

## Articles

# WHY TOLERATE RELIGION?

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### I. PRINCIPLED TOLERATION

Religious toleration has long been the paradigm of the liberal ideal of toleration of group differences, as reflected in both the constitutions of the major Western democracies and in the theoretical literature explaining and justifying these practices. While the historical reasons for the special “pride of place” accorded religious toleration are familiar,<sup>1</sup> what is surprising is that

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1. See, e.g., Douglas Laycock on the American constitutional experience: “[I]n history that was recent to the American Founders, governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States.”

no one has been able to articulate a credible *principled* argument for tolerating religion *qua* religion: that is, an argument that would explain why, as a matter of moral or other principle, we ought to accord special legal and moral treatment to religious practices. There are, to be sure, principled arguments for why the state ought to tolerate a plethora of private choices, commitments, and practices of its citizenry, but none of these single out religion for anything like the special treatment it is accorded in, for example, American and Canadian constitutional law.<sup>2</sup> So why tolerate religion? Not because of anything that has to do with it being religion as such—or so I shall argue.

To see why this is so we will need to start with some distinctions that make possible a more perspicuous formulation of the question. In particular, we need to state clearly what is at stake in something called a “principle of toleration.” I shall take as a point of departure a useful formulation of the issues by the late English philosopher Bernard Williams:

A practice of toleration means only that one group as a matter of fact puts up with the existence of the other, differing group. . . . One possible basis of such an attitude . . . is a virtue of toleration, which emphasizes the moral good involved in putting up with beliefs one finds offensive. . . . If there is to be a question of toleration, it is necessary that there should be some belief or practice or way of life that one group thinks (however fanatically or unreasonably) wrong, mistaken, or undesirable.<sup>3</sup>

For there to be a *practice* of toleration, one group must deem another differing group’s beliefs or practices “wrong, mistaken, or undesirable” and yet “put up” with them nonetheless. That means that toleration is not at issue in cases where one group is simply *indifferent* to another. I do not “tolerate” my neighbors who are non-White or who are gay, because I am *indifferent* as

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Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

2. The Canadian Charter does, at least, recognize in the text liberty of “conscience,” along with religious liberty, but in practice, the protection for religious conscience turns out to be stronger. Some U.S. Supreme Court cases, involving constitutional challenges to the Universal Military Training and Service Act, have moved in the direction (at least for “conscientious objectors” to military service) of expanding the meaning of “religion” to encompass broader commitments of conscience. *See esp.*, *Welsh v. United States*, 398 U.S. 333 (1970). Even here, this was framed as a matter of statutory interpretation, not constitutional principle.

3. Bernard Williams, *Toleration: An Impossible Virtue?*, in *TOLERATION: AN ELUSIVE VIRTUE* 18, 19 (David Heyd ed., 1996).

to the race or sexual orientation of those in my community. "Toleration," as an ideal, can only matter when one group *actively* concerns itself with what the other is doing, believing, or "being." Obviously, in many cases, the attitude of "indifference" is actually morally preferable to that of "toleration": better that people should be indifferent as to their neighbors' sexual orientation than that they should disapprove of it, but "tolerate" it nonetheless.

But a *practice* of toleration is one thing, a *principled reason* for toleration another. Many practices of toleration are not grounded in the view that there are *moral* reasons to tolerate differing points of view and practices, that permitting such views and practices to flourish is *itself* a kind of good or moral right, notwithstanding our disapproval. Much that has the appearance of principled toleration is nothing more than pragmatic or, we might say, "Hobbesian" compromise: one group would gladly stamp out the others' beliefs and practices, but has reconciled itself to the practical reality that they can't get away with it, at least not without the intolerable cost of the proverbial "war of all against all." To an outsider, this may look like toleration—one group seems to "put up" with the other—but it does not embody what Williams called a "virtue" of tolerance (or what I will call "principled" tolerance), since the reasons for putting up are purely instrumental and egoistic, according no weight to moral considerations. One group "puts up" with the other only because it wouldn't be in that group's interest to incur the costs required to eradicate the other group's beliefs and practices.

But it is not only Hobbesians who mimic commitment to a principle of toleration. On one reading of Locke,<sup>4</sup> his central non-sectarian argument for religious toleration is that the coercive mechanisms of the state are ill-suited to effect a real change in *belief* about religious or other matters. Genuine beliefs, sincerely held, can't be inculcated at gunpoint, as it were, since they respond to evidence and norms of rational justification, not threats.<sup>5</sup> In consequence, says the Lockean, we had better get used to toleration *in practice*—not because there is some princi-

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4. Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, in *JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES* 61 (Susan Mendus ed., 1988).

5. Locke puts a distinctively Protestant "spin" on this epistemological point, since he believes that salvation can *only* come through a free (i.e., uncoerced) embrace of religious doctrine. On that Protestant view, there would be *no point* in non-toleration, since it would not accomplish any meaningful religious objective given the prerequisites for salvation.

pled or moral reason to permit the heretics to flourish, but because the state lacks the right tools to cure them of their heresy, to inculcate in them the so-called “correct” beliefs.

Locke, it is fair to say, did not fully appreciate the extent to which states and—in capitalist societies—private entities can employ sophisticated means to effectively coerce belief, means that are both more subtle and more effective than he imagined. That history offers up so many examples of societies in which the tyranny of the few over the many is *accepted* by the many as a quite desirable state of affairs is compelling evidence that states can successfully inculcate beliefs, even dangerously false beliefs. Locke’s “instrumental” argument for a practice of toleration should provide little comfort to the defender of toleration given Locke’s (understandable) failure to appreciate the full complexity of the psychology and sociology of belief inculcation.

Not only Hobbesians and Lockeans, however, mimic principled toleration. A variation on the Lockean *instrumental* argument for toleration is apparent in a popular theme in American political thinking—one that receives a well-known articulation in Frederick Schauer’s defense of free speech<sup>6</sup>—according to which government *can’t be trusted* to discharge the task of intolerance “correctly,” that is, in the right instances. Speech can harm, in all kinds of way, notes Schauer, and the various rationales for putting up with these harms—from John Stuart Mill’s “marketplace of ideas” to Alexander Meiklejohn’s conception of free speech as essential to democratic self-government—almost all fall prey to objections of one kind or another. But, says Schauer, there is still a reason to demand that the state “tolerate” many different kinds of speech (even harmful speech), and that is because *there is no reason to think the state will make the right choices* about which speech ought to be regulated. Schauer calls this “the argument from governmental incompetence,”<sup>7</sup> and says,

Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a

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6. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982). See also JOHN STUART MILL, *ON LIBERTY* 73–92 (Elizabeth Rappaport, ed., Hackett 1978) for similar considerations.

7. SCHAUER, *supra* note 6, at 86.

somewhat deeper distrust of governmental power in a more general sense.<sup>8</sup>

It is not, then, as in the Lockean argument, that government lacks the right *means* for bringing about intolerant ends, it is rather that government is not *competent*, that is, can not be relied upon, to deploy its means in the right cases. Perhaps this kind of *instrumental* argument for state toleration is more plausible, but its justificatory structure makes it no different from that of the Lockean's: it doesn't tell us why we, morally, ought not to crush differing beliefs or practices, it tells us only that we (through the instrumentality of the state) are unlikely to do it right.

