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Religion and Law in Late Modernity

"Each party's lifestyle is completely antithetical and antagonistic toward the other."[1] So declared a New York State Supreme Court Justice regarding Naftali and Chavie Weisberger in a 2015 ruling. The Weisbergers, a Hasidic Jewish couple and parents of three children, had divorced in 2008 in a religious court (*beth din*), and though Chavie had initially been granted primary custody of the children, she was bound by the agreement to raise them in the ultra-Orthodox Hasidic Jewish faith.[2] By 2012, however, her lifestyle, including her home life with the children, no longer reflected ultra-Orthodox Jewish practice, and Naftali sued Chavie for custody in civil court. Naftali won custody on the grounds that Chavie was not upholding the religious divorce agreement, which the secular court considered to be as binding. The decision was later overturned by another civil court, and the children are being raised with both secular and Hasidic influences in their lives.[3]

This case raises not a small number of difficult questions, few of which yield clear answers. What it does expose, however, is the precarity of a world in which the only categories of law are human and divine. The case portrays the tragedy of a clash between divine law, which Naftali sought to follow in raising the couple's children as Hasidic Jews, and human law, which allows a person such as Chavie to leave her faith without thereby losing her children. With only these two categories of law, however, no middle ground was possible; "each party's lifestyle" – including which law one invoked – was antithetical to the other. Something more is needed.

In a world in which "law" can only mean "human law" or "divine law," religious freedom becomes especially complicated, for it leaves unanswered the question of which authority is higher – the divine law to which a religious person owes allegiance, or the human law that declares religious freedom a legal, or even

[1] Sharon Otterman, "When living your truth can mean losing your children," *New York Times*, May 25, 2018, www.nytimes.com/2018/05/25/nyregion/orthodox-jewish-divorce-custody-ny.html.

[2] Hasidism is a subset of ultra-Orthodox Judaism.

[3] Otterman, "Living your truth," and WBUR Boston, "For those trying to leave ultra-Orthodox communities, courts can play major role," *Here and Now*, June 14, 2018, www.wbur.org/hereandnow/2018/06/13/leaving-ultra-orthodox-community; *Weisberger* v. *Weisberger*, 2017 NY App. http://nycourts.gov/reporter/3dseries/2017/2017_06212.htm.

human, right in the first place. The central claim developed in this chapter is that religious freedom as a legal concept has a tension – even conflict – built into its very essence, for it represents human law's acceptance of the legitimacy of a discrete divine law. Thomas Hobbes recognized this; this is why the Church of England had to be subsumed by his Leviathan. This tension has only been exacerbated in subsequent centuries, for – as in Hobbes' day but to a much greater degree – religious pluralism increases the number of divine laws active in society, multiplying the potential for conflicts between human law and any number of sources of divine law. Hence, the greater the religious pluralism, the greater the challenges of religious freedom. This is not to denounce religious pluralism; rather, it is a call to recognize the challenge of religious freedom for what it is, which is essentially the challenge of reconciling two (or more) competing sets of law, human and divine.

My account of religious freedom, then, proceeds in three parts: first, I discuss law in the modern and late modern contexts, in which both reason and law are understood in exclusively human terms, arguing that the ever-expanding array of choices and the loss of traditional strictures on social life actually leave humans more, rather than less, in search of religious moorings – yet also committed to expansive freedoms. Secondly, I discuss religious freedom in the context of liberalism and democracy, showing how the latter two phenomena contribute to what I term the "dilemma of religious freedom," in which one must choose between the sovereignty of human law or that of divine law. Finally, I suggest that the best available basis for religious freedom in the late modern era is an expanded conception of "law" meaning not only human law, nor human and divine law only, but also, crucially, natural law, which mediates the perennial conflict between human and divine law and provides an end and order to law itself.

MODERNITY, REASON, AND LAW

Law as Human: A Story of Modernity and Rationality

The separation of law from nature is a modern phenomenon. To ancient Greeks, as early as the Presocratics, nature, divinity, and law were intimately intertwined; as one commentator puts it, "nature was divine, *physis* was *nomos*."[4] The medieval linkage of human, divine, and natural law is well known; cursory knowledge of the Treatise on Law in Aquinas' *Summa Theologica* provides the clearest, but by no means exclusive, picture of medieval confidence in reason's ability to know about not only human law but of about God through natural law. This does not preclude early positivists; indeed, Thrasymachus' insistence in Plato's *Republic* that justice is

