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# Theses on Secularism

NOMI MAYA STOLZENBERG\*

(1) Notwithstanding the notorious difficulty of defining religion<sup>1</sup> and the consequent effort on the part of jurists and academics to avoid embracing any particular definition, one model of religion has dominated modern discourse: religion as conscience.<sup>2</sup> Because of the

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1. The classic cases pointing out the difficulty of defining religion in American law are as follows: *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Mozert v. Board of Education*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Board of School Commissioners*, 827 F.2d 684 (11th Cir. 1987); *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1982); and *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). Literature on the definitional challenge includes the following: FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995); I KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 128 (2006); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 826–29 (1978); Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 329 (1996); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791 (1997); and Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

2. For evidence of the ubiquity of the assumption that religion is essentially or centrally a matter of conscience, see, for example, MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 61 (1986) (developing an interpretive theory of the religion clauses based on “[t]he focal significance that Jefferson and Madison give to the right to conscience”); JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 41 (2d ed. 2005) (“Liberty of conscience was the general solvent used in the early American experiment in religious liberty.”); and sources cited in Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 967 n.28 (2010). On the centrality of conscience to the Lockean conception of religion, see Ronald Beiner, *Three Versions of the Politics of Conscience: Hobbes, Spinoza, Locke*, 47 SAN DIEGO L. REV. 1107, 1120–24 (2010).

dominance of this model, alternative views—which either subordinate the conscience to other supposedly more fundamental features of religion or dispense with the psychological apparatus of conscience altogether—have been largely submerged in modern political and legal discourse. Yet they will not remain suppressed. As a number of the conference papers here attest,<sup>3</sup> alternatives and challenges to the dominant model have been surfacing with increasing regularity and insistence, particularly in the last decade, in part because the logic of the model seems to have exhausted or deconstructed itself, or driven itself

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For the clearest example in this Symposium of a work committed to the assumption that religion, as a matter of definition, is centrally a matter of conscience, see Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935, 944–51 (2010).

3. Michael White and Andrew Koppelman both offer strong arguments against exclusive reliance on the conscience model. See Koppelman, *supra* note 2, at 965–70; Michael J. White, *The First Amendment's Religion Clauses: "Freedom of Conscience" Versus Institutional Accommodation*, 47 SAN DIEGO L. REV. 1075, 1080, 1094–1105 (2010). Although he argues that we *ought* to replace a model of religion rooted in individual conscience with an “institutional privilege” approach, Professor White recognizes that the conscience model has been, and continues to be, dominant. White, *supra*, at 1094. He thus challenges the model’s normative and conceptual dominance but recognizes its dominance in legal thought as an empirical fact. Koppelman disputes the primacy accorded to the conscience model on normative and conceptual grounds *and* challenges the empirical claim that the conscience model dominates American legal thinking about religion. See Koppelman, *supra* note 2, at 965 (“If Leiter is interested in American law, however, conscience is a misleading place to begin. Some special treatment of religion can easily fit under the rubric of conscience; some much less so.”). Although Koppelman is right to call our attention to the instances in which individuals, policymakers, and courts use the term *religion* in a way that is not reducible to conscience, and is further correct that these usages demonstrate that our legal and political institutions, and popular culture, are not beholden *exclusively* to the conscience model, I do not think it follows that the conscience model has not been dominant historically. Nor does the fact that alternative models of religion have had some influence on American legal thought contradict the fact that the conscience model continues to occupy a privileged place in American law, oftentimes, although not always, resulting in the denial of claims rooted in alternative models of religion. To say that the conscience model is or has been dominant is not to say that it has gone unchallenged. Professor Koppelman and I share the view that the conscience model represents “a radically impoverished conception of what religion is and what religion does,” *id.* at 962, and we further share the view that alternative conceptions of religion, ones that contest the centrality of conscience to the definition of religion, occupy an important place in the phenomenology and sociology of religious experience. We further agree that such alternative models have always afforded a conceptual standpoint from which to contest the conscience-based model. Finally, we also share the view that alternatives to the conscience-based model have been gaining ground. There is thus much that we agree upon with regard to the inadequacy of the conscience model embraced by other writers. Where we part company is with regard to Koppelman’s argument that evidence of the acceptance of alternative views shows that the conscience model is no longer, or never was, dominant in American legal thought.

into a corner,<sup>4</sup> but also because theoretical rivals to the conception of religion as conscience have always existed, have never disappeared, and have never stopped pressing their claims.<sup>5</sup> Because the conscience model has seemingly run itself into the ground, leaving constitutional discourse about religion at an impasse, it seems that we might finally be ready to *see* the conceptual alternatives and consider their implications for policies concerning religious accommodation, freedom, and the relationship between religion and the state.

(2) The contours of the theoretical alternatives to thinking of religion as conscience remain fuzzy, but they can be sharpened if we break down the component features of the dominant model with more precision. What the conscience model leaves out is, of course, directly, inversely related to what it rules in, so a precise inventory of what is ruled into the model can help us to get a handle on the conceptual alternatives. That inventory begins, and ends, with the psychological faculty of human cognition.

While there are various ways of conceiving what “conscience” is, for example, Thomist versus Protestant versus secular conceptions,<sup>6</sup> and varying views about whether conscience is a strictly “religious” faculty or whether it encompasses nonreligious beliefs as well,<sup>7</sup> what all conceptions that picture religion as conscience have in common is the fundamental assumption that religion is a species of *belief*.<sup>8</sup> More precisely, conscience is viewed as a “faculty” of the human psyche,

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4. For analyses of the contemporary doctrinal predicament and impasse, see Koppelman, *supra* note 2, at 960–70; White, *supra* note 3, at 1080, 1083, 1092.

5. *Accord* Koppelman, *supra* note 2, at 963–67; *see also* Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

6. On Protestant and Thomist conceptions, *see* White, *supra* note 3, at 1077–80, 1094–96.

7. On the debate over whether religion is “special” or no different from other beliefs for purposes of constitutional treatment, *see*, for example, STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 909–16 (2010); Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 585, 591; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 735 (2003); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 12–14 (2000); Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 1011–13 (2010); White, *supra* note 3, at 1083. *See also* NUSSBAUM, *supra* note 2, at 19–20, 102; Beiner, *supra* note 2, at 1109; Leiter, *supra* note 2, at 944–45, 950–51.

8. *Accord* Koppelman, *supra* note 2, at 970–73.

through which an individual's beliefs or judgments—about moral or metaphysical truth or ultimate questions of meaning—are formed, discerned, or held.

To think of religion as a matter of holding beliefs is to place religion on the plane of human knowledge and thus to link it to age-old debates about the psychology of cognition and the philosophy of knowledge—debates about the nature of truth and the objectivity of truth claims. The concept of conscience both responds to and finesses these epistemological debates by adopting a “subjectivist” view that treats as religion whatever the individual happens to believe in—qua religion.<sup>9</sup> Because it “brackets the truth claim,” neither affirming nor denying the truth of the beliefs a believer happens to hold, focusing instead on whatever the believer believes to be religious dogma, truth, or religion tout court,<sup>10</sup> this subjectivist perspective is consistent with both philosophical realism and constructivist views of human knowledge and truth claims. Likewise, it is perfectly compatible with modern-day materialist views of religion that regard particular religious belief systems as cultural constructions and religion in general as an “anthropological projection.”<sup>11</sup> But it is equally at home with faith traditions that are humble about the fallibility of human knowledge and alert to the human capacities for projection and self-deception while still maintaining faith in the possible or actual

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9. See Nomi Maya Stolzenberg, *Jiminy Cricket: A Commentary on Professor Hill's Four Conceptions of Conscience*, in *INTEGRITY AND CONSCIENCE* 53, 55–57 (Ian Shapiro & Robert Adams eds., 1998) [hereinafter Stolzenberg, *Jiminy Cricket: A Commentary*]. On subjectivism, see also Nomi Maya Stolzenberg, “*He Drew a Circle that Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 *HARV. L. REV.* 582, 626–34, 640–41 (1993) [hereinafter Stolzenberg, *He Drew a Circle*]. Cf. Beiner, *supra* note 2, at 1108 (quoting Letter from Rousseau to Voltaire (Aug. 18, 1756), in 3 *THE COLLECTED WRITINGS OF ROUSSEAU* 108, 119 (Roger D. Masters & Christopher Kelly eds., Judith R. Bush et al. trans., 1992)) (describing Hobbes's, Spinoza's, and Locke's views of religion as an inner judgment of mind “where demonstration has no place”).

10. See Stolzenberg, *He Drew a Circle*, *supra* note 9, at 626 (quoting Vincent P. Branick, *The Attractiveness of Fundamentalism*, in *FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE?* 21, 23–24 (Marla J. Selvidge ed., 1984)).