Where a genuine "*principle* of toleration" gets its purchase is in the cases where one group (call it the "dominant" group) actively disapproves of what another group (call it the "disfavored" group) believes or does; where that dominant group has the means at its disposal to *effectively* and *reliably* change or end the disfavored group's beliefs or practices; and yet still the dominant group acknowledges that there are *moral* or *epistemic* reasons (that is, reasons pertaining to knowledge or truth) to permit the disfavored group to keep on believing and doing what it does. That is pure or "principled" toleration,<sup>9</sup> and the question, then, is whether there is such a reason to tolerate religion.

My concern here shall mainly be with the principled grounds of *state* toleration, as opposed to toleration in interpersonal relations, though the issues are often similar. But for purposes of the argument, I shall confine my attention to the principled reasons why the state should refrain from a distribution of benefits and burdens that has as its intended consequence the disfavoring of religion or of particular religions. I frame the problem in these terms because, even though the historical problem about religious toleration was generated by conflict *among* religious groups, the contemporary problem, at least in the post-Enlightenment, secular nations (of which the United States may still be one) is different: it is why the state should tolerate religion *as such* at all.

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8. *Id.*

9. "Pure" or "principled" because the reasons for toleration are not based on self-interest, at least not directly.

## II. PRINCIPLED ARGUMENTS FOR TOLERATION

Before we consider religious tolerance in particular, it will be useful to consider the general structure of principled arguments for state toleration of group differences. The literature on the subject is voluminous, so necessarily I will be able to consider only a few themes here. Yet the themes I emphasize will, I believe, capture the main principled positions in the debates.

We can distinguish between two broad classes of principled arguments for toleration, which I will call “moral” and “epistemic” (though the latter incorporates some moral considerations as well). The strictly *moral* arguments for toleration claim either that there is a *right* to the liberty to hold the beliefs and engage in the practices of which toleration is required; or that toleration of those beliefs and practices is essential to the realization of moral goods. The moral arguments divide, predictably enough, into Kantian and utilitarian forms.<sup>10</sup>

As paradigmatic of the broadly Kantian arguments, consider the Rawlsian theory of justice according to which “[t]olerat[i]on. . . follows from the principle of equal liberty,”<sup>11</sup> one of the two fundamental principles of justice that, Rawls argues, rational persons would choose in what he calls the “original position.” The “original position” is a situation in which people choose the basic principles of justice to govern their societies, and in which they do so deprived of the kind of information about their place in society that would render their judgments partial and self-serving. As Rawls puts it:

[T]he parties must choose principles that secure the integrity of their religious and moral freedom. They do not know, of course, what their religious or moral convictions are, or what is the particular content of their moral or religious obligations as they interpret them. . . . Further, the parties do not know how their religious or moral view fares in their society, whether, for example, it is in the majority or the minority. . . . [E]qual liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if

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10. Since I want to keep the focus squarely on toleration, I am going to take no position on the relative merits of the Kantian and utilitarian defenses, especially since the moral and political philosophy of the last 200 years has made no meaningful progress on this issue.

11. JOHN RAWLS. A THEORY OF JUSTICE 214 (1971) [hereinafter, RAWLS, JUSTICE].

it wishes. Even granting . . . that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs.<sup>12</sup>

Notice that nothing in this argument is specific to *religion*: the argument, as Rawls says quite clearly, is on behalf of rights securing "liberty of conscience," which can include, of course, matters of conscience that are distinctively religious in character, but are not limited to them.<sup>13</sup>

The utilitarian arguments have a similar feature, namely, that they do not obviously single out religion for special consideration as opposed to other important matters of conscience. These arguments come in many different varieties, but all share, in one form or the other, the core idea that it maximizes *human well-being*—however exactly that is to be understood—to protect liberty of conscience against infringement by the state.<sup>14</sup>

Why does it promote human well-being to protect liberty of conscience? Many of the arguments trade, at bottom, on a simple idea: namely, that *being able to choose what to believe and how to live* (within certain side-constraints, about which more shortly) makes for a better life. Being told *what you must believe and how you must live*, conversely, makes lives worse. I shall gloss this simple thought as the "Private Space Argument." It maximizes human well-being, so the argument goes, if, within certain limits, individuals have a "private space" in which they can freely choose what to believe and how to live.

12. *Id.* at 206–07.

13. I am going to ignore in this essay the later revision of Rawls's views, marked by JOHN RAWLS, *POLITICAL LIBERALISM* (1993), since its concerns are inapposite for the principled argument here. In this later work, Rawls comes to the view that (as Freeman puts it) "any traditional moral conception (justice as fairness [i.e., the conception of *A Theory of Justice*] included) is not feasible so far as it aspires to be the public grounding of substantive moral and political principles." Samuel Freeman, *The Burdens of Public Justification: Constructivism, Contractualism, and Publicity*, 6 *POL., PHIL. & ECON.* 5, 9 (2007). The moral theory of *A Theory of Justice* is now treated as another "comprehensive" doctrine that might be reasonably rejected by the members of a pluralistic society that liberalism aims to govern, and so fails by the standards of reasonable "public justification" such a society demands. But how could a theory of justice function as a merely "political" theory, one stripped of its controversial moral, metaphysical, and epistemological doctrines? I am sympathetic to those who do not think this works and that, in particular, its account of "reasonableness" is woefully undertheorized. See, e.g., GERALD GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* (1996), for one trenchant critique.

14. A good recent example is TIMOTHY MACKLEM, *INDEPENDENCE OF MIND* 119–54 (2006).

Is it true that granting individuals a “private space” maximizes human well-being? Could it be that many, perhaps even most, individuals make themselves miserable, i.e., worse-off, precisely because they make foolish choices about what to believe and how to live—or perhaps because they don’t make *real* choices at all, being hostage to social and economic milieu and enjoying only the *illusion* of choice? These illiberal thoughts—familiar to readers of Plato, Marx, and Marcuse, among many others—have little purchase these days within the mainstream of English-speaking moral and political theory, though not, as far as I can tell, because they have been refuted systematically.<sup>15</sup> For the sake of argument here, I shall put these doubts to one side and grant that the Private Space Argument is plausible, and thus states a utilitarian ground for toleration.

In contrast to the moral arguments for toleration which we have just considered, *epistemic* arguments for toleration emphasize the contribution that tolerance makes to *knowledge*. Such arguments find their most systematic articulation in the work of John Stuart Mill. According to Mill, toleration is necessary because (1) discovering the truth (or believing what is true *in the right kind of way*) contributes to overall utility; and (2) we can only discover the truth (or believe what is true *in the right way*) in circumstances where different beliefs and practices are permitted to flourish.<sup>16</sup> The first premise in the Millian argument for toleration is, quite obviously, a moral one: we should care about the truth (or believing the truth *in the right kind of way*) because of the contribution that makes to the morally valuable end of utility. Nietzsche, among others, denies the moral premise: the “truth is terrible,” says Nietzsche,<sup>17</sup> by which he means precisely that sometimes knowing the truth is incompatible with life, *a fortiori*, with utility (though utility was not, of course, Nietzsche’s particular concern).