[4] Tony Burns, "Sophocles' *Antigone* and the history of the concept of natural law," *Political Studies* 50 (2002), 548, quoting Victor Ehrenberg, *Sophocles and Pericles* (Oxford: Blackwell, 1954), 35.

the interest of the stronger reflects early, serious engagement with the idea that justice and law are human constructs only. Still, legal positivism (i.e., the idea that law is a strictly human creation) remained for most of history a minority view.[5]

Modern historical and intellectual developments would change this. The separation of law from tradition and, most importantly for our purposes, from the will or mind of God, gained traction in early modernity, ushering in with it social contract theory and birthing much of modern political philosophy as we know it.[6] This legal and philosophical innovation seemed initially to liberate societies to govern themselves rather than be tied to the sometimes inscrutable will of God. In hindsight, though, this liberation came at a price. Ultimately a rejection of metaphysical foundations, untethering law from the will of God has meant that it is tethered only to the will of humans – and as with the law of God, the law of humans turns out sometimes to be a frightening thing.

This ascent of legal positivism paralleled the ascent of philosophical rationality, as understood in a peculiarly modern sense. Just as law became human only, rather than human and divine and natural, so too did reason trim its sails. No longer the quasi-divine reason residing in the immortal soul, as, for instance, Plato's analogy of the charioteer might suggest,[7] post-Enlightenment reason effectively immanentized the quest for truth, erasing its divine aspects (Greek, Christian) and harmony with nature (Stoicism). This newer version of rationality, which underwrites modern law, is the exclusive purview of human beings rather than a spark of the divine, a purely immanent rationality worthy of its own Enlightenment cult. Reason understood as such – what I henceforth refer to as "rationality" or "rationalism," as distinguished from the older understanding of "reason" I want to deploy in discussions of natural law – typically, though not necessarily, promotes a progressive vision of life, morality, and law that seeks to cure suffering and overcome all obstacles to human desire and happiness; after all, if all rationality is man's, then it is for man to determine his own ends. White refers to this concept as "immanent infinitude," that is, the idea that human rationality can be called upon to "subdue

[5] In the twentieth century, legal positivism is most famously associated with H.L.A. Hart's *The Concept of Law*, but its origins continue back through modern history through Jeremy Bentham (1748–1832), John Austin (1790–1859), David Hume (1711–1776), and Thomas Hobbes (1588–1679), the last of whom I address in this chapter. Though these thinkers vary considerably in their concepts of law, they share the idea that law, for human purposes, is a human creation – whether explicitly, through the command of the sovereign (Austin, Bentham, and Hobbes), or simply through the removal of any metaphysical or religious aspect (Hume). Importantly, none of this requires a denial of the existence of a divine, but simply the position that in human society, law does and should come exclusively from humans.

[6] This is not to disagree with John Finnis' chronology, in which the idea of positive law originates far before the modern era in French theological humanists' writings of the twelfth century and in the thirteenth in the works of Thomas Aquinas. See John Finnis, "The truth in legal positivism," in Robert P. George, ed., *The Autonomy of Law* (Oxford: Clarendon Press, 1996), 195–214. Still, these writers, while recognizing positive law as a valid form of law, did not assert law as such to be limited to positive law.

[7] See *Phaedrus* 246a–254b.

nature and reform the recalcitrant qualities of self and society."[8] And indeed this rationality has made good on much of its promise; no one can deny the tremendous gains in medicine, technology, and even social norms that have occurred since this revolution of reason.

Still, if the problem with retaining the divine aspects of reason and law was that the gods were too cruel and controlling, then reducing them to human constructs alone has not solved the problem. If rationality is purely human, there seems to be little standing in the way of a calculating, utilitarian ethic in social life, an ethic easily translated into human law. Unsurprisingly, therefore, this modern confidence in human rationality has in more recent decades been met with the postmodern suspicion that reason and law are nothing more than the will to power, a mask for the strong to dominate the weak under the guise of a supposedly universal Reason that isn't truly universal, nor, perhaps, truly reasonable.[9]

When the smoke has cleared from modernity's exaltation of reason and postmodernity's deconstruction of it, though, it is difficult to see what, if anything, is left. If the Enlightenment relieved us of God, and man's distinguishing feature, reason, proved to be nothing other than the will to power, there seems to be little remaining basis for law, ethics, and politics – or, indeed, for knowledge at all.