11. For classic expressions of the materialist/anthropological view, see, for example, PASCAL BOYER, *RELIGION EXPLAINED: THE EVOLUTIONARY ORIGINS OF RELIGIOUS THOUGHT* 32 (2001); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 22 (Joseph Ward Swain trans., 1915); LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* at xl (George Eliot trans., 1957); SIGMUND FREUD, *MOSES AND MONOTHEISM* 133–34 (Katherine Jones ed., 1951) (1932); SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 18 (James Strachey ed. & trans., 1961) (1928); CLIFFORD GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87 (1973). For an early adumbration of the anthropological view, see BARUCH SPINOZA, *THEOLOGICAL-POLITICAL TREATISE* at xxxv–xxxvi, 36–48 (Samuel Shirley trans., 1991) (1925).

existence of a divine truth, being(s), or realm.<sup>12</sup> Because it is “nondenominational,” it is easy to think that this cognitive-subjectivist approach to religion is truly “ecumenical” and avoids the sectarianism that infects more specific definitions of religion found within particular faith traditions. Indeed, because of its ecumenical aspirations, combined with its actual dominance, it can be hard to see that it is dominant and that there are rival views, which (a) contradict the stated aspiration for a suitably neutral, unbiased way of identifying religion and (b) generate different views about the policies regarding religious freedom, accommodation, and the separation of religion and state. But, regardless of whether religion is deemed to be “special,” or no different from nonreligious beliefs,<sup>13</sup> determining which belief systems are eligible for accommodation, support, or freedom from regulation requires making *some* assumptions about what religion is, or of what it is a species. And amongst the most fundamental of such assumptions is the view that religion is a species of individual belief.

The idea that religion is creed—in essence, a set of cognitive propositions that individual adherents of faith more or less consciously hold—is so deeply embedded in our legal culture that it can be hard to see it as a particular, debatable view of what religion is. But there have always been other ways of understanding religion that do not define it wholly or primarily in terms of its members’ cognitive beliefs. What follows is an effort to get a better grasp of these noncreedal, noncognitivist views and to see how these alternative models of religion are excluded or distorted by the cognitive model of religion as conscience, if only to better appreciate what the consequences of that exclusion and distortion are.<sup>14</sup>

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12. See, e.g., Ronald R. Garet, *To Secure the Blessings* (USC Law Legal Studies Research Paper No. 10-11, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1645526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645526).

13. See *supra* note 7.

14. To attend to these exclusionary and distorting effects is not to deny the utility of the conscience model in certain—indeed many—contexts. The idea of religion as conscience captures an important aspect of religious experience, the centrality of which in modern religious life, and earlier chapters of religious history as well, cannot be denied. The point here is not that the conscience model fails to capture this important aspect of religious life or that the conscience model should never be followed, but rather that it is not the *exclusive* reality of religious experience and, therefore, failing to recognize other ways of conceptualizing religion, and other forms of religious experience, is problematic.

(3) The most obvious feature of the cognitive conception of religion is its inward nature, the fact that it resides within the recesses of the individual human mind. The preeminence of this feature is reflected in contemporary debates over whether religion is special and to be treated differently from nonreligious beliefs. The widely shared assumption, held by people on both sides of the specialness debate, is that the larger category into which religion is, or is not, to be subsumed, is that of *belief*—perhaps narrowed to *moral* belief but belief nonetheless.<sup>15</sup> More than that, the assumption is that the beliefs we are talking about when we talk about religion are beliefs held by the individual, beliefs that dwell within the individual mind.

This picture of religion as an essentially psychological, subjective, and inward affair, an affair of the cognitive mind, is connected to not just one but three dichotomies, each of which plays an important role in structuring the idea of religion as conscience. Students of religious conscience have long been aware of the relevance to their topic of two of these dichotomies: first, that between the realm of inner human experience and the realm of outward human experience and behavior, a dichotomy commonly if somewhat misleadingly referred to as the belief-practice or belief-conduct distinction; second, that between subjective psychological perceptions and objective transcendental reality.<sup>16</sup> The inward realm of the psyche can be contrasted both with an outer realm of earthly human behavior and with a transcendental realm of supra-human being or law, and both of these distinctions are implicit in the dominant, psychological model of religion.

There is also a third dichotomy that plays an important role in structuring our understanding of what the conscience is—the dichotomy between rationalist and nonrationalist conceptions of human psychology. Rationalist conceptions of psychology are ones that single out the psychological faculty of *reason* as the faculty that forms judgments and beliefs. Rationalist conceptions of the human psyche diverge from rival psychological views that see the process of belief formation as driven not by reason, or not by reason alone, but rather, by the nonrational aspects or “faculties” of the human psyche. Depending on the era and

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15. For examples of writers who argue against the specialness of religion while subscribing to the model of religion as a realm of belief, see, for example, Leiter, *supra* note 2, at 944–45, 950–51; Perry, *supra* note 7, at 996, 1011–12. For an example of writers on the prospecialness side of the debate, who subscribe to the same model, see, for example, Greenawalt, *supra* note 7, at 909–17.

16. On the belief-conduct distinction, see, for example, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

the particular theory, these nonrational faculties have been variously conceptualized as emotions, the passions, the appetites, animal instincts, or drives. In the more modern scientific idiom of cognitive psychology, they are the “affective” rather than cognitive sides of the human psyche.<sup>17</sup> In a more traditional religious idiom, they are either vices, such as lust, greed, or gluttony, or virtuous expressions of “the spirit.”

This dichotomy between rationalist and romanticist conceptions of the human psyche, familiar from debates over the Enlightenment,<sup>18</sup> plays an important role in our conception of religion as conscience. But the precise nature of that role is elusive. The dominant model of religion is perfectly aligned with neither the rationalist nor romantic side of the rationalist/romanticist dichotomy. Instead, ambivalence regarding this dichotomy is built into the very concept of “belief”—belief in general and religious belief in particular. From one point of view, beliefs are regarded as a product of the exercise of human reason; from another point of view, beliefs are seen as the very antithesis of reason—as when

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17. In the field of cognitive psychology, the idea that the affective parts of the human psyche predominate over the strictly rational intellectual faculties in the production of beliefs has produced the idea of “bounded rationality,” an idea that has been picked up with gusto in the emergent field of behavioral economics. For the classic works on bounded rationality, see generally HERBERT SIMON, *ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION* (Massimo Egidi & Robin Marris eds., 1992); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCI. (n.s.)* 453 (1981). See also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325, 1326–28 (1990); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 *VAND. L. REV.* 1499, 1503 (1998); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 *U. CHI. L. REV.* 511 (2004); see generally Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 *VAND. L. REV.* 1495 (1998). For a discussion of the impact of this model of cognitive psychology on law in the larger context of the contest between rationalist and nonrationalist pictures of human cognition and psychology, see Anne C. Dailey, *Striving for Rationality: Reviewing Open Minded: Working Out the Logic of the Soul*, 86 *VA. L. REV.* 349, 383 nn.124–25 (2000).

18. On the influence of romanticism and the significance of the debate between rationalism and romanticism for law, see Dailey, *supra* note 17, at 380–89. See also Nomi Maya Stolzenberg, *Liberalism in a Romantic State*, 5 *LAW, CULTURE & HUMAN.* 194, 195–201, 204–05, 214–15 (2009) [hereinafter Stolzenberg, *Romantic State*]; Nomi Maya Stolzenberg, *Liberalism in Love*, 28 *QUINNIPIAC L. REV.* 593 (2010) [hereinafter Stolzenberg, *Love*]. On the intertwining of religion and romanticism, see SUZANNE R. KIRSCHNER, *THE RELIGIOUS AND ROMANTIC ORIGINS OF PSYCHOANALYSIS* 150–57 (1996).



religious belief is depicted as “blind” or described as being insulated from ordinary standards of evidence.<sup>19</sup>

That ambivalence bespeaks the importance of the unresolved tension between rationalist and romanticist understandings of the nature of belief to the way we conceptualize religion and the religious conscience. The ambivalence concerning whether beliefs are the products, or the foils, of reason is particularly pronounced in modern-day liberal secular discourse. It is commonplace among those who fashion themselves as secular liberals today to distinguish religious from nonreligious beliefs precisely on the grounds of the former’s ostensible opposition, or resistance, to reason.<sup>20</sup> And this understanding is not wholly without merit; people of faith also distinguish faith from reason and elevate the former over the latter, though for them the irreducibility of faith to reason is not a badge of shame.<sup>21</sup> But the distinction drawn between faith and reason is seriously misleading if it is taken to imply either a lack of affinity between religious beliefs and rationalism, or a perfect affinity between reason and secular or “scientific” beliefs.<sup>22</sup> Even if the core of religion involves a “leap of faith,” religious beliefs are also, like other cognitive beliefs, products of the exercise of the faculty of human reason, and religious thought has often embraced one or another form of rationalism. Contrariwise, the uncritical view of secular science that sees it as the purely rational antithesis of presumptively irrational religious belief has

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19. See Leiter, *supra* note 2, at 944–45. The divergence between conceptions of the conscience that view conscientious beliefs as “all things considered, deliberative judgments of our own reason” and other conceptions that dispute the role of reason in producing the “promptings” of conscience is discussed in Thomas E. Hill Jr., *Four Conceptions of Conscience*, in INTEGRITY AND CONSCIENCE, *supra* note 9, at 13, 28.