It is only the second premise of the Millian argument for toleration that is distinctively *epistemic*: for it is this premise that claims that *toleration* of divergent beliefs and practices contributes to knowledge of the truth. Note that the “truths” at issue for

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15. Michael Rosen’s critique of Marx’s thesis about false consciousness is an exception. See MICHAEL ROSEN, ON VOLUNTARY SERVITUDE: FALSE CONSCIOUSNESS AND THE THEORY OF IDEOLOGY (1996). I do not think that critique is successful. See Brian Leiter, *The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud*, in THE FUTURE FOR PHILOSOPHY 74, 84–87 (Brian Leiter ed., 2004).

16. MILL, *supra* note 6, at 15–72

17. FRIEDRICH NIETZSCHE, ECCE HOMO 326 (W. Kaufmann trans., Vintage 1967).



Mill concern both truths about “facts” as well as truths about “value”—in particular, moral truths about the best kinds of lives available to creatures like us. From an epistemic point of view, both factual and moral truths have several features in common. First, in neither case are we justified in assuming that we are infallible: we may be wrong, and that is a reason to permit dissident opinions, which may well be true. Second, even to the extent our beliefs are partially true, we are more likely to appreciate the whole truth to the extent we are exposed to different beliefs which, themselves, may capture other parts of the truth. Third, and finally, even to the extent our present beliefs are *wholly* true, we are more likely to hold them *for the right kinds of reasons*, and thus more reliably, to the extent we must confront other opinions, even those that are false. For all these epistemic reasons, toleration of a wide array of expression of differing beliefs is warranted according to Mill.

Moral truths, however—that is, truths about how we *ought* to live—supply the ground for a wider scope of toleration, one that encompasses *practices*, not just *beliefs*. For the epistemic conditions for the discovery of moral truths require not only that we be exposed to differing *beliefs*, but that, as Mill puts it, “the worth of different modes of life should be proved practically” through what Mill calls “experiments of living.”<sup>18</sup> In other words, to know how we really *ought* to live, it is not enough to hear differing opinions expressed on the subject; one must have the empirical evidence provided by lives actually lived in accordance with different guiding principles. It is only, for example, by seeing (or, better yet, experiencing) the lives of a pig satisfied and Socrates dissatisfied (in Mill’s famous example) that we can come to the knowledge that the latter life is better, i.e., involves higher quality pleasures, than the former.

Before we turn to the special case of religious toleration, we need to call attention to one more feature of principled arguments for toleration: namely, that they all recognize *side-constraints* on the scope of toleration.<sup>19</sup> Even if there is a right to liberty of conscience which demands state tolerance of differing beliefs and practices, as Rawls holds; or even if toleration promotes overall utility or happiness—or facilitates a kind of knowledge which promotes overall utility—as the utilitarian ar-

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18. MILL, *supra* note 6, at 54.

19. An early conversation with Ross Harrison was helpful in clarifying my thinking on this topic.

guments hold; it is still the case that there are *limits* on how much toleration is demanded.

For the Rawlsian, “The limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse,”<sup>20</sup> so “liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain.”<sup>21</sup> “This expectation,” he adds, “must be based on evidence and ways of reasoning acceptable to all.”<sup>22</sup> For the utilitarian, by contrast, the side-constraints on toleration are typically set by some version of Mill’s famous Harm Principle, according to which “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>23</sup>

On either theoretical approach, the limits of tolerance are set by the liberty interests or well-being of others in the community, and these limits have their primary impact not on toleration of *beliefs* but on toleration of the *practices* or *actions* undertaken in accord with those beliefs. The state will still, on either the Rawlsian or Millian view, it seems, have to tolerate some religious group’s *belief* that adherents of all other religions are heretics, destined for damnation; but the state need not tolerate that same group’s desire to act on its beliefs, by, for example, killing the infant children of the alleged heretics before their souls are corrupted, and thus eternally damned, by heresy.

Cases like these are, of course, the easy cases on any view of toleration and its limits. Much harder are two other kinds of cases: first, those involving the expression of beliefs that have as their probable (but not certain) consequence actions that infringe upon liberty or are otherwise likely to cause prohibited harms; and second, those involving practices or actions that have as their probable (but not certain) consequence the infringement of liberty or the causing of prohibited harms.

Mill is, of course, thinking of the first category of cases when he writes that,

[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous [i.e., harm-

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20. RAWLS, *JUSTICE*, *supra* note 11, at 215.

21. *Id.* at 213.

22. *Id.*

23. MILL, *supra* note 6, at 9.

ful] act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer . . . .<sup>24</sup>

That same thought is codified in American constitutional law by the doctrine that speech which poses a “clear and present danger” can be suppressed by the state.<sup>25</sup> This approach supposes that you can hold and express any belief *unless* there is a “tight” causal nexus between expression of the belief and forbidden acts. The Rawlsian view seems to come to the same thing, though the metaphors Rawls employs are different: the threat to liberty, he says, for example, “must be securely established by common experience.”<sup>26</sup> The Rawlsian formulation does not as obviously incorporate a requirement that the resultant harm be as *immediate* or *imminent* as do the Millian examples or the American constitutional doctrine. It suffices on the Rawlsian view that the causal nexus between expression of belief and liberty-infringing act be “securely established.” To be sure, the criteria for *securely* establishing that nexus may only be satisfied in the same cases of *immediate* or *imminent* harmful conduct contemplated on the Millian view, which is reason to think they come to the same thing.

The second category of cases presents the same issue: that is, there are practices based on beliefs which it seems *ought* to be tolerated (on either the Millian or Rawlsian view) about which we can ask whether those practices might stand in a causal nexus with harm that satisfies the applicable evidential standards. The recent Canadian case<sup>27</sup> involving the right of Sikhs to carry the kirpan (a ceremonial knife), as required by their religion, even in schools, illustrates this issue. Those opposing the practice argued, in part, that this religious practice poses too great a risk of harm, reflected on the general ban of weapons in school; the other side argued, by contrast, that the probability of harm was very slight, as evidenced, for example, by the fact that there was no known instance of a kirpan being used as a weapon. The

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24. *Id.* at 53.

25. The “clear and present danger” test comes from the U.S. Supreme Court opinion in *Schenck v. U.S.* 249 U.S. 47, 52 (1919). It has been replaced, as a matter of doctrinal formulation, by the idea of “imminent lawless action” in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

26. RAWLS, *JUSTICE*, *supra* note 11, at 215.

27. *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 (Can.).

Court, of course, opted for toleration of the *practice* of carrying the kirpan, given the importance of the practice to the believers, the putatively slight risk of harm, and the special value multiculturalism is assigned in the Canadian Charter.