These already murky epistemological waters become yet more opaque in matters of religion. Modernity's embrace of purely human rationalism attempted to eradicate the perennial tension between knowledge and faith by subsuming all knowledge under the umbrella of science, whether social or natural. But while that science and rationalism have cast doubt on the mythical, metaphysical, and mystical elements of religion, they have not managed either fully to supplant the personal and social roles that religion has always filled, or provide an answer to the deepest questions concerning what human beings can, in the final analysis, know. At the same time, however, a postmodern deconstruction of the idea of truth seems both undesirable and self-defeating as the only alternative to a strong modern rationalism, for without the possibility of discernible knowledge, discourse, even though itself, breaks down. In such epistemological quicksand, there is no publicly available way to ascertain true religious faith, doctrine, practice, or heritage.

The twenty-first century, then, perhaps finds us chastened, having gained epistemological humility: we see that a strong rationalism cannot save us, but radical skepticism leaves us wanting both as souls and societies. This humility can lead to an expansiveness of religious horizons, creating an exhilarating sense of liberation from inherited patterns, traditions, and dogmas, for we realize that we cannot claim certainty on any given creed. But whether this ends in formal secularism, as in

[8] Steven K. White, *Ethos of a Late-Modern Citizen* (Cambridge, MA: Harvard University Press, 2009), 12.

[9] White cites Foucault, Horkheimer, and Adorno as leading the postmodern rejection of modern rationalism, but I would locate the shift further back, in Marx's thought, with a more developed version in Nietzsche's. See White, *Ethos*, 11–12.

France or Turkey, or in pluralism, as in the United States, with this expansiveness often comes a great deal of tension on a given social fabric. This is because the proliferation of religious and value systems – the "alternatives" of which Taylor writes – at once pluralizes the erstwhile common base of a society's mores and laws and increases the demands for religious accommodations to existing legal and social norms. In other words, late modernity's epistemological humility increases religious pluralism, which heightens the need for religious freedom because we cannot know, or at least agree upon, ultimate truths, so there must be freedom for a wide swath of religious communities and practices.

Adrift in Modern Freedom: Tocqueville, Authority, and the Role of Religion

Already, then, we can see how the rise of human rationality and human law ended in a world replete with demands for greater religious freedom. The story doesn't end here, however, for the same epistemological humility that leads to expansive freedom can also create a tendency to clamp down on freedom. Humans are social and political creatures, we have learned over and over, and unbounded freedom and options tend toward a felt need for mooring in a society that senses itself to be increasingly untethered from any common core of values on which to base public discourse and shared life, law, and politics. On this human need for moorings, Alexis de Tocqueville wrote that human beings, while they love freedom, have a deep psychological need for that freedom to have boundaries. In a democratic age, he wrote, hierarchies in both religion and politics disappear – a scenario at least as familiar in our own time as it was in Tocqueville's. "Where there is no authority in religion or in politics," then, "men are soon frightened by the limitless independence with which they are faced."[10] Tocqueville recognized the human need for boundedness, yet he saw its decay in a democratic age marked by freedom and equality. Without the restrictions of place, social role, and class that accompanied past eras, the democratic citizen is freed from constraints. His desires proliferate accordingly, until he is left in the misery of chasing them aimlessly: "A man will build a house in which to pass his old age and sell it before the roof is on; he will plant a garden and rent it just as the trees are coming into bearing; he will . . . settle in one place and soon go off elsewhere with his changing desires."[11] Religion, however, serves as an "essential palliative for the democratic soul that is prone to attend singularly but without satisfaction to the immediacy of desire."[12] It provides an authoritative framework of understanding and acting in the world that not only cuts off certain behaviors and ways of life by imposing moral rules, but also

[10] Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, and ed. J. P. Mayer (New York: Harper Perennial, 1988), 444.
[11] Tocqueville, *Democracy in America*, 536.
[12] Joshua Mitchell, *The Fragility of Freedom: Tocqueville on Religion, Democracy and the American Future* (Chicago, IL: University of Chicago Press, 1999), 201.

subordinates one's desires and channels them toward an (at least perceived) higher good.

