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The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond

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Freedom of religion stands on precarious ground in the landscape of the modern liberal democratic state. While the state and the courts rely on the tools of rational, secular, "neutral" reasoning to strike a balance between protecting individual freedoms and achieving important state goals, the religious adherent is driven by an understanding of existence that defies the liberal tradition of rationalism. In this article, the author examines the conflicts that occur between religious obligations and the needs of the state. Through an examination of Canadian and American jurisprudence concerning freedom of religion, the author provides a critique of some aspects of the modern liberal state's treatment of religion. The author seeks to provide a clear picture of the social and intrinsic value of religion, and suggests that a proper understanding of the value of religion will lead the state to adopt a supportive and accommodating approach toward religious beliefs and practices in the modern state.

L'État démocratique libéral moderne est un terrain mouvant pour la liberté d'expression. L'état et les tribunaux se fient à un outillage mental rationel, profane et impartial en pour déterminer l'équilibre optimal entre la protection des libertés individuelles et l'atteinte de buts prônés par la collectivité. Or, le croyant s'inspire d'une conception de l'existence humaine étrangère à la tradition libérale de rationalité. Dans cet article, l'auteur étudie les conflits entre l'obligation religieuse et

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les besoins de l'État. Par une analyse de la jurisprudence canadienne et américaine concernant la liberté de religion l'auteur présente une critique de certains aspects du traitement de la religion par l'État libéral moderne. L'auteur cherche à présenter un portrait lucide de la valeur sociale et intrinsèque de la religion. Il suggère qu'une compréhension adéquate de la religion mènera l'État à une attitude conciliante et solidaire envers les pratiques et croyances religieuses.

> Then Peter and the other apostles answered and said, We ought to obey God rather than men.
>
> — Acts 5:29

> Whatever the subject of your disputes, the final word belongs to God.
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> — *The Koran*[1]

I. Introduction

The religious believer in the modern liberal state is the servant of two masters. On the one hand, there is the web of obligations, laws and rules that attach to every facet of life, from prohibitions against criminal behaviour to the myriad administrative regulations encountered in the workplace. On the other, there is the compulsion to obey one's spiritual obligations, as revealed through prayer, scripture, or participation in a faith community. As long as the two obligations do not conflict, one can fulfill both sets of requirements. Once they do, both the religious adherent and the state face the question: Which should be valued more highly—obligations to temporal authority or to divine authority?

The object of this article is to suggest that how we answer this question will help provide the answer to a broader question: Can the modern state accommodate views that deviate from the social and political norm, and which operate in a realm apart from the societal norm of liberalism, or will the state be blind to those whose claims are grounded in experiences and beliefs that lie beyond the paradigm of rationality and liberalism?

In Canada, the conflict between religion and the state has often played itself out in struggles over whether the social structure must give equal support to different religious groups; for example, the struggles over the Sunday shopping laws[2] or the entitlement of religious communities to funding for the separate education of their children.[3] Less concern has been given to the question whether the state and its laws may interfere with pre-existing religious obligations, and thereby force an

1. *The Koran*, trans. N.J. Dawood (London: Penguin Classics, 1993) at 339.
2. See *e.g. R.* v. *Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Big M*]; *Edwards Books and Art* v. *R.* (1986), 35 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Edwards Books*].
3. See *e.g. Reference Re Bill 30, an Act to amend the Education Act (Ontario)* (1987), 40 D.L.R. (4th) 18 (S.C.C.) [hereinafter *Reference Re Bill 30*]; *Adler* v. *Ontario* (1994), 19 O.R. (3d) 1 (C.A.) [hereinafter *Adler*].

individual to obey the law in violation of the precepts of his or her faith. This may be because existing laws create few problems, or because not all laws are strictly enforced in the face of religiously compelled behaviour. A likelier explanation is that, as the vast majority of Canadians are still Christian,[4] the laws created by political majorities present few conflicts with the majority faith. Moreover, religion itself has declined as a force in Canadian life: more than three million Canadians say they have no religion at all, a figure that has doubled in the last decade.[5] Thus, few people are likely to take seriously religious commands that require them to disobey the dictates of the state.

Indeed, we have built the notion of conflict between religion and the state into the very language of the *Canadian Charter of Rights and Freedoms*.[6] The preamble's statement that "Canada is founded upon principles that recognize the supremacy of God *and* the rule of law [emphasis added]," stirring as it is, also reminds us that a citizen may have two sources of obligation.[7]

Nevertheless, it is essential that the role and limits of religious freedom be clearly defined. Despite the lack of strong religious allegiances among many in the Canadian mainstream, both the influx of immigrants of diverse religions and the nation's policy of encouraging multiculturalism, as signalled by s. 27 of the *Charter*,[8] suggest that more conflicts will arise in the future between the practices of religious minorities and laws crafted by members of the majority. Furthermore, as the reach of the administrative state extends ever further into every aspect of life, the law is bound to disturb an increasing number of religious practices.[9] Though a few useful discussions of these problems have appeared in the Canadian legal literature, the scarcity of thorough attempts to confront the meaning of religious freedom in Canada leaves us unprepared to deal with the conflicts that are sure to arise with increasing frequency.[10]

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4. "[F]our out of five people report Christianity as their religion" in Canada. M. Campbell, "Christmas in a secular society" *The Globe and Mail* (24 December 1994) D1.
5. *Ibid.* Even among the Christian majority, church attendance has dipped from 60 percent after World War II to 20 percent today. *Ibid.*
6. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].
7. Moreover, the presence of the word "God" in the preamble creates a tension with the presence in the *Charter* of a guarantee of freedom of religion, as William Klassen points out: "To mention God with a capital letter in the preamble to the Charter and then to go on to say that the Charter provides a fundamental freedom of conscience and religion, is a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize." W. Klassen, "Religion and the Nation: An Ambiguous Alliance" (1991) 40 U.N.B. L.J. 87 at 95 [hereinafter "Religion and the Nation"]. Klassen advocates the word's removal. *Ibid.* In *O'Sullivan* v. *M.N.R.*, [1992] 1 F.C. 522 (T.D.), Muldoon J. suggests that this preamble merely "prevents the Canadian state from becoming offically atheistic." *Ibid.* at 536. With respect, this seems like little more than an attempt at rationalization, and is not supported by any convincing argument.
8. *Supra* note 6, s. 27.
9. See D. Laycock, "The Remnants of Free Exercise" [1990] Sup. Ct. Rev. 1 at 68 ("Today, the scope of pluralism and the scope of government are both vastly greater. The occasions on which the normal government restricts religious exercise have multiplied manyfold").
10. The most prominent treatments of the subject so far are Weinrib, "Reading the Lesson," *infra*

The project of illuminating the meaning and extent of religious freedom is even more important because it is a way to answer questions whose import go beyond the religious community: What should be the extent of the state's power? What role should intermediary groups play in a liberal democracy? In particular, what should be the role of religious groups in a society whose public dialogue is based on the shared language of rationalism and liberalism? Must we all share the same language to ensure a productive public discourse? Or is liberalism, too, no more than another faith, another uncertain way of interpreting existence, and thus no more entitled to the mantle of legitimacy and primacy than any other faith-based claim?[11]

In the course of examining the role and limits of freedom of religion in a liberal democracy, I wish to suggest that liberal democracy has in recent years often given the wrong answer to those questions. In the United States, the Religion Clauses of the First Amendment have given rise to a rich but tangled jurisprudence on law and religion,[12] which has, in recent years, resulted in a tendency to treat religion as one of many mere 'choices' that individuals can make, an important part of one's life but one that must give way to the encroachments of the administrative state—in short, in Stephen Carter's memorable phrase, a tendency to treat "religion as a hobby."[13]

In Canada, a somewhat different problem presents itself. Though the major cases dealing with freedom of religion have offered expansive definitions of the freedom, the relative paucity of cases arising under the *Charter's* guarantee of freedom of religion[14] means that the courts have not clearly defined the extent of the *limits* on religious freedom. And in the cases that they have decided in this area, the courts have as yet given inconsistent answers, largely because of an

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note 62; Cotler, *infra* note 104; Macklem, *infra* note 89; and Black, *infra* note 39. In addition, David M. Beatty provides an extended discussion of religious educational funding issues in *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*, ch. 5 (Toronto: Carswell, 1990). Most of these discussions pre-date the considerable developments in freedom of religion jurisprudence in the United States and Canada that have occurred in the last five years. Macklem's piece, though useful, pre-dates all significant *Charter* jurisprudence on freedom of religion. It is hoped that this article's attempt to discuss a substantial part of the Canadian jurisprudence on s. 2(a) will provide both an analytical framework and a useful jumping-off point for increased discussion of this topic.

11. See S. Fish, "Liberalism Doesn't Exist" [1987] Duke L.J. 997 at 997: "[L]iberalism is informed by a faith (a word deliberately chosen) in reason as a faculty that operates independently of any particular world view. . . . The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue."

12. For a useful guide to United States Supreme Court jurisprudence on freedom of religion, see C.H. Esbeck, "Table of United States Supreme Court Decisions Relating to Religious Liberty 1789–1994" (1993–94) 10 J.L. & Religion 573.

13. See S.L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor Books, 1994) at 29 [hereinafter *Culture of Disbelief*]; "Evolutionism, Creationism, and Treating Religion as a Hobby" [1987] Duke L.J. 977.

14. *Charter, supra* note 6, s. 2:
    2. Everyone has the following fundamental freedoms:
    (a) freedom of conscience and religion . . .

incomplete understanding of the role and purpose of freedom of religion. One thing is clear, however: as in the United States, Canadian courts have adopted a view that favours the goals of the state over the obligations of religion, and that evaluates limitations on freedom of religion from the viewpoint of a rational, secular actor. To the degree that the state bases its decisions on a rational, liberal framework, the qualities that make religion unique and valuable—its allegiance to the irrational and the supernatural[15]—will cause religious goals to be subordinated to statist goals.

I do not wish to demonize liberal democracy, which provides a strong environment for the of religious freedom of a fairly diverse number of faiths. I will argue, however, that religion and liberal democracy represent two very *different* views of human experience,[16] and their divergence leads to significant consequences for the religious person in the liberal state. Ultimately, when religious adherents most need the help (or at least non-interference) of the state, they may be least likely to receive it.

In both the United States and Canada, I will suggest, the prevailing statist conception of liberalism guarantees that religion is seen as an important choice, but a choice at best; where it conflicts with rationally conceived goals, it will lose. As reasonable as this outcome may seem when viewed from the statist viewpoint, I will suggest that it ultimately impairs and impoverishes the growth of a stronger and more inclusive liberal state by remaining blind to religion's vital role as an independent social force and a source of ideas from outside the liberal worldview. This statist view relegates religion to the sphere of private action, when it should respect and protect religion as an important public actor. Ultimately, if we understood religion's value and its role in society, we would be more willing to defer to religious beliefs and practices, even where they conflict with the reasonable and legitimate workings of the state.

In Part II of this article, I will attempt to provide working definitions of the motive forces of this article: religion and liberal democracy. In Part III, I will briefly outline the relationship between religion and the state in North America, focusing on the pre-*Charter* history of freedom of religion in Canada and the conflicting interpretations of the Religion Clauses of the United States Constitution. Part IV will discuss the current liberal, statist approach to religion, which misunderstands religion by viewing it largely as an individual, private act, and devalues it by leaving it little room for participation in liberal discourse. In Part V, these findings are applied to the current jurisprudence on freedom of religion in Canada and the United States. They will show the rationalist bias in both countries' treatment of

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15. Some religions or sects, it is true, construct highly rational, logic-based justifications for their positions. But even the logical argument of an Aquinas is, at some level, rooted in beliefs or premises that defy empirical proof or adopt extra-logical claims. Accordingly, though a religion may take on the colour of rational discourse, its uniqueness may still, in large measure, relate to its reliance on a supernatural source or an 'irrational' conclusion.

16. See C. Dlamini, "Culture, Religion, and Education" in D. van Wyk, *Rights and Constitutionalism: The New South African Legal Order* (Cape Town: Juta & Co., 1994) at 593: "[R]eligion and politics embrace in differing ways the whole of human life. Both religious movements and political movements (or governments) hold their own views of what human beings . . . should be."

religion, particularly in areas where the importance of the state's claim leads the courts to overlook how compelling religious claims may be to their adherents.

Finally, in Part VI, I will attempt to flesh out the role of religion in society and its importance to the societal dialogue that is necessary for liberal democracy to flourish. Having presented a clear picture of religion's value, I argue in Part VII that the proper approach of the courts and the state to religion should be both supportive and accommodating: offering general support to religion and accommodating it where its obligations come into conflict with the law. While not all religious claims will prevail over the claims of the state, the courts' approach should attempt to give full weight to the value of religion both to society and to the adherent, and avoid taking a strictly rational or statist view of religious claims. In the final result, it will be shown that if the state shows a willingness to give way rather than impose its laws, it will reap more in the long run from full religious participation in society than it will lose; in short, it will ensure the progress of participation and dialogue in a "free and democratic society."[17]

II. Definitions

A. TOWARD A DEFINITION OF RELIGION

The definition of what constitutes a religion, and thus when the right of freedom of religion under s. 2(a) of the *Charter* will apply, is a logical prerequisite to any discussion of freedom of religion. But the term has been poorly defined in Canada and presents recurring definitional difficulties in other countries.

In *Big M*, the most important case so far in Canadian freedom of religion jurisprudence, Dickson J. (as he then was) noted, "Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter."[18] Perhaps because the term "conscientiously-held beliefs" embraces both conscience and religion, which both find protection in s. 2(a) of the *Charter*, Dickson J. did not go further to define religion itself. Ironically, the case that has most clearly defined the *scope* of freedom of religion does little to indicate what sorts of conscientiously held beliefs will be protected.

Though it may be impossible to devise a perfect definition of religion,[19] a more

17. *Charter, supra* note 6, s. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See also L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469 (arguing that both *Charter* rights and s. 1 should be applied to forward the values and ideals of a free and democratic society).

18. *Big M, supra* note 2 at 361–62.

19. See G.C. Freeman III, "The Misguided Search for the Constitutional Definition of 'Religion'" (1983) 71 Geo. L.J. 1519.

substantial working definition is necessary.[20] A clear definition will ease any uncertainty on the part of the courts. It will also remove the possibility that individual judges will craft biased definitions of religion that reflect a majoritarian skepticism about the claims of religious adherents whose beliefs and practices do not resemble the tenets of mainstream religions. As Tarnopolsky J.A. noted in *R.* v. *Videoflicks*,

> all religions require their adherents to observe the tenets of that religion by various practices which would appear to others to have a purely secular significance, such as not cutting one's hair and wearing turbans, or shaving one's head and wearing saffron robes, such as not eating certain foods or eating them on certain days and not others, such as not killing certain animals or consuming some and not others and, above all, such as not working or buying or selling goods or services on certain days specified as the sabbath.[21]

Tarnopolsky J.A.'s statement applies to beliefs as well as to practices: what may seem to the adherent to be a binding tenet of a spiritual faith, entitling that person to the protection of the *Charter*, may seem to another to be a purely secular philosophy or even a fraudulent or absurd claim. This is particularly true given the myriad faiths other than mainstream denominations such as Christianity, Judaism, or Islam that are now represented in the Canadian population.[22] Accordingly, a proper definition is called for. Moreover, *Videoflicks* suggests that the relative breadth of the definition of religion may affect whether the right is limited by definition, or by matters such as the sincerity or importance of the belief. Beyond prudential considerations, however, the courts must have a proper definition of religion because they do not make their rulings in a vacuum; they constitute an influential social institution, whose influence makes itself felt beyond the confines of the law and whose rhetoric may become part of a citizen's social vocabulary. As Winnifred Fallers Sullivan notes,

> How the courts talk about religion is critical, because the texture of the public discourse about religion creates a culture about religion. People's lives are given meaning in the spaces created by words. If the courts distort . . . religion when they talk about it, they both do violence to peoples' experiences and undermine their own authority.[23]

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20. See P.E. Johnson, "Concepts and Compromise in First Amendment Religious Doctrine" (1984) 72 Cal. L. Rev. 817 at 839: "How can we say anything about religion if we do not know what it is?"
21. *R.* v. *Videoflicks* (1984), 14 D.L.R. (4th) 10 at 36 (Ont. C.A.), rev'd in part *Edwards Books, supra* note 2.
22. See L. Tribe, *American Constitutional Law*, 2d. ed. (Mineola, N.Y.: Foundation Press, 1988) at 1179 ("Religion in America, always pluralistic, has become radically so in the latter part of the twentieth century"). The same forces—immigration and the growth of political pluralism and multiculturalism—that have led to an increase in the number of religions in the United States have, of course, also affected Canada. Thus, M.H. Ogilvie notes that according to the 1991 Census, Canada was home to 84 recorded religious minorities, as well as those faiths that were not recorded and those individuals with no religious faith. M.H. Ogilvie, "Overcoming 'The Culture of Disbelief' " (1995) 29 L. Soc. Gaz. 105 at 118.
23. W.F. Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United*

Of central importance to the shaping of a definition of religion in the United States Constitution's Religion Clauses[24] has been the absence of a clause with respect to freedom of conscience. Accordingly, at least with respect to cases under the Free Exercise Clause,[25] the definition of religion has embraced a broad range of beliefs. Thus, in *United States* v. *Seeger*,[26] a case involving an application for a statutory exemption from military service based on religious belief, Clark J. held that a definition of a "belief in relation to a Supreme Being" includes any belief that takes "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for this exemption."[27] In another conscientious objector case, *Welsh* v. *United States*,[28] a similar statute was held to apply to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[29]

Of the two cases, it is *Seeger*'s definition that, for all its breadth, appears to retain a requirement of spiritual belief. This definition will be of more aid to Canadian courts, since the *Charter* right of freedom of conscience is separately guaranteed and need not be implied in the guarantee of religious freedom. Indeed, even in the United States the Court has attempted to retain a spiritual component, notwithstanding the statutory interpretation in *Welsh*; this is appropriate, since most claims of conscience can be addressed under the Speech and Association Clauses of the First Amendment.[30] The Court considered the issue specifically in *Wisconsin* v. *Yoder*,[31] a case granting a religion-based exemption. There, the Court ruled that claims based on "subjective evaluation and rejection of the contemporary secular values accepted by the majority"[32]—that is, simple philosophical rejections of the social norm—are not valid freedom of religion claims.[33] Similarly, the values of pluralism

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States (Cambridge: Harvard University Press, 1994) at 163.

24. U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The two halves of this guarantee are commonly referred to as the Establishment Clause and the Free Exercise Clause.

25. See R.J. Araujo, "A Dialogue Between the Church and Caesar: A Contemporary Interpretation of the Religion Clauses" (1993) 34 B.C. L. Rev. 493 at 500: "Commentators have generally agreed that the definition of religion for each [clause] is different. In the context of the Establishment Clause, the definition tends to be narrow, whereas for Free Exercise claims it normally is much broader." See also Tribe, *supra* note 22 at 1186 (acknowledging and criticizing the dual definition approach).

26. 380 U.S. 163 (1964).

27. *Ibid.* at 166.

28. 398 U.S. 333 (1970).

29. *Ibid.* at 344. See also *Re Civil Service Assn. of Ont. (Inc.) and Anderson* (1976), 60 D.L.R. (3d) 397 at 400 (Ont. H.C.J.), *per* Morden J. (religion may include that which is held to be of ultimate importance). For a criticism of the *Welsh* decision as overbroad, see D.N. Feofanov, "Defining Religion: An Immodest Proposal" (1994), 23 Hofstra L. Rev. 309 at 367–74.

30. U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ."

31. 406 U.S. 205 (1972).

32. *Ibid.* at 216.

33. For an application, see *e.g. Africa* v. *Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) (rejecting the

and multiculturalism that are prominent in Canadian law and society appear at first to suggest the need for a broad definition of religion that encompasses faiths that do not resemble the mainstream religions. It should be remembered, however, that deep-seated beliefs that are *not* identifiably religious will find protection under the freedom of conscience guarantee, which is also part of s. 2, or under other sections of the *Charter*. Therefore, too broad an approach to the definition of religion should be avoided.[34]

At the other extreme is a narrow definition that focuses on particular requirements—requirements that bear a strong resemblance to traits that are central to mainstream religions. Thus, in *R.* v. *Registrar General; Ex parte Segerdal*,[35] Lord Denning M.R. defined a place of worship as one in which

> people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity.[36]

Under this definition, a Scientologists' meeting place was found not to be a place of worship. Similarly, warning that "the mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call themselves a religion," the Australian High Court in *Re Church of New Faith*[37] set a definition of religion that requires "belief in a supernatural Being, Thing or Principle" and "the acceptance of canons of conduct in order to give effect to that belief";[38] in this instance, the Court accepted the Scientologists' claim of religious status. While limiting religion in this way may be beneficial, inasmuch as it clearly protects those with spiritual obligations while excluding mere personal philosophy, the danger of a narrow definition is that it may encourage an "ethnocentric definition" based on the majority's views of what constitutes religion.[39]

Another possible approach to a definition of religion emphasizes its *communal* aspects.[40] Thus, Stephen Carter, suggesting that religious communities as a whole may end up in conflict with the state, takes the following as a working definition of religion:

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claim of MOVE, a revolutionary political organization, that it is religious).

