it in its context. So I agree, for example, that when one is thinking about schoolchildren, the threat of proselytizing in a coercive setting is ever-present. This is why organized classroom prayer is bad, and, possibly, why moments of silence are bad, too; at least if, as in *Wallace v. Jaffree*,<sup>26</sup> the state has no particular objective in mind other than the encouragement of the very prayer that the school prayer cases properly found coercive. But it is less clear that the scientific creationism dispute fits this model. True, it is possible to characterize the teaching of creationism as an effort to impose religious belief, but it is just as possible, and, I think, far more plausible, to view it as a battle between competing epistemological systems, each of which, when judged in terms of the other, yields conclusions that are demonstrably wrong.

But, even if we once more put the epistemological problem to one side, what we discover nevertheless is that while other critiques of the school curriculum—that it is racist or sexist, for example—are admitted as valid criticisms that must be answered or satisfied, a religious critique alone is placed out of bounds. So, in the schools as elsewhere, citizens whose views rest on religious knowledge are denied privileges that other citizens enjoy. “But there’s *Yoder*,” you might object. “What about *Yoder*?”

A good question, perhaps the central one, and more important by far than the matter of equal time for scientific creationism. *Yoder*, I hasten to add for the non-lawyers among you, is not the name of the

---

<sup>26</sup> 472 U.S. 38 (1985).

Jedi Master who taught Luke Skywalker the ways of the Force, but rather the name of a Supreme Court decision. The full name is *Wisconsin v. Yoder*,<sup>27</sup> and in that case, the Justices sustained on free exercise grounds the refusal of Old Order Amish parents to send their children to public schools beyond the eighth grade. *Yoder* has long been a controversial decision, in part because, the critics fear, the case totters at the edge of the slippery slope, down which lie all manner of harms that parents might do to children in the name of religious belief. Perhaps in response to criticism, subsequent decisions have limited *Yoder* very nearly to its facts, and the facts to which it has been limited are quite revealing.

The *Yoder* majority repeatedly emphasized one facet of the Amish community—the community’s nearly complete isolation from the rest of the world. The Court used the isolation of the Amish to refute the claim by the state that compulsory education was a necessity to prepare children for the challenges of adult life:

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.<sup>28</sup>

It is not news to note that this passage begs its question, but I have a different criticism in mind, one that is better made after quoting two more passages. First, in the very next paragraph, the majority opined: “Whatever their idiosyncracies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society even if apart from the conventional ‘mainstream’.”<sup>29</sup> And then, in response to the state’s suggestion that the children not educated past the eighth grade might one day leave the community and later need the skills denied them by their early exit from school, the Justices explained: “[O]n this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children . . . would become burdens on society because of educational shortcomings.”<sup>30</sup> Thus the majority’s conclusion seems to be that the reason it is all right for Amish parents to remove their children

---

<sup>27</sup> 406 U.S. 205 (1972).

<sup>28</sup> *Id.* at 222.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 224.

from school after the eighth grade is that they all live off by themselves, in a self-sufficient, separated community. In other words, the Amish don't bother anybody; the rest of the country can, if it chooses, ignore them entirely.

This is what I mean by treating religion as a hobby. The establishment clause, as we have seen, prohibits any public dialogue aimed at promoting moral positions supported by a faith-based epistemology. Now it turns out that the free exercise clause leaves the adherents free to pursue their religious beliefs only when it is possible to show in detail that nobody is bothered by them.

### C. *A Doctrinal Interlude*

How did our establishment clause jurisprudence reach this unfortunate pass? I would suggest that the courts were headed for trouble from the moment they began looking for the religious motivations of legislators. After all, in a nation with so many religiously devout people, there is a very substantial likelihood that religious motivation will form an important part of our legislators' decisions on whether to support many different sorts of legislation. The *Lemon v. Kurtzman*<sup>31</sup> test for establishment clause violations, established by the Supreme Court twenty years ago, asks, among other questions, whether the legislation has a secular purpose or not. But as subsequent decisions have made clear, the term "purpose" in *Lemon* is much closer to "motivation" than to "effect." So once *Lemon* became the law of the land, an inquiry into motivation was scarcely avoidable.

A serious prohibition on religious motivation is likely to be unworkable. Consider, for example, the call of the Roman Catholic bishops for a nuclear weapons freeze. Is a freeze prohibited if it turns out that the Catholic bishops played a major role? What about the religious motivation of the abolitionists or, a century later, the deep religious roots and open theological justification for the civil rights movement? Well, one might respond that there are mixed secular and religious purposes in these examples, but one is hardly sure what that means. Is there really a defensible difference *in motivation* between the statements "Oppression of black people is contrary to God's will" and "Killing of fetuses is contrary to God's will"? There might be a difference in real-world result. The latter, if turned into policy, would infringe on what is so far a fundamental

---

<sup>31</sup> 403 U.S. 602 (1971).

constitutional right, but that simply points up the problem with *Lemon*. It would be far better to judge alleged establishment clause violations by their results rather than their motivations.

