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# Faith as a Secular Value

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The fundamental freedoms, including freedom of religion, are guaranteed for reasons that have to do with the value that the exercise of those freedoms is thought to contribute to the lives of those who enjoy them. What reason is there, then, for a secular society to guarantee freedom of religion? What reason do we have to extend special protection to forms of belief that can be called religious, whether because they bear a resemblance to traditional religions, or because they have some fundamental role to play in a believer's life? What is it that distinguishes religious beliefs from other beliefs, so as to make them worthy of distinctive, perhaps superior constitutional protection? These are not questions that Canadian courts have sought to answer, despite their commitment to a purposive understanding of *Charter* rights and freedoms. Yet an answer to them is clearly required in order for the *Charter* to be legitimately applied to any alleged breach of religious freedom.

This article explores the possibility that the moral foundation of freedom of religion is to be found in the value that faith, understood as a mode of belief distinct from reason, is capable of contributing to human well-being. It concludes that there are secular reasons to regard faith as valuable, and suggests that it is in recognition of that fact that a secular society—the most prominent and the most vulnerable site for the pursuit of faith—has guaranteed freedom to religion.

Les libertés fondamentales, incluant la liberté de religion, sont garanties parce que leur exercice est vu comme contribuant aux vies de ceux qui en jouissent. Pourquoi une société laïque est-elle amenée à garantir la liberté de religion ? Pourquoi étendons-nous cette protection spéciale aux croyances dites religieuses ? Doit-on comprendre que c'est parce qu'elles comportent une ressemblance aux religions traditionnelles ou bien parce qu'elles jouent un rôle fondamental dans la vie des croyants ? En quoi les croyances religieuses se distinguent-elles d'autres croyances, de façon à acquérir une protection constitutionnelle distincte, voire supérieure ? Il ne s'agit pas de questions auxquelles les tribunaux canadiens ont tenté de répondre malgré leur engagement à établir une compréhension de la *Charte canadienne des droits et libertés* adaptée à ses objectifs. Cependant, une réponse à ces questions s'avère nécessaire afin que la *Charte* soit convenablement appliquée dans les cas d'atteinte à la liberté de religion.

Cet article explore la possibilité que le fondement moral de la liberté de religion se trouve dans la valeur selon laquelle la foi, lorsque comprise comme une croyance distincte de la raison, est capable de contribuer au bien-être de l'homme. L'auteur conclut qu'il existe des raisons séculières de valoriser la foi et suggère que c'est en reconnaissance de ce fait qu'une société laïque — cet endroit le plus important et le plus vulnérable dans la poursuite de la foi — garantit la liberté de religion.

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## Introduction

This paper explores the possibility that the moral foundation of freedom of religion is to be found in the value that the practice of faith, understood as a mode of belief distinct from reason, contributes to human well-being. In doing so the paper, first, analyzes and rejects the two most prominent contemporary accounts of freedom of religion, accounts that are based upon semantic and psychological, rather than moral approaches to the meaning of religion; second, attempts to show what a better foundation might entail, both for well-recognized religions and for marginal beliefs; and finally, ventures to distinguish the roles played in a democratic society by a guarantee of freedom of religion and the rule against any establishment of religion.

The justification for religious freedom is not to be found in the articles of religious belief, however ecumenically described those articles may be, nor in the institutions and practices that attend religious belief, but in the capacity of religious faith to sustain its adherents in their fundamental commitment to life and to the moral values that make life worth living, a commitment that cannot always be made on the basis of reason alone. This is a capacity that those responsible for our political freedoms, from the drafters of our constitutional rights to the judges who have been called upon to interpret those rights, were morally bound to recognize as valuable and deserving of protection, despite their own commitment, at least in their public role as the architects of a non-theocratic political order, to a secular view of rights and freedoms. As we as a society have gradually come to acknowledge with respect a number of practices once thought to be the exclusive preserve of religion, practices such as the exercise of moral conscience, the expression of moral and political belief, and the investigation of our place in the world and beyond, close analysis of the meaning of faith and the relationship it bears to human well-being leads to the conclusion that there are secular reasons to regard faith as valuable. Moreover, it is in recognition of that fact that a secular society has guaranteed freedom to religion, the most prominent and most vulnerable site for the pursuit of faith.

### I. The Traditional Approach to Freedom of Religion

Religious toleration has come to be so widely endorsed that it is sometimes hard to remember that as recently as the 17th century it was a rare and contested virtue. When the Puritans emigrated to America in 1620, it was to acquire freedom for their own beliefs, not to recognize that freedom in others. Apart from Maryland (founded by Lord Baltimore, a Catholic, in 1632) and Rhode Island (founded by Roger Williams, a Baptist, in 1636), the first American colonies did not recognize freedom of religion.<sup>1</sup> On the contrary, settlements such as Virginia, and in particular that of Mas-

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<sup>1</sup> The Quaker colony of Pennsylvania, which famously endorsed religious freedom, was not founded until 1681. It was thus subject to the terms of the *Toleration Act, 1689* (U.K.), 1 Gul. & Mar., c. 18 almost from the outset.

sachusetts Bay, pursued open policies of religious persecution as brutal as any that their citizens had endured in England. In Massachusetts Bay, John Cotton observed that "it was Toleration that made the world anti-Christian", while the President of Harvard College declared: "I look upon unbounded Toleration as the first-born of all abominations".<sup>2</sup>

Meanwhile in 17th century England, Monarchy and Parliament conducted a struggle for political supremacy in part through the medium of a debate over religious toleration. Contrary to what one ignorant of English history might have expected, it was the people's representatives in Parliament who took the repressive position in that debate, and in the end it was Parliament that prevailed. Following the Restoration in 1660, an *Act of Uniformity*,<sup>3</sup> more severe than any that had preceded it, imposed the Book of Common Prayer and Church of England liturgy upon all ordained preachers. In response to this, King Charles II attempted to suspend both the *Act of Uniformity* and other laws penalizing the practices of non-established religions, but was rebuffed on the basis that it was beyond the King's authority to suspend legislation.<sup>4</sup> Parliament then quickly enacted the *Test Act*,<sup>5</sup> effectively barring Catholics and Dissenters from public office. In further response, the Catholic King James II, ignoring his brother's earlier failure, made common cause with the Dissenters and once again attempted to suspend both the *Test Act* and similar penal legislation by issuing a Declaration of Indulgence. Having brought the debate to a head by linking the issue of religious toleration to that of political supremacy, James was promptly deprived of his Crown, and upon the accession of William of Orange the purported power of suspension was declared to be illegal by the *Bill of Rights, 1689*.

That was to be the high water mark of religious establishment and intolerance in England. In that same year, Parliament enacted a *Toleration Act*, admittedly less generous in its terms than King James' *Declaration of Indulgence*, but which nevertheless granted a limited measure of religious freedom to certain Protestant Dissenters. However, it would be another two centuries before Parliament agreed to remove all disabilities from all religions. Meanwhile, the terms of the *Toleration Act* came to govern religious toleration in the American colonies, thus reducing the freedom previously available in the few colonies where toleration had been endorsed.

The publication in 1689 of the English translation of Locke's "A Letter Concerning Toleration"<sup>6</sup> (actually drafted somewhat earlier) introduced to the public debate arguments for a significantly wider understanding of freedom of religion than the *Toleration Act* had secured. Locke argued, in essence, that the state should not intervene in matters of religion for the simple reason that the state lacks the capacity to compel

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<sup>2</sup> Quoted in H. Kamen, *The Rise of Toleration* (Toronto: McGraw-Hill, 1967) at 182.

<sup>3</sup> *Act of Uniformity, 1662* (U.K.), 14 Car. II, c. 4.

<sup>4</sup> *Declaration of Indulgence, 1672* (U.K.) 23 Car. II, c. 2.

<sup>5</sup> *Test Act, 1673* (U.K.) 25 Car. II, c. 2.

<sup>6</sup> J. Locke, "A Letter Concerning Toleration" in *The Works of John Locke*, vol. 6 (Germany: Scienta Verlag Aalen, 1963) 3.

religious belief, and in particular lacks the capacity to compel the order of belief that can lead to personal salvation. By their very nature, Church and state belong to different realms, a fact that must be reflected in the constitutional arrangements that describe the proper limits of the state's authority, such as a guarantee of freedom of religion. Drawing upon these arguments, two guarantees securing freedom of religion and prohibiting the establishment of religion were, in 1791, finally entrenched as a fundamental right, even ahead of freedom of speech, by the opening words of the First Amendment to the Constitution of the United States, as part of what has come to be known as the Bill of Rights. The First Amendment provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>7</sup>

In the realm of rights, as in so much else, where the United States has led, the rest of the world has followed. Freedom of religion is no longer a rare or contested virtue; instead it has become a commonplace virtue. In the two hundred and more years that have passed since the adoption of the First Amendment, freedom of religion has been broadly guaranteed not only in a series of national constitutions but in international covenants for the protection of human rights, albeit usually without the accompanying prohibition against the establishment of religion. Article 18 of the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948, and later to become a model for a number of other international agreements, provides that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>8</sup>

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<sup>7</sup> U.S. Const. amend. I.

<sup>8</sup> *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 17 at art. 18, online: Human Rights Internet <<http://www.hri.ca/Uninfo/treaties/1.shtml>> (last modified: 29 September 1999). Similar language is incorporated in Article 18 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), online: Human Rights Internet <<http://www.hri.ca/uninfo/treaties/2.shtml>> (last modified: 29 September 1999) and Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Treaties Rome 4.X.1.1950, online: European Commission of Human Rights Homepage <<http://www.coe.fr/eng/legaltxt/5e.htm>> (date accessed: 9 January 2000). Modern national constitutions follow a similar approach. The *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], provides, *inter alia*, that "[e]veryone has the following fundamental freedoms: a) freedom of conscience and religion". It is worth noticing here that modern human rights documents tend to grant parallel protection to freedom of religion and freedom of conscience. In my view, however, the two freedoms have separate moral foundations, for conscience is based upon reason rather than faith. See the discussion of faith and conscience in Part V.A.2, below.

Accompanying this rise in religious freedom, however, has come a decline in religious practice. By and large, the citizens of those same Western societies that have so assiduously guaranteed freedom of religion have lost much of their interest in the enjoyment of that freedom. The exercise of moral conscience, the expression of moral and political belief, and the creation and maintenance of institutions that can serve as a home for those activities have increasingly come to be seen in secular terms. It is now widely assumed in the West that religion has no monopoly on the moral and spiritual concerns that have traditionally constituted its distinctive territory. Perhaps as a result, most and possibly all of the leading features of religious freedom have now found secular expression and a corresponding political guarantee under the rubric of non-religious principles, such as freedom of expression, freedom of association, and the right to be free from discrimination (including certain multicultural guarantees).

In the wake of these developments a number of questions arise concerning the continued relevance of freedom of religion. The first question is whether there is still independent content to the guarantee of freedom of religion, or whether that guarantee has been rendered empty by the recognition of other rights and freedoms, other than rhetorically, as a way of advertising certain implications of the other rights. The second question is, if the guarantee retains independent content, what is the proper justification for the freedom which that independent content confers? Is a guarantee of freedom of religion still justifiable in light of the activities that the term religion is now understood to cover distinctively, and if so on what basis? And finally, does that justification, if available, warrant the extension of the distinctive protection of freedom of religion to institutions and practices that are not animated by ideas of the divine, given that the moral outlook that must justify that freedom is necessarily secular, that is to say, is not drawn from the tenets of any particular religion or religions, and thus is detached from religious doctrine? Or are there secular reasons to restrict the guarantee of freedom of religion to activities that are shaped and informed by contact with the divine? In the balance of this article I will address each of these questions in turn and examine their consequences for freedom of religion.

It might be helpful as an indication of the shape of the discussion that is to follow if I were to suggest at the outset what I take the crux of the issue to be. At the moment, in Anglo-American law at least, the guarantee of freedom of religion tends to be extended simply by reference to the doctrinal features of well-recognized religions.<sup>9</sup> In other words, freedom of religion is taken to protect those institutions and practices that have features in common with well-recognized religions. There is an obvious objection to this approach, namely that it appears to violate the essence of the guarantee by establishing the features of well-recognized religions as conditions for the enjoyment of the guarantee, contrary to the requirement contained in the guaran-

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<sup>9</sup> See e.g. the English cases of *Bowman v. Secular Society*, [1917] A.C. 406 (H.L.); *R. v. Registrar-General, ex parte Segerdal*, [1970] 2 Q.B. 697 (C.A.); *Barralet v. Attorney-General*, [1980] 3 All E.R. 918 (Ch.); the United States case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [hereinafter *Yoder*]; and the Canadian case of *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336, 18 D.L.R. (4th) 321 at 353 [hereinafter *Big M* cited to S.C.R.].

tee that no religion (or the definitive features thereof) be established. Nevertheless, this ready objection meets the ready response that once one goes beyond reference to the features of well-recognized religions it becomes impossible to give any shape to the guarantee in order to distinguish various collective expressions of belief, be they mass political movements or questionably religious cults. And even if that problem could be resolved, would the resulting guarantee still warrant the description of freedom of religion, given that it would be detached from any commitment to the features of well-recognized religions? What needs to be determined, then, is whether the objection to doctrinally-based understandings of religion is well founded, and, if so, what better moral foundation there might be for freedom of religion.

## II. Independent Content

To what extent, then, does freedom of religion retain independent content? The readiest way to answer that question, in my view, is to examine the protection that is offered to religious beliefs and practices by the other fundamental rights and freedoms currently available in most Western societies. Fortunately, this can be done quite briefly, without entering into the niceties of those rights and freedoms, since the description of the human activities to which freedom of religion can plausibly be said to offer distinctive protection is, as it turns out, neither subtle nor abstruse, as can be shown by a simple process of elimination.

Freedom of speech and expression safeguards the expression of religious beliefs, and so covers not only religious speech but religious conduct that has a symbolic character, such as rituals, ceremonies, and the act of worship itself. Freedom of conscience and belief now protects those who subscribe to religious doctrine from being penalized for their beliefs. Freedom of association and assembly protects religious gatherings, and when coupled with freedom of speech and expression protects the collective act of worship. Freedom from discrimination, where available, guarantees to members of religious minorities equality in the provision of employment, services and accommodation; however, at a constitutional level, in the United States at least, this guarantee of equality offers protection against direct discrimination only, leaving unprotected those forms of conduct that do not address religion but nevertheless have an adverse impact upon the practice of religion.<sup>10</sup> Finally, multicultural rights, where available, now protect certain activities that express membership in particular minority cultures, such as the use of a minority language, a language that may help to define and to sustain a community of believers. Multicultural rights may also protect certain institutions that maintain membership in those minority cultures, such as sectarian schools. Otherwise they merely serve as aids to the interpretation of other rights and freedoms.<sup>11</sup> In particular, multicultural rights offer no general right to abstain from the

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<sup>10</sup> Compare *Griggs v. Duke Power*, 401 U.S. 424 (1971) [hereinafter *Griggs*] and *Washington v. Davis*, 426 U.S. 229 (1976) [hereinafter *Davis*].

<sup>11</sup> See *Charter*, *supra* note 8, s. 27.

requirements of the common good simply because those requirements have an adverse impact upon the minority culture, as perhaps they should.<sup>12</sup>

Therefore, of the range of possible human beliefs and actions that might be brought within the ordinary description of religion (a description that is accurate enough for present purposes), all that freedom of religion can claim to cover distinctively today is religiously inspired conduct, or more precisely, religiously inspired conduct that lacks a symbolic character and so would not be protected by freedom of expression.<sup>13</sup> In itself, however, this is far from a trivial benefit to believers, for unlike multicultural rights and rights to equality, freedom of religion requires the majority to accommodate the practices of religious minorities even when those practices are otherwise generally unlawful, which is a benefit that Locke himself would have denied to believers<sup>14</sup> and one that cannot be derived from the terms of any other right or freedom, at least as presently understood. For example, parents are entitled by right of freedom of religion to educate (or not to educate) their children entirely according to their own religious beliefs, and this despite the fact that no other right or freedom would entitle non-religious parents to educate *their* children according to their non-religious beliefs.<sup>15</sup>

In addition to securing religiously inspired conduct, however, freedom of religion may offer distinctive reasons, and thus possibly distinctive protection, for securing freedom of expression, freedom of assembly, and freedom of association with regard to acts of religious expression, religious assembly, and religious association. If one adopts the conventional view that the interpretation of any right or freedom must be purposive, the view that a freedom must be interpreted in terms of the purpose for the sake of which it is guaranteed, then freedom of religion offers a different purpose, and

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<sup>12</sup> See J. Raz, "Multiculturalism: A Liberal Perspective" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) 155 [hereinafter *Ethics in the Public Domain*].

<sup>13</sup> See *Sherbert v. Verner*, 374 U.S. 398 at 406 (1963) [hereinafter *Sherbert*], holding that unemployment benefits must be extended to a Seventh Day Adventist who refused to work on a Saturday because of her religious beliefs: "[T]o condition the availability of benefits upon [her] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." See also *Yoder*, *supra* note 9.

<sup>14</sup> Locke's conception of toleration extended only to the protection of what he took to be inherently religious activities. "[T]hose things that are prejudicial to the commonwealth of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites": in Locke, *supra* note 6 at 34.

<sup>15</sup> See *Yoder*, *supra* note 9, where Amish children are exempted from a requirement of school attendance beyond the eighth grade. Parents can normally send their children to private, fee-paying schools, both religious and non-religious. Even private schools, however, are subject to certain state educational requirements relating to curriculum or inspection and the parents of school-age children remain subject to other requirements, such as the requirement that their children attend some school, private or public, until the age of 16. It is exemption from these requirements that freedom of religion, and no other freedom, may confer. For limits to this see *R. v. Jones*, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569.

thus different reasons, for securing freedom of speech, assembly, and association. In certain cases at least, that difference in purpose may well lead to different consequences. It follows that religious speech may be protected by freedom of religion in circumstances where it would not be protected by freedom of expression. For example, the distribution of scurrilous tracts that promote one religion by maligning another (as Jehovah's Witnesses were once accused of having done in Québec) might not be protected by freedom of expression (if the purposes of that freedom were restricted to the promotion of democracy, truth, and individual self-fulfilment), yet might be protected by freedom of religion.<sup>16</sup>

Finally, it may matter to a claimant that protection be granted to his or her expression on the basis of religion rather than on the basis of speech since a claimant's sense of the value of his or her speech may well be diminished if the public protection of that speech depends on its being characterized in secular terms. If that is true, then protecting religious speech on the basis of its status as speech may well undermine the contribution to human well-being that religious speech is capable of making. It is that kind of contribution that may justify freedom of religion as an independent guarantee, a question that I will turn to next.

