

Chapter 4 offers an exposition of this claim, and then attempts to develop a coherent egalitarian liberal theory of group rights. The remaining two chapters in Part II apply this theory to two important topics, chapter 5 to religion and chapter 6 to education.

Part III, which comprises chapters 7 and 8, raises some questions about the broader significance of multiculturalism. The gist of chapter 7 is that many moves that deploy 'culture' as a justification of actions and practices make sense only on the assumption that moral universalism is false. Some of those who appeal to 'culture' acknowledge this, while others do not. Either way, my claim in this chapter is that moral universalism is valid, and that as a consequence there are only certain very limited contexts (the criteria for which can be precisely specified) in which 'This is the way we do things here' can operate as a justification for going on doing the thing in question. (This is not to say, of course, that there may not be plenty of good reasons for continuing in our customary ways, only that in general merely pointing out that it *is* our custom is not one of them.) Finally, chapter 8 addresses the politics of multiculturalism. There are two main theses. One is that, to the extent that the advocates of multiculturalism have succeeded in getting their policies adopted, this does not shed a very flattering light on the workings of liberal democratic institutions. The other is that these particularistic policies do little to help (and sometimes do a lot to harm) members of their target groups, while at the same time tending to stand in the way of the kinds of universalistic policies that would be of far more benefit to most members of minority groups.

This is a quite substantial book, and I recognize that not everybody is as uniformly interested in the topics discussed in it as I am. It therefore occurs to me that it may be helpful to give some indication of the extent to which chapters in different parts of the book can be read independently of one another. On the assumption that anybody reading this has already completed chapter 1, I estimate that it should be possible, without too much loss, to go straight from here to any of chapters 2, 3, 4, 7 or 8. (The later chapters contain references to relevant earlier material that can be followed up if desired.) Chapters 5 and 6 can also be read independently of one another, but it would be advisable before tackling either of them to read chapter 4, or at the very least the final section of it.

2

The Strategy of Privatization

I. Cultural Diversity

In every society, differences are socially recognized. The distinction between male and female is everywhere a basic building block of social organization, and most societies have far more elaborate and differentiated expectations of behaviour appropriate to the sexes than do contemporary western societies. Similarly, every society distinguishes age groups – at the minimum the young, the old and those in between – and attaches different expectations to each. The blind and the deaf, the physically handicapped and the severely mentally retarded are always socially recognized as different, and as requiring special treatment – though not necessarily benign treatment. Again, every society recognizes relations of marriage and kinship, and attaches normative expectations to the roles of husbands and wives, parents and children and often many additional relationships within extended families.

The fact of difference is universal and so is its social recognition. As far as that goes, there is nothing different about contemporary western societies. What is, however, true is that in these societies differentiation tends to be more complex and to have a larger optional component than is characteristic of traditional societies. The whole concept of a 'lifestyle', as something that can be deliberately adopted and may demand some sort of recognition from others, is indicative of a society in which the consumer ethic has spread beyond its original home. Somewhere on the interface between the more or less serious commitments involved in a lifestyle and the realm of pure assumption are modes of dress: when visiting other parts of the world,

western visitors are bound to be forcibly reminded of the cultural peculiarity of their own societies in the wide range of clothing that is socially acceptable. What line, if any, public policy should take in relation to this proliferation of divergent lifestyles is a question that is addressed by this book.

Most countries have always contained people with different religious beliefs and other divergent ideas about the right way to behave: these are typically transmitted within the family or some wider social group from one generation to the next. Here, too, there is nothing new. Nor is there anything new about conflict arising from difference. Conflicts between different Christian denominations, and between Christians and Jews, have been endemic in Europe. Adding to the religious and cultural mix Muslims, Hindus, Sikhs, Buddhists, Rastafarians and others in the last half century has undeniably created tensions which have given rise to harassment and occasionally lethal violence in Britain, for example. However, these phenomena do not appear to be motivated to a significant extent by doctrinally based hostility. Saying this is not, of course, to suggest that violence fuelled by racism or xenophobia is any less to be deplored than violence stemming from religious or cultural antagonism. It is only to make the simple but (as we shall see throughout this book) often neglected point that religious or cultural difference may be a marker of group identity without being the reason for the members of the group to suffer physical abuse or discrimination. It is doubtful that the louts who set out in a British city for an evening's 'Paki-bashing' see themselves as the spiritual descendants of the mediaeval Christian knights who set out to fight the Paynim.

It is, I suggest, precisely because the *odium theologicum* has not held the centre of the stage that the violence generated by the influx of widely divergent religious and cultural groups has been on a totally different scale from that which different Christian denominations managed to produce all by themselves in centuries of religious wars and persecutions. The one sizeable non-Christian group in Europe, the Jews, suffered over the centuries from segregation, discrimination and sporadic violence that was largely inspired by the Christian belief that the Jews were responsible for killing Jesus Christ. (It is curious that this should have been thought to be a bad thing, since Christians believe that somebody had to do it if mankind was to be redeemed.) The Holocaust was a different matter – a horrific reminder that racism too has a potential for unleashing massive destruction. It is instructive to contrast racialist ideology with the driving force behind the introduction of the Spanish Inquisition, which was the fear that Jewish *conversos* still harboured non-Christian beliefs in the inner recesses of their minds. It was thus premised on the assumption that there was nothing in principle preventing Jews from being good Christians – otherwise the inquiry into beliefs would have been pointless – whereas it followed from Nazi racist doctrine that Jews could never become Aryans: 'Germanism was in the

blood, and this blood made possible the sentiments and capacities of the German spirit.¹

In the previous chapter, I quoted Will Kymlicka as saying that 'the earlier model of a unitary republican citizenship, in which all citizens share the identical set of common citizenship rights . . . was originally developed in the context of much more homogeneous political communities', and as denying that this earlier model 'can be updated to deal with issues of ethnocultural diversity'.² In fact, this model of citizenship was developed in response to the wars of religion that made much of Europe a living hell in the sixteenth and seventeenth centuries. If it could bring those conflicts to an end – and on the whole it did – it is not at all apparent why it should not be up to the task of coping with religious and cultural differences now. In direct opposition to Kymlicka, indeed, I maintain that the relatively peaceful incorporation of a wide range of religions and cultures in the past half century is a tribute to the ability of what he calls the 'earlier model' to 'deal with issues of ethnocultural diversity'. For, whether the exponents of multiculturalism like it or not, no country – even Canada – has so far departed very far from the model of 'common citizenship rights'. Naturally, it is the sore spots that get the attention – from both politicians and academics – and I shall be discussing a number of them later in this chapter. But what tends to get forgotten is that the problems thrown up by a uniform system of liberal laws have been relatively few. In contrast, the 'politics of difference' is a formula for manufacturing conflict, because it rewards the groups that can most effectively mobilize to make claims on the polity, or at any rate it rewards ethnocultural political entrepreneurs who can exploit its potential for their own ends by mobilizing a constituency around a set of sectional demands.

Diversity is a fact and is here to stay – assuming (as I do) that we rule out, as possible 'solutions' to ethnic and cultural diversity, such drastic measures as compulsory sterilization, genocide, mass expulsion and Taliban-style methods of enforcing cultural conformity. The point is worth emphasizing if only because of the intellectually corrupting role played in contemporary discourse by the word 'multiculturalism'. One objection is that it has built into it the idea that the basis of all social groups is cultural – an assumption that does a lot of work but is in many instances simply bad anthropology. Thus, for example, Will Kymlicka's *Multicultural Citizenship* is largely about the phenomenon of multinational states.³ But national identity may or may not be based on a sense of cultural distinctiveness; and the demand for a degree of national autonomy may or may not be bound up with the desire to control the institutions responsible for cultural reproduction, such as the schools and the media, so as to ensure the perpetuation of the national culture. Scotland lies at one extreme, Quebec at the other. In the course of this book, I shall be calling attention in a variety of contexts to the way in which the analysis of groups (including ethnic and national groups) is

distorted by defining groups so that their basis must be some distinctive cultural identity rather than some other distinguishing feature.

An even more potent source of confusion is the use of terms such as 'pluralism' and 'multiculturalism' to refer simultaneously to a state of affairs and a political programme. Thus, we may speak descriptively of 'a view of society first depicted as "pluralism" and later as "multiculturalism"'. The former term points to the socio-cultural diversity that one may find in contemporary society; the latter indicates that this diversity has become an essential attribute of society itself.⁴ At the same time, 'some writers emphasize an ideological and normative aspect'.⁵ The trouble is that one and the same writer is liable to switch between the two uses without notice. Thus, the author of the first of these two quotations cites as an illustration of the descriptive use of 'multiculturalism' Charles Taylor's essay on 'The Politics of Recognition'.⁶ But in that essay Taylor also uses 'multiculturalism' to refer to a set of public policies that would give different cultures some kind of official 'recognition'. Similarly, 'pluralism' can be used not only descriptively but also prescriptively to advocate a programme of group separation that I shall discuss in the next section.

What makes the conflation of the descriptive and prescriptive uses of words such as 'multiculturalism' intellectually corrupting is that it can license an unargued shift from the one to the other. Recognition of the fact of multiculturalism can easily be taken to entail a commitment to the multiculturalist programme; conversely, anybody who dissents from normative multiculturalism automatically stands accused of blindness to the fact of multiculturalism. A fine example of this kind of *non sequitur* can be found in an essay on Canadian multiculturalism by three academics based in Québec. 'In English Canada, multiculturalism as policy is criticized in the name of equality, the latter being contrary to the promotion of distinction or differentiation. Such criticism advocates a unity that is impossible to reconcile with the constant insistence on the population's ethnic diversity.'⁷ This compounds both of the errors I have been talking about. First, ethnic diversity – especially in the North American usage of 'ethnicity' – is not the same thing as cultural diversity. People belong to an ethnic group to the extent that they identify themselves as descended from immigrants who saw themselves as belonging to some nationality, whether or not it had a state of its own. The identity may linger on for many generations even if after the first or second generation it has little cultural content and none that could form a basis for any special demand on the polity. (I shall have more to say about ethnicity of this kind in the next chapter.)

The second error embodied in the quotation is the unargued move from fact to norm. Even if 'ethnic diversity' (i.e. the fact of a number of ethnic groups in the sense just laid out) could be equated with cultural diversity, it does not follow that there is anything wrong with the criticism of multi-

culturalism (considered now as a programme) quoted by the authors. That is to say, it would be perfectly possible to accept the reality of cultural diversity while still maintaining that the multiculturalist programme is incompatible with equality, on the ground that equality is 'contrary to the promotion of distinction or differentiation'. The sleight of hand involved in moving from fact to norm is accomplished via the assertion that 'such criticism [of the multiculturalist programme] advocates... unity'. But there is nothing in the advocacy of a system of rules equally applicable to all citizens that commits one in any way to advocating 'unity', if that is taken to mean anything over and above (tautologically) the policy of equal treatment itself. Just as the whole point of liberal institutions with respect to religion is to give different religions a chance to flourish on equal terms, so an enormous range of cultural differences can be accommodated within a common framework of liberal laws.

Charles Westin, whom I quoted as drawing attention to the equivocation between multiculturalism as fact and multiculturalism as norm, goes on to make a terminological proposal: 'Some of the confusion may be cleared by consistently using the term "multiculturalism" for normative, programmatic approaches, and the term "multiculturality" for empirical conditions of cultural plurality.'⁸ I have too much respect for the English language, bruised and battered as it already is by so much of the multiculturalist literature I shall have to discuss, to accede to the second half of this suggestion. I do, however, accept the spirit of the proposal and will reserve the term 'multiculturalism' for the political programme of the 'politics of difference' – or, more precisely, the variety of programmes (not all necessarily consistent with one another) that have been advocated in its name. I shall not, however, engage in the pedantry of modifying quotations to fit this usage, nor will I draw attention to deviant uses on the part of others unless there is some special reason for doing so.

Similarly, of the numerous contemporary uses of pluralism (several of which, unfortunately, will have to be encountered in the course of this book), I shall allow myself the pleasure of eliminating one of them: that which describes a situation of cultural diversity. I shall reserve 'pluralism', in contexts such as the present one, for a political programme that aims to institutionalize cultural difference by segmenting society. If we were to call the realization of this programme the creation of a 'plural society', we would be in line with a distinguished tradition of sociological analysis, according to which 'in a condition of cultural plurality, the culturally differentiated sections will differ in their internal organization, their institutional activities, and their system of belief and value. Where this condition of cultural plurality is found, the societies are plural societies.'⁹

In terms of the vocabulary that I am adopting, then, the argument of this book is not that the fact of multiple cultures is unimportant (or in most

instances regrettable) but that the multiculturalist programme for responding to it is in most instances ill-advised. Indeed, it is just because the fact of multiple cultures is important that the politicization of group identities and the development of group-specific policies should be resisted. The liberal doctrine that the same law should apply to all, so far from being obsolete in contemporary conditions, is especially well adapted to meeting the challenges that they throw up. Of course, the liberal doctrine is not that any old law is satisfactory merely on condition that it has uniform application. The liberal commitment to civic equality entails that laws must provide equal treatment for those who belong to different religious faiths and different cultures. Much of what follows will be devoted to asking precisely what equal treatment means.