And what effects ought to matter? I would argue that the effects that ought to matter are effects that actually establish religion. That is, unconstitutional statutes should be not those that are in some sense religiously motivated, but rather, as Michael McConnell has proposed, be those that have the effect of endorsing religion in a coercive setting. So the President's declaration of a national day of prayer would not represent an establishment of religion, but a public elementary school's declaration of a day of prayer would. And what of the recurring cases about religious symbols on or in public buildings? It hurts me to say so, particularly in light of last night's lecture, but I fear that each case would have to be judged on its facts.

The reason that an effects test seems doctrinally difficult is that our establishment clause jurisprudence has, until now, been deeply steeped in a metaphorical wall between church and state. It's the wall that leads to the motivation test, for an inquiry into motivation is seen as perhaps the only way to keep the wall up.

I know that any number of theorists (and lately, some Justices, too) have offered the view that the idea of a wall is ahistorical, but my concern is not originalist. My concern is with the reasons that anyone might suppose that a wall ought to exist. To work this out, one must decide why there is an establishment clause at all. One might simply say, "The separation of church and state helps everyone, the state, the church, and individuals, whether religious or not." But this is sophistry. In the first place, it isn't clear that the separation helps everyone. Undoubtedly, there are some people in the country who place a very high value on the ability to write the tenets of their faith into law. Imagine that Faith A commands its adherents to ensure that their nation is run in accordance with the teaching of Faith A. Adherents of Faith A are then hurt, not helped, if they are forbidden to do so. One might of course offer the paternalistic response, "They don't really know what's best for themselves." But that is like saying that following the dictates of Faith A is bad for the adherents, which represents another version of the hostility to religious faith that I have already discussed. Or one might say, "The adherents of Faith A are helped by the wall between church and state because others will not be allowed to impose the tenets of Faith B on them." It isn't at all clear, however,

that adherents of Faith A would see matters this way. Not only might they prefer to risk losing out to Faith B rather than be forced to ignore the tenets of Faith A, they might believe that God will protect them from having Faith B imposed.<sup>32</sup>

Moreover, one cannot readily assume that either the state or other citizens are better off with the protection of a wall between church and state, at least not without some a priori assumptions about the validity of faith. Perhaps the policies that Faith A would demand, quite apart from the motivation behind them, are readily defensible in secular liberal terms. Once more, I give you the example of the abolitionists. Certainly the adherent of Faith A would look at the state and say that the state is better off if it subjects itself voluntarily to God's will as revealed to A. Or she might look at citizens not adhering to Faith A and say that they, too, are better off in a state governed in accordance with God's will as revealed to A.

There is no reasonable sense in which these statements can be said to be *false* unless one knows the substantive content of God's will as revealed to A. Of course, one might offer a statistical claim, asserting that those who are moved by their faith to intervene in the real world of politics are likely to be advocates of policies that are, in liberal terms, objectionable. But that argument would come as a considerable surprise, as well as a considerable insult, to veterans of the non-violent civil rights movement, a movement inspired from its earliest days by theological arguments.<sup>33</sup>

No, I think that the liberal fear of religion's role in dialogue is based on something else. The fear is rooted in a critique of the epis-

---

<sup>32</sup> One might then say that God will surely enable them to impose Faith A without the assistance of the state, but it is difficult to guess at the mysteries of the faith of another.

<sup>33</sup> One reader responded to an earlier draft of this paper by challenging my reference to the civil rights movement with the suggestion that the civil rights movement was responding to an oppression so deeply ingrained, and so resistant to other responses, that "rolling out the big guns"—including religious leaders—was not only appropriate, but necessary. But, the reader argued, the big guns should be reserved for the most egregious evils, and their use should not be taken as precedent in the ordinary operations of secular governance. This point, while obviously well taken, potentially runs afoul of the rule of recognition problem: Which evils count as egregious? Some deeply religious people (and some who are not) would argue that abortion is such an evil; others, nuclear weapons; still others, poverty and hunger. I am not sure what principle to offer to explain to *someone else* how to choose among these putative evils. One possibility is to insist on a secular model of what counts as egregious, but that might serve once again to trivialize religion by saying, in effect, that these mountebanks, these cult leaders, should be trotted out to appeal to the superstitious when we right-thinking liberals think the time is right, and should otherwise mind their own business.



temology of faith. People of deep religious beliefs make decisions in ways that are foreign to the rhetoric of liberalism; they have a habit of appealing to God as their authority, as though the Enlightenment never occurred. Those religionists, in other words, are not amenable to reason.