### III. Conventional Justifications

#### A. *The Semantic Approach*

##### 1. Semantic and Moral Analyses of Religious Freedom

Conventional accounts of freedom of religion, particularly those developed in the context of the First Amendment to the United States Constitution, have tended to address themselves to the question of the proper meaning of the term religion. When claims to religious freedom are advanced by bodies not traditionally recognized as religious, such as Scientologists,<sup>17</sup> or in support of the exercise of personal convictions not necessarily regarded as religious, such as a conscientious objection to armed conflict,<sup>18</sup> or in support of activities that have not conventionally formed part of religious

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<sup>16</sup> But see to the contrary *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 876-79, 133 D.L.R. (4th) 1 at 35-37, where the purpose supporting the guarantee of religious freedom is said to be a commitment to freedom of belief, a purpose that is said to preclude the denigration of other beliefs. That conclusion must have surprised not only those religious proselytizers accustomed to denigrating other religions, but also those non-religious activists who had assumed their freedom to engage in brutal criticism of the beliefs of others. Compare *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641, where the right of Jehovah's Witnesses to distribute tracts allegedly denigrating the Catholic faith was upheld on the basis of freedom of speech and religion.

<sup>17</sup> *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969).

<sup>18</sup> See *United States v. Seeger*, 380 U.S. 163 at 163, 166 (1965) [hereinafter *Seeger*]: interpretation of a statute requiring belief in relation to a Supreme Being was held to include a belief that occupies

ceremony, such as the use of moose meat for a funeral potlatch,<sup>19</sup> those claims have been assessed by drawing analogies between the social practices underlying the claims and the practices of well-recognized religions, so as to determine whether the beliefs and rituals for which freedom is claimed have parallels in religions to which freedom is clearly due.<sup>20</sup> For example, Kent Greenawalt begins his analysis of religion as a concept in constitutional law by observing, with approval: “[N]o-one doubts that Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism are religions. Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations.”<sup>21</sup> There is an obvious paradox here, in that access to freedom of religion is taken to depend upon conformity to the fundamental features of recognized religions. At first blush, this would seem to be inconsistent not only with freedom of religion but with its companion requirement, just as securely entrenched in the United States Constitution, that there be no establishment of religion. If the fundamental features of leading religions are in effect constitutionally entrenched as models for all other religions, does that entrenchment not amount to state establishment? Whether or not that is indeed the case is a question that I will return to below. Rightly or wrongly, however, accounts such as these have been widely condemned on this basis as imposing undue constraints upon the concept of religion.<sup>22</sup>

Given these criticisms of straightforward comparisons between the indisputably religious and the allegedly religious, more sophisticated accounts, including that offered by Greenawalt himself, have sought to develop more subtle forms of analogy. While continuing to take the traditional features of religious practice as his starting point, Greenawalt argues that those features should not be regarded as necessary or sufficient conditions for the presence of a religion. Rather we should recognize that the term religion describes a family of practices that has no common element just as, according to Wittgenstein, we should recognize that the term game describes a family of games.<sup>23</sup> In assessing whether a particular set of beliefs amounts to a religion, therefore, we should begin by cataloguing the characteristics of traditional religions, so as to arrive at what Greenawalt calls a paradigm instance, and then simply assess how

“a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption”.

<sup>19</sup> See *Frank v. Alaska*, 604 P.2d 1068 (Alaska 1979).

<sup>20</sup> For a prominent and relatively liberal version of this approach see J.H. Choper, “Defining ‘Religion’ in the First Amendment” [1982] 3 U. Ill. L. Rev. 579.

<sup>21</sup> K. Greenawalt, “Religion as a Concept in Constitutional Law” (1984) 72 Cal. L. Rev. 753 at 767. For an argument along similar lines see G.C. Freeman III, “The Misguided Search for the Constitutional Definition of ‘Religion’” [1983] 71 Geo. L.J. 1519.

<sup>22</sup> See e.g. L.H. Tribe, *American Constitutional Law*, vol. 1, 2d ed. (New York: The Foundation Press, 1988) at 1181. See also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 at 642 (1943), Jackson J.: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

<sup>23</sup> L. Wittgenstein, *Philosophical Investigations*, 3d. ed. (New York: MacMillan, 1968) I at paras. 66-76.

closely the characteristics of the alleged religion match that paradigm, without demanding that the alleged religion display any particular feature of the paradigm.<sup>24</sup>

Clearly, however, this cannot quite be the answer to the problem of interpreting freedom of religion. There is something basic missing from what I have called conventional accounts, in both their sophisticated and their unsophisticated versions, and that is that they make no attempt whatsoever to address the question of justification, a question that must be addressed in order to say anything at all about the scope of the freedom. Wittgenstein's analysis of language, relied upon by Greenawalt, is a descriptive and not a normative analysis. It is no part of Wittgenstein's purpose to tell us what language should look like or how it should function. Rather, he seeks to tell us what language does look like and how it does function. If we were concerned to know how the term religion is in fact used in the world, as part of an attempt to understand the nature of language, perhaps we might well turn to Wittgenstein for assistance. But if we are concerned to know how the term religion *should* be used, in the interpretation, the application, or the justification of a fundamental freedom, then a semantic inquiry into the use of that term is simply misplaced, unless, of course, there are moral reasons to resolve the problem of justification in semantic terms. In other words, it only makes sense to approach freedom of religion by asking what the term religion means if the reasons for guaranteeing the freedom are also reasons to determine its scope on linguistic principles. It is those reasons that are missing from the accounts that I have just described, or at least that are missing from their face, and that must be taken to be implicitly present in them if the accounts are to be justified as legitimate descriptions of freedom of religion.

In the absence of such reasons the accounts are radically incomplete. To claim this is not to demand that we carry on a moral debate rather than a semantic debate. Instead, it is to insist that semantic answers not be given to what are inherently moral questions. As I have said, a semantic account of religion may tell us how people in general use the word religion, how the legal profession uses it, or how people should use the word if they wish to be understood by their peers. But a semantic account cannot, in itself and without assistance, tell us what forms of human activity ought to be secured under the rubric of freedom of religion.

Semantic accounts of freedom of religion are incomplete because they do not tell us, other than in semantic terms, why one understanding of religion should be preferred to another in the application of a fundamental freedom. And yet our reason for wanting to know which understanding should be preferred is not semantic but moral, not descriptive but normative. Our concern is not with linguistics but with justice. In the setting of a fundamental freedom what matters is not how the word religion is cor-

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<sup>24</sup> Greenawalt, *supra* note 21 at 768. I might note that this still has the effect of constitutionally entrenching the fundamental features of those religions whose characteristics are catalogued in order to arrive at the paradigm instance of religion; it merely ensures that the paradigm thus established is applied flexibly rather than rigidly. In my view, however, this is not a telling objection to Greenawalt's account, for the reasons given in Part III.A.5.a, below.

rectly used, whether generally or as a term of art, but how it should be used in order to arrive at a just outcome in balancing the requirements of personal autonomy against those of the public good.<sup>25</sup> It follows that a semantic approach to freedom of religion is necessarily dependent upon some prior moral justification which, if not explicitly stated on the face of a given account of freedom of religion must be treated as implicit in it.

## 2. Arguments From Authority

I will assume in their favour, therefore, that conventional accounts of freedom of religion, those that determine the scope of the freedom by reference to the meaning of the term religion, a meaning that is to be inferred from the central features of social practices indisputably acknowledged to be religious, implicitly take the proper justification for the freedom to be the fact that its entrenchment is the product of a democratic decision, whether of a constitutional convention or some other body.<sup>26</sup> In other words, according to these accounts, freedom of religion is implicitly taken to be justified by the just character of its source. Whatever reasons may support the exercise of democratic authority necessarily support actions taken by that authority. Having settled the problem of justification in this way, conventional accounts of freedom of religion can then plausibly address the proper application of the freedom by interpreting the concept of religion in exclusively linguistic terms. That is to say, they are able to take the view that in order to understand the concept of freedom of religion and its proper application we should simply ask ourselves what the word religion means, for that is the word that the democratic authority used when entrenching the freedom. Once we discover the proper answer to that question we will be able to apply the concept in a manner that is justified.

There is again a ready objection to this line of reasoning. A bare reference to the presence of a democratic decision simply begs the question of whether and on what basis that democratic decision is justifiable. This question must be answered not merely in order to justify the freedom but in order to apply it. In other words, the reference to a democratic decision postpones but does not resolve the problem of justification for the simple reason that there is a difference between justifying a certain form

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<sup>25</sup> I am not suggesting here that there is any inherent conflict between personal autonomy and the public good: see J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 213ff. I am assuming, however, that incidental conflicts between the claims of autonomy and the public good clearly do arise, and that the proper interpretation and application of a fundamental freedom involves the resolution of such conflicts.

<sup>26</sup> I make this assumption because it is the only basis that I can think of upon which one might justify approaching freedom of religion by simply seeking the meaning of the term religion. If, contrary to my assumption, one thought that the question of justification was not answered by the role of a democratic authority in guaranteeing this freedom, or if one thought that the question of justification was *prima facie* answered in that way, but that what the democratic authority had guaranteed was a moral rather than a linguistic concept, then the absence of any consideration of justification on the face of a semantic account would clearly be fatal, for it would make the account not merely superficially but radically incomplete.

of authority and justifying what that authority does. It is right, and so justifiable, that most political decisions, including a decision to secure freedom of religion, be taken by a democratic body, but it does not follow from this that any of the decisions taken by that body are themselves justifiable, other than in procedural terms. Just procedures do not necessarily produce just outcomes.

More particularly, the fact that a decision is democratically authorized does not in any way enlighten us as to the specific basis on which that decision may be justifiable. Democracies often err; when they do good it is for varying moral reasons. We cannot conclude from the fact that the guarantee of freedom of religion was democratically arrived at, therefore, that the guarantee is justified at all, and that being the case we certainly cannot ascertain from the bare fact of its democratic origins the particular basis on which that guarantee may be justified, a basis that it is necessary to identify in order to be able to apply the guarantee.

### 3. Identity of Concept and Purpose

In response to this objection it might be argued, indeed can only be argued, that the concept of religion so far reflects the moral purpose for which it was constitutionally entrenched that the protection of activities that fall within that concept is necessarily morally justified. If this is true, then it would seem to follow that a semantic inquiry into the meaning of the concept of religion would indeed be sufficient to answer the problem of justification. As long as we understand the concept of religion properly, and as long as we apply that concept faithfully, we will act in fulfilment of the moral purpose for which that freedom was guaranteed.

In a sense, of course, this response is once again question-begging, for the alleged answer it provides to the question of justification does not in fact tell us what justifies the protection of freedom of religion, but rather tells us that this is something that we do not need to know. According to this response, the search for justification is unnecessary. All we need to do is to interpret and apply the concept in the assurance that the outcome of that semantic inquiry is bound to describe and, thus, lead to a degree of protection that is morally justified.

Leaving the issue of question-begging aside for a moment, is it in fact true that the concept of religion so far reflects the purpose for which it has been guaranteed that protection of the activities that fall within the concept is necessarily morally justified? And if we want to seek the answer to that question, how should we go about discovering it? Clearly, the claim will be true only if there is a high degree of correlation between the concept of religion and the moral purpose or purposes that are capable of justifying a guarantee of religious freedom, which is open to doubt. How then are we to determine the degree, indeed the existence of correlation between the concept and the purpose that justifies its guarantee? Plainly, by comparing the concept of religion and the purpose or purposes for which the activities covered by that concept are guaranteed by religious freedom. It follows that the degree of correlation between the concept of religion and the purpose or purposes that justify its fundamental protection can only be determined by identifying what those purposes might be. It is not possible to

decide what the term religion means in a guarantee of religious freedom without knowing why freedom should be extended to the practices covered by that term.

In other words, the accusation of question-begging matters here, for identifying the meaning that is to be given to the concept of religion in this setting depends upon identifying the moral purpose that justifies granting freedom to some or all of the manifold activities that are capable of being brought within that concept. We can only determine the meaning and significance that the concept of religion ought to bear in the context of an analysis of religious freedom by referring to the purpose or purposes that justify the entrenchment of that concept in a fundamental guarantee. It follows that freedom of religion cannot be justified, explained, or applied in the absence of a moral debate over the purposes for which that freedom has been and continues to be guaranteed.

If this is true it does not simply raise questions about the completeness of what I have called conventional accounts of freedom of religion but, more important, suggests significant constraints upon the direction that any search for a better account must take. For that reason it is worth examining this conclusion and its implications in somewhat greater detail, since they may tell us a good deal more about religion as a fundamental freedom and the purpose or purposes for which that freedom is guaranteed than is immediately apparent.

#### 4. Reference to the Concept of Religion

In general, any concept only has significance for us as a society to the extent that it serves as the vehicle for some social purpose. The concept of religion is no exception. Religion has different meanings for different purposes, not because religion means whatever it suits our purposes to have it mean, but simply because the concept of religion genuinely has a large number of possible meanings, so that it takes a social purpose to make any one meaning matter rather than some other. The debate over the scope of religious freedom simply confirms this. If religion did not have multiple meanings, there could be no debate over the meaning that it should bear in the setting of a constitution or other form of fundamental guarantee. If, for example, in order to answer the question of whether Scientology is a religion, a court does not simply assess evidence as to the practice of Scientology but entertains argument about the proper scope of the concept of religion, it can only be because the court recognizes that religion is capable of meaning different things, some of which may embrace Scientology and some of which may not.

In order to apply a guarantee of religious freedom, then, it is necessary to assign a meaning to the term religion as it is used in that guarantee. Plainly, that involves selecting one meaning rather than another. To select one meaning rather than another, however, requires a purpose that makes the selected meaning relevant. That purpose can only be the moral justification supporting the freedom, for the moral justification supporting the freedom is the only consideration that can legitimately establish the relevance or irrelevance of a particular meaning of religion in that setting; otherwise

the selection would be arbitrary and thus unjustifiable.<sup>27</sup> It follows that it is necessary to refer to the justifications in support of freedom of religion in order to establish the proper meaning of religion in the setting of a fundamental political guarantee. This is true even if it is the case that all possible meanings of religion fall within the justification of freedom of religion, so that there is a perfect correlation between the concept and its justification, for we can only know that such a correlation exists by looking to the justification. Otherwise the correlation would simply have to be taken on faith. As I suggested above, then, any recourse to a semantic inquiry necessarily depends upon a prior moral inquiry.

However, something more follows here, something that is a further product of the relationship between meaning and purpose. So far I have considered the positive implications of the relationship between meaning and purpose, namely, the extent to which the choice of meaning requires a moral purpose to support it. Still, there are also negative implications to the relationship between meaning and purpose, namely, the extent to which the choice of a meaning may be precluded by the absence of any moral purpose that could support it. In the context of freedom of religion the possible meaning of the term religion is constrained not only by the purposes that support the existence of that freedom, but by the purposes that could not do so. The concept of religion must be assigned a meaning that can be sustained by some plausible account of the moral reasons in support of freedom of religion. If a particular meaning, generally recognized as falling within the concept of religion, cannot be justified in that way, because the reasons that might support that particular meaning are not acceptable justifications for a guarantee of freedom of religion, then that meaning simply cannot be a candidate for a correct interpretation of religious freedom.

If that is so, then a search for the moral purposes that might justify a guarantee of freedom of religion will be correspondingly constrained. Just as the possible moral purposes for guaranteeing the freedom constrain the possible meanings of the word religion, so too impossible moral purposes make some possible meanings of the word religion insupportable in this setting. The only candidates for a correct justification of freedom of religion are those moral purposes that support meanings of religion other than those meanings that have already been determined, for whatever reason, to be insupportable. Following this line of reasoning, I suggest that doctrinal accounts of the

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<sup>27</sup> I take it as given that a morally arbitrary decision could not be justified in this setting. Two further points should be noted here. First, in the case of those guarantees of freedom of religion that form part of a written constitution, it is theoretically possible that a recognized rule of interpretation might grant to one particular understanding of the word religion (be it a dictionary definition or the reading said to be intended by the framers of the constitution) the authority of law. In fact, no such rule exists, and even if it did, it would only establish the scope of the freedom as a legal right, as an aspect of positive law, and would not tell us what judges should do in order to secure the freedom as a moral right. Second, the moral justification supporting the freedom may not exhaust the question of meaning, for that justification may make a number of meanings relevant, some of which may need to be discarded, either for other reasons, such as their vagueness perhaps, or because they are simply incompatible with one another, so that a choice must be made between them on non-rational grounds.

meaning of religion, accounts that define religion by reference to the content of religious belief, cannot be sustained by any plausible understanding of the reasons in support of freedom of religion. The moral basis for religious freedom cannot be found in religious doctrine. If that is so, then the meaning of religion, at least as far as freedom of religion is concerned, and the purposes that would justify giving the freedom that meaning rather than some other, must be sought in non-doctrinal accounts of religion, or at least must be sought in accounts that are not focused exclusively upon matters of doctrine.

### 5. Reference to Religious Doctrine

A crucial feature of what I have called conventional or semantic accounts of freedom of religion is that their description of the paradigmatic elements of religion draws exclusively upon religious beliefs and the practices that express those beliefs. In other words, religion is defined solely in doctrinal terms. Let me return to Greenawalt's account and its clearly intentionally generous description of the meaning of religion:

[N]o-one doubts that Roman Catholicism, Greek Orthodoxy, Lutheranism, Methodism, and Orthodox Judaism are religions. Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations. These include: a belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repentance and forgiveness of sins; "religious" feelings of awe, guilt and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices.<sup>28</sup>

Greenawalt recognizes the restricted nature of his description but defends it on practical grounds:

In this brief discussion of the ordinary concept of religion, I have not explored the plausible claim that some deep characteristic such as "faith" or the "transcending of ordinary experience" does unite all instances of religion. My reason is that a common characteristic as vague and general as these would be little help for someone trying to classify beliefs and practices as religious or not. For legal purposes, one needs to concentrate on features of religion that are specific enough to be employed by judges and other actors in the legal system.<sup>29</sup>

I do not want to imply that there is anything wrong with taking practical considerations into account here. Moral requirements can only be implemented in law to the extent that they are susceptible to adjudication and enforcement through law. Whether Greenawalt is right, and the concept of faith is indeed too vague to be adjudicated, is a point that I will return to below.<sup>30</sup> What I want to explore at the moment are the conse-

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<sup>28</sup> Greenawalt, *supra* note 21 at 767-68.

<sup>29</sup> *Ibid.* at 768-69.

<sup>30</sup> See Part VI.A.3, below.

quences of pursuing a doctrinal approach to the analysis of religious freedom, and the readiest way to do this is, first, to begin with the conventional objections to what I have called conventional accounts; next, to examine the merits of those objections; and finally, to refine them where necessary, and to see where they lead.