20. See SAM HARRIS, LETTER TO A CHRISTIAN NATION 62–79 (2006); CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 63–71 (2007); DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, *reprinted in* THE PORTABLE ATHEIST: ESSENTIAL READINGS FOR THE NONBELIEVER 33–34, 44–45 (Christopher Hitchens ed., 2007); VICTOR J. STENGER, GOD: THE FAILED HYPOTHESIS: HOW SCIENCE SHOWS THAT GOD DOES NOT EXIST 22 (2007); STEVEN WEINBERG, DREAMS OF A FINAL THEORY, *reprinted in* THE PORTABLE ATHEIST: ESSENTIAL READINGS FOR THE NONBELIEVER, *supra*, 374–79.

21. Accord JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE’S POLITICAL THOUGHT 102 (2002) (discussing Locke’s religiously grounded views, including the belief “that there were certain elements of morality which are just not accessible to reason in the ordinary way”).

22. On the historic affinity between religion and rationalism, see Stolzenberg, *Romantic State*, *supra* note 18, at 196, 204–05, 209. See generally Stolzenberg, *Love*, *supra* note 18. On the imperfect affinity between science and a strictly rationalist conception of belief formation, see STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 22–27 (1994); STEPHEN SHAPIN, NEVER PURE 367–69 (2010).

been succeeded by a more sophisticated awareness that *all* beliefs rest on faculties apart from pure reason, including secular and scientific ones. Religion's relationship to reason is thus a good deal more complicated than simplistic distinctions between faith and reason, religion and science, make out. And just as secular science may fail to meet the stringent standards of pure reason, religion may embrace, rather than repudiate, rationalism and reason.

It bears emphasis that rationalism has been a central feature of all of the religious traditions that have influenced modern liberal political thought.<sup>23</sup> All of the religious traditions from which the lineage of Western political thought descends have traditionally embraced a distinctively rationalist conception of human psychology and morality, according to

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23. See generally Nomi Stolzenberg, *The Profanity of Law*, in LAW AND THE SACRED (Austin Sarat et al. eds., 2007) (discussing the influence of rationalism on religious traditions that have influenced modern liberal political thought, in particular Christianity and Judaism) [hereinafter Stolzenberg, *The Profanity of Law*]; see also Stolzenberg, *Romantic State*, *supra* note 18, at 196, 200, 203. Discussions of rationalist traditions of thought within Christianity, the religious tradition that most directly influenced the development of Western political philosophy, are extensive. They tend to begin with the Thomistic synthesis of faith and reason, and include consideration of the rationalist traditions in Judaism and in Islam, the latter of which provided the conduit through which classical philosophy entered into contact with Christian and Jewish thought. See, e.g., HERMANN COHEN, *ETHICS OF MAIMONIDES* (Almut Sh. Bruckstein trans., 2004); MAJID FAKHRY, *A HISTORY OF ISLAMIC PHILOSOPHY* (3d ed. 2004); JULIUS GUTTMANN, *PHILOSOPHIES OF JUDAISM: THE HISTORY OF JEWISH PHILOSOPHY FROM BIBLICAL TIMES TO FRANZ ROSENZWEIG* (David W. Silverman trans., 1964); 1 *HISTORY OF ISLAMIC PHILOSOPHY* (Seyyed Hossein Nasr & Oliver Leaman eds., 1996); MOSES MAIMONIDES, 1 *THE GUIDE OF THE PERPLEXED* (Shlomo Pines trans., 1963). On the rationalist strain in Locke's Christian thinking, see WALDRON, *supra* note 21, at 25 (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 162 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("God makes [man] in his own Image after his own Likeness, makes him an intellectual Creature, and so capable of Dominion.")), and 94–107 (discussing further Locke's rationalist theology). The fact that religious traditions have influenced secular theories of liberalism itself bears emphasis. Indeed, as a matter of intellectual genealogy, the political theory of liberalism derives from traditional theological conceptions of persons and politics—and rationalism. On the derivation of liberalism from religious thought, see WALDRON, *supra* note 21, at 102–05. See also JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE TWO TREATISES OF GOVERNMENT* 262–67 (1969); Nomi M. Stolzenberg & Gideon Yaffe, *Waldron's Locke and Locke's Waldron: A Review of Jeremy Waldron's God, Locke, and Equality*, 49 *INQUIRY* 186, 202, 205 (2006). On the religious roots of modern political thought more generally, see CHARLES TAYLOR, *A SECULAR AGE* 159–61 (2007).

which religious faith is a product of free will and the faculty of reason.<sup>24</sup> Free will, on this traditional conception, is viewed as being governed by, or subject to, human reason.<sup>25</sup> Far from being an invention of the secular Enlightenment, rationalism thus formed the basis of most traditional, premodern views of psychology. On this traditional view, the “lower” faculties of the human psyche—the drives, the passions, the appetites—need to be “governed” by the “higher” faculty of reason, whose task it is to discern the transcendent moral law and to guide human behavior—and belief—accordingly.<sup>26</sup> Such was the *theological* proposition underlying the Protestant doctrine of Christian liberty, according to which faith cannot be forced but has to be the product of a volitional exercise of a person’s own inward reason.<sup>27</sup> Such also was the theological position of the Catholic Church, crystallized in the Thomist synthesis of faith and reason.<sup>28</sup> And such was the view of moral psychology shared by any number of both religious and nonreligious premodern theories concerning the proper relationship between the state and the individual, all of which viewed beliefs as at least in part the product of the volitional exercise of reason—an inward faculty of the mind—which in turn led to a recognition of the need to respect the free exercise of reason as a central problem, if not necessarily a desideratum, of political theory.<sup>29</sup>

The notion of conscience is manifestly connected to this rationalist tradition, as evidenced by the frequent designation of freedom of conscience—whether specifically religious or not—as an “intellectual freedom,” in other words, a freedom of the cognitive mind.<sup>30</sup>

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24. This is not to say that the rationalist view of faith as a product of free will and reason was the *only* view that prevailed within these religious traditions. To be sure there were nonrationalist and antirationalist conceptions of faith and belief formation within these faith traditions as well.

25. See GIDEON YAFFE, *LIBERTY WORTH THE NAME: LOCKE ON FREE AGENCY* 66 (2000).

26. See Stolzenberg, *Romantic State*, *supra* note 18, at 209–10 and sources cited therein.

27. On the Protestant doctrine of Christian liberty, see Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 5, 15 (Michael W. McConnell et al. eds., 2001). Although he does not emphasize their theological foundations, Beiner’s analysis of Hobbes, Spinoza, and Locke similarly highlights the centrality of this view of faith as a product of individual reason in the political thought of each of these three thinkers. See Beiner, *supra* note 2, at 1109; accord WALDRON, *supra* note 21, at 102–03.

28. The literature on the synthesis of faith and reason in the Thomistic tradition is vast.

29. See *supra* note 23 and accompanying text.

30. See, e.g., *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 442 (1950) (Jackson, J., concurring and dissenting) (“Intellectual freedom means the right to re-examine much that has been long taken for granted.”); Ezra Heywood, Commencement Address at

Conceptualizing the conscience as an intellectual or cognitive rather than an affective faculty is related to the choice between thinking of the conscience (or religious belief more generally) as a matter of religious or moral *knowledge*, or rather as species of “blind faith.” Of course, both views have a place in our thinking about religion; the tension between them remains unresolved. The important point here is that the view that religious belief is solely a matter of blind faith, impervious to reason, is itself blind to the long tradition of association between religious faith and rationalism and the view that religious beliefs are at least in part—important part—a product of the exercise of human reason.

The rationalist strand of traditional religious thought is linked to another important feature of the traditional idea of conscience—its connection to the moral law. The task of reason, according to the traditional moral psychology, is, as stated above, to discern the moral law. To be sure, theologians questioned whether reason alone could discern the moral law and most contended that faith was a necessary auxiliary to reason. More precisely—putting aside the more extreme fideist positions, according to which reason was an enemy of faith and faith alone could show “the way”—most traditional religious thinkers contended that reason was a necessary auxiliary to faith.<sup>31</sup> But even when faith was distinguished from and elevated above reason, mainstream theologians, both Catholic and Protestant, commonly held that reason was a necessary, noble, and important faculty of the human psyche, whose special task it was to perceive and follow the moral law. (How widely distributed the faculty of reason is was a separate question.) The two notions of submitting the lower faculties of the human psyche to the governance of human reason, and of exercising one’s reason in order to

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Brown University: Milton: The Advocate of Intellectual Freedom (1856), *cited in* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 32 (1997); Sean Murphy, *Freedom of Conscience and the Needs of the Patient*, PROTECTION OF CONSCIENCE PROJECT, <http://www.consciencelaws.org/issues-ethical/ethical023.html> (last visited Oct. 26, 2010) (“The first, and traditional view, is that conscience is an intellectual faculty that judges whether an act is morally good or evil.”); *see also* Stolzenberg, *Jiminy Cricket: A Commentary*, *supra* note 9, at 54, 58.