### III. IS RELIGION SPECIAL FROM THE STANDPOINT OF PRINCIPLED TOLERATION?

In asking whether there is something *special* about religion that bears on religious toleration, we are not asking whether there is some feature (or features) of religious belief that warrant principled toleration of religion on either *moral* or *epistemic* grounds. There plainly are such features, for example, that religious beliefs are often matters of *conscience*, and thus would fall within the scope of any argument, like the Rawlsian one, for protecting liberty of conscience. If there is a *special* reason to tolerate religion it has to be because there are features of religion which warrant toleration *and* these features are *either*:<sup>28</sup>

1. Features that *all and only* religious beliefs have, either as a matter of (conceptual or other) necessity or as a contingent matter of fact; or
2. Features which other beliefs have, or might have, but which in these other cases possession of the features would not warrant principled toleration.<sup>29</sup>

I am hard-pressed to think of features of religion that satisfy the second category, so I shall put that possibility to one side here. Are there, then, features of religious belief that, either necessarily *or* simply contingently, distinguish religious beliefs from other kinds of belief that might warrant toleration?

The general question of what distinguishes “religion” has been extensively discussed in the constitutional literature, though often with an eye to purely doctrinal questions about the meaning of a particular constitutional provision within a particu-

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28. This formulation owes much to David Killoren.

29. There is a variant on this possibility, namely, features which are not unique to religious belief, but which are nonetheless more salient, or more urgent, when annexed to religious beliefs than when not. We need not go so far as to say that when not annexed to religion they don't warrant principled toleration *at all*. It might be enough that the case for toleration is *strongest* in the case of religion. Again, as with (2), in the text, I am not sure what those features might be. (Thanks to Les Green for clarification on this point.)

Brian Kierland also points out to me, correctly, that what is really at issue here are *systems* of religious belief, not necessarily individual beliefs. For ease of discussion, I will refer to beliefs *simpliciter*, but I don't think the failure to spell out the notion of *system*, and membership in the system, will be significant for what follows.

lar constitutional tradition and socio-political context.<sup>30</sup> Being concerned with questions of statutory or constitutional meaning, these approaches do not necessarily grapple with what makes religion *morally* or *epistemically* distinctive from the standpoint of principled toleration. The inquiry here is to figure out *what is distinctive about religion* such that religion *ought* to be tolerated, quite apart from any particular legal regime. An answer to that question will permit us then to return to actual constitutional protections to see whether they are justifiable from a principled point of view.

The legal philosopher Timothy Macklem is unusual in having addressed our question directly in a 2000 article on “Faith as a Secular Value” in the *McGill Law Journal*<sup>31</sup> and in his recent book on the philosophical foundations of the individual liberties.<sup>32</sup> According to Macklem, what distinguishes religious belief is that it is based on *faith*, not *reasons*. As he puts it:

[F]aith itself provides the moral basis for freedom of religion. . . . At its most basic level, the concept of faith describes the manner in which a particular belief or set of beliefs may be subscribed to by human beings. In that sense of the word, faith exists as a form of rival to reason. When we say that we believe in something as a matter of faith . . . we express a commitment to that which cannot be established by reason, or

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30. See, e.g., Abner Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993), which treats an extrahuman source of normative authority as distinctive of religion and thus as doing justice to the understanding of religion in the American context. Andrew Koppelman rejects Greene’s view for its tethering of religion to theism, proposing instead that religion includes “all belief systems that make ultimate claims about the meaning of human existence.” Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 135 (2002). This is rather obviously over-inclusive, as Koppelman effectively concedes when subsuming Nietzsche’s philosophy under the rubric of religion so defined (*id.* at 131)—and, of course, it would not only be Nietzsche’s philosophy that would turn out to be a “religion” on this view. Some other writers (in different forms, Justices Scalia and Thomas, as well as John Finnis and Michael McConnell) contend that religion should be singled out for legal solicitude because it is “good,” for society or for the believer or perhaps both. (In a sense, Timothy Macklem’s argument [discussed, below, in the text] is a more sophisticated version of this position.) But that, of course, begs the question of what religion is, and the answers these writers offer turn out to be over- and under-inclusive in rather obvious ways. See, e.g., Koppelman’s criticism of Finnis on this score. *Id.* at 130.

Many other writers seem attracted to Kent Greenawalt’s view that we should eschew definitions of religion, in favor of looking at “indisputable instances” and then arguing by analogy to other cases, even when all the cases taken together do not share common features. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 763 (1984). The problem with this kind of approach from a moral point of view is well-discussed by Macklem. MACKLEM, *supra* note 14, at 120–26.

31. Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L.J. 1 (2000).

32. MACKLEM, *supra* note 14.

to that which can be established by reason but not for that reason.<sup>33</sup>

According to Macklem, *faith* is required “[w]here the quest for reasons is impossible, but commitment [even without reasons] is potentially valuable”<sup>34</sup> and so, even from a secular perspective, we have reason to value faith and tolerate it.<sup>35</sup>

Remarks by a prolific American scholar of law and religion, John Witte, Jr., suggest a second important feature of religion for purposes of our question. Professor Witte sounds familiar themes when he writes:

[R]eligion is special and is accorded special protection in the [American] Constitution. . . . The founders’ vision was that religion is more than simply a peculiar form of speech and assembly, privacy and autonomy. Religion is a unique source of individual and personal identity, involving “duties that we owe to our Creator, and the manner of discharging them,” as Madison put it. Religion is also a unique form of public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith.<sup>36</sup>

Although these themes are familiar, most of them seem to me to be clearly false, at least in the world today. Religion is not “a unique source of individual and personal identity”; the hundreds of millions of people who have no religious beliefs presumably still have individual and personal identities, defined by sundry other systems of belief—moral, cultural, ethnic, professional, and so on. It also seems dubious that religion is “a *unique* form of public and social identity” as purportedly evidenced by the institutions that operate in the name of religion. Politics, class, ethnicity, cultural traditions, and so on all seem to play the same kind of role, in some instances, much more powerfully than religion does (think of France or England). Where Witte is on to something important, I think, is in calling attention to the religious idea of “duties that we owe to our Creator, and the manner of discharging them.” Many religious commands have a kind of *normativity*, a kind of motivational force for persons—

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33. *Id.* at 133.

34. *Id.* at 137–38.

35. *Id.* at 138–41.

36. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 232 (2000).

perhaps, *but not necessarily*, in virtue of their being “owed to [a] Creator”—that may, indeed, distinguish them in important ways.