I have said that conventional accounts of freedom of religion have tended to address themselves to the question of the proper meaning of the term religion, and have sought to determine that meaning by reference to the central features of those social practices that are indisputably acknowledged to be religions. When a claim is made to freedom of religion, an analogy is drawn between the social practices underlying that claim and a paradigm established by traditional religions. The paradigm may be described strictly, so as to impose specific requirements upon any alleged religion as necessary and sufficient conditions of its freedom, or it may be described loosely, so as to require only a reasonably close resemblance between the alleged religion and the paradigm. In either case, the analogy is regarded as having been established where the alleged religion and the paradigm are found to have features in common.

As I have also indicated, objections have been taken to this approach on the basis that the apparently privileged position that it grants to well-recognized religions violates both freedom of religion and the accompanying rule against any establishment of religion.<sup>11</sup> In my view, these objections, while not sound in themselves, nonetheless reveal reasons to object to any doctrinal account of freedom of religion and so are worth reviewing and responding to in some detail.

#### *a. Anti-Establishment Objections to Reliance on Doctrine*

The first objection is what I might call the anti-establishment argument: the tenets of dominant religions cannot be used as a template to describe the proper outlines of the guarantee of freedom of religion, since to rely on those tenets would be to establish certain doctrinal aspects of dominant religions as necessary conditions of access to the freedom. For my own part, I cannot deny that there is a certain attraction to this objection, particularly when one remembers that the genesis of the guarantee of religious freedom as we now know it was in the desire of members of minority religions to be free from the oppressive weight of religious orthodoxy. Nevertheless, it seems to me that there are ready and effective responses to the objection. First, the objection assumes that a rule against the establishment of religion is a necessary aspect of any guarantee of freedom of religion, so that an approach to freedom of religion that establishes certain features of religion is a contradiction in terms. But is this so? Surely it may well be the case that freedom of religion is capable of co-existing with an established church, as it has arguably done in England for the past century

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<sup>11</sup> See e.g. "Toward a Constitutional Definition of Religion" Note (1978) 91 Harv. L. Rev. 1056 at 1074-75 [hereinafter "Constitutional Definition"]: "At the very point when those approaches say, in effect, that a person must hold certain tenets or focus on certain issues to come within constitutional protection, they demonstrate their incapacity to effectuate that protection. They enshrine an orthodoxy within a Constitution designed in part to protect unorthodoxy."

and a half. Even if that were not true, so that we would be driven to conclude that England today does not in fact enjoy religious freedom, it seems clear that one cannot demand that freedom of religion be predicated upon a rule against establishment without assuming one's conclusions, for if a rule against the establishment of religion is required at all it must surely be as a consequence and not as a presupposition of the moral justification of the guarantee of religious freedom. If there is an objection to defining religious freedom in terms of religious doctrine, then it must lie elsewhere than in the rule against the establishment of religion.

Second, and more important, however, anti-establishment objections to reliance upon the tenets of dominant religions as the basis for a proper understanding of the scope of religious freedom overlook the fact that any guarantee of religious freedom necessarily enshrines protection for what it takes religion to mean, and in that sense and to that extent necessarily establishes the values to which it lends its protection.<sup>32</sup> Another way to put this is to say that the guarantee cannot be impartial between what it guarantees and what it does not. It follows that the privileged position of certain elements of religious doctrine and of the conduct that attends belief in those elements of doctrine is no more than what is required by the guarantee, and is indeed fundamental to the very existence of the guarantee.

Put another way, reference to religious doctrine as the template for religious freedom does not amount to an establishment of religion on a proper understanding of what establishment means, even where the doctrine that is referred to is drawn from a limited number of well-recognized religions. An establishment of religion involves the endorsement of particular religious doctrines, institutions, and practices by the state, not the entrenchment of broadly recognized religious values in a guarantee of religious freedom. In other words, an insufficiently inclusive understanding of the scope of religious freedom, one that is based upon an insufficiently generous reference to the wide variety of religious doctrine present in the world, is simply not the same thing as a state religion.

### *b. The Moral Limits of Religious Doctrine*

But do these responses exhaust the force of the objection? If a reference to religious doctrine as the source of religious freedom is not objectionable on the basis of a rule against the establishment of religion, may it yet be objectionable on the basis of an incompatibility between the basic requirements of any justification for a fundamental political guarantee and the character of religious doctrine? One way to test this is to ask what a guarantee of freedom of religion would look like if it were, in fact, drawn from the doctrines of well-recognized religions, so that we had to look to those doctrines as the source for our understanding of religious toleration. It is possible that in such a case the freedom might not exist at all. One does not have to be much of a

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<sup>32</sup> An argument to this effect has been advanced by Choper, *supra* note 20 at 579, in response to "Constitutional Definition", *ibid.* at 1074-75.

skeptic to believe that the doctrines of well-recognized religions are unlikely to yield any sort of commitment to religious toleration. If this skeptical view were right, then religious doctrine clearly could not be the basis of freedom of religion, and accounts of freedom of religion that define religion by reference to the elements of religious doctrine would be simply misguided. But even if this skeptical view were wrong, can religious doctrine be made to yield a commitment to religious toleration that is at once recognizable and acceptable as a fundamental political guarantee? In my view, it cannot.

Were religious toleration indeed the product of religious doctrine the result would be not a state guarantee of freedom of religion, but state endorsement of a tolerant faith. The distinction between these two outcomes is critical, for a religious morality, however tolerant, displays certain features that are simply incompatible with what is required of a morality that is to justify the guarantee of a fundamental freedom.

First, as I will explain below, religious beliefs are not held exclusively for reasons, but rather are endorsed, in part at least, as a matter of faith. By contrast, the design of state institutions, and the scope of the protection that they offer or deny to individuals, must be based on reasons. It follows that the task of justifying freedom of religion as a political guarantee must be a rational, not a theological exercise.<sup>33</sup>

Second, the account of morality that is embodied in religious doctrine is necessarily partial and incomplete, rather than plural and comprehensive, for even the most tolerant of religions does not and cannot take other accounts of morality to be as true as its own.<sup>34</sup> In itself, of course, there is nothing wrong with this. In fact, much individual and group morality displays this form of partiality and is not necessarily wrong to do so, for the account of morality that each of us gives, whether as an individual or as a group, need only be as comprehensive as is required to accommodate the well-being of those to whom we are responsible.<sup>35</sup> But it follows that a partial and incomplete account of morality is inappropriate for adoption by the state, whose policies and institutions must reflect a comprehensive, value-pluralist account of morality if they are not to exclude the recognition of values upon which the well-being of certain human beings depends, human beings who necessarily fall within the ambit of the

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<sup>33</sup> I am not suggesting that theology and reason are mutually exclusive, but I am suggesting that theology necessarily draws upon non-rational considerations. See the discussion of faith in Part V.A.

<sup>34</sup> Would this claim still hold if the doctrine thus referred to was an ecumenical amalgam of several doctrines? Would such an amalgam not be capable of serving the well-being of all believers? The answer, in my view, is that as far as a guarantee of freedom of religion is concerned no amalgam of doctrines can be genuinely ecumenical without deciding what religion means in the first place, the very question that the amalgam is constructed to answer. In other words, partiality is built into an approach that decides the scope of religion, and so limits the guarantee of religious freedom, by reference, however sophisticated, to the doctrines of any set of religions other than the set whose scope it is supposed to determine.

<sup>35</sup> Partial and incomplete accounts of morality are wrong but they need not be harmful.

state's responsibility.<sup>36</sup> Furthermore, it follows that the freedom of religion whose guarantee lies at the foundation of the state must be based upon, and assessed against, a view of morality that is capable of embracing all those for whom the state is responsible. Religious morality, which is accountable only to those who have freely embraced its tenets, does not and cannot meet this requirement.

Three factors then come together. The first is value pluralism, which describes the diversity of the goods that are available to human beings. The second is human variety, the range of characteristics, be they biological or cultural in their origin, that distinguish people from one another. The combination of these two factors leads to the conclusion that it is the range of human characteristics present in a given population that establishes the range of goods upon which the well-being of that population may depend. The third factor at work here is the state's responsibility for the well-being of those people who fall within its political jurisdiction, a responsibility that must be discharged, at least in part, by the just design of state institutions and the just description of the rights and freedoms that are to be respected and enforced by those institutions. The interplay of these three factors leads to the conclusion that the state is bound to guarantee freedom of religion to its citizens if and to the extent that the exercise of that freedom is essential to the well-being of at least some of those citizens, and further, that the state is bound to guarantee religion on a basis that is sufficiently comprehensive to embrace the full range of religious beliefs and practices to which its citizens are now or may become committed in the pursuit of their well-being.

Religious doctrine, even when broadly understood, does not and cannot offer that kind of basis for freedom of religion, for it is not and cannot be that comprehensive while maintaining its religious character. As I have suggested above and will explore more fully below, a particular set of beliefs acquires a religious character when those beliefs are held collectively on the basis of faith, or at least in part on the basis of faith. It is that particular mode of belief that gives a commitment to religious doctrine its distinctively religious character, a character that is necessarily singular, stable, and partial, as opposed to being plural, evolving, and comprehensive. Commitment to religious doctrine is none the worse for displaying that kind of character as long as it remains within its own realm, for in that realm religious doctrine need only be responsible to those people who have freely committed themselves to its tenets and to the manner in which those tenets are held. But if and when it is taken as a justification for a fundamental freedom, religious doctrine escapes its own realm and enters a very different realm, that of the state, a realm in which responsibility must be assumed for the well-being of all citizens, of whatever faith or none, a responsibility that religious doctrine is simply incapable of fulfilling.<sup>37</sup> It is for this reason that a guarantee of free-

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<sup>36</sup> This would also hold true for a value-monist account of morality, although the argument would have to be revised so as to claim that state policies and institutions must reflect an account of morality that is comprehensive enough to recognize what is instrumentally, as opposed to inherently, valuable in the pursuit of human well-being.

<sup>37</sup> Religious morality is entitled to be partial because endorsement of that morality by believers is and must be free. This means that religious institutions need only concern themselves with the well-

dom of religion that is based upon religious doctrine would diminish the well-being of the very citizens to whom that freedom is owed, and it is for this reason, therefore, that a just account of freedom of religion cannot be based upon religious doctrine, no matter how widely and liberally that doctrine may be interpreted.

What this reveals, then, is that the morality justifying freedom of religion must be secular, not religious. It follows that religious doctrine cannot serve as the moral inspiration for a guarantee of freedom of religion, and that doctrinal accounts of that guarantee, those accounts that assess the meaning and scope of freedom of religion by reference to the content of religious doctrine, are simply misguided.<sup>38</sup> This is not to assume one's conclusions, to say that the morality justifying a fundamental freedom must be secular because the morality justifying any fundamental freedom must be secular. Instead, it is to say that only a secular morality is capable of providing the connection to human well-being that is necessary to justify a fundamental freedom. What is more, there is no reliance here upon any rule against the establishment of religion, for the rule against establishment is not the source of this conclusion, but rather one of its possible consequences.

### **B. The Psychological Approach**

The semantic approach to freedom of religion has not been without its rivals. A second strand in American law, which has yet to find favour in the constitutional jurisprudence of the United States Supreme Court, but which has nevertheless attracted the support of a number of academic commentators, takes the essence of freedom of religion to be the protection of whatever beliefs and associated practices play a fundamental role in the life of any particular individual. This approach is sometimes described as functional,<sup>39</sup> but for my own part I find it more revealing to think of it as a psychological approach and to trace its roots, as have American courts, to the work of William James.<sup>40</sup>

For the purpose of exploring religion as a psychological phenomenon, in his "The Varieties of Religious Experience: A Study in Human Nature",<sup>41</sup> James adopted what

being of those who have freely assented to their tenets (subject of course to the responsibility not to harm others, in this case non-believers). Political morality must be comprehensive and plural, because participation in that morality by citizens is not necessarily free, notwithstanding any right of exit. This means that state institutions must concern themselves with the well-being of all.

<sup>38</sup> I will consider below, in Part IV.C, whether a secular morality could possibly justify the interpretation of religious freedom in terms of religious doctrine.

<sup>39</sup> Tribe, *supra* note 22 at 1182.

<sup>40</sup> See *United States v. Sun Myung Moon*, 718 F.2d 1210 at 1227 (2d Cir. 1983) specifically endorsing James's definition. Compare this with *Seeger*, *supra* note 18 at 166 holding that a statutory requirement of belief in a Supreme Being as a condition of conscientious objector status is satisfied if "a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption".

<sup>41</sup> W. James, "The Varieties of Religious Experience: A Study in Human Nature" in *Writings, 1902-1910* (New York: Literary Classics of the United States, 1987) 1.

he himself described as an arbitrary definition of religion, referring to it as “the feelings, acts and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine,”<sup>42</sup> where experience of the divine is understood to mean a personal emotional experience centred upon happy acceptance of the universe and what it requires of each of us.<sup>43</sup> James intended this definition to be flexible enough to include those spiritual beliefs, such as transcendentalism, that involve an acceptance of “the spiritual structure of the universe” but do not refer to a particular deity.<sup>44</sup> According to James, “from the experiential point of view” beliefs of that kind are as much religions as are Christianity or Buddhism (itself without a deity).<sup>45</sup> It is this distinctive focus on the internal attitude of religious believers that has made James’ psychological understanding of religion, and others like it that have followed, appealing to courts and commentators who have been reluctant to interpret freedom of religion by reference to the external features of religious belief, lest by doing so they enshrine religious orthodoxy. Psychological understandings of religion have yet to be endorsed by the United States Supreme Court as proper interpretations of the constitutional guarantee of freedom of religion, but they have been recognized as the proper approach to the interpretation of statutory religious exemptions from military service.<sup>46</sup>

### 1. The Protection of Ultimate Concerns

According to one of the most influential psychological accounts of freedom of religion, every person has a religion, and that religion is composed of that person’s deepest commitments or ultimate concerns.<sup>47</sup> However secular those commitments or concerns may seem to others they nevertheless merit protection as a religion, for “[a]utonomy of belief can be safeguarded only if the believer is entrusted with the task of ranking and articulating his own concerns.”<sup>48</sup> In other words, the test of what constitutes a religion here is purely subjective. The law can require that a belief or activity be a matter of ultimate concern in order to obtain the protection of freedom of religion, but only the individual can determine what is of ultimate concern to him or her.

There are some startling consequences to this point of view. To take the most obvious, this account of religion makes it impossible for anyone to lead a secular life, unless of course his or her life is devoid of anything that he or she could regard as an ultimate concern. If a person claims that a single-minded pursuit of uncommitted sex is his or her religion, we cannot assume that the claim is metaphorical, for if that person is a Lothario, then philandering may indeed be his or her ultimate concern, and

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<sup>42</sup> *Ibid.* at 36.

<sup>43</sup> *Ibid.* at 36, 42, 44, 50.

<sup>44</sup> *Ibid.* at 36.

<sup>45</sup> *Ibid.* at 38.

<sup>46</sup> *Seeger, supra* note 18; *Welsh v. United States*, 398 U.S. 333 (1970).

<sup>47</sup> “Constitutional Definition”, *supra* note 31 at 1056.

<sup>48</sup> *Ibid.* at 1076.

thus his or her religion. Just as surprisingly perhaps, this account of religion makes it impossible to lead a religious life, and to claim the freedom to do so, unless religion is at least part of one's ultimate concern.<sup>49</sup> A Catholic, for example, cannot obtain the protection of freedom of religion in support of the practice of some tenet of the Catholic religion unless Catholicism in general and that tenet in particular form part of his or her ultimate concern no matter what view the doctrines of the Catholic religion itself might take on the proper role of religion in individual life.<sup>50</sup>

## 2. Semantic Objections to the Equation of Religion and Ultimate Concern

These consequences suggest reasons to reject this account of freedom of religion as inconsistent both with the concept of religion and with the moral reasons that must justify the guarantee of religious freedom. First, while it is true, as I have argued above, that the concept of religion has a number of possible meanings, only some of which are capable of being made relevant by the possible moral justifications for freedom of religion, religion cannot be made to mean whatever we want it to mean. In particular, religion cannot be equated with ultimate concern. The ultimate concerns of human beings may, like religions, deserve some sort of protection as part of the recognition of human autonomy and what it requires, but it does not follow that those concerns *are* religions and deserve protection under the rubric of freedom of religion. It is certainly true that religion may constitute a person's ultimate concern, but it does not follow that all matters of ultimate concern are religions, for the simple reason that ultimate concern and religion are different concepts. That being the case, ultimate concerns cannot be protected as religions, for in order to be protected as a religion a belief, commitment, institution, or practice must fall within the concept of religion. I have argued above that semantic accounts of religion are incapable of determining the proper scope of freedom of religion, but it remains true that they can and must set limits to what a reference to religion in the context of a fundamental freedom can be taken to mean.<sup>51</sup> Those limits exclude the possibility of treating ultimate concern as a religion.

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<sup>49</sup> Moreover, ultimate concern is "an act of the total personality, not a movement of a special and discrete part of the total being". It follows that to qualify as an ultimate concern a commitment must be "unconditional, made without qualification or reservation": *ibid.* at 1076, n.110.

<sup>50</sup> *Ibid.* at 1083, n.129.

<sup>51</sup> I argued above that a semantic inquiry into freedom of religion must depend upon the outcome of a prior moral inquiry; what the present discussion shows is that a moral inquiry into freedom of religion is also dependent upon a prior semantic inquiry, for we have to have some idea of what religion is capable of meaning before we can ask what it should mean in the context of a fundamental freedom. Furthermore, once a moral basis for the freedom has been decided upon, the meaning of religion can be refined in light of that basis, so as to function as a term of art in the interpretation and application of a fundamental guarantee, but it cannot be entirely reinvented, for to do so would be to offer no explanation or justification for the existence of a guarantee of religion rather than a guarantee of ultimate concern (or whatever other underlying value is taken to be the moral basis for the guaran-

Notwithstanding the wide variety of religious experience, no religion is or can be purely individual in its outlook, as ultimate concern is said to be. On the contrary, religions are necessarily collective endeavours. By the same token, no religion is or can be defined purely by an act of personal commitment, as the ultimate concerns of an individual are said to be. Instead, all religions demand a personal act of faith in relation to a set of beliefs that is historically derived and shared by the religious community. It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief.

