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Two Aspects of Liberty

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SYMPOSIUM

TWO ASPECTS OF LIBERTY

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Isaiah Berlin was a wonderful writer about political theory, the author of a number of essays we still read. Upon assuming the Chichele Chair at All Souls College in 1958, he gave a lecture entitled *Two Concepts of Liberty*.

Berlin described the two concepts as "negative" and "positive." The negative concept of liberty (he sometimes called it "freedom from") is a classical liberal ideal, one we associate with Locke and Mill, Constant and Tocqueville. It is simply the "absence of interference."[1] People who are free from all constraints can do as they like—an idea that appealed to Berlin, a great believer in value pluralism.[2]

Berlin's positive concept of liberty (or "freedom to") "derives from the wish on the part of the individual to be his own master."[3] Any number of things might frustrate that desire: an economic system that reduces me to servitude; the waywardness of my own passions; or a dominant social institution (a church, an aristocracy) that propagates false consciousness. Berlin associated this concept of freedom with Rousseau, Hegel, and Marx. Its proponents maintain that a law does not restrict my freedom if I impose it on myself or accept it freely. The important thing is that I should be able to act in accordance with the wishes of my true self.

I'm a big fan of Berlin as an essayist and a writer of intellectual history, but I think his analysis of liberty is muddled. "Freedom from" and "freedom

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1 ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 123 n.2, 127 (1969) (quoting THOMAS HOBBES, LEVIATHAN 159–68 (Michael Oakeshott ed., 1974)).

2 *See id.* at 172. Berlin's earlier essay *The Hedgehog and the Fox* is a reflection on the difference between monism and value pluralism. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX (Henry Hardy ed., 2d ed. 1953). It takes its name from a fragment of verse by the Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing." *Id.* at 1. Berlin classifies various thinkers as foxes (Plato, Dante, Hegel, Nietzsche) or hedgehogs (Aristotle, Shakespeare, Goethe). *Id.* at 2.

3 BERLIN, *supra* note 1, at 131.

to" are not two different concepts of liberty. They are different parts of the same idea. We can't talk sensibly about liberty without invoking both of them.

Liberty in the constitutional sense is always a right against state interference (a "freedom from").[4] The First Amendment begins by saying that "Congress shall make no law"; it forbids Congress to license or fine or jail people for speaking, or publishing, or assembling.[5] Liberty is also, always, a right to do something (a "freedom to"): to speak, to assemble, to practice religion, to get married, etc. So "freedom from" and "freedom to" are always parts of the same idea, just as "flying from" and "flying to" are aspects of the same airplane trip. Freedom is always the right to do some particular act without government restraint.

I mention Berlin's confusion because I think that a focus on these two aspects of liberty (freedom from state interference and freedom to practice religion) can help us understand the battles we are currently having about religious liberty. There have been two phases in this modern fight. In the first phase, opponents of religious freedom have focused on the freedom from state interference. They have argued that although religion is an important social (and theological!) good which deserves our utmost respect, nevertheless in this or that particular case the state should prevail because its concerns are especially weighty—more weighty than the plaintiff's religious concerns.

In the second phase, people have argued that the religion that we should be free to practice is a more limited idea than we might suppose. In this phase, it is not a matter of weighing private concerns against public ones and finding the public ones more weighty. The private concerns simply don't count as religious, so we don't get to the point of balancing them against concerns of state.

I. "FREEDOM FROM"

Let me begin with the first phase. I have said that freedom has two aspects. It is always a right to act in some way (the "freedom to") and a "freedom from" state interference. But saying that I have a right to freedom is just the beginning, not the end, of a legal argument. Because it is a right to act, people can invoke it in an infinite variety of cases. Someone might falsely shout "fire" in a crowded theater and cause a panic, then defend his behavior as an exercise of free speech. Someone else might argue that freedom of religion excuses him from paying taxes. For this reason, freedom is a defeasi-

4 I speak about freedom as a right—specifically, as a constitutional right. Freedom of the will is a different thing. And freedom in private law, though it is a relation, may be a relation between two private persons, rather than between a person and the state. For example, you and I may have a contract for the purchase of apples that leaves me free to choose from among several varieties.