34. See Tribe, *supra* note 22 at 1183.
35. [1970] 3 All E.R. 886.
36. *Ibid.* at 889-90.
37. (1983) 49 A.L.R. 65.
38. *Ibid.* at 74. Wilson and Deane JJ., concurring in the result, adopted a less strict test, listing several criteria as indicia of whether a belief or group is religious. *Ibid.* at 106.
39. See W.W. Black, "Religion and the Right of Equality" in A.F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 134.
40. See *e.g.* M. McConnell, "Neutrality Under the Religion Clauses" (1986) 81 Nw. U. L. Rev. 146 at 159: "Religious experience typically is communal and institutional, not individualistic."

> a tradition of group worship (as against individual metaphysic) that presupposes the existence of a sentience beyond the human and capable of acting outside of the observed principles and limits of natural science, and, further, a tradition that makes demands of some kind on its adherents.[41]

Carter is right to stress that religious groups are poorly dealt with by the state, which is accustomed to treating rights as individually held rather than communally held. A group emphasis can, however, have unfortunate results. In the recent decision in *Ontario (Attorney General)* v. *Dieleman*,[42] Adams J. upheld (while limiting the scope of) an injunction against picketing outside hospitals and clinics that performed abortions. One defendant claimed the injunction violated her s. 2(a) rights, because her actions were "motivated by her religious faith."[43] Notwithstanding that Carter's definition is merely a working definition for the sake of a book dealing substantially with group behaviour, Justice Adams cited Carter for the proposition that "the concept of religion connotes the beliefs of a group."[44] Justice Adams continued:

> If [the defendant's] belief that her protest activity is required by her religion is not shared by the vast majority of the members of her religion, which is the case, it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion.[45]

With respect, this is unpersuasive and unsettling reasoning. Dissentience within religious communities is a common phenomenon that both renews and challenges old faiths and leads to the creation of new ones. One need only recall the example of Martin Luther to understand that the doctrinal orthodoxy of one's beliefs is not a true index of their legitimacy or sincerity.[46] While the courts should be aware of the corporate nature of many religious communities in order to give full meaning to the guarantee of freedom of religion, they should not define religion to reinforce the same tyranny of the majority that led to the s. 2(a) right in the first place.

I would propose that the following criteria be viewed as minimal criteria for a claim to fall under the guarantee of freedom of religion: (i) a belief that is spiritual, supernatural or transcendent in nature, whether or not it is shared by anyone else, so long as it is sincerely held; (ii) the belief is best served or honoured by certain behaviour, whether individually or in a group; (iii) if the behaviour is not actually compelled by the belief, it should be part of the regular practice of a group of common faith-holders.

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41. *Culture of Disbelief, supra* note 13 at 17.
42. (1994), 20 O.R. (3d) 229 (Gen. Div.).
43. *Ibid.* at 331.
44. *Ibid.*
45. *Ibid.*
46. See *Thomas* v. *Review Board*, 450 U.S. 707 at 715 (1981) for a preferable approach: "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."

These criteria are broad insofar as they embrace both individual and group practice, and recognize the importance of behaviour that is *suggested* by religious belief, and not just behaviour that is religiously *compelled.* Still, the scope of the criteria will be limited by two aspects. First, the requirement of a belief in a supernatural or spiritual authority separates such beliefs from claims of conscience and gives weight to the religious adherent's view that he or she is bound by something higher than temporal authority. In many faiths the adherent may face extratemporal consequences if he or she obeys the temporal authority of the state—a dilemma that merits the state's respect. Thus, Jesse Choper has suggested that the definition of religion for the purpose of Free Exercise Clause claims in the United States must include the requirement that "violation of those beliefs entails extratemporal consequences."[47] The idea of extratemporal consequences must be broadly applied. Those who do not believe in such concepts as damnation, for example, may still be included under this definition if their faith favours some actions and disfavours others; this qualification would embrace any religion with a strongly held system of ethics or a concept of karma or spiritual balance. If so applied, this definition may be a useful signpost to courts seeking to define a belief or practice as religious.

Similarly, the U.S. Supreme Court in *U.S.* v. *Macintosh* offered this definition: "The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation."[48] If the reference to God is omitted (a reference suggesting a view of religion that accords with mainstream Western faiths but excludes faiths such as Buddhism), a useful definitional concept is revealed: the idea of a superior duty stemming from an individual's relationship with spiritual or transcendent forces. Such a definition retains the idea that the law should give way because the religious adherent must obey a spiritual duty, but still embraces a broad and pluralistic view of religious faith.

Second, an *individual's* freedom of religion claim must be based on compulsion rather than mere preference—a distinction that narrows the scope of individual claims and eases the courts' obligation to give way to any individually stated ethical preference. While a very limited number of individuals may be prejudiced by this requirement, it will drastically limit the opportunity for some individuals to advance fraudulent claims to religious exemptions from generally applicable laws, since the prior or subsequent failure to perform any 'compelled' practice will be a strong indication of an insincere claim. At the same time, this requirement recognizes that some practices may be essential to the vitality of a religious community, and thus worthy of protection, even though the practices are not actually *compelled* by

47. J.H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (Chicago: University of Chicago Press, 1995) at 54. However, I would disagree with Choper's justification for this requirement—that "obeying the law at the price of perceived eternal repercussions produces substantially greater psychological suffering than does doing so at the cost of compromising scruples with only temporal reactions." *Ibid.* at 86. Rather, I would emphasize the importance of the potential *severity* of the extratemporal consequences, and the state's inability to evaluate claims, such as a claim that an act would lead to damnation, which are grounded in non-rational understandings of experience.

48. 283 U.S. 605 at 633-34 (1931).

threat of extratemporal consequences. In this way, even those faith communities that do not retain Western concepts of duty or obligation but that do involve a web of spiritually related cultural practices will find protection under the umbrella of religious freedom.

It should be noted that even broad definitions of religious freedom can be unduly limited by rules of application. Thus, in *R.* v. *Videoflicks*, Tarnopolsky J.A. wrote that freedom of religion

> also includes the right to observe the *essential* practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed not from the majority's perspective of the concept of religion but in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned.[49] [emphasis added]

Thus, under this approach, a practice that is not essential to one's religious practices may fall outside the scope of the guarantee. Though the court clearly states that the test of what is essential should be made from the perspective of the faith-holder, the rule can be used to justify a searching, even invasive scrutiny of a religious group's practice.[50] Of course, whether or not a belief is essential, it can be argued that "each individual should be afforded the maximum opportunity for emotional and spiritual development."[51]

Accordingly, a more appropriate approach would not focus on how essential a religious practice is, but would simply ask: Is the claim related to the individual or group's religious behaviour? The court may use a justification test to limit a right in a number of ways. But, when the court asks initially whether a right has been infringed, a practice that relates to the spiritual tenets of a person or group, essential or not, should be viewed as distinctly religious.[52]

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49. *R.* v. *Videoflicks, supra* note 21 at 35.

50. See *Salvation Army, Canada East* v. *Ontario (A.G.)* (1992), 88 D.L.R. (4th) 238 (Ont. Ct. (Gen. Div.)). In this (in my view) unfortunate decision, Henry J., following a searching inquiry, ultimately discounted the testimony of leading officers in the Salvation Army that the application of the *Pension Benefits Act* would violate an important religious principle, that of voluntariness. Henry J. called the evidence led by these officers "apologia for the views of the hierarchy and . . . formalistic and technical . . . rather than rooted in the fundamental doctrines of the faith." He added: "This dedication of body and soul to the religious life and mission as reflected in the religious, *i.e.*, non-secular tenets of the Army, cannot *in all logic* and sincerity be affected by the question whether retirement allowances under a pension plan are gratuitous and discretionary, or are legally or contractually guaranteed. . . . [T]o say that the officers stand in a voluntary relationship to their supervisors is patently not realistic." *Ibid.* at 282–83. The value of illuminating religious belief by inquiring as to its logic or realism is questionable.

51. Black, *supra* note 39 at 135; but see *ibid.* at 135–36.

52. Nevertheless, not *every* practice of a religious group is a *religious* practice. Some courts are too forgiving in this regard. See *e.g. Powell* v. *Stafford*, 859 F.Supp. 1343 (D.Colo. 1994) (application of age discrimination statute in termination of Catholic high school teacher violates Religion Clauses despite absence of religious considerations in dismissal); *Gabriel* v. *Immanuel Evangelical Lutheran Church*, 640 N.E.2d 681 (Ill.App.4.Dist. 1994) (breach of contract suit against church is an ecclesiastical matter despite absence of religious reasons for breach); *Dlaikan*

B. LIBERALISM AND LIBERAL DEMOCRACY

Equally as important as a definition of religion is a reasonable working definition of liberalism and liberal democracy, since these are the forces that act on religion in the modern Western state. I will not attempt to define liberalism in detail, since that elusive goal is better suited to a work of pure philosophy. Still, it may be useful to isolate and describe certain familiar and common elements of liberal democracy, whose presence will be clear in the jurisprudence of freedom of religion.[53]

Robert J. Sharpe has identified three central premises of liberalism: its belief in the "intrinsic and ultimate worth of the human individual"; its view of the state's role as "maximizing human dignity, self-fulfillment and autonomy, while minimizing interferences with individual moral choice"; and its belief that "the state and the law should be neutral as to particular conceptions of the good life."[54] In addition to noting these values, John Gray adds that liberalism is egalitarian, in that it "confers on all men the same moral status," and universalist, in that it affirms "the moral unity of the human species and accord[s] a secondary importance to specific historic associations."[55] Liberalism can be understood in terms of the values it raises in opposition to foreign value systems: "reason versus affect, free choice versus conditioning, individual liberty versus social will."[56]

It is clear that certain liberal values adumbrated above—for instance, individualism, egalitarianism, rationalism, and the exaltation of the species over any "historic associations"—may conflict with religious values. What, then, of liberalism's 'neutrality'? Does this concept not offer a safe haven for religious values? The answer to this question seems to be that liberalism's claims to value-neutrality are hollow. Liberal states, Joseph Raz suggests, "reject the idea that the state has a right to impose a conception of the good on its inhabitants. . . ."[57] As Charles Taylor has pointed out, however, "Liberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with

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v. *Roodbeen*, 522 N.W.2d 719 at 720–21, *per* Taylor, J., dissenting (Mich.App. 1994) (suit against Catholic school is ecclesiastical matter): "[B]y its unwarranted and unwise expansion of the ecclesiastical exception provided by the Free Exercise Clause, the majority has created a jurisprudential black hole in which the exception swallows the rule."

53. It is interesting to remember that the development of liberalism is itself closely tied to the question of religious belief. See W.A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991) at 13: "Liberalism may be said to have originated in an effort to disentangle politics and religion. It has culminated in what I see as a characteristic liberal incapacity to understand religion."

54. R.J. Sharpe, "New Ways of Thinking—Liberalism" in F.E. McArdle, ed., *The Cambridge Lectures 1991* (Cowansville, Que.: Yvon Blais, 1993) at 265–66.

55. J. Gray, *Liberalism* (Minneapolis: University of Minnesota Press, 1986) at x.

56. N.M. Stolzenberg, " 'He Drew a Circle That Shut Me Out': Assimilation, Indoctrination, and the Paradox of a Liberal Education" (1993) 106 Harv. L. Rev. 581 at 586.

57. J. Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986) at 108.

other ranges. . . . Liberalism is also a fighting creed."[58] At the very least, liberalism's focus on the autonomous individual, and on the maximization of individual conceptions of the good, tends to give it in practice an emphasis on freedom over tradition, will over obligation, and individual over community. In the context of liberal democracy, in which the liberal state seeks to maximize happiness among a diverse number of groups, and thus seeks some form of common ground, a further tendency is often seen: the tendency to understand the state and its concept of the good through rational terms, and to deal best with those claims grounded in rational argument.

One additional element must be considered in the working definition of liberal democracy: the growth of statism. Not a concrete political philosophy, statism may be characterized as an approach to democratic governance that exalts the goals of the modern administrative state, viewing the state's democratically arrived at and rationally justified goals as central to social order and well-being—in other words, a philosophy that represents the primacy of "good government." Since statist goals are grounded in rationalist terms and liberal principles, they may conflict with non-rational private preferences such as religious beliefs. Thus, the statist goal of a well-ordered system of universal public education may be confounded by claims favouring the establishment and funding of separate schools to cater to religious communities; and statist arguments in favour of medical care for children, grounded as they are in liberal notions of autonomy and rational arguments in favour of corporeal existence, will dismiss as irrational and monstrous those claimants who advance religious arguments against medical intervention.

In fairness, it must be acknowledged that there may be said to be many different forms of liberalism, ranging from the "procedural liberalism" which most resembles the individualistic, rational, neutral philosophy I take for my general definition, to those forms of liberalism that emphasize the communitarian aspects of citizenship and are more willing to acknowledge and work toward social goals.[59] There is no doubt, however, that while the academic understanding of liberalism may be undergoing revision, the popular understanding of liberalism and liberal goals continues to exert great influence in the public sphere. In particular, my definition of liberal democracy must be understood in the context of the modern administrative state, which reinforces such classical liberal values as rationalism and procedural equality and fairness.

In short, these values may be taken to represent the most common elements of statist liberal democracy. Though this working definition is vastly simplified, these values will be evident throughout our examination of the treatment of religion in a liberal democracy.

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58. C. Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at 249. See also Galston, *supra* note 53 at 3: "Nor can the liberal state be properly understood as 'neutral' in any of the senses in which that term is currently employed. Like every other political community, it embraces a view of the human good that favors certain ways of life and tilts against others."

59. See Taylor, *ibid.* at 181–203.

II. The History of Church-State Conflict in North America

Though the content of the guarantee of religious freedom under the *Charter* cannot be bound by history, an understanding of the role and limits of s. 2(a) may be enriched by an examination of the historical basis of freedom of religion, and of the extent to which the guarantee has been provided or respected in the past, both in Canada and in the United States. The language in s. 2 may declare the fundamental freedom of religion in "ringing terms,"[60] yet the words will be frustratingly vague unless an understanding of the context in which the right was granted breathes life into the language. And so, in *Big M*, Dickson J. (as he then was) recommends an analysis of the right

> by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, *to the historical origins of the concepts enshrined*, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.[61] [emphasis added]

It has been suggested that carrying out an analysis of the historical roots of the Religion Clauses of the United States Constitution may be a snare for the unwary:

> Since protection of religious freedom is the prototypical right, and since the American jurisprudence is so readily accessible and superficially intelligible, it is tempting to search it for answers to Charter questions. But this search must be carried out with caution lest it carry back to Canada presuppositions rooted in the particularity of American experience, as interpreted or misinterpreted by the United States Supreme Court, and import the contradictions of American doctrine which follow thereupon.[62]

With this caveat in mind, I would contend that an examination of the history of freedom of religion in the United States is both necessary and beneficial to the understanding of freedom of religion in Canada, for a number of reasons. First, American jurisprudence is unquestionably useful, both for an understanding of the role of religion in a liberal democracy and for a specific analysis of the content of s. 2(a); accordingly, it is necessary to appreciate the historical roots of the American jurisprudence, in order to see both its virtues and its flaws more clearly. Second, as Canadian society becomes increasingly pluralistic, the development of freedom of religion in the United States, which from its inception has been home to a profusion of religious sects, will be increasingly instructive. Third, despite our differences,

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60. *Big M*, *supra* note 2 at 359.

61. *Ibid.* at 359–60 [emphasis added].

62. L.E. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 Supreme Court L.R. 507 at 511–12 [hereinafter "Reading the Lesson"]. This alarm is particularly apt with regard to the Establishment Clause, which lacks a direct parallel in the *Charter*, but is somewhat less pressing with regard to the Free Exercise Clause.

Canadian and American courts have often achieved similar results in freedom of religion cases, and any effort to find out why (and whether) that should be is worthwhile.[63] Finally, the sheer volume of American history and jurisprudence on freedom of religion, while it may not be a controlling influence on the development of Canadian jurisprudence, may fill a void left by a much smaller body of literature and jurisprudence on that subject in Canada.

A. THE AMERICAN EXPERIENCE

Given the heated nature of the disputes among those with differing interpretations of the historical origins of the Religion Clauses, it seems safe to say only that the more attention that is devoted to the topic, the less certainty there is about the proper way to read the intentions of the framers of the Constitution with respect to freedom of religion. As Thomas Curry notes, "The opposing sides [in the interpretive battle] have tangled in heated engagements, but have now settled into a kind of trench warfare."[64] Leonard Levy, perhaps the best-known historian of the First Amendment, observed that the Establishment Clause, "like any other controversial clause of the Constitution, is sufficiently ambiguous in language and history to allow few sure generalizations."[65]

Perhaps one reason the debate over the historical meaning of the Religion Clauses has been so heated is that, until recently, the attention has been focused almost exclusively on the Establishment Clause, not the Free Exercise Clause.[66] This narrower approach, in my view, has led scholars to focus disproportionately on the limits of religious influence in the state, and ignore the question of the desirable extent of religious freedom; in turn, this has caused a reluctance to give full credence to the Free Exercise Clause. At the same time, Establishment Clause interpretation has itself been constrained—by the force of a 200-year-old metaphor with a powerful grip on the judicial and historical imagination: the metaphor of a "wall of separation" between church and state.[67]

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63. See R.A. Sedler, "The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis" (1988) 20 Case. W. Res. J. Int'l. L. 577 at 588–89 (citing cases).

64. T.J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986) at vii.

65. L.W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Co., 1986) at xiv. For a critique of the often careless attempts at historical research and analysis made by lawyers, judges and legal academics, see M.S. Flaherty, "History 'Lite' in Modern American Constitutionalism" (1995) 95 Colum. L. Rev. 523 at 523–26. He writes: [C]onstitutional discourse is replete with historical assertions that are at best deeply problematic and at worse, howlers." *Ibid.* at 525.

66. See M. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion" (1990) 103 Harv. L. Rev. 1409 at 1413–14 [hereinafter "Origins of Free Exercise"]. For criticisms of this article's historical conclusions, see P.A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective" (1992) 60 Geo. Wash. L. Rev. 915.

67. For judicial criticism of the dominant influence of the wall of separation, see *e.g. McCollum* v. *Board of Education*, 333 U.S. 203 at 247 (1948) (Reed J. dissenting) ("A rule of law should not be drawn from a figure of speech"); *Wallace* v. *Jaffree*, 105 S.Ct. 2479 at 2516 (1985)

As has been noted elsewhere,[68] the wall of separation metaphor was suggested, with radically different meanings, by two figures from the Revolutionary period: Roger Williams and Thomas Jefferson. Williams's use of the metaphor, as Mark DeWolfe Howe noted, stemmed from a "dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained";[69] in other words, he urged separation as a way to protect the church, not the state. Conversely, Jefferson's use of the metaphor, in a letter to the Baptists of Danbury, Conn., has been taken as a product of "the skepticism and the confidence of the Enlightenment."[70] These, then, are the polar opposites of Religion Clause interpretation, and particularly Establishment Clause interpretation: either the First Amendment was erected as a rationalist, Enlightenment project to guard against any religious influence over the state,[71] or it was intended more as a protection of the church *from* the state, to protect religious diversity and guard against a single national religious establishment.[72]

This interpretive struggle has played itself out in the courts, most notably in two Supreme Court decisions that have attempted to provide historical justifications for two opposing jurisprudential approaches to the Religion Clauses. The first approach was seen in *Everson* v. *Board of Education*,[73] a 1947 decision dealing with a New Jersey statute that reimbursed parents for the use of publicly operated buses to transport their children to school; the statute was challenged because it allowed busing to parochial schools as well as public schools. Writing for the majority, Black J. relied largely on the early experience in Virginia to describe religious freedom in the United States as a right born of

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(Rehnquist, J. dissenting): "The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."