More fundamentally, while it is possible to understand religion in such a way as to include practices that would conventionally be regarded as secular, it is simply not possible to understand religion in such a way that the distinction between the religious and the secular collapses, for the religious and the secular exist in contradistinction to one another. Yet such a collapse is implicit in the view that the secular becomes religious as and when it becomes a matter of ultimate concern to any individual, for whether a practice is secular or religious would then be a purely subjective question.<sup>52</sup> Any objective distinction between the two would disappear.<sup>53</sup>

The claim that religion is equivalent to ultimate concern, while giving the appearance of objectivity, is in truth just another way of expressing the view that the meaning of religion is a subjective question, for the function of the claim is to transform an objective inquiry into the meaning of religion into a subjective inquiry into the content of an individual's ultimate concern. In other words, treating religion as equivalent to whatever is a matter of ultimate concern to an individual is tantamount to taking religion to mean whatever a person subjectively takes it to mean, for it strips the concept of religion of any possibility of objective meaning, albeit in two stages with the first stage equating religion with individual concern and the second stage referring to the content of individual concern in subjective terms. In fact, on any objective view it is simply not possible to regard a secular activity as religious just because some person cares about it enough to make it his or her ultimate concern. Stamp collecting is not and cannot be a religion, no matter how obsessive its adherents may be.<sup>54</sup>

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tee). In effect, this means that the meaning of religion can be narrowed by its moral basis but cannot be implausibly broadened or altogether transformed.

<sup>52</sup> In this respect the equation of religion and ultimate concern differs from the equation of religion with faith-based beliefs, for two reasons. First, unlike ultimate concern, the content of faith is objectively determinable, so as to be capable of offering a moral reason for guaranteeing freedom of religion. Second, unlike ultimate concern, the collective endorsement of faith-based beliefs can plausibly be regarded as religious, so as to be capable of offering a semantic basis for guaranteeing the practice of those beliefs under the rubric of religion.

<sup>53</sup> Indeed eliminating that distinction is the point of the theory.

<sup>54</sup> I am assuming that one cannot have faith in stamp collecting as one can have faith in religious doctrine: see Part V.B.2 below.

### 3. Moral Objections to the Protection of Ultimate Concerns

More important than these semantic objections are the moral objections to the protection of ultimate concerns. The equation of religion with ultimate concern makes the guarantee of freedom of religion incompatible with any moral justification that could be offered for the entrenchment of that freedom. This is so for two further reasons.

First, as the description of its possible consequences suggests, the account would protect freedom in a sphere of individual conduct that cannot be brought within any plausible justification for personal freedom, whether that freedom be freedom of religion or some other freedom. In other words, not only do consequences of this kind lack any connection with the concept of religion, but they cannot be reconciled with any plausible description of the legitimate scope of personal autonomy. The requirements of personal autonomy entitle people to the resources and opportunities that are necessary to enable them to pursue their well-being through the development and realization of certain valuable options in life.<sup>55</sup> Personal autonomy does not, however, entitle people to pursue whatever goals may be of ultimate concern to them, for the scope of personal autonomy is limited, on the one hand, by the requirement that individual goals be valuable and, therefore, capable of grounding a successful life (an objective, not a subjective issue), and on the other hand, by the requirement that the pursuit of individual goals not cause harm to others. As an account of personal autonomy, ultimate concern does not respect either of these limits. To return to my earlier examples, an ultimate concern with stamp collecting is unlikely to yield a successful life, while an ultimate concern with philandering is not only unlikely to yield a successful life but may well cause harm to others.

Second, and what may simply be a variation on the same point, fundamental protection of the pursuit, in words and deeds, of whatever is of ultimate concern to an individual is a recipe for individual self-government, the government of each by each rather than the government of each by all. It describes a state of anarchy, not a democracy; a state of survival, not freedom. For that reason it is incompatible with the very existence of a democratic state,<sup>56</sup> whose responsibility it must be to secure justice to all citizens, and is correspondingly incompatible with the requirements of a fundamental political guarantee,<sup>57</sup> whose role it must be to discharge the state's responsibility to its citizens by providing an adequate setting for the pursuit of well-being by every one of those citizens, through both individual and collective endeavours.

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<sup>55</sup> This description is of course derived from that given by J. Raz in *The Morality of Freedom*, *supra* note 25 and *Ethics in the Public Domain*, *supra* note 12.

<sup>56</sup> See Choper, *supra* note 20 at 596; G. Merel, "The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment" (1978) 45 U. Chi. L. Rev. 805 at 836; Freeman, *supra* note 21 at 1564.

<sup>57</sup> This is true whether or not this is entrenched in a written constitution.

## IV. Alternative Justifications

### A. *The Elements of Religion*

If the semantic and psychological approaches to the interpretation of freedom of religion are unacceptable accounts of that freedom, primarily because they are incompatible with any plausible moral justification for entrenching the freedom in a fundamental political guarantee, then some alternative to them must be found if the freedom is to be justified at all. In order to discover that alternative, it is necessary to return to the concept of religion itself, for it is the value that religious activities can contribute to human well-being that provides the moral basis for freedom of religion, and it is only possible to discover what that value might be by reviewing the concept of religion and the activities that it is capable of describing. I will try to do this in very broad terms, so as not to be guilty of prejudicing the outcome.

Let me assume for this purpose, then, that the term religion refers to *collective participation in institutions and practices that manifest a freely given personal commitment to a particular set of beliefs, beliefs that are not based on reason alone but are held, at least in part, on the basis of faith*. There are four principal elements to this definition of religion: first, institutions and practices that serve as vehicles for the collective expression of religious belief, the protection of which is the distinctive contribution of a guarantee of religious freedom; second, freely given personal commitments to the articles of religious belief; third, the articles of religious belief themselves, however they may be defined; and fourth, the mode by which religious belief is held, namely, faith. In my view, only the last of these elements, faith, is capable of providing the moral basis for a guarantee of freedom of religion, for it is only faith that can generate a contribution to human well-being that is both capable of meeting the moral requirements of a fundamental political guarantee and sufficiently distinctive to warrant protection as religion, over and above the protection that is offered to expression, association, assembly, and other secular activities.

This is not to say that the other elements of the concept of religion have no role to play in the description of freedom of religion. On the contrary, it is my view that each is a necessary part of the description of the freedom, but that their role in the description is ancillary rather than primary. As I hope to show, we guarantee freedom of religion because of the value that faith is capable of contributing to the pursuit of human well-being. That value can only be secured, however, and the freedom fully justified, when faith is exercised in relation to certain beliefs, beliefs that are capable of sustaining a valuable life. Not all beliefs that fall within the concept of religion have that capacity, and it follows that some constraint must be imposed upon the scope of freedom of religion if the guarantee is not to extend to conduct that does not warrant fundamental protection. In my view, that constraint is to be found in the other elements that make up the concept of religion.

Furthermore, faith is not always exercised in relation to beliefs that would be conventionally regarded as religious and so recognized as falling within the concept of religion. If such exercises of faith are to warrant the description of religions, so as to obtain protection under a guarantee of freedom of religion, they must be accompa-

nied by other elements of the concept of religion, elements that must be shown to have their own contribution to make to human well-being, unless of course the presence of faith alone is enough to render a belief religious.

But this is to anticipate the balance of the argument. What needs to be shown at this point is why faith, and faith alone, is capable of providing the moral basis for a guarantee of freedom of religion. In my view, the readiest way to do this is to assess the capacity of the other elements of religion to serve as the moral basis for a fundamental political guarantee, and to turn to the evaluation of faith as and when they are found wanting.

### ***B. The Collective Character of Religious Institutions and Practices***

One possibility is that we guarantee freedom of religion, and the institutions and practices that serve as vehicles for the collective expression of religious belief, because of the value that the collective character of religious activity is capable of contributing to human well-being. It might be argued that vehicles for collective endeavour are in short supply in contemporary society, and that in their absence human beings lack access to certain valuable options that are necessary to the achievement of their well-being. On this argument, then, the reason that we guarantee freedom of religion is that religious institutions and practices are an important means of fulfilling the very real need of human beings to engage in shared activities, and thereby to find echoes of their own values and commitments in the lives of others, as well as develop options in life that they could not imagine, let alone pursue, in isolation.

The most obvious merit of this argument, apart from the fact that it draws attention to the value that social institutions and practices can contribute to human well-being, is that, in certain important respects, it is consistent with both the meaning of religion and the moral requirements of a fundamental political guarantee. From a conceptual point of view, it is clearly part of the nature of religion to be a social enterprise. Indeed, it is not possible to think of a religion with only one believer, unless of course that believer is the sole survivor of an extinct social enterprise, as was the last Shaker in each dying Shaker community.<sup>58</sup> A person who constructs his or her own doctrine and commits himself or herself to that doctrine on the basis of faith is a visionary, not a religionist. Such a person only becomes the founder of a religion, and thus a participant in that religion, when others join in the faith and commit themselves, not only to the doctrines of the visionary, but to the creation and development of institutions and practices in and through which those doctrines can be nourished,

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<sup>58</sup> The Shakers, the popular name for the United Society of Believers in Christ's Second Appearing, were founded by Ann Lee in Manchester. They flourished in the United States from the late 18th century to the mid 19th century. Today only one Shaker community survives at Sabbathtown, Maine. Shaker men and women believed in both the equality and the segregation of the sexes. This commitment to separate and equal sexual communities meant that they had to attract their recruits entirely from among the children of others. When recruitment failed, the communities died out.

preserved, and passed on to others. The collective participation in belief is central to the meaning of religion.

From a moral point of view, moreover, the collective character of religious conduct is not simply an accident of history, or a consequence of the practical need to pass beliefs on to others if those beliefs are to survive, but is an essential element in the worth of religious conduct, for the collective aspect of religious practice is constitutive of the value that religion is capable of contributing to human well-being.

That said, however, the difficulty with treating the collective character of religious institutions and practices as the basis for freedom of religion is that to do so, is in other critical respects, inconsistent with both the meaning of religion and the moral requirements of a fundamental political guarantee. From a conceptual point of view, not every collective commitment to a set of beliefs can be described as a religion. The pursuit of politics, for example, sometimes forms part of religious practice, but it does not follow that every collective endorsement of a political belief, and participation in the institutions and practices that sustain that belief, can or should be regarded as religious in character. Whatever impression Margaret Thatcher may have given from time to time, belief in monetarism is not a religion. On the contrary, belief in monetarism would only become a religion if and to the extent that commitment to that belief were based on faith rather than reason, as the critics of monetarism were eager to charge and its supporters as eager to deny, for in that case, like any other religious doctrine, monetarism would have no legitimate place in the design of state institutions and practices. It follows, then, that the collective endorsement of a set of beliefs, the collective expression of those beliefs, and collective participation in the institutions and practices that sustain and reflect belief, are necessary but not sufficient conditions for the existence of a religion.

From a moral point of view, moreover, not every collective endeavour is capable of furthering human well-being. Indeed, some such endeavours are plainly harmful. Let us assume, as is probably the case, that collective participation in certain beliefs and in certain activities is valuable in itself, simply because solidarity is valuable in itself. Even if that assumption is justified, however, the value of solidarity will remain modest where the collective practice in question is without value. Furthermore, it will be altogether undermined where the collective practice is harmful, as when gang members get together to wreak havoc upon the members of other gangs or citizens at large. In other words, the value of a collective activity is ultimately a function of two separate sources of value: solidarity and the goals to which people commit themselves on the basis of solidarity. It follows that in and of itself the collective character of a practice is too undiscerning a criterion to serve as the moral basis for a guarantee of freedom of religion since it takes no account of the value of the practice that is collectively defined and pursued. It is worth bearing in mind, in this regard, that while the guarantee of freedom of association by definition protects acts of association, it has been held to offer only qualified protection to associative activities, so as to protect

only the right to do things in association that one otherwise has a right to do, not the right to do whatever activities involve association.<sup>59</sup>

Finally, it does not seem necessary to dwell on the possibility that the moral basis for freedom of religion can be found in the value of religious institutions and practices, *qua* institutions and practices, for the value of those institutions and practices is indisputably a function of both the value of the religious beliefs that they reflect and sustain, as well as the value of the manner in which those religious beliefs are subscribed to, namely faith, which are the issues that I will turn to next.

### C. *The Content of Religious Beliefs*

As will be obvious at once, the preliminary definition of religion given above deliberately eschews any reference to the content of religious doctrine. There are two reasons for this. First, and most obviously, if the moral basis for freedom of religion cannot be found in the substance of religious doctrine, as I have already argued, it is clearly not necessary to look to the character of religious beliefs, and the similarities or differences between them, when engaging in a search for the moral basis of freedom of religion. Second, for the same reason, it is unnecessary to look to the character of religious beliefs as a basis for narrowing a guarantee of freedom of religion that is founded on some other aspect of religion, such as faith.

Is it possible, however, that there are value-pluralist reasons, not found in religious doctrine itself, for restricting the benefit of a guarantee of freedom of religion to certain religious doctrines and to the conduct that those doctrines inspire? Is it possible, in other words, that there are secular reasons to deny fundamental protection to the institutions and practices that sustain secular beliefs, despite the fact that those institutions and practices display the same features as the institutions and practices of conventional religious belief? If there are such reasons, then the moral basis for freedom of religion would continue to be the secular requirement that activities protected by a fundamental political guarantee must have a special contribution to make to the achievement of human well-being, but that requirement would be satisfied, and only satisfied, by certain well-recognized religious doctrines and the activities that those doctrines inspire and sustain. If that were the case, the preliminary definition of religion offered above would have to be modified so as to restrict the scope of freedom of religion to the doctrines in question.

The short answer to this query is that I cannot think of any such reason to so restrict the benefit of freedom of religion. As I have indicated above, the conventional approach to freedom of religion assumes that the freedom guarantees certain well-recognized religious beliefs, and guarantees other beliefs only where they bear an analogy to those well-recognized beliefs. Secular beliefs, those beliefs that make no

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<sup>59</sup> See *e.g.* the Labour Relations Trilogy: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; *PSAC v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, 12 D.L.R. (4th) 10.

reference to the divine or other doctrinal feature of well-recognized religious beliefs, are not entitled to the protection of freedom of religion, however valuable their content may be and however like a religion the mode by which they are held may be. Clearly, this conclusion can only be justified in secular terms if conventional religious beliefs, and those analogous to them, have a special connection to human well-being that is lacked by other beliefs. In fact, however, there is simply no evidence that this is true. Whatever our forebears may once have thought, we today would be prepared to acknowledge the distinctiveness, but not the uniqueness of the connection between religious belief and human well-being.

What needs to be shown, in order to supply a moral reason for restricting freedom of religion to conventional religious beliefs, say to the Catholic, the Buddhist, or the Puritan, as is the case for restricting freedom of thought, opinion, and belief to certain thoughts, opinions, and beliefs, or freedom of expression to certain forms of expression, is that the beneficiaries of the restriction make a contribution to human well-being that is not merely different from the contribution made by the victims of the restriction, but different in what makes it worthy of fundamental protection. In other words, it must be shown both that some beliefs, and the conduct that they inspire, deserve protection and others do not, and that the distinction between the deserving and the undeserving is the distinction between the religious and the secular, or, more narrowly, between conventional religious beliefs and other beliefs.

In my view, the first of these propositions is true and the second is false. Not every belief that otherwise satisfies the preliminary definition of religion given above deserves fundamental protection, for reasons that I will consider in a moment, but those beliefs that deserve protection are not exclusively religious, in the conventional sense, while those beliefs that do not deserve protection are not exclusively secular. Conventional religious beliefs, and the institutions and practices that they inspire and sustain, are not inherently more valuable than secular beliefs, nor more vulnerable. There is no moral reason, therefore, to restrict the benefit of freedom of religion on the basis of a doctrinal distinction between what has conventionally been regarded as religious and what has conventionally been regarded as secular.<sup>60</sup>

That does not mean, however, that there are no moral reasons to restrict the scope of freedom of religion on doctrinal grounds. On the contrary, an unrestricted freedom of religion would undermine the very values that the freedom is expected to secure, for not all beliefs, be they conventionally religious or conventionally secular, are capable of serving human well-being. Many indisputably religious beliefs, both familiar and unfamiliar, have been pursued at great cost to human well-being. The most familiar examples of that cost have been provided by religious cults, whose beliefs from time to time commit their disciples to self-destruction. Several such cults have emerged in recent years, from the cult of the followers of Jim Jones and the corre-

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<sup>60</sup> The same argument applies, *mutatis mutandis*, to the distinction between conventional and unconventional religious beliefs. On the traditional approach to freedom of religion the latter have been treated as secular, that is, as falling outside the scope of the guarantee.

sponding events of Jonestown, to that of the followers of David Koresh and what happened at Waco, to the Heaven's Gate cult and what it led to. In my view, the harm caused by collective faith in beliefs such as these is reason enough to restrict the protection of freedom of religion to beliefs that have at least some capacity to serve human well being, as suicidal cults clearly do not. The possibility of that kind of harm is no reason, however, to restrict freedom of religion to conventionally religious beliefs, for as I have already suggested, the distinction between the valuable and the harmful simply does not coincide with the distinction between the conventionally religious and the conventionally secular. Indeed, it is difficult to avoid the conclusion that cults, such as the one led by David Koresh, satisfy the doctrinal criteria of conventional religious belief, however warped their interpretation of conventional religious doctrine may be.

Are there semantic rather than moral reasons to restrict the scope of freedom of religion to doctrines that have been conventionally regarded as religious, as there would be if secular beliefs could not plausibly be brought within the scope of the concept of religion? Once again, in my view there are not, for it is my view that the account of the meaning and value of faith given below, and the consequent description of a faith-based account of religion, can plausibly be brought within the scope of religion. If this view is wrong, then I do not believe that freedom of religion, as such, can be justified at all.

If faith-based beliefs, and collective participation in the institutions and practices that manifest those beliefs, could not plausibly be regarded as religions, on semantic grounds, then only two possibilities would remain available with respect to the justification of freedom of religion.

The first possibility is that a different approach to the justification of freedom of religion could be found. That would not be easy. A different approach would have to be one that neither looked to religious doctrine for its understanding of religion nor relied upon religious doctrine for its justification of religious freedom, for the reasons given above. Furthermore, it would have to be one that did not look to faith for its understanding of religion, for the mere presence of faith, unaccompanied by recognizably religious doctrines, would not be enough, on this assumption, to make a belief religious. For my own part, I cannot think of any such approach, for once both faith and doctrine have been subtracted from the concept of religion little, if anything, of the concept is left.

That raises a second possibility, then, which is that the guarantee of freedom of religion would have to be regarded as unfounded unless and until it was revised as a guarantee of freedom of faith.<sup>61</sup> That, however, would be to acknowledge that a guar-

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<sup>61</sup> While it may be that not all religions rely on faith, that in itself does not provide a semantic reason to reject a faith-based approach to freedom of religion, for those religions that do not rely on faith would simply fall outside the scope of the guarantee, on the basis that they fail to meet the conditions of its moral justification, as would other religions to the extent that commitment to them is predicated on reason rather than faith.

antee of freedom of religion, as such, cannot be justified. No third option is available, for what is not possible is to accept faith as the moral basis for freedom of religion and then seek to restrict that freedom to certain conventionally religious doctrines on semantic grounds. Any semantic restriction must be morally justified, and a restriction of that kind would be morally arbitrary.<sup>62</sup>

#### ***D. Mode of Belief***

The preliminary definition of religion given above stipulated that commitment to religious beliefs must be both freely given and based, in part at least, upon faith rather than reason. Clearly, the bare fact of a freely given commitment cannot provide the moral basis necessary to justify a fundamental political guarantee, for the value of any commitment, freely given or otherwise, is a direct function of the value of the object of the commitment, which may be worthless or even harmful. That leaves the possibility that the act of faith itself provides the moral basis for freedom of religion. In order to explore that possibility it is necessary to explore the meaning and value of faith.