Consider Bruce Ackerman's explanation of why appeal to divine revelation cannot be used to settle disagreements on matters of policy. He sets up a dialogue between two interlocutors, Democrat and Diviner. Diviner insists that "we should leave the decision in the hands of this black box that God has been so kind as to provide." Democrat responds, "I insist that you take *my* word for it," because the dispute is not between Democrat and God, but between Democrat and Diviner's version of the word of God. When Diviner turns the tables and refuses to take Democrat's word either, Democrat is unbothered:

I am not trying to be a dictator. While I am happy to concede that my opinion may be outweighed by the contrary opinions of my *fellow citizens*, I am unwilling to have my views ignored merely because you believe that your *divination procedure* provides a better way of resolving our policy problem than my considered judgments on the liberal merits.<sup>34</sup>

At best, this dialogue warns against abandoning individual reason to adopt the word of some person who claims possession of a direct line to God's wisdom. Suppose, however, that Diviner goes out and begins to preach and convinces most people that God's word is indeed as Diviner has claimed. Suppose further that the people decide to base their law on God's will. Now suddenly Democrat is being asked to yield not simply to Diviner's interpretation, but to the contrary opinions of fellow citizens—precisely what, in the dialogue, Democrat implies would be sufficient.

Nor can Ackerman escape by rejecting the acts of the fellow citizens on the ground that they do not accord with liberal neutrality. As Ackerman recognizes, there is real epistemological conflict here.<sup>35</sup> All he is able to offer, finally, is a warning to the religiously devout:

It is better to recognize the inevitability of sin, and hope for divine salvation, than to play the role of God's avenging angel on earth. It is worse than foolish to try to anticipate the day of final judgment. It is sensible for the religious, no less than the skeptical, to reason their way to an acceptance of Neutrality—for this

---

<sup>34</sup> B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 281 (1980).

<sup>35</sup> *Id.* at 364-65.

conversational constraint is merely a device for marking the conceptual boundary on the secular authority of all those who pretend to be God's vice-regent on earth.<sup>36</sup>

As Ackerman himself admits in the next paragraph, however, “[n]one of this . . . must necessarily convince a true believer . . . .”<sup>37</sup> Ackerman goes on to say why, but the reasons that he gives, which I will not trouble to quote here, are rather denigrating to both the charity and the rationality of the religious. The truth is simpler; the reason that none of this need convince a true believer is that a true believer, by definition, truly believes. If Diviner truly believes that God's will requires certain statutes in an imperfect earthly world—be they statutes banning abortion, banning the death penalty, or banning nuclear weapons—why is the possibility that others might disagree or even prevail a reason not to try? I would suggest that it is no reason at all. Similarly, the fact that others may enact legislation that goes the other way is no argument against the efforts of secular moralists to convince the government to enact what they believe it should.

But Ackerman seeks to differentiate the two. It is all right to make a moral argument with a secular base; it is not all right to make a moral argument with a religious base. Michael Perry, in describing a hypothetical dialogue that he might conduct with Ackerman, explained succinctly how this distinction disadvantages the religiously devout citizen who seeks to enter the liberal conversation:

Ackerman might get to rely on all or most of his relevant beliefs, including his most important relevant beliefs, while I would get to rely only on some of my relevant beliefs, *not* including the most important ones: my religious convictions. In that sense Ackerman might get to rely on much of the relevant part of his web of beliefs while I would get to rely on strands of my web—strands approved (“shared”) by Ackerman. I fail to see what is “neutral” about such a practice of political justification.<sup>38</sup>

There is force to Perry's criticism, for it captures nicely the difficulty that exclusionary dialogic rules pose for citizens whose moral convictions are strongly influenced by prior religious convictions. Still, I do not take Ackerman to disagree with another recent proponent of neutral dialogue, David Richards, who argues that “we should use the tools of constitutional analysis not to examine the

---

<sup>36</sup> *Id.* at 364.

<sup>37</sup> *Id.*

<sup>38</sup> Perry, *Neutral Politics?*, 51 REV. POL. 479, 484 (1989) (footnote omitted).

groups who advocate claims, but to scrutinize the claims advocated.”<sup>39</sup>

Richards’ point, of course (Ackerman’s too), is that some arguments cannot be scrutinized in a neutral way and that those arguments should be excluded. But matters are never quite so simple. Suppose, for example, that one opposes abortion with the following argument:

(1) It is wrong to deny to any soul the opportunity for salvation.

(2) If the body dies before the soul is released from original sin through Baptism, the soul may not find salvation.

(3) *Therefore*, it is wrong to let the body die before Baptism.

(4) The unborn fetus possesses a soul.

(5) *Therefore*, it is wrong to kill an unbaptized fetus.

I think that Richards and Ackerman would say, albeit for slightly differing reasons, that this critique of abortion is not a neutral argument. Its moral premises rest on a privileged and inaccessible epistemology (Soul + Baptism = Salvation), and its factual premise—the claim of fetal ensoulment—either does not really make a factual claim, or, at best, makes a factual claim that is not verifiable in the material world. Besides, says Richards, “[m]oral people are not required to guide their moral conduct according to metaphysical assumptions they do not reasonably believe . . . .”<sup>40</sup>

The difficulty is that for many devoutly religious people, the distinction between moral truth and empirical (material) truth is not as clean as these dialogic theories require. Many Christians, for example, might take the view of the theologian Karl Rahner, who argues that our existence as moral beings is grounded in our experience of “[t]he difference between what we simply in fact are and what we should be” according to God’s will, and that “this difference is always found as something concrete, not as something abstract.”<sup>41</sup> The difference, like God’s will, is seen as *real*: no metaphysics, just the *fact* of God, the *fact* of divine command, and the *fact* of difference. In opening his Gifford Lectures nearly a century ago, William James complained that “many religious persons . . . do not yet make

---

<sup>39</sup> D. RICHARDS, *supra* note 19, at 254.

