Pascal's First Amendment:
Taking Religion Seriously as a Justification for Free Exercise

By Nathan Oman[1]

The current dilemma for theorists of religious liberty is how to provide a justification for a truly independent content for the Free Exercise Clause. One possibility is an argument that genuinely takes religion seriously. A modified version of Pascal's Wager may provide a way of doing this.

I.

At the opening of the twenty-first century, American thinking on the question of religious liberty is in disarray. In 1990 the Supreme Court handed down its decision in *Employment Division v. Smith*[2], which set off a flurry of reaction in the both the academic and political worlds. *Smith* was decided on the ostensibly narrow question of whether or not a citizen could claim an exemption from a neutral law of general applicability on the basis of the Free Exercise Clause. The Court ruled that the answer was "no," in effect overturning its earlier decision in *Sherbert v. Verner*[3]. Yet behind the apparently narrow legal issues lurks a fundamental debate about the relationship of religion and the state.

At its heart *Smith* is about the question of whether or not the Free Exercise Clause is cognizable as a separate and independent right protected under the constitution. In its decision, the Court basically ruled that it was not. Under post-*Smith* jurisprudence the Free Exercise Clause is only viable in claims against laws specifically targeting religious practice. This, in effect, makes "free exercise of religion" into a subspecies of equal protection. The state cannot use religion to single out some group for different treatment. Religion has thus become akin to a "suspect classification," like race and (to a somewhat lesser extent) gender. What *Smith* disallows is the notion that there is some distinctive and exclusive right available only to religion under the First Amendment. Indeed, Justice

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[2] 494 U.S. 872 (1990)
[3] 374 US 398 (1963)

Scalia more or less made this point explicit when he classified previous rulings granting special rights under the Free Exercise Clause as really involving a hybrid between free exercise and some other constitutionally protected right[4].

None of this is new. The last ten years has seen a stream of commentary criticizing and defending both *Smith* and the congressional legislation that *Smith* has spawned. What has become evident recently is a new pessimism among the proponents of an independent Free Exercise Clause. For example, Professor Frederick Gedicks, who undoubtedly would like a more robust constitutional protection of free exercise, has advocated abandoning the notion of an independent Free Exercise Clause altogether. Legal theorists interested in protecting religion, he argues, should turn instead to finding ways of protecting religion under less controversial rights like freedom of speech, equal protection, and due process.

II.

Gedicks's pessimism lays out both the promised land of religious freedom, and the difficulty of the wilderness between there and where we are today. What partisans of robust free exercise really want, he says, is a right to religious freedom even in those cases when such a right is not protected by other constitutional provisions. They want a truly independent content for the Free Exercise Clause. Gedicks rejects arguments for this position that rely simply on appeals to the constitutional text. Given the elasticity of constitutional interpretation, Gedicks believes such arguments are only appealing to those already committed to religious freedom. What is required is an argument that provides an independent, non-textual justification for an independent content. Gedicks sadly concludes that such an argument is not possible within the context of contemporary jurisprudence.

[4] "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . ." *Employment Division v. Smith*, 494 U.S. 872, 881 (1990) internal citations omitted.

At first glance, it appears that Gedicks and pessimists like him are correct. Religion has largely been defended with arguments that are not ultimately religiously specific. For example, a certain school of thinkers exalts religion as a needed source of the civil virtue that makes democratic government possible[5]. Yet this justification is problematic on several fronts. First, it requires that the government act to create some level of official orthodoxy of belief – a proposition that is at odds with most generally accepted interpretations of the Establishment and the Free Speech Clauses of the First Amendment. Furthermore, such an attitude is ultimately condescending to religion, reducing it to the kind of "noble lie" that Plato argued elites should use to control the ignorant *demos*[6]. But perhaps most damning from the point of view of a religious freedom partisan, the notion of civic virtue provides no basis for protecting precisely the kind of religion that is most likely to be subject to state sanction – minority faiths with idiosyncratic and iconoclastic beliefs. The opening chapter of American free exercise jurisprudence powerfully illustrates this point. The first case in which the Court squarely faced the issue of the Free Exercise Clause came when nineteenth century Mormons claimed an exemption from anti-bigamy laws that burdened the practice of plural marriage. For the Mormons plural marriage was a religious principle, but to the rest of Victorian America it was the height of immorality *and for that reason* it had to be destroyed by the state[7].