2. Privatization and Pluralism

So far in this chapter, I have made a good deal of the role of religion in inciting people to conflict, some of it of enormous magnitude. It is therefore important, for the sake of balance, to add that there is nothing inherent in the phenomenon of religion as such that inevitably leads to conflict between adherents of different deities, cults or sects. In Edward Gibbon's famous words: 'The various modes of worship which prevailed in the Roman world were all considered by the people as equally true; by the philosopher as equally false; and by the magistrate as equally useful. And thus toleration produced not only mutual indulgence, but even religious concord.'¹⁰ The key to this happy state of affairs was the non-exclusivity of religious faith: 'The devout polytheist, though fondly attached to his national rites, admitted with implicit faith the different religions of the earth.'¹¹ Contrary to the much-touted claim of Samuel Huntington, there is no reason why adherents of different belief systems cannot coexist peacefully.¹² 'Civilizations', which Huntington largely identifies with major religions, will 'clash' only if there is something specific to fight about. Difference as such is not a source of conflict. What causes conflict among adherents of different religious faiths is their leading to incompatible demands. Thus, the belief in a divinely sponsored mission to convert others, if necessary by force, is an obvious recipe for conflict. So is a claim made by the adherents of some religion to possess a particular holy place when this claim is contested by others. (Jerusalem is the prime example.) Finally, where members of different religious faiths have incompatible ideas about the way in which a polity and a society should be organized, and at least one group seeks to impose its ideas on a territory containing other groups, that is bound to result in conflict. Given that these are the conditions for conflict, it is scarcely surprising that the two prosely-

tizing monotheistic religions, Christianity and Islam, have been implicated in so much of it.

Liberal principles are not some sort of 'magic bullet' that can somehow create harmony without any need for sacrifices by the parties. If we want a medical analogy, we might better make the less agreeable comparison with a course of chemotherapy: it holds out the hope of destroying the malignant features of religion, but only with side-effects that are liable to be experienced as debilitating by believers. In other words, if the parties want peace enough to make the concessions that are needed to reduce their demands so that they become compatible, liberalism proposes a formula for doing so. More than that, liberal principles can make a moral appeal as a fair way of solving conflict, because they offer the parties equal treatment. There is, however, no guarantee that either peace or equity will be regarded by everybody as more important than winning – that is to say undertaking courses of action destructive of civility that are derived from religious beliefs.

The liberal formula for the depoliticization of differences first arose as a way of dealing with the strife between Protestants and Roman Catholics that the Reformation brought about, and that remains an important reference point. The prior assumption in Europe was that civil peace required the imposition of a single religion within each state, and that international peace required the mutual recognition by states of the rule 'Cuius regio, eius religio': to each realm its own religion. Religion was thus politicized up to the hilt: it was a matter of prime public concern, in as far as conformity to the state religion and loyalty to the state were regarded as inseparable. The liberal move – stated at first with qualifications and later more boldly – consisted in throwing all of this into reverse. The source of conflict, it was now suggested, was the very attempt to create religious conformity that was supposed to eliminate conflict. Only if the state took no official line on religion would religious passions be calmed and peace assured. As we now know, the gamble paid off, and religious toleration brought an end to holy warfare. Residual attempts to suppress a well-entrenched religious faith (as in Ireland well into the nineteenth century) simply reinforced the lesson by creating massive and lasting disaffection from all the state's institutions.

Nevertheless, the liberal proposal is controversial, and is bound to be. A common charge is that it assumes the unimportance of religion in people's lives. In this form, the objection is misguided. On the contrary, it can be replied, it is precisely because liberals recognize the important role that religion plays in many people's lives that they emphasize the importance of neutralizing it as a political force. There is, however, a more carefully phrased version of the objection that must, I think, be accepted as valid in its own terms. According to this, the liberal solution to religious conflict, in relegating religion to the private sphere, fails to accommodate all those

whose beliefs include the notion that religion ought to have public expression.

In virtue of the unworldly teachings of its founder, Christianity has at base a certain affinity with the privatization of religion. Many Protestant sects, indeed, find the detachment of religion from public life entirely congenial, while a few carry detachment to the point of refusing to 'render unto Caesar the things that are Caesar's', such as authority over road safety or sanitation. (I shall return in chapter 5 to the problems that they pose.) However, the founder – assuming him to have been accurately reported – appears to have assumed that the Last Trump would be heard by some of his audience in person. The failure of this prophecy, like the failure of subsequent prophecies on the same lines, did not undermine belief in the rest of the doctrine, but it left ample room for reinterpretation. Beginning as a cult whose members desired nothing except to be free of persecution, it in time developed towering structures such as the Roman Catholic Church and its Orthodox counterparts. Doctrinal development to legitimate them occurred alongside. All of these churches made claims to (direct or indirect) secular authority, and so in their turn did Lutherans and Calvinists. There is no way of denying, then, that the liberal formula fails to satisfy the understandings of the role of religion that have formed a central element in most mainstream variants of Christianity. The complaint is undeniably valid, as far as it goes. The only question is how far it does go.

Pressure on the legitimacy of official state neutrality has increased as a result of the permanent settlement in the past half century of substantial Muslim populations in France, Germany and Britain. The political pretensions of Christian churches are lent little support by the New Testament. Thus, for example, the temporal authority of the Pope rested only on 'what was arguably the most momentous – and the most successful – fraud of the Middle Ages: that known as the Donation of Constantine'.¹³ In the ironic words of Gibbon: 'This fiction was productive of the most beneficial effects. The sovereignty of Rome no longer depended on the choice of a fickle people; and the successors of St Peter and Constantine were invested with the purple and prerogatives of the Caesars.'¹⁴ In contrast with this, it is widely thought that (as one Indian scholar has expressed it) 'a Hindu or a Sikh, or a Muslim for that matter, would find it more difficult to make sense of the notion of "privatization of religion" than, perhaps, a Christian does'.¹⁵

At the same time, however, it is also widely agreed

that Hinduism as traditionally practised in India is for the most part accommodative of the coexistence of plural religions, and [that]... Hindu nationalism of the current sort... is a distortion and perversion of Hinduism because it has *politicized religion*, mobilizing and exploiting religion instrumentally for

political ends, thereby making it a divisive force providing no meeting ground for followers of different faiths.¹⁶

The position of Islam is rather different. It is true that here, too, we can distinguish the core doctrine from characteristically modern forms of politicized Islam, which are themselves pathological reactions to modernity.¹⁷ But to describe them as 'fundamentalist' is misleading if it is taken (on analogy with fundamentalism within Christianity) as siting their distinctive feature in a belief that the Koran is the literal word of God. For this is a standard, though not defining, feature of Islam. Although the Koran does not (as is sometimes supposed) underwrite a theocracy, it does contain a set of prescriptions for the way in which the community of the faithful is to be organized that has no counterpart in the Gospels.¹⁸ This body of doctrine, subsequently elaborated by generations of interpreters, sets up a strain between Islam and liberal norms a sign of which is that no polity with a Muslim majority has ever given rise to a stable liberal democratic state.¹⁹ It is also significant that the one that comes closest, Turkey, was subjected to what could without exaggeration be described as a 'cultural revolution' under Kemal Atatürk, following the overthrow of the Ottoman empire. Yet even this effort to create a secular state has not been sufficient to create a stable democracy observing the rule of law or to avoid a tension between secular and Islamic forces, as is evident today.

What follows from all of this? The lesson commonly drawn by multiculturalists is that 'liberalism can't and shouldn't claim complete cultural neutrality'.²⁰ This is a lazy response because no attempt is made to specify what 'complete cultural neutrality' might look like or to explain why it should ever have been supposed that liberalism is committed to it. The evidence against liberalism's having this property appears to consist in nothing except its incompatibility with some other (obviously incompatible) beliefs. Charles Taylor, from whom the quotation is taken, emphasizes the incompatibility of liberalism with Islam.²¹ But liberalism is also, as I have been at some pains to point out, incompatible with most versions of organized Christianity too, as they have existed during most of their history. If this is the evidence that constitutes the case against liberalism's cultural neutrality, we have to ask how on earth the condition of cultural neutrality could ever possibly be instantiated. It would seem that for liberalism – or any other doctrine for that matter – to be culturally neutral, there would have to be no existing (or possible?) world-view with which it conflicts. Since this is manifestly absurd, the assertion that liberalism is not culturally neutral asserts something that could not conceivably be denied.

Unless you take it as axiomatic that liberals are complete cretins, prudence might counsel caution here. If the claim to offer 'neutral ground' can be dismissed as easily as Taylor supposes, would it ever have been put forward?

The alternative, which Taylor does not consider, is that there must be some other sense in which liberals claim that they can offer 'a neutral ground on which people of all cultures can meet and coexist'.²² The answer is that the way in which liberalism is neutral is that it is fair. This is a general claim, but let us stick for now to the paradigmatic case of religion. What can be said about the liberal proposal for privatizing religion, then, is that it is the only way in which religions can be given equal treatment, and equal treatment is what in this context is fair. This contention is, of course, open to dispute. But it cannot be proved wrong merely by observing that the kind of settlement it recommends will be inimical to the beliefs of some people. A fair distribution of property will be inconvenient to those who have an unfairly large amount. Similarly, a fair way of dealing with religions will incommode those who wish to make claims on behalf of their own religion that cannot be accommodated within the constraints prescribed by fairness. There is nothing surprising in this.

The objection to privatizing religion was, let us recall, that there are many faiths that assign religion a more central role than is permitted by the strategy of privatization. From their point of view, the proposal demeans religion by denying it the public position that it ought to have. But the demand that the public arena should be suffused by religion is not, of course, a demand that it should be suffused by religion in general. Rather, it is a demand that one particular set of doctrines, or one particular religious authority, should be granted a privileged position. It may be a matter of outright proscription of rivals, a prohibition on their building places of worship, a ban on proselytizing, or some other form of discrimination, but the intention as well as the effect is unequal treatment. Similarly, if the society's major institutions are modelled on the prescriptions handed down by one religion, that must necessarily mean that the views of other believers (and non-believers) will not be equally incorporated.

Tariq Modood has written, with feigned innocence, that 'it is surely a contradiction to require both that the state should be neutral about religion, and that the state should require religions with public ambitions to give them up'.²³ But the point is, as he understands very well, that the giving up of public ambitions is precisely what neutrality between religions does require, to the extent that those ambitions would, if realized, violate the conditions of equal treatment. As Modood remarks, 'it is interesting that Prince Charles has let it be known he would as a monarch prefer the title "Defender of Faith" to the historic title Defender of the Faith.'²⁴ But it is mainly interesting for the light it throws on the Prince's ideas about religion: given that his guru was Laurens van der Post, we can guess that it is equated by him with some kind of vague spirituality devoid of doctrinal content. Actual *faiths* cannot all be defended unconditionally, because their demands are likely to conflict. Fortunately, the monarchy has done nothing to defend *the*

faith since the conscientious scruples of William IV held up the enactment of Roman Catholic Emancipation, but it would be better to perpetuate an anachronism than replace it with a piece of nonsense. Taking the monarchy out of the faith business altogether would be even better, of course, though best of all would be to get rid of the monarchy.

Neutrality is, then, a coherent notion that defines the terms of equal treatment for different religions. It is compatible with neutrality, however, that religions should be publicly recognized: the only constraint is, again, that they should be treated equally. Thus, almost every liberal democratic polity (the United States is a notable exception) provides public funding on some basis or other for schools run by or on behalf of religious denominations. This kind of pluralism can be questioned for its tendency to reinforce communal boundaries and disserve the interests of children in being well educated. (I shall say more about this in chapter 6.) But there is no doubt that such policies can be carried out in a way that is compatible with equal treatment. It should be noticed, however, that what we have here is the pursuit of privatization by other means. Parents are treated as having a preference for one sort of school over another, and they then get their proportional share of the total school budget in order to satisfy their preference. Religion is thus still depoliticized, and dealt with as a private matter; all that happens is that education is also depoliticized and treated as a private matter (at least within limits). Similarly, giving churches charitable status for tax purposes is not to be deemed inconsistent with privatization, even though it requires the fiscal authorities to determine (subject to an appeal to the courts) what is a church, and hence entails state recognition of churches for this purpose. The point is that charitable status or subsidy does not involve public endorsement of the activities carried out by the organization.