31. To hold, as traditional theology did, that the task of the faculty of reason is to discern the moral law—and that reason is therefore necessary—is not necessarily to hold that reason is sufficient to the task. *Cf.* YAFFE, *supra* note 25, at 65–69 (attributing to Locke the view that reason, although necessary, is insufficient and must be supplemented by revelation, and that “[w]hile revelation might not be indispensable in principle, it is indispensable in fact”).

subject one's behavior to the guidance of the moral law, are two sides of the same notion, inward reason being but the subjective correlate of the objective moral law on the traditional conception.<sup>32</sup>

The notion of conscience, which derives from traditional rationalist moral psychology and hence subscribes to the twin notions of the moral law and reason, is thus both rationalist and what we might call legalist in nature—"legalist" in the sense that it imagines the conscience as speaking to us in the form of "dictates," commandments, negative or positive behavioral injunctions, religiously sanctioned obligations, privileges, and permissions—in a word, laws. Conscience, then, as it has traditionally been conceived, is legal or law-like in both substance and form. This legal character is intimately connected to the underlying rationalism of the dominant model of religion.

Together, the legalist and rationalist aspects of the traditional model of religion as conscience are responsible for many of the conundrums of contemporary free exercise jurisprudence noted in the other conference papers. One problem with viewing religion solely as a matter of conscience and viewing conscience as an expression of beliefs or judgments about what the moral law requires is that not all religions take the form of religiously prescribed moral commandments and obligations. Some religious traditions are more law-like—more given to moral pronouncements and behavioral injunctions—than others. And, as has been noted, even religious traditions that are very law-like are not exhausted by the articulation of legal or moral commandments and obligations.<sup>33</sup> They make other kinds of claims as well. Religions also do many other things, quite aside from making claims of any sort. For example, many religions cultivate states of spiritual "awareness"—not the same thing as conscious propositional belief. Religions also customarily generate a general cosmological orientation—again, not the same thing as a propositional belief, nor precisely the same thing as spiritual "awareness." Some religions prescribe a particular spiritual

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32. Here we can see how the rationalist/irrationalist dichotomy links up with the dichotomy between a transcendental realm of objective morality and a subjective mental realm mired in the material human brain.

33. Cf. Koppelman, *supra* note 2, at 963–64 ("The emphasis on conscience focuses excessively on duty, which is only a small part of religious motivation. Many and perhaps most people engage in religious practice out of habit; adherence to custom; a need to cope with misfortune, injustice, temptation, and guilt; curiosity about religious truth; a desire to feel connected to God; or happy religious enthusiasm, rather than a sense of duty prescribed by sacred texts or fear of divine punishment."); *see also id.* at 973 (describing reasons given by Catholics for participating in the custom of attending Mass other than the belief that it is religiously required).

discipline or regimen. Some generate particular cultural identities and a sense of belonging and attachment to a particular group, expressed in culturally specific traditions and customs and affiliations. Religions give people somewhere to go and something to do, a way to structure their life-cycle events and to number their days. In short, religions do all kinds of things besides issuing law-like, or even non-law-like, claims. The coexistence within some faith traditions of nonobligatory customs with obligatory laws is just one case in point.<sup>34</sup> The existence of religious beliefs concerned with neither custom nor law but rather with “ultimate” questions of “meaning” or “reality” is another.<sup>35</sup> The general point is that there are many things that religions do besides articulate commandments, injunctions, permissions and prohibitions, and other more or less law-like dictates.

The dominant tendency—which is to equate religion with beliefs in the existence of law-like commandments about what is morally permitted or required—has increasingly come under fire, as critics of that model pose questions that open up to an ever-widening circle of beliefs and practices that might be counted as matters of conscience worthy of protection, accommodation, or separation from the state. Why, such critics ask, should religious propositions about nonmoral matters such as the nature and the origins of the universe be any less respected than religious propositions about what forms of human conduct are morally prohibited or mandated? Why should nonreligiously based views about what is morally required be treated any differently than religious ones? Why should religious customs be any more vulnerable to state prohibition—or any less separated from the practice of statecraft—than actual commandments?

For that matter, what is the basis for protecting the paradigm case, the right to follow religious commandments? Here, as others have shown, the problems multiply. From the standpoint of the believers in a

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34. A good illustration of the difference between claims rooted in duties mandated by religious law and claims rooted in religious custom is provided in *Goldman v. Weinberger*, in which the right claimed—that of a Jewish military chaplain to be able to wear a yarmulke or head covering notwithstanding military regulations proscribing the wearing of headgear—concerns a practice rooted in custom not a duty prescribed by Jewish law. *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub L. No. 100-180, 101 Stat. 1019 (1987), *as recognized in* *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

35. *Cf. Perry*, *supra* note 7, at 996–98.

religiously prescribed commandment, the multiple bases for protecting their right to act in accord with it are clear: it is commanded, it is the moral thing to do, it would be immoral to do otherwise, and the consequences of violating the commandment—eternal damnation or other forms of punishment expected to be meted out for violating the commandment—are likely catastrophic. But none of these beliefs can be the state’s basis for allowing the believers to follow their conscience for the simple reason that they *are* the believers’ religious beliefs (and therefore it would violate the basic principle of the separation of church and state for the courts or legislature to adopt them). Either the state has to be making a purely pragmatic, prudential judgment about the futility of enforcing a law against believers’ objections—the idea being that, from a deterrence point of view, conscientious objectors will never be deterred by state-prescribed punishments if they perceive the negative consequences of violating their consciences to be significantly greater than the negative consequences of violating state law. Or, as some of the language of the conscientious objector cases suggests, the state is basing its decision on the subjective psychological *suffering* that would be caused if the believers *believe* that they will go to hell or otherwise be subject to terrifying divine punishment.

Alternatively, the suffering recognized as a basis for exempting religious believers from legal obligations that contravene their religious beliefs might be the anxiety that believers experience if they believe that their failure to discharge their religious obligations will cause others unacceptable harm.<sup>36</sup> Either way, if psychological suffering is the basis for the court’s or the state’s decision to grant an exemption to conscientious objectors, then it is hard to see why it matters whether their emotional anguish results from acting in ways that violate their *religious* beliefs as opposed to their nonreligious moral beliefs—or why it matters that emotional suffering results from violating moral beliefs or beliefs of any kind. Emotional suffering can result from being required to follow laws to which one objects for reasons quite independent of one’s beliefs. Why, then, are beliefs relevant to the decision to spare a person emotional suffering that results from following the law? And why, more particularly, are beliefs in the existence of moral commandments relevant when emotional suffering can result from being forced to comply with the law of the state, regardless of the existence of a belief in

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36. See *Welsh v. United States*, 398 U.S. 333, 344 (1970) (extending exemption from draft to people “whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war”).

the existence of a moral commandment prohibiting such compliance? People can suffer just as much from acting in ways that violate their sense of the cosmos or ultimate meaning—or their own interests. Likewise, suffering can result from being prevented from passing on one's cultural identity to one's children. Even when there is no religious law commanding them to respect the order of the cosmos or to contemplate the meaning of the universe or to pass on their heritage to their children, people often suffer when laws require them to act in ways that violate their sense of religious order.<sup>37</sup>

The slippery slope and line-drawing problems associated with this line of questioning are well-known.<sup>38</sup> I do not mean to rehearse them here. The point is rather to point up the distinctively legal form of the beliefs that are typically imagined to motivate or constitute the religious or nonreligious conscience. It is not only that beliefs constitute the central protected category. It is not only that religious belief is seen as essentially cognitive or creedal in nature—with religion imagined as a set of intellectual propositions about the content of the divine moral law, itself regarded as a metaphysical truth, which each individual is free to affirm or deny in the light of her own reason. It is also that this metaphysical truth is assumed to express itself solely or chiefly in the form of commandments and obligations, coupled with the existence of a divine legislator or divine source from which those obligations flow. The quintessentially legal form that conscientious beliefs assume follows from the fact that conscientious beliefs are, by definition, beliefs about the propositional content of moral law. As such, they are more aptly regarded as a species of moral knowledge than as the species of feeling connoted by terms like *blind faith*. Like “blind love,” faith that is “blind” eclipses rational thought. By contrast, the law-like character imputed to conscience partakes of the rationalist side of the rationalist-romanticist dichotomy. But then this means that the conscience model

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37. Cf. Perry, *supra* note 7, at 1001 (“[D]enying religious or moral freedom to people—freedom to live their lives in harmony with their religious or moral convictions and commitments—is hurtful to them, sometimes greatly hurtful. The hurt consists of the suffering that attends the experienced disintegration of a central aspect of their lives: they are legally prevented from living their lives in harmony with one or more of their core convictions and commitments; in that sense, and to that extent, they are legally prevented from living their lives in harmony with themselves.”).

38. See White, *supra* note 3, at 1089 (discussing the “slippery slope” produced by the adoption of a “subjective and psychological approach”); Smith, *supra* note 5, at 336–37.



of religion excludes from its ambit all those religious traditions, beliefs, practices, and forms of awareness that do not take the rationalist form of a law-like code of commandments in which one consciously affirms one's belief.