Of course, this mooring is also one of the functions of law: law provides clear lines about how people, individually and together, are to act. In this light, the rise of conflicts over religion, including religious freedom, is wholly unsurprising. The search for mooring is universal; the chosen means of mooring are at odds. That is, those whose confidence lies in human reason will seek to clamp down on the uncertainties of late modernity through human law and politics, whereas those who find ultimate meaning in religion will seek boundaries through its means. Either way, however, both sides may seek to impose their own limits on others. Thus it is no surprise that the twenty-first century has seen a rise not only of nationalist movements in advanced liberal societies but also of what are termed "strong religions" (i.e., religions that make substantial demands on their adherents).[13] This is what Joshua Mitchell refers to as "the paradox of freedom and obedience,"[14] namely, the idea that greater freedom leads humans to seek greater obedience. For in a world shorn of strictures, if Tocqueville is correct, human beings will seek something to provide mooring, boundaries – perhaps especially those dealing with the perceived metaphysical or divine aspects of life.

Still, it is clear that there is no going back. The religious and moral homogeneity of premodern life are no longer tenable, having been eroded by various encounters with science, philosophy, and an increasingly globalized world in which technology renders insularity impossible. Religious pluralism and religious freedom are both facts and demands of late modern life. What remains to be answered, then, is how such varied individuals and communities can live together, settling differences and cooperating in society, in a world in which knowledge and consensus prove so elusive. For barring the possibility of discernible truth and common knowledge, politics becomes an arena of power plays, an endless *agōn* with no clear starting points for cooperation or pursuit of the common good.

From epistemology to ethics to politics, then, contemporary citizens find themselves on uncertain ground when it comes to religion and its role in the public sphere, including religious freedom. It is against this epistemological and religious backdrop that I situate the following project. If I am right, and the struggle of religious freedom is the struggle between two competing sets of laws, divine and human, then harmonizing them is perhaps, in the final analysis, impossible. In short, humans will never arrive at a perfect union of reason and revelation, church and state, religion and politics; efforts to prioritize one over the other as a matter of principle typically erode, rather than advance, the gains in equality and freedom achieved by the very liberalism that gives rise to religious freedom. To seek a perfect harmony would be to remove ambiguity from what are usually deeply complex and

[13] See Gabriel A. Almond, R. Scott Appleby, and Emmanuel Sivan, *Strong Religion: The Rise of Fundamentalisms around the World* (Chicago, IL: University of Chicago Press, 2003).

[14] Mitchell, *Fragility*, 194.

often oblique moral questions. This sort of moral certainty is neither epistemologically nor politically tenable in our late modern era. What I propose instead, then, is a re-examination of traditions of natural law that, because they lie between the heaven of divine law and the earth of human law, may be not only our best but our only option for retaining some of the comfort, the structure, and the guidance of law in an era in which certainty is elusive but unbounded freedom is frightening, even chaotic, while resisting the artificial certainty – and violence – of law as exclusively human or exclusively divine.

LIBERALISM, DEMOCRACY, AND RELIGIOUS FREEDOM

Religious Freedom: Where Are We Today?

Contemporary engagement with the idea of religious freedom can be grouped into three roughly hewn and overlapping categories, which I term "Jurisprudential," "Liberal," and "Critical-Theoretical." The Jurisprudential theorists, such as Michael McConnell, Micah Schwartzman, Richard Garnett, Kathleen Brady, Steven D. Smith, Christopher Eisgruber, and Lawrence Sager, deal primarily with American law as it interacts with religion, usually focused on First Amendment jurisprudence. Liberal approaches are characterized by assumptions of autonomy and human choice as the basis of freedom; in this category one finds such thinkers as John Rawls, Ronald Dworkin, Brian Leiter, William Galston, and Martha Nussbaum. Finally, the Critical Theory school of thought, which has evolved over the past few decades, includes some overlap with the Liberal school but questions some of its fundamental assumptions, including its structural secularism and a focus on the individual over the community.[15] Elizabeth Shakman-Hurd, Saba Mahmood, Peter Danchin, and, to some extent, Cécile Laborde belong to this cohort, among others. I primarily address the ideas of the latter two groups in the present chapter, as the philosophical and ideological disagreements between the Liberal theorists and the Critical Theorists account for a great deal of the legal controversy that eventually makes its way downstream to questions of jurisprudence and legal interpretation, but without making explicit these disagreements and conflicting assumptions about the nature of law, justice, and religion, the jurisprudential aspect of religious freedom can only be marked by conflict and confusion.