5 U.S. CONST. amend. I.

ble right, as the philosophers say.[6] It is just the first step in a legal argument. It forces the government to justify its interference. But sometimes the government's reasons will be so compelling that the courts will allow it to interfere.

In constitutional law, we describe this process of making judgments about defeasible rights as one of balancing private rights against public concerns. Of course, the government balances private and public interests whenever it makes a law. But when the private actor has a right, the government must offer an especially good reason for interfering. The right protects us from state interference, at least sometimes. We might describe this handicap as the weight or value of the right.[7]

For a long time, the custom was to assign a great weight or value to claims of religious freedom, and to rule in favor of the state only if it could show a compelling reason for the prohibition or restriction it wished to impose. Consider the approach the Court took in *United States v. Lee*.[8] The respondent, a member of the Old Order Amish, refused on religious grounds to withhold and pay social security taxes for his employees. He thought that doing so would violate the injunction in I Timothy 5:8: "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel."[9] The government responded in two different ways. First, it argued that paying the tax wouldn't really burden Lee's beliefs. To this line of argument the Court gave the standard answer: whether Lee had a religious problem was for him to say.[10] The government (the IRS, the courts) was not in a position to judge about that.[11]

Second, the government argued that there was a really important reason why Lee had to pay the tax. This proved to be the winning approach. As the Chief Justice put it, the government needed to demonstrate that compliance was "essential to accomplish an overriding governmental interest."[12] As it turned out, it was. If the Court excused Lee from having to pay his taxes, a lot of other people might follow his example, and that would imperil the fiscal solvency of the social security system.

In 1990, the Court limited considerably the protection it would offer in cases about religious liberty. *Employment Division v. Smith*[13] allowed a govern-

6 Some other kinds of rights are indefeasible. This is true of several immunities the Constitution gives us against state action in the criminal process. Consider the Fifth Amendment privilege against self-incrimination. There are no reasons that will justify or excuse the government for violating it. Even in the classic *Dirty Harry* case, where the police extract a confession to save an innocent life, the government cannot use a self-incriminating statement to prosecute the offender. The Eighth Amendment right against cruel and unusual punishment is similar. No countervailing argument can justify torture.

7 *Cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89 (1982).

8 455 U.S. 252 (1982).

9 1 *Timothy* 5:8.

10 *Lee*, 455 U.S. at 257.

11 *Id.*

12 *Id.* at 257–58.

13 494 U.S. 872 (1990).

ment agency to discharge two members of the Native American Church for ingesting peyote, a controlled substance under Oregon law. The Court was willing to assume that taking peyote was a religious act just like taking wine at a mass or a seder.[14] The Native American Church deserved as much protection as Catholics and Jews.

But, the Court said, the First Amendment rule against laws "prohibiting the free exercise" of religion refers to laws that single out religion for special bad treatment.[15] Imagine a law saying that Catholics, but not Jehovah's Witnesses, could hold services in public parks.[16] It would take the most compelling reason to justify such a law. Laws that are neutral and generally applicable ("no one may ingest controlled substances") can also have indirect effects on religion. But these effects are unintended, and the state need not offer any special defense of them. We would be "courting anarchy"[17] with a demand like that. And the danger of anarchy "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[18]

II. "FREEDOM TO"

In the last few years we have entered a new phase in the attack on religious freedom. Our debates center on the very meaning of religion, rather than on state concerns that might outweigh it. Sometimes the focus is on *who* is a religious actor. The Obama Administration has asserted, for example, that for-profit corporations are not religious actors. (We hear similar arguments about the freedom of the press. Some say it covers only the institutional press; others say it extends to bloggers.) Sometimes the focus is on *what activity* is religious. Not every kind of action counts. (We hear similar arguments about the freedom of speech. Not every kind of communication is protected by the Free Speech Clause. Flag-waving is "speech." Obscenity is not.)