68. See *e.g.* M.D. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: Phoenix Press, 1965) [hereinafter *Garden and Wilderness*]; Weinrib, "Reading the Lesson," *supra* note 62.

69. *Garden and Wilderness, ibid.* at 6.

70. *Ibid.* at 7. Jefferson wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." *Ibid.* at 1. See also S.G. Gey, "Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment" (1990) 52 U. Pitt. L. Rev. 75 at 79: "The establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith."

71. See *e.g.* Gey, *ibid.*; P.B. Kurland, "Of Church and State and the Supreme Court" (1961) 29 U. Chi. L. Rev. 1 at 3 (noting the "large number of unbelievers in the community that inserted these guarantees into the Constitution"); W.V. Alstyne, "Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on *Lynch v. Donnelly*" [1984] Duke L.J. 770; L.W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* (New York: Oxford University Press, 1986) at 135–70.

72. See *e.g. Garden and Wilderness, supra* note 68; "Reading the Lesson," *supra* note 62.

73. 330 U.S. 1 (1947) [hereinafter *Everson*].

> the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.[74]

Black emphasized the need for absolute separation:

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.[75]

Everson's influence has extended far past the facts of the case, in which, in the end, the Court upheld the program *against* an Establishment Clause claim, relying on the fact that the statute granted its benefits to any child. Notwithstanding the result, the decision's strong language and historical interpretation of the First Amendment has formed the basis of a subsequent judicial view that the Religion Clauses made the state a secular preserve.[76]

The opposing view of history on the Court was advanced by Rehnquist J. (as he then was) in his dissenting opinion in *Wallace* v. *Jaffree*, a decision striking down an Alabama statute that provided a moment of silence in the schools for "meditation or voluntary prayer."[77] Noting *Everson*'s Jeffersonian interpretation of the Establishment Clause, he complained:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.[78]

Rehnquist J. argued instead that the Establishment Clause was intended merely to prevent the advancement of particular sects and the adoption of any one faith as a *national* religion. He based his argument substantially on his emphasis on another framer of the Constitution—James Madison—and on evidence of religious, if non-sectarian, behaviour sanctioned by the First Congress.[79]

Is either of these warring interpretations demonstrably more correct than the other? In my view, both suffer for their focus on the Establishment Clause, since a proper understanding of each clause depends on an interpretation that takes both

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74. *Ibid.* at 11.

75. *Ibid.* at 18.

76. See *e.g. Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982). See also *Everson, ibid.*, Jackson J. dissenting: "[The Establishment Clause] was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life."

77. *Wallace* v. *Jaffree*, *supra* note 67 at 2481.

78. *Ibid.* at 2508.

79. *Ibid.* at 2511–14. More recently, in *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 115 S.Ct. 2510 (1995) (permitting the University of Virginia to aid a religious publication through its general subsidy of printing costs for student publications), Thomas and Souter JJ. have joined battle on the historical interpretation of the Establishment Clause.

clauses into account. On one point, Rehnquist J. certainly is correct: a narrow focus on Jefferson's intent distorts a proper view of the Religion Clauses. It is true that Jefferson's outlook was substantially influenced by the skepticism of the Enlightenment;[80] but Jefferson was one of many leading figures in the creation of the Constitution, and his views were not necessarily either universal or controlling, as Michael McConnell has pointed out.[81]

Rehnquist J. is also right to point to Madison. Madison's emphasis on pluralism is the missing ingredient in First Amendment history, and perhaps the most pertinent point for Canadians, for whom pluralism is a constitutional dictate,[82] to take from the interpretive debates in American constitutional history.[83] Madison expressed his interest in pluralism thus:

> In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, on the multiplicity of sects.[84]

Where Rehnquist J. errs, however, is in his failure to recognize that the Madisonian imperative of pluralism may have an impact on the Establishment Clause, both at a national and a state level,[85] given the multiplicity of sects and interests that may now be found in our polyglot society.[86]

Thus, an appropriate modern reading of the Religion Clauses should recognize the state's interest in encouraging religious liberty and pluralism (thus departing from the essentially secularist view of *Everson*), while recognizing that in such a

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80. See *e.g.* M.D. Peterson, "Jefferson and Religious Freedom" *The Atlantic Monthly* (December 1994) 112.
81. See McConnell, "Origins of Free Exercise," *supra* note 66 at 1517: "Locke and Jefferson may well have been animated . . . by the freedom from conformity to religious dogma. But that is not what the Baptists, Quakers, Lutherans, and Presbyterians who provided the political muscle for religious freedom in America had in mind."
82. *Charter, supra* note 6, s. 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
83. For scholarship emphasizing the importance of pluralism in understanding the Religion Clauses, see McConnell, "Origins of Free Exercise," *supra* note 66; Laycock, "The Remnants of Free Exercise," *supra* note 9 at 68; G.V. Bradley, "Dogmatomachy—A 'Privatization' Theory of the Religion Clause Cases" (1986) 30 St. Louis U. L.J. 275 at 276 [hereinafter "Dogmatomachy"]: "This, of course, is the startling feature of our Constitution—its muteness on the centripetal force essential to its operation. Thus, the high-stakes constitutional gamble explained by Madison hoped to achieve manageable conflict fueled by diversity and freedom, instead of a politically molded national community of similarly minded men and women."
84. A. Hamilton, J. Jay & J. Madison, *The Federalist Papers*, ed. Garry Wills (New York: Bantam Books, 1982) (1788) at 264.
85. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (using Fourteenth Amendment to apply Free Exercise Clause to states); *Everson, supra* note 73 (Fourteenth Amendment used to apply Establishment Clause to states).
86. And not just 'now'; even in the Revolutionary era, according to one writer, the American colonies were home to more than 3,000 religious organizations. See L. Underkuffler-Freund, "The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory" (1995) 36 Wm. & Mary L. Rev. 837 at 846.

radically pluralistic age, establishment at the federal *or* state level is an entirely untenable form of state preference for a single group.[87]

B. THE CANADIAN EXPERIENCE

Literature on the history of religious freedom in Canada presents far more unanimity of opinion than is to be found in the United States, but far less detail. The two nations do share a popular view that the birth of religious freedom on the new continent stems from dissentience and from the intolerance encountered in their European roots. In attempting to illuminate the roots of religious freedom in *Big M*, Dickson J. discussed the view, formulated as a reaction to establishmentarian practices in England, that

> belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of "freedom of conscience and religion."[88]

Religious freedom and tolerance were at least paid lip-service long before the advent of the *Charter*, in provincial and federal legislation. For example, the *Freedom of Worship Act*[89] guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference."[90] Similarly, an act amending the *Public Schools Acts* in British Columbia stressed the importance of a

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87. For similar views, see McConnell, "Origins of Free Exercise," *supra* note 66 at 1516 ("The Court should not ask, 'Will this advance religion?,' but rather, 'Will this advance religious pluralism?' "); Weinrib, "Reading the Lesson," *supra* note 62 at 513–14 (arguing for a "liberty component for the religion clauses"). In a recent book, Steven D. Smith has offered another interpretive suggestion: that there is no satisfactory, cohesive way to understand the Religion Clauses. See S.D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995). Smith argues that our search for a consistent principle of religious freedom has led us to twist the meanings of the Religion Clauses, which in reality are of limited power and "have nothing of substance to say on questions of religious freedom." *Ibid.* at 16. Smith argues against an attempt to build a theory of religious freedom, and in favour of a "prudential," more circumstance-based approach to religious freedom cases.

88. *Big M, supra* note 2 at 361. Dickson J.'s analysis may be misleading, however. See J.W. Grant, *The Church in the Canadian Era,* rev. ed. (Burlington, Ont.: Welch Publishing, 1988) at 11: "The early settlers of Canada came, almost without exception, for reasons other than religious."

89. (1850–51), 14 & 15 Vict., c. 175 (Canada). Noted in P. Macklem, "Freedom of Conscience and Religion in Canada" (1984) U.T. Fac. L. Rev. 50 at 54; B. Laskin, "Freedom of Religion and the Lord's Day Act—The Canadian Bill of Rights and the Sunday Bowling Case" (1964) 42 Can. Bar. Rev. 147 at 156.

90. Essentially the same legislation remains on the books in Ontario: the *Religious Freedom Act*, R.S.O. 1990, c. R-22, consists of a preamble and one section, which guarantees "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province."

secular, non-dogmatic education as early as 1876.[91] It was, of course, the subject of a guarantee in the *Canadian Bill of Rights, 1960*.[92] Thus, Rand J. could state in *Saumur* v. *City of Quebec*,[93] in ruling that a Quebec by-law had the improper effect of banning the religious solicitation activities of Jehovah's Witnesses:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.[94]

Nevertheless, it must also be acknowledged that long after the English settlers' escape from Continental intolerance, and as recently as the latter part of this century, "Religious inequality has played an all too important part in Canadian history."[95] In the course of Canadian history, Jews, Jehovah's Witnesses and Hutterites, among other groups, have been victims of religious discrimination.[96] Those guarantees encoded in law before the *Charter* were often not applied to grant the protection that was needed.[97]

Of equal concern in the history of Canadian religious freedom has been the fact that, as Lacourcière J.A. has noted, "there is no firm wall between church and state in Canada."[98] Instead, the state has accorded special support to selected faiths, in the separate school education guarantees for Catholic and Protestant communities granted in the *Constitution Act, 1867*.[99] The minority religious education rights granted therein may have represented a "protection of minority rights" at the time

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91. *An Act to amend and consolidate the Public Schools Acts*, C.S.B.C. 1877, c. 140, s. 40; noted in *Russow* v. *British Columbia (A.G.)* (1989), 62 D.L.R. (4th) 98 at 102–03 (B.C.S.C.).
92. S.C. 1960, c. 44, s. 1(c).
93. [1953] 2 S.C.R. 299.
94. *Ibid.* at 327.
95. Black, *supra* note 39 at 131. See also The Hon. Madam Justice Beverley McLachlin, "Who Owns Our Kids? Education, Health and Religion in a Multicultural Society" in McArdle ed., *The Cambridge Lectures 1991*, *supra* note 54 at 148 [hereinafter "Who Owns Our Kids?"]: "We like to think that freedom of religion has always been one of the fundamental tenets of Canadian society. We are wrong to think so. Canadian history abounds with examples of attempts by establishment religions, often with government support, to suppress non-establishment religious thinking."
96. See *e.g.* Black, *ibid.* at 131–32; G.N.A. Botting, *Fundamental Freedoms and Jehovah's Witnesses* (Calgary: University of Calgary Press, 1993); D.E. Sanders, "The Hutterites: A Case Study in Minority Rights" (1964) 42 Can. Bar. Rev. 225. This recitation does not but certainly could include direct and incidental incursions on the religious and spiritual practices of native Canadians occasioned by colonization and expansion by Europeans across Canada.
97. See *Robertson and Rosetanni* v. *R.*, [1963] S.C.R. 651, *per* Ritchie J. (upholding the *Lord's Day Act* against a claim that it violated the *Canadian Bill of Rights*).
98. *Zylberberg* v. *Sudbury Board of Education* (1988), 52 D.L.R. (4th) 577 at 611 (Ont. C.A.), *per* Lacourcière J.A. dissenting. See also J.S. Moir, ed., *Church and State In Canada, 1627–1867: Basic Documents* (Toronto: McClelland and Stewart, 1967) at xiii: "Here no established church exists, yet neither is there an unscalable wall between religion and politics."
99. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 93.

of Confederation;[100] but this "Confederation compromise"[101] has become, I would suggest, a *de facto* establishment of religious privilege[102] that accords to a few groups, as a result of a historical compromise, the benefits that all or none deserve to enjoy.[103] As one would expect with establishment, the result has been that "no other provision of the Act of 1867 has engendered so much bitterness."[104]

The pre-*Charter* roots of freedom of religion must, in sum, be seen as having achieved a singular confusion of ideal and reality. The tradition of guaranteeing religious freedom in Canada had its beginnings as long ago as the United States' tradition. However, the combination of a lack of rigorous adherence to the guarantees, as in *Robertson and Rosetanni*, and the *de facto* establishment of s. 93 of the Constitution has created little historical or doctrinal certainty from which the courts can draw in exploring the scope of s. 2(a) of the *Charter*.[105] Such a void makes the courts more susceptible to misstep, inconsistency and error. As suggested in Parts IV and V, as statism and liberalism have advanced ideas that are anathema to the full flourishing of religious freedom, the courts have indeed fallen prey to errors that might have been cured with a stronger sense of the roots of and reasons for the guarantee of religious freedom.

IV. The Liberal Understanding of Religion

In this section, I wish to suggest that the virtues of liberal democracy are countered by a significant flaw: a tendency to treat rationalism and liberalism as a bedrock epistemology, a mode of thinking that tolerates other modes of experience but ultimately asserts its superiority over them.[106]

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100. *Reference Re Bill 30, supra* note 3 at 42, *per* Wilson J.

101. *Ibid.* at 61.

102. See also Sedler, *supra* note 63 at 583–84: "[T]here has been a long history of governmental involvement with religion in Canada, and a non-establishment component [in the text of s. 2(a)] would have been inconsistent with this aspect of the Canadian tradition."

103. See *Adler, supra* note 3 at 10, *per* Dubin C.J.O. (rejecting claim of other religious groups to public funding for separate schools for faiths not included in the s. 93 guarantee): "The right [in s. 2(a)] involves the freedom to pursue one's religion or beliefs without government interference, and the entitlement to live one's life free of state-imposed religions or beliefs. It does not provide, in my view, an entitlement to state support for the exercise of one's religion." Section 93, however, *does* provide that right—but only for some.

104. I. Cotler, "Freedom of Conscience and Religion: Section 2(a)" in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd. ed. (Toronto: Carswell, 1989).

105. Those who do not learn from history are, of course, condemned to repeat it; thus, recall Klassen's complaint that the preamble to the *Charter*, with its use of the name of God, creates a built-in contradiction of s. 2(a). Klassen, "Religion and the Nation," *supra* note 7 at 95. One might add that it also effects an establishment of sorts, by suggesting a supremacy of monotheism. See also *Charter, supra* note 6, s. 29, guaranteeing that the *Charter* in no way affects the ability of the state to aid a few faiths only, through the separate school funding provision.

106. See Fish, *supra* note 11; P.F. Campos, "Secular Fundamentalism" (1994) 94 Colum. L. Rev. 1814, which criticizes Rawls's version of political liberalism as "secular fundamentalism. . . . [which] asserts that the supreme political value is to produce a political system that accepts liberal principles of political morality as embodiments of the supreme political value." *Ibid.* at

Liberal democracy drives the social and political dialogue in post-Enlightenment Western states such as Canada and the United States.[107] Still, it is important to acknowledge once more that the precise definition of liberalism, or even of liberal democracy, is as elusive of definition as is the term 'religion.' It consists of a raft of values, often conflicting, and any focus on some of the values that are part of the liberal state may ignore the important role played by others. Thus, a focus on the liberal state's attachment to individual rights may conceal liberal democracy's approval of community and interest groups as intermediary institutions. In a broader sense, a focus on liberalism's failings may lead one to forget that liberalism's overarching values accord to religious believers a full recognition of their right to maintain an allegiance to beliefs and practices that defy certain aspects of liberalism.

Nevertheless, I will argue that certain aspects of liberalism have a negative impact on religion. Moreover, they are not peripheral aspects of liberalism, but central tenets of liberal thought; accordingly, they will have a strong influence on decision making even in an ideal liberal state. As for the imperfect state in which we live, these particular values are often in the ascendancy and have a heightened impact on religious beliefs. These touchstones of liberalism are rationality, empiricism, skepticism, individualism, and the value of autonomy. In the modern liberal democratic state, they are accompanied by one more common and influential value: statism, which attaches a high value to the political and administrative goals of the properly constituted liberal democratic state. Other values may enrich liberalism,[108] but these particular values are at its core, particularly in the modern state. They are the focus of this examination of liberalism.

As I have suggested above, the value of liberal democracy is its willingness to cherish religious freedom as a valuable part of the freedom of any autonomous individual. Where it fails is in its inability to fully recognize that religion is (or, at least, may be) more than a mere *choice* on the individual's part. Rather, it is a radically different but equally valid mode of experiencing reality.[109] As long as the

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1824. Campos notes: "The irony, of course, is that in this triumphalist incarnation liberalism can begin to resemble the very dogmatic systems that it once rebelled against." *Ibid.* at 1825.

107. See *e.g.* C.R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993) at 307 ("The establishment clause creates a secular, liberal democracy"); K.M. Sullivan, "Religion and Liberal Democracy" in G.R. Stone, R.A. Epstein & C.R. Sunstein, eds., *The Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992) at 198 ("The bar against an establishment of religion entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes"); *Capitol Square Review and Advisory Bd.* v. *Pinette,* 115 S.Ct. 2440 at 2475 (1995), *per.* Ginsburg J., dissenting (citing Sullivan's assertion); *Roach* v. *Canada (Minister of State for Multiculturalism)* (1992), 88 D.L.R. (4th) 225 (F.C.T.D.) at 229 ("Canada is a secular state and although many of its laws reflect religious tradition, culture and values, they are none the less secular or positivistic in nature"); *O'Sullivan* v. *M.N.R, supra* note 7.

108. Note, for instance, Wilson J.'s dissent in *Edwards Books, supra* note 2, which endorses a vision of the *Charter* as protecting "group rights as well as individual rights," *ibid.* at 60, and which cautions that "respect for human rights cannot be achieved in a pluralist society without a spirit of co-operation and goodwill on the part of all citizens but especially on the part of the majority," *ibid.* at 64.

109. Frederick Mark Gedicks puts it aptly: "[R]eligion is experienced by the believer as holistic. . . .

religious adherent's practices are private, or public but minimally intrusive, they are accepted; but where these conditions do not apply, where the beliefs are taken so seriously as to interfere with the liberal understanding of the public good, the liberal state views religion as a choice that is wrong, unreasonable, or dangerous, according to liberal epistemology, and so denies the possibility of co-existence.[110] Thus, for example, prayer in the abstract is tolerated or even approved of; prayer as a substitute for medical care is quietly regarded as a form of suicide. Since the state and the courts reason from within the liberal, rationalist paradigm, religion must ultimately "listen to reason."

The language of liberalism betrays its misunderstanding of religion and its bias in favour of itself in a number of ways. This section examines some of the most common principles evident in liberalism's treatment of religion.

The most general failure on liberalism's part is its fundamentally secular understanding of religious experience, its inability to penetrate the nature of religious experience. What is incontrovertible and evident to the religious adherent may seem vague, mysterious, or simply inconceivable when examined from a secularist standpoint. The language of liberalism is the language of rationalism, and whatever cannot be approached rationally is bound to meet with skepticism, at best. A student comment on the religiously based refusal by parents of medical treatment for their children captures superbly the frustration occasioned by a secular attempt to understand a spiritual motivation:

> The fact that so many of these deaths could have been prevented is appalling, for there is nothing more tragic than the *senseless* death of a child.
>
> Perhaps it is so easy to condemn parents who refuse medical treatment for their children because it is too difficult for most people to imagine being confronted with deeply held religious beliefs, with the life of a child hanging in the balance.[111] [emphasis added]

Notable in this plaint is the equation of irrationality and senselessness. Of course, those whose religious beliefs force them to confront the very choice described here would not consider senseless the goal of saving a child's soul, which is implicit in the refusal of treatment. But the rationalist, liberal epistemology is unable to support or confront judgments stemming from religious, non-rational experience.[112]

[and] compelling . . . on both the conscious and unconscious level. Both of these attributes of religious experience are in serious tension with the assumptions of privatized religion and secularized politics." F.M. Gedicks, "Some Political Implications of Religious Belief" (1990) 4 Notre Dame J.L. Ethics & Pub. Pol'y 419 at 427.

110. See *Culture of Disbelief, supra* note 13 at 15: "[The rhetoric of the liberal state sends] the subtle but unmistakable message: pray if you like, worship if you must, but whatever you do, do not on any account take your religion seriously."

111. L.M. Plastine, Comment, "'In God We Trust': When Parents Refuse Medical Treatment for Their Children Based Upon Their Sincere Religious Beliefs" (1993) 3 Const. L.J. 123 at 124.

112. See Bradley, "Dogmatomachy," *supra* note 83 at 277: "The Court conceives religion . . . not as objective truth but as subjective preference."