We can say, then, that such policies are neutral, in the sense that they are even-handed, and that is the only sense that matters. The educational policy is not 'culturally neutral' in the impossible sense presupposed by Taylor, because it must displease those who would prefer no state funding of religious schools, those who would prefer all state funding to go to schools run by their own religious denomination, and those who would like all schools except those of their own religious denomination closed down by the state. Similarly, some would prefer no tax breaks for religions to tax breaks all round, and others would prefer that they should be selective.

A policy of pluralization could be carried even further and made not merely facilitative but compulsory. Thus, parents might not merely be offered an opportunity to send their children to the schools of their own religion but made to do so. There is an obvious objection to this on the basis of freedom, but it could still be regarded as equal treatment. (Indeed, Charles Taylor is prepared to support parallel measures in relation to

language and culture on the ground that this is a superior interpretation of equal treatment.) The final stage would be for a society to 'require its citizens to remain loyal to whatever system of belief they were brought up in, or first committed themselves to... That would be consistent with pluralism even though it would run counter to liberal principles.'²⁵ It would also (like the previous proposal) go beyond privatization in that it would shift the state away from the passive accommodation of religious demands towards the role of an enforcer of pluralist policies. If the refusal to countenance the enforcement of diversity makes liberalism 'inhospitable to difference', as Taylor claims, that is a complaint whose validity must be acknowledged. (I shall explore Taylor's argument on this score in the next chapter.)

To conclude this discussion, it is worth noticing that the pluralist approach of protecting religious beliefs at the expense of liberty could be pursued in relation to the law of blasphemy. The current situation in Britain, which puts Christianity (and in particular the Church of England) in a uniquely privileged position, is manifestly indefensible on the most elementary conception of equal treatment. At least taking a short-term view, the conflictual potential of religion would plausibly be minimized by the prohibition of any attack on a religion that its adherents might find offensive. Thus, Lord Scarman, the most vociferous advocate among the judiciary of multicultural policies, argued at the time of the Rushdie affair in favour of 'legislation extending [the offence of blasphemy] to protect the religious beliefs and feelings of non-Christians', on the ground that it would 'safeguard the tranquillity of the Kingdom.'²⁶ (So would putting Valium in the water supply.) There is also an argument for pluralism as intellectual insulation on the ground that, because beliefs are constitutive of persons, 'to undermine and despise their beliefs is simultaneously to undermine and despise their selves. Freedom of speech should be devoted to, and also limited by, the promotion of mutual understanding between different communities of believers.'²⁷

The case against all this is that a society owes its members the opportunity – whether they choose to avail themselves of it or not – of changing their minds in matters of religious belief, and that this entails more than the absence of legal sanctions against apostasy. The basic argument for freedom of expression is travestied when it is represented as a way of indulging authors. If, as Bhikhu Parekh has suggested, 'the traditional liberal defence' was simply that free speech benefits intellectuals, perhaps at the expense of what is 'good for society as a whole', it would indeed be weak.²⁸ Parekh tells us that 'advocates of free speech [such as Milton, Locke, J. S. Mill, Kant and Schelling universalized [the interests of] the poet, the philosopher, the scientist or the artist.' Their high-minded protestations were a mere disguise for the pursuit of filthy lucre: 'the illustrious defenders of free speech... earned their living by, and had a vested interest in, free speech.'²⁹

Let us concede, for the sake of the argument, the claim made that James Joyce put into the mouth of Stephen Dedalus in chapter 9 of *Ulysses*: the claim that Shakespeare liked money – and very likely wrote for money. Still, there is something rather breathtaking in the idea that the chief gainer from the existence of Shakespeare's plays is Shakespeare's bank account. Yet it is absolutely clear that, when Parekh writes that 'liberal writers have tended to concentrate on the beneficiaries, ignoring those who stand little chance of enjoying these rights and for the most part bear only the corresponding burdens', he means to identify the creators with the beneficiaries of free speech and to identify the rest of the population with those who mainly stand to suffer burdens from its being exercised by others.³⁰

If this is where 'respect for culture' takes us, it is scarcely necessary to spell out its illiberal implications. The chief beneficiaries of the world's literature, philosophy and science are those whom it enables to break out of the limited range of ideas in which they have been brought up. There is no reason for exempting religion from this. Indeed, since religions (as against culturally transmitted practices) claim a truth value, there is even more reason for saying that the members of all religious faiths should be able to find out what can be said against them. Moreover, it is not enough that only polite and respectful criticisms should be available. Parekh complains that the contributions of (other) political philosophers to the discussion of the Rushdie affair were largely irrelevant to the terms in which the public debate was carried on. 'They asked if the Muslim demand for the restriction of free speech was justified. In fact Muslims were asking to know if and why the right to examine beliefs critically included the right to mock, ridicule and lampoon them.'³¹ There are two answers to this. The obvious one is that the right to mock, ridicule and lampoon is inseparable from the right of free speech. Seeking to ban *The Satanic Verses* on the grounds that it mocked, ridiculed and lampooned Islam was therefore demanding a restriction of free speech, and the political philosophers were simply doing their job by treating it as such. Parekh's attempt to suggest that there were two different issues, one discussed by political philosophers and the other by Muslims, is completely spurious.

A more substantive answer is that few people have ever been converted to or from a religion by a process of 'examining beliefs critically'. Religious fanaticism is whipped up by non-rational means, and the only way in which it is ever likely to be counteracted is by making people ashamed of it. If Christianity has in the past fifty years finally become compatible with civility (at least in most of Western Europe), that is the long-term consequence of an assault on its pretensions that got under way seriously in the eighteenth century. Gibbon employed the stiletto, while Voltaire resorted to the rapier. But in both cases the core of their deflationary strategy was mocking, ridiculing and lampooning. Voltaire, however, lived openly at Ferney and

died in old age of natural causes, even though religious zealots would have had no difficulty in assassinating him. The fate of Rushdie, forced to live in hiding with a price on his head, unfortunately suggests that the Islamic equivalent of Voltaire may still be some time off.

I wrote several years ago that we might be 'headed for a new Dark Age' and was roundly abused by Parekh for it: 'although Barry thinks "the evidence is there for all to see", he does little more than point to fascist and fundamentalist movements, none of which really threatens the fabric of Western civilization.'³² I remain uncontrite about the evidence, which seems to me to show that in many parts of the world liberal institutions and liberal ideas are on the defensive, and in some cases actually in retreat. But it is not necessary to go far afield to look for evidence. There is quite enough of a threat from within. To appreciate this, we need only ask what would be the prospects for freedom of speech if ideas such as those put forward by Parekh became dominant in currently liberal societies.

3. Equal Treatment

The strategy of privatization entails a rather robust attitude towards cultural diversity. It says, in effect, 'Here are the rules which tell people what they are allowed to do. What they choose to do within those rules is up to them. But it has nothing to do with public policy.' A simple model of rational decision-making, but one adequate for the present purpose, would present the position as follows: the rules define a choice set, which is the same for everybody; within that choice set people pick a particular course of action by deciding what is best calculated to satisfy their underlying preferences for outcomes, given their beliefs about the way in which actions are connected to outcomes. From an egalitarian liberal standpoint, what matters are equal opportunities. If uniform rules create identical choice sets, then opportunities are equal. We may expect that people will make different choices from these identical choice sets, depending on their preferences for outcomes and their beliefs about the relation of actions to the satisfaction of their preferences. Some of these preferences and beliefs will be derived from aspects of a culture shared with others; some will be idiosyncratic. But this has no significance: either way it is irrelevant to any claims based on justice, since justice is guaranteed by equal opportunities.

None of this means, of course, that people will not in fact feel hard done by and complain that the system of uniform laws treats them unfairly. Many such complaints are, indeed, made. The question that has to be asked is what merit there is in these complaints. That will be the subject of the rest of the chapter. The main conclusion for which I shall argue is that a popular political response – and one that multiculturalists would like to see made

more common – is actually very hard to justify in any particular case, even though it cannot be ruled out a priori. This is the approach that keeps the rule objected to for most of the population but allows members of cultural or religious minorities to opt out of the obligation to obey it. More precisely, I shall concede that this approach, which I shall call the rule-and-exemption approach, may sometimes be defensible on the basis of political prudence or an estimate of the balance of advantages. But I shall reject the characteristic case made by the supporters of multiculturalism, that a correct analysis would show exemptions for cultural minorities to be required in a great many cases by egalitarian liberal justice.

An example of the rule-and-exemption approach is the exemption from humane slaughter regulations that many countries have enacted to accommodate the beliefs of Jews and Muslims. Another is a family of exemptions from laws designed to reduce head injuries which have the effect of permitting turban-wearing Sikhs to ride motorcycles, work in the construction industry, and so on. I shall discuss both of these in the next section. Most, though not all, of these exemptions are claimed on the basis of religious belief. Indeed, Peter Jones has gone so far as to suggest that, if we leave aside the 'religious components of culture', there should be 'few, if any problems of mutual accommodation' arising from cultural diversity.³³ We shall see in the course of this book how often demands for special treatment – by individuals and by organizations – are based on religious belief. This is, perhaps, to be expected if we recognize the tendency for religious precepts to be experienced as more peremptory than norms that are supported only by custom.

We should at the same time, however, appreciate that claims based on religion are more likely to be sympathetically received by outsiders than claims based on custom, especially in largely Protestant (or ex-Protestant) countries, in which there is a traditional reluctance to 'force tender consciences'. This tendency is reinforced in the United States by the constitutional guarantee of 'freedom of religion', which encourages the packaging of custom as religion. The result is, for example, that wearing a *yarmulke* (skull cap) is presented as a religious obligation rather than as the traditional practice that it is for some Orthodox Jews. Even without this incentive, however, it is perceived as advantageous to press claims on the basis of religion wherever possible. Thus, it is questionable that the wearing of a turban is a religious obligation for Sikhs, as against a customary practice among some.³⁴ In the parliamentary debate on the proposal to exempt turban-wearing Sikhs from the requirement that all motorcyclists must wear a crash helmet, those who favoured the exemption thought it important to insist on the religious standing of the turban, while those who were opposed to it argued for its customary status.³⁵ There is, however, a countervailing force in Britain, as we shall see below: outside Northern Ireland,

discrimination on the basis of religion is not illegal, but discrimination on the basis of race or ethnicity is. This means that there is an incentive to code what may plausibly be a religious obligation (e.g. the wearing of some kind of head-covering by Muslim women) as an ethnic cultural practice, so as to bring it within the scope of the Race Relations Act.

The strong claim made by many theorists of multiculturalism is that special arrangements to accommodate religious beliefs and cultural practices are demanded by justice. The argument is that failure to offer special treatment is in some circumstances itself a kind of unequal treatment. For, it is said, the same law may have a different impact on different people as a result of their religious beliefs or cultural practices. Thus, the liberal claim that equal treatment is generated by a system of uniform laws is invalid. What can be said of this argument? There can be no question that any given general law will have a different impact on different people. But is there anything inherently unfair about this? The essence of law is the protection of some interests at the expense of others when they come into conflict. Thus, the interests of women who do not want to be raped are given priority over the interests of potential rapists in the form of the law that prohibits rape. Similarly, the interests of children in not being interfered with sexually are given priority over the interests of potential paedophiles in the form of the law that prohibits their acting on their proclivities. These laws clearly have a much more severe impact on those who are strongly attracted to rape and paedophilia than on those who would not wish to engage in them even if there were no law against them. But it is absurd to suggest that this makes the laws prohibiting them unfair: they make a fair allocation of rights between the would-be rapist or paedophile and the potential victim.

The point is a completely general one. If we consider virtually any law, we shall find that it is much more burdensome to some people than to others. Speed limits inhibit only those who like to drive fast. Laws prohibiting drunk driving have no impact on teetotallers. Only smokers are stopped by prohibitions on smoking in public places. Only those who want to own a handgun are affected by a ban on them, and so on *ad infinitum*. This is simply how things are. The notion that inequality of impact is a sign of unfairness is not an insight derived from a more sophisticated conception of justice than that previously found in political philosophy. It is merely a mistake. This is not, of course, to deny that the unequal impact of a law may in some cases be an indication of its unfairness. It is simply to say that the charge will have to be substantiated in each case by showing exactly how the law is unfair. It is never enough to show no more than that it has a different impact on different people.