<sup>40</sup> *Id.* at 265.

<sup>41</sup> K. RAHNER, FOUNDATIONS OF CHRISTIAN FAITH: AN INTRODUCTION TO THE IDEA OF CHRISTIANITY 407-08 (1978).

a working use of the distinction" between facts and values.<sup>42</sup> But James, so wise in other matters, missed the point here. The point is that for many believers the fact/value distinction, in the existential sense that James had in mind, is simply beside the point.<sup>43</sup>

That is what worries liberal moral theorists and, by extension, liberal constitutional theorists. Religiously devout people have a different, and quite threatening, way of looking at the world. I fear that this way of thinking about religion has its basis in an anti-religious prejudice. That is, a sense that people whose moral judgments are rooted in religious devotion are more likely than other people to be closed-minded. To put the matter simply, they refuse to think, at least the way that liberal theory says people should think, and this refusal makes them dangerous fanatics.

I find this ground unconvincing. I am not at all sure that people whose moral judgments are based explicitly on religious premises are more closed-minded than anyone else who might engage in public moral dialogue. There are a lot of people with strong moral views who will not abandon them easily and not all of them are religiously devout. I worry, moreover, that the tendency among liberal theorists to treat the religiously devout as dangerous primitives bespeaks a hostility toward religion itself. But, my purpose tonight is not to argue against the claim of closed-mindedness. I only want to trace its implications. So, assuming for the sake of argument that people whose morality stems from religious belief are less inclined than others to change their minds on moral questions, what should liberal theory do?

Well, first of all, we know what liberal theory does do. It holds that those people whose religious devotion makes them not amenable to reason are not welcome in the public moral dialogue on which liberalism depends. But mediating the dialogue through a rationality requirement that excludes many of the religiously devout from the dialogue is obviously not the answer. Quite apart from the matter of insult that I have already discussed, there is the troubling question of who gets to decide what the mediating dialogic requirement is going to be. After all, as Stephen Holmes has noted in discussing what he calls "gag rules," "[i]n a liberal social order, the

---

<sup>42</sup> W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 6 (1929).

<sup>43</sup> Cf. R. UNGER, *KNOWLEDGE AND POLITICS* 157-58 (1975) ("The contrast of understanding and evaluation is foreign to the religious consciousness, for its beliefs about the world are simultaneously descriptions and ideals.").

basic normative framework must be able to command the loyalty of individuals and groups with widely differing self-understandings and conceptions of personal fulfillment.”<sup>44</sup> For Holmes, this is a reason that liberal theory must “steer clear of irresolvable metaphysical disputes,”<sup>45</sup> but in practice the insight points in a somewhat different direction. For the simple truth about American society in the late twentieth century is that a dialogic rule that does not permit religious convictions to enter the policy debate, for all its theoretical fairness, cannot “command the loyalty of individuals and groups with widely differing self-understandings.”<sup>46</sup> Millions, perhaps tens of millions, of Americans are deeply offended as well as perplexed when told that their most deeply felt moral beliefs are not suitable for public debate because their consciences were formed through the wrong process. And, indeed, it is fair to ask what sort of liberalism we have if the primacy of conscience only extends to those citizens whose epistemologies are of the proper kind.

The trouble with trying to confine religion to a private sphere is not simply that it denigrates religious as opposed to other ways of knowing moral (to say nothing of factual) truths. What may be a larger problem is that the effort misconceives the nature of religion itself. In the first place, as Michael Perry has pointed out, to insist that religious morality remain a matter of private conscience, to ask citizens to bracket the religious convictions essential to their character from their moral reasoning, might result in a destruction of self, for the religious are told, in so many words, “You are useless to liberal dialogue as you are.”<sup>47</sup> Moreover, as David Tracy has noted in his effort to sketch a “post-modernist” theology, a religion is not the same as an idle reflection. It is worth quoting him at length:

Despite their own sin and ignorance, the religions, at their best, always bear extraordinary powers of resistance. When not domesticated as sacred canopies for the status quo nor wasted by their own self-contradictory grasps at power, the religions live by resisting. The chief resistance of religions is to more of the same. . . . The religions also resist the temptations of many post-modernists to see the problem but not to act. But the religions also join secular postmodernity in resisting all earlier modern, liberal, or neoconservative contentment with the ordinary dis-