Other theorists have offered a slightly more sophisticated argument based on the insights of Alexis DeToqueville. DeToqueville saw two great dangers within the structure of American democracy. The first danger is the simple problem of tyranny by the majority. The second danger is the radical individualism inherent in America's classical liberal foundations. DeToqueville's fear was that American individualism

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[5] See Richard Vetterlli and Gary Bryner, IN SEARCH OF THE REPUBLIC (1988)

[6] See generally Plato, REPUBLIC, trans. G.M.A. Grube (1992), especially 278c.

[7] *Reynolds v. United States*, 98 US 145 (1879). See B. Collin Mangrum and Edwin Firmage, ZION IN THE COURTS: A LEGAL HISTORY OF THE LATTER-DAY SAINTS, 1830-1900 (1988)

would atomize people, destroying the sense of community upon which democracy depends. The solution, said DeToqueville, is a rich set of mediating institutions that acted as a check on both an overweening government captured by a single majority and a centrifugal individualism. Scholars such as Stephen L. Carter have argued that religion should be afforded protection because it provides just such powerful mediating institutions[8]. However, upon closer examination this argument also turns out to provide no ground for offering special protections to religion. Political scientists have identified the benefits of mediating institutions with what they call "social capital."[9] This "social capital" is the trust and mutual commitment that makes communal life successful. However, it is provided equally well, they demonstrate, by institutions such as soccer leagues and the Lions Club. Thus, theorists such as Carter who would justify religious freedom with this argument fail to show why religion should be protected but bowling clubs should not[10].

A final argument for religious freedom is that it should be protected as a part of some kind of constitutionally protected personal autonomy. The Supreme Court has announced that "at the heart of liberty is the right to defines one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[11] It seems plausible to think that religion could be protected under such a broad view of human autonomy. Yet this approach has several problems. It seems to identify freedom of religion with a generalized right of "freedom of conscience."[12] To the extent that such a right to personal autonomy has been found in the constitution it has come from the right

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[8] See Stephen L. Carter, THE CULTURE OF DISBELIEF (1993)

[9] See Edward C. Banfield, THE MORAL BASIS OF A BACKWARD SOCIETY (1958) and Robert D. Putnam, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993)

[10] One might argue that bowling clubs should be protected under the Freedom of Association Clause for precisely the reason that they do provide "social capital." If this is the case, then religious freedom is simply subsumed as a subset of another constitutional right.

[11] *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 832 (1992)

[12] The authors of the First Amendment seemed to have specifically considered—and rejected—such a provision. See generally Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

to privacy that lurks in the penumbras of various provisions of the Bill of Rights and the Fourteenth Amendment rather than within the Free Exercise Clause. Furthermore such a right rests purely with the individual. Yet religion is most often a communal endeavor, and it is often the corporate rather than the personal manifestations of religion that are seeking protection.

All three of these arguments ultimately fail because, while they provide some justification for religious freedom, they do not provide any independent content for the Free Exercise Clause. To the extent that they are constitutionally cognizable it is always under provisions other than the Free Exercise Clause. They have the virtue of being appealing to non-believers, but they cannot provide a sufficient justification for religious freedom as a genuinely unique protection for religion. As the Mormon example illustrates, ultimately these arguments provide only accidental protection for religious practice, and it may well be that they leave religion with no protection precisely at those moments when it is most vulnerable.

III.

Ultimately, current justifications of religious freedom fail because they do not take religion seriously on its own terms. This fact should be obvious to thoughtful believers. No Muslim believes the he should make a pilgrimage to Mecca in order to raise the general level of civic virtue. He does it because his faith that "There is no God but Allah and Mohammed is his Prophet" teaches that only by completing the *hadj* can he qualify for entry into paradise. Likewise, Orthodox Jews are not interested in creating mediating institutions but in faithfully fulfilling the conditions of the covenant God made with Moses and Israel on Mount Sinai. Buddhist temples are not factories for the production of social capital but places where people attempt to follow the example of Buddha to nirvana. Christian churches are not expressions of autonomous individuals attempting to define "the mystery of human life." They are meetings of "fellow citizens with the saints,

and of the household of God"[13] seeking salvation through Jesus Christ the Son of God. In short, none of the arguments offered in favor of religious liberty have anything to do with the ultimate concerns that are at the heart of religious belief. They simply do not take such concerns seriously. Of course, it is difficult to discern precisely how the law can take such claims seriously without creating the kind of official orthodoxy that is anathema to the other provisions of the First Amendment. However, this seems to be precisely what an independent content for the Free Exercise Clause requires. The seventeenth century French philosopher Blaise Pascal (1623-1662) provides us with a model of how this might be done.