All of this bears on a line of thought in recent political philosophy according to which a legitimate claim for additional income can, in principle at least, be made by those with expensive tastes – people who have to eat

plowers eggs and drink vintage claret (to take a famous example) if they are to achieve the same level of satisfaction as others can achieve with sausages and beer. The usual reaction to the idea that those with expensive tastes should get extra resources is that it is absurd, and such a reaction is perfectly sound. This is not simply because the proposal is unworkable: those who put forward the idea are usually quite willing to concede that. The error lies in thinking that, even as a matter of principle, fair treatment requires compensation for expensive tastes. To explain what is wrong with the idea, we have to invoke the fundamental premise that the subject of fairness is the distribution of rights, resources and opportunities. Thus, a fair share of income is a fair share of income: income is the stuff whose distribution is the subject of attributions of fairness. Suppose that you and I have an equal claim on society's resources, for whatever reason. Then it is simply not relevant that you will gain more satisfaction from using those resources than I will. What is fair is that our equal claim translates into equal purchasing power: what we do with it is our own business.

If we rule out the claim that equal treatment entails equal impact, there may still be other arguments for special arrangements to accommodate cultural practices or religious beliefs. But what are they? One natural recourse is to suggest that what I have said so far may be all very well for costs arising from preferences, but that costs arising from beliefs are a different kettle of fish. It is very hard to see why this proposition should be accepted, however confidently it is often advanced. Consider, for example, the way in which people's beliefs may make some job opportunities unattractive to them. Pacifists will presumably regard a career in the military as closed to them. Committed vegetarians are likely to feel the same about jobs in slaughterhouses or butchers' shops. Similarly, if legislation requires that animals should be stunned before being killed, those who cannot as a result of their religious beliefs eat such meat will have to give up eating meat altogether.

Faced with a meatless future, some Jews and Muslims may well decide that their faith needs to be reinterpreted so as to permit the consumption of humanely slaughtered animals. And indeed this has already happened. According to Peter Singer, 'in Sweden, Norway and Switzerland, for example, the rabbis have accepted legislation requiring the stunning [of animals prior to killing] with no exceptions for ritual slaughter'.³⁶ The case for saying that humane slaughter regulations are not unfair does not, however, depend upon the claim that beliefs are a matter of choice, so that it is somehow people's own fault if they are accommodated by their beliefs. (That is not the point about expensive tastes either.) If we want to say, as Yael Tamir does, that people should be 'free to adhere to cultures and religions of their choice', that should be taken to mean only that they should not be penalized for changing their minds about the value of their current religious

or cultural commitments.³⁷ It should not be interpreted to mean that these commitments are the product of choice. It makes no sense to say that we can decide what to believe. Similarly, we can say if we like that people are responsible for their own beliefs, but that should be understood simply as a way of saying that they own them: their beliefs are not to be conceived of as some sort of alien affliction. (The same may, again, be said in general about preferences.) Talking, as Michael Sandel does, about people being 'encumbered' by their beliefs feeds this sense of alienation.³⁸

The position regarding preferences and beliefs is similar. We can try to cultivate certain tastes (by, for example, developing a familiarity or skill), and we can try to strengthen certain beliefs (by, for example, deliberately exposing ourselves to messages tending to confirm them), but in neither case is there any guarantee of success. Moreover, the decision to make the attempt must come from somewhere: we must already have a higher-order preference for developing the taste or a higher-order belief that it would be a good thing to strengthen the belief. Choice cannot, in either case, go all the way down. I suspect that one source of the idea that many preferences are easily changeable is a result of a tendency to muddle together preferences and choices. Suppose, for example, that I have a preference for vanilla over strawberry ice cream, other things being equal. That entails that, if other things are actually equal, I will choose vanilla. But this preference may be a weak one, which means that things do not have to be very unequal before my choice switches to strawberry. The weakness of my preference would be revealed by my willingness to pay only a little more for vanilla and my lack of reluctance to let somebody else have the last vanilla ice cream. Even so, the preference itself, even if weak, may be solidly based in physiology and almost impossible to change. The upshot is, then, that beliefs and preferences are in the same boat: we cannot change our beliefs by an act of will but the same can be said equally well of our preferences. It is false that the changeability of preferences is what makes it not unfair for them to give rise to unequal impact. It is therefore not true that the unchangeability of beliefs makes it unfair for them to give rise to unequal impacts.

Beliefs are not an encumbrance in anything like the way in which a physical disability is an encumbrance. Yet precisely this claim is sometimes made. Thus, Bhikhu Parekh argues that giving people special treatment on the basis of their beliefs 'is like two individuals who both enjoy the right to equal medical attention but who receive different treatments depending on the nature of their illness'.³⁹ A disability – for example, a lack of physical mobility due to injury or disease – supports a strong *prima facie* claim to compensation because it limits the opportunity to engage in activities that others are able to engage in. In contrast, the effect of some distinctive belief or preference is to bring about a certain pattern of choices from among the set of opportunities that are available to all who are similarly placed

physically or financially. The position of somebody who is unable to drive a car as a result of some physical disability is totally different from that of somebody who is unable to drive a car because doing so would be contrary to the tenets of his or her religion. To suggest that they are similarly situated is in fact offensive to both parties. Someone who needs a wheelchair to get around will be quite right to resent the suggestion that this need should be assimilated to an expensive taste. And somebody who freely embraces a religious belief that prohibits certain activities will rightly deny the imputation that this is to be seen as analogous to the unwelcome burden of a physical disability.

The critical distinction is between limits on the range of opportunities open to people and limits on the choices that they make from within a certain range of opportunities. Parekh deliberately blurs this distinction by writing that 'opportunity is a subject-dependent concept', so that 'a facility, a resource, or a course of action' does not constitute an opportunity for you, even if it is actually open to you, unless you have 'the cultural disposition... to take advantage of it'.⁴⁰ This proposal actually destroys the meaning of the word opportunity, which originally related to Portunus, who was (and for anything I know to the contrary still is) the god who looks after harbours.⁴¹ When the wind and the tide were propitious, sailors had the opportunity to leave or enter the harbour. They did not have to do so if they did not want to, of course, but that did not mean (as Parekh's proposal would imply) that the opportunity then somehow disappeared. The existence of the opportunity was an objective state of affairs. That is not to say that opportunity could not be individualized: whether a certain conjunction of wind and tide created an opportunity for a particular ship might depend on its build and its rigging. But it did not depend on the 'cultural disposition' of the crew 'to take advantage of it'. They might, perhaps, have chosen not to sail because setting out on a voyage was contraindicated by a religious omen, but that simply meant that they had passed up the opportunity.

Lily Bart, the heroine of *The House of Mirth* (in the sense in which Becky Sharp is the heroine of Thackeray's *Vanity Fair*), spends a lot of time in the novel bemoaning the way in which the wealth of her relatives and friends provides them with opportunities – a word she uses several times in this context – that they do not take up because their horizons are limited by the stifling culture of upper-crust New York, and she reflects on the advantage she would be able to take of the same opportunities. If Parekh were right, we should have to convict Miss Bart and her creator, Edith Wharton, of committing a conceptual mistake. On Parekh's analysis, Lily Bart would have had to think that, if she had the wealth of her relatives and friends, she would have had a lot of opportunities that they did not have. But this would be, I submit, to lose the point of her complaint, which was precisely that they had the opportunities yet did not use them. Similarly, the opportunity to

read a wide range of books is ensured by literacy plus access to a public library or (provided you have the money) a bookshop. If you belong to some Christian sect that teaches the sinfulness of reading any book except the Bible, you will choose not to avail yourself of this opportunity. But you still have exactly the same opportunity to read books as somebody who is similarly placed in all respects except for not having this particular belief.

The peculiar implications of Parekh's analysis are well illustrated by his treatment of one example of 'giving people special treatment on the basis of their beliefs'. At issue here is the exemption that Sikhs enjoy from the 'provisions designed to penalize those who carry knives and other sharply pointed objects' contained in the Criminal Justice Act of 1988, which 'specifically states that it is a defence for an accused to prove that he had the article with him in a public place "for religious reasons"', a provision that was 'introduced... to permit Sikhs to carry their *kirpans* (swords or daggers) in public places without fear of prosecution'.⁴² Parekh asks if non-Sikhs can 'legitimately complain of discrimination or unequal treatment' and replies that 'there is no discrimination involved both because their [i.e. non-Sikhs] religious requirements are not ignored, and because they [i.e. non-Sikhs] do not suffer adversely as a result of the law respecting those [religious requirements] of the Sikhs'.⁴³ However, the rationale of a law against the carrying of knives in public must be that unarmed citizens (pleonastically) 'suffer adversely' if some other people are going around carrying weapons. Unless a knife confers an advantage on its possessor, there is no point in having a law restricting the carrying of knives at all. Assuming that the law's rationale is sound, it is absurd to deny that granting an exemption to it for members of one group inevitably reduces the personal security of all the rest of the population.

Parekh also argues that 'as for the complaint of inequality, there is a *prima facie* inequality of rights in the sense that Sikhs can do what others cannot. However the alleged inequality grows out of the requirements of the principle of equal respect for all, and it is not so much inequality as an appropriate translation of that principle in a different religious context'.⁴⁴ But the inequality of rights is not *prima facie* - it is real. The right to carry knives amidst a population none of whom can legally do the same is an inequality of rights, however we look at it. Whether or not it is a justifiable inequality is another matter. But it is playing with words to suggest that it is really a superior form of equality to the liberal one that says we have equal rights when we have the same ones.

I have argued so far that the differential impact of a general law cannot in itself found a claim that the law is unjust. But justice is not the only basis on which the argument for an exemption from the law might be made. If it is true that a law bears particularly harshly on some people, that is at the very least a reason for examining it to see if it might be modified so as to

accommodate those who are affected by it in some special way. Prudence or generosity might support such a move. From a utilitarian point of view, we could pose the question by asking if it is worth giving up some of the benefits of the law in order to reduce the costs of complying with it. It does not follow, though, that the best approach is to keep the general rule unchanged and simply add an exemption for the members of some specific group. The alternative is to work out some less restrictive alternative form of the law that would adequately meet the objectives of the original one while offering the members of the religious or cultural minority whatever is most important to them. This avoids the invidiousness of having different rules for different people in the same society. In practice, however, it is the rule-and-exemption approach that is usually followed.

We can understand how this comes about if we think for a moment about the politics involved. Any open political system (not only one with formally representative political institutions) is inevitably subject to lobbying by minority groups with a special interest in some aspect of public policy. It very often happens that there is no similarly well-organized group on the other side. Governments and legislatures are naturally tempted, therefore, to take the path of least resistance and cave into these minority group demands. To a politician, the attractions of a general law with exemptions for members of specific groups are almost irresistible. No creative effort is required; and, while those who are concerned with the objective of the law may grumble at the special dispensations, they will at least be satisfied that they have achieved most of what they want. At the same time, the articulate special interests that are most opposed are bought off by permission to opt out. Sikhs, whose relatively small overall numbers in Britain are offset by their concentration in a small number of parliamentary constituencies, have been remarkably successful at playing this game, as we shall see.

Once we accept, however, that the case for exemptions must be based on the alleviation of hardship rather than the demands of justice, it seems to me much more problematic to make it out than is widely assumed. I do not wish to rule out the possibility that there will be cases in which both the general law and the exemption are defensible. Usually, though, either the case for the law (or some version of it) is strong enough to rule out exemptions, or the case that can be made for exemptions is strong enough to suggest that there should be no law anyway. Consider, for example, the claim that 'the core of Rastafarian religiosity resides in the revelatory dimensions induced by the sacramental use of *ganja* [cannabis], in which a new level of consciousness is attained. Adherents to the movement are enabled more easily to perceive Haile Selassie as the redeemer and to appreciate their own identities'.⁴⁵ It might perhaps be said of many other religious truths that they too would be more easy to believe in under the influence of mind-altering substances.⁴⁶ However, there would obviously be insuperable practical

problems in legalizing the use of cannabis for Rastafarians only, such as the difficulty of restricting its use to Rastafarian religious ceremonies, the absurdity of trying to distinguish 'genuine' from 'opportunistic' Rastafarians, and the virtual impossibility of preventing Rastafarian cannabis from 'leaking' into the general population.⁴⁷ For the same reasons, claims for religiously based exemptions to laws prohibiting use of marijuana in the United States have been ruled out even by those Supreme Court judges sympathetic to such exemptions in general: 'the Ethiopian Zionist Coptic Church... teaches that marijuana is properly smoked "continually all day"', and even if its use were officially prescribed only within the context of a religious ceremony, 'it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts'.⁴⁸ The best case for making cannabis legal for Rastafarians or members of the Ethiopian Zionist Coptic Church would be to argue that it is far less harmful than either alcohol or tobacco, both of which are legal.⁴⁹ But this is an argument whose scope is not confined to Rastafarians. Rather, if it is valid, it constitutes a case for legalizing the consumption of cannabis by anybody.