Following the leads of Macklem and Witte, we might suggest that two features single out “religious” states of mind from others. The first pertains to the *normativity* of (at least some) religious commands; the second pertains to the relationship between religious belief and evidence. On the proposed account, what distinguishes religious belief from other kinds of beliefs is that:

- (1) Religious belief issues in *categorical* demands on action, that is, demands that must be satisfied, no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up;<sup>37</sup> *and*,
- (2) Religious beliefs do not answer ultimately (or at the limit) to *evidence* and *reasons*, as evidence and reasons are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on “faith,” are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science.<sup>38</sup>

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37. The claim is *not* that all beliefs commonly denominated “religious” issue in such commands, but that it is characteristic of religion that at least some of the commands in which it issues are *categorical* in character. It may be more accurate, though, to say that religious belief issues in *as-if categorical demands* on action, since it is familiar enough that religions can impose other-worldly incentives to produce action *in this world* that seems “as if” it were a response to a categorical reason, when it is really a response to an instrumental reason for achieving an other-worldly objective. As Adrienne Martin aptly put it to me in correspondence: “an instrumental reason motivates as strongly as the incentive on which it is contingent,” and other-worldly incentives can, of course, provide a very powerful instrumental reason! Indeed, as I note later on, to the extent that a *metaphysics of ultimate reality* is also a distinguishing feature of religion, it may supply believers with *instrumental* reasons for acting insofar as acting in the right kinds of way enables believers to stand in the right kind of relationship to that ultimate reality.

38. Religious beliefs presumably do answer to evidence in *instrumental* contexts, that is, when there are questions about what means would be effective to the realization of the *categorical commands* of the religion. So, too, one suspects that the interpretation of categorical commands is *causally influenced* by the *experiences* of the interpreters: so, e.g., “liberation theology” arose as a strand of Catholicism in the context of the horrific poverty and vicious oppression that characterized U.S. client states in Latin America after World War II. But this phenomenon trades on an ambiguity between “evidence” as *justification* for the proposition it supports and “evidence” as the experiences which explain why particular propositions are embraced. An adequate socio-historical explanation of liberation theology must, of course, make reference to the climate of social and economic oppression in which it arose: but the beliefs constitutive of that religious outlook were not, themselves, presented as *justified* by those experiences. (Thanks to Sheila Sokolowski for raising this issue.)

I shall refer to this first feature as the *categoricity of religious commands* and the second as religious belief's *insulation from evidence*. The categoricity of religious commands accounts for both one of the most admirable and one of the most frightening aspects of religious commitment, namely, the willingness of religiously motivated believers to act in accordance with religious precepts, notwithstanding the costs. Thus we find the devoutly religious among those who were at the forefront of domestic resistance to Nazi oppression in the 1930s,<sup>39</sup> and the injustice of apartheid in South Africa from the 1960s onward and in America in the 1950s and 1960s.<sup>40</sup> We also, of course, find the devoutly religious among those who bomb abortion clinics and fly airplanes into buildings. These religiously inspired individuals risk (and often suffer) death, injury, and prison in order to comply with their religious conscience. It is painfully familiar, of course, that in all these cases adherents of the very same religion contested whether the actions of these believers were sanctioned, let alone commanded, by the religious doctrine. (Religious leaders, to take but one example, were also at the forefront of defense of apartheid in the U.S. in the 1950s and 60s.) The important fact here, however, is that religious commands—whether rightly or wrongly understood—are taken categorically by their adherents.

Is religion really alone in this regard? One respect in which Marxism may have been rightly called a “religion” is precisely that in some of the historical contexts just noted, the only other groups as categorically committed to resistance as the religiously inspired were Communists, who led resistance to Nazism, as well as apartheid in both South Africa and the U.S., long before other groups joined the battle. More generally, of course, one might think that *all commands of morality* are categorical in just this way. Does that mean, then, that religion is not *special* after all, since it shares the property of categoricity of its commands with Marxism and with one common understanding of morality?

We can easily distinguish the case of moral commands.<sup>41</sup> To be sure, there are theoretical understandings of morality—Kant's most famously, though not only his—according to which

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39. See, e.g., MARY ALICE GALLIN, *ETHICAL AND RELIGIOUS FACTORS IN THE GERMAN RESISTANCE TO HITLER* 165–97 (1955).

40. See, e.g., JOHN W. DE GRUCHY, *THE CHURCH STRUGGLE IN SOUTH AFRICA* (2d ed., 1986); DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 87–104 (2004).

41. We shall, however, return to a further complication about the moral case, below.



the demands of morality are indeed categorical. What is interesting and important about religion is that it is one of the few systems of belief that *gives effect* to this categoricity. Pure Kantian moral agents are few and far between (I think I can count them on one hand, and probably have fingers left over!), but those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious.

But not all of them are, of course, and this is where the case of Marxists and other similar “believers” become relevant. Here, though, we need to attend to the second purportedly distinctive feature of religious belief, namely, its insulation from evidence and reasons. Whatever the historical and philosophical verdict on the evidence and reasons supporting Marxism, one very clear difference is that Marxism took itself to be answering to—not insulated from—standards of evidence and reasons in the sciences, in a way that religion has not.<sup>42</sup> Marx, as is well-known, conceived of his theory as a “scientific” account of historical change, and thus it had to answer to the same standards of evidence and justification as any other scientific theory. (That is why it has been possible to refute historical materialism by counter-example.<sup>43</sup>) Nothing similar, of course, is true of any of the major religious traditions: all countenance at least some central beliefs which are not ultimately answerable to evidence and reasons as these are understood elsewhere (e.g., in common sense, and in science). This is why Professor Macklem was correct to emphasize that the distinctively religious state of mind is that of *faith*, that is, believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it.

Even here, of course, we need to be careful. There are, for example, “intellectualist” traditions in religious thought—Paley’s “natural theology” or neo-Thomist arguments come to mind—according to which religious beliefs (for example, belief in a Creator or, as in America recently, belief in “an Intelligent De-

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42. I think this is true notwithstanding the unhappy strand of Marxist thought that took seriously the Hegelian idea that “dialectical reason” was a special kind of reason, as opposed to a metaphysical dogma. For even the idea of “dialectical reason” took seriously the idea of evidence and rational justification, and, in fact, Hegel’s entire philosophical career was an exercise in providing evidence for the purportedly dialectical structure of ideological, and thus historical, evolution. That the Hegelian influence on Marxism produced a *false* picture of evidence and reasons does not alter the fact that Marxism took itself to have an obligation to answer to standards of rational justification.

43. See, e.g., Joshua Cohen, Book Note, 79 J. PHIL. 253, 266–68 (1982) (reviewing G.A. COHEN, *KARL MARX’S THEORY OF HISTORY: A DEFENCE* (1978)).

signer”) are, in fact, supported by the kinds of evidence adduced in the sciences, once that evidence is rightly interpreted. It is doubtful whether these intellectualist traditions capture the character of popular religious belief, but even if they did, there remain important senses in which they are still “*insulated from evidence*.” First, of course, it is dubious (to the put matter gently) that these positions are really serious about following the evidence where it leads, as opposed to manipulating it to fit preordained ends. Second, and relatedly, in the case of the sciences, beliefs based on evidence are also *revisable* in light of the evidence; but in the intellectualist traditions in religious thought just noted, there is no suggestion that the fundamental beliefs will be revisable in light of new evidence. Religious beliefs are *purportedly* supported by evidence, but they are still insulated from revision *in light of evidence*.<sup>44</sup>