### **V. Faith and Religion**

#### ***A. The Meaning of Faith***

At its most basic level, the concept of faith describes the manner in which a particular belief or set of beliefs may be subscribed to by human beings. In that sense of the word, faith exists as a type of rival to reason. When we say that we believe in something as a matter of faith, or to put it the other way around, when we say that we have faith in certain beliefs, we express a commitment to that which cannot be established by reason, or to that which can be established by reason but is not believed for reason's sake. The rivalry between the two concepts is real, but not complete. Faith and reason are modes of belief with different sources and different characters, but not necessarily different consequences. The particular consequences of faith may defy reason, as when faith prompts us to believe or do what we would otherwise have no reason to believe or do, but they may also be consistent with reason, as when faith prompts us to believe or do what we otherwise have reason to believe or do. Christian faith, for example, asks us to believe in the possibility of a life beyond material existence, with all that such a belief implies,<sup>63</sup> a possibility that rational thought would regard as, not merely unverifiable, but unknowable and perhaps unintelligible, given the

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<sup>62</sup> As above, I am assuming that a morally arbitrary decision could not be justified in this setting.

<sup>63</sup> As exemplified in the Apostles' Creed: "I believe in God the Father Almighty, Maker of heaven and earth: And in Jesus Christ, his only Son our Lord, Who was conceived by the Holy Ghost, Born of the Virgin Mary, Suffered under Pontius Pilate, Was crucified, dead, and buried, He descended into hell; The third day he rose again from the dead, He ascended into heaven, And sitteth at the right hand of God the Father Almighty; From thence he shall come to judge the quick and the dead. I believe in the Holy Ghost; The holy Catholic Church; The Communion of Saints; The Forgiveness of sins; The Resurrection of the flesh, And life everlasting. Amen."

intimate connection between the nature of life and the fact of death, between the evanescence of the human spirit and the materiality of the human body.<sup>64</sup> Christian faith also asks us to believe in the redemptive power of love, a power that rational thought might well endorse. What is important is that, in either case, faith treats itself as a reason to believe, and to act in accordance with belief, without submitting to the conditions of reason.

I must make clear, before going further, that I recognize that this interpretation of faith, as a mode of belief distinct from reason, is not the only interpretation that faith is capable of bearing. On the contrary, like religion, faith has several possible meanings, with the result that a selection must be made from among those meanings on the basis of their relevance to the issue at hand. In other words, it is necessary to make a choice among meanings of faith, and it is not possible to make that choice either randomly or on the basis of purported fidelity to the core meaning of the concept, for such bases of choice would be morally arbitrary in the present setting. What is required here is an understanding of faith that is capable of providing the moral basis for the guarantee of a fundamental freedom.

I might also say, however, that in my view, a view that I will seek to defend in a moment, the understanding of faith as an alternative to reason is the only meaning of faith that describes the distinctive contribution that faith is capable of making to human well-being, precisely because of its distance from reason. Moreover, this particular understanding of faith has for so long informed and sustained what we generally recognize as religious commitment that religions are now commonly referred to as faiths on the basis of it, so as to be characterized exclusively in terms of the mode by which their doctrines are held rather than in terms of those doctrines themselves. It follows that there are, on the face of it, both moral and semantic grounds to rely upon this conception of faith when examining the possible justifications for freedom of religion. That initial impression can be confirmed by a brief review of two other prominent meanings of faith.

### 1. Faith and Trust

The most obvious rival to the meaning of faith, that I have just sketched and will explore more fully below, is the meaning of faith as a species of trust. For some people, patriotic Americans in particular, faith is equivalent to trust, so that it becomes sensible for such people to maintain that they trust in God rather than that they have faith in Him. Just as the concept of trust may be used in the place of faith in this way, so too the concept of faith can be used in the place of trust. According to this meaning of faith, it makes sense to say that one has faith in one's doctor, or in one's bank man-

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<sup>64</sup> What is here described as the rational conclusion is not simply a matter of stipulation, of saying that life means a species of existence that has an ending rather than no ending. On the contrary, it is a claim that the fact of life is so bound up with the fact of death that to speak of eternal life is an oxymoron. Life without age, without children, without generations, would not be a different life; it would not be life at all.

ager, or in one's husband or wife, for the same reasons that it would make sense to say that one had trust in those people.

Yet it seems clear, however, without calling the validity of such usages into question, that a distinction between faith and trust can and should be drawn. While the two concepts may, in some respects, overlap one another, they are not synonymous. One notices at once, as a matter of ordinary speech, that people tend to trust in the concrete and have faith in the abstract, so that it is common to say that one trusts people or institutions but has faith in certain values. For example, part of the point of maintaining that in God we trust is that it makes the presence of God a concrete rather than an abstract fact in the life of a society. Admittedly, this contrast between faith and trust is not perfect, for as I have already suggested it is clear that it is entirely sensible to say that one has faith in people (the concrete) as well as in values (the abstract), although perhaps it is less sensible to say that one has trust in values as well as in people. Nevertheless, the contrast, however imperfect, suggests an implicit recognition in linguistic usage of a significant difference between the two concepts, namely, the very difference between faith and reason as modes of belief.

In contrast to faith, one has trust in oneself, or another, or in the safety of the bridge that one is about to step upon, for reasons. It would be simply unintelligible to claim that one trusted the safety of a bridge, and yet simultaneously to acknowledge that there was no reason to do so. Trust demands the presence of reasons, and without their foundation it cannot be justified. Faith, on the other hand, is subject to no such requirement. It may be unreasonable to claim that one has faith in the resurrection of the flesh and life everlasting, but it is not unintelligible. If faith and trust are to be understood as distinct concepts, therefore, it is faith rather than trust that depends upon non-rational belief. One may have faith in oneself, in friends, in certain practices, customs, expectations, or beliefs, including religious beliefs, as long as one commits oneself to those people or beliefs independently of any reason to do so.<sup>65</sup>

It follows that the concept of faith, when understood as equivalent to trust, is incapable of providing the moral basis for a guarantee of freedom of religion, for faith so understood would be equivalent to reasoned belief. As a general matter, reasoned beliefs are protected by freedom of belief, and to offer the same beliefs the same protection in the name of freedom of religion would be superfluous. By the same token, to offer reasoned beliefs, or some subset of them, additional protection in the name of freedom of religion would be unjustifiable in the absence of some additional feature of those beliefs, for example the fact that they are held on the basis of faith understood as a mode of belief distinct from reason.

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<sup>65</sup> According to this account, the reason why people tend to trust in the concrete and have faith in the abstract is that people find it easier to perceive reasons to commit themselves to the concrete than to perceive reasons to commit themselves to the abstract.

## 2. Faith and Conscience

The concept of faith can also be used, in a substantive sense, to refer to the content of certain beliefs rather than to the manner in which those beliefs are held. In this sense, faith is commonly used as a synonym for religion. We say that certain people have faith, or are guided by faith, meaning that they endorse beliefs that are generally recognized as religious. When we do so, however, we conceal one meaning of faith within another. In other words, where the concept of faith is used in this substantive sense, it is just because of the prior presence of faith understood as a mode of belief distinct from reason. The substance of certain beliefs can be sensibly referred to as a faith only as and when those beliefs are held on the basis of faith, that is, without regard to the presence or absence of reasons to endorse them. Otherwise such beliefs could not be described as faiths. We do not call a belief in the laws of physics or the laws of chemistry a faith, for belief in those laws is held as a matter of reason, not faith. It follows that the substantive meaning of faith as religion is inherently parasitic upon the meaning of faith as a mode of belief.

This point can be clarified by comparing the concepts of faith and conscience. Faith, as a substantive concept, differs from conscience in precisely the same way that faith, as a species of personal commitment, differs from trust, and faith, as a mode of belief, differs from reason. From the opposite perspective, the non-rational character of faith as a mode of belief is felt, first, in the distinctive character of a consequent commitment to the belief in question, a commitment that we accordingly describe in terms of faith rather than trust, and second, in the description of the substance of what is believed, as an article of faith rather than an article of conscience. In short, religious belief is sustained by faith, conscientious belief by reason. It is true that the claims of religion and the claims of conscience frequently coincide, as in conscientious objector cases, for religion commonly asks us to believe what there is reason to believe as a matter of conscience. Yet only the claims of religion are consequently referred to as faith, for only the claims of religion are endorsed as a matter of faith. The claims of conscience, by contrast, are the product of reason.<sup>66</sup>

It follows that the concept of faith, when understood in the substantive sense as referring to the content of certain beliefs rather than to the manner in which those be-

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<sup>66</sup> It might be noted here that the United States Supreme Court has taken the view that quasi-religious beliefs that are not held on the basis of faith are not protected by freedom of religion. See *Yoder*, *supra* note 9 at 216:

[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

For this reason matters of religion and matters of conscience may require distinct guarantees, whether contained in a single clause, as in the *Universal Declaration of Human Rights*, *supra* note 8 (and those conventions modelled on it), or in separate clauses. For further discussion of *Yoder* and of the relationship between religion and reasonable belief see Part VI.A.2.

liefs are held, is not capable of providing the moral basis for a guarantee of freedom of religion. First, if faith, in this sense, is parasitic upon the presence of faith as a mode of belief, as I have claimed, then it is the latter meaning of faith that must be assessed as a justification for freedom of religion. Second, if, contrary to my claim, faith in this substantive sense is not tied to the presence of faith as a mode of belief, then it is simply a synonym for religious doctrine, and as such is incapable of providing the moral basis for a fundamental freedom, for the reasons given above.

### 3. The Impact of Faith on the Character of Belief

In my view, then, the meaning of faith as a mode of belief distinct from reason is the only meaning capable of sustaining a fundamental guarantee of freedom of religion. Given the fact that, according to this understanding of faith, one does not have faith for reasons, it follows that the articles of one's faith are not subject to modification by reason. Where reason and faith are in conflict with one another, one may decide to give priority to reason and so abandon one's faith, in whole or in part, but one cannot, consistently with one's faith, rely upon reason either as a guide to or critic of that which faith has revealed. On the contrary, the content of beliefs that are based on faith, having been acquired through revelation, can only be altered through revelation, or less dramatically, through a gradual evolution in the culture of belief, perhaps as a consequence of theological inquiries into the true implications of what has been revealed, inquiries whose conclusions may, over a sufficient period of time, acquire the status of revelations themselves.

When understood as a mode of belief, therefore, faith differs from reason in one crucial respect: it does not embody the instrument of its ongoing evaluation and reform. The chief feature of faith, from some perspectives its greatest strength, from others its greatest weakness, is what might be called this wilful suspension of disbelief. Since revelations are rare, and since theological inquiries tend to be modest in scope lest they challenge the substance of what has been revealed, commitments to moral doctrine that are based on faith are inherently static. In this respect, they are to be contrasted with commitments to moral doctrine that are based on reason, which are inherently dynamic.<sup>67</sup>

Stability of belief is not the only consequence of this conception of faith as a mode of belief distinct from reason. It is also in the nature of faith to demand a comprehensive, unqualified endorsement of what has been revealed, subject only to verification of the authenticity of the revelation and examination of its implications. Revelations cannot be treated as limited truths, unless they so limit themselves. Even the most tolerant of religions does not and cannot take other accounts of morality to be as true as its own. It is in the nature of reason, on the other hand, to permit only qualified endorsement of that which has been shown to be rationally justified. Properly under-

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<sup>67</sup> On the latter point see J. Raz, "Moral Change and Social Relativism" (1994) 11:1 Soc. Philo. & Pol'y 139.

stood, rational conviction is not only provisional, because subject to revision, but modest, because subject to recognition of the existence of parallel, often incompatible rational convictions.

The difference between faith and reason, in this respect, has an important effect upon the claims to status and authority of beliefs that are based on faith. When faced with rival claims, be they the claims of reason or the claims of some other faith, subscribers to beliefs that are based on faith can neither argue with nor acknowledge the force of those rival claims, but can only invite unbelievers to recognize what has been revealed, or remain lost and unredeemed in a world without the fundamental moral and metaphysical truths that faith has revealed. This is the necessary consequence of the fact that faith provides no basis upon which to recognize the claims of reason or the claims of other faiths as qualifying or supplementing the scope of its own claims. It follows then, as suggested above, that faith-based views of the world are necessarily singular rather than plural, partial rather than comprehensive, in that they cannot embrace the possibility of their co-existence with views of the world that are based on the recognition and pursuit of values that are radically different, sometimes incompatible, with their own.

### ***B. The Value of Faith***

While faith is not equivalent to trust, in that it is indifferent to the presence or absence of reasons to believe, its popular association with the idea of trust is no accident, and, in some respects, no mistake. Faith and trust, I will argue, not only mean different things, but are valuable for different reasons. Yet the distinctive value of faith, which arises from its capacity to bridge the unknowable, is readily intelligible only when contrasted to the distinctive value of trust, which arises from its capacity to bridge the unknown.

#### **1. Overcoming Ignorance and Doubt**

The most obvious role that might be played by faith in the conduct of human life is the same role played by trust, namely, to function as a device that will serve to forestall the need of individuals to undertake a reasoned examination and assessment of every significant issue confronting them on every occasion that such an issue may arise. When we have faith in certain values, or have trust in certain people, we are able to rely on those values and on those people as a matter of course, without having to ask ourselves constantly whether that reliance is justified. From this point of view, then, the role of faith, like the role of trust, is to stand in for the knowledge upon which rational judgment must depend. The presence of trust and faith in our lives means that there is no need for us to be doubting Thomases, at least in the colloquial sense of that phrase. We do not need to conduct spot checks on the fidelity and integrity of our friends, or our partners, in order to depend on them. Similarly, we do not need to subject moral doctrine to rigorous and regular examination in order to be guided by it. In this sense, faith, like trust, might be said to have a practical, functional aspect, in that it enables us to make commitments of a certain kind, and to act upon those commitments, in the absence of full reason to do so, and thus facilitates the re-

alization of whatever value those commitments are capable of yielding. It follows, according to this account, that the presence of faith and trust in our lives promotes human well-being by enhancing our capacity to pursue certain values successfully.

But is this the true value of faith, or is it the value of faith only if one equates the concepts of faith and trust, as I have already suggested one should not? If the realization of value in these settings depends on the presence of general reasons to believe, reasons that enable us to overcome moments of ignorance and doubt, then that value plainly cannot be realized on the basis of faith as I have defined it as a mode of belief distinct from reason. In that case one would have to look elsewhere for the true value of faith in the promotion of human well-being.

The doubting Thomas image, taken literally, offers some sense of the difference between the value of trust and the value of faith, and some indication of a more fruitful direction in which to look for the value of faith. A decision not to place one's finger in the wound, the decision that faith requires, is not simply a decision that forestalls the need to engage in a reasoned examination of the possibility of bodily resurrection, but rather is a decision to believe in the Resurrection despite the absence of any possibility of reasons to believe, or more troublingly perhaps, despite the presence of good reasons not to believe. It is in this sort of setting, in my view, that faith and trust necessarily part company, and that the distinctive value of faith becomes apparent.

It follows from the meaning of faith that the value of faith is something that can only be realized in situations where one believes without regard to reason to believe. The value of trust, on the other hand, can only be realized in situations where one believes because there is general reason to believe, a reason that enables one to overcome one's ignorance and doubt in a particular setting, and thus enables one to overcome the absence of any specific reason to believe, and to act in accordance with belief, that ignorance and doubt give rise to in that setting. Both faith and trust, therefore, enable one to believe and to act in the absence of full reason to do so, but trust depends upon the presence of prior, albeit incomplete reasons, while faith does not depend upon reason at all. Given the difference in their characters, it cannot be assumed that faith and trust are necessarily valuable in the same settings. In which settings, then, is the exercise of faith justified, and so capable of yielding value, and in which settings is trust the proper response? Put another way, which sorts of ignorance and doubt are profitably overcome by faith, and which are the necessary province of trust?

As I have just said, one trusts for reasons, general authorizing reasons that justify one's neglect to seek specific reasons in specific settings. One trusts one's bank, for example, for general reasons, and it is those general reasons that justify one's neglect to seek specific reasons to rely on the bank's probity whenever one makes a deposit. Trust thus makes it possible to benefit from the bank's probity without having to confirm that probity in every step of one's dealings with the bank. It is also possible to have faith in one's bank, but it would clearly be unwise to do so, for in the absence of reasons to believe in the bank's probity, faith in that probity cannot be regarded as valuable, and indeed may well be harmful.

To repeat, one trusts for reasons, but has faith without regard to reasons. Yet if the role of trust and faith in overcoming ignorance and doubt is to facilitate the realization of certain benefits, as this account of their value assumes, then the value of trust and faith is entirely dependent on there being some benefit to realize. Where there is no reason to expect that benefit, there is no reason to regard the exercise of faith as valuable. To put it from the opposite perspective, since there is no reason to have faith in a particular consequence, there is no reason to expect that the exercise of faith will facilitate the realization of beneficial consequences, and thus no reason to regard the exercise of faith as valuable in terms of those consequences. To have faith in one's bank despite the absence of any reason to do so is simply foolish, for belief in one's bank is justifiable and so valuable only where there is reason to believe that the bank will behave honestly, and that reason is something that faith cannot offer. Trust is what is called for in such a setting.

It follows that it is trust, not faith, that enables us to bridge the unknown, overcoming ignorance and doubt where there is some deeper, underlying reason to do so. Where there is reason to believe one should trust, not have faith; where there is reason not to believe, both faith and trust are misplaced.

## 2. Leaps Into the Dark

This gives rise to an obvious problem. The assessment of value, and thus the assessment of devices such as fundamental freedoms that are designed to yield value, is necessarily rational. Yet faith is not based on reasons. How can an irrational attachment be rationally determined to be valuable?<sup>68</sup> Are we driven to the conclusion that faith is incapable of yielding value other than accidentally, as when it calls upon us to endorse what we have independent reason to endorse? The answer is negative in form. One of the things that we have to deal with in life, and one of the things that can affect our well-being, is the unavailability of reasons. The quest for reasons in life is sometimes troublesome and difficult, but at other times impossible. Where the quest for reasons is impossible, but commitment is potentially valuable, faith can come into play. It follows that there is reason to seek, and value in finding, a way to come to terms with the unknowable where to do so is necessary to human well-being.