A. Who Is Free to . . . ?

Let me begin by looking at who is a religious actor. My own university, and yours, sued the Department of Health and Human Services in 2013 to challenge regulations under the Affordable Care Act. The regulations require certain group health plans to cover sterilization procedures and prescription contraceptives, including some that can induce abortions. We think this interferes with our religious freedom because it requires us to help provide services we view as sinful.[19]

14 *See id.* at 876–78.

15 *Id.* at 877.

16 That was the case in *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

17 Smith, 494 U.S. at 888.

18 *Id.*

19 Our claim relies on the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb-1 to -4 (2012), not the First Amendment. But Congress designed RFRA

The regulations exempt "religious employers" from the requirement. These institutions don't have to provide coverage, and their employees don't get it. But "religious employer" is defined very narrowly. It includes churches and religious orders,[20] but not Catholic universities or Catholic charities. Nonprofits like us are classified simply as "eligible organizations."[21] We get an accommodation of sorts. We don't have to provide the mandated services ourselves. But we are required to contract with an insurance company (or if we self-insure, a third-party administrator), who will provide the objectionable coverage. This is one example of what I mean by narrowing the scope of religion. Under the regulations, churches are "religious," schools are not.[22]

Here is another. Hobby Lobby is a for-profit corporation organized under Oklahoma law. Though it owns 500 stores, it is closely held by the Green family, which retains exclusive control. Hobby Lobby's statement of purpose commits it to operating in accord with biblical principles—a pledge that leads it to close on Sundays, contribute profits to Christian missions, and withhold health coverage for abortions. For that reason Hobby Lobby objected to four of the twenty FDA-approved methods of birth control mandated by the HHS regulations.

Though the regulations exempted a few "religious employers" and offered a grudging accommodation to "eligible organizations" like Catholic University, they made no concession at all to for-profit corporations like Hobby Lobby. Can a company like that have a right to the free exercise of religion?

HHS and the Solicitor General argued that for-profit corporations "are not protected by RFRA because they cannot exercise religion."[23] Justice Ginsburg observed in dissent that corporations "have no consciences, no

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to express its own understanding of the Free Exercise Clause—one that the Supreme Court used to hold before *Employment Division v. Smith*. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). And the statutory disagreement over the HHS regulations illustrates the trend toward depreciation of religion in the same way constitutional quarrels do.

I recognize that the statutory definition of "exercise of religion" may comprise activities outside the constitutional understanding. Congress amended RFRA in 2000 to say that "religious exercise" included "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-5(7)(A).

20 Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets, 45 C.F.R. § 147.131(a) (2014); *see* 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii) (2012); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

21 45 C.F.R. § 147.131(b).

22 We lost our case, as did you. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, 136 S. Ct. 446 (2015); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015) (denying a preliminary injunction), *petition for cert. filed*, No. 15-812 (U.S. Dec. 18, 2015).

23 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014).

beliefs, no feelings, no thoughts, no desires."[24] This argument has a surface appeal, but it is hard to square with what religious people think. Catholics believe that the Church (a corporation) is the body of Christ. Jews believe that God chose Israel as his people.[25] The Supreme Court concluded, though the vote was close (5-4), that even for-profit corporations can be religious actors.[26] They may pursue charitable aims. They may, like Hobby Lobby, engage in business practices that are compelled or limited by religious doctrine.

B. Free to What . . . ?

Let me turn now to some fights over *what activity* is covered by the Free Exercise Clause. Three years ago the Supreme Court considered what it called a "remarkable view" advanced by the Equal Employment Opportunity Commission (EEOC) and the Justice Department: "that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[27] Cheryl Perich sued the Evangelical Lutheran Church for firing her as a grade-school teacher of religion, math, and other subjects. She argued that the Church's real reason for dismissing her was that she suffered from narcolepsy, a condition protected by the Americans with Disabilities Act.