Yet there is a different kind of case—pertaining not to the *under-inclusiveness* of the characterization but rather its *over-inclusiveness*—that might raise doubts about whether *categoricity of commands* and *insulation from evidence* are distinctive features of religious belief and practice. Think, for example, of the Maoist personality cult that gripped China during the “cultural revolution” in the 1960s.<sup>45</sup> Here masses of individuals acted on commands from Chairman Mao which they took to be, in effect, “categorical,” and which they carried out without regard to evidence, including evidence of the substantial harms inflicted on individuals and, ultimately, society as a whole (though arguably evidence of these latter harms was less apparent at the time). Does this make the Maoist personality cult a religion? Perhaps we should so describe it, yet this seems to run roughshod over distinctions it seems worth drawing. Pre-theoretically, after all, we might think totalitarian personality cults are distinct from religions, even if in some historical and cultural contexts their nature and effects are the same. But what marks the difference, given that it is not the *categorical* character of their commands or the *insulation* of their core beliefs from evidence? One plausible idea is that religious beliefs not only involve *categorical commands* and *insulation from evidence*, but also:

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44. It might be said (as Kenneth Himma pointed out to me) that religious beliefs are “in principle” revisable: if God thundered from the sky that Heaven and Hell do not exist, it might be supposed that this would, in fact, change the minds of some number of religious believers. But “in principle” responsiveness to a kind of evidence that is never in the offing seems indistinguishable in practice from insulation from evidence, *simpliciter*.

45. See, e.g., TAI SUNG AN, MAO TSE-TUNG'S CULTURAL REVOLUTION (1972).

- (3) Religious beliefs involve, explicitly or implicitly, a *metaphysics of ultimate reality*.

But what is it to endorse a “metaphysics of ultimate reality”? A *metaphysics* of an ultimate reality seems to be distinguished, in part, by the relationship in which it stands to the *empirical evidence of the sciences*: namely, that such a view about the “essence” or “ultimate nature” of things *neither claims support from empirical evidence*, nor purports to be constrained by *empirical evidence* (its claims “transcend” the empirical evidence, hence its “metaphysical” character). In this regard, though, (3) seems to be only a variation on the idea that religious belief is *insulated* from evidence—“insulated” *not only* in the sense that it does not answer to empirical evidence, but also in the sense that it does not even *aspire* to answer to such evidence.

The latter point may capture the *metaphysical* character of the beliefs, but it is still silent on the sense in which they concern *ultimate reality*. “Ultimate” in this context has less to do, I think, with metaphysical gradations of what is *essential* (whatever that would mean) than it does with questions of *value*: the “ultimate” reality is the aspect of reality that is most important for valuable/worthwhile/desirable human lives, whether that concerns the transcendent well-being of the “soul,” or the moral value of life in this, the material world. The *categoricity of commands* distinctive of religious beliefs are, in turn, related to this *metaphysics of ultimate reality* in the sense that they specify what *must* be done in order for believers to stand in the right kinds of relations to “ultimate reality,” i.e., to the reality that makes their lives worthwhile and meaningful.<sup>46</sup>

Will the addition of a third distinctive characteristic of religious belief rule out personality cults of the Maoist variety? There is some reason to think so. First, the Maoist-style personality cults may ordinarily be *de facto* insulated from evidence, but they are less often *de jure* insulated: that is, they *purport* to answer to facts and evidence, in a way that “metaphysical” claims about “ultimate” reality do not even purport to do so.<sup>47</sup> Second, the personality cults, focused as they are on the *personality* of the leader, have an only indirect connection to the nature

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46. In this sense, the as-if categorical reasons may really be instrumental ones. See discussion *supra* note 37.

47. So, e.g., Mao thought forcing educated professionals to labor in the fields was an instrumentally rational approach to promoting the egalitarian values on which the communist revolution was based.

of ultimate reality, one contingent on the extent to which the “leader” is interested in those kinds of questions. To the extent a personality cult is *de jure* insulated from evidence and the “dear leader’s” commands are directly related to his view of ultimate reality, then to that extent we may need to revise the pretheoretical intuition (if we share it) that personality cults are different from religious beliefs.

Although a *metaphysics of ultimate reality* may be the *third* essential feature that distinguishes religious belief from the beliefs held by participants in personality cults, for purposes of the question of whether there is a principled reason for toleration of religion *qua* religion, only the first two features, I will argue, matter. This is because the second feature, *insulation from evidence* (especially *de jure* insulation from evidence), already captures what is significant: namely, the *metaphysical* character of religious beliefs about “ultimate reality.” By contrast, so many different systems of belief involve views about “ultimate reality”—and such views almost all qualify for toleration under the rubric of “conscience” (subject, of course, to the usual side-constraints)—that the fact that religious beliefs *also* involve such views won’t generate any special reason for toleration that does not attach in virtue of the first two distinctive features of religious belief.

This leaves us, then, with a final possible (and perhaps the most worrisome) case of over-inclusiveness in the proposed account of “religion,” namely morality itself. For is not morality characterized both by categoricity of its commands and its insulation from reasons and evidence (as reasons and evidence are understood, e.g., in the sciences)? Now as noted earlier, categoricity is not necessarily a feature of morality, though it is, to be sure, central on many theoretical understandings; and religion, as we also observed earlier, may make categoricity socially effective in a way that it would not otherwise be. But what of “insulation from reasons and evidence”? What we say about morality on this score will depend on what we take to be the relevant metaphysics and semantics of morality. For cognitivist realists like Richard Boyd and Peter Railton,<sup>48</sup> for example, moral judgments are not insulated from reasons and evidence as they are understood in the sciences—indeed, just the opposite.<sup>49</sup> So on

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48. See, e.g., Richard Boyd, *How to Be a Moral Realist*, in *ESSAYS ON MORAL REALISM* 181 (G. Sayre-McCord ed., 1988); PETER RAILTON, *FACTS, VALUES, AND NORMS* (2003).

49. If one takes views like John McDowell’s to be instances of cognitivist realism,

this view, morality is not at all like religion: it answers to reasons and evidence—and answers successfully! Non-cognitivist anti-realists, by contrast, conceive of moral judgments not as expressing beliefs (which might be true or false) but rather as expressing mental states that are not truth-apt, i.e., are by their nature *insulated* from reasons and evidence.<sup>50</sup> Religious judgments are still different, on this account, since some religious judgments do express beliefs and so, *in principle*, could be answerable to reasons and evidence, but are held to be insulated from them. So on either of the main contenders for a credible metaphysics and semantics of morality, morality is still different from religion.

If, then, the *categoricity of its commands* and its *insulation from evidence* (not just *de facto*, but also *de jure*) are the distinctive features of religious belief—not, to be clear, the features that make religious beliefs important and meaningful to people, but rather the features that distinguish religious beliefs from other equally important and meaningful beliefs—do the principled reasons for tolerance reviewed earlier warrant singling religion out for protection?<sup>51</sup> It is to this question that we now turn.

#### IV. WHY TOLERATE RELIGION?

We considered, earlier, three categories of principled arguments for toleration: two kinds of moral arguments, one deontological (illustrated by Rawls), and one utilitarian; and an epis-

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then the issue is trickier; but I do not think views like McDowell's are viable accounts of the objectivity of morality, for reasons discussed in Brian Leiter, *Objectivity, Morality, and Adjudication* (2001), reprinted in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 225 (2007). I shall, in any case, bracket them here.