4. The Rule-and-Exemption Approach

Because it tastes better and is less likely to contain antibiotics or growth hormones, but also out of feelings of guilt (since I can see no answer to the moral case for vegetarianism), I try to buy only meat from animals that have been reared under conditions appropriate to them, fed only food that forms part of their natural diet, and have been slaughtered humanely. This is, literally, an expensive taste. A metaphorically expensive taste (since it might actually end up saving money) would be that of somebody who is a vegetarian out of moral conviction but misses the taste of meat and would still be buying it if they had not come across Peter Singer. A variant on this would be a vegetarian on religious grounds (a Brahmin, for example) or somebody whose religion forbade them to eat pork, such as an observant Jew or Muslim, if they hankered for what was not permitted. Provided we are prepared to extend the conception of 'expensive taste' to include costs that arise from moral convictions or religious beliefs, these are all cases of expensive tastes. They are also, I shall take it, all cases in which nobody would suggest that those with the expensive taste should be compensated out of public funds or granted some waiver from generally applicable laws.

I mentioned earlier that humane slaughter regulations will have the effect of ruling out the consumption of meat for Orthodox Jews and observant Muslims, unless their religious authorities declare that the traditional precepts do not have to be followed, as has occurred among Jews in Norway, Sweden and Switzerland. These religious precepts may also be said to create

an expensive taste, in conjunction with humane slaughter legislation, at any rate among those who would eat meat as long as it was kosher or halal. Unlike the previous cases, however, this is one in which the expensive taste is widely held to justify the demand that Jews and Muslims should be given special treatment in the form of an exemption from humane slaughter legislation so that they can go on eating meat consistently with their beliefs. Moreover, campaigns to secure such an exemption have been successful in almost all western countries, the exceptions being the three already listed. In Britain, for example, 'under the Slaughter of Poultry Act (1967) and the Slaughterhouses Act (1979) Jews and Muslims may slaughter poultry and animals in abattoirs according to their traditional methods'.⁵⁰ 'Traditional methods' is a euphemism for bleeding animals to death while conscious, rather than stunning them prior to killing them, as is otherwise required.

There are two possible approaches to ritual slaughter that would not lead to the making of an exemption to a general rule. The first would be a libertarian one. It can be argued that, just as the decision to eat meat at all is currently left to the individual conscience, decisions about the way in which animals are killed should be left to the conscience of the consumer. In effect, the job of weighing animal welfare against human carnivorous tastes would be left for each person to perform. This argument is parallel to one used to oppose the prohibition of bloodsports to the effect that their moral acceptability should be left to the individual conscience. Alternatively, the case of ritual slaughter might be assimilated to the ban on cockfighting and dogfighting, customs in their time just as deep-rooted as hunting or hare-coursing but prohibited nonetheless on animal welfare grounds. Taking this line, the implication would be that there is a certain point beyond which cruelty to animals is a legitimate matter for collective decision-making, and that kosher/halal butchery is over that line.

The current situation in Britain is indefensible on libertarian grounds because it is fundamental to the libertarian position that consumers should have clear information on the basis of which to make choices. This condition is not met. There is no requirement that meat from animals killed while still conscious should be labelled to indicate this. Moreover, there is a conspiracy of silence maintained by government and retailers to conceal from consumers the fact that meat displayed on supermarket shelves may come from animals killed in this way. I have never seen this information provided at point of sale and my own informal survey indicates that it is a well-kept secret. In practice, 'a substantial proportion of meat produced by means of religious slaughter is marketed to the general public without any indication of its origins'.⁵¹ The reason for selling most of this meat (as much as two-thirds, according to Singer) on the general market is the cost of preparing meat that is to be sold as 'kosher'.

For meat to be passed as 'kosher' by the Orthodox rabbis, it must, in addition to being from an animal killed while conscious, have had the forbidden tissues, such as veins, lymph nodes, and the sciatic nerve and its branches removed. Cutting these parts out of the hindquarters of an animal is a laborious business and so only the forequarters are sold as kosher meat.⁵²

Does this matter? I think it does. Already 'by 1983 a National Opinion Poll [in Britain] revealed that 77 per cent of respondents were altogether opposed to religious slaughter'.⁵³ Since then, there is much evidence that public opinion has moved ahead of the politicians in concern about the welfare of farm animals. There has, for example, been a big swing away from purchase of eggs from hens in battery cages, and survey evidence suggests that more explicit labelling would have created a bigger swing still. It is therefore reasonable to assume that a very large proportion of the population would shun meat from animals killed by ritual slaughter if they were aware of its provenance.

At the opposite pole from the libertarian position is the proposal to require all animals to be stunned before death. This was advocated by the British government's own Farm Animal Welfare Council in its 1985 *Report on the Welfare of Livestock when Slaughtered by Religious Methods*. The Report's principal conclusion was that, although there was a dearth of scientific evidence to indicate at precisely what stage in the process of losing consciousness animals cease to feel pain, loss of consciousness following severance of the major blood vessels in the neck is not immediate.⁵⁴ In their own words: 'The up-to-date scientific evidence available and our own observations leave no doubt in our minds that religious methods of slaughter, even when carried out under ideal conditions, must result in a degree of pain, suffering and distress which does not occur in the properly stunned animal.'⁵⁵ On similar grounds, 'the Commission of the European Communities Scientific Veterinary Committee recommended to the European Parliament in 1990 that the legal exemptions from stunning should be abolished in all the Community's member states.'⁵⁶

In the face of this, it seems to me virtually impossible to provide an intellectually coherent rationale for the rule-plus-exemption strategy, even though it is easy enough to understand its political success. The libertarian line is that there should be no collective view about the demands of animal welfare. Individual consumers should be put in a position to make informed choices, according to their own religious beliefs, ideas about the importance of animal suffering, taste preferences, and anything else that comes into the equation. The alternative line is that there is a legitimate collective concern with the welfare of animals which underwrites the requirement that all animals be stunned prior to being killed.

What do we have to think in order to finish up with neither of these but rather with the notion that the general rule should be that stunning must take place yet at the same time that there should be a special exemption for religious slaughter? Clearly, we have to accept two things: first, that it is legitimate to take collective decisions in pursuit of animal welfare, and, second, that animal welfare is better served by stunning. (If we did not believe the second, there would be no point in having a restrictive policy that makes stunning the rule.) We then have to hold that an inferior method is nevertheless to be tolerated, so long as its practice is restricted to those for whom it has religious significance. A rough analogy would be to allow hunting but restrict it to those who could show that it was part of their culture. However, it is implausible that a fox would feel better about hunting if it knew that it was to be chased by the Duke of Beaufort than if it knew it was to be chased by Roger Scruton, whom it might regard as a parvenu unable to claim hunting as part of his ancestral way of life.⁵⁷ Similarly, it is hard to see why some cows and sheep should have to suffer in ways that are unacceptable generally in order to enable people with certain religious beliefs to eat their carcasses. To withstand that objection, it is necessary to postulate that, although ritual slaughter is far from being best practice, it is nevertheless above some threshold of cruelty below which prohibition would be justified. This then has to be taken to legitimate some sort of collective decision about the relative weight of the interests involved in which those of the animals lose out. I would not be so bold as to say that nobody could in good faith maintain such a position. I do, however, wish to claim that it requires a capacity for mental gymnastics of an advanced order.

It is worth adding this: the rule-plus-exemption regime is predicated on the assumption that the total amount of suffering due to ritual slaughter is to be minimized – consistently with not prohibiting it, of course. But then it is inconsistent with that logic to permit the sale of any part of the carcass of an animal killed by ritual slaughter as anything except kosher meat. A requirement that all the meat must be marketed as kosher would cut in three the number of beasts killed without prior stunning if the demand for kosher meat remained the same. Since, however, the expense of removing the forbidden parts would have to be reflected in the price of kosher meat, there would presumably be some reduction in demand for it, so the total number of beasts killed under the exemption would decline even further. This kind of provision, which as far as I am aware has never been proposed, cannot reasonably be resisted by anyone who seriously accepts the premises that are required for the derivation of the rule-plus-exemption system.

Some will no doubt think that I have overlooked the most compelling argument in favour of an exemption, the argument from freedom of religion. Thus, Sebastian Poulter cites in support of the right to kill animals while conscious Article 9 (1) of the European Convention on Human Rights,

which 'provides that everyone has a right to freedom of religion, including the right to manifest this religion in practice and observance', and Article 27 of the International Covenant on Civil and Political Rights, which says that members of minority groups 'shall not be denied the right ... to profess and practise their own religion'.⁵⁸ However, an appeal to religious liberty provides only spurious support for this and other similar exemptions, because the law does not restrict religious liberty, only the ability to eat meat.

However insubstantial it may be, the argument from religious liberty is often put forward in this kind of context and has been found persuasive by the British parliament.

In 1976 Parliament enacted a special exemption for turbaned Sikhs from the statutory requirement that all motorcyclists must wear crash helmets. ... Parliament voted in favour of the special exemption with little debate because it wished to safeguard the religious freedom of the Sikh community in Britain even though there was a strong counter-argument about the need for safety on the roads.⁵⁹

In the discussion within a Standing Committee of the House of Commons, 'the value of religious freedom was stressed by several speakers', so the question was conceived as one of 'whether the right to religious freedom should predominate over the principle of equal treatment in the enforcement of measures promoting road safety'.⁶⁰

The requirement that drivers and passengers should wear helmets was introduced in 1971 with no exemptions. This was challenged in court on the ground that 'the regulations [requiring a helmet] were null and void as being in contravention of the guarantee of freedom of religion enshrined in the European Convention of Human Rights'. Lord Widgery disposed of this claim with the crisp remark: 'No one is bound to ride a motor cycle. All that the law prescribes is that if you do ride a motor cycle you must wear a crash helmet.'⁶¹ The European Commission on Human Rights rejected a similar claim based on freedom of religion, saying that 'the compulsory wearing of crash helmets is a necessary safety measure for motor cyclists. The Commission is of the opinion therefore that any interference there may be with the applicant's freedom of religion was justified for the protection of health in accordance with article 9 (2)'.⁶² If the regulations could be said to have interfered with freedom of religion, it was an interference justified by (as the judgement continued) 'the valid health considerations on which the regulations are based'.⁶³ But the wording leaves it open whether or not the regulations could properly be counted as an interference at all. Lord Widgery's argument was that they did not, because the inability to ride a motorcycle does not prevent a Sikh from observing any demands of his religion. This is the right answer.

Lord Widgery continued by saying that Sikhs were 'prevented from riding a motor cycle, not because of the English law but by the requirements of their religion'.⁶⁴ Poulter criticizes this by saying that he was 'transparently wrong in stating that their faith precluded the riding of motor cycles when it clearly did not. It was the provisions of English law which had this effect'.⁶⁵ This is as silly as asking if it is the upper or lower blade of a pair of scissors that cuts the paper. The essential point is that the practice of their religion entails that turbaned Sikhs cannot ride a motorcycle without exposing themselves to a risk of preventable head injuries. The question is then whether or not they should nevertheless be allowed to assume that risk. The important point made by Lord Widgery in this context is that if they are not given an exemption they are not discriminated against by the law, as they would be if there were a law that said 'No Sikh may ride a motorcycle.' To say, as Poulter does, that it is the law that precludes Sikhs from riding motorcycles assimilates a crash helmet law to this quite different kind of law, which could quite correctly be said to be discriminatory.

Once again we must insist on the crucial difference between a denial of equal opportunities to some group (for example, a law forbidding Sikhs to ride motorcycles) and a choice some people make out of that from a set of equal opportunities (for example, a choice not to ride a motorcycle) as a result of certain beliefs. Those who believe that, even with a crash helmet, riding a motorcycle is too dangerous to be a rational undertaking are (in exactly the same, misleading, sense) 'precluded' from riding one. We all constantly impose restrictions on ourselves in choosing among the options that are legally available to us according to our beliefs about what is right, polite, decent, prudent, professionally appropriate, and so on. Atheists are entitled to feel offended at the idea that the only restraints on self-gratification derive from religious belief.