This exclusion of non-law-like religion from the ambit of constitutional protection is one of the chief problems confronted by a liberal jurisprudence of tolerance and religious freedom. The exclusion raises the question of whether an ostensibly secular government can live up to its basic obligation of avoiding religious favoritism while protecting the free exercise of all religions (subject, of course, to appropriate, universally applied limitations.)<sup>39</sup> More generally it raises questions about the meaning of secularism and the nature of the connection between secularism and the idea of religion as conscience.

(4) It is often mistakenly thought that the idea of secularism was born in modern times with the decline of traditional religion and the concomitant “disenchantment” of the world. In fact, the traditional moral psychology embedded in Christian theology was linked not only to rationalism but also to a conception of secularism.<sup>40</sup> The conscience model of religion cannot be fully understood without appreciating the background conception of secularism against which it operates and how that background conception has changed over time.

To repeat, the traditional moral psychology embedded in Christian theology, discussed above, was linked not only to a conception of rationalism but also to a conception of secularism. Indeed, it was by virtue of its commitment to rationalism that the tradition of Christian theology that we are discussing embraced a conception of secularism and the necessity—and virtue—of secular politics. The particular conception of secularism that issued from this distinctively religious understanding of the capacity—and limits—of human reason formed the basis of premodern as well as early modern theories of political sovereignty and state law.<sup>41</sup>

Because of its grounding in religious theology, I have suggested that we call this conception of secularism and secular government “theological secularism” or “secularist theology”—a notion that sounds paradoxical to modern ears only because of the profound changes that

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39. Perry addresses the question of appropriate limitations on the right to freedom of conscience, and distinguishes the existence of such limitations from denial of the underlying right, in his symposium contribution. See Perry, *supra* note 7, at 1011–13.

40. See Stolzenberg, *The Profanity of Law*, *supra* note 23, at 42.

41. *Id.*

the original idea of secularism has undergone.<sup>42</sup> In fact, the idea of a realm of the secular, split off from a spiritual realm, was originally a religious idea, derived from the premises of religious—in particular, Christian<sup>43</sup>—theology. The traditional religious conception of a division between religious and secular realms partakes of the more basic theological conception of a divide between the heavenly realm of the spirit and the earthly realm of matter. From this standpoint, all mortal doings, including the exercise of reason, are subject to the limitations of the material world. It follows that reason is highly fallible—we are prone to be mistaken in our individual and collective judgments about our moral rights and obligations as we are prone to be mistaken about every truth proposition, regardless of whether it concerns the realm of physical or metaphysical reality.

Fallibilism, the doctrine that states that human beings are prone to error and, more particularly, that human reason is prone to error, is intimately related to—and is in fact a product of—the quintessential religious belief: the belief in the existence of God, who alone is possessed of perfect knowledge. God is all-knowing; we are not. This is the fundamental religious insight that ultimately led to the embrace of virtually all of the doctrines that we associate today with liberal secularism. The traditional theological argument for secularism—and that there was a traditional theological argument for secular law and government bears repeated emphasis—began with the proposition that, notwithstanding the fact that human beings are possessed with the faculty of reason—a belief that is itself a product of the religious doctrine of the *imago dei*, according to which we are all created in the image of God and, by virtue of that, possessed with the divine spark of reason—that divine spark permits us to discern God and his moral law only imperfectly, precisely because it is embedded in the material world.

This recognition of the imperfection of human reason, and the more general imperfection of the human and larger material world, drove some devout Christians, and people of other faiths with similar doctrines of fallibilism, to embrace doctrines of political quietism, which ostensibly renounced politics in pursuit of a withdrawal from worldly affairs. Ironically, such quietist doctrines invariably necessitate the assumption of precisely the powers of worldly government and law from which they

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42. *Id.* at 43.

43. *Id.* at 42.

seek to escape.<sup>44</sup> More significantly, though, for purposes of the analysis here, such quietist doctrines were never the dominant political theory within Christian thought. Instead, most theologians and religious believers drew the opposite conclusion from the same religious understanding: that human structures of governance needed to be established and law needed to be implemented by the state through the exercise of human reason, imperfect though it was. Indeed, the dominant theological view was that the establishment and implementation of human government and law through the exercise of reason were not just morally and practically necessary but also (by virtue of that necessity) divinely ordained.

In order to appreciate the distinctively *secular* character of state politics and law that this traditional theological viewpoint gives rise to, it is important to follow its basic line of argument, which proceeds from positive postulates about human beings' potential to follow the moral law to negative postulates about human beings' potential for evil as well as the fallibility of reason back to more positive postulates about human reason and the project of human governance. This back-and-forth oscillation between optimism and pessimism about human nature bespeaks a distinctive—and distinctively religious—*attitude* toward human government, an attitude that is neither overly optimistic, nor overly pessimistic, but rather a *cautious blend of optimism and pessimism* about the capacity for human beings to govern justly. Optimism, based on the human capacity for reason, is chastened by the *awareness* of the fallibility of reason and the human capacity for innocent error as well as evil. As we shall see, this religiously fostered awareness was, ironically, directly linked to an appreciation of the inherently secular, *profane* character of the political project.

A rough outline of the theological argument for secular politics goes like this: God has prescribed the moral law; this law is sacred; it emanates from and dwells within the transcendental realm of the spirit. Human beings, in the earthly material world, the temporal realm, are subject to that law. In the afterlife, they will meet their just deserts:

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44. With David N. Myers, I explore this paradoxical phenomenon of the emergence of highly politicized forms of religion out of religious commitments to political quietism in our ongoing work on Kiryas Joel, an ultra-orthodox Jewish community, which, in the name of separatism and political quietism and withdrawal from the realm of “earthly power,” has established its own municipal institutions and become ever more deeply engaged with the levels of political power at every level of U.S. government. See David N. Myers & Nomi M. Stolzenberg, *Rethinking Secularization Theory: The Case of the Hasidic Public Square*, AJS PERSPECTIVES (forthcoming 2011).

eternal punishment or eternal salvation as the case may be. God is thus not only the divine legislator; he is also the divine law enforcer. The problem is how, or even whether, to enforce the moral law in the temporal world.

The problem is complex: not only is there the problem of people who willfully violate the moral law, there also is the problem of people who genuinely mean to follow—and enforce—the moral law but whose cognitive imperfection prevents them from doing so without error. The first problem, more conventionally known as the problem of evil, is what we may refer to more directly and simply as “the bad guy problem.” The second problem, known conventionally as the problem of knowledge, is more of a “good guy problem.” Deriving from the fallibility of reason and the cognitive limitations of the material brain, unlike the bad guy problem, which results from acting on the human inclination to do evil things in violation of the moral law, it afflicts even those who are sincerely trying to conform to the moral law (but are simply mistaken about what the moral law requires).

Unless one draws the extreme quietist conclusion that only God can and should enforce the moral law, the project of human governance is *necessitated* by the bad guy problem. The basic idea here, *contra* quietism, is that it cannot be God’s will for human beings to have to endure the commission of crimes and other moral violations with impunity while they are here on this mortal earth. The *function* of human government, on this view, is thus to carry out God’s moral law. And if the theological argument for earthly politics stopped there, it would—as many modern-day secularists charge—imply a *theocratic* model of politics. But—and this is the key point—the traditional religious argument for politics does not stop there. Resisting the quietist alternative to theocratic politics—no politics—it moves on from the bad guy problem, which, quietist doctrine aside, necessitates human law and government, to the good guy problem, which prevents human beings from being able to enforce the moral law without error.

Others have noted the existence within religious faith traditions of a well-founded distrust of the government’s ability to discern or determine moral truth, a distrust rooted in the same problem of knowledge that we are discussing here.<sup>45</sup> But it is important to realize that the limitations of

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45. See Perry, *supra* note 7, at 1008.

the government's ability to discern the truth extend not only to identifying what the moral truth is but also to applying the moral law to particular cases. Furthermore, the same inherent cognitive limitations that impair the ability of the government to apply sacred law to particular cases impair its ability correctly to apply any body of law to particular cases, be it positive or moral, secular or sacred. The religiously inspired understanding, enshrined in centuries of theological thought, is that positive law *cannot* be sacred precisely because of the cognitive fallibility of every putative law enforcer. In recognition of this, the good guy problem, the sacred law pictured in the biblical tradition combines the substantive principles of moral law, composed of various religious-moral injunctions and obligations, with a *procedural* law that is designed to curb erroneous judgments and the consequent miscarriages of justice. The substantive sacred law is addressed to the bad guy problem: it tells people what not to do. The procedural part of the sacred law is addressed to the good guy problem: it tells the people who claim to be enforcing the sacred, moral law, including those who sincerely—conscientiously—believe that they are enforcing God's law, that they have to be mindful that they may be mistaken. And in recognition of that ever-present risk of human error, biblical law articulates procedural requirements that are designed to prevent erroneous judgments from being rendered. Indeed, the procedural requirements articulated in biblical law are so stringent that they make it virtually impossible to secure a conviction.<sup>46</sup>

At this point we reach the first pessimistic turn in the theological argument for secularism.<sup>47</sup> This is precisely the point at which other theological interpretations renounce worldly politics altogether and retreat to a position of extreme quietism and skepticism. The line of argument that we are pursuing resists such extreme skepticism in favor of a more moderate skepticism, which permits it to turn back toward a cautiously optimistic perspective, which ultimately combines moderate skepticism with an equally moderate, chastened faith in reason and government. This distinctive attitude, a complex blend of trust and distrust, motivates an embrace of worldly politics that coexists with the recognition that power may run amok, and therefore worldly politics needs to be subjected to moral constraints. Thus, the line of argument that we are pursuing simultaneously recognizes the need for worldly

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46. See Stolzenberg, *The Profanity of Law*, *supra* note 23, at 41–43.