As Stephen Carter observes, this view that rationalism offers a factually accurate vision of the world has a profound effect on what courts decide and how citizens are treated; it leads to the court's according a lesser weight to religious considerations when it makes decisions balancing state and religious goals. This phenomenon will become clearer below, in this article's examination of the *Charter* jurisprudence dealing with freedom of religion.[113]

In addition to liberalism's inability to understand the nature of religious *beliefs*, it also frequently errs in applying a secular, liberal understanding of the world to religious *cultures*, and in the process thoroughly misunderstanding them. This misunderstanding is most evident in secular evaluations of the structure of faith communities, such as church hierarchies. For example, in the recent debate in Quebec over whether Muslim schoolgirls should be allowed to wear the *hijab* – a headdress that is often considered a required part of Muslim women's dress—one line of argument advanced was that the garb connotes "the sexual exploitation of women,"[114] and "defies the values of the equality of men and women."[115] Elsewhere, Mary Becker has asserted that "[k]eeping women out of religious leadership positions precludes a necessary prerequisite for religious freedom to mean as much to women as to men."[116] Another author has argued that "the exclusion of women from positions of power and influence in the Catholic Church forcefully communicates the inferior status of women within the hierarchy of that church."[117]

Applied to secular aspects of life, these are eminently sensible and sympathetic positions. But applied to religious phenomena, these judgments are category-mistakes—that is, judgments based on liberal criteria but not on criteria that may matter to the religious adherent herself. Religious hierarchies and practices may in fact reflect entirely worldly illiberal ideas masquerading as spiritual beliefs. Indeed, it is for that very reason that religious dissent occurs (for example, the rift that occurred among American Baptist churches in the 19th century over slavery). Nevertheless, a liberal understanding of religion may miss the fact that a religious community comprehends hierarchy and equality in a fundamentally different way.

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113. See *Culture of Disbelief, supra* note 13 at 217, dealing with the claims of creationists: "There is, however, a more fundamental liberal difficulty with the creationist claims: in the world of post-Enlightenment liberalism, science deals with *knowledge* about the natural world, whereas religion is simply a system of *belief*, based on faith"; and at 220–21, dealing with Jehovah's Witnesses and the refusal of treatment for their children: "There is, however, a logical sense in which the refusal to take account of the [religious] claim *is* to treat it as false. For if the claim is true, life eternal would seem plainly to trump the transient life available on earth."

114. See A. Nasrulla, "Educators outside Quebec mystified by hijab ban" *The Globe and Mail* (13 December 1994) A1 at A4 (remarks of Francois Lemieux, president of the St. Jean Baptiste Society).

115. See R. Mackie, "Muslim headgear polarizes Quebec" *The Globe and Mail* (12 December 1994) A7 (remarks of Francois Lemieux).

116. M.E. Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" in Stone, Epstein & Sunstein, *The Bill of Rights in the Modern State, supra* note 107 at 485.

117. J.C. Brant, " 'Our Shield Belongs to the Lord': Religious Employers and a Constitutional Right to Discriminate" (1994) 21 Hastings Const. L.Q. 275 at 278.

As indicated above, another common error in liberalism's understanding of religion stems from the fact that its tolerance of religion is based on the value of the autonomous individual: liberalism treats an individual's religion as a *choice*, rather than as a compulsion or a facet of participation in a faith community. Although the language of choice is appropriate as long as it is applied to suggest that the religious believer should be personally free to reject a particular faith, it is often misapplied to the *loyal* religious believer as well. This categorization leads to the tendency to view a religious belief or practice as being no more essential to the committed believer than any other autonomous individual choice.[118] While this approach values religion as part of the autonomy that liberalism treasures, it devalues it by treating it as one of a set of possible choices, rather than as the ineluctable set of duties compelling, and not merely chosen by, the religious adherent.[119]

The autonomy-based toleration of religious freedom also errs in tending to treat religion as a *private* activity,[120] and thus one that is entitled to protection as long as it is confined to the private sphere of subjective beliefs; once it extends into the public sphere, it is subject to countervailing 'objective' claims.[121] This attitude has led to a suggestion by liberal theorists such as Kent Greenawalt that while participants in a liberal democracy should be freely permitted to base their political decisions on religious faith, all participation and discussion in the public sphere must take place in commonly understood, rationally arrived at terms—in other words, in the language of secularism and liberalism.[122] Indeed, although he acknowledges that "[t]alk about religion is important for people to understand and evaluate our culture and the meaning of their own lives,"[123] Greenawalt argues that if "publicly

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118. See E. West, "The Case Against a Right to Religion-Based Exemptions" (1990) 4 Notre Dame J.L. Ethics & Pub. Pol'y 591 at 613: "[I]t might be said that exemptions are needed to protect human autonomy or freedom. But all persons and groups may claim that they have as much a right to freedom as do religious persons or groups." See also W.P. Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption" (1989) 40 Case W. L. Rev. 357 at 408–09: "[L]iberal theory reacts to the belief of the religious adherent as if that individual chose her particular belief system rather than having had the truths and obligations of that belief system imposed upon her by transcendent authority."

119. See Book Note, "Liberalism and the Limits of Religious Freedom" (1991) 104 Harv. L. Rev. 1937 at 1939.

120. See *e.g.* M. Valpy, "Religion and the schools" *The Globe and Mail* (25 October 1995) A17: "Religion in a liberal society belongs in private culture, in the family and the house of faith. It does not belong in the public-school system, which is our most important instrument, our essential instrument, of socialization, citizenship and community for all."

121. See F.M. Gedicks, "Public Life and Hostility to Religion" (1992) 78 Va. L. Rev. 671 at 676, 678–79: "[T]he purpose of the liberal state is to preserve the objectivity of public life from the subjectivity of private life, while nonetheless ensuring that there remains sufficient private space for the pursuit of subjective values. . . . Secularism constitutes the test of residency in American public life, and religion by its nature cannot pass the test." See also F.M. Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Durham: Duke University Press, 1995).

122. See K. Greenawalt, *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988); B. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

123. K. Greenawalt, "Religious Convictions and Political Choice: Some Further Thoughts" (1990) 39

accessible reasons" decisively answer a particular question, the religious adherent in a liberal democracy must not rely on religious reasons to oppose the rational reasoning.[124]

The danger of such a position is clear. If religious convictions sincerely compel a believer's political position, to ask him or her to discount any religious aspects inherent in that position, as Michael Perry has noted, would "preclude *her*—the *particular* person *she* is—from engaging in moral discourse with other members of society."[125] The approach also errs because it misunderstands the purpose of religious freedom and adopts a view even stricter than Jefferson's by shutting off the religious, not only from public office, but from public discussion. Of course, this view will be of particular value to political groups who fear the influence of religionists on the *other* side of a debate.[126]

Moreover, this approach suggests that any dialogue that goes beyond rationalist boundaries lacks social value; it effectively argues that while liberalism attempts to find answers to questions, religion dogmatically assumes the correctness of its answers and so frustrates the possibility of productive dialogue. Given goodwill, however, it *is* possible to have conversations that embrace both secular and religious concepts,[127] and such conversation should be encouraged for the sake of full social participation in the public dialogue. Notwithstanding this point, the prevailing liberal view continues to seek to limit religion's involvement in political dialogue.[128]

Ultimately, it may be argued that the liberal difficulty with religion and religious concepts relates at least in part to a defensiveness about the future of the liberal project itself and the future of the state. In particular, the liberal urge to circumscribe the extent of religious entry into the political sphere, even in the sense of simple dialogue, betrays a view that beliefs and concepts that cannot be understood in a

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DePaul L. Rev. 1019 at 1035.

124. Greenawalt, *Religious Convictions and Political Choice, supra* note 122 at 207.

125. See M. Perry, *Morality, Politics, and Law: A Bicentennial Essay* (New York: Oxford University Press, 1988) at 72–73. For a critique of Greenawalt's position, see also M. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (New York: Oxford University Press, 1991) at 16–22.

126. "When conservative ministers support Ronald Reagan and speak out on their social agenda; when Catholic bishops speak out on abortion, nuclear weapons, economic redistribution, and peace in Central America; or when rabbis speak out on behalf of Israel, someone on the other side of the political issue is sure to charge that these attempts to influence public policy violate separation of church and state." D. Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers" (1986) 81 Nw. U. L. Rev. 1 at 27.

127. See *e.g.* A.E. Cook, "God-Talk in a Secular World" (1994) 6 Yale J.L. & Human. 435 at 444–47.

128. For a Canadian example, see A. Scott, "A New Deal for Religious Broadcasting in Canada? Continuing Political and Legal Pressures for Change" (1994) 4 M.C.L.R. 189. Scott notes a dictate in the CRTC's Religious Broadcasting Policy requiring that programming be "entirely religious. . . . The regulator must, therefore, separate out religious programming from political offerings, and distinguish between sacred and commercial motives." *Ibid.* at 212. He adds: "The theoretical, legal, historical and practical problems with state bodies making determinations about what constitutes 'religion' are numerous." *Ibid.* One might add that requiring a determination of what constitutes permissible topics of discussion for religious adherents is equally problematic.

rational manner represent potential threats both to reason and to its offspring, liberal democracy. Mark Tushnet has written:

> Religion poses a threat to the intellectual world of the liberal tradition because it is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between the individual and the state.[129]

It is more than religion's passion that threatens the liberal state, however; it is the fact that the religious group submits to an entirely different authority, one that cannot be reasoned with. Arguing against the accommodation of religion, Steven Gey perceives the threat clearly, albeit in a somewhat exaggerated fashion:

> [R]eligion is an alternative system of nonrational and unprovable beliefs. As such, religion is fundamentally incompatible with the critical rationality on which democracy depends. . . . The essence of the accommodation principle requires that democratic control over certain aspects of public policy be subordinated to a higher force that is beyond human control.[130]

It will be suggested in Part VI that such a view, while grounded in an accurate view of religion's inability to accept temporal authority, remains fundamentally blind to the value of religion as a social force. In any case, it is clear that, at best, prevailing tendencies in liberal thought value religion as a strongly held but arbitrarily chosen belief. At worst, liberals are baffled and threatened by the presence, in the midst of the modern liberal democratic state, of forces that deny the primacy of political authority and question the finality and sufficiency of reason as an epistemology. Reason is, nonetheless, the mode of analysis that we expect from the courts in the proper performance of their duties—and, as will become clear below, the effects on religion of a conscientiously applied rational approach can be devastating.

V. Right and Wrong Turns: Judicial Applications of Liberalism and Rationalism to Religion

It has been suggested that certain aspects of liberalism may lead to an improper relegation of religion to the private sphere and an inevitable finding that religious claims must be subordinated to rationally conceived goals. At the same time, however, it must be acknowledged that liberalism is also a culture of rights. Notwithstanding the secularist aspects of liberalism, the *Charter*'s guarantee of freedom of conscience and religion establishes that, subject to limits, religion is a fundamental freedom;

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129. M. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1988) at 248. Tushnet argues that a society that adopts the republican tradition will appreciate the communitarian value of religion more than a liberal society.

130. Gey, *supra* note 70 at 176, 186.

similarly, the First Amendment establishes a claim of religious freedom to 'first-ness' among rights.[131] Where liberalism's secularist tendencies may be influential, then, is in shaping the *scope* and *limits* of the right. In particular, once the religious believer's claim extends beyond freedom of religious *belief* to freedom of religious *action*, his or her right may face limits, which in turn will face a justification test phrased in the language of liberalism and rationalism.[132]

In exploring the scope and limits of religious freedom as outlined in Canadian and American jurisprudence, I wish to suggest that the same inability to give proper credence to the claims of religion which was apparent in this article's general examination of liberalism's pitfalls may also be found in numerous decisions by the courts of both nations. Though courts in both countries have at times given a rich scope to the guarantee of freedom of religion, effectively carving out religion as a "forbidden zone" for the legislature,[133] judicial trends in the United States, and the structure of the *Charter* in Canada, have created an unfortunate tendency toward an "inappropriate statism . . . an inordinate faith in government."[134] Consequently, the courts have been quicker to accept the claims of the state over the equally pressing claims of the religious believer. This can be seen in an examination of certain leading Canadian and American cases, and of the courts' treatment of freedom of religion in 'hard cases'—cases presenting equally compelling claims by both religious believers and the state.

A. THE CANADIAN APPROACH

The leading trilogy of cases in defining freedom of religion in Canada, *Big M, Edwards Books,* and *R.* v. *Jones*,[135] attempted early on in the development of *Charter* jurisprudence to build an expansive definition of the right. They hoped to provide a "generous" interpretation of the right without "overshoot[ing] the actual purpose

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131. See Weinrib, "Reading the Lesson," *supra* note 62 at 508–09: "Although the primacy of speech protection within the American scheme of protecting constitutionalized rights is often heralded as symbolically embodied in the 'firstness' of the first amendment, it is not speech but religion that the framers put first." Whether speech, religion, or other fundamental freedoms have a claim to a particular primacy among rights in Canada is not essential to any arguments made in this article; it simply assumes that these fundamental freedoms are all of strong importance to the Canadian democratic project.

132. See *Reynolds* v. *United States*, 98 U.S. 145 at 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order"); McLachlin, "Who Owns Our Kids?," *supra* note 95 at 150 ("While there may be an absolute constitutional right to *believe* what one wishes, the right of *action* pursuant to those beliefs may be limited by other considerations").

133. See S.J. Godfrey, "Freedom of Religion and the Canadian Bill of Rights" (1964) 22 U.T. Fac. L. Rev. 60 at 68 ("When a Constitution or a Bill of Rights sets up a guarantee for 'freedom of religion', it in effect establishes a 'forbidden zone' into which other legislation may not go").

134. M. McConnell, "Religious Freedom at a Crossroads" in Stone, Epstein & Sunstein, *The Bill of Rights in the Modern State, supra* note 107 at 116 [hereinafter "Religious Freedom at a Crossroads"].

135. (1986), 31 D.L.R. (4th) 569 (S.C.C.) [hereinafter *Jones*].

of the right";[136] and it must be acknowledged that the Supreme Court did in fact fashion a broad interpretation of the freedom of religion.

In interpreting the right in *Big M*, which struck down the federal *Lord's Day Act* as unconstitutional, Dickson J. (as he then was) rejected a strict distinction between belief and action. Writing for the majority in *Edwards Books*, which found that Ontario's *Retail Business Holidays Act* constituted a reasonable limit on freedom of religion, Dickson C.J.C. similarly rejected a strict distinction between direct and indirect burdens placed on the exercise of religion:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to *manifest* belief by worship and practice or by teaching and dissemination.[137]
>
> * * *
>
> In my opinion, indirect coercion by the State is comprehended within the evils from which s. 2(a) may afford protection. . . . It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable.[138]

Even more valuable in the long run, perhaps, is Dickson J.'s rejection in *Big M* of a formal neutrality rule, which would require 'equal' treatment of religions even though different religions might benefit from different relationships with the state:

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.[139]

At the same time, the Court in these cases began to draw up limits to the right, and it is here that elements of secular or liberal bias, or of a simple misunderstanding of minority religious practices, begin to become apparent. First, in rooting freedom of religion so firmly in the notion of "the centrality of individual conscience," the Court adopted the view of religion as belief or choice, and as an individual rather than a community experience. While this may rarely have an impact on actual judicial decision making, it indicates a Court more comfortable with addressing religion in the context of individual rights, rather than the context of duty and group worship which the religious believer experiences.

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136. *Big M, supra* note 2 at 361.

137. *Ibid.* at 353.

138. *Edwards Books, supra* note 2 at 34.

139. *Big M, supra* note 2 at 362. For support of a 'true equality' approach to religious freedom, see M. McConnell, "Accommodation of Religion" [1985] Sup. Ct. Rev. 1; Laycock, "The Remnants of Free Exercise," *supra* note 9. But see W.P. Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption," *supra* note 118; R. Teitel, "When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools" (1986) 81 Nw. U. L. Rev. 175; E. West, "The Case Against a Right to Religion-Based Exemptions," *supra* note 118.

The limit itself, as suggested in *Big M*, appears quite reasonable:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia,* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[140]

It should be noted that elsewhere in the decision, Dickson J. also subjects religion to the limit of the "public . . . morals,"[141] a limit that has been used in the United States to effect such improper intrusions on religious life as the criminalization of polygamous marriage by Mormons.[142] Use of a public morality justification to disturb a religious community's notions of morality simply affords too great an opportunity for state intervention, particularly where, as in the example of polygamy, the 'morality' in question is not closely related to the public's health or safety and the alleged immorality is a matter of custom that affects only the faithful. Nevertheless, with that phrase excepted, the limit appears to be as narrow as the right is broad.

In the same trilogy of decisions, however, the Court indicates that religious freedom may be more circumscribed than Dickson J.'s statement implies. In particular, the Court has suggested that not *all* infringements on freedom of religion will reach the threshold of a s. 2(a) violation. In *Edwards Books*, Dickson C.J.C. wrote:

> This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. . . . The purpose of s. 2(a) is to ensure that society does not interfere with *profoundly personal beliefs* that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. . . . The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.[143] [emphasis added]

Wilson J. further fleshed out this limit in *Jones,* writing:

> Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion.[144]

This approach suggests a number of dangers. First, of course, it once again adopts the language of religion as personal, privately held belief, thus impliedly leaving to the public sphere the dominance of liberalism and rationalism. Moreover, it

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140. *Big M, ibid.* at 361.
141. *Ibid.* at 354.
142. *Reynolds* v. *United States, supra* note 132.
143. *Edwards Books, supra* note 2 at 34–35.
144. *Jones, supra* note 135 at 578.

suggests that the courts will launch an inquiry into what constitutes a serious threat to religious belief or practice and what is a mere trivial or insubstantial breach. What may seem like trivial interference from a rationalist perspective, however, may be vital to one whose religion suggests that a certain practice is important or necessary to his or her faith.

Consider what was actually at issue in *Jones*: the appellant claimed that Alberta's requirement that he apply for certification for his private religious school would constitute a forced acknowledgement of the authority of the state, rather than the supremacy of God.[145] To Wilson J., the province's requirement seemed both reasonable and minor:

> No one is asking the appellant to replace God with the school board as the source of his right and his duty to educate his children. They are merely asking him to have the quality of his instruction approved by the secular authorities. . . . If the statutory machinery has any impact at all on the appellant's freedom of conscience and religion . . . it is an extremely formalistic and technical one.[146]

As La Forest J. pointed out, however, it would "negate history" to ignore the fact that for centuries, the church played a more significant role than the state in providing education;[147] it might also be added that only a poor understanding of religion would fail to recognize that, for many, to acknowledge an authority other than that of God is to betray one's faith. Clearly, Wilson J. is driven by a rationalist view that the interference simply did not rise to a serious level. This approach errs by failing to adopt the adherent's view of what constitutes a serious breach of religious faith; to Jones, the Court's decision may have been the equivalent of the state's asking him to risk his own damnation. Placing the limit as Wilson J. does at the level of the right rather than at the justification stage of s. 1[148]—and recall that in *Videoflicks* the Ontario Court of Appeal suggested a similar test, demanding that the practice in question be an essential tenet of the adherent's faith[149]—suggests that even the definition of 'freedom of religion' will be driven by non-religious reasoning.

An additional factor contributing to a statist, rationalist approach to freedom of religion is the structure of the *Charter*, which separates the right of religious freedom in s. 2(a) from the limit on a freedom as stated in s. 1:

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145. *Ibid.* at 575.

146. *Ibid.* at 578–79. Wilson J.'s point is somewhat misleading, however, as Jones did not object to the subsequent testing of his pupils, only to the *ex ante* requirement that the state sanction his school.

147. *Ibid.* at 591, *per* La Forest J. concurring.

148. For United States cases acknowledging that licensing requirements may offend religious beliefs and emphasizing the state's compelling interest rather than the triviality of the violation, see *e.g. People* v. *DeJonge*, 501 N.W.2d 127 (Mich. S.C. 1993); *State* v. *Anderson*, 427 N.W.2d 316 (N.D.S.C. 1988), cert. den. 109 S.Ct. 491 (1989). While the result may be the same, this approach at least need not treat a religious belief as trivial in order to dispense with the religious adherent's claim.

149. *Videoflicks*, *supra* note 21.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[150]

Lorraine Weinrib has suggested that s. 1 ought to be read to require the limit imposed to be based not on pure utilitarian grounds, which would favour the state, but according to whether imposing the limit will forward the values of a free and democratic society.[151] Unfortunately, the courts have neither escaped utilitarianism nor given full credit to the democratic interpretation of s. 1. Rather, I would argue that they have given s. 1 an interpretation that often stresses the primacy of the needs and goals of the state, and that reflects the rationalist and liberal tradition from whence the *Charter* was born.