---

<sup>44</sup> Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 19, 20-21 (J. Elster & R. Slagstad eds. 1988).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See M. PERRY, MORALITY, POLITICS AND LAW: A BICENTENNIAL ESSAY 72-73 (1988).

course on rationality and the self.<sup>48</sup>

A religion, in this picture, is not simply a means for understanding one's self, nor even of contemplating the nature of the universe, of existence, or of anything else. A religion is, at its heart, a way of denying the authority of the rest of the world; it is a way of saying to fellow human beings and to the state those fellow humans have erected, "No, I will *not* accede to your will." This a radically destabilizing proposition that was central not only to the civil resistance of King and Gandhi, but also to Operation Rescue. Mark Tushnet has suggested that it is precisely this ultimate radical possibility of refusing to accept the will of the state that leads to liberalism's suspicion toward religious belief.<sup>49</sup> Perhaps so; for the nature of religion is finally not simply to know, but to act, and to act at times without regard to what others regard as the facts. Thus, quoting Tracy once more: "[A]bove all, the religions are exercises in resistance. Whether seen as Utopian visions or believed in as revelations of Ultimate Reality, the religions reveal various possibilities for human freedom that are not intended for that curious distancing act that has become second nature to our aesthetic sensibilities."<sup>50</sup> This idea is a very subversive one, but religion is a very subversive force; subversive, at least, in a state committed to the proposition that only one epistemology counts. No wonder liberalism is afraid.

#### *D. Empirical Morality and the Free Exercise Clause*

By way of illustrating the epistemological point in a bit more detail, I would like to take examples that involve the free exercise clause rather than the establishment clause. This is not because I have a sudden yen to muddy the free exercise waters. Indeed, it is not my purpose tonight to analyze the free exercise clause as such. But by looking at the way that certain cases have been approached under the free exercise clause, I hope to illustrate the impossibility of liberal constitutional dialogue coming to serious terms with a vision of the world that does not demand materialistic evidence as proof of facts.

First, I would like to keep my promise of last night and say a few

---

<sup>48</sup> D. TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 83-84 (1987) (footnotes omitted).

<sup>49</sup> See M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 269-76 (1988).

<sup>50</sup> D. TRACY, *supra* note 48, at 84 (footnote omitted).

words about *Employment Division v. Smith*.<sup>51</sup> The *Smith* case involves two former employees of the State of Oregon who were dismissed from their positions for ingesting peyote, a controlled substance, in religious observances of the Native American Church, of which they were members at the time. The question is whether they are entitled to unemployment compensation. On remand from an earlier decision of the Supreme Court of the United States, which sought a clarification, the Supreme Court of Oregon held that the dismissed employees were entitled to unemployment compensation because “outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment . . . .”<sup>52</sup> Maybe this is right. I don’t want to get into a discussion tonight of whether the decision is right or wrong. I will mention, however, that the fear of the state and other critics is, of course, the slippery slope: perhaps every drug abuser will claim a religious requirement. And what about the snake-handlers and those who violate a wide variety of other laws?

Douglas Laycock, in defending the *Smith* decision, suggested the possibility of a limiting principle. Perhaps, he says, protection might be limited to “groups that can point to some substantial tradition and that limit the use of drugs to structured worship service.”<sup>53</sup> But Laycock’s effort to offer a pragmatic answer conceals a difficulty. Tomorrow, a long-time adherent of Faith A might announce a revelation and the need to found Faith B, a central tenet of which just happens to involve the use of currently proscribed mind-altering substances. Why should Faith A, if it happens to hold a similar tenet, have the advantage over Faith B? Is it because there is more reason to believe in the sincerity of the adherents of Faith A? Why?

I do not mean to argue entirely by rhetorical questions. The questions are leading up to another unsettling possibility. Suppose that the revelation to the founder of Faith B happens to be true. By this I mean, suppose that it really is God’s will that adherents of Faith B use mind-altering substances.

The quick answer, and perhaps the correct one, is that liberal law can take no account of that possibility. Not that it is false, not that

---

<sup>51</sup> *Smith v. Employment Div.*, 307 Or. 68, 73, 763 P.2d 146, 148 (1988), *rev’d*, 110 S. Ct. 1595 (1990).

<sup>52</sup> 307 Or. at 73, 763 P.2d at 148..

<sup>53</sup> Laycock, *Peyote, Wine, and the First Amendment*, CHRISTIAN CENTURY, Oct. 4, 1989, at 876, 880.

it is doubted, but simply that it cannot be permitted to carry weight. And if this means that the Founder of Faith B cannot use mind-altering substances and, therefore, faces the fires of hell, well, that's not the law's problem; that's between the Founder and his God.