47. See Nomi M. Stolzenberg, *Taking Blessings Seriously: A Comment on Ronald R. Garet's "To Secure the Blessings,"* USC Law Legal Studies Paper No. 10-17 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1681558](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1681558).

government and positive law, rooted in the need to protect the good guys from the bad guys, while remaining mindful that, even when run by the good guys, government, like all people and human institutions, lacks the cognitive equipment necessary to ensure that the implementation of positive law will always conform to the moral law.<sup>48</sup>

It is in precisely this sense that positive law is understood, on the traditional theological account we are tracing here, to be *inherently* secular as opposed to sacred. If government adhered consistently to the sacred law, it would be bound by the stringent procedural requirements built into the sacred law that make it effectively unenforceable, except by God. In other words, effective government would be impossible. Positive law is thus defined in the first instance by the relaxation of these impossibly stringent procedural requirements, which permits the machinery of law enforcement to go forward. That relaxation makes it inevitable that, far from implementing the sacred law, positive law is bound on occasion to violate it. Positive law is thus precisely *not* sacred law. It is, in this precise sense, secular law. It is profane.<sup>49</sup> It requires getting one's hands dirty. The people tasked with its implementation therefore must be secular, rather than spiritual, figures.

None of this means that positive law is not divinely ordained. On the contrary, according to the traditional theological conception that we are outlining, it is God's will that there should be secular rulers charged with the dirty task of enforcing the law.<sup>50</sup> The law of the sovereign is nonetheless regarded as *authorized* by God's law even as it is understood to be secular in the precise sense that it will deviate from—and on occasion violate—sacred law's procedural and substantive requirements. The sovereign's law is understood to be secular in the additional sense that, despite good faith efforts to discern the content of the transcendental moral law and conform positive law to it, it will emanate from the minds of human beings and not from God; it is further understood to emanate not from religious authorities—human beings charged with special knowledge of God's way—but rather from secular authorities, human beings charged with the separate business of governing temporal affairs. But even though it is well understood that these rulers will inevitably have dirty hands, which is precisely what it means for rule to be secular,

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48. *Id.*

49. *See* Stolzenberg, *The Profanity of Law*, *supra* note 23, at 30.

50. *See id.* at 41–42.

that is, mired in the material world, the law of the sovereign is nevertheless regarded as authorized by God's law. It is God's law that demands the creation of a sphere of secular law and politics separated from the sphere of religious authority. Indeed, it is precisely because of law's inherently secular, profane nature that God's law demands the separation of religious and political authority.

This is the distinctively religious vision of secularism and the need for secular government that I call theological secularism.<sup>51</sup> It obviously differs from the understanding of secularism that prevails today, which is, we might say, a *secularized* understanding of secularism from which any religious content or grounding, or religious authorization, has been emptied out.<sup>52</sup>

(5) This traditional *religious* conception of the need to separate religion from politics has recently been recuperated in a number of important writings that posit the "institutional" view of separation between religion and the state.<sup>53</sup> According to this view, the purpose of the Establishment Clause, and the broader principle of separation between church and state, is to protect the autonomy of religious institutions—prototypically, the Catholic Church<sup>54</sup>—as against a more individualistic conception of the purpose as being to protect the individual's freedom of conscience. The old theological view of church-

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51. *See id.* at 41.

52. *Cf.* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989) (comparing the premodern understanding of "the secular" as a sphere of human activity entailed by religious principles and encompassed by religious dogma to the modern notion of "the secular" as the dichotomous opposite of "the religious"); *see also* Steven D. Smith, *How Is America 'Divided By God'?*, 27 MISS. C. L. REV. 141, 150 (2007) (explaining that many religionists "favor maintaining a secular public sphere," and describing a variety of traditional religious theories of secular government); Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1276–77 (2004) (describing the religious character of much Enlightenment discourse in which "the assumption of an overarching [sacred] normative order was entirely compatible with the Enlightenment concept of reason"); Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 223 (1999) (reviewing TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998)) (discussing Roger Williams's idea of a civil sphere "firmly grounded in religious rationale"); Steven D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487, 502–03 (2001) (explaining that "for the devout, 'religion' is the name of the encompassing city within which the 'secular' is a contained neighborhood").

53. *See generally* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009) (analyzing the hands-off "rule" and its application in the courts); Smith, *supra* note 5; White, *supra* note 3, at 1091–93, 1087, 1100–01.

54. *See* White, *supra* note 3, at 1098, 1102–03.

state separation is thus presented as a theoretical alternative to the modern liberal idea of freedom of conscience.

The institutional conception stands as an important correction to the individualist bias of modern conceptions of religion and law. That individualist bias is exhibited in many features of the model of religion that we have been discussing. Perhaps the most obvious manifestation of the way in which religion as conscience is committed to an individualist approach to rights is its dependency on the distinction, noted above, between the inner realm of human subjectivity, the psyche, and an outer realm of human behavior and experience. In legal doctrine and in the broader public, the inward-outward distinction is often articulated in terms of the distinction between practice and belief. There is, however, an ambiguity in the usage of the term *belief*, which complicates and in some ways undermines the inward-outward, belief-practice distinction. More often than not, the term *belief* has reference to the “interiority” of the human mind. Regardless of whether the “seat” of the psyche that holds or forms beliefs is imagined in rationalist terms, as the head or the cognitive mind or, in more romantic terms, as the heart, the libido, or the spirit, belief, on this commonplace view, is understood to dwell within the mind of a single individual.

This notion that beliefs reside within the individual has to be contrasted with the equally commonplace idea of “belief systems” that constitute and differentiate human cultures. An idea derived from the modern discipline of cultural anthropology, roughly synonymous with the anthropological idea of “culture,” belief *system* has primary reference to outward forms, symbols, social practices, activities, and institutions in which a culture’s values, attitudes, and beliefs are embodied. Belief systems exist not only, or primarily, in the mind of the individual but rather in the external realm of social practice. They thus have an “objective” existence that is independent, or more precisely, outside, of any individual’s inward beliefs.

This is not to deny the intimate connections between an individual’s inward beliefs and the beliefs embodied in the external culture. Indeed, connections run both ways, with outward actions and social practices and institutions “expressing” people’s subjective beliefs, and people forming their subjective beliefs through a process of cultural norm “internalization.” But, quite apart from the gaps that can exist between an individual’s subjective beliefs and the beliefs embodied in the surrounding culture, even when there is no gap, there remains an



important conceptual and practical difference between beliefs as they are manifested in the external world of social relations and cultural institutions—belief systems—and the beliefs to which an individual actually subscribes, which may or may not accord with the external belief system. Even the most cynical account of the faculty of the conscience, which views it as nothing but the internalization of societal norms,<sup>55</sup> bespeaks a recognition of the interiority of the human mind that is in some sense separate from, even if determined by, the outward realm of human experience. What, after all, could it mean for norms to be “internalized” were there not an inner psychological realm distinguishable from the realm of outward social action?

There is thus an important ambiguity in the usage of the term *belief*. Sometimes the beliefs protected under a doctrine of freedom of religion or freedom of conscience are the belief systems that unite people as cultural collectivities, give them a distinct sense of cultural identity and belonging, and instill in them a felt need to engage in certain kinds of practices, activities, and rituals as an expression of who they are. Other times, the reference is to the beliefs that dwell within the mind of the individual, beliefs that may be oppositional to, or simply different from, the beliefs embodied in the surrounding culture and its belief systems. Typically, religious freedom doctrine finesses this distinction between a cultural belief system and the subjective beliefs to which an individual actually subscribes. But the prevailing model’s commitment to individualism and the consequent devaluation of the social and the practical, including the outward realm of culture in which belief systems are materialized, is quite clear. Religion as conscience draws a distinction drawn between an inward realm of subjective psychological belief and the outward realm of external physical and social experience. More to the point, it privileges the former over the latter. In so doing, it simultaneously privileges the individual over the social and privileges belief, or theory, over practice. To put it otherwise, it privileges *individual* belief over belief *systems*. Hence the perceived tension between the “institutional” conception of the religion clauses, which would confer autonomy on churches and other religious associations, and an individualistic conception, concerned with protecting the individual’s freedom of belief.

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55. See Hill, *Four Conceptions of Conscience*, in INTEGRITY AND CONSCIENCE, *supra* note 9, at 21–22 (describing what he refers to as the “extreme cultural relativist conception” of conscience, according to which the conscience is nothing but the internalization of a given set of cultural norms).