It is interesting to note that, in the parliamentary debates, the ritual slaughter exemption was drawn on as an argument for the exemption of Sikhs from the requirement of wearing a crash helmet.⁶⁶ We thus see how one dubious case is deployed to support another. The claim that exemptions for ritual slaughter are about religious freedom, as members of parliament seem to have believed, is just as bogus as in the crash helmet case, and for exactly the same reason: to adapt Lord Widgery's lapidary words, nobody is bound to eat meat. (Some Orthodox Jews are vegetarians.) Assuming that killing animals without prior stunning falls below the prevailing standards for the humane treatment of animals, the point is that those who are not prepared to eat meat from animals killed in any other way cannot eat meat without violating these minimum standards. It is not the law but the facts (assuming the facts bear it out) of neurophysiology that make this so. The law may condone the additional suffering of animals killed without prior

stunning, but if it does we should be clear that what it is doing is accommodating the tastes of a subset of carnivores, not observing the demands of religious freedom.

As in the ritual slaughter case, it is hard to steer a path between the conclusion that wearing a crash helmet is so important that all motorcyclists should have to do it and the alternative of saying that this is a matter that people should be left free to decide for themselves. There is one argument for making turbans a special case that would be valid if its premises were true. However, the minor (factual) premise of the argument is not true. The major premise has been put forward by Parekh as follows: 'if another headgear served the purpose [of avoiding death and injury] equally well [as a crash helmet], there was no reason to disallow it.'⁶⁷ This is undoubtedly true, and if turbans did serve this purpose equally well there would be no need to stipulate that the right to wear a turban instead of a crash helmet should be restricted to Sikh motorcyclists: the law could simply specify either a crash helmet or a turban. The minor premise consists in the claim that 'the turban largely satisfied that criterion' (that is to say, the criterion that whatever headgear was worn should avert death or injury as well as a crash helmet), and the conclusion is then drawn that, in virtue of this equivalence, the turban 'was accepted as legally equivalent to the helmet'.⁶⁸ This is an imaginative reconstruction of the terms of the parliamentary debate, such as it was. In fact, the government's spokesman denied explicitly, on the basis of test results, 'that a properly tied turban in itself provides adequate protection in the event of an accident involving a blow to the head'.⁶⁹ The choice was presented as one between 'road safety criteria' and 'religious tolerance', and this way of structuring the issue appears to have been generally accepted.⁷⁰ Thus, Parekh's argument is invalidated by the falsity of its factual premise.

The relevance of the test results for the incidence of death and injury among motorcyclists could be challenged by suggesting that they assume no difference in behaviour between those wearing helmets and those not wearing them. Thus, if it said that 'by wearing a helmet the risk of death could be reduced by 40 per cent and the risk of serious injury by 10 per cent', the reply might be made that these figures translate into actual deaths and serious injuries only if those with and without helmets have accidents at exactly the same rate.⁷¹ Perhaps those lacking the protection of a helmet drive more safely, so that their rate of death and serious injury is no higher than that among those wearing helmets. If there is anything at all in this idea, it may be noted that it depends upon those who do not wear helmets being in possession of accurate information about their much greater exposure to death or serious injury from an accident of any given degree of gravity. Those who, like Parekh, propagate the myth that turbans are as safe as helmets will have a lot to answer for in this case.

Suppose, however, that people did have accurate information about risks and (consciously or unconsciously) adapted their behaviour to keep constant the level of risk of death or serious injury to which they exposed themselves. Then the conclusion would still not be that there should be a special exemption for turban-wearing Sikhs. Rather, it should be concluded that there is no point in imposing any safety measures that can be offset by changes in behaviour, because they are bound to be self-defeating. The hard-core version of this 'risk-budget' theory would suggest, indeed, that even safety measures that cannot be offset will fail to alter the death rate in the long run: if flying became less safe because airlines spent less money on maintenance, people would adapt (even if they flew as often as before) by being infinitesimally more cautious in overtaking or infinitesimally more careful when crossing the road so as to keep their 'risk budget' in balance. Quite apart from its limited a priori plausibility, this theory appears to be contradicted by the facts: in 1976, when the crash helmet law had been running for five years without any provision for an exemption, 'the Ministry of Transport estimated that compulsory helmets were saving around 200 fatal and serious casualties each year' – and this despite the fact that 80 per cent of motorcyclists had already been wearing crash helmets before the legislation became effective.⁷²

A more direct, and more defensible, argument against a compulsory crash helmet measure is that the legislation is paternalistic, and that if people choose not to wear crash helmets the resultant injuries are (literally) on their own heads. Libertarians may object on principle to having to adhere to such a law. Others may object not on general principle but on the ground that the thrill of riding a motorcycle at high speed is severely compromised by having to wear a crash helmet: a former colleague in North America once assured me that nothing matches riding a Harley-Davidson at full throttle down a deserted freeway, and that a bare head is essential to the value of the experience. These may add their voices to those of Sikhs in demanding to be allowed to decide for themselves what risks to take.

It is sometimes suggested that the case for a compulsory crash helmet measure can be made without appealing to paternalistic considerations. The argument is that the extra cost to the National Health Service arising from injuries that could have been avoided by wearing a helmet justifies the imposition of the rule. I strongly suspect that those who put forward this argument are for the most part actually moved by the paternalistic desire to reduce the toll of death and paralysis resulting from preventable head injuries but are deterred by the bogeyman of paternalism from saying so. In any case, the argument is superficial. If we really want to pursue the kind of macabre analysis proposed, we should bear in mind that a helmet is estimated as reducing deaths by 40 per cent but injuries by only 10 per cent. Deaths – provided they occur before arrival at the hospital – are

cheap, involving only the cost of transport to the mortuary; in comparison, the last months of people who die of natural causes are often very expensive. Moreover, if we carry through this grisly calculus to the end, we have to reckon that healthy people who die suddenly in the prime of life are an excellent source of organ donation, thus saving other lives and also expense, since organ transplants are highly cost-effective in comparison with other forms of treatment. If we do the benefit-cost analysis right, it will perhaps turn out that crash helmets should be prohibited! If we do not believe that any such conclusion should be drawn, however the calculation comes out, then we cannot believe that the case for making crash helmets compulsory rests on benefit-cost considerations either.

Suppose we accept that it is a valid objective of public policy to reduce the number of head injuries to motorcyclists, and that this overrides the counter-argument from libertarian premises. Then it is hard to see how the validity of the objective somehow evaporates in the case of Sikhs and makes room for an exemption from the law requiring crash helmets. As in the ritual slaughter example, the argument for a general rule coupled with a specific exemption has to be made on balance-of-advantage grounds. Perhaps it is actually more plausible in this case, because the balance of gains and losses has Sikhs on both sides of the computation, rather than the desires of Orthodox Jews and Muslims on one side and the suffering of cows and sheep on the other. Nevertheless, it is still necessary to walk a fine line to make the desired answer emerge.

To finish up with a rule-plus-exemption regime, the injury-saving rationale of the law has to be conceded to be powerful enough to justify compulsion of the majority, while at the same time being deemed not powerful enough to outweigh the desire of the minority to ride a motorcycle without a crash helmet. From the other side, if we are too highly impressed by the point that those who choose to avail themselves of the exemption are not harming others but merely undertaking a self-imposed risk, we are liable to conclude that the same privilege should be available to all. Thus Poulter writes that

there is force in the argument that the people whose safety is principally put at risk are the turbaned Sikhs themselves. . . . If they decide that the practice of their religion outweighs the greater risk of physical injury, the values of a liberal democracy are hardly imperilled in the way in which they might be if a significant degree of harm was being inflicted upon others.⁷³

But why should not anybody else make a similar claim? Religion appears to play no essential part in what is in essence a simple argument to the effect that people should be free to decide for themselves what risks of injury to accept. The case is thus analogous to the one involving the Rastafarians and

cannabis discussed at the end of the previous section: if it is valid, the argument implies that the restrictive law should be repealed, not that it should be retained and some people allowed an exemption.

The persuasiveness of the balance-of-interests argument for exemption depends on the context. If not being able to ride a motorcycle ruled out a significant proportion of all the jobs in an area open to somebody with a certain level of trained ability, that would be relevant. But it does not. It would also be a matter of specific concern if the inability to ride a motorcycle prevented Sikhs from joining the police force, because it is important that the police should be open to all, and should in fact contain representatives of all minorities. This is not so much a matter of doing a favour to Sikhs as one of pursuing a benefit to all of us. But there is nothing to prevent police forces from organizing themselves so that Sikh members are not assigned to duties that entail riding a motorcycle. (The police already, quite rightly, permit Sikhs to wear turbans.)⁷⁴

Where turbans create a real employment problem is in the construction trade, which is the largest single source of employment for Sikhs, because 'the traditional occupation of the Ramgarhia "caste" was skilled work as artisans (carpenters, blacksmiths, bricklayers etc.).'⁷⁵ There is an extremely strong case based in industrial safety for requiring hard hats on construction sites, and 'the turban provides generally poor protection'.⁷⁶ Even with a special exemption for Sikhs, the hard hat requirement reduced fatalities within two years of coming into operation from 26 to 15 per year and halved the number of major injuries from 140 to 70.⁷⁷ The exemption for Sikhs from the hard hat regulation is, furthermore, in violation of a directive from the Council of the European Communities of 1989 which specifically mandated that 'helmets for head protection on building sites' were to be required for all workers by the end of 1992.⁷⁸

While the case for a universally applicable rule is strong, the particular circumstances make the balance-of-advantage argument for an exemption rather powerful. There is no official figure for the number of Sikhs in Britain but it is estimated at between 300,000 and 500,000.⁷⁹ There are 'reckoned to be around 40,000' who are building workers.⁸⁰ Assuming that Sikhs have now been settled long enough to have a more or less normal age and sex distribution and that the building workers are all males, this implies, if the lower figure for the total population is correct, that almost half of all male Sikhs of working age are engaged in construction work. Even the high figure for total numbers makes it over a quarter. Clearly, ending this employment for whatever (unknown) proportion of Sikh construction workers who wear turbans could be seriously disruptive socially, especially because Sikhs tend to live in geographically concentrated areas. Employment is important not only as a source of income but also as a means of social integration, so there is a strong argument against the sudden termination of the exemption. At

the same time, it is hard to deny that the improvement in safety justified the compulsion of the 70 per cent of construction workers who were not wearing hard hats before the requirement was brought in.⁸¹ Perhaps the most sensible course would be to restrict the exemption to those already employed in the construction trade, and possibly in addition those already embarked on acquiring relevant qualifications. This would accept that those who have already availed themselves of the exemption have acquired a sort of vested interest in the job, while gradually phasing out the inherently dangerous business of working on a construction site with only the protection of a turban.

5. A Pragmatic Case for Exemptions

My argument has been that there is a possible case for letting everybody do what they please and a possible case for constraining everyone alike, but that a great deal of finagling is needed in order to support a general rule with exemptions based on religious beliefs. In the cases considered here, I have made clear my own opinion that the case for having a restrictive law is a strong enough one to tip the balance in favour of universal constraint, apart from a continuation of the exemption from hard hat regulations for existing beneficiaries. Nothing turns on that as far as the validity of the general argument is concerned, and some readers may well think that in some cases the libertarian solution is the appropriate one. There is, however, one asymmetry between the two logically coherent positions. This involves the practical problems of moving from a currently anomalous situation to either of the internally consistent ones.

Anyone who believes that the case for having a restrictive law is strong enough to justify universal constraint is bound to believe, of course, that repealing a version of the law that contains exemptions so that there were no constraints at all would have bad consequences: more animal suffering, more tragic victims of motorcycling accidents, and so on. But it would not have bad effects on relations between members of different religious groups. It might even if anything have good effects in eliminating the cause of any resentment that the majority may feel about special privileges for minorities. In contrast, retaining the law but rescinding the exemptions would have good direct effects but would probably have bad effects on relations between different religious groups and would give an encouraging signal to racists who peddle nostalgic dreams of cultural homogeneity. At the same time, it would be widely regarded by members of religious minorities as representing some kind of attack on their position within the polity, and would thus increase the alienation that they already feel as a result of racially motivated harassment and job discrimination.

There is no need here to weigh the pros and cons to decide where the balance of advantage lies. Suppose, however, that the conclusion reached is that – at any rate in the current parlous state of race relations in Britain – rescinding the existing exemptions would over all do more harm than good. What then should be the position of those who nevertheless think that the constraints now enforced are valuable? The answer is surely that it is preferable to give up on consistency than abandon the advantages of the present legislation. The objectives are, after all, being met quite extensively, and these are not situations in which non-compliance with a general rule undermines the efforts of those who do comply. The good done is in direct proportion to the amount of compliance. If the current amount is the most that is desirable, taking account of side-effects, then the present state of affairs is the best attainable.