The language of s. 1, as expressed in the definitive case of *R.* v. *Oakes*,[152] is the evaluative language of rational liberalism. It focuses substantially on the reasonableness of the state's goals; thus, among other factors, the state's concerns must be "pressing and substantial," and the impairment must bear a "rational connection" to the goal. The courts are required to ensure that the limit is proportionate to the goal. Nevertheless, I would suggest that, steeped as they are in the tradition of liberalism and rationalism, and facing state arguments that are crafted in rationalist terminology and serve liberal ideals, the courts are likely to take the state's claims more seriously than the claims of the believer that his or her ineffable, rationally incomprehensible needs must take precedence.[153]

Indeed, developments in s. 1 jurisprudence in recent years have suggested that the courts will apply the language of *Oakes* in a manner that is highly deferential to the state's claims of reasonableness.[154] In particular, the courts are unlikely to disagree with the state's claim that it is advancing a pressing and substantial objective.[155] In *R.* v. *Lee*,[156] for instance, the Supreme Court was willing to accept the efficient administration of justice as a pressing and substantial objective; for

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150. *Charter, supra* note 6.

151. Weinrib, "The Supreme Court and Section One of the Charter," *supra* note 17.

152. (1986), 26 D.L.R. (4th) 200 (S.C.C.).

153. But see Wilson J.'s dissent on the interpretation of s. 1 in *Edwards Books, supra* note 2, for an interpretive vision that accords significant weight to minority interests when balancing them with state claims. For a defence of *Oakes* against claims that it is too stringent, arguing instead that it rejects utilitarianism to find that "the same values undergird limits on rights as inform the rights themselves," see Weinrib, "The Supreme Court and Section One of the Charter," *supra* note 17 at 483. Unfortunately, if these values are themselves informed by pure liberalism rather than by a pluralist acceptance of the claims of non-rational experience, the effect on the religious adherent may be substantially identical.

154. For scholarship advancing this thesis, see *e.g.* C.M. Dassios and C.P. Prophet, "Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada" (1993) 15 Advocates' Q. 289; A. Lokan, "The Rise and Fall of Doctrine Under Section 1 of the *Charter*" (1992) 24 Ottawa L. Rev. 163; P.W. Hogg, "Section 1 Revisited" (1991) 1 N.J.C.L. 1.

155. See Dassios and Prophet, *ibid.* at 292, suggesting that judicial treatment of this section of the *Oakes* test "illustrates the trend from activism to deference."

156. [1989] 2 S.C.R. 1384.

religious observers, whose practices interfere with efficient state administration, such deference is plainly of concern.[157]

Moreover, the courts have also shown a frequent unwillingness to strictly enforce the minimal impairment test, preferring instead to be deferential to the state's legislative scheme. This resiling from *Oakes*'s strict standard is evident in the statement in *Edwards Books* that a "*reasonable* alternative scheme" [emphasis added] must be available before the legislation fails this branch of the test.[158] This ruling suggests a subtle shift in emphasis: rather than concentrate on the broad ambit of the infringement, the courts will inquire as to the reasonableness of the impairment *given the state's objective.* Since the courts take a broad view of what constitutes a pressing and substantial objective, any number of restrictions might then, if argued by a competent lawyer, be said to be reasonable.[159] This will jeopardize any religious observers whose practices fall under the scope of a restrictive piece of legislation, which might have been tailored more compassionately at the reasonable cost of some effectiveness.

The courts' deference to reason-driven state claims is borne out by their approach to the balancing of religious freedom against the claims of the state. Thus, in *Edwards Books*, Dickson C.J.C. ruled that an exemption that was not broad enough to include all Sabbatarian observers, and would thus have the effect of sundering the community of worshippers in a Saturday-observing faith,[160] constituted a reasonable limit on freedom of religion. What was balanced against the religious community's claims? In response, Dickson J. invoked the need for a common pause day, rhapsodizing over such secular values as "a picnic, a swim, or a hike in the park on a summer day, or a family expedition to a zoo."[161] In addition, he noted the difficulty of launching judicial inquiries into the believer's claim.

In *R.* v. *Gruenke*,[162] the Court found that there were insufficient policy interests to grant a *prima facie* privilege to religious communications between, for instance, priest and penitent. The decision thus suggested, in some cases at least, a subordination of the "human need for a spiritual counsellor"[163] to the goals of the state.

In *Hothi* v. *R. and Mitchell Prov. J.*,[164] the Manitoba Court of Queen's Bench upheld the order of a Provincial Court judge forbidding the presence of kirpans (Sikh

157. But see *R.* v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.) (law against spreading false news does not clearly show substantial objective).

158. *Edwards Books, supra* note 2 at 44.

159. See also the suggestion in *Irwin Toy* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 994, that the government only has to show a "reasonable basis . . . for concluding" that the regulation impairs a right as little as possible "given the government's pressing and substantial objective."

160. See the partially dissenting opinion of Wilson J.: "[To grant only a partial exemption] is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together." *Edwards Books, supra* note 2 at 61.

161. *Ibid.* at 42–43.

162. (1991), 67 C.C.C. (3d) 289 (S.C.C.).

163. *Ibid.* at 320, *per* L'Heureux-Dubé J. concurring.

164. [1985] 3 W.W.R. 256 (Man. Q.B.), aff'd [1986] 3 W.W.R. 671 (Man. C.A.).

ceremonial knives) in the courtroom. The court found that a reasonable limit existed; this decision was based partly on safety concerns, but largely on a "transcending public interest that justice be administered in an environment free from any influence which may tend to thwart the process."[165] Thus, statist concerns led the court to view the kirpan not as a religious implement worn by a full participant in the justice system, but as a threatening influence interfering with the justice system.[166]

In sum, the courts' view of reasonable limits may be seen as having been grounded in traditional liberal concepts and a rule of rationalism. Rational standards cannot help but support rational goals over religious needs. And while such standards may serve the social interests of the moment, they risk sacrificing the deeper public interest in the full participation of religious adherents in society.

B. LEADING AMERICAN CASES

Though the American freedom of religion jurisprudence is in large measure as skeptical toward religious claims as is the Canadian jurisprudence, a line of cases, beginning in 1963 with *Sherbert* v. *Verner*,[167] has created for some religious believers some exemptions from generally applicable laws.[168] This line of cases has shown a sympathetic understanding of the compelling nature of religious obligation and of some sects' need to maintain certain practices, or even their whole existence, outside the realm of state control. Thus, in *Sherbert*, a Seventh-Day Adventist who was fired for her refusal to work on Saturday (Adventists are Sabbatarian observers) was denied unemployment benefits since that statute barred benefits to workers who failed to accept suitable work when offered. The Supreme Court upheld her claim that the state's denial of benefits violated the Free Exercise Clause. Brennan J., writing for the Court, held that the state must show a "compelling state interest" in interfering with a religious practice.[169] Stewart J., concurring, acknowledged the accommodationist undercurrent of the result:

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165. *Ibid.* at 259.

166. Kirpans have been allowed in other contexts, subject to certain rules (such as the blunting of the blade), even where safety concerns might be greater, given the absence of guards and bailiffs. Compare with *Hothi* the richly pluralistic approach of Wachowich J. in *Tuli* v. *St. Albert Protestant Separate School* (1987), 8 C.H.R.R. D/3906 (Alta. Q.B). The decision granted an interim injunction against the school board to allow a student to wear his kirpan. Wachowich J. suggested at para. 3907 that the presence of the kirpan "would provide those who are unfamiliar with the tenet of his faith an opportunity to be introduced to and to develop an understanding of another's culture and heritage. . . . I might also comment, perhaps this Court secretly wishes it had been fortunate enough during my own formative years to have been exposed during that period of youth to the benefits of another's culture and religion so as to have developed a better appreciation of the richness of one's heritage." See also *Peel Board of Education* v. *Ontario Human Rights Commission* (1991), 80 D.L.R. (4th) 475 (Ont. Ct. (Gen. Div.)) (upholding Commission's finding that a ban on the wearing of kirpans in the schools was impermissible discrimination).

167. 374 U.S. 398 (1963).

168. See R.D. Rotunda and J.E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 2nd. ed., vol. 4 (St. Paul, Minn.: West Publishing Co., 1992) at 520.

169. *Sherbert* v. *Verner, supra* note 167 at 406.

> I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief.[170]

Similarly, in *Wisconsin* v. *Yoder*,[171] perhaps the high point of support of accommodation by the Court, the Amish were granted an exemption from state laws requiring attendance in high school. Despite the state's significant interest in educating children,[172] Burger C.J. found that it did not warrant interfering with the desire of the Amish community to live apart from society and according to their religious customs. The state could not prevail unless it showed a compelling interest, one "of the highest order."[173] Thus, the Court obviated any potential judicial bias in favour of the state's rational goals by according religious groups a right of accommodation unless an extremely important state interest was at stake; moreover, the state would be required to show that an exemption would actually hurt the operation of the legislation in question.[174] What is significant here is not just the exacting standard placed in the way of the state; equally important is the courts' sympathetic view of the need to meet spiritual obligations, even in the face of substantial state interests.

Unfortunately, as Christopher Eisgruber and Lawrence Sager have observed, "In the Court's more modern experience, the *Sherbert* line and *Yoder* emerge as exceptions rather than the rule."[175] In a series of cases in the second half of the 1980s, the Supreme Court began to swing from a sympathetic understanding of religion to a view that treated religion as a spanner in the works of the orderly workings of the liberal state. In *Goldman* v. *Weinberger*,[176] the Court upheld a military restriction against the wearing of a yarmulke while in dress uniform, accepting the military's argument that it had an interest in "the subordination of personal preferences and identities in favor of the overall group mission";[177] as the dissent noted, this interest had not prevented the military from allowing some individual dress, such as jewelry.[178] In *Estate of Thornton* v. *Caldor*,[179] the Court found unconstitutional a

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170. *Ibid.* at 415–16.

171. *Supra* note 31.

172. See *e.g.*, *Jones*, *supra* note 135 at 592.

173. *Wisconsin* v. *Yoder*, *supra* note 31 at 215.

174. See *e.g. Frank* v. *State*, 604 P.2d 1068 at 1073 (Alaska S.C. 1979) (reversing conviction for unlawful killing of a moose where the moose was killed for meat for a religious funeral ceremony): "It is not enough, however, simply to conclude that there is a compelling interest. . . . The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." See also *Quaring* v. *Peterson*, 728 F.2d 1121 (8th Cir. 1984), aff'd 105 S.Ct. 3492 (1985).

175. C.L. Eisgruber and L.G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" (1994), 61 U. Chi. L. Rev. 1245 at 1247.

176. 106 S.Ct. 1310 (1986).

177. *Ibid.* at 508.

178. *Ibid.* at 1319, *per* Brennan J. dissenting. He added: "A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet

statute requiring employers to accommodate their employees' sabbath preferences. In her concurrence, O'Connor J. suggested, "All employees, regardless of their religious orientation, would value . . . the right to select the day of the week in which to refrain from labor."[180]

In *O'Lone* v. *Estate of Shabazz*,[181] the Court upheld a prison's restrictions on some aspects of a Muslim prisoner's religious practices,[182] applying a mere reasonableness standard of justification to ensure "appropriate deference to prison officials."[183] In *Lyng* v. *Northwest Indian Cemetery Protective Assn.*,[184] the Court declined to apply a compelling interest test in a case involving plans by the government to build roads and commence logging operations on government land that had long been used for religious purposes by several native American tribes who believed the ground was sacred.

The culmination of these cases was the landmark decision of *Employment Division, Department of Human Resources* v. *Smith*.[185] In that 1990 decision, Scalia J. wrote a majority opinion stating that legislation need not meet the stricter compelling interest test if it is "neutral [and] generally applicable."[186] Accordingly, the Court upheld a denial of employment benefits to native Americans who were discharged from their jobs as state employees for ingesting peyote as part of the religious ceremonies of their faith.[187]

The Court's judgment is a singular example of the infusion of statist bias into judicial decision making and an example of how rationalist modes of judgment interfere with an understanding of the importance and compelling nature of religious claims. It is an example of the danger of rationalist assessments of the relative importance of religious obedience compared with obedience to temporal authority. Scalia J. warns that a society that applies a compelling interest test to all laws "would be courting anarchy," and that the danger "increases in direct proportion

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erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." *Ibid.* at 1321.

179. 472 U.S. 703 (1984).

180. *Ibid.* at 711. Michael McConnell notes: "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God." McConnell, "Religious Freedom at a Crossroads," *supra* note 134 at 125.

181. 107 S.Ct. 2400 (1987).

182. In fact, a mandatory practice, according to his beliefs; see *ibid.* at 2410, *per* Brennan J. dissenting.

183. *Ibid.* at 2404, *per* Rehnquist C.J.

184. 108 S.Ct. 1319 (1988).

185. 110 S.Ct. 1595 (1990) [hereinafter *Smith*].

186. *Ibid.* at 1601; see also 1602–05.

187. For a case upholding a Free Exercise claim against a criminal prosecution for the religious use of peyote, see *People* v. *Woody*, 394 P.2d 813 (Calif. S.C. 1964). In *R.* v. *Kerr* (1986), 75 N.S.R. (2d) 305 (N.S.C.A.), where the accused had argued that his use and cultivation of marijuana was religiously motivated, the Nova Scotia Court of Appeal affirmed the trial judge's ruling that the accused had failed to demonstrate the existence of a religious belief. The Court further stated that even if the accused's s. 2(a) rights had been violated, the application of the *Narcotic Control Act* would be upheld under s. 1 of the *Charter*.

to the society's diversity of religious beliefs."[188] He acknowledges that, since the majority tends to design the social structure to suit its own needs,

> [i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[189]

This decision has been amply criticized elsewhere.[190] It need only be noted here that the decision represents a clear statement that religion is viewed as an arbitrary, potentially fraudulent preference, and as a threat to the social order, which, from the point of view of the liberal state, it is. Of course, most faiths obey most temporal laws, few faiths would require any exemptions at all, and few exemptions would arise in sufficient numbers to significantly interfere with important state goals. Further, Scalia J.'s remark that the lack of protection for minority faiths is an unavoidable consequence of democratic government ignores the possibility that the First Amendment was designed to guard against just that contingency. In short, *Smith* demonstrates that a liberal, statist approach may not take religious claims seriously enough to allow them to overcome temporal authority.

Though this article has concentrated on Free Exercise claims in the American jurisprudence, much Establishment Clause jurisprudence can also be said to be the product of secularist, state-protective thinking. Perhaps the clearest example of this is the Supreme Court's decision in *Lemon* v. *Kurtzman*,[191] which has been called "the traditional establishment clause test."[192] *Lemon* established a three-pronged test to determine whether government action does or does not violate the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.[193]

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188. *Smith, supra* note 185 at 1604. For a Canadian expression of a similar sentiment, but which focuses on trivial religious claims, see Wilson J.'s statement in *Jones, supra* note 135 at 579: "To state that any legislation which has an effect on religion, no matter how minimal, violates the religious guarantee would radically restrict the operating latitude of the legislature. . . ." (citation omitted).

189. *Smith, ibid.* at 1606.

190. See *e.g.* McConnell, "Religious Freedom at a Crossroads," *supra* note 134; M. McConnell, "Free Exercise Revisionism and the *Smith* Decision" 57 U. Chi. L. Rev. 1109 (1990); Laycock, "The Remnants of Free Exercise," *supra* note 9. But see West, "The Case Against a Right to Religion-Based Exemptions," *supra* note 118; Marshall, "The Case Against the Constitutionally Compelled Free Exercise Exemption", *supra* note 118; W.P. Marshall, "In Defense of *Smith* and Free Exercise Revisionism" (1991) 58 U. Chi. L. Rev. 308 (defending certain conclusions reached in *Smith* but criticizing aspects of the judgment).

191. 403 U.S. 602 (1971) [hereinafter *Lemon*].

192. Tribe, *supra* note 22 at 1191.

193. *Lemon, supra* note 191 at 612–13.

Though *Lemon* has occasioned much scholarly and judicial disagreement, and is not always followed,[194] it remains a potent force shaping the course of Establishment Clause decisions.[195] Its force as good precedent was recognized by the Court as recently as 1993,[196] despite a sardonic rebuke from a dissenting Scalia J., who wrote:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* haunts our Establishment Clause jurisprudence once again. . . .[197]

The *Lemon* test is plainly shot through with the liberal democratic view of religion as a subject to be approached with the utmost suspicion, in terms that will inevitably exclude religion from the public sphere. First, the secular purpose prong, on its surface, fails to distinguish between the impermissible religious purpose of effecting a religious establishment or enforcing a religious orthodoxy and the valuable religious purpose of accommodating deeply held religious beliefs and practices or lending equal support to religious institutions; thus, any effort to aid the religious believer becomes suspect.[198] The second prong, too, "fails to distinguish between advancing *religion* and advancing *religious freedom*."[199] Finally, the entanglement prong, vague and cautious, suggests a singular fear of the corrupting influence of any contact between the two spheres, secular and religious. Any dealings with a religion, even those designed to aid its position as an autonomous and independent social institution, may raise the spectre of "entanglement." Thus, the courts mandate the relegation of religious institutions to a neglected and unfavoured status in the public sphere. And, as Stephen Carter points out, all this arose out of a case in

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194. See *e.g. Marsh* v. *Chambers*, 463 U.S. 783 (1983) (upholding the use of state legislative chaplains); *Lee* v. *Weisman*, 112 S.Ct. 2649 (1992) (upholding Establishment Clause claim without using the *Lemon* test); *Capitol Square Review and Advisory Bd.* v. *Pinette, supra* note 107, and *Rosenberger* v. *Rector & Visitors of Univ. of Va., supra* note 79 (most recent Establishment Clause decisions by the Court; not grounded on *Lemon*).

195. See *e.g. Aguilar* v. *Felton*, 473 U.S. 402 (1985) (relying on *Lemon* to strike down New York program under which public school teachers offered supplementary classes in parochial schools); *Larkin* v. *Grendel's Den, supra* note 76 (relying on *Lemon* to strike down Massachusetts law that allowed churches and schools to prevent liquor licences from being issued to restaurants within 500 feet of them). But see M.S. Paulsen, "*Lemon* is Dead" (1993) 43 Case W. Res. L. Rev. 795 (arguing that *Lemon* has been silently overturned by the Supreme Court and replaced with a coercion-based test); Bradley, "Dogmatomachy," *supra* note 83 (approving of *Lemon* but arguing that "the 'test' no longer even purports to decide cases").

196. *Lamb's Chapel* v. *Center Moriches School District*, 113 S.Ct. 2141 at 2148 n. 7 (1993), *per* White J.: "[T]here is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled."

197. *Ibid.* at 2149.

198. See Paulsen, *supra* note 195 at 801 (the prong was frequently read as if it required "functional hostility" toward religion); McConnell, "Religious Freedom at a Crossroads," *supra* note 134 at 129 ("To the extent that *Lemon's* purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance").

199. McConnell, *ibid.*

which the benefits to religion were both reasonable and modest: in *Lemon*, the Court found unconstitutional the simple benefit of providing to religious schools, along with all other private schools, reimbursement for the cost of textbooks, materials, and some salaries for the teaching of non-religious subjects.[200]

Thus, both halves of the Religion Clauses have exhibited the same liberal reluctance to treat religion as a valued social institution. Instead, while religious behaviour may be respected as a private activity, once religion interferes with the state's rational goals or attempts to receive the same favour as other institutions in society, it will be viewed as a potential threat to the social order.[201]

C. HARD CASES

While the cases above have given a general idea of the liberal, statist tendencies driving the *high* courts' views of freedom of religion—and their respect, at times, for religious freedom—it must be remembered that lower courts must give effect to these views on a daily basis in the adjudication of the multitude of disputes before them. These courts' views can be seen most clearly in an examination of hard cases involving serious competing claims by both the believer and the state; in these cases the courts are compelled to give the clearest exposition of their reasons for judgment for one side or the other. An examination of the courts' work in two related areas, both of which have seen recent decisions by the Supreme Court of Canada—custody disputes involving children, and the refusal of medical treatment for religious reasons—reveals that where both sides have strong claims, the liberal inability to treat religious belief as seriously as secularly based reasoning leads most often to the victory of temporal authority over religious obligation.

i) Custody and Access Disputes

As Madam Justice Beverley McLachlin has noted, the task of striking a balance between religious freedom and the protection of children is "one of the most difficult that can ever challenge a lawyer or confront a judge."[202] Divorcing parents often

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200. Carter, *The Culture of Disbelief*, *supra* note 13 at 110.