Pascal was at the center of the scientific revolution of that included such figures as Kepler, Descartes, and Newton. At the same time, he was deeply religious, allying himself with a radical religious sect in France know as the Jansenists. He combined religious faith with a keen awareness of the position of such contemporary intellectual skeptics as Montaigne. He sought a way of religiously appealing to honest doubters and skeptics with an argument that they would find persuasive. The result was what has come to be known as Pascal's Wager. Roughly stated the argument goes something like this:

God exists or He does not exist, and we must of necessity lay odds for or against Him.

If I wager *for* and God *is* -- infinite gain;

If I wager *for* and God *is not* -- no loss;

If I wager *against* and God *is* -- infinite loss;

If I wager *against* and God *is not* -- neither loss nor gain;

Therefore, the most reasonable course is to wager in favor of belief in God.[14]

Pascal's argument is ingenious for at least two reasons. First, it is not based on any specific religious or metaphysical claim. Rather, it assumes the open-mindedness of its audience rather than some shared premise. It requires only that they are willing to admit

[13] Ephesians 2:19, KING JAMES VERSION

[14] See "Pascal, Blaise" s.v. THE CATHOLIC ENCYCLOPEDIA (1917)

that God might or might not exist. Second, it is not an argument for the existence of God *per se*. Ultimately, the argument is not about establishing a proposition at all. Rather it is a way of making the decision of whether or not to pursue the religious life. Pascal is attempting to show that the choice in favor of the religious life is what decision theorists call the "dominant position." Formally stated a dominant position is at least as good as all other possible outcomes, and under some conditions it is better than any other possible outcome[15].

A legal analogy to Pascal's Wager can be constructed in favor of a unique right to the free exercise of religion. If we take as given that the state cannot establish an official orthodoxy on religious issues, then it follows that the state must adopt a peculiar attitude *ex ante* on religious questions. Generally, we speak in terms of government neutrality, but this is not always the most useful way of talking about the issue. A better word might be "openness." The state must take a genuinely open position on questions of religion. It cannot affirm the truth or falsity of any particular religion or of religion in general without violating the prohibition against state sponsored orthodoxy. This means that from the point of view of the state all religious propositions might or might not be true. Generally this openness is legally irrelevant, but when the issue of religious exemptions from neutral laws of general applicability arises, the state's official openness must come into play. Like the skeptic in Pascal's Wager, the state must of necessity wager for or against religious freedom.

All religions claim to offer their adherents something of ultimate value – salvation, nirvana, entrance to paradise, righteousness before God, etc.. These are real and important goods for believers. Indeed, the long history of believers willing to give up liberty and property for their faith demonstrates that people place value on these ultimate goods that is every bit as concrete as the value they place on more commonplace goods

[15] See Simon Blackburn, "Pascal's Wager" s.v. and "dominance" s.v. THE OXFORD DICTIONARY OF PHILOSOPHY (1994)

protected by the law[16]. Furthermore, these goods are potentially valuable to seekers who, while they do not yet adhere to any given faith, are looking for ultimate truth and value. The state cannot affirm the value of any of these ultimate claims, but it also cannot dismiss them as valueless. From the point of view of the government, all religious claims must be treated as potentially valuable[17].

From this it follows that religious freedom is the dominant position for the state to take. Granting an exemption from neutral laws might or might not result in allowing citizens access to the ultimate goods promised by religion. If it turns out that the rituals of Buddhist temples do not in fact grant their followers the promised nirvana, nothing is lost. However, if the state, under the aegis of neutrality, denies a believer access to such rituals, and it turns out to be the case that such rituals do in fact provide the promised result, then the state has perpetrated a very great wrong on its citizens. Thus, proponents of freedom can argue that given the constitutionally required openness of the state towards questions of religious truth, the state should side with freedom of religion in the interest of forestalling massive potential evils.

IV.