Does this mean that the entire argument up to now lacks any practical import? Not at all. For the way in which the existing exemptions are viewed has important policy implications. The usual context in which exemptions such as those discussed above are cited is as illustrations of some general principle mandating respect for religious differences. The suggestion is then made that following through this principle consistently would entail more exemptions for more groups. However, if (as I have maintained) there is no such principle, these cases are not the thin end of the wedge – they are the wedge itself. In other words, they are anomalies to be tolerated because the cure would be worse than the disease. But they provide no support for any extension to new cases. If the argument is made (as it surely will be) that it is inconsistent to have these exemptions and not others of a similar kind, the answer that can be given is that the current exemptions were a mistake that is awaiting rectification at an opportune time, so it would be absurd to add to their number in the meanwhile. Moreover, those that do exist should be limited as tightly as possible.

I can illustrate what I have in mind by going back to my other example involving Sikhs – the exemption that they have been granted from the general prohibition on the carrying of knives in public. There is no doubt that this was introduced, as Poulter says, 'to permit Sikhs to carry their *kirpans* (swords or daggers) in public places without fear of prosecution'.⁸² However, it may be recalled that the law was couched in general terms, 'stat[ing] that it is a defence for an accused to prove that he had the article with him in a public place "for religious reasons"'.⁸³ A consequence of this open-ended exemption was the following case.

In the legend, the young Arthur claimed his 6th-century birthright by answering a challenge where all others had failed. 'Whoso pulleth out this sword of this stone and anvil is rightwise King born of all England.' Yesterday, the man who believes he is Arthur's 20th-century reincarnation wrestled his Excalibur

from the grip of the law. After seven months apart, Arthur Uther Pendragon – otherwise titled Honoured Pendragon of the Glastonbury Order of Druids, Official Swordbearer of the Secular Order of Druids and Titular Head of the Loyal Arthurian Warbands – was reunited with the 3ft-long, double-edged sword by a judge at Southwark crown court. Dressed in flowing white robes and a green velvet cloak, the former biker heard Judge Stephen Robbins declare himself satisfied that Pendragon was a genuine druid who used the sword for ceremonial purposes.... The sword and a ritual dagger were taken from Pendragon when he was arrested at a demonstration in Trafalgar Square in April. The prosecution had argued the weapons should be confiscated for good. But after reading reports from Ronald Hutton, professor of history at Bristol university and the country's leading authority on druids, Judge Robbins dismissed the charges. He said 'Professor Hutton leaves this court in no doubt that this defendant's druid credentials are genuine. It is not in the public interest to pursue the case.'⁸⁴

As I observed earlier in this chapter, states cannot, if they are going to give privileges to religions impartially, avoid taking some decision about what is to count. 'For American witches, a watershed event occurred in September 1986, when a Federal appeals court ruled that Wicca was a religion protected by the constitution.'⁸⁵ Wicca is a broad, but rapidly growing, church:

given the movement's diversity, without essential texts, no central authorities and many solitary practitioners, estimates of how many people fit under the pagan umbrella vary widely, from 100,000 to three or more times that number. Some have found historical antecedents for their beliefs and work to re-create ancient Egyptian or Greek religions; some call themselves Druids.⁸⁶

In Britain, 'paganism, which embraces a colourful mix of druids, witches and followers of the Viking god Odin, is recognised as a "faith" by the Home Office'.⁸⁷ As a result, 'the Home office pays for 30 pagans to visit devotees in jail'.⁸⁸ Similarly, 'the Department of Health pays the expenses of 50 pagan chaplains who visit hospitals under the "right to solace" enshrined in the patient's charter'.⁸⁹ Despite this official recognition, however, 'the country's fastest-growing religion has been stripped of its charitable status by the Charity Commission and has consequently lost lucrative tax perks'.⁹⁰

This reverses a decision taken ten years earlier that 'first granted charitable status to a [sic] openly pagan trust'.⁹¹ The Commission's arguments for taking this step are remarkably weak. One is that 'paganism has many strands and there is a difficulty in its definition and identifying teaching which it promotes'. The other is that 'any charity must be established for public benefit. This is not apparent in the case of paganism.'⁹² I cannot see that paganism is any less of a public benefit than any other religion: neither in Britain nor in the USA do religions normally have to prove, in order to

acquire favourable tax treatment, that they provide public benefits over and above those presumed to flow from their simply being religious. Moreover, the charities that have been deregistered are far more clearly beneficial to the public (as against benefiting their own adherents solely) than any churches: these include a charity 'created to raise money to buy threatened woodlands associated with ancient rituals' and the Pagan Hospice and Funeral Trust, which 'had been a charity for a year, tending to sick people of all faiths without complaint' (according to its former head) when it was denied charitable status.⁹³

As far as content is concerned, the 'former chaplain-general at the Home office' told the Charity Commission that paganism 'is a valid religion, having a deity and a clearly defined system of beliefs and practice'.⁹⁴ This is, perhaps, putting it a bit too strongly. Nevertheless, the credentials of paganism will certainly bear comparison with those of any other religion. Its cult antedates that of Christianity in Britain. Moreover, the propitiation of the chthonic deities or spirits is the closest thing there is to a universal religion, and is probably the oldest. (It has been suggested that neolithic cave-paintings may have had something to do with it.) Indeed, in the absence of belief in a special revelation, its claims seem rather strong, since nobody who is not wholly lacking in sensibility can fail to be moved by a sense of awe at the forces of nature. The worst that can be said of contemporary pagans is that they do not altogether dispel an air of postmodern irony. But that is not a sufficient basis for dismissing the judge at Southwark Crown Court as a buffoon and the expert witness as a dupe. Those who are unhappy with the outcome in the case of Arthur Pendragon's sword should admit that dignifying a pragmatic concession to Sikhs with the trappings of a general rule defined in terms of a religion was a mistake. It would be wiser to beat an unprincipled retreat, amending the legislation so that it refers only to Sikhs.

Alternatively, here as elsewhere, the need to worry about exemptions to a general rule could be avoided by abolishing the rule altogether. The case for doing so might be put by arguing that the existence of a law prohibiting the carrying of knives will not actually prevent the ill-intentioned from carrying them anyway, and that there is nothing to fear from those who are not ill-intentioned. This is parallel to the case that the American gun lobby has pressed (successfully in a number of states) for legislation permitting the carrying of concealed firearms in public. I believe that the argument is equally flawed in both instances, for two reasons. First, if the ill-intentioned are stopped by the police before using their illegal weapons, they can be disarmed and also charged with an offence. And, second, intentions are not always decisive: you may not plan to get into a drunken brawl when you set out for the evening, but if you are carrying a knife (and even more, of course, a gun) the brawl has a greater potentiality of leading to serious injury.

Moreover, you are more likely to carry a knife just in case you might need it if you think that others are likely to be carrying them, and they are more likely to do so if they think people like you will... and so on in a vicious spiral. Even if a law prohibiting the carrying of knives has mainly a declaratory effect (and this is a more important function of law than is commonly recognized), it may still succeed in coordinating expectations at the non-knife equilibrium rather than at the equilibrium at which the carrying of knives in public is widespread. Provided that the exemption for Sikhs does not do too much damage to the achievement of the non-knife equilibrium, there is a clear case for preferring it to the alternative of repealing the law altogether.

6. Culture and Job Discrimination

There are a variety of jobs outside the construction industry in which injuries to the head are to be feared. These are not covered by the legislation that exempts turban-wearing Sikhs from the requirement imposed on other workers to wear a hard hat. Let us suppose that an employer whose business is not covered by the legislation imposes a hard hat requirement on all workers deemed to be in danger of head injuries. He may cite in defence the raised insurance premiums to which he would otherwise be liable, the greater risk that work will be disrupted due to injury if not all workers are protected, and the danger that somebody who incurs a head injury poses to fellow workers by falling on them or dropping things on them from a height. Does a Sikh who is thereby prevented from wearing his turban on the job have good grounds for claiming that he has suffered from discrimination? Such cases have been litigated in Britain, and it has been decided that the employer is justified in imposing the hard hat requirement. As a consequence, the employer has won in these cases, because a charge of discrimination is annulled if the condition of employment imposed is held to be justifiable.⁹⁵

In this concluding section, I shall focus on cases such as these: that is to say, cases in which there is no specific exemption deriving from primary legislation but in which the claim is made, on the basis of general anti-discrimination law, that some condition of work imposed by an employer constitutes job discrimination. Let me begin at the beginning by asking what, from an egalitarian liberal point of view, is wrong with job discrimination. This will make it easier to see why some things should count and others not. A central principle of egalitarian liberalism, it may be recalled, is equality of opportunity. But the concept of equal opportunity is a difficult one, and it has to be interpreted differently in different contexts. Thus, in its most general signification, equality of opportunity may be characterized as equal-

ity of choice sets. In the context of employment, however, it requires a narrower definition. It is not a violation of equality of the opportunity to be employed as a brain surgeon if only those who are qualified as brain surgeons are considered, even though this eliminates an element from the choice sets of all others. What equality of opportunity means in relation to employment is that those who are equally well qualified to do a job have an equal chance of getting the job. If some people who are as well qualified as others are denied an equal chance of employment in some job, they can complain of (unfair) discrimination.

In some instances, establishing the existence of discrimination entails statistical tests, comparing the proportion of qualified applicants in different racial groups (for example) with the proportion appointed. This is a use of group-based measurements that is, incidentally, entirely compatible with the principles of liberal individualism. For the objective is to ensure that individuals are not treated unfairly. In other cases, discrimination is so blatant that there is no need of statistical tests to establish its presence. All that is needed is to send a candidate with certain qualifications for a job, and compare his or her experience with that of another with the same qualifications but different ascriptive characteristics. Thus, if the black candidate is told that the job is filled while the white candidate is offered it, that amounts to virtual proof of discrimination. Unhappily, such experiments regularly demonstrate the existence of pervasive discrimination in the United Kingdom.

Equal opportunity entails that each applicant for a job should be considered on his or her individual merits. Thus, even if the possession of some job qualification is associated statistically with some characteristic, this does not excuse the blanket exclusion from employment of those with this characteristic. For example, if some job genuinely requires a certain degree of physical strength to perform it satisfactorily and men are much more likely than women to have this degree of strength, it would be quite efficient for an employer to refuse to consider women for it, since this would reduce the cost of selecting workers. But taking the decision on an individual basis is a cost that employers have to bear in order to provide equality of opportunity. Statistical discrimination of this kind is an example of a practice that may be said to have a rational basis from the point of view of the employer, but is still ruled out as unfair. For it clearly fails to provide everybody equally capable of doing a certain job with an equal chance of getting it.

Similarly, employers cannot cite pure prejudice on the part of fellow workers or customers in justification of a refusal to employ members of certain ascriptive groups. Even if it is true that many customers in some area prefer to be served by white shop assistants, and that some will choose a shop catering to their prejudices over one that does not, permitting firms to

base employment criteria on these facts would clearly subvert any notion of equal opportunity. For it would mean that people could be denied a job simply on the basis of ascriptive characteristics. Hence, the notion of a relevant qualification must be construed in terms of relevant behaviour, as distinct from identity as such. This does not mean, however, that the criteria must be purely technical or mechanical. For some jobs, for example, it may be perfectly reasonable to say that a certain quality of personal charm is highly desirable. (I shall return to this issue in the next chapter.)

In Britain, discrimination on the basis of race or ethnicity is illegal, though penalties are inadequate and enforcement insufficiently vigorous. On the mainland of Britain, though not in Northern Ireland, discrimination on the basis of religion is not illegal. There is a certain rationale for treating religion in Northern Ireland as the equivalent of ethnicity because it is a place in which 'Protestant' and 'Catholic' are the names of communities. To find out which community somebody belongs to involves an inquiry about their family background. A scrutiny of their precise views about transubstantiation is not required. In this context, discrimination on the basis of religion is the equivalent of discrimination on the basis of any other ascriptive characteristic. What needs to be emphasized, since it will be important later, is that religion here has nothing to do with any kind of behaviour related to ability to do the job. Thus, Harland and Wolff, the shipyard that was a major source of employment in Belfast, was notorious for not employing Roman Catholics. This could not be justified by saying that Roman Catholics refused to wear safety equipment on religious grounds or wished to break off work at inconvenient times to pray. It was simply an expression of domination by the Protestant community. If there was any ulterior motive, it was to encourage Catholics to emigrate disproportionately, thus preventing their higher birthrate from changing the ethnic balance within Northern Ireland to the disadvantage of Protestants.