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<sup>68</sup> Faith is something like love in this regard, which is perhaps why a number of religions describe the relationship between the human and the divine in terms of love. One possible response to the question posed here is that the value of both faith and love is entirely derived from the value of the commitments that are made on that basis. In that case faith and love would be without value where what we have faith in or love cannot be rationally demonstrated to be valuable. In fact, I do not believe that it is as simple as that, for the reasons given in the text above. If it were true then it would follow that the value of a religious commitment based on faith would be entirely derived from the value of the doctrine that one committed oneself to on that basis. Yet, for the reasons given above, the content of religious doctrine cannot be looked to as the basis for a guarantee of religious freedom. In short, if faith does not have some independent value, then the guarantee cannot be justified.

Faith, in the sense of the word that I have drawn attention to, comes into play and acquires its distinctive role, in precisely those contexts, be they generally or specifically described, where examination of the options before one would not be revealing of the value latent in those options, simply because the information necessary to the evaluation of the options is, not only unknown, but unknowable. Thus, faith makes it possible to benefit from commitments that there is and can be no prior reason to make. In this it differs from trust, which merely makes it possible to benefit from commitments that there is prior reason to make, admittedly a reason that is not fully established in advance of the commitment, but nevertheless a reason that could be fully established at that point, albeit at some cost.

It follows that all ventures into the unknowable depend on faith, ventures where one not only lacks the information necessary to the exercise of rational judgment, but where one could not acquire that information without first committing oneself to the project or activity in question. It is often the case in life that one cannot know in advance that something is worth doing, for it is in the nature of the project or activity that one can only know whether it is worth doing by doing it. This is not simply a matter of lack of information. Rather, it is a question of activities the value of which derives in part from the very fact of commitment to that activity, so that the value of the activity is unknowable in advance of commitment to the activity. When we decide to move from one city to another, or to exchange one job for another, or to start living as the partner of one person rather than another, we necessarily commit ourselves, to a neighbourhood, to a workplace, to a man or woman, without full reasons to do so, for one can only know fully whether a neighbourhood is worth living in by living in it, whether a place is worth working in by working in it, whether someone is worth living with by living with him or her.<sup>69</sup> In each of these settings an act of commitment has to be made in advance of the existence of the value that might justify the commitment, and that act of commitment cannot be based upon reason, therefore, but must be based on faith.

It is for this reason that I have described such ventures as ventures into the unknowable, rather than as ventures into the unknown, for the information that might serve to justify the commitment is not unknown, in the sense of being present but unavailable to the actor and perhaps any other person, but rather is unknowable, in the sense of not existing unless and until the commitment in question has been made. All ventures into the unknowable, all leaps into the dark depend on faith. Or to put it somewhat differently, faith is required in order to make any commitment that involves a projection into the future where one's ability to realize the value that arises from the commitment is incompatible with the existence of reasons for making the commitment in the first place. It follows that faith is facilitative of those activities that depend on the connection between oneself and others, or between oneself and certain sets of

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<sup>69</sup> It is of course possible to know quite a lot about a neighbourhood, a job or a partner before committing oneself to them. It is not possible, however, to know these things *fully* in advance of one's commitment to them, and what one cannot know in advance often is critical to their value.

circumstances, when a search for reasons to commit oneself to those activities would be inconclusive. Activities of that kind often constitute valuable options in life.<sup>70</sup> In such settings faith provides a basis for action in the absence of any possibility of adequate reasons for action.<sup>71</sup>

This does not mean that all ways of coming to terms with the unknowable are valuable. It may well be that some questions that confront us should simply be left unanswered, that some commitments that are offered to us should be left ungrasped, that we should be prepared to acknowledge the mysteries of life and to accept the limits of our condition. It is certainly the case that some purported responses to such questions and commitments are dangerous or worse. It follows that the role of faith in enabling us to make leaps into the dark is a necessary but not a sufficient condition for regarding the exercise of faith as valuable, and hence for protecting the institutions and practices that make faith possible.

Something more needs to be said here, therefore, since these comments about the contingent character of the value of faith raise obvious concerns about the value of faith in the making of religious commitments. Those concerns are reinforced by the highly specific nature of the examples of faith that I have chosen to illustrate my argument. It is a weakness of my account of faith and its value, as I have so far described it, that the examples of faith that I have relied upon, namely, faith in the value of a commitment to a new neighbourhood, to a new job, or to a new relationship, all involve individual and local, as opposed to collective and comprehensive, acts of faith.

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<sup>70</sup> Such options are not only valuable but may be critical to the achievement of well-being for some people, so that lack of faith in them leads to a loss of well-being. For example, those people whose caution in the absence of full reasons to commit themselves prevents them from entering into a relationship such as marriage remain single by default, rather than because they are the kind of people who are capable of realizing the value of a solitary life, and so deny themselves access to a condition that is critical to their well-being.

<sup>71</sup> The argument might also be presented schematically. Given that there is no reason to have faith in *x*, where *x* stands for the object of faith, one cannot find reason to value faith in the value of *x*, for there is no rational connection between the presence of faith and the value of *x*. One can, however, find reason to value faith in the possibility of the value of *x*, where reason to believe in *x* or not to believe in *x* is unavailable and where the absence of such reason, and the consequent inability to believe in *x* or commit oneself to *x*, has a negative impact on human well-being. This is not the same thing as having reason to believe in the possibility of the value of *x*, for in the circumstances that I have described, that possibility is not rationally verifiable.

A similar point has been made by John Stuart Mill in regard to religion:

When the only truth ascertainable is that nothing can be known, we do not, by this knowledge, gain any new fact by which to guide ourselves; we are, at best, only disabused of our trust in some former guide-mark, which, though itself fallacious, may have pointed in the same direction with the best indications we have, and if it happens to be more conspicuous and legible, may have kept us right when they might have been overlooked. It is, in short, perfectly conceivable that religion may be morally useful without being intellectually sustainable . . . (J.S. Mill, "Three Essays on Religion" in J.M. Robson, ed., *Collected Works of John Stuart Mill: Essays on Ethics, Religion and Society*, vol. 10 (Toronto: University of Toronto Press, 1969) 369 at 405).

For that reason, none of these examples can be regarded as an entirely persuasive explanation of the value of religious commitment, which plainly involves a collective and comprehensive act of faith.

Further argument is required, then, if this account of the value of faith is to explain the value of religion and clarify the basis upon which freedom of religion is guaranteed. Yet that argument will take us into rather different territory, for, as I have already suggested, the distinction between the examples of faith, discussed above, and religious faith is not simply a matter of scope. Faith, as I have so far considered it, involves commitments that there can be no prior adequate reason to make, because the nature of the commitment is such that the value of the commitment is unknowable until the commitment is made. Religious faith, however, is typically attached to beliefs in and commitments to matters which, from the perspective of rational believers, are far from unknowable and which there may well be reason to make or not to make. That being the case, it is questionable whether faith in such matters is justified, and if so, when and under what circumstances it is justified.

*a. The Content of Religion and Its Relation to the Act of Faith*

It will be remembered that in order to assess alternatives to the conventional justifications for freedom of religion I offered a preliminary definition of the elements of religion, one that carefully eschewed any reference to the content of religious doctrine, for reasons that I sought to justify in the argument that followed. According to that definition, the term religion refers to *collective participation in institutions and practices that manifest a freely given personal commitment to a particular set of beliefs, beliefs that are not based on reason alone but are held, at least in part, on the basis of faith.*

It will by now be obvious that however well-fitted to its original purpose that definition may have been, it is not ultimately satisfactory as the basis for an explanation of the value of religious freedom, for the value of an act of faith, the value that I have argued must underpin a guarantee of freedom of religion, cannot be determined entirely in isolation from the value of the beliefs that are adhered to on the basis of faith. Let me then offer a revised approach to the meaning of religion, one that explicitly addresses the question of religious doctrine, and so comes closer to explaining the most central and most familiar instances of what we intuitively recognize as religion. Such an approach may make it possible to determine whether and on what basis faith, in doctrines of that kind, can be said to be valuable. As above, this description of the elements of religion is to be regarded as preliminary and provisional. Nevertheless, it seems clear that if freedom of religion cannot be justified in terms of the value of faith in beliefs such as these, it is doubtful whether the freedom can be justified at all; if the freedom could be justified on some other ground, it is doubtful whether its guarantee could be plausibly understood in terms of religion.

Assume for the time being, therefore, that the elements of religion are as I originally described them, but with the addition of a doctrinal qualification. Religious doctrine, it seems fair to say, has been traditionally and typically based upon a set of beliefs, first, about the nature and purpose of human life, and in particular, about the

possibility of a life other than material existence, and second, about the nature of the good, and in particular, about the possibility of moral grounds that lie beyond human life and beyond human reason.

If this very crude description of the content of religious doctrine is generally accurate, in the sense that it comprehends most beliefs that we intuitively recognize as religious, then it might be argued on the basis of it that faith is necessary to the practice of religion because the substantive beliefs that form the content of religion are by their very nature not verifiable by reason, or if verifiable, would provide less effective moral guidance were verification to be demanded of those who hold them. It might be argued that the possibility of a life beyond material existence is inaccessible to reason and must, therefore, be taken on faith or not at all. By the same token, it might be argued that the possibility of moral grounds that lie beyond human life and beyond human reason, by definition, must be taken on faith or not at all. In this respect, the role of faith could be said to be just as I have described it, namely, to enable human beings to make commitments that serve their well-being despite the unavailability of any reason to do so.

It is just as possible, however, to use the same description of the elements of religion as the basis for a much less benevolent account of the consequences of religious faith. According to this less benevolent account, the topics of religious doctrine, namely, the possibility that there is life beyond material existence and the possibility that there are moral grounds that lie beyond human life and human reason, are not in fact inaccessible to reason, so that the role of religious faith cannot be said to be a function of the unavailability of reasons. In other words, on this account it cannot be said that the role of religious faith is to supplement reason. Instead, the role of religious faith must be to supplant reason and so forestall the conclusions that reason would otherwise yield on the topics of religious belief.

It has been both assumed and argued above that religion is by its nature a collective enterprise, part of the purpose of which must be to eliminate individual differences of belief among its adherents on the issues that form the fundamental content of religion, thereby creating a community united in belief and concerted in the actions that follow from that belief. According to this less benevolent account, faith is necessary to religious practice because it ensures the conjunction of the beliefs of religious adherents, preventing any questioning of or challenge to those beliefs, other than by heresy, and thereby securing general conformity to doctrine in the thoughts and actions of individuals. Were religious belief not based upon faith, and were the topics of religious belief accordingly vulnerable to rational analysis, the independent application of reason to the broad topics of religious doctrine would almost certainly lead to pluralist, rather than uniform, outcomes on particular moral issues. That being the case, it can be plausibly maintained that the role of faith is to suppress the conclusions that reason would otherwise yield.

According to the first account, then, religious faith is valuable and so perhaps worthy of fundamental protection; according to the second, it is harmful. Which of these pictures of religious belief is correct? Before addressing the question it must be remembered why we are asking it in the first place. Faith, I have argued, comes into play in those settings where a commitment to a particular option or course in life can-

not be made on the basis of reason, simply because the reasons to make or not to make the commitment cannot be known in advance of making it. Clearly, this is not enough to show that faith fosters human well-being, however, for not all commitments based on faith are valuable. That being the case, I have argued further that faith contributes to human well-being when the inability to make the commitments that faith makes possible would have a negative impact on well-being, both because the commitments in question are potentially valuable and because failure to make them would be harmful. In evaluating the contribution of religious faith to human well-being, therefore, two distinctions need to be drawn. The first distinction is between what is knowable and what is unknowable, between what is accessible to reason and what is not. The second distinction lies within the realm of what is unknowable and so inaccessible to reason, and is between what does and what does not need to be addressed in order to secure human well-being. Faith is only valuable in dealing with what is unknowable, and is only valuable there if the unknowable must be addressed in order to secure human well-being. In short, faith is not valuable unless both those conditions are met.

### *b. The Value of Religion*

Are both conditions met in the case of religious faith, as the benevolent account would have it? Are the topics of religious belief truly unknowable, and if so, must they be addressed on the basis of faith in order to enable human beings to make commitments that are essential to their well-being? From a fully rational point of view, the answer must be no. A commitment to life itself, and to the various projects that constitute the particular life of any person, does not involve a venture into the unknowable, and indeed could not be thought to do so unless one regarded life as being so bound up with death as to make the fact of life as unknowable as the fact of death sometimes appears to be. Even from that point of view, however, life could not be said to amount to a venture into the unknowable, for from a rational perspective death is no mystery, however upsetting it may be.

By the same token, a commitment to the good and all that it requires of us does not involve a venture into the unknowable either, for moral grounds do not lie beyond human life and are not inaccessible to human beings on the basis of reason. On the contrary, it is a necessary feature of morality that any account of it must be fit for human beings and the lives that they are bound to lead,<sup>72</sup> and it is one of the principal functions of reason to offer us a rich and complex account of the content of that morality. It follows that human well-being, which clearly depends upon a complete commitment to life and a full understanding of morality, is not necessarily dependent upon an act of religious faith. Just as the non-benevolent account of the consequences of religious belief claimed, the role of religious faith for most human beings, namely all those who endorse a fully rational point of view, is to suppress the conclusions that reason would otherwise yield. As Mill put it over a hundred years ago:

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<sup>72</sup> See J. Raz, "A Morality Fit For Humans" (1993) 91 Mich. L. Rev. 1297.

It is time to consider, more impartially and therefore more deliberately than is usually done, whether all this straining to prop up beliefs which require so great an expense of intellectual toil and ingenuity to keep them standing, yields any sufficient return in human well being; and whether that end would not be better served by a frank recognition that certain subjects are inaccessible to our faculties, and by the application of the same mental powers to the strengthening and enlargement of those other sources of virtue and happiness which stand in no need of the support or sanction of supernatural beliefs and inducements.<sup>73</sup>

But is this true for all human beings? Is it the case that we are all capable, or should be, of adopting a fully rational point of view in response to all issues that confront us? If what is required here is an approach to well-being that is capable of accommodating the character and commitments of very different people, and if the guarantee of certain rights and freedoms is one way of ensuring that the well-being of every person, however idiosyncratic, is capable of being realized, is it not essential that the guarantee take into account the fact that for some people the nature of life and the content of morality are unknowable on the basis of reason alone? It is possible that such people are merely superstitious, or fearful, or in need of grander, more comprehensive explanations than reason can offer, but that is in itself no answer, for two reasons.

First, it seems to be the case that most of us from time to time invoke mythic beliefs in order to deal with certain issues in life, beliefs that are supportable only on the basis of faith, although our ability to do so successfully depends upon our willingness to heed rational reminders of the status of those beliefs as myths. All that is distinctive about religious believers, then, is that they rely upon what, from the rational point of view, are myths for the very foundation of their commitment to life and to the basic conception of the good that makes the successful pursuit of the project of that life possible. Moreover, their commitment to faith compels them to ignore rational reminders of the status of those beliefs as myths.

Second, the fact remains that whether religious believers are merely superstitious or not, and whether they are distinctive in that regard or not, for them faith in the beliefs that form the content of religious doctrine is critical to the achievement of well-being. Their character is such that their well-being requires them to commit themselves to what, for them, is and must remain unknowable. The question is whether they are to be condemned for this, or whether our account of morality and the institutions and practices that serve to implement that morality must be such as to serve them as they are. The answer clearly depends on the nature of the beliefs to which they have committed themselves.

There is an important difference between religious faith and the individual and local acts of faith that are often involved in commitments to new neighbourhoods, new jobs, or new relationships. Religious faith is not faith in the value of a particular commitment, but faith in the value of a *belief* that is designed to sustain all or at least

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<sup>73</sup> Mill, *supra* note 71 at 404-05.

most of one's commitments in life. Following the line of argument sketched earlier, faith is only valuable where the inability to make the commitments that faith makes possible would have a negative impact on well-being, both because the commitments in question are potentially valuable and because failure to make them would be harmful. The difficulty with religious faith, then, is that it does not merely function as the trigger for the making of a commitment, like faith in a new neighbourhood, a new job, or a new partner, but, since it is faith in a certain set of beliefs, governs the character of any consequent commitment and so governs the value of that commitment. It follows that religious faith can only serve the well-being of religious believers if and to the extent that religious beliefs have the capacity to inspire commitments that are capable of contributing to well-being. Otherwise there is simply no value in religious faith.

### i. The Price of Faith

As a general matter, then, the value of faith, be it religious or secular, is not merely facilitative, in the sense of making easier what could otherwise be done through reliance on reason. Rather, the abdication of rational assessment that faith requires creates conditions of confidence that are essential to the pursuit of certain valuable activities and relationships. In the most literal sense of the phrase, faith means that one does not have to be a doubting Thomas: one does not need to have placed one's finger in the wound to believe in the resurrection of the body.

However, that example also suggests the price of faith. The difficulty with faith, secular or religious, is that it often serves as a substitute for knowledge and reason in settings where those are not only available, but constitute a sounder basis for action and belief. New relationships, for example, may require an act of faith, as I have argued above, but the scope of that faith must be carefully circumscribed, for new relationships must also be consistent with reason. This is not simply to say that faith is a necessary, but not a sufficient condition of any new relationship. Rather, it is to say that faith is a necessary condition of a new relationship in certain dimensions of that relationship only, namely, those dimensions the value of which cannot be determined until one has committed oneself to the relationship. Other dimensions of the relationship must be rationally founded if the relationship, overall, is to contribute to the well-being of both parties. Relationships that are founded on faith, and faith alone, are valuable only by chance (in terms of the fundamental compatibility of the parties) and as the result of ongoing acts of concern, commitment, and good management, acts that are themselves rationally based (in terms of the capacity of the parties to develop and pursue their relationship successfully).

It follows that faith, which can be vital to the achievement of well-being in some dimensions of life, in particular those dimensions where reasons are unavailable, will undermine well-being if and when it is invoked in dimensions where reasons are both available and constitute a sounder basis for action and belief. As far as religious faith is concerned, this means not only that religious beliefs must be capable of furthering well-being, but that the endorsement of religious belief must be confined to those people whose well-being depends on it, as described above, and further, must be restricted to those dimensions of their lives where their well-being depends on it. Faith is inappropriate as a wider guide either to the individual pursuit of well-being or to the

collective exercise of responsibility for the design of institutions to further that pursuit.