The title of this book recalls Winnifred Sullivan's seminal *The Impossibility of Religious Freedom*, which argued that legally ensconcing religious freedom is both conceptually and practically impossible because human law cannot comprehend

[15] David DeCosimo has written critically but helpfully on what he terms the "new genealogy" of religious freedom and its proponents; see "The new genealogy of religious freedom," *Journal of Law and Religion* 33 (2018), 1–39. His category of the New Genealogy overlaps with my Critical Theorists, and what he terms "foundationalists," while not discussed at length in the article, would encompass both the Jurisprudence and Liberal schools in my terminology.

the experiential nuances of religion and should therefore shift to the "accommodation of difference" more generally.[16] Sullivan further clarified her rationale for claiming that religious freedom is legally impossible in her self-described address to American liberals in the wake of the 2014 US Supreme Court decision of *Burwell* v. *Hobby Lobby*. The decision of this case states that closely held companies objecting on grounds of conscience to the provision of certain contraceptives need not provide such health services in their insurance policies, pursuant to the Religious Freedom Restoration Act.[17] To Sullivan, this decision illustrates perfectly her thesis in *The Impossibility of Religious Freedom*, namely that the judgment of what constitutes acceptable religious practice *vis-à-vis* religious freedom laws is necessarily arbitrary. In her words:

> The need to delimit what counts as protected religion is a need that is, of course, inherent in any legal regime that purports to protect all sincere religious persons, while insisting on the legal system's right to deny that protection to those it deems uncivilized, or insufficiently liberal, whether they be polygamist Mormons, Native American peyote users, or conservative Christians with a gendered theology and politics. *Such distinctions cannot be made on any principled basis.*[18]

In other words, and assuming, *pace* Sullivan, that the law is nothing more than a human construct (i.e., all law is human law), the parameters of religious freedom are necessarily arbitrary and unprincipled because human law lacks the epistemic resources to discern true or good religious practice.[19] Given these difficulties,

[16] Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005), 149.

[17] A 1993 law, henceforth referred to as RFRA, as amended by the 2000 Religious Land Use and Institutionalized Persons Act.

[18] Winnifred Sullivan, "The impossibility of religious freedom," *The Immanent Frame*, July 8, 2014, http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom/. Emphasis added.

[19] As a slight aside, one is left wondering why Sullivan does not bother considering the harm principle as a basis on which to decide which religious claims are granted protection. Similarly, she disregards the RFRA's standard of allowing all religious practice except that for which there is a compelling state interest to regulate, which then must be regulated by the least restrictive means. Whatever their shortcomings, these are at least intelligible standards by which to adjudicate claims of religious freedom, such that it can hardly be said that there are no principles by which to distinguish acceptable from unacceptable practices.

However, it would seem that perhaps *any* legal interference in one's religious practices is unacceptable to Sullivan. In the 2001 Florida case detailed in Sullivan's book (*Warner* v. *City of Boca Raton*), for instance, the plaintiffs were required to remove cemetery memorials beyond a certain size for their loved ones that were, while religiously inspired, not considered by the court to be *required* practices in their respective religions. While it is disputable whether the regulation was necessary, it hardly seems that the decision was entirely unprincipled – the plaintiffs selected this cemetery for their loved ones' burials, which entailed a contract between them and the cemetery, the regulations of which were presumably made available at the time of plot purchase. Furthermore, the plaintiffs' religions – Orthodoxy, Catholicism, Judaism, and Protestant Christianity – were by no means without intelligible teachings and traditions, even if the individual consciences of the plaintiffs could not be so clearly discussed. The regulations and even the court's decision are certainly disputable, but Sullivan's claim that this sort of decision must necessarily lack a principled basis strikes the reader as exaggerated.

Sullivan's prescription is to give up on the concept of religious freedom altogether. She asks, "What would be lost if law focused not on the special case of religion but on the accommodation of difference generally?" Her answer: Not much. To Sullivan, religion as an entity or composite set of beliefs, practices, rituals, et cetera, should not be singled out for protection. Instead, it can – and indeed should – be parceled into its constituent parts such that religions would be protected de facto, but not de jure: "Without an explicit protection for religion, guarantees of freedom of speech, of the press, and of association would continue to protect most of those institutions, including religious ones, usually thought necessary for a free democratic society."[20] This is a striking statement; religion, in this reading, is not only implicitly primarily institutional, but is also only worth protecting insofar as it is "necessary for a free democratic society," not on its own terms.