The Court observed that the right of a church to appoint its own ministers has been protected since Magna Carta. Requiring a church to accept a minister it objects to would interfere with the church's ability to shape its own faith by selecting the people "who will personify its beliefs."[28] The EEOC grudgingly acknowledged that it could not force the Catholic Church (or an Orthodox Jewish seminary) to ordain women. But, it said, that was because the right to freedom of association protects churches, in common with the Jaycees and the Rotary Club. The Free Exercise Clause added no special exemption for religious actors.

Last year it was the National Labor Relations Board (NLRB) that undertook to regulate the activities of the Evangelical Lutheran Church.[29] Pacific Lutheran University is a private liberal arts school sponsored by the Church in Tacoma, Washington. The issue before the NLRB was whether the Board could supervise contract negotiations between the university and its faculty. The Board ruled that it could, unless the faculty were charged with "propa-

24 *Id.* at 2794 (Ginsburg, J., dissenting) (quoting Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part)).

25 *See* JOHN GARVEY, WHAT ARE FREEDOMS FOR? 150 (1996).

26 *Hobby Lobby*, 134 S. Ct. at 2759 (majority opinion).

27 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

28 *Id.*

29 *See* Pac. Lutheran Univ. & Serv. Emps. Int'l Union, Local 925, 361 N.L.R.B. 157 (2014).

gating religious tenets[] or engaging in religious indoctrination or religious training."[30]

This shows a disappointing ignorance of the way faith is communicated among intelligent adults. Faith is not an unthinking adherence that we learn through "indoctrination." Nor are the things we believe formulae we commit to memory, as fourth graders learn the catechism or ninth graders the axioms of geometry. Religious universities like ours bring their students to know and love God by appeals to the intellect and examples of virtue. These can't be persuasive unless they occur in an atmosphere of academic freedom. The government should not try to pare the definition of religion down to its own narrow view.

Here is a third example of an effort to limit the kind of conduct the Free Exercise Clause protects. The Supreme Court established a constitutional right to same-sex marriage in *Obergefell v. Hodges*.[31] Not everyone is onboard that wagon. Many people, Catholics among them, continue to believe that sexual activity outside traditional marriage is sinful. And folks who think like that often hold moral reservations about participating in gay weddings. That is the point that made Memories Pizza famous. The owners of the Walkerton, Indiana, pizza parlor said they made no distinction between gay and straight customers, but that it would go against their religious principles to cater a gay wedding. We have seen similar objections raised by photographers[32] and bakers.[33]

The legal issues in these cases vary. Memories Pizza was a bystander in the culture war over Indiana's effort to enact a state religious freedom law (RFRA). It was portrayed by a local TV station as practicing the kind of sexual orientation discrimination the new law would allow. Elane Photography and Masterpiece Cakeshop were ordered under state human rights laws to cater same-sex weddings in New Mexico and Colorado. Their principal argument was that the Free Speech Clause protected them from being forced to deliver a message they opposed.[34] They all lost.[35]

The interesting thing about these quarrels is the way they characterize the religious claim. Neither the courts nor the media seem to understand that the business owners object on moral grounds to participating in an activity they view as sinful. Rather, the act of refusing service has a negative moral

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30 *Id.* at 9.

31 135 S. Ct. 2584 (2015).

32 *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

33 *See* Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453, at *7 (Colo. App. 2015).

34 *See Elane Photography*, 309 P.3d 53; *Masterpiece Cakeshop*, 2015 WL 4760453.

35 Well, Memories Pizza had to shut down for a while, but it finished $842,387 ahead, thanks to a crowdfunding effort by its supporters. *See* Jill Disis, *Crowdfunding Donations for Indiana Pizzeria that Supported RFRA Capped at $842,387*, INDIANAPOLIS STAR (Apr. 4, 2015), http://www.indystar.com/story/news/politics/2015/04/03/crowdfunding-page-indiana-pizzeria-supported-rfra-raises/25270337/.

valence—it is an act of "discrimination" which the law should forbid rather than protect.