There is good reason to be concerned that the model of religion as conscience, which relies on the basic distinction between practice and belief, privileging the latter over the former, threatens to give short shrift to religious practices and institutions. But it is more than “practice” as that term is ordinarily understood that falls outside the definitional ambit of that model. It is possible, after all, to make the case for protecting religious practices that are “grounded in” religious beliefs. The idea of a right to freedom of conscience can indeed be interpreted as encompassing the right to *live in accordance* with one’s beliefs, as others have proposed.<sup>56</sup> But then the only practices that will receive protection are ones that can be traced to a religious sanction in which the believer believes. In other words, this argument for protecting religious practices, or analogous nonreligious moral practices, is ultimately rooted in the same legalist conception of religious belief as the argument for protecting belief. Absent a showing of a religious commandment in which the believer believes, or at least some authorizing “custom,” there is no warrant, on the conscience model, for protecting religious practices. Thus, the Amish would have no grounds for an exemption from the compulsory school laws unless they could produce evidence of the “existence,” in their religious tradition, of a religious law commanding them to keep their teenage children out of school—or commanding them to transmit their traditional way of life to their children. Likewise, the plaintiffs in *Mozert*<sup>57</sup> could not honestly claim that secular humanist education interferes with their free exercise of religion unless they could prove that they believed in the existence of a religious law *commanding* them to insulate their children from exposure to “secular humanist” ideas. And so on. In any given case, the plaintiffs might be able to satisfy the requirement of demonstrating the existence of a religious commandment, injunction, or obligation prescribing the practice for which protection is sought. But this seems to miss the point of cases like *Yoder*<sup>58</sup> that recognize the value of preserving a religious “way of life” as a value in its own right.

(6) The problem goes beyond giving short shrift to religious or cultural practices that cannot be referred to a particular religious commandment enjoining their performance. There are also aspects of

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56. Perry, *supra* note 7, at 996, 1011–13.

57. *Mozert v. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

58. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

religion that go beyond either inward belief or outward practice. Attitudes, for example, are neither practices nor precisely beliefs, though they may be expressed in practices and informed by beliefs. In some religions, the cultivation of certain attitudes is just as important as the adoption of certain beliefs or the performance or avoidance of certain actions. Indeed, there are religions in which the cultivation of a certain attitude is *more* important than either belief or practice. Like thoughts, feelings, and inward beliefs, attitudes dwell in our individual psyches. Yet we also speak meaningfully about “cultural attitudes.” Like conduct, cultural attitudes pertain to the outward realm of the social, the cultural, the collective; they are external to the individual psyche in much the same way that a practice or an institution is external.

Yet attitudes are not precisely beliefs. And they certainly are not practices, notwithstanding their outward cultural manifestations. Yet, like practices that cannot be tethered to protected beliefs, spiritual attitudes are liable to escape the ambit of protection of the dominant model because they are neither beliefs in the existence of divinely ordained law nor practices enjoined by such law. Religious attitudes, and the practices devoted to their cultivation, thus join religious social institutions, religious ways of life, and religious belief systems that are embedded in cultural institutions and social practices as manifestations of religious life that fall outside the definitional ambit of the dominant conscience-based model of religion. Like those more obviously cultural or communitarian forms of religion, religious attitudes are yet another casualty of the individualist bias against the social.

(7) Needless to say, the adoption of a model of religion that excludes such communitarian or cultural conceptions and forms of religion reflects a bias in favor of what was historically the dominant religion. To be more specific, the conscience model is a product of the historically dominant Christian faith—more specifically, it is a product of the particular forms of Protestantism that flourished in America and, until quite recently, dominated American political and legal culture. The inherent individualism, as against more social conceptions of religion; the legalism, with religion pictured as a code of behavior expressed in the form of moral injunctions; the subjectivism and the focus on the inner psychological life of the individual, in particular the individual’s cognitive beliefs concerning the existence and the content of the moral law; the implicit rationalism, albeit rationalism of a particularly moralistic kind—all of these are features of the religious tradition that was historically dominant in the English and American societies out of which our contemporary legal culture derives, and they demonstrate the

ongoing influence of a certain strain of Protestantism on the doctrine of freedom of conscience.<sup>59</sup>

(8) Taking stock, the exclusions that are most readily observed fall into the domain of the social and the practical as against the domain of individual mental interiority. Social practices are commonly accorded a lesser level of protection or not protected at all under the historically dominant model of religious freedom precisely because they are external to the protected realm of belief and conscience. Even when the case is made for protecting religious practice on the grounds that there is an interest in living one's life in accord with one's beliefs, beliefs remain primary and social practice secondary. The practice has to be demonstrated to be *required* in some meaningful sense by one's beliefs. Without any such authorizing beliefs, the case for protecting social forms of life in the name of religious freedom or tolerance falls by the wayside.

But, if we recognize that “[a]ll social life is essentially *practical*”<sup>60</sup> and if we further recognize that not all practices and social institutions are undergirded by authorizing beliefs—at least not in the legalistic sense demanded by the conscience model of religion—then it becomes clear that one important consequence of adhering to the conscience model of religion is that many religious practices and institutions will go un- or under-protected.<sup>61</sup> To put it otherwise, religions that are more concerned with practice than with individual belief—religions that express themselves in the form of institutions and cultural belief systems with which people identify for reasons other than creedal belief—will receive less recognition than those religions that conform to the prevailing individualist model of conscience—unless of course, as is often the case, nonconforming religions survive by adapting to the prevailing model.<sup>62</sup>

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59. See WITTE, *supra* note 2, at 39–42; accord White, *supra* note 3, at 1075–76. On the individualist bias of religion clause jurisprudence, see GEDICKS, *supra* note 1, at 12–13; Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1007 (1983). But see 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 436 (2008) (arguing against Gedicks's view that Supreme Court jurisprudence is necessarily beholden to a secular individualist theory to the exclusion of the recognition of more communitarian values).

60. Karl Marx, *Theses on Feuerbach*, in 1 THE GERMAN IDEOLOGY 121, 122 (C.J. Arthur ed., 1970).

61. But see Koppelman, *supra* note 2, at 978–79.

62. On Judaism's adaptation to mainstream American cultural norms and the dominant Protestant model of religion, see generally STEVEN M. COHEN & ARNOLD M.

(9) In addition to the outward—social and practical—aspects of religious life that fall out of the model because they cannot be reduced to the requisite sort of belief, there are inward religious experiences that likewise cannot be reduced to belief and therefore may fail to be recognized by the dominant model. As discussed above, attitudes are one important kind of inner psychological state not reducible to conscious cognition or propositional knowledge. (The complex attitude discussed above of cautious skepticism and cautious faith in reason and government cultivated by the theology of secularism is just one example of an attitude cultivated by religious faith traditions.) Although such cultural attitudes in a certain sense “exist” in the external cultural realm, just as other aspects of belief systems do, they are also internalized into the psyche. And insofar as they are, they represent a species of inward psychological experience that, although seeming to conform to the individualist model of religion in being located within the individual’s mind, does not conform to the model’s insistence on the presentation to the mind of consciously held propositional beliefs.

Yet another example of inner mental states that escape the terms of the belief-practice dichotomy are those commonly referred to as states of religious or spiritual “awareness,” or what some non-Western traditions call “mindfulness.” For example, the attitude, discussed above, of tempered optimism, characteristic of theological secularism, was fostered by a certain kind of spiritual awareness—to wit, the awareness of God’s unique perfection and human fallibility. This is more than a matter of holding a certain set of propositional beliefs, conscious or otherwise. Belief in God’s perfection and human imperfection stems from a sense of divinity, an intuition of the existence of a world beyond the material world that surpasses conscious mind even as it informs conscious beliefs. Or such, anyway, is some people’s reported experience. The awareness of cosmic oneness, or of human nothingness, or of a transcendent spirit or realm of being—these are other examples of particular forms of spiritual awareness that certain religious traditions cultivate. Such states of awareness may be coupled with beliefs, but they are not reducible to them. They may even be, in some important sense, *prior* to or *constitutive* of the beliefs with which they are associated. Indeed, a religious awareness of a certain kind may be critical to *maintaining* certain beliefs with the result that, when the awareness is lost, the beliefs crumble.

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EISEN, THE JEW WITHIN: SELF, FAMILY, AND COMMUNITY IN AMERICA (2000); and ARNOLD M. EISEN, THE CHOSEN PEOPLE IN AMERICA: A STUDY IN JEWISH RELIGIOUS IDEOLOGY (1983).

Alternatively, awareness may be directed at dissolving propositional beliefs and the minded ego that holds them. Awareness of all of these varieties is an *inner* psychological state but one that does not necessarily take the form of “holding” propositional beliefs. Indeed, it need not be a conscious state at all.

Many religious traditions take seriously the project of cultivating conscious or even *unconscious* psychological states, such as spiritual awareness. The belief-practice dichotomy that underlies the model of religious conscience not only privileges inner religious experiences over outward ones and in so doing promotes individualism over theories of social solidarity; it further privileges *conscious* inner experiences—specifically, cognitive beliefs about moral law—over attitudes and states of awareness that, while essential to our practices and beliefs, are not reducible to them. The worries about the exclusionary consequences of a model of religion as conscience thus extend beyond concerns about the failure to recognize the obviously social dimensions of religion, such as culture, institutions, and practice, to encompass concerns about the exclusion of certain inward spiritual states from the model as well.