201. Abner S. Greene has suggested a slightly different model of the Religion Clauses, which disfavours religion with one half but grants it special dispensations with the other; see A.S. Greene, "The Political Balance of the Religion Clauses" (1993) 102 Yale L.J. 1611. Greene argues that the Establishment Clause should be read as excluding the enactment of any legislation that expressly advances religious values; in exchange for this disenfranchisement, religious adherents are granted exemptions from generally applicable laws under the Free Exercise Clause. *Ibid.* at 1613. With respect, this is no solution; it will merely create a Potemkin village of public discourse, in which religious identity and motivation will be hidden from view and religious adherents will be compelled to adopt stratagems of insincerity in order to join in public dialogue on political issues. Surely the best cure for the use of religious speech in the political arena is the fact that in a culture that is grounded in liberal democracy, those who use extra-rational language are likely to sway fewer people and hence less likely to form majorities. This fact, and the factionalism prevailing in a multi-religious society, make a draconian interpretation of the Establishment Clause unnecessary.

202. McLachlin, "Who Owns Our Kids?," *supra* note 95 at 158.

each wish to expose a child to his or her religion or to prevent the other parent from doing so. It is not surprising, then, to find that judicial reasoning in such cases lays bare many of the assumptions underlying judicial views of religion. At their worst, decisions in this area may exhibit an outright impatience with religious claims raised by parents. Thus, in *Hockey* v. *Hockey*,[203] the Ontario High Court of Justice overturned a trial judge's order that prevented a divorced father, a Jehovah's Witness, from taking his children to church; the children's mother, the custodial parent, was a Roman Catholic. The trial judge had stated:

> I can merely suggest in the strongest terms that the father disabuse himself of the idea that it is his duty or right to export his religious beliefs to his children. Failure to act sensibly in that regard might eventually lead to a denial of access.[204]

More commonly, judges ruling in custody disputes recognize the value of religion, but are willing to place stringent limits on a non-custodial parent's religion. This restriction is based on the easily over-extended argument that any conflict between the parents' religious beliefs will result in confusion for the child, and that such confusion is tantamount to a harm that violates the child's best interests. For example, in *Brown* v. *Brown*,[205] the Saskatchewan Court of Appeal upheld an order granting a father access to his children as long as he did not take them to religious services; the trial judge had said, "If both parents are pushing a different brand of religion it may well have a harmful effect on the children."[206] In *B.(L.)* v. *C.(J.)*,[207] the Quebec Court of Appeal set aside part of a custody order prohibiting the parent from taking his child to meetings of the Jehovah's Witnesses, but upheld the part of the order prohibiting him from taking the child door-to-door as part of his religious duties. In *Milton* v. *Milton*,[208] a father was ordered not to make *any* religious remarks in front of his children.

This harm-based approach, like the more impatient approach exhibited by the trial judge in *Hockey*, leads to this danger: it requires the courts to sever one part of a religious parent's beliefs from the rest, an act that severs the parent's very identity. Moreover, it does so on the assumption that the children's confusion at facing two competing faiths is more harmful than the benefit of allowing parents to convey their religious identities to their children. It must be acknowledged that some disputes will unquestionably result in more harm than mere 'confusion'; still, given the potential benefit of the free communication of the elements of selfhood between family members, the courts should at least be very cautious when considering claims of harm.

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203. (1989), 60 D.L.R. (4th) 765 (Ont. H.C.J.).
204. *Ibid.* at 767.
205. (1983), 3 D.L.R. (4th) 283 (Sask. C.A.).
206. *Ibid.* at 285.
207. (1991), 91 D.L.R. (4th) 27 (Que. C.A.).
208. (1985), 64 N.B.R. (2d) 165 (Q.B.).

The courts also evince a suspicion at non-traditional faiths and forms of worship (for example, the door-to-door proselytization in *B.(L.)*), which may have a disparate impact on parents who wish to share with their children a way of life that deviates from mainstream liberal society.[209] Thus, of particular concern to Veit J. in *Borris* v. *Borris*,[210] in which a father was restricted from sharing his religion with his children, was that the tenets of the father's Pentecostal faith included women's subservience to men and the damnation of non-Pentecostalists.[211] In *Droit de la famille—955*,[212] Malouf J. noted his concern that

> the principles by which the father lives as indicated in his preaching would direct the child's education, in the broadest sense of the term, against current trends, advocating, for example, paternal power rather than parental authority, austerity in leisure rather than, perhaps, participating in a sport, a dominant role for men rather than the principle of equality between the sexes.[213]

Similarly, in *Brown* v. *Brown*, one of the trial judge's concerns was the practice by members of the father's religious community of associating only with members of their own faith.[214]

It was to be hoped that the Supreme Court of Canada's recent decisions in the area would clear up the confusion and direct courts to show an appropriate respect for the value of parents' religion; however, the conflicting judgments in *Young* v. *Young*[215] and *Droit de la famille—1150*[216] show opposing approaches to religion even at the highest level.[217] The cases both involved disputes between parents over whether the non-custodial parent could expose his children to aspects of his faith. McLachlin J.'s judgment in *Young*, holding that the mere fact of conflicting religious beliefs does not present a threat to the child's best interests, shows a clear sensitivity to the importance of religion in the family's life and the benefits of

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209. See J. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992) at 87: "The courts are prejudiced against those religions that encompass an entire way of life, and which insulate themselves from the community as a whole, even though the courts purportedly claim not to prefer one religion over another. . . . 'Real harm' is more likely to be found if the parent is a Jehovah's Witness living in Quebec, than if the parent is a Catholic or Protestant, particularly if the congregant canvasses door to door with his children against the custodial parent's wishes."

210. (1991), 37 R.F.L. (3d) 339 (Alta. Q.B.).

211. In fairness, these concerns related to Veit J.'s concern that the children not be confused about the safety of their own souls or their mother's; but for fear of these two aspects of his faith, which may be shared quietly by more mainstream Christian and other sects, the father was restrained from conveying all other aspects of his faith.

212. [1991] R.J.Q. 599 (C.A.), noted in *B.(L.)* v. *C.(J.)*, *supra* note 207.

213. *Droit de la famille—955*, *ibid.* at 602 [translation].

214. *Brown* v. *Brown*, *supra* note 205 at 290–91.

215. (1993), 49 R.F.L. (3d) 117 (S.C.C.) [hereinafter *Young*].

216. (1993), 49 R.F.L. (3d) 317 (S.C.C.) [hereinafter *Droit de la famille*].

217. For critical commentary on these decisions, see W.G. How, Case Comment, "*Young* v. *Young* and *D.P.* v. *C.S.*: Custody and Access—The Supreme Court Compounds Confusion" (1994) 11 C.F.L.Q. 109; G.D. Chipeur and T.M. Bailey, "Honey, I Proselytized the Kids: Religion as a Factor in Child Custody and Access Disputes" (1994) 4 N.C.L.J. 101.

"coming to know [the children's] father as he was—that is, as a devoutly religious man devoted to the Jehovah's Witness faith."[218]

In *Droit de la famille*, however, the Court upheld a trial judge's finding that the parents' conflicting religions would harm the child, despite the lack of strong evidence in support of the finding, and approved the judge's order prohibiting the father from sharing with his child his practices as a Jehovah's Witness. Particularly distressing is L'Heureux-Dubé's J.'s reliance on the fact that "the trial judge's order refers to the appellant's 'religious fanaticism' and not to the normal exercise of his religion in respect of his child."[219] Quite apart from the endorsement of a loaded term such as "fanaticism," the decision suggests a standard for distinguishing acceptable and unacceptable religious behaviour that is bound to favour mainstream religious practices—practices that are commonplace and inoffensive to the liberal standard of behaviour.[220] One hopes that lower courts will follow the path set by McLachlin J. rather than her colleague.[221]

ii) Refusal of Medical Treatment

Many of the concerns observed in the preceding section apply to the refusal of medical treatment, particularly where a parent refuses treatment on behalf of his or her child. In such cases, both claims are heightened: the state's interest is in the preservation of life, whereas the person refusing treatment is concerned with the salvation of a soul.[222] This article acknowledges that the state's compelling interest in preserving a child's life means that the decision should not come down on the side of the parent refusing treatment for a child. Nevertheless, it will be argued that the state and the courts appear to be as motivated by skepticism about the validity of religious claims as they are by the compelling nature of the state's claim.

The jurisprudence on the refusal of medical treatment in Canada suggests that a competent adult individual's desire to follow his or her own beliefs, including the religious obligation to refuse life-saving medical treatment, will prevail over the state's interest in preserving that person's life.[223] Where children are involved,

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218. *Young*, *supra* note 215 at 155.

219. *Droit de la famille*, *supra* note 216 at 392.

220. See also *Hilley* v. *Hilley*, 405 So.2d. 708 (Ala. S.C. 1981) (court may consider evidence that the intensity of a parent's religious involvement harms her children), noted by D.L. Beschle, "The Use of Religion in Custody Disputes" in S.R. Humm *et al.* eds., *Child, Parent and State: Law and Policy Reader* (Philadelphia: Temple University Press, 1994). Joseph Mucci has argued that courts adjudicating in custody and access disputes should openly, rather than quietly, favour religions that teach liberal values. J. Mucci, "The Effect of Religious Beliefs in Child Custody Disputes" (1986) 5 Can. J. Fam. L. 353.

221. For a subsequent case following McLachlin J.'s view in *Young* and ignoring the dissent in that case by L-Heureux-Dubé J., see *Voortman* v. *Voortman* (1994), 4 R.F.L. (4th) 250 (Ont. C.A.).

222. See McLachlin, "Who Owns Our Kids?," *supra* note 95 at 150–53.

223. See *e.g. Malette* v. *Shulman* (1990), 67 D.L.R. (4th) 321 (Ont. C.A.); L.E. Rozovsky and F.A. Rozovsky, *The Canadian Law of Consent to Treatment* (Toronto: Butterworths, 1990) at 88–90. American courts have been split on the issue; see Rotunda and Nowak, *supra* note 168 at 565–66.

however, the courts are likely to adopt the view stated by Rutledge J. in *Prince* v. *Commonwealth of Massachusetts*:[224]

> Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[225]

Thus, the courts will allow the state to override a parental wish that a child not receive medical treatment.[226]

In *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, the Ontario Court of Appeal recognized that interfering in the family's religious decisions on matters of ultimate importance does implicate a parent's s. 2(a) rights, even though it is the child that undergoes treatment.[227] The Court found, however, that the parents' right to determine their child's religious beliefs "is protected by s. 2(a) only so long as it does not impede the vital and overriding state concern with the life and health of a child."[228]

The Court of Appeal's conclusion that the state's interest in a child's life is compelling is incontrovertible; what is missing from the decision, however, is some recognition of the religious family's fear of the arguably graver possibility of damnation or other extratemporal consequences. Without some indication of how seriously the courts will take religious claims when considering whether the state may order treatment, the religious parent may justly fear that the court's reasoning is informed by simple rationalist skepticism about the very validity of religious claims. This attitude was expressed by the Missouri Court of Appeals in *Morrison* v. *State*:[229]

> The fact that the subject is an infant child of a parent who, *arbitrarily,* puts his own theological belief higher than his duty to preserve the life of his child cannot prevail over the considerable judgment of an entire people, in a case such as this.[230] [emphasis added]

This view that religion is fundamentally an arbitrary choice, in comparison with the

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224. 321 U.S. 158 (1944).

225. *Ibid.* at 170.

226. See *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto* (1992), 96 D.L.R. (4th) 45 (Ont. C.A.); *Jehovah's Witnesses* v. *King County Hosp.*, 278 F.Supp. 488 (W.D. Wash. 1967), aff'd 390 U.S. 598 (1968); K.J. Rampino, Annotation, "Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections for Child Whose Life is Not Immediately Endangered" 52 ALR 3d 1118; Rozovsky and Rozovsky, *supra* note 223 at 87–88.

227. *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto, ibid.* at 76.

228. *Ibid.* at 79.

229. 252 S.W.2d. 97 (Mo. Ct. App. 1952).

230. *Ibid.* at 101. Quoted in F.A. Rozovsky, *Consent to Treatment: A Practical Guide*, 2nd. ed. (Boston: Little, Brown, 1990) at 339.

state's purportedly rational and incontestable emphasis on life and health, may also be detected in cases that have allowed the state to order medical treatment over religious objections, even where the treatment is not life-saving.[231]

The Supreme Court of Canada's recent affirmation of the Ontario Court of Appeal decision in *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*[232] has shed some further light on tensions within the Court as to how to treat religious freedom in hard cases. While the Court agreed that the *Charter* should not prevent the Children's Aid Society from gaining temporary custody of the child, the Court split 5 to 4 on how to apply s. 2(a). Thus, La Forest J. for the majority on this point found that the parents' religious freedom had been infringed, calling the right to rear one's child according to religious beliefs, including choosing medical treatments, a "fundamental aspect of freedom of religion";[233] however, he held that the infringement was justified under s. 1.

In short, La Forest J. was willing to concede that choosing one's child's medical treatment can play a central role in the value system of a religious adherent. Of equal interest, however, is his treatment of the *child*'s interests:

> While it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so. S. was only a few weeks old at the time of the transfusion.[234]

This view is even more sharply stated by the minority opinion, written by Iacobucci and Major JJ. In urging the matter to be settled at the level of s. 2(a) rather than s. 1, they wrote:

> The appellants proceed on the assumption that S. is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, S. has never expressed any agreement with the Jehovah's Witness faith, nor, for that matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon S.'s freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.[235]

This opinion indicates the Court's continuing inclination to view religion not as a cultural phenomenon or (at least for some adherents) communitarian activity,

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231. See *Re Sampson*, 278 N.E.2d. 686 (N.Y. Ct. App. 1972) (upholding family court judge's order authorizing physicians to perform surgery to improve a disfigured youth's appearance despite his mother's religious objections); *Re McTavish and Director, Child Welfare Act* (1986), 32 D.L.R. (4th) 394 (Alta. Q.B.) (upholding provincial court decision overruling parents' refusal to approve blood transfusions for infant, despite evidence that the parents' position was not medically unreasonable).

232. (1995), 122 D.L.R. (4th) 1 (S.C.C.) [hereinafter *B.(R.)* v. *C.A.S.*].

233. *Ibid.* at 49.

234. *Ibid.*

235. *Ibid.* at 91.

but as a matter of individual choice. The result may be appropriate, by liberal standards; but it offers little consolation to religious families whose understanding of religion is as *social* in nature as it is individual, and who believe that God will judge their child according to its conduct, regardless of whether the child has made an autonomous choice. To them, the Court's words indicate that a child is but an empty vessel, which nominally carries its parents' faith but is essentially irreligious and effectively secular until it is old enough to make 'rational' decisions.[236]

It is true that in cases involving children who require medical attention, the state's claim is at its most pressing; for *this* reason, I would argue that interventions that are *necessary* to protect either a child's health and life or the health and welfare of others (as in cases where religious adherents seek exemption for themselves or their children from public vaccination programs) are justifiable. But courts that are quick to discount the countervailing religious claim, seeing it as a vague or philosophical position, are likely to make two mistakes. First, they will fail to give due weight to all the factors that should be considered, spiritual and medical. *Re L.D.K.; Children's Aid Society of Metropolitan Toronto* v. *K. and K.*[237] offers a glimpse of a proper approach in this regard. Main Prov. J. faced the issue of a 12-year-old child of Jehovah's Witnesses, stricken with leukemia, who shared her parents' view that she should not undergo chemotherapy, which would involve blood transfusions. The Children's Aid Society applied to have the child declared in need of protection under the *Child Welfare Act*[238] to ensure that the treatment would take place. Acknowledging the sincerity of the child's religious views and her reluctance to undergo chemotherapy in any case, the judge accepted her and her family's wish that she try a mega-vitamin therapy at home, where she

> would be surrounded by her family and . . . be free to communicate with her God. She would have peace of mind and could get on with attempting to overcome this dreadful disease with dignity.[239]

Main Prov. J. added:

> With this patient, the treatment proposed by the hospital addresses the disease only in a physical sense. It fails to address her emotional needs and her religious beliefs. It fails to treat the whole person.[240]

Second, courts that are skeptical of religious claims will fail to treat the religious family *as a community*—as a group of individuals who find religious fulfilment

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236. For a recent critique of 'parental rights' arguments that treat the child as falling under the parents' religion, see J.G. Dwyer, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 Calif. L. Rev. 1371.

237. (1985), 48 R.F.L. (2d) 164 (Ont. Prov. Ct. (Fam. Div.)).

238. R.S.O. 1980, c. 66.

239. *Re L.D.K., supra* note 237 at 169.

240. *Ibid.*

and meaning as a communal entity. As I have suggested, an individual rights-based judicial culture is, rightly, reluctant to treat individuals as non-autonomous, particularly when dealing with children who have yet to develop their own sense of judgment;[241] but such an approach clearly will not entirely reflect the reality of religious experience as the believer knows it.

Finally, it should be clear that no matter how sensitively the courts approach this area, their decisions may send the message that any category of thinking that cannot be apprehended by a legal tradition steeped in rationalism is, in some way, wrong; after all, if the court took the religion's belief seriously, it would have much more difficulty upholding the state's claim against the possibility of eternal damnation.[242] Despite the state's strong claim that a just society must protect the life of its children, these cases should be among the hardest to decide, not the easiest. That few courts would find these cases truly difficult leaves us with a clear conclusion, one that may be applied far beyond the precincts of this one issue: "The law, in fact, seems to have comparatively little difficulty in discounting religious belief."[243]

VI. In Defence of Religious Freedom: Evaluating and Valuing the Culture of Belief within a Liberal Democracy

This article has shown the ways in which liberal democracy devalues religion and religious freedom: it does so by viewing religion through the lens of the unbeliever and treating it as a mysterious and threatening force that cannot be understood by rational, secular reasoning and so must give way to the state's rational goals. But assuming that we do sometimes need to curtail religious freedom, the mere knowledge that the legislature and the courts may have a bias in favour of the state does not determine when that interest should give way to the claims of the religious believer. A balance must be struck. How, then, in striking this balance, should we *value* religion?

As we saw in Part III, the Supreme Court's judgment in *Big M* begins to answer that question. But *Big M* is just one case dealing with one dispute, and so is too slender a reed on which to hang all future judgments about the value of religious freedom. Yet little has been written since that judgment, by the courts or Canadian

241. See *e.g.*, *Re C.P.L.* (1988), 70 Nfld. & P.E.I.R. 287 at 302 (Nfld. S.C. Unif. Fam. Ct.), *per* Riche J. (finding a violation of s. 7 but not s. 2(a) in the apprehension of a child by the Director of Child Welfare for the purpose of surgery): "A child does not have a religious belief until it reaches an age of reason." Riche J. does, however, acknowledge the important right of parents to raise a child in their religion until she reaches maturity. *Ibid.* at 302–03.

242. See Carter, *Culture of Disbelief*, *supra* note 13 at 221: "By forcing the Witness to live and be damned rather than permitting her to die and be saved, the state is necessarily treating her religious claim not as irrelevant, but as false. . . . Part of the trouble with contemporary liberal epistemology is that it is not capable of treating as a factual inquiry a question like 'Can the Jehovah's Witness achieve salvation after receiving a blood transfusion?'. . . ." See also Ogilvie, *supra* note 22 at 112.

243. J.K. Mason and R.A.M. Smith, *Law and Medical Ethics*, 4th ed. (London: Butterworths, 1994) at 230.

legal scholars, to expand our understanding of the role of religion in a liberal democracy, and why we may want to protect it even against rational state claims.[244] This places s. 2(a) in a fragile, precarious position; for, as William P. Marshall has noted, "A jurisprudence that is not based upon an understanding of the values involved is likely to be perceived as shallow, inconsistent, and nonpersuasive."[245] Indeed, it is clear that a jurisprudence based on an inadequate understanding of the values and purpose of religious freedom *will* be shallow and unpersuasive, particularly to those religious communities the court most needs to persuade.[246] Protecting religious freedom thus demands a full accounting of the value of religion and of the justification for according it special protection. In this section, I shall suggest a number of ways in which religion is unique and valuable, both to the individual believer and to society, and thus worthy of protection. If liberalism's greatest threat to religion is its emphasis on rationalism, then this section may be seen as an effort to turn rationalism around and use this tool of liberalism to demonstrate the value of religion to the liberal state in terms it can understand.