50. Moral judgments, to be sure, may still be *influenced* by evidence, insofar as the attitudes expressed presuppose factual claims that answer to evidence.

51. In the American constitutional literature, another proposal has recently attracted attention, though it suffers, in my view, from an even more extreme problem of *over-inclusiveness* than the proposal considered in the text. On this view—defended, most prominently, in Christopher Eisgruber & Lawrence Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994), and in CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 1 (2007)—religious belief demands special protection because it is supposed to be especially vulnerable to discriminatory treatment. But *special vulnerability to discriminatory treatment* can hardly mark out “religious belief” as a category of human belief (and concomitant practices) warranting special protections. Race and physical disability, to take two obvious cases, make individuals vulnerable to discriminatory treatment, probably more often than religious belief and practice; but even if we confine our attention to *beliefs*, there is ample evidence, in terms of legal sanctions and state persecution, that believing in abolitionism, or anarchism, or Communism at various points in American history made one at least as vulnerable to discrimination as believing in a particular religion.

temic argument, exemplified by Mill. If I am right about the features that distinguish religious belief, is there any reason to think that principled toleration demands tolerance of those beliefs *in particular*?

I am going to bracket here the Rawlsian moral argument for toleration, because I can not see how persons in Rawls's original position, operating behind the "veil of ignorance," could reason, in particular, about the value of insulation from evidence and the categoricity of demands. To be sure, Rawls allows that those in the original position do know that they will recognize categorical demands, though they do not, of course, know what those will be. As Rawls writes: "An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests."<sup>52</sup> But this grounds, in Rawls's view, the argument for the general principle of equal liberty of conscience—individuals in the original position "cannot take chances with their liberty"<sup>53</sup> as he says—not anything specific to religion. Indeed, Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith.<sup>54</sup> If that is right, then the Rawlsian perspective can not help us evaluate the principled case for toleration of religion *qua* religion.

It may also seem that we can dispense with the *epistemic* arguments for toleration equally quickly. There is no reason to think, after all, that tolerating the expression of beliefs that are *insulated* from evidence and reasons—that is, insulated from *epistemically relevant* considerations—will promote knowledge of the truth. Bear in mind, though, that Mill is not concerned only with *knowing* the truth, but believing what is true for the right kinds of reasons. Perhaps exposure to opinions that are insulated from reasons and evidence is, itself, a spur to better rea-

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52. RAWLS, JUSTICE, *supra* note 11, at 207.

53. *Id.*

54. There is a puzzle, tangential to my concerns here, suggested though by Rawls's discussion. Individuals in the original position choose equal liberty of conscience because they can't "gamble." *id.* at 207, on the prospect that their own categorical religious commands will be disfavored in the society in which they find themselves. Yet insofar as they endorse equal liberty of conscience, they do have to gamble that their categorical religious commands will not be fundamentally illiberal ones, i.e., ones that demand the extermination of heresy and the like.

sons for believing what we ought to believe? That is certainly possible, but it is hard to see why it is likely to be the case.

Yet this dismissal of the epistemic argument is too quick.<sup>55</sup> For only if we already suppose that the only epistemically relevant considerations are those having to do with evidence and reasons as understood in both common-sense and the sciences would we be entitled to conclude that beliefs insulated from these kinds of considerations do not contribute to knowledge of the truth. Indeed, it might seem to be precisely in the spirit of Millian epistemic libertarianism to think that alternative epistemic methods (or methods that *purport* to have epistemic pay-offs) be permitted in the interests of discovering new truths.

We must be cautious here, however, about the proper extension of the Millian view. For even Mill, recall, believed that there was no epistemic reason for the “free market” of ideas and arguments in the case of mathematics (geometry in particular): “there is nothing at all to be said on the wrong side of the question [in the case of geometry]. The peculiarity of the evidence of mathematical truths is that all the argument is on one side.”<sup>56</sup> This is all the more striking in light of the fact that Mill is a radical empiricist, and so denies that there is any *a priori* knowledge: even logical and mathematical truths are *a posteriori*, vindicated by inductive generalizations based on past experience. On the Millian view, then, there simply would not be any epistemic case for making room for, e.g., “mathematics based on faith,” on the grounds that new truths might be uncovered.

Might we not generalize the point? Because religious belief is insulated from the standards of evidence and reasons that have been vindicated *a posteriori* since the scientific revolution, one might think that, as with mathematics, there is a Millian reason to think that any wholesale departure from these epistemic standards is tantamount to a wholesale abandonment of epistemically relevant considerations, as my original formulation of the “quick” response proposed originally.<sup>57</sup> Religious belief, on this

55. I am grateful to Adam Samaha for pressing this point.

56. MILL, *supra* note 6, at 34–35.

57. I take it Quine adopts a similar posture in W.V. QUINE, PURSUIT OF TRUTH (1990) when he says that, “Even telepathy and clairvoyance are scientific options, however moribund. It would take some extraordinary evidence to enliven them, but, if that were to happen, then empiricism itself . . . would go by the board. For remember that that norm . . . are integral to science, and science is fallible and corrigible.” *Id.* at 20–21. But, he then immediately adds, “it is idle to bulwark definitions [e.g., of science] against implausible contingencies,” such as evidence reviving telepathy as a scientific option. *Id.* at 21.

account, really is marked by its insulation from the *only* epistemically relevant considerations, the latter point (so it is claimed) vindicated *a posteriori* as in the case of mathematics. The claim about *a posteriori* vindication of certain epistemic standards is, itself, a controversial one, and much will ultimately turn on the details of what we take the historical record to show. So perhaps there is a weaker, but still pertinent, response to the challenge to what is supposed to count as epistemically relevant considerations for purposes of the Millian epistemic argument for toleration. For even if we allow that there is an epistemic reason to tolerate purportedly epistemically relevant considerations different than those that figure in common-sense and the sciences, there will now be nothing in this argument that singles out religious “faith” for special solicitude, since it is only one of a multiplicity of non-standard methods that purportedly provide access to truths (consider telepathy, talking with the dead, clairvoyance, etc.). So even if there is a viable epistemic argument for toleration of beliefs insulated from the familiar standards of evidence and reasons, that argument does not help single out religious belief for special protection.