## VI. The Place of Religion in Public Life

### A. Freedom of Religion

#### 1. Definition

If freedom of religion, properly understood, is founded upon the value that faith in certain beliefs, beliefs in matters that are for some people inaccessible on the basis of reason, is capable of bringing to the lives of those people, then the essence of the freedom must be to offer protection to the institutions and practices that foster and express the beliefs in question. As far as freedom of religion is concerned, therefore, religion refers to *collective participation in institutions and practices that manifest a freely given personal commitment to a particular set of beliefs commitment to which is capable of enhancing human well-being, beliefs that are not based on reason alone but are held, at least in part, on the basis of faith.*

I must stress that this definition is a term of art, designed to meet the purposes of a fundamental political guarantee. It does not pretend to be acceptable to, or to capture the full value of, any or all of the institutions and practices that have been traditionally regarded as religions. Such is not and could not be its purpose, for the role of the definition is, as I have said, to describe the scope of freedom of religion as a fundamental political guarantee in a secular constitution, not to describe the scope of religion itself.

It will be clear at once that this definition of religion is based upon the preliminary definition that I offered above, now modified to recognize that religious faith is not valuable except when attached to a set of beliefs that are capable of enhancing human well-being. This modification does not mean that the value of a particular religious belief is dependent upon the existence of a necessary connection between endorsement of that belief and the achievement of well-being, for no commitment, whether to a person, to a course of action, or to a set of beliefs, can ever be expected to guarantee well-being. Nor does it mean that the value of a religious belief is a function of the degree to which that belief sustains human well-being, for commitments are not susceptible to that kind of evaluation. Rather, it means what it says, that religious belief must possess the capacity to enhance the well-being of those who commit themselves to it. Whether it ultimately does so will depend upon them, upon others, and upon chance.

It is important to emphasize, however, that apart from the requirement that there be a connection between belief and well-being, this definition of religion is entirely silent, and hence entirely open-minded, as to the content of religious doctrine. Any belief that both is and must be held on the basis of faith, in the sense described above, whether or not it bears any similarity to conventional religious beliefs, is entitled to fundamental protection under the rubric of freedom of religion if it is capable of en-

hancing human well-being. It follows, as will be explained more fully below, that the distinction between protected and unprotected beliefs should no longer turn on comparisons between the content of traditional and non-traditional religious doctrines, but should be determined by a frank examination of the contribution that any doctrine held on the basis of faith, be it traditional or non-traditional, is capable of making to well-being. If what are commonly known as cults, for example, are to be denied the protection of freedom of religion it must be because and to the extent that commitment to those cults diminishes human well-being, not because of the success or failure of a comparison between the doctrines espoused by those cults and conventional religious belief.<sup>74</sup>

#### *a. The Relationship Between Religion and Well-Being*

Yet to describe the scope of freedom of religion in such expansive terms is a trifle misleading, for I have already indicated that the range of religious belief that is entitled to the protection of a fundamental guarantee is not in fact unlimited, but is necessarily constrained by the contingent nature of the capacity of faith to enhance well-being. In other words, the requirement of a connection between faith and well-being places significant constraints upon freedom of religion, albeit not the same constraints as have been recognized in conventional analyses of that freedom.

I have argued above that faith, which can be vital to the achievement of well-being in certain dimensions of life, those dimensions where reasons are unavailable, will undermine well-being if and when it is invoked in regard to dimensions of life where reasons are both available and constitute a sounder basis for action and belief. It follows that religious belief is only capable of enhancing well-being if and to the extent that it calls for faith in regard to dimensions of life where reasons are inaccessible to the believer. Conversely, religious belief will undermine well-being if and to the extent that it calls for faith in regard to dimensions of life where reasons are accessible to the believer. In short, religious faith must be confined to realms where reason is inaccessible and yet belief is necessary to well-being. Outside those realms religious faith diminishes well-being, not so much because its consequences may not coincide with the consequences of rational belief, but because the exercise of rational thought in relation to the selection and pursuit of goals in life, to the extent that it is accessible, is a necessary element in the achievement of human well-being. It follows that any definition of religion that is designed to serve the purposes of a fundamental guarantee by linking religious faith to human well-being must successfully distinguish those two realms.

In my view this can only be done by imposing two requirements upon any belief that presents itself as a candidate for the protection of freedom of religion, first that

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<sup>74</sup> This is to ignore for the moment the very real possibility that cults should be denied the protection of freedom of religion because commitment to them is normally not freely given, as the above definition of religion requires, but rather is obtained and maintained by a form of psychological manipulation that is inconsistent with free will.

the belief in question be freely endorsed, and second, that the content of that belief be confined to those dimensions of a believer's life in regard to which his or her well-being depends upon faith. The first of these requirements is entirely familiar, the second less so. Yet each is a necessary albeit not a sufficient condition of the link between faith and well-being.

Free endorsement of belief is not only central to religious tradition (cults aside), but is a necessary feature of freedom of religion. The fact that a religious belief has been freely endorsed is the surest evidence of the believer's own conviction that his or her well-being depends upon faith in the substance of that belief. But that in itself is not enough to establish a link between faith and well-being, for believers may be and indeed often are mistaken as to the value of their beliefs. If a belief is genuinely capable of serving well-being the fact that it has been freely endorsed is the best evidence available that it serves the well-being of the particular believer in question. However, the fact that a belief has been freely endorsed is not in itself evidence that the belief is genuinely capable of serving well-being, for the act of endorsement has neither the power to make a belief serve well-being nor the capacity to determine whether or not that belief is actually capable of serving the well-being of the believers in question. In short, beliefs do not serve well-being just because they are freely endorsed.

How otherwise, however, are we to determine that the content of religious doctrine is restricted to those dimensions of the believer's life in regard to which his or her well-being depends on faith in that doctrine? The answer is in some respects familiar. Freedom of religion has always recognized restrictions on the content of religious doctrine, namely, the semantic restrictions that have been relied upon to determine whether a set of beliefs qualifies as a religion or not. I have argued above that supporters of those restrictions have mistakenly taken the features of traditional religions to be definitive of the scope of freedom of religion. Yet while the features of traditional religions can no longer be regarded as providing a template for access to freedom of religion, they remain reasonably sound illustrations of faith-based beliefs that have been formulated in such a way as to ensure that their adherents are offered access to religious faith in order to deal with issues that they find unknowable, while leaving those adherents free to rely upon reason in all other aspects of their lives. It follows that there may be good reason to protect the exercise of traditional religious beliefs, not out of an unwarranted attachment to history or habit, but because of the connection between adherence to those beliefs and the achievement of well-being, a connection whose existence we have always assumed but never tested. It further follows that any exploration of the scope of freedom of religion, and of the link between religious faith and human well-being upon which that freedom depends, requires that we both test the assumption that adherence to traditional religious beliefs serves well-being and examine the possibility that adherence to other faith-based beliefs also does so.

I suggested above that religious doctrine has been traditionally and typically based upon a set of beliefs first, about the nature and purpose of human life and in particular about the possibility of a life other than material existence, and second, about the nature of the good and in particular about the possibility of moral grounds that lie beyond human life and beyond human reason. It is clear that for some, indeed

perhaps for many human beings a rational approach to such matters is either intellectually inaccessible or psychologically unendurable. Yet the ability to come to terms with those matters is frequently, perhaps normally, essential to the achievement of well-being, and where reason cannot provide that ability faith must step in. It follows that the value of traditional religious faith lies in its capacity to enable certain people to make commitments to the project of a life and to the moral values that sustain that project, commitments that are essential to the achievement of their well-being, despite the inaccessibility to them of any reason to do so.

What is important for present purposes is that this predicament and the response to it is one that human beings who do not share in it can recognize and respect without themselves either endorsing or seeing reason to endorse. It is often the case in life that one can recognize the legitimacy of doubts and uncertainties that one does not share and sees no reason to share. This is because there is a zone of perception beyond the known and the unknown, a zone of understanding beyond the reasonable and the unreasonable "when the only truth ascertainable is that nothing can be known",<sup>75</sup> a zone where issues are widely recognized to be in some sense mysterious or unknowable. There are things that we do not know and there are things that we cannot know. The precise scope of the latter zone is in dispute, so that certain issues fall into it for some people and not for others. Moreover, the ability to deal with issues that fall into this zone is essential to the achievement of the well-being of some people but not others.

It is in regard to issues that fall into this zone that religious faith may be essential to well-being, and correspondingly, it is upon such issues that religious doctrine must be focused if it is to attract the protection of freedom of religion. If a body of people claims that Jesus lives and that they depend upon faith in that fact for their sense of purpose in life, it is possible for us to recognize and respect that claim without either endorsing it or seeing any reason to endorse it, for faith in the Resurrection and its implications is one way of coming to terms with death, an issue that we can all recognize to be in some sense genuinely mysterious. But if a body of people claims that Elvis lives and that they depend upon faith in that fact in order to carry on in life we would be forced to conclude that they needed professional help, for belief that Elvis is still alive is not a way of coming to terms with death or any other mystery in life, but is simply an unfortunate and damaging consequence of the cult of celebrity.

The topics of traditional religious doctrine are, of course, not the only mysteries that people find it impossible to deal with or to live with, nor is traditional religious doctrine the only way to address the topics that it focuses upon. Yet it remains the case that those topics are paradigmatic examples of matters that are, for many people, unknowable and yet essential to the achievement of well-being. It follows that in assessing whether commitment to a faith-based belief is capable of enhancing well-being the question will be, not whether the belief in issue has doctrinal features in common with traditional religions, but whether like them it enables people to address

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<sup>75</sup> Mill, *supra* note 71 at 405.

and overcome matters that we can all recognize, if not accept as being in some sense profoundly mysterious and so inaccessible on the basis of reason, and yet respect as central to the achievement of the well-being of at least some people, those who freely endorse a faith-based response to them.

*b. Religiously Inspired Conduct*

There is a further, related point to be made here about the role of religious institutions and practices. The presence of such institutions and practices is essential to the survival and development of faith in religious beliefs, the existence and nourishment of which depends first, upon contact with the sources of revelation, second, upon the guidance of clerics (for want of a better word), and third, upon the commitment of other believers. In this respect faith-based beliefs differ somewhat from rational beliefs, and it is that difference that is the source of the requirement that freedom of religion extend to the protection of religiously inspired conduct, despite the fact that conduct based upon other beliefs is entitled to no such protection.

It is true that rational beliefs also depend first, upon sources (in the form of a history of reasoning), second, upon the guidance of scholars, and third, upon contact with other thinkers, and so might be said to be parallel to religious beliefs in those respects. One might be tempted to conclude that, as a matter of consistency, protection ought to be accorded to the institutions and practices that sustain both types of belief, rational and non-rational, or neither. It is also true, however, that these features of a culture of rational belief are separately guaranteed by other rights and freedoms, whether formally expressed in a constitution or not, such as freedom of expression, freedom of association, and the right to a decent education. By contrast, the institutions and practices that foster and sustain faith in religious beliefs are and must be a direct reflection of the distinctive, non-rational character of the belief in question and so must be protected as such. In other words, those institutions and practices cannot be independently guaranteed but must be treated as necessary implications of the guarantee of freedom of religion, for they cannot be fully described other than by reference to the content of a particular religious belief and what the protection of that belief entails.

In short, the guarantee of freedom of religion extends to religiously inspired conduct because a religion is not a set of ideas like any other, but rather is a faith-based institution and set of practices, the character and consequences of which are, from a rational point of view, idiosyncratic and consequently must be protected idiosyncratically.

*c. Individual and Collective Acts of Faith*

There are two further features of this definition of religion to which attention must be drawn, for they distinguish religious faith, which warrants fundamental political protection, from individual acts of faith of the sort described above, such as commitment to a new neighbourhood, a new job, or a new relationship, which do not warrant such protection. First, for the reasons just given, the protection of freedom of religion extends primarily to the institutions and practices that foster and sustain the

collective development and expression of religious belief. As long as religious beliefs remain entirely interior, as they do unless and until they are displayed in religious institutions and practices, they neither require nor are entitled to fundamental protection, although in fact that protection is conventionally accorded to them by constitutional clauses that protect freedom of thought and belief in company with freedom of opinion and expression. In other words, as long as acts of faith remain interior they do not need protection, any more than do reasons, in whose place they serve. This explains why freedom of religion protects collective acts of faith but not individual acts of faith of the sort described above. Such individual acts of faith remain interior and so invulnerable. On the other hand, collective acts of faith, or to be more precise, individual acts of faith in collective beliefs, are manifested in the institutions and practices that foster and sustain those beliefs, at which point they come to be in need of protection.

Second, and to reprise briefly points that were made earlier, this definition of religion requires commitment to a doctrine, or set of beliefs, beliefs that are capable of enhancing well-being, for religious faith differs from the individual acts of faith described above in that it is necessarily mediated by the presence of a belief. Since individual acts of faith are not so mediated, they do not require fundamental protection.

## 2. Application

As one moves from the problem of defining freedom of religion to the problem of applying the freedom that has been so defined one is forced to face the question of what difference, if any, a shift in the justification of the freedom and a consequent modification of its definition makes or should make to the present beneficiaries and non-beneficiaries of that freedom. Would the approach to freedom of religion that I have just urged, if adopted, have the consequence of denying fundamental protection to certain faith-based beliefs that we have traditionally recognized as religions while extending that protection to other faith-based beliefs that we have traditionally refused to recognize as religions?

I have already suggested that traditional religious beliefs should continue to be protected under the approach that I have recommended, provided that it can be demonstrated that what we have always assumed to be true is in fact true, namely, that belief in the doctrines of those religions, when freely endorsed on the basis of faith, is capable of enhancing human well-being in the manner indicated above. Indeed, were this not so, and were most traditional religious beliefs not protected under this approach, the approach would have to be judged a failure, for the semantic constraints upon any explanation and justification of freedom of religion are such that an approach to freedom of religion that excluded a significant number of traditional religious beliefs from the scope of the freedom could not be regarded as an acceptable account of freedom of religion, although it might of course serve as an acceptable account of some other freedom.

The question remains, however, to what extent the approach to freedom of religion that I have recommended would offer protection for the first time to faith-based beliefs that we have heretofore refused to recognize as religions, would offer a differ-

ent form of protection to faith-based beliefs that we have heretofore recognized as religions, or would deny protection to what we have previously protected as religion. While I clearly cannot offer answers to every sort of hypothetical question that might possibly be raised as to the scope of freedom of religion, or perhaps even to all the questions that I have just sketched, a few examples may help to give a sense of what this approach to freedom of religion that I have recommended might entail in practice.

The first example is the example of marginal, unconventional religious beliefs. Two questions arise here, first, whether such beliefs are entitled to fundamental protection under the rubric of freedom of religion, and second, if they are so entitled what degree and scope of protection they are entitled to. As to the first question, I have already indicated that under the approach that I am recommending a decision whether to extend protection to the institutions and practices that express and sustain belief in what is alleged to be a religion should be based, not on a comparison between the doctrines of the alleged religion and the doctrines of traditional religions, but on a frank examination of the contribution that faith in the doctrine of the alleged religion is capable of making to human well-being. The result of such an examination would not necessarily confirm conventional conclusions as to the non-religious character of what are commonly described as cults.

On the one hand, it is indisputable that faith in the doctrines of self-destructive, or suicidal cults, such as those led by Jim Jones or David Koresh, is incapable of enhancing human well-being. On the other hand, it is less clear whether faith in the doctrines of quasi-religions such as Scientology is incapable of enhancing well-being. It is true that there seems to be reason to question whether the doctrines of Scientology are at all times freely endorsed by their adherents. If they are not, then they cannot be said to enhance human well-being, for the reasons given above. If they are, however, then the further question must be whether the content of the doctrines of Scientology is such that faith in that content is capable of enhancing human well-being, by enabling the adherents of Scientology to address and to deal with matters that are for them unknowable and yet central to the achievement of their well-being, matters that can from the rational point of view be recognized to be in some sense genuinely mysterious or unknowable, albeit not necessarily so. This is a question that I cannot pretend to answer myself, for I have no special knowledge of Scientology. I can note, however, that conventional approaches to the question of whether Scientology is a religion deserving of fundamental protection have not addressed this question at all, but have instead contented themselves with a comparison between the doctrines of Scientology and the doctrines of traditional religions, a comparison that for the reasons given above is, in my view, an illegitimate means of determining the scope of freedom of religion. It follows that while I would be privately surprised if the institutions and practice of Scientology merit the protection of freedom of religion, I recognize that it is only possible to know that this is so by asking straightforwardly whether Scientology is capable of enhancing human well-being.

Other marginal, unconventional religious beliefs raise somewhat different questions about the scope of freedom of religion. In particular, under the approach that I have recommended a belief is only entitled to the protection of freedom of religion if and to the extent that it is held on the basis of faith. A set of beliefs that is endorsed

entirely on the basis of reason is not a religion, therefore, at least not for these purposes, and is not entitled to be protected as such. This may be what the United States Supreme Court had in mind when it observed in *Wisconsin v. Yoder*:

[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.<sup>76</sup>

It is not clear from this passage whether the Supreme Court's objection to the idea that Thoreau's beliefs were religious was based on the view that those beliefs were merely subjective or were philosophical. Indeed the Court seems to have equated the two. Nor is it clear whether, as a matter of fact, the Court was correct in its characterization of Thoreau's beliefs. But if the Court meant to say that Thoreau believed what he did because he had arrived at a reasoned rejection of the prevailing values of his time, then in my view it correctly concluded that Thoreau's beliefs did not constitute a religion. According to the account that I have given, religion must be based on faith, not reason, for it is the presence of faith that gives religion its distinctive capacity to enhance human well-being.

What then of atheists and agnostics? In my view, the answer is clear and follows from what I have just said. Atheism and agnosticism are rational positions, the essence of which is either to deny or to remain non-committal as to the legitimacy of religious faith. That being the case atheism and agnosticism plainly do not warrant the protection of freedom of religion, although in practice the related requirement of non-establishment of religion, which I will turn to below, is likely to yield them a similar degree of protection.

Other categories of belief may be less easy to characterize as rational or non-rational. Political beliefs are typically based on reasons, but from time to time commitment to them may change its character, either temporarily or permanently. We are all familiar with political commitments that it is only possible to explain in terms of faith. Does it follow that such commitments are entitled to the protection of freedom of religion? The answer, in my view, is that there is no categorical bar to the protection of a political faith on the basis that it has become a religion, but that in practice such protection is unlikely to be accorded, for when political beliefs come to be matters of faith it is generally because it has come to be recognized that the connection between the realization of those beliefs and the achievement of human well-being is, from any rational point of view, extremely dubious.

I have argued above that religious faith can only be said to be capable of enhancing human well-being when it is confined to issues that, from the point of view of the believer, are inaccessible to reason and, from the point of view of reason itself, are in

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<sup>76</sup> *Yoder*, *supra* note 9 at 216.

some sense genuinely mysterious. If political beliefs come to be matters of faith simply as a way of concealing their inadequacy from those who are committed to them, those beliefs do not thereby begin to address matters that are genuinely mysterious, and for that reason faith in them is not capable of enhancing human well-being. On the contrary, such forms of political faith are no more than delusions, delusions that notoriously can be and have been extremely harmful to those who are subjected to them. And, of course, as a general principle beliefs that are harmful to others do not assist well-being, even of those who subscribe to them.