A. RELIGION AS INTERMEDIARY COMMUNITY

Beyond the language of individual rights in liberal democracies is the awareness that society is made up of *groups*, communities to which individuals may belong. Though to the outsider such communities may seem less significant than the individuals that comprise them, to the participant the community as a whole may be more real and more important than his or her own part in it. The individual may subsume his or her identity as an individual to the authority of the community, speaking and acting through the corporate community rather than directly as an individual. Thus, the group becomes both a central source of an individual's identity and an intermediary providing effective and meaningful interaction with citizens outside the group.[247]

The value of intermediary communities has been recognized in the Constitutions of both Canada and, arguably, the United States. In Canada, as has been noted, the *Charter* constitutionalizes the principle of multiculturalism,[248] providing both a

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244. For some treatments of this issue, see Weinrib, "Reading the Lesson," *supra* note 62; Cotler, "Freedom of Conscience and Religion: Section 2(a)," *supra* note 104.

245. W.P. Marshall, "Truth and the Religion Clauses" (1994) 43 DePaul L. Rev. 243 at 243.

246. See also J.H. Garvey, "Free Exercise and the Values of Religious Liberty" (1986) 18 Conn. L. Rev. 779 ("One thing that has always bothered me about free exercise jurisprudence is that it rests on values we have seldom tried to state, much less justify"); S.D. Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse" (1991) 140 U. Pa. L. Rev. 149, quoted in Marshall, "Truth and the Religion Clauses," *supra* note 245 ("[I]f we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment").

247. See Carter, *Culture of Disbelief*, *supra* note 13 at 37: "Indeed, from Tocqueville's day to contemporary theories of pluralism, the need for independent mediating institutions has been a staple of political science."

248. *Charter*, *supra* note 6, s. 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

recognition of the value of intermediary groups and an admonition to protect these groups' well-being. In the United States, much scholarly attention has recently been centred on the notion of civic republicanism, which, it has been suggested, undergirds the development of the American political and constitutional structure. This theory suggests that the very nature of republican democracy recognizes the importance of separate groups within society, which band together to collaborate in the deliberative process of democracy.[249] In this regard, Mark Tushnet has noted:

> By distinguishing between religion and other forms of belief, the first amendment contains a nonindividualist principle. It thus signals that the Constitution is not an entirely individualist document. The Constitution's communitarian commitments take the form of an implicit appeal to a tradition of civic republicanism which was more vibrant in the framers' world than it is in ours.[250]

Further evidence supporting the protection of intermediary groups may be seen in the famous "Footnote Four" in the Supreme Court's decision in *United States* v. *Carolene Products Co.*,[251] in which Stone J. (as he then was) said:

> Nor need we inquire into whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[252]

Both through its singling out of religious groups and the language of "discrete and insular minorities,"[253] the footnote suggests that religions and other intermediary groups are valuable but vulnerable to majoritarian decision making, and so deserve special protection.[254]

Thus, one value of religion is its role as an intermediary institution that provides value and identity for the individual worshipper and a means of interaction between the religious community and society at large. In a strongly pluralistic society such as ours, this should be a persuasive statement in favour of religious freedom.

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249. See *e.g.* Sunstein, *The Partial Constitution*, *supra* note 107.

250. Tushnet, *Red, White, and Blue*, *supra* note 129 at 274.

251. 304 U.S. 144 at 152 n. 4 (1938).

252. *Ibid.*

253. For a significant discussion of this phrase as an aid to structuring and understanding constitutional rights in the United States, see J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

254. For a discussion of *Carolene Products* and the protection of religious minorities, criticizing the Supreme Court's recent decisions on religion, see A.D. Boyle II, "Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence" (1993) 3 Const. L.J. 55 at 107–13.

B. RELIGION AS POLITICAL INTERMEDIARY

A natural corollary to the idea of religion as intermediary group is that religious groups may be a source of political action. Religious believers and groups arrive at a code of moral behaviour through prayerful consideration of the will of God (or, in less deistic religions, through simple consideration of the moral and ethical conclusions following from their spiritual beliefs) rather than through obedience to the dictates of the state. Such groups thus represent an alternative and potentially competing source of moral understanding. Therefore, due to religiously motivated beliefs, religious groups may seek changes in the legal *status quo*, by bearing witness against a particular legal rule or political regime or through actual disobedience of the law.

Because religious groups derive their moral principles from a source other than the state's authority (principles that may also differ from prevailing majoritarian notions of proper behaviour), they may arrive at—and fight for—a proper conception of justice where the state and the majority sometimes fail. Moreover, because religions recognize the permanence of only one authority—that of God, karma, or whatever spiritual order is at the heart of the ultimate concerns of religion—they will react against any tendencies on the part of the state to arrogate to itself inordinate power. This is why William Klassen identifies "the major role of religion in any society as monitoring the claims governments make for themselves and protesting the absoluteness of its power inherent in any state."[255] Indeed, as Stephen Carter notes, the very existence of an autonomous religious group within society is a profoundly anti-authoritarian statement:

> A religion is, at is heart, a way of denying the authority of the rest of the world; it is a way of saying to fellow human beings and to the state those fellow humans have erected, "No, I will *not* accede to your will."[256]

The value of religion as a powerful force for resistance and social change has long been recognized. Religion has played a central role in advocating social change well into recent decades, even as religiosity on the part of many individuals has waned.[257] Tocqueville noted that religion provides a valuable moral restraint on the state by informing the moral consciences of the governors and the governed.[258] In recent history, a prominent example of religion as a political force has been

255. Klassen, "Religion and the Nation," *supra* note 7 at 98.

256. Carter, *Culture of Disbelief, supra* note 13 at 41.

257. See Howe, *Garden and Wilderness, supra* note 68 at 62: "We all know that American churchmen and American churches have, throughout our history, played an important role in public affairs. . . . Whether the cause has been abolition, prohibition, or integration, the churches and their leaders have played a central, sometimes a crucial, role in translating what the churches perceived to be moral principle into rules of law."

258. See A. de Tocqueville, *Democracy in America*, vol. 1 (New York: Everyman's Library, 1994) (1835) at 305: "Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust."

the civil rights movement in the United States, as exemplified in the person of the Rev. Martin Luther King. King's actions can be seen as much as a reflection of his concern for the spiritual life of the nation as a reflection of his concerns over the temporal effects of injustice; his call for civil disobedience against laws that do not "[square] with the moral law or the law of God"[259] and his cry that he was "compelled to carry the gospel of freedom"[260] clearly indicate the religious thread running through his activism.

In *Ontario (Attorney General)* v. *Dieleman*, Adams J. noted:

> Dr. Martin Luther King's inspirational speeches often called on God and on spiritual values. But I am sure many who joined in that movement did so for reasons not based on their religious faith.[261]

Of course, beyond the inspiration they offered to others, many who led and joined the movement, King included, *were* substantially motivated by religious compulsion. Just as King called on God in his speeches, so it would be accurate to say that according to his perception, Dr. King's God and his spiritual values called on *him* to make the speeches and to lead the fight for change. To this day, religious commitments to, *inter alia*, "the sacredness of life, to peace, to justice, to freedom, or to the independence of religious organizations from improper government regulation"[262] continue to motivate social criticism and activism.

Two risks are posed when religion is permitted to play a productive part in the political realm: religious groups might be forced to homogenize their beliefs to achieve effectiveness as public actors[263] or they might "not merely pluralize public life, but may attempt to sacralize it, by casting secularism out of the political temple and replacing it with sectarianism."[264] Moreover, some may strongly oppose certain positions taken by religious groups; as Sanford Levinson has commented, "the moral valence assigned to *resistance* may well depend on who is resisting what."[265] None of these concerns, however, equals the value of religion as a social and political force. Religious groups in societies that recognize the value of pluralism, and whose practices and peculiarities are respected, are less likely to need to resort to homogenization when seeking social change. As for fears of

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259. M.L. King, Jr., "Letter From Birmingham Jail" in *Why We Can't Wait* (New York: Signet Books, 1964) at 82.

260. *Ibid.* at 77.

261. *Ontario (Attorney General)* v. *Dieleman*, *supra* note 42 at 331.

262. See statement of the American Lutheran Church in Perry, *Morality, Politics, and Law: A Bicentennial Essay*, *supra* note 125 at 206.

263. See K.M. Sullivan, "God as a Lobby" (1994) 61 U. Chi. L. Rev. 1655 at 1668; Ogilvie, *supra* note 22 at 107, notes the dangers of blending religious beliefs with "apparently compatible secular ideologies" in order to communicate with and get along with others: "But accommodation has too often metamorphosed into assimilation, so that purportedly Christian communities often minimize and trivialize belief to the point of non-recognition."

264. Gedicks, "Some Political Implications of Religious Belief," *supra* note 109 at 447.

265. S. Levinson, "The Multicultures of Belief and Disbelief" (1994) 92 Mich. L. Rev. 1873 at 1883.

hegemony, if pluralistic, Madisonian values prevail, the multiplicity of sects, with their divergent interests, should ward off any serious fear of tyranny by a religious majority (particularly where, as in Canadian society, evangelical religions are less prominent).[266]

Furthermore, as for the concern about the particular views that religious groups may espouse, such differences already exist between non-religious groups and should not bar entry into the public sphere by religious groups. Indeed, it is not the particular change advocated that makes religion important; it is the fact that a social force exists outside the state, operating according to a different worldview and denying the absolute authority of the state and the infallibility of its views. In this sense, religion serves the "checking" value put forward by Vincent Blasi as a justification for the Speech, Press, and Assembly clauses of the First Amendment:

> [It] can serve in checking the abuse of power by public officials. . . . [It] facilitat[es] a process by which countervailing forces check the misuse of official power . . . by protecting the dignity of the individual, [and] maintaining a diverse society in the face of conformist pressures.[267]

Religion, then, has a strong instrumental value as a source of and inspiration for social criticism and activism, and as a structural check on the absolute authority of the state.

C. RELIGION AS A SOURCE OF NEW IDEAS

Beyond any particular political dispute in a liberal democracy, one must remember that the nature of deliberative liberal democracy suggests a continuing clash of ideas in the civic arena, in which liberalism and secularism are generally observed as the ground rules of the debate; it is somewhat like a continuing dialogue between like-minded people whose opinions vary on minor points and not major premises. For example, however heated a public debate about gun control may become, one can be certain that both sides will argue from the same general common values: safety, security, freedom, responsibility, etc. Both sides will understand the terms of the debate.

Religion, for its part, may enrich liberal democracy by arguing from *outside* the sphere of common definitions and concepts. Religion derives its principles from prayer, fellowship, revelation, and the reading of sacred texts, among other sources. Therefore, it may come up with values and arguments that do not resemble anything seen in the moral structure of liberal democracy. In this way, religion may generate new modes of reasoning and contribute new ideas and methods to the

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266. For an argument that the constitutional structure designed by Madison has both protected religion and prevented it from becoming too powerful, see C.L. Eisgruber, "Madison's Wager: Religious Liberty in the Constitutional Order" (1995) 89 Nw. L. Rev. 347.

267. V. Blasi, "The Checking Value in First Amendment Theory" [1977] Am.B. Found. Res. J. 521 at 527.

liberal democratic dialogue, which would otherwise run the risk of growing stale and self-justifying.[268]

Thus, not only may religion argue for political change, but it may transform and renew the political debate (this is meant in a broad sense, of course) by introducing unfamiliar concepts and principles.[269]

D. RELIGION AS CORE SELF-EXPRESSION

So far, this section's discussion of the value of religion has focused on religion's structural value in contributing to the health and vigour of the liberal democratic polity, rather than adopting the common liberal focus on the value of rights to the individual. I have done so to suggest that religion's value is greater than may be recognized by a pure rights-based approach and that religious *groups* are essential to the social and political well-being of liberal democracy. In a pluralistic society, it has been argued, we must recognize the structural benefits of protecting religious groups and their practices, even where they deviate from the state's goals. A larger political benefit is derived from preserving the health of mediating institutions to serve as a check on the state.

Religion is equally valuable, however, if viewed through the lens of individual rights. As a society that exalts the autonomy of the individual, we value those aspects of an individual that represent the most profound and central parts of his or her identity—and religion is surely a central aspect of one's identity. In *Irwin Toy* v. *Quebec (A.G.)*,[270] the Supreme Court recognized three core values in the s. 2(b) right of freedom of expression, and each is equally applicable to freedom of religion: "[T]he pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing."[271] If the justifications for religious freedom adumbrated above address participation in the community, we must also remember the centrality of religion to the individual self-fulfilment of the believer.[272]

The Court directly recognized this aspect of religion in *Big M*, in which Dickson J. emphasized "the centrality of individual conscience and the inappropriateness of

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268. See Eisgruber, *supra* note 266 at 374: "Reason must be open to the possibility of its own inadequacy." See also *ibid.* at 349: "[R]eligion is a source of especially virulent political factions, but it is also a valuable haven for political and philosophical diversity."

269. This militates against Daniel Conkle's suggestion that some religious arguments may be more valuable in the public sphere because of their ability to communicate with the secular world and show openness to competing ideas; see D.O. Conkle, "Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law" (1993–94) 10 J.L. & Religion 1. Thus, fundamentalism, for example, is not capable of the "deliberative, dialogic decision-making process" he thinks is necessary for productive political debate. *Ibid.* at 16. But if we wish to find sources of ideas far outside the commonplace terms of debate of the liberal arena, we must look to religions that exist outside the common framework of liberal debate.

270. *Supra* note 159.

271. *Ibid.* at 977.

272. For a discussion of the truth-seeking value of religion, see Marshall, "Truth and the Religion Clauses," *supra* note 245.

governmental intervention to compel or to constrain its manifestation."[273] The need to protect the autonomous individual's strongly held beliefs is particularly important because such beliefs may be vulnerable to modern social pressures, as the Supreme Court of California eloquently noted in *People* v. *Woody*:

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however, unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.[274]

Clearly, then, religion serves more than a structural value. When we value religion, we express the same impulse that underlies the very creation of the *Charter*—namely, the impulse to cherish and protect the individual's fundamental right to shape and express an identity, even in the face of state imperatives.

E. RELIGION AS COMPULSION

Recognizing the centrality of religion to the individual leads naturally to the observation that, whereas some non-religious beliefs may be deeply held, religious beliefs are unique in creating what, to the religious believer, is an *external* compulsion—an obligation based on one's duty to a supernatural force or being. The price of disobedience may be the loss of salvation, a punishment beyond the scope of mere worldly punishments such as fines or imprisonment. But the fact that the state's punishments are minor compared to spiritual punishment does not mean that they are insignificant, or that the religious adherent does not *want* to obey the law. Thus, the religious observer is in a vulnerable position, caught between his or her desire to be a good citizen and the ineluctable call to religious duty and obedience.[275]

If we value deeply held beliefs, and if we are sympathetic to the premises of religious belief despite our own lack of particular religious beliefs, then we must recognize that respect for religious compulsions dictates a strong protection of religious freedom. This is so not merely for the sake of the individual, but for the sake of society. After all, religious believers are as likely as any others to be—and to want to be—good citizens. If we value their participation in society and their loyalty to the common project of creating a just state, we must respect their absolute need, under some circumstances, to be exempted from particular laws; otherwise, we lose the willing participation in society of a valued citizen. Perversely, it has been suggested that respect for religious freedom may entail allowing barriers to remain in the path of the religious observer.[276] But such views do not recognize the

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273. *Big M, supra* note 2 at 361.

274. *People* v. *Woody, supra* note 187 at 821.

275. See McConnell, "Neutrality Under the Religion Clauses," *supra* note 40 at 152: "[T]he believer stands in a unique position with respect to secular government: he is vulnerable to inconsistent obligations that cannot be reconciled in purely secular terms."

276. See West, "The Case Against a Right to Religion-Based Exemptions," *supra* note 118 at 637:

full value of the religious citizen as a *citizen,* and the importance of preserving this value by not branding such people as lawbreakers. Rather, the state should ease the way for the religious observer, so he or she is not faced with a choice between duty to God or to Caesar, and thus forced to risk being lost to one or the other.

Finally, as A. Bradney has pointed out, we must recognize that how we treat religious compulsions is more than a sign of how much we value individual autonomy or our desire to preserve a citizen's benefit to society. It is also a telling sign of the liberal state's own moral principles:

> Faced with an individual conscience, resolved to act for itself alone, a mere legal system can do nothing. Penalties will not alter the true believer's mind. The only question for a legal system that is held out as being liberal is, in punishing or stigmatising a believer for their faith, what damage will the legal system do to the conception of itself?[277]

F. THE INTRINSIC VALUE OF RELIGION

Finally, a proper evaluation of religion and its value must acknowledge that beyond any political, instrumental, or rights-based justifications for religious freedom is the simple belief that religion is an intrinsic good, whose value can be recognized without recourse to demonstrations of its value to society at large.[278] After all, this article has argued that religion must be valued on its own terms, for its intrinsic worth, and not just for the ways in which it benefits the liberal state.

An intrinsic worth justification for religion argues that religion is, in some indefinable way, *sui generis,* not merely a special species of conscientious belief. This may pose difficulties to the strictly rational liberal mind: in the rational conception, moral beliefs that are a part and parcel of religious faith may seem identical to moral principles not derived from religion, while the theological aspects of religious belief will simply seem like any other arbitrary, unprovable assertion. But a sympathetic understanding of religion should treat religiously derived morals and theological

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"[F]rom the standpoint of certain religious traditions, having to 'stand up' for the faith from time to time is beneficial to that faith." See also S.L. Carter, "The Resurrection of Religious Freedom?" (1993) 107 Harv. L. Rev. 118 at 137: "The late Robert Cover was doubtless correct to point out that the centrality of a proposition to a religion is not truly tested until all of the state's forces—not excluding the courts—line up on the other side and the oppressed religion must decide whether to abandon what it claims to cherish. One hopes that the opportunities for testing of that kind will be rare."

277. A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993) at 161.

278. Scott Idleman, reviewing Carter's *The Culture of Disbelief,* expresses a concern that instrumental justifications for religious freedom, and in particular religious exemptions, will not protect a religious practice when it will not lead to a social benefit. S.C. Idleman, "The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief" (1994) 142 U. Pa. L. Rev. 1313 at 1314. While it is unlikely that social benefit analysis would take place on a case-by-case basis once the general principle of the instrumental value of religion has been recognized, his concern does point to a deficiency in instrumental justifications for religion.

beliefs as parts of a whole, inseparable and mysterious, easily recognized but always eluding definition. The intrinsic value argument is not subject to proof or justification and it is dependent on the willingness of a skeptical society to respect a leap of faith. Consequently, it is plainly ill-suited to the culture of the law and liberalism. All the same, I would argue, as an intuitive proposition it is both clear and compelling. Even those who lack religious faith can understand the ineffable and invaluable quality of religious commitment: it is a quest for possibilities that are foreclosed by rational systems of belief, a claim to transcendence in a world whose physical nature apparently speaks of inherent limits. Scott Idleman sums up religion's intrinsic value most eloquently:

> At its core, intrinsic worth rests on the possibility that there is meaning to be found beyond the profanity of our day-to-day, hand-to-mouth existence—within realms we might call the spiritual, or the supernatural, or the sacred—and on the ultimate or transformative significance that this possibility holds for our lives as individuals and as communities.[279]

VII. A Model Approach to Freedom of Religion

If the liberal state is infused with a full understanding of the value of religion, and recognizes the instrumental and intrinsic benefits of religion that this article has described, how will the state approach the guarantee of freedom of religion? More specifically, if we now understand more clearly the value of s. 2(a) of the *Charter*, what general rules should govern our approach to the right and to the limits to that right provided by s. 1 of the *Charter*? While it is difficult to create such rules in the absence of specific disputes, I suggest that any state consideration of religion, whether by the legislature or the courts, should be informed by the following three principles.

First, in any conflict between religion and the state, the state or the court should attempt, when balancing the interests of the religious believer, to approach the problem *from the believer's perspective.* As we have seen, many judgments in disputes between state goals and religious beliefs are informed by a skepticism that treats religion as an individual belief—a valuable belief, perhaps, but a mere belief nonetheless. Against this belief is mustered the rational, provable interests of the state. Particularly where there may already be a general attitude of deference to the state,[280] a religious claim will be far more likely to fall short in the balance if it is examined from a rationalist perspective, or even a sympathetic outsider's perspective.

Accordingly, a legislature drafting legislation that may affect religion, or a judge balancing religious freedoms against state imperatives, should attempt to give the

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279. *Ibid.* at 1367.

280. See Dassios and Prophet, *supra* note 154.

religious claim the value that the believer would assign to it. This entails a temporary abandonment of the rationalism that is a hallmark of legal reasoning and, effectively, the adoption of non-rational premises. But this step is necessary to give full weight to both sides of the church-state conflict.