This exclusion from the dominant model of religion of inward mental states that do not involve conscious cognition and the affirmation of propositional beliefs may seem at first blush to be disconnected from the individualist bias against the social, practical, and institutional dimensions of religion. After all, inward mental states, regardless of whether they are cognitive or noncognitive, seem to reside within the individual, making it difficult to see how the exclusion of nonpropositional, noncognitive mental states could be expressive of the dominant model’s commitment to individualism. But there may well be a communal dimension to the inner “awarenesses,” attitudes, and cosmological “orientations” excluded from the cognitivist model of religion. Consider that the most common noncognitive inner states of spiritual awareness and mindfulness cultivated by religious faith traditions are ones that are said to “transport” the individual beyond himself. These are the states of spiritual transportation characteristically promoted by mystical (in other words, nonrationalist) forms of religion. In these mystical states, the individual is said to achieve a sort of cosmic union or sense of communion in which the boundaries established by ordinary sense perception are dissolved.

But if what such “inner” psychological states involve is a mystical or spiritual connection—be it with humanity, with God, with nature, or with the cosmos—then their exclusion from the dominant model’s

definition of religion is actually of a piece with the model's individualist bias against experiences of sociality. The semantic links between "communion" and "community" are suggestive of a profound connection between spiritual experiences of unity—communion—and social experiences of solidarity—community or "communism" in the root sense of the word—that goes beyond the merely semantic. Like external manifestations of community that take place in the material world of social practice and cultural institutions, the inward state of spiritual communion and "oneness" with the universe is a form of experience in which the sense of one's individuality, prized in liberal culture, dissolves.<sup>63</sup>

(10) The question that remains is how the dominant model of conscience, with its emphasis on individual cognition and moral law, relates to the notion of the secular to which our liberal polity is ostensibly committed. Obviously, the contemporary understanding of secularism and the requirements of secular government vis-à-vis religion is very different from the theological conception of secularism elaborated above. Indeed, from the standpoint of today's understanding of secularism, theological secularism is oxymoronic. Secular political authority is not supposed to be authorized by divine law on the contemporary understanding. Divinely ordained government is supposed by contemporary secular thought to be tantamount to a theocracy in which religious law, applied by religious authorities, rules. But the divinely ordained government of secularist theology is precisely not a theocracy. Secularist theology authorizes not rule by religious authorities but rather rule by secular authorities. The spheres of religious authority and secular political authority are supposed to be kept separate according to theological secularism. Yet, both are authorized by sacred law, as indeed is the separation between political/secular and religious jurisdictions. The traditional conception of secularism is thus radically different from the modern conception of secularism and the division of religious and secular jurisdictions, according to which the authority of secular government is supposed to be entirely independent of religious authority or belief.

(11) The standpoint of the old secularism is religious; the standpoint of the new secularism is—ostensibly—nonreligious. From the standpoint of the old secularism, the secularism of the new secularism has been, as

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63. Here one wonders what connection there might be between such social and spiritual experiences of communion and the original meaning of conscience, as knowing in common? White, *supra* note 3, at 1076–77.

it were, secularized—emptied out of religious content.<sup>64</sup> The pressing question, for both the secular and the religious, is how we moved from the old secularism to the new one, and what was gained—and what was lost—when we did so. More particularly, what are the implications for the policies of religious freedom and conscience of moving from one conception of secularism to the other?

From the standpoint of the old secularism, we are always strangers in a secular land. If *secular* is defined not as that that is void of religious content and authority but rather as that that pertains to the affairs of the temporal, material world, then the world is per se secular, as are all “worldly affairs.” The former definition represents the modern understanding of secular; the latter is the viewpoint of premodern—theological—secularism, a concept that, it should by now be clear, is no oxymoron.

What was seen very clearly from the traditional standpoint of secularist theology is that the temporal world’s secularism consists in nothing more or less than its (necessary) estrangement from the sacred. The conditions of the material world—our physical needs, the “burdens of judgment,” our “fallen” nature—practically ensure that it, or more precisely, we, will fail to live up to the requirements of sacred law. The violations of sacred law that are endemic to material life are an integral aspect of the original meaning of the secular. On this understanding, political authority is, by its very nature, secular, and therefore estranged from the sacred whether its inherent secularity is acknowledged or not.

It should by now be clear that the theological justification for the establishment of secular political authority that grew out of this understanding of the unholy condition of existence in the material world is grounded in the logic of the state of emergency. Adumbrating the emergency theory of political sovereignty recuperated in Carl Schmitt’s controversial work on “political theology,” the theological texts that articulated the doctrines of theological secularism explicitly describe the institution of government and effective mechanisms of law enforcement as an assumption of emergency powers necessitated by a state of emergency.<sup>65</sup> All of the hallmarks of a Schmittian state of exception are present in this traditional theological conception of secular political rule:

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64. Cf. Smith, *supra* note 5 (discussing the emptying out of religious content from the concept of the secular).

65. See Stolzenberg, *The Profanity of Law*, *supra* note 23, at 48–49.



the institution of effective government that involves a suspension of the rule of law (that is, the sacred law that guarantees the inviolable rights of liberty and life) coupled with the explanation that their suspension is *necessitated* by the conditions of emergency. Without effective mechanisms of law enforcement within the temporal world, the explanation goes, people can commit crimes and other moral violations with impunity. In other words, there is a “bad guy problem.” There is no way to protect people from such rampant violence without violating the sacred law whose stringent procedural rules will inevitably be violated by erroneous convictions and miscarriages of justice. This, of course, is the “good guy problem.” Notwithstanding the good guy problem—the problem of miscarriages of justice and erroneous convictions owing to the inevitable limitations of human judgment that the doctrine of fallibilism records—the conditions of emergency that would result from the absence of any effective law enforcement—the bad guy problem again—necessitate the establishment of a government with the power to enforce the law.

The bad guy problem, in other words, is just another way of describing the state of emergency. The good guy problem is another way of expressing the acknowledgment that effective responses to such a state of emergency—effective law-enforcement mechanisms—inevitably carry the risk of miscarriages of justice, which is to say, violations of the (sacred) rule of law. Yet sacred law itself, the law that recognizes the inviolability of human life and liberty, is what requires—and justifies—the suspension of the sacred law. In other words, all secular law is emergency law, by definition. Furthermore, the emergency is never going to end because the emergency conditions that necessitate the institution of secular government and deviations from the strict procedures of the sacred law stem from the inherent condition of the secular mortal world. The emergency, in other words, is permanent (within the bounds of secular time). The matter is life. There is no possibility of restoring the sacred law in earthly time or space.

It is for this complex set of reasons that, on the traditional theological understanding, the realm of the sacred must remain separate from the jurisdiction of the secular. And by the same token, the secular must remain estranged from the sacred. What sets the traditional religious, theological understanding of the principle of church-state separation apart from the contemporary nonreligious view is the recognition that wherever we are in this mortal world, we are in a secular, hence strange—estranged—land. Even Christians in Christendom, even Jews in the “Jewish Commonwealth” of Israel, are, on the traditional religious

understanding, in a secular land because a commonwealth, or system of human political rule is, by definition, secular. Wherever we are in this mortal world, we are always in a secular land, living under a political order defined by the conditions of emergency that result from the imperfect conditions of mortal life. Those conditions estrange us from the realm of the sacred, but they also estrange us from the realm of the secular insofar as we have any intimation of the realm of the spirit, making us everywhere and always strangers in a secular land.<sup>66</sup> The essential function of religion, from this perspective, is to maintain our awareness, our consciousness, our mindfulness of this condition of estrangement from a realm of existence (divinity) that transcends the fallen condition of the material world.

The “institutional” conception of church-state separation is a dim echo of this ancient religious conception of secularism. A number of scholars are laboring now to revive it. But how can a principle of institutional autonomy be defended against a conception of individual freedom of belief in a world where the religious belief that authorized both religious and secular jurisdictions has been almost entirely lost? How can the idea of institutional or jurisdictional separation be adapted to a society in which the individualist ideal of intellectual freedom and a secularized understanding of secularism hold sway? In addition to what was gained, what was lost when we moved from the old understanding of secularism to the new one? How can we remember that we are always “strangers in a secular land” without the old theology to cultivate the requisite spiritual awareness? Is it possible to sustain that awareness of being strangers in a strange land—of being a part but not fully a part of this world, of there being something within us that *transcends* this world—without religion? What are the consequences of losing that (spiritual?) awareness that we are always strangers in a secular land? And what are the implications of this loss of awareness for our understanding of, and policies toward, conscience? In our modern-day secular world, we cannot even begin to answer these essential questions until we have reconstituted an awareness of our essential condition of estrangement either by recuperating the old way of thinking about secularism or by constructing a new one, in which these questions can again make sense.

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66. Cf. ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