So, for example, if and to the extent that in certain of its manifestations Communism was a faith-based political belief, it would not for that reason have warranted the protection of freedom of religion (unlikely though it is that any of its adherents would ever have sought such protection), for faith in Communism arose as and when the capacity of Communist principles to foster and nourish human well-being in dimensions of life that were, from any point of view fully knowable, came to be questioned. At that point Communist doctrine could not have been said to serve the well-being of either those to whom it was applied or those who believed in its application (who may have been the same or different people).

The final question of application, as I have already indicated, is what degree and scope of protection faith-based beliefs are entitled to once it has been shown that they are entitled to the protection of freedom of religion. To some extent, there can be no general answer to this question. Freedom of religion protects the institutions and practices that express and foster faith in the doctrines of a particular religion. The character of those institutions and practices is as varied as the character of the doctrines that they foster and give expression to. Beyond that the limits to the freedom can only be determined as they are now determined, by asking to what extent an alleged exercise of freedom of religion fulfils the purposes for which that freedom has been fundamentally guaranteed, and by weighing the answer to that question against the purposes for the sake of which, it is alleged, that freedom is presently being infringed. Since I have given an explanation of the purposes for which freedom of religion has been fundamentally guaranteed that differs from the conventional explanation of that guarantee, I must expect that this weighing process and its consequences will correspondingly differ from the present process and its consequences. And yet I cannot say exactly what that difference will be without going through the weighing process myself on a case by case basis, something that I clearly cannot do. What I can say, however, is that the focus of the first branch of the inquiry must be on the question of religious faith and the extent to which an alleged exercise of religion can be said to express that faith in a way that fosters human well-being. In other words, those who wish to claim religious freedom for their conduct must be able to show that the conduct in question is central to the possibility and the practice of their faith, and further, that their faith is central to their well-being. This is something quite different from what they have traditionally been expected to show.

This shift in focus may well give rise to somewhat unfamiliar conclusions concerning the freedom that is owed to the doctrines and practices of traditional religions. The approach that I have recommended is likely to offer those religions protection of a rather different character than the protection they have traditionally enjoyed. In ex-

ceptional cases, it may even deny them protection altogether. I have already suggested that in principle traditional religions can expect that the bulk of their doctrines and practices will continue to be-protected under the approach that I have recommended. Indeed I have even suggested that the approach would be a failure were traditional religions not so protected by it. It does not follow, however, that traditional religions can expect to be protected in precisely the same way that they are now protected, for there is no particular reason to believe that the present approach to the scope of freedom of religion has yielded conclusions that correspond precisely to the conclusions that would be yielded by a faith-based approach to the freedom. If, as I have argued, traditional religions should continue to receive fundamental protection because and only because they constitute paradigmatic examples of beliefs that offer their adherents the possibility of faith in relation to dimensions of life that those adherents reasonably regard as inaccessible other than on the basis of faith, dimensions of life that are critical to their well-being, then traditional religions should be denied protection to the extent that they have misidentified those dimensions of life, so as to embrace matters in regard to which reason is not only accessible but constitutes a sounder guide to the achievement of human well-being. Since this is not the test that traditional religions have had to meet in the past, it is almost inevitable that if asked to meet it now they would receive a different, perhaps lesser protection.

However, there should be nothing particularly surprising or disturbing in this fact. On the contrary, it simply confirms and continues an accepted historical trend. As I indicated in the introduction to this paper, the story of the modern era has in part been the story of the ascendancy of reason in relation to matters that were once regarded as inherently matters of faith, and thus as matters falling within the exclusive preserve of religion, matters such as the exercise of moral conscience, the expression of moral and political belief, and the investigation of our place in the world and beyond. The ascendancy of reason in relation to these matters has not entirely displaced faith, as the continuing existence of religious conviction confirms, but it has limited faith's authority. Faith in such matters remains permissible, indeed is guaranteed freedom by the state for the reasons that I have advanced in this paper, yet that freedom is now limited by the requirement that the pursuit of faith involve no harm to others and require no endorsement by the state.<sup>77</sup> To put it from the opposite perspective, faith in such matters may be denied the protection of freedom of religion, and indeed often has been, in settings where reason is not only accessible but constitutes a sound and necessary basis for the achievement of human well-being. We do not, for example, permit parents to insist that the state provide their children with a form of education that reflects their particular faith, nor do we permit parents who wish to opt out of the system of public education to insulate their children entirely from the requirements of that system, such as its basic syllabus, even where those requirements are incompatible with the parents' faith. There is no reason to assume that this ongoing process of secularization has now come to an end. The shift in approach to freedom of religion

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<sup>77</sup> See the discussion in Part VI.B. of the rule against any establishment of religion.

that I have recommended neither furthers nor curtails the process; it merely makes its reflection in freedom of religion explicit, as it surely should be.

### 3. Rights and Freedoms, as Categories and as Moral Ambitions

It will be clear by now that this account of freedom of religion is based upon or at least consistent with a general attitude to the character of rights and freedoms, an attitude that is in some respects unconventional and that might be regarded as implausible for that reason. Freedom of religion, as I have described it, offers fundamental protection to what might be described as a certain moral ambition or moral purpose, a purpose that must be endorsed by any state the population of which includes people for whom access to the institutions and practices of religious belief is critical to well-being. By contrast, freedom of religion as it is conventionally described offers fundamental protection to a certain category of human conduct, a category that is assumed to embody the moral purpose for the sake of which that freedom has been guaranteed. Where that category of conduct is accorded protection in law, following the decision of a constitutional convention or otherwise, it is the duty of courts to decide whether any given instance of human behaviour falls within the category, and then to offer that behaviour protection if it does and to deny it protection if it does not. If categorization becomes difficult, then the court should refer to the moral purpose for the sake of which the category, in this case religion, has been protected and decide whether the behaviour in question fulfils that purpose.

This is a rather crude sketch of the conventional approach to constitutional interpretation and I do not wish to place any great weight upon it, although I would claim that it accurately reflects at least one way in which constitutional interpretation is actually practised.<sup>78</sup> Nevertheless there are two features of this kind of approach to the interpretation and application of freedom of religion that the arguments that I have offered clearly reject, namely, the role played by a category of human conduct in the application of the freedom that it describes, be it the category of religion or the category of speech or some other, and the weight that is to be given to the moral purpose that underlies the protection of that category.

My earlier discussion of the semantic approach makes plain my reasons for refusing to refer to the meaning of a concept in order to determine the ambit of the protection that the concept enshrines. Freedoms are guaranteed for moral reasons. Yet concepts such as speech are not moral concepts, while concepts such as religion, if moral, express a moral purpose different from and alien to any purpose for the sake of which the freedom that they refer to could justifiably be guaranteed. Furthermore, it cannot be assumed, for the reasons given above, that there is a sufficient correlation between the concept, be it religion or speech or some other, and the purpose for the sake of which that concept has been constitutionally entrenched, that the concept can

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<sup>78</sup> See *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156-57, 11 D.L.R. (4th) 641 at 650-51 (sub nom. *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*); *Big M*, supra note 9 at 344.

be relied upon in order to determine the scope of the freedom, such that central instances of the concept can be regarded as central instances of the freedom and vice-versa.

Clearly there must be some correlation between concept and purpose or the concept would not have been selected as the means of fulfilling the purpose that underlies its entrenchment. Some other concept would have been chosen instead. Yet given the complexity of certain concepts, and the varying purposes to which those concepts are capable of being put, apparently central instances of a concept may do little to reflect the purpose for which the concept has been constitutionally entrenched as a fundamental freedom, while apparently marginal instances of the concept may be central instances of the freedom. It follows that those responsible for recognizing and applying the freedom, be they courts in the exercise of their judicial responsibility (where the freedom has been entrenched in a written constitution), or politicians in the exercise of their legislative responsibility (where it has not) are bound to turn for guidance to the moral purpose underlying the freedom, and to treat the concept that describes the freedom, be it speech or religion or some other, as simply a place-marker, presumably the best available, for the recognition and summary expression of that moral purpose.<sup>79</sup>

This may appear to impose an undue burden upon judges and politicians, given that judges and politicians are not and do not pretend to be moral philosophers. That kind of criticism may have been what Greenawalt had in mind when he rejected what he saw as the otherwise attractive possibility that freedom of religion could be explained in terms of faith on the ground that a faith-based approach to the meaning of religion is too abstract a basis for the interpretation of a legal guarantee:

In this brief discussion of the ordinary concept of religion, I have not explored the plausible claim that some deep characteristic such as "faith" or the "transcending of ordinary experience" does unite all instances of religion. My reason is that a common characteristic as vague and general as these would be little help for someone trying to classify beliefs and practices as religious or not. For legal purposes, one needs to concentrate on features of religion that are specific enough to be employed by judges and other actors in the legal system.<sup>80</sup>

As I have already suggested, it is entirely reasonable to ask that an obligation, be it moral or legal, be sufficiently specific that it is capable of being understood and respected by the person to whom it is addressed in the discharge of the responsibilities that it gives rise to. But that does not mean that judges, politicians, or citizens can reject or reshape their moral responsibilities on the grounds that those responsibilities are abstract and therefore the business of philosophers. On the contrary, each of us must be enough of a moral philosopher to discharge the moral responsibilities that at-

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<sup>79</sup> Of course, this practice will gradually elucidate the meaning of the concept as a term of art, so that it may become possible over time to refer directly to the concept of religion rather than to the purpose underlying it in order to determine the scope of the freedom in certain cases.

<sup>80</sup> Greenawalt, *supra* note 21 at 768-69, see also *supra* note 24.

tend our respective roles in life, as judges, as politicians, or as citizens. It is true that to the extent that those responsibilities are functions of the particular roles that they govern, be it the role of judge, politician, or citizen, they cannot require that those who are subject to them betray their roles, the roles that the responsibilities govern. No judge, for example, is or can be said to be obliged by the moral responsibilities of judicial office to betray his or her role as a judge, although, of course, a judge may well be so obliged by his or her moral responsibilities as a citizen. But by the same token a judge cannot reject the moral responsibilities of judicial office, including the responsibility of determining the scope of a constitutional freedom in accordance with the moral purpose for the sake of which that freedom has been guaranteed, on the grounds that he or she is not a moral philosopher, for that is precisely what that responsibility demands that he or she be. It may or may not be wise to impose such a responsibility upon the judiciary, by entrenching rights and freedoms in a written constitution, but once imposed the responsibility cannot be rejected or avoided.

There is a practical dimension to this conclusion. A judge is in no position to reject his or her moral responsibility, as I have described it, other than by resigning office, for a judicial decision on the scope of a freedom such as freedom of religion that refuses to engage in moral inquiry and relies instead on the exposition of the concept of religion does not thereby avoid moral responsibility but simply executes that responsibility improperly. To offer protection to a set of beliefs, and to the institutions and practices that express and foster those beliefs, solely on the basis that those beliefs clearly fall within the generally recognized bounds of the concept of religion, or conversely, to deny protection to a set of beliefs solely on the basis that those beliefs fall outside those same bounds, is not to avoid or reject a moral responsibility and the role that the responsibility entails, but to betray that role. One can execute a moral responsibility well or badly but one cannot avoid it, for decisions that purport to reject the responsibility are in fact decisions that fail to fulfil that responsibility, other than by accident.

For example, the proper bounds of a concept that has been made the subject of a fundamental guarantee, a concept such as religion, are determined by the moral purposes underlying that guarantee. It follows that decisions that refer to non-moral sources in order to determine the bounds of the concept, sources such as semantics, and that consequently either ignore the issue of moral purpose or relegate it to a secondary role, are decisions that purport to entrench a freedom other than that which has in fact been entrenched, a freedom that will in some respects overlap the freedom that has in fact been entrenched, but nevertheless a freedom that there is no moral justification for securing.

More needs to be said but cannot be said here. The purpose of the above account is simply to acknowledge the implications for judicial decision-making of the approach to freedom of religion that I have recommended and to offer some indication, however preliminary, of the arguments that might be offered in support of the kind of decision-making that I believe the freedom requires.

### B. Non-Establishment of Religion

There is one final point to be made about the place of religion in public life. I have already suggested that freedom of religion does not require a rule against the establishment of religion, although in practice, of course, freedom of religion has been closely associated with that rule as the result of their conjunction in the First Amendment to the United States Constitution. Yet in support of my suggestion, and in opposition to the lessons of American constitutional practice, stands the fact that in certain countries where freedom of religion is apparently enjoyed, such as England, there is an established church, and in other countries where there is a written constitution with a guarantee of freedom of religion, such as Canada, there is no constitutional rule against the establishment of religion.<sup>81</sup> Of course it might be the case that the people of England do not now enjoy freedom of religion to the extent that they are affected by the presence of an established church, and similarly it might be the case that the people of Canada do not now enjoy freedom of religion to the extent that the failure to entrench a rule against the establishment of religion has permitted one or another religion to be established, officially or unofficially, as Catholicism might once have been thought to have been established in Quebec.

In fact, I do not believe that this is so. Indeed, notwithstanding the lessons of American constitutional law, I find it in some ways difficult to see how a rule against the establishment of religion could possibly be regarded as an aspect of freedom of religion, given that any account of freedom of religion implicitly or explicitly assumes that the primary purpose of that freedom is to promote the well-being of religious believers. Establishment is on balance a benefit to those believers, a benefit that may be critical to the well-being of at least some of them. Moreover, the rule against establishment prohibits any establishment of religion, however ecumenical, however tolerant, and so denies religious believers the very real benefit of the presence of religion in public life. In other words, the purpose of freedom of religion is to secure to religious believers a benefit to their well-being, namely, the value that adherence to religious faith is capable of giving rise to, the very benefit that the rule against establishment at least partly denies to them.<sup>82</sup>

It is true, of course, that the rule against establishment has the effect of guaranteeing a form of equality to different religions, by ensuring that no religion enjoys precedence over any other by reason of its having been granted a privileged place in public life. Yet this is not a form of equality that can be said to make any contribution to the well-being of religious believers,<sup>83</sup> for it secures its egalitarian goal by ensuring

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<sup>81</sup> Nevertheless, certain aspects of the rule against establishment, as expounded in United States law, have been held to be implicit in a guarantee of freedom of religion. See *Big M*, *supra* note 9 at 339-41.

<sup>82</sup> I am assuming of course, in accordance with my previous argument, that freedom of religion offers no protection to those who lack religious faith.

<sup>83</sup> Unless, of course, this privatization of religion ultimately contributes to the well-being of the adherents of what would otherwise have been the established religion.

that no religion enjoys the benefit of establishment, thus eliminating the contribution that establishment makes to the well-being of religious believers, rather than by ensuring that all religions enjoy whatever benefit is enjoyed by any one religion, thus securing equal access to any established practice.<sup>84</sup> In fact, the effect of the rule against establishment is to protect the interests of those who do not believe at the expense of those who do, and therein, in my opinion, lies its justification.

In the debates surrounding the entrenchment of what has become known as the Bill of Rights, namely, the first ten amendments to the United States Constitution, different views were taken of the establishment clause and its justification. Some thought that a rule against establishment was a corollary of freedom of religion. Others, most famously Thomas Jefferson, believed that a rule against establishment was necessary for the protection of the public realm against the influence of religious belief. Still others, such as James Madison, took a compromise position.<sup>85</sup> It will be clear from the course of my argument, and particularly from my earlier discussion of the necessity for a secular basis for freedom of religion, that I am broadly of Jefferson's view.

Given that religious beliefs are adhered to, not on the basis of reason alone, but at least in part on the basis of faith, and given that the impact of faith, as a mode of belief distinct from reason, is to impart to beliefs that are held on the basis of it a character that is singular, stable, and partial, as opposed to plural, comprehensive, and evolving, it follows that the requirement of non-establishment is simply a reflection of the moral limitations of religious belief, limitations that do not detract from the value that religious belief is capable of contributing to the lives of those who freely endorse it, but limitations nevertheless that make that belief unacceptable as a basis for the design of state institutions and state practices, even when expressed ecumenically. In other words, the rule against establishment insulates state institutions and practices from the straitening effect upon morality of religious belief, thereby ensuring that those institutions and practices are capable of fostering valuable ways of life that religion does not recognize and may even forbid, ways of life that are critical to the well-being of at least some of those to whom the state is responsible, namely, those non-believers

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<sup>84</sup> I should also note that the egalitarian argument for a rule against establishment of any religion does not merely fail to serve human well-being but implicitly assumes that an ecumenical establishment of religion is impossible, as is surely not the case. It is true that I have argued above (see *supra* note 34) that one cannot invoke an ecumenical understanding of the meaning of religion as part of the justification for a semantic approach to the interpretation of freedom of religion, for one can only be ecumenical in one's approach to religion once one has decided what religion means, or ought to mean. Nevertheless, it follows that once one has decided what religion ought to mean, there is no logical reason why one could not then grant the benefit of the establishment of religion to all those practices that meet that definition. There is moral reason not to do so, however, and it is this that in my view constitutes the justification for the rule against any establishment of religion.

<sup>85</sup> For a summary account of these different views, see Tribe, *supra* note 22 at 1158-59. These were actually views as to the overall place of religion in public life, a place ultimately secured by both clauses of the First Amendment, rather than views about the establishment clause alone. Of course, the fact that these views apply to the free exercise clause does nothing to diminish their application to the establishment clause.

whose way of life is inconsistent with the requirements of one or more religious beliefs. One does not have to look far for instances of such non-believers. Homosexuality, for example, is condemned by certain religious beliefs, yet the ability to pursue a homosexual way of life free from public censure is clearly essential to the well-being of some, indeed many people.<sup>86</sup>

In short, the moral character of religious belief places it in conflict with value pluralism and so leads to the common requirement of liberal political cultures that there be no establishment of religion. This is a corollary of freedom of religion only in the sense that, like that freedom, and indeed like any other right or freedom, the rule against establishment reflects and respects the basic moral requirements that govern the just design of state institutions and state practices.<sup>87</sup>

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<sup>86</sup> This paper is concerned with the general principles underlying freedom of religion, so I cannot address here the specific implications for that freedom of what is also true, namely, the fact that for many people the ability to combine religious commitment with a homosexual life is critical to the pursuit of well-being, with the consequence that well-being is denied to them when their religion is homophobic, as it often is.

<sup>87</sup> It follows, further to the discussion in Part III.A.5.a., that the presence of an established church in countries such as England does not violate freedom of religion but does violate the equally necessary rule against any establishment of religion.