This rule will be balanced by two considerations. First, it may be difficult to give full credit to the concept of damnation, because it could become an automatic exemption from any further consideration of the importance of the state's goals. Still, the ultimate importance of a religious duty should be taken seriously enough that the legislature or courts will do their best to avoid interference with it.

Also, adopting the religious believer's position does not eliminate the consideration of the reasonableness of a state limit on a religious practice under s. 1, and there may still be situations in which the state's interests will outweigh the religious duty. Adopting the believer's position simply means that, just as a court accepts rationally argued goals as legitimate, it will also be obliged to treat religious beliefs as legitimate and accurate, even though they defy proof by rational means.

Second, given the value of religion as enumerated in Part VI, the state should be required to show a truly compelling interest before it can overcome a conflicting religious claim. A compelling interest must be an interest in achieving an *essential* goal, one that goes to the heart of democratic values or the survival of the state, rather than a mere reasonable, rational state goal. After all, if religion's value is central to the health and vigour of the state, as I have suggested above, it would be unreasonable to allow a more quotidian state interest to overcome the broader state interest in preserving religion. Moreover, if the state would still be able to achieve its compelling interest if the religious believer is exempted, the religious claim should prevail; only if an exemption would make it impossible for the state to achieve its interest against anyone should the state win.

Of course, language suggesting the need for a compelling interest is contained in both the accommodation line of cases in the United States, such as *Yoder*,[281] and *Oakes*' s. 1 test in Canada.[282] The rule as I have suggested it, however, would differ from each country's current approach to the justification of state claims. First, it would be applicable against any state claim, including generally applicable state laws, unlike the rule set forth in *Smith*. Thus, even a state rule of broad application would be required to meet a strict justification standard when applied against religious believers, even if this increases the administrative burden on the state. Clearly, an infringement of a religious belief is of grave concern to the observer whether or not it is contained in a law of general application; and administrative inconvenience is a small price to pay to preserve religion's larger value to the liberal democratic state.

Second, the rule would require courts to carefully scrutinize the importance of the state's goals to the preservation of a free and democratic society. An objective that is reasonable, valid, and important would not necessarily overcome a religious

281. *Wisconsin* v. *Yoder*, *supra* note 31.

282. *R.* v. *Oakes*, *supra* note 152.

claim. This suggests a stricter approach to the justification test than the courts have in fact adopted in Canada.[283]

It should be clear that despite these stringent protections, some restrictions on religious activity would ultimately be considered justifiable. This is the realm of the hard cases. No perfect guide is available to guide the courts' actions in such cases. Nevertheless, it might be said that harm to non-religious third parties, or *grave* harm to those who *are* religious but not perfectly autonomous and thus under the special care of the state, would justify interference with religious obligations. For instance, there is little doubt that the state's interest in protecting the health of children would justify interference with a family's religious beliefs in order to save the life of a child through a blood transfusion. Similarly, though some families have religious objections to vaccination programs, the state's overwhelming interest in the public health, and the impossibility of securing the goal of public health through other means, would justify a restriction of the family's religious freedom.

In cases of grave harm to religious but non-autonomous individuals such as children, the courts should seek the least restrictive means of interference with religion. For example, a religious practice that involves mutilation of children should be restricted, but a solution might be sought that bars the offending practice while allowing a harmless, symbolic substitute for the practice to continue.

Other state interests would, however, be required to give way to religious freedom if a strict level of scrutiny were required. The state's interest in a common pause day, for instance, is surely not as essential as the religious adherent's need to worship; nor is the participation of the worshipper utterly necessary to the goal of providing a reasonably successful pause day. Similarly, the state's laws against the use of narcotics should not be held to override the essential place of narcotics such as peyote in the ceremonies of certain religions. Clearly, some limits would still result from the effort to strike a reasonable balance between religious freedom and significant state goals, even after courts begin to give significant weight to the religious adherent's claims. These limits would, however, be more sensibly drawn.

Finally, given religion's importance to a free and democratic society, we should expect more of the state than the requirement that it show a compelling interest before it infringes on religious freedom; it should also show an awareness of its positive duty to *advance* religious freedom. It can do so in two ways: granting exemptions from generally applicable laws, and engaging in legislative efforts to aid religion.

Granting religiously based exemptions, both at the level of legislative drafting and as a constitutional imperative read into neutral laws that interfere with an individual's religious duties, would signal the state's recognition that if we wish to capture the full value of the religious citizen, we must occasionally treat him or her differently. Such exemptions would put the structural value of religion in democratic society above the value of particular state schemes. Ultimately,

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283. See Hogg, "Section 1 Revisited," *supra* note 154 at 7–8 (noting that, despite the language of *Oakes*, it has not been difficult to show a pressing and substantial governmental objective).

despite its interference with state goals, the exemption will further the religious believer's ability to practice his or her faith *and* advance the state's interest in the full participation of its citizens in the life of the nation. The value of exemptions, thus perceived, clearly outweighs those losses that would be suffered when *some* individuals sought exemption from *some* laws.

It may be argued that religiously based exemptions violate the s. 15 guarantee of equality "before and under the law."[284] I would respond that the exemption should not be viewed as a special grant of privilege to a few, but as a manifestation of the right to religious freedom to which everyone is entitled.[285] Neither should the fact that different religions require different exemptions cause any difficulty, since the Supreme Court recognized in *Big M* that "the interests of true equality may well require differentiation in treatment" of different faiths.[286]

The principle of aid to religion suggests that in addition to the exemption of religious believers from neutral laws, the state should ensure that the social value of religion is reinforced by lending its support to religious groups. A pertinent example is the funding of religious schools. While the jurisprudence indicates no constitutional obligation to fund religious education for groups not enumerated in s. 93 of the *Constitution Act, 1867*,[287] a richer understanding of the value of having strong religious groups in society ought to indicate the appropriateness of extending aid for religious schooling to those faiths that were not rewarded in the Confederation compromise.

Certainly more is required than the curt statement of the Ontario Court of Appeal in *Adler* that religious parents are offered a choice between sending their children to public schools and sending them elsewhere, and thus that their difficulty lies with their religious beliefs and not with any government action.[288] To religious parents whose beliefs require them to send their children to religious schools, but who lack the means to pay for private schooling, that choice is no choice at all. Such a statement is reminiscent of the position taken by employers, prior to the advent of human rights laws, that Saturday sabbatarians had a choice between working on

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284. *Charter, supra* note 6; see Black, *supra* note 39 at 163–64.

285. See McConnell, "Religious Freedom at a Crossroads," *supra* note 134 at 139: "To conceive of free exercise exemptions as requests for special benefits implicitly assumes that the state has the natural authority to regulate the church, and that choosing not to do so is a favor. That is not the inalienable right to freedom of religion conceived by those who wrote and ratified the First Amendment." Similarly, since the fundamental right of freedom of religion is enshrined in the *Charter*, an exemption that gives effect to that right can hardly be said to be creating a novel inequality. This accords with Dickson J.'s expansive definition of freedom of religion in *Big M, supra* note 2 at 362.

286. *Big M, ibid.*

287. See *Reference Re Bill 30, supra* note 3; *Adler, supra* note 3; *Bal* v. *Ontario (A.G.)* (1994), 121 D.L.R. (4th) 96 (Ont. Ct. (Gen. Div.)) (the government is not obliged to provide funding for minority religious alternative schools within the public school system).

288. See *Adler, supra* note 3 at 18. Equally arguable is the *Bal* and *Adler* courts' conflation of 'secular' education with neutral education. See Stolzenberg, *supra* note 56, for a discussion of how public schools, by advancing pluralistic and ultimately relativistic values, may pose a threat to religious cultures that may be part of our pluralistic society but are not themselves pluralistic.

Saturday or looking for other work. Through the human rights laws, governments recognized the perversity of allowing someone the freedom to starve under such circumstances and required employers to bear a greater social cost to accommodate religious workers. Courts should recognize that the 'choice' is no less perverse in religious-education funding cases, and that the government is the most appropriate cost-bearer in such circumstances. Moreover, even if the courts find no positive duty to fund religious education, legislatures are not thereby freed from their duty to give full recognition to the constitutional and social value of s. 2(a). Whichever institution ultimately acts, the significant need to provide an appropriate level of genuine accommodation to religious parents should be recognized, even if that means bearing the social cost of funding or contributing to religious education.

The provision of aid to religious groups does raise the question of whether such aid, if not apportioned exactly among all faiths, would create the impression that the imprimatur of the state has been given to certain faiths and not others. As a matter of practicality, it may not be possible to aid religious groups equally; majority faiths, though they may need less aid, would be more likely to receive aid, since they have the greatest political power. This does not pose any problems under s. 2(a) of the *Charter:* so long as preferential religious aid does not "[impose] on religious minorities a compulsion to conform to the religious practices of the majority,"[289] it would not violate s. 2(a).[290] Still, since one of the purposes of providing aid to religious institutions is to advance the social good of pluralism, a value which is given credence by the multiculturalism clause of the *Charter,* it is hoped that the state will spread its largesse among a variety of groups.[291]

Other than that, however, aid to religion should be constrained by only two considerations. It must not create an "element of religious compulsion"[292] on the part of any believers or non-believers in a given faith.[293] Also, while government aid may properly create the impression that the state is as supportive of religion as it is of other mediating institutions, it should not create the impression that it has singled out a particular faith, or religiosity over non-religiosity, for endorsement.[294]

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289. *Zylberberg, supra* note 98 at 591.

290. A credible argument might, however, be launched under the equality clause of the *Charter.*

291. Sections 15 and 27 of the *Charter* might play a useful role in guaranteeing this outcome.

292. *Big M, supra* note 2 at 364. See also *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (Ont. C.A.).

293. This would not capture aid to separate religious schools, which I assume to be private institutions established for 'voluntary' use by religious families. If anything, such schools allow the state to avoid providing separate religious educations to myriad cultural groups in a given public school, while permitting religious communities to avoid educations that effectively compel a neutral, liberal viewpoint.

294. O'Connor J. has advanced an 'endorsement' test in Establishment Clause jurisprudence, which would ask whether government aid in a given case "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." See *Lynch* v. *Donnelly,* 104 S.Ct. 1355 at 1367 (1984) (O'Connor J. concurring). The test has, however, been criticized as "no test at all, but merely a label for the judge's largely subjective impressions." See Paulsen, "*Lemon* Is Dead," *supra* note 195 at 815. See also Choper, *supra* note 47 at 27–34.

Endorsement, even if it does not compel behaviour on the part of the minority, defeats the pluralism and multiculturalism that are a central part of religion's value to society.

In summary, an approach to religious freedom that shows a proper appreciation of the value of religion as a productive force in society will do its best to exempt religion from onerous requirements, unless the state's need overwhelms the importance of religious duty. Such a balancing test must give full and fair weight to the religious obligation as felt by the observer, even though this requires the judge to deviate from the norm of rationality. Finally, given religion's social value, the state should not hesitate to aid and advance religious institutions, so long as it is not too closely identified with any one of them.

Would such an approach substantially change the outcomes of cases involving claims of religious freedom? In hard cases involving conflicts between religion and central projects of the state, such as the preservation of a child's life despite the parents' wish that the child not undergo medical treatment, I doubt that it would. In other cases, the increased respect for the social value of religious freedom might well tilt the balance against the state. In any event, in judicial decisions more is at stake than the outcome of an individual case. Winnifred Fallers Sullivan's words are worth noting once more: "How the courts talk about religion is critical, because the texture of the public discourse about religion creates a culture about religion."[295] The loyalty of a citizen to the state, and the likelihood that that person will fully contribute to his or her society, is surely related to how that person is treated by the state. If the language of the courts indicates a measure of indifference toward, or lack of comprehension of, religion and its value, the courts will cease to command the respect or obedience of many who would otherwise be valuable citizens. Thus, even if individual outcomes do not change, a judicial and legislative approach to religious freedom that is properly respectful of the value of religion will result in a stronger and healthier society.

VIII. Conclusion: Glimmers of Hope

I have argued in this article that liberalism's virtues—its focus on individual rights, its emphasis on individual belief as individual choice, its rationalism—have the unfortunate effect of narrowing the state's and the courts' understanding of the nature and value of religion. Liberal democracy has a long tradition of protecting religious belief, as manifested in s. 2(a) of the *Charter*. But the ineffable and irrational nature of religion has meant that religious claims are sometimes viewed with skepticism, and may lose out when balanced against the claims of the state, which are argued in the language of rationalism that liberal democracy finds so attractive. It has been suggested that once we attain a proper understanding of the intrinsic worth of religious belief, and the social value of religions as intermediary institutions that guard against tyranny and complacency, we will be more willing to

295. Sullivan, *supra* note 23 at 163.

accord full protection to the beliefs and practices of religious believers, even when they ask the state to balance irrational claims against the state's rational arguments.

Of course, cold rationalism is not the only strain in liberal political discourse; one may also find appreciation for pluralism and respect for the compelling nature of religious claims. Furthermore, religious voices have not been completely absent from the political dialogue and have certainly helped to ensure that the vision of the state that emerges from the legislatures and the courts is not compeletely indifferent to the fate of religion. In both the United States and Canada, one may still witness signs that religious freedom will be allowed to flourish as it ought.

In Canada, encouraging developments have emerged from human rights jurisprudence. In this area, the courts and the legislatures have supported religious exemptions from generally applicable laws. Thus, for instance, Ontario's *Human Rights Code*[296] allows religious organizations to discriminate in employment where it is a *bona fide* occupational requirement that an employee share the organization's faith or meet its religious standards.[297]

Even more important has been the courts' growing support of the principle of accommodation of religious practices in the secular workplace. In *Re Bhinder and C.N.R. Co.*,[298] a Sikh, whose faith required him to wear a turban, brought suit against Canadian National Railway after it fired him for refusing to wear a safety helmet. The Supreme Court held that a safety helmet was a *bona fide* occupational requirement in a railway coach yard and that once the company established the validity of the requirement it was under no duty to accommodate the worker. This misstep was effectively corrected in *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*,[299] in which a worker was fired because he was unable to go to work on two holy days. The Court held that even where, as here, there was a *bona fide* occupational requirement that would allow discrimination against the religious believer, the employer must prove that it attempted to accommodate the believer up to the point of undue hardship. Thus, Canadian courts have, at least in the context of human rights legislation, shown that they are willing to require society to structure itself to pay proper respect to the needs of the religious believer.[300] While the courts' definition of what constitutes an undue hardship may prove a thorny area,[301] it is at least clear that "[t]he existence of a duty to accommodate

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296. R.S.O. 1990, c. H-19.

297. *Ibid.*, s. 23. Followed in *Garrod* v. *Rhema Christian School* (1992), 15 C.H.R.R. D/477 (Ont. Bd. Inquiry). See also *Re Caldwell and Stuart* (1984), 15 D.L.R. (4th) 1 (S.C.C.) (*bona fide* qualifications of a Catholic school teacher include a willingness to obey the doctrines of the Church).

298. (1985), 23 D.L.R. (4th) 481 (S.C.C.).

299. (1990), 72 D.L.R. (4th) 417 (S.C.C.).

300. See also *Renauld* v. *Board of Education of Central Okanagan*, [1992] 2 S.C.R. 970.

301. In the United States, the strength of a similar requirement in protecting religious practices was significantly undercut in *Trans World Airlines, Inc.* v. *Hardison*, 97 S.Ct. 2264 (1977), in which the Supreme Court held that anything more than a *de minimis* cost would constitute an undue hardship. The Court thus allowed the airline to terminate a Sabbatarian observer's employment, ruling that it was more important to preserve the seniority system established between the airline

now seems indisputable."[302] It is hoped that this principle will be extended beyond the context of human rights legislation and embraced as an essential part of the guarantee of freedom of religion.[303]

In the United States, the Supreme Court has not yet backed away decisively from the unfortunate *Smith* decision. Its most recent decision in the area, *Church of the Lukumi Babalu Aye* v. *Hialeah*,[304] continued to follow *Smith*'s rule that a generally applicable law need not be justified by a compelling governmental interest.[305] The result in *Church of the Lukumi Babalu Aye*, which concerned a law *specifically* targeted at the religious sacrifice of animals, favoured the protection of the religious practice. For that reason, some have seen in this case "a glimmer of hope that the Court may be ready to try a different way."[306] That hope may be premature; but there have been signs of support for religion on other fronts.

In particular, in reaction to cases such as *Smith*, the United States Congress passed the *Religious Freedom Restoration Act of 1993*,[307] which forbids Congress from substantially burdening an exercise of religion unless the law forwards a compelling governmental interest and is the least restrictive means of securing the interest.[308] The law declares as a legislative finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[309] Thus, Congress has forced the Court back to the pre-*Smith* standard of review for religious claims.[310] While it is still too early to judge the effectiveness of the*Religious Freedom Restoration Act*,[311] it seems likely to provide

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and the employees' union than to disturb it for the sake of accommodating Hardison's religious beliefs.

302. W.W. Black, "Accommodation of Religious Beliefs and Practices" in McArdle, ed., *The Cambridge Lectures 1991*, *supra* note 54 at 173.

303. In this regard, it is interesting to note that the Department of Justice recently floated the idea of a "culture defence" from criminal responsibility. Under this defence, a Sikh with a ceremonial knife could be protected against a charge of carrying a concealed weapon, and one who used drugs for religious purposes would be similarly protected. See Department of Justice Canada, "Reforming the General Part of the *Criminal Code*: A Consultation Paper" (Ottawa: Department of Justice, 1995).

304. 113 S.Ct. 2217 (1993).

305. *Ibid.* at 2226, *per* Kennedy J. In a concurrence, Souter J. urged that "in a case presenting the issue, the Court should re-examine the rule *Smith* declared." *Ibid.* at 2240.

306. See Carter, "The Resurrection of Religious Freedom?," *supra* note 276 at 123.

307. 42 U.S.C. § 2000bb, 107 Stat. 1488 (1993).

308. 42 U.S.C. 2000bb-1(a),(b).

309. 42 U.S.C. § 2000bb(a)(2).

310. Note, too, that state courts since *Smith* have shown a willingness to use the religious freedom guarantees in *state* constitutions to apply a compelling interest standard to state laws; thus, both levels of jurisdiction have reacted to *Smith* by working around it to ensure the protection of religious freedom. See S.G. Parsell, Note, "Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to *Employment Division v. Smith*" (1993) 68 Notre Dame L. Rev. 747.

311. For cases applying the Act, see *Powell* v. *Stafford*, 859 F.Supp. 1343 (D.Colo. 1994) (age discrimination suit against Catholic high school fails; application of an age discrimination statute would violate the Religion Clauses, and the state must show a compelling interest); *Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F.Supp. 538 (D.D.C. 1994) (Church's

a breathing space for religious believers whose practices cast them into the minority that is so callously treated by *Smith*, at least until the Court is ready to reconsider its decision in that case.

We have much to be grateful for, then, but still more reason to be cautious and watchful. Given liberalism's emphasis on "the rational, empirical, and factual,"[312] the more ethereal virtues of religion, and the still more inexpressible call of religious duty, are all too liable to be shrugged aside as individual values and choices that must give way to secular progress, rather than cherished as forces that have the highest possible claim on the religious community. Without proper regard for the value of religion as experienced by the believer, we may forget that religion's claims on human destiny are ancient; the state's, only temporal and transient.

A voice raised in dissent provides us with our final reminder. The rights accorded to religion must not be "reduced to the level of merely expendable desiderata. They ought instead to be given their proper weight as critical expressions of the proper constitutional boundary between the state and the individual."[313]

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conduct in feeding the homeless was religious conduct, and zoning board must show a compelling interest before it can burden the conduct). However, in 1994 the Supreme Court denied certiorari to *Swanner* v. *Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska S.C. 1994), in which the Alaskan Supreme Court upheld a law preventing landlords from discriminating against potential tenants on the basis of marital status; the landlord, Swanner, argued that his religious convictions prevented him from renting to those who live together outside of marriage. The Court followed *Smith* in finding that no compelling interest was necessary, and argued that in any case a compelling interest had been shown. Thomas J., dissenting from the denial of certiorari, rightly argued that the lower court's decision "drains the word *compelling* of any meaning and seriously undermines the protection for exercise of religion that Congress so emphatically mandated in RFRA [the Act]." See 115 S.Ct. 460 (1994) at 462.

312. Cook, "God-Talk in a Secular World," *supra* note 127 at 436.

313. *Brown* v. *Polk County*, 37 F.3d 404 at 413 (8th Cir. 1994) (Morris Sheppard Arnold Cir. J., dissenting).