Of course, on the Millian view, there is a second kind of epistemic goal at issue—namely, knowing how one *ought* to live—a kind of knowledge requiring “experiments in [different kinds of] living.” Perhaps, then, a different epistemic argument for tolerance of *religious* beliefs in particular is that living in accord with categorical demands that are unhinged from reasons and evidence is one of the “experiments” we ought to encourage through a regime of toleration?<sup>58</sup>

Toleration, however, operates under side-constraints, as we noted earlier. Being a genocidal white supremacist, after all, is an “experiment in living,” but the Millian (or even the Rawlsian) argument from toleration does not suppose that we ought to tolerate that experiment given the harm it can be reasonably expected to cause. And that brings us to the absolute crux of the issue as to whether there is a *special* reason to tolerate religion *qua* religion. *If* what distinguishes religious beliefs from other

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58. Many, perhaps most, religious believers in the industrialized nations these days embrace only a “softer” version of these kinds of beliefs: unhinged from evidence, yes, but much more rarely categorical in their commands. If there are reasons for tolerating these “experiments in living”—as there presumably are—it seems unlikely they are going to be *peculiar* to this “softer” form of religious belief and practice, which is harder to distinguish from other exercises of conscience that figure in people’s lives. The focus in the text is on the *core, distinctive* case of religious belief.



important and meaningful beliefs held by individuals is that religious beliefs are *both* insulated from evidence *and* issue in categorical demands on action, then isn't there reason to worry that religious belief, as against other matters of conscience, are *far more likely* to cause harms and infringe on liberty?

Now such a demeaning conclusion about religious belief would certainly be congenial to many non-believers, but I wonder whether it is warranted. It is true that the combination of *categorical demands on action* and *indifference to evidence* seems a frightening one, as it can often be, but is there any reason to think that attention to evidence precludes embrace of abhorrent categorical demands? Or, to put the point differently: why think the *evidence* would thwart grossly unjust categorical demands?

This raises vexed philosophical questions—for example, does knowledge of the *facts* require certain moral responses, such that people sensitive to the evidence would not be capable of the atrocities so commonly perpetrated by religious zealots?—but we may bracket those here. For from the standpoint of a principled argument for toleration, the question is slightly different. The question is *not* whether toleration of *categorical demands on action* conjoined with *indifference to evidence* stands in the requisite causal nexus with harm or infringements of liberty such that we would be justified in *not* tolerating those kinds of beliefs. Rather, the question is whether there is any *special* reason to tolerate beliefs whose distinctive character is defined by the *categoricity of its demands* conjoined with its *insulation from evidence*? That is, we are still looking for a principled argument for tolerating religion *qua* religion; only if we found such an argument, would we then have to address the question about the *limits* of that principle of toleration by reference to side-constraints. If it is true that beliefs that support *categorical demands* which are *insulated from evidence* have a special potential for harms to well-being, then that would be reason to doubt whether any utilitarian argument for tolerating religion *qua* religion will succeed.

The worry, baldly stated then, comes to this: there may be compelling principled reasons for the state to respect liberty of conscience, but there is no apparent moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action. Singling out religion for toleration is tantamount to

thinking we ought to encourage precisely this conjunction of categorical fervor based on epistemic indifference. And it is hard to see what utilitarian rationale there could be for that.<sup>59</sup>

Where does that conclusion leave us, then? First, it suggests that there is no principled reason for legal or constitutional regimes to *single out* religion for protection; there is no moral or epistemic consideration that favors special legal solicitude towards beliefs that conjoin *categorical commands* with *insulation from evidence*. Second, the general principled arguments for toleration noted earlier, both the broadly Rawlsian and Millian ones, do justify legal protection for liberty of conscience, which would necessarily *encompass* toleration of religious beliefs. Third, and perhaps most controversially, the general reasons for being skeptical that there are special reasons to tolerate religion *qua* religion (because of the special potential for harm that attaches to the conjunction of *categorical demands* based on beliefs *insulated from evidence*) suggest that we must be especially alert to the *limits* of religious toleration imposed by the side-constraints.

How these theoretical conclusions about principled toleration should play out in the practical realm of legal regulation is a

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59. It may be useful to consider the recent Canadian kirpan-in-the-schools case (*Multani*, [2006] 1 S.C.R. 256, 2006 SCC 6) in light of these points. Although the Canadian Supreme Court allowed that the kirpan “undeniably has characteristics of a bladed weapon capable of wounding or killing a person” *id.* at para. 37; that many Sikhs “wear a plastic or wooden kirpan” *id.* at para. 39, which does not present these risks; and that carrying kirpans is, properly, prohibited in courts and on airplanes, *id.* at paras. 62–64, the Court nonetheless held that the student in question could carry the most dangerous kind of kirpan as long as “his personal and subjective belief in the religious significance of the kirpan is sincere” *id.* at para. 37, including his “sincere” belief that wearing a plastic or wooden kirpan will not suffice—since adherents of a religion “may adhere to the dogma and practices of that religion to varying degrees of rigour” *id.* at para. 39, apparently free from scrutiny by the state.

The extent to which the state must defer to the “dogma” of a “sincere” believer—whose beliefs issue in categorical commands unhinged from evidence (hence their dogmatic character)—is perhaps most apparent in the Court’s peculiar discussion of why the school setting is different than courtrooms and airplanes. Although there are obvious differences between these environments, the Court laid most emphasis on its romantic view of schools as places where “both teachers and students are partners” rather than adversaries, such that it is “possible to better control the different types of situations that arise in schools.” *Id.* at para. 65 (citing *Pandori v. Peel Bd. of Education* (1990), 12 C.H.R.R. D/364 at para. 197). Quite remarkably, no mention is made of the pertinent differences that might count in favor of *stricter* restrictions in schools, such as: the absence of armed guards in many schools all of the time, and in all schools in at least some places some of the time; the literal immaturity and concomitant problems with impulse control characteristic of school populations; as well as the antagonistic relationships among students, and between teachers and students, that surely exist as often as the romantic “partnerships” the Court envisions.

complicated question that I plan to address in a separate paper.<sup>60</sup> In the latter context, we will have to remain especially alert to non-principled considerations, such as Schauer's worry about "governmental incompetence," which may seem particularly acute in this context, as they are in the context of free speech. There may, indeed, be no moral or epistemic reason why the state should give special consideration to private beliefs which issue in *categorical demands* that are unhinged from reasons and evidence. But as a practical matter, what reason is there to think that government will correctly identify that class of beliefs? Sectarian bias and prejudice are surely likely to co-opt principled arguments for unprincipled ends.<sup>61</sup> It may turn out there is no principled reason to tolerate religion *qua* religion, but there may still be compelling practical reasons to think the alternatives are worse.

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60. It will be particularly important to distinguish questions about the *accommodation* of religious practices (for example, by exempting religious practitioners from generally applicable laws) from questions about the *establishment* (or state endorsement) of religion. Accommodation arguments may find their grounding in very different considerations than those adduced here pertaining to religious *toleration*. So, e.g., Martha Nussbaum argues, plausibly enough, that "equal respect" considerations are likely to demand substantial religious accommodation, given the ease with which "neutrality" considerations will favor the *de facto* dominant religious culture. See generally MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE* (2008).

61. That fact might be thought to lend support to the Eisgruber and Sager argument discussed earlier (*supra* note 51). But the question there was whether *vulnerability to discrimination* was adequate to mark out religion as deserving *special* legal protection, and the answer to that question is unaffected by the fact that religion, like so many other kinds of human beliefs and practices, may be susceptible to discrimination: what matters for the point in the text is that religion is vulnerable to discrimination, *not* that it is *especially* or *uniquely* so vulnerable.