I wonder, though, whether this is an entirely satisfactory answer. Think back on the Jehovah's Witness example. What we know from the cases is roughly this: if a mature, conscious Jehovah's Witness refuses a blood transfusion to save her life, a court will not order it; if a mature, conscious Jehovah's Witness refuses a blood transfusion to save her life and then lapses into unconsciousness, a court might well order it; if a mature Jehovah's Witness arrives at a hospital already unconscious, and her family refuses permission for a blood transfusion to save her life, a court will order it; and, if a Jehovah's Witness parent refuses a blood transfusion to save the life of a minor child, the court will temporarily suspend parental custody and appoint a guardian, who will invariably grant permission for the transfusion.

In none of these cases does the court give much weight to the proposition that accepting a transfusion will lead to eternal damnation. But that is hardly surprising, because no notion of free exercise is required to explain any of these decisions. The right of a Jehovah's Witness to refuse a blood transfusion for herself or for a family member seems, as a legal matter, to be of precisely the same scope as the right of any individual to refuse life-saving medical treatment for herself or for a member of the family. Mature adults may refuse treatments that might save their lives, but they may only rarely refuse those treatments on behalf of unconscious relatives—generally, only in cases involving “heroic” measures—and they may never refuse those treatments on behalf of minor children.<sup>54</sup> In short, no matter what lip service might be paid to the free exercise clause, the cases about blood transfusion seem to have nothing to do with religion at all.

Perhaps that is unsurprising, given what I have said about the private role of religion. But what sort of statement does it make about the underlying religious belief itself? I said earlier that the liberal would respond that the refusal to take account of the claim of perdition is not to say that it is false, only that it is irrelevant. However, there is a logical sense in which the refusal to take ac-

---

<sup>54</sup> They may sometimes refuse *life-extending* treatments, as in the *Baby Jane Doe* case. Query the result in that case were it certain that the infant would have recovered fully had treatment been undertaken.



count of the claim *is* to treat it as false. For if the claim is true, life eternal would seem plainly to trump the transient life available on earth. Put otherwise, if the claim is true, the Witness is better off dead—dead, that is, in the ordinary language, materialistic sense of the word. By forcing the Witness to live and be damned rather than permitting her to die and be saved, the state is necessarily treating her religious claim not as irrelevant, but as false.

There is a far from semantic distinction between acting neutrally toward a religious belief—refusing to consider it as either true or false—and acting as though it is false. Again, think back on the Ayatollah's death sentence on Salman Rushdie. Would it matter much to the critics who charge fanaticism if the Ayatollah's view was that a death in this world cost Rushdie very little, because it was the judgment of God that really mattered, and that Rushdie, if after all not a blasphemer, might nevertheless gain eternal life? Would it matter if this were Rushdie's own view? Perhaps not. But I am reminded of Paul Brest's comment on the constitutionality of the death penalty, and his hermeneutic and anti-historicist argument for giving little weight to the widespread agreement among the founders that taking human life was sometimes appropriate punishment for criminal behavior. Writes Brest:

The adopters of the [cruel and unusual punishment] clause apparently never doubted that the death penalty was constitutional. But was death the same event for inhabitants of the American colonies in the late 18th century as it is two centuries later? Death was not only a much more routine and public phenomenon then, but the fear of death was more effectively contained within a system of religious belief. Twentieth-century Americans have a more secular cast of mind and seem less willing to accept this dreadful, forbidden, solitary, and shameful event. The interpreter must therefore determine whether we view the death penalty with the same attitude—whether of disgust or ambivalence—that the adopters viewed their core examples of cruel and unusual punishment.<sup>55</sup>

Brest might well have added what is also true: death as a penalty was long ago justified by the argument that God would correct the errors of mortal man. I think Brest may still be wrong on his sociology, because survey research suggests that Americans strongly support both the death penalty and the concept of an afterlife, two notions that he is surely right to link. I am also concerned that his tone reflects the liberal tendency to dismiss religion that I have al-

---

<sup>55</sup> Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 220-21 (1980) (footnotes omitted).

ready mentioned. But, I have a different criticism in mind. Suppose that Brest is right, that Americans are much less certain today than they once were about life after death, that "fear of death" is no longer "effectively contained within a system of religious belief."<sup>56</sup> I wonder why that should be the critical interpretive question in determining whether their era is like ours. Why not the question that suggests itself a bit more obviously, given the link between support for the death penalty and support for the concept of an after-life? Why not ask instead "Is there life after death or not?"

Now, if that's not an idea to make the contemporary liberal constitutionalist rise in disgust, I don't know what is. Of course liberalism can't answer that question. I'm not even sure that liberal dialogue can treat it as a question. This is a matter of private conscience, not for the state to know about or care about, isn't it? It's just what one *believes*; morality and law play no part in it.

Except that that isn't so. Listen to the way the question is structured: "Is there a life after death or not?" The question is whether a thing exists or not; it is a question intended to discover a fact. To be sure, a liberal might *say* that asking whether there is an afterlife is a question about belief not about fact. But to say so doesn't make it so. After all, whatever else may be said about life after death, one thing seems sure: either there is one or there isn't.