Sullivan writes from the vantage point of late modern liberalism, a tradition inaugurated by John Rawls[21] and tweaked by Ronald Dworkin.[22] This is an intellectual tradition that argues for, and sometimes assumes, the necessity of not only the proverbial "wall of separation" between church and state but even the shuttering of the public square's doors to religious belief at all. Brian Leiter, for instance, echoes Sullivan in calling for the end of legally protected religious freedom, though he proposes in its place protections for conscience more than speech, assembly, and press. Leiter asks whether the difference between religious and nonreligious beliefs and practices is substantial enough to warrant special legal protection for the former. His conclusion is strikingly similar to Sullivan's above: "there is no principled reason for legal or constitutional regimes to single out religion for protection."[23] To arrive at this, Leiter first identifies what he takes to be the defining features of religion, features that build on the modern notion of purely immanent rationality: religion produces categorical demands on action; it does not "ultimately answer to evidence and reasons," it includes a "metaphysics of ultimate reality," and it produces "existential consolation."[24] But these traits, he claims, do not make religion special – these things could be said about any number of other types of belief. There are,

[20] Sullivan, *Impossibility*, 149.

[21] In both his earlier *A Theory of Justice* and his later works, including *Political Liberalism*, Rawls theorizes that the use of directly religious reasons in the public sphere is illiberal because such reasons are not publicly intelligible and therefore accessible to all citizens. From this necessarily follows what is commonly referred to as the "privatization" of religion (i.e., the idea that religious belief pertains to the individual and to belief, not to the community and to reason). As such, it is both inaccessible to and inappropriate for the public sphere, which is governed by reason and which concerns the common, not individual (only) good.

[22] I have in mind Dworkin's more general framing of the public sphere as one of individual choice and autonomy most significantly evaluated in the priority of the right – and indeed, of rights – over the good. However, his call in *Religion without God* (Cambridge, MA: Harvard University Press, 2013) for a conception of religious freedom grounded in a general "right to ethical independence" (p. 133) rather than in any sort of conception of religion qua religion, indicates the depth of the divide he envisions between religion and the public sphere.

[23] Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2012), 66–67.

[24] Leiter, *Why Tolerate*, 34, 47, 52.

however, both epistemic and utilitarian justifications for allowing the liberty of *conscience*. Citing John Stuart Mill's "epistemic libertarianism,"[25] Leiter grants that there may be occasions in which we should tolerate beliefs that are held despite their incompatibility with the "standards of evidence and reasons that have been vindicated a posteriori since the scientific revolution."[26] It is not clear on what grounds Leiter concedes this point, however, for he ultimately holds that "religious belief ... really is marked by its insulation from the *only* epistemically relevant considerations."[27] In other words, there can be no relevant epistemic standards by which we determine which anti-scientific beliefs might be acceptable and which are not, so why should conscientiously held irrational beliefs *ever* be tolerated? His only answer appears to be the Rawlsian, deontological one, namely that individuals in the original position would agree that we should have this liberty.[28] This is tangential to the point at hand, however; what matters is that people hold many such unjustified beliefs, and though we may have to put up with such beliefs, it is unclear to Leiter why we should single out from among them *religious* beliefs for special legal protections.[29]

Leiter and Sullivan, then, while they arrive at the conclusion by different means, agree that religion *qua* religion should be jettisoned as a legally protected entity. Nor are they alone; Martha Nussbaum, likewise, has suggested avoiding the controversies of religion by shifting our eyes from the import of religion to the necessity of equality as the basis for liberty of conscience.[30] While I disagree that religion cannot (or should not) be legally protected, this conclusion needs to be taken seriously, as all three writers are pointing out – explicitly or implicitly – a contradiction at the heart of liberalism, under which guise the right to religious freedom has historically been understood. The liberal conception of religious freedom rests fundamentally on the idea that all humans have a right to choose their religion and exercise it freely, assuming it does not harm another person without her consent. But this means that a person may very well choose a system of belief that rejects liberalism and choice entirely, thus undermining the very freedom she is enjoying. For example, she may freely choose a religion that forbids exit, denies gender equality, or demands strict censoring of speech. In other words, she has chosen a religion that rejects the system that gave rise to her freedom to choose a religion in the first place. Furthermore, when all law is human law, even such legal concepts as "harm" and "compelling interest"[31] become highly contestable terms, concepts that take on different

[25] Leiter, *Why Tolerate*, 56.
[26] Leiter, *Why Tolerate*, 57.
[27] Leiter, *Why Tolerate*, 57.
[28] Leiter, *Why Tolerate*, 55.
[29] Leiter, *Why Tolerate*, 67.
[30] See Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008).
[31] I refer to the "compelling interest test" as developed in *Sherbert* v. *Verner* (1963) and *Wisconsin* v. *Yoder* (1972), which requires any state-imposed burden on a fundamental right to be justified by