The media pile-on in Indiana illustrates this well. Tim Cook, CEO of Apple, wrote that "[t]his isn't a . . . religious issue. This is about. . . . [o]pposing discrimination."[36] Connecticut Governor Dannel Malloy signed an executive order barring state spending on travel to Indiana. He called Indiana's RFRA "disturbing, disgraceful and outright discriminatory."[37] When Indiana amended the law to stress that it would not protect businesses like Memories Pizza, Bill Oesterle, CEO of Angie's List, complained that the fix didn't go far enough. "There was no repeal of RFRA and no end to discrimination of homosexuals in Indiana."[38]

The culture doesn't see this as a collision of rights, like when the working of a free press may conflict with a defendant's need for a fair trial. Refusing service to gay patrons is intrinsically wrong, not "religion," just as obscenity, libel, and true threats are not "speech," as the First Amendment uses the term.[39]

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36 Tim Cook, Opinion, *Tim Cook: Pro-Discrimination 'Religious Freedom' Laws Are Dangerous*, WASH. POST (Mar. 29, 2015), https://www.washingtonpost.com/opinions/pro-discrimination-religious-freedom-laws-are-dangerous-to-america/2015/03/29/bdb4ce9e-d66d-11e4-ba28-f2a685dc7f89_story.html.

37 *Malloy Bans State-Funded Travel to Indiana Amid "Religious Freedom" Law Backlash*, NBC CONN. (Mar. 30, 2015), http://www.nbcconnecticut.com/news/local/Malloy-to-Bar-State-Travel-to-Indiana-Amid-Religious-Freedom-Law-Backlash-298010911.html. Malloy did not mention that Connecticut has a RFRA as well.

38 Sunnivie Brydum, *Angie's List: Indiana's RFRA Fix "Is Insufficient"*, ADVOCATE (Apr. 2, 2015), http://www.advocate.com/business/2015/04/02/angies-list-indianas-rfra-fix-insufficient.

39 Notice how the institutional press (the Washington Post, NBC) use scare quotes around "religious freedom" when describing Indiana's law. *See supra* notes 36–37.

This is not the first time our debates about religious freedom have focused on the meaning of "religion," rather than on the state's interest in controlling it. The most serious persecution of a religious group in our history was the federal government's treatment of the Church of Jesus Christ of Latter Day Saints (the Mormons) in the latter half of the nineteenth century. In a series of cases decided in the decades after the Civil War, the Supreme Court upheld laws enacted by Congress to stamp out the Mormon practice of polygamy.

In the first of these cases the Court affirmed the conviction of George Reynolds, Brigham Young's private secretary. Reynolds acknowledged his bigamy, but argued that he should be exempt from territorial law because his faith required it. Writing for the Court, Chief Justice Waite observed that "[t]he word 'religion' is not defined in the Constitution." Reynolds v. United States, 98 U.S. 145, 162 (1878). As a general matter, it was intended to protect belief, not conduct. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" like polygamy. *Id.* at 166. The activity Reynolds sought to protect "has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Id.* at 164.

In *Davis v. Beason*, the Court upheld an Idaho law requiring voters to forswear teaching or practicing polygamy. 133 U.S. 333, 334 (1890). Calling polygamy "a tenet of relig-

C. Does It Matter?

This shift in legal theory, from a focus on public concerns to a focus on private ones, says something important about the future of religious liberty. It should be a matter of real concern to all of us. Let me try to explain why.

Earlier I observed that freedoms are by nature defeasible rights. The reason is that freedoms are rights to do things (like speak, have sex, or get married), and they can be exercised in all kinds of circumstances. You never know what might happen in a free society.

So the government can sometimes forbid people to exercise their freedoms, and this is perfectly consistent with