In this connection, I am reminded of Walter Murphy's novel *The Vicar of Christ*, which includes a scene in which the Pope has invited to dinner a group of seminarians and overhears two of them in heated argument over the nature of the Holy Trinity. The Roman Catholic church teaches that the Holy Ghost proceeds from the Father and the Son, whereas the Greek Orthodox Church insists that the Holy Spirit proceeds from the Father alone. Tiring at last of their debate, the Pope leans over the table and asks "What are the data?"<sup>57</sup> When the seminarians seem confused, he adds an explanation: "[Y]ou have been talking about a factual problem, not one of logical relationships. Either the Holy Spirit proceeds one way or He proceeds the other. Either is perfectly justifiable in logic. What are the data on which we can determine which is correct?"<sup>58</sup>

Now, that may not be good theology, but like the question of whether there is or is not a life after death, the question of the procession of the Holy Spirit can be stated in a way that does not seem

---

<sup>56</sup> *Id.* at 221.

<sup>57</sup> W. MURPHY, *THE VICAR OF CHRIST* 538 (1979).

<sup>58</sup> *Id.*

to offend any principle of liberal dialogue. In that sense, there is no reason either to outlaw or laugh at the claim that either question seeks a factual answer. There is, however, one difficulty common to both inquiries: although stated as empirical propositions, they are not readily and directly testable by material means. That is not, please note, the same as saying that they are not testable at all. But as I have already noted about scientific creationism, the issue of testability might ultimately turn on what counts as evidence, which is to say, the question is again epistemological.

Well, all right. Back to the Jehovah's Witnesses who refuse a blood transfusion. I asked whether their objection, that accepting blood would deny them eternal salvation, was a claim about fact or a claim about value. What I hope that I have shown by now is that that very question—fact or value—has meaning only in a particular epistemology that considers factual propositions as those that are testable against the material world, and considers a proposition falsified whenever materialistic evidence runs against it. Thus, for example, in deciding whether scientific creationism is a plausible account of the origin of the earth and of humanity, the only evidence that counts is the evidence of natural science, evidence that is empirical in the sense of being both testable and measurable. The evidence on which the creationist might have decided to accept the proposition—Scripture itself—is out of bounds.

So, too, with the Jehovah's Witness. Even if the question of eternal salvation is admitted *arguendo* to be one of fact, it leads to no hypotheses testable against the natural world. All of its hypotheses are testable only against God's word, and that is no sort of liberal evidence.

But note the difference between the Witness who believes that a transfusion will deny salvation and the creationist who believes that the earth is relatively young and that there has been no significant animal evolution. The creationist's position either leads to no hypotheses that are testable in the natural world, or if it does generate testable hypotheses, they fail the tests of materialist science, and so liberalism and liberal constitutionalism reject them. But the Witnesses' claim leads to no hypotheses testable in the natural world, *and is still rejected*. This distinction is crucial. It is one thing for liberalism to say, "Our epistemology trumps your epistemology, so when there is a conflict we win." But in the case of the Jehovah's Witnesses, *there is no conflict*, because liberal materialist epistemol-

ogy takes no position. The same is true of those who wish to use peyote in a religious ritual; no epistemological conflict exists.

So when we move from the establishment clause to the free exercise clause, what we learn is that liberal constitutionalism rejects the epistemology of faith even when the results yielded by that epistemology are not in conflict with the results offered by the materialist epistemology that liberalism prefers. This cannot be justified on the ground that the religious views have been displaced by the evidence; it cannot be justified on the ground that the religionists in question are trying to impose their views on society; it can only be justified on the ground that the religionists are taking their views out of the private sphere to which liberalism consigns them and are trying to use those views as the basis for public acts. And public conduct intended to turn faith into action—unless the conduct is in pursuit of some expressly liberal end, as in the civil rights movement—is something that is difficult for liberalism to countenance.

#### *E. Liberal Dialogue and the Danger of Elitism*

So that is where liberal theory, and liberal law, leave us. People who are religiously devout are not supposed to make trouble; they are supposed to be too embarrassed to show a willingness to risk their material selves for some metaphysical promise of eternal life. And if they do want to take such risks, they cannot expect the courts to go along with them. Why not? Because they are illiberal. Because they are fanatics. Because Stoppard was right after all. The noes *do* have it.

At least, the noes have it in liberal theory. But that aspect of liberal theory can hardly be expected to be popular in a nation as consciously, if pluralistically, religious as this one. A large part of the trouble, of course, is that not everyone agrees that the Enlightenment was a good idea. Suppose that the Enlightenment project of replacing divine moral authority with the moral authority of reason failed not, as Alasdair MacIntyre suggests, because the post-Enlightenment philosophers proceeded from a set of shared, historically contingent, and utterly incoherent assumptions,<sup>59</sup> but because of a psychological problem. Perhaps most people are upset with the idea that morality is itself contingent, that ethical debates have no right answers. Perhaps for many of us, the idea of moral authority itself implies the existence of an arbiter, a proposition that would

---

<sup>59</sup> See A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 49-75 (2d ed. 1984).

help explain why a morally pluralistic nation like ours is willing to let a *court*, of all things, settle many of our toughest moral dilemmas. No other agency of settlement seems to be available.