What I have been discussing so far is direct discrimination: treating people differently on the basis of certain ascriptive characteristics. However, the cases that are of interest here have arisen as claims of indirect racial discrimination. The concept of indirect discrimination was incorporated into English law by the 1976 Race Relations Act, which

renders unlawful certain apparently neutral acts done by employers and others, which are not designed to discriminate against ethnic minorities but which nevertheless have a disproportionate impact on them because of their cultural and religious backgrounds. In particular, the Act's provisions have the effect of making it unlawful for employers and educational establishments to impose standardized rules about uniforms, dress and appearance with which members of minority groups cannot conscientiously comply, unless such rules can be demonstrated to be 'justifiable'.⁹⁶

The question that I shall take up to illustrate the application of the idea of indirect discrimination is this: could a woman who was dismissed from her job - working in an office in London, say - for wearing a headscarf claim to be a victim of unfair discrimination?

Countries that are predominantly Muslim vary enormously in the prevailing norms concerning the appropriate dress for women in public. (This is leaving aside those in which the norm is that women should not appear in public at all.) Within a single country, urban norms are often more liberal than rural ones. Whatever the norms are, they are also enforced differently in different places: sanctions may have the force of law, or they may be imposed arbitrarily by vigilantes (with or without police connivance), or they may take the form of social disapproval and rejection. Muslim immigrants to Britain tend to have been drawn from unsophisticated rural environments, within which it has been a customary practice for women to cover their heads in public. It is also worth bearing in mind the point that diasporas are liable to be culturally conservative, clinging to ways of behaving that have been abandoned in their countries of origin. (A Scandinavian Lutheran from the 1870s would find Lake Wobegon a good deal more congenial than contemporary Oslo or Stockholm.) The claim that wearing some kind of head covering is a customary practice can therefore be brought forward to show that forbidding it is illegal discrimination, unless the employer can prove that it is justifiable.

One authority, Professor Gordon Conway, has suggested along these lines that 'a young Asian woman might be successful in arguing in court that a headscarf is a custom of Pakistan, where her parents came from'.⁹⁷ He complains, however, that a convert to Islam from a Christian family background would not have any case under the Race Relations Act, because religious discrimination is not illegal in Britain. Muslims have been ruled not to constitute an ethnic group, so Muslim religious practices cannot claim protection *per se* under the Race Relations Act.⁹⁸ However, immigrants and their descendants who are of Pakistani or Bangladeshi origins are undeniably an ethnic group, and can therefore claim indirect discrimination based on their membership of that group. If a ban on the wearing of a headscarf were held to be disproportionately disadvantageous to members of this group, it would follow that it could be treated as *prima facie* indirect racial discrimination.

Even if religious discrimination were outlawed, Conway's hypothetical convert to Islam might still fail in court if the norm requiring the wearing of a head covering were held to be customary rather than religious. For it could then be concluded that only those whose traditional culture contained the norm could claim the protection of the law. I shall suppose, however, that it could be argued successfully that a conscientious Muslim convert could reasonably feel an obligation to cover her head, even if other converts

could reasonably reach a different conclusion. (Whether reasonableness is needed or whether it is enough simply to hold the belief sincerely is a question I shall postpone until chapter 5.)

Clearly, the situation complained of by Conway constitutes an 'anomaly' (as he suggests it does) only on the assumption that religious discrimination should be prohibited as such. Should it be? It can be argued that giving protection to people on the strength of religion is to open a can of worms. However, the expansive conception of ethnicity adopted by the House of Lords has already opened that can, and faced courts with adjudicating claims of indirect discrimination arising from religiously mandated practices. Moreover, most of the work of industrial tribunals and the courts reviewing their decisions turns around questions about what kind of behaviour by employees can and cannot reasonably be treated by employers as grounds for dismissal. While, therefore, 'justifiability' is a vague notion in itself, legislation outlawing indirect religious discrimination that cannot be justified could latch on to a formidable body of existing case law.

How might the question of justifiability be argued in the case of headscarves? It is consistent with everything said so far that the reason for wishing to wear a headscarf is relevant. If wearing a headscarf were a purely personal preference, it is doubtful that it would be appropriate to bring to bear the ponderous machinery of the law in order to enforce a right to wear one. Specifically, there could be no reasonable basis for describing a ban on headscarves as constituting unfair job discrimination in such circumstances. This still leaves the question: should a ban on headscarves count as unfair discrimination if wearing one has customary or religious significance? Those who are anxious to be on the side of the angels will regard the case as an open and shut one. All the more reason, then, for putting the other side. Dress codes are a matter of convention: what is appropriate for praying in a mosque is one thing, what is appropriate for working in an office is another. Immigrants have always accepted that some accommodation with the host society will be necessary – the most obvious accommodation being to learn its language. (I shall take this up in the next chapter.) An Englishwoman who chose to work in Pakistan would be expected to conform to local sensibilities in the way of dress. Why should not those who want a job in the mainstream economy leave the customs of Pakistan behind in Pakistan?

One way of posing the question is to ask if headscarves are within the scope of the response 'This is the way we do things here.' There are unquestionably some things that are covered by it, the traffic code being the most straightforward and most commonly cited. There are also unquestionably some things that are not: Christianity is an equally obvious example on that side. The argument against the appropriateness of 'This is the way we do things here' in the headscarf case is fairly clear. All dress codes are, in the last analysis, conventional. These conventions are, nevertheless, heavily

freighted with symbolic import. That they could have been otherwise is neither here nor there: what matters is the way that they actually are. To abandon a long-established custom that enjoins women not to appear in public with uncovered heads is no trivial matter. Since there is no non-trivial reason in support of a ban on headscarves, the ban is rightly to be regarded as a denial of equal opportunity, or at the very least an unreasonable infringement of the right to make a living without having to make a gratuitous sacrifice.

Professor Conway, whom I quoted in introducing this topic, is clearly locked into the paradigm of exemptions for specific groups from general rules. For it is on the basis of this that he wishes to extend the exemption from 'ethnic' Muslims to Muslim converts. This is fair enough as far as it goes. It is the implication of my overall argument, however, that it does not go far enough because the whole rule-and-exemption approach is suspect. It seems to me as obnoxious that an employee who had converted to Islam might have to produce a certificate from a mosque before she was allowed to wear a headscarf as it would be if she had to produce a record of regular church attendance before being allowed to wear a crucifix. The essential question is whether or not the wearing of headscarves can legitimately be claimed by an employer to interfere with the operations of the business. If this claim cannot be sustained, it is hard to see why employers should be licensed to carry out intrusive investigations into their employees' religious affiliations simply in order to be able to deny permission to 'rogue' headscarf-wearers. It is one thing to say that the right to wear a headscarf would be weakly founded if it were never more than a matter of personal preference. Once the right has been won, however, why should not those for whom it is a matter of personal preference be able to take advantage of it?

I specified in raising the example that the context was employment in an office. Would it make a difference if it were changed to employment as a shop assistant in a department store? Those who manage these emporia operate on the assumption that what customers want is a service but not necessarily a personal statement, and therefore tend to have rigid codes specifying dress and prohibiting personal adornments. They may fear that some of their customers will prefer to take their business to some rival establishment in which the experience of shopping does not include confrontation with a form of dress that they may regard as having not only religious significance but also as symbolizing the inferior status of women. The customers could be wrong about this: according to two Canadian political philosophers, 'one could make a plausible case that French *haute couture*, by constructing female identity in terms of a women's [*sic*] ability to dress in ways that are attractive to men, has contributed more to the subordination of women – think of short skirts and high heels – than the *hijab* ever did'.⁹⁹ I am inclined to doubt that this view is ever likely to be

found plausible outside the circles moved in by Canadian political philosophers, but that is beside the point. Whether a distaste for headscarves could be held to have a rational basis or not, the implication of the maxim that 'the customer is always right' will be that those who run shops should be entitled to take account of the prejudices of their customers in deciding whom to employ. But I have already argued that this principle cannot be endorsed unless we are going to let employers drive a coach and horses through anti-discrimination legislation. For then they could legitimately appeal to the racial prejudices of their customers as a justification for reflecting those prejudices in their hiring policies.

As far as the headscarf case is concerned, I think we have to say bluntly that one of the costs of cultural heterogeneity is that, in implementing anti-discrimination legislation, we simply cannot afford to ask if negative reactions to behaviour are well-founded or not, provided the behaviour in question does not actually get in the way of the efficient discharge of the task in hand, narrowly defined. That proviso, it need hardly be said, leaves a lot of room for interpretation. The principle, however, is clear: culturally derived characteristics that do not demonstrably interfere with the ability to do the job cannot be accepted as a basis for job discrimination.

The headscarf question has been the centre of a controversy in France, where the symbolic significance of the headscarf was the key to the position of both sides. *L'affaire du foulard* was precipitated when some Muslim schoolgirls in the town of Creil, north of Paris, went to school wearing headscarves. When they were sent home by the school, a major dispute erupted which eventually drew in the public intellectuals and the politicians. Among those whose self-perception put them on the left, there was a sharp division between on one side those who inveighed against an action that they saw as expressing or at any rate fostering anti-Algerian prejudice and on the other side those who saw the headscarf as a symbol of female subjection, hinting darkly at family pressure, especially from fathers and brothers. However, the issue as it presented itself to those charged with running the schools did not turn on any of these things. The key for them was the *laïcité* of the French public school system.¹⁰⁰ The headscarf, as a religious symbol, was claimed to be a threat to this lay status. When it was pointed out that no objection was made to the wearing of a crucifix, the defenders of the headscarf ban resorted to a distinction between discreet and prominent religious symbols. Needless to say, the opponents found this distinction contrived.

To put this dispute into perspective, a couple of things should be borne in mind about France. The first is that the republican tradition has throughout been non-racist but assimilationist. Anybody could become French, but the entrance ticket was fairly high: command of the French language, absorption into French culture, a knowledge of (and the right attitude towards) the major events in French history, and so on. The second is that schools, along

with the army, have been the institutions entrusted with the major role of creating French citizens on this model. This has been largely a matter of homogenizing the linguistically and culturally disparate regions of France itself, but it has also included the assimilation of immigrants. The militantly lay status of the schools is an aspect of this republican mission.

The point of interest here is that in the British context the religious significance of the headscarf counts in its favour, but in the French context it is precisely the religious significance of the headscarf that condemns it. The position is almost that in France headscarves would be fine if there were nothing to wearing them except an expression of personal taste – the precise opposite of conventional British rule-and-exemption thinking. Secular public schools are a possible form of the privatization of religion, provided that attendance at them is not compulsory. However, the difficulty of the French position seems to me to be that it is simply not very plausible to suggest that headscarves will really undermine *laïcité*. A less vulnerable argument would be, I believe, a version of the one advanced earlier on the anti-headscarf side in Britain: that dress codes are a matter of convention and schools can legitimately decide on the convention to be observed in them. It has to be conceded, however, that this is open to the counterargument that wearing or not wearing a headscarf cannot simply be declared to be a matter of convention if for some people it manifestly is not because it has religious or customary significance.

In Britain, it may be noted, the conventionalist case for imposing a school dress code has been decisively rejected by the House of Lords. The leading case involved a turban-wearing Sikh boy aged thirteen who was refused admission to a private school in Birmingham on the ground that he failed to comply with the school's rules, which 'prescribed a particular uniform, including a cap, and required boys to have their hair cut short so as not to touch the collar'.¹⁰¹ This was the leading case that established Sikhs as an ethnic group for the purposes of the Race Relations Act on the ground that they were a 'separate and distinct community'.¹⁰² Once this hurdle had been cleared, it was straightforward that the school rule was discriminatory, since it was unquestionably one 'which was such that the proportion of Sikhs who could comply with it was considerably smaller than the proportion of non-Sikhs who could so comply', in the sense that fewer could not comply with it 'consistently with the[ir] customs and cultural conditions'.¹⁰³ The only remaining question was: could the rule nevertheless be held to be justifiable? The headmaster put forward (among others) the argument 'that the school was seeking to minimise the external differences between boys of different races and social classes, to discourage the competitive fashions which tend to exist in a teenage community'.¹⁰⁴ But this (along with the other arguments) was dismissed by Lord Fraser as failing to 'provide a sufficient justification for what was *prima facie* a discriminatory school rule'.¹⁰⁵