Obviously there are objections that can be raised to this understanding. The most obvious one is that religiously granted exemptions may, in fact, result in some harm. Therefore, the objector could argue, the state should forestall such harms by refusing to grant the religious exemption. Clearly, a claim of religious liberty – like any other claim of a right – cannot be absolute. Traditionally, proponents of religious liberty have

[16] On a purely monetary note donations to religious institutions no doubt totals in the billions of dollars annually.

[17] An easy way to misunderstand this claim is to understand the potential value of belief in terms of some psychological benefit to the believer. This *not* the argument I am making. The potential value of letting someone attend mass is *not* (under this theory) that it will confer some psychological benefit on a Catholic believer. Rather the potential value is that communion will actually cleans the believer of sin and literally give her access to Heaven and the Beatific Vision. Likewise, the potential wrong of burdening communion is *not* some psychological damage. It is the danger of hell-fire and damnation.

provided for a safety valve by advocating a "compelling state interest" test[18]. Yet perhaps the standard used in free speech cases – "a clear and present danger"[19] – would be a better way of considering the question. In those cases, the Court has reasoned that the potential benefits of freedom of speech are so great, that it can be violated only when there is an immediate and actual danger. It is easy to see how this balancing of potential and actual would fit quite nicely with the theory of religious freedom articulated above. The great *potential* benefits of religious freedom could be negated by some *imminent, actual* wrong.

Another objection that can be raised is that by entertaining the possibility that religious claims are actually true, the state is establishing religion within the meaning of the Establishment Clause. This approach is problematic for two reasons. First, the state is not positively affirming the truth of religious claims. It is only willing to acknowledge the possibility that the claims could be true. However, this requires that it be equally willing to acknowledge that the claims could be false. Second, if the state is refuses to grant a unique claim of free exercise to the religious believer, there are two possible explanations of the state's behavior. Either, the state is taking that the position that their religious claims are false (and therefore the believer suffers no "real" harm), or the state is willfully interfering with the believers pursuit of some ultimate good in favor of its own immediate desires. The first alternative is precisely what the First Amendment uncontroversially prohibits (an official orthodoxy), while the second alternative is manifestly unjust[20].

It might be argued that the gamble in favor of religious freedom is only justified in the case of certain kinds of religious claims. If the justification for religious exemptions is

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[18] The legislative attempts to reverse *Smith* – RFRA and RLPA – have added a "least restrictive means" qualifier to this test.

[19] See *Schnenck v. United States*, 249 U.S. 47, 52 (1919)

[20] As a practical matter, those who advance the position that the state should *de facto* treat religious claims as false (and therefore irrelevant) are most likely the kind of people who would strenuously object to any form of religious establishment. But once one removes the prohibition against a state orthodoxy, it is much more likely, given the demographics of the electorate, that some sort of religious establishment would ensue rather than the *de facto* state irreligion they desire.

based on the possibility that such exemptions might lead to the ultimate good promised by that religion, then it seems to follow that only situations in which the religious doctrines teach that the ultimate good is implicated should enjoy protection. While this argument is theoretically sound, its application would be impossible without the violation of the Establishment Clause. In order for the state to protect only central religious tenants, it would require that the state interpret the theology and doctrines of a religion. Furthermore, the state would then back up its interpretation with coercion, since the application or non-application of any given law would hinge on how a government official understands religious doctrine. This, in effect, would let the state hi-jack its citizens' theology, imposing a state-sponsored interpretation of doctrine as a condition for legal protection.

Ultimately, this Pascalian understanding of the Free Exercise Clause does two things. First, it allows for a genuinely religious understanding of the Free Exercise Clause. It engages religion on its own terms, understanding the value of religion from within the perspective of religious believers. At the same time, it requires that the state genuinely refuse to take a position on the truth or falsity of religious claims. This gives genuinely independent content to the Free Exercise Clause without recourse to a narrow, textualist argument. This has the second result of "calling the bluff" so to speak of the easy rhetoric of liberal neutrality and tolerance[21]. Many opponents of a robust understanding of religious liberty resent the claim often leveled against them that they are really advocating a state-sponsored irreligion. In many cases the accusation is unfair and unjustified. However, the burden is on them to show that they can deny the claims for an independent Free Exercise clause without *de facto* treating the religious belief behind those claims as untrue. To the extent that the state is genuinely neutral towards religion, it must acknowledge that the claims of religion might be true. It is within this context of taking

[21] I use the term liberal here in its philosophical context, not in its commonly used political context.

religion seriously without accepting it that religious freedom makes sense as a unique right.