Except that, for tens of millions of Americans another authority *is* available: divine command. It is relatively easy for well-educated liberals to scoff at the idea that God's will is relevant to moral decisions in the liberal state, but the citizen who is religiously devout might ask why John Rawls' will, or Bruce Ackerman's will, or David Richards' will, or, for that matter, the will of the Supreme Court of the United States is more relevant to moral decisions than God's. And so far, at least, I do not think that liberal theory has presented an adequate answer.

So liberalism, as a theory of politics, is moving in an unsettling direction. According to Richard Rorty, "[l]ogical positivism got a bad name by calling religion and metaphysics 'nonsense' and by seeming to dismiss the Age of Faith as a matter of incautious use of language."<sup>60</sup> Liberal dialogue seems to be headed down the same road, and in a nation where so many citizens are centrally moved by their religious convictions, unless there is a change of course, the consequences for liberal theory are likely to prove disastrous. Is there an alternative? Of course there is, and the physicist John Ziman hints at it in his book *Public Knowledge*. Says Ziman:

In the late eighteenth and early nineteenth century, prehistoric remains were found that we now see as pointing to the great antiquity of Man. But many scholars stood out against this interpretation because it did not square with the Biblical chronology of the past. Is it fair to treat this as a conflict between scientific rationality and religious prejudice? Would it not be more just to say that a widely accepted theory was being ousted by a better one as new evidence came to light?

The point is that this debate was open and free. The participants on one side may have been blinkered by their upbringing, but their beliefs were honestly held and rationally maintained. They may often have used poor arguments to defend their case—but they did not call in the secular arm or the secret police. In the end, they lost; and since then the appeal to Divine Scripture has ceased to be an acceptable element in a scientific discussion.<sup>61</sup>

Taking the last point—that Divine Scripture is not acceptable in scientific discussion—as definitional, Ziman seems to me to have matters basically right. There is an important distinction, one that

---

<sup>60</sup> R. RORTY, CONSEQUENCES OF PRAGMATISM 33 (1982).

<sup>61</sup> J. ZIMAN, PUBLIC KNOWLEDGE: AN ESSAY CONCERNING THE SOCIAL DIMENSION OF SCIENCE 21 (1968).

he seems to appreciate, between saying to the religionist, "Your argument is out of bounds because it is based on Scripture," and saying, "Your argument doesn't hold up against the evidence, let me show you why."

A conversation of this kind would at least take religion seriously as a motive force in tens of millions of lives. I do not suggest that Ziman's model is the only one that is possible. Robert Audi and Kent Greenawalt, for example, have struggled to produce theories that would admit religious convictions into the debate but require their justification in secular terms.<sup>62</sup> I am not sure that these rejustification theories are actually coherent, but if carried to another step, they might at least point in the right direction. What is needed is not a requirement that the religiously devout choose a form of dialogue that liberalism accepts, but that liberalism accept whatever form of dialogue a member of the public offers. What is needed is a willingness to *listen*, not because the speaker has the *right* voice but because the speaker has the right to speak. For unless liberal theory and liberal law develop a way to welcome the religiously devout in public moral debate without first demanding that they make themselves into different people, liberalism will continue its slide from a pluralistic theory of politics to a narrow, elitist theory of right results, and damned be those who try to block the liberal path.

\* \* \* \* \*

Well, it's been a long two nights, and I want to thank all of you for your kind attention. I argued last night that the move toward what I have called empirical morality has established a constitutional law more interested in counting than reasoning, and I tried to explain why that development ought to be unsettling to those who prefer their constitutional decisions clear and determinate. In tonight's lecture, I have tried to explain why the relentlessly materialist focus of contemporary liberal constitutionalism necessarily creates a constitutional law that appears in some ways to denigrate religious faith.

That last point deserves a few more words, for the danger to liberalism as a political theory is almost palpable. Until the time that liberalism manages to change itself, I really do fear that the matter comes down to something like this: if you keep quiet about your religious belief, practice it privately, treat it, as I have said, like a

---

<sup>62</sup> See K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 *PHIL. & PUB. AFF.* 259 (1989).

hobby, well, that's just fine; if you parade your belief, however, if you make a public show of your devotion, then you are at best a fool and at worst a hypocrite; and if you act on religious principle, if you try to build the world that you think your God wants you to, and if your only reason for doing so is to fulfill the word of God, well, then you're a fanatic.

I find this a frightening vision of the course of liberalism. A public moral dialogue that rules so many opinions out of bounds because of the way in which they were formed is a dialogue scarcely worthy of the name. And a liberalism that considers scientific creationists less like the supporters of the Circular Area Bill than like the Ayatollah Khomeini is a liberalism that has somewhere along the line forgotten that its central tenet is not primacy of materialist science, but primacy of individual conscience.

\* \* \* \*

End of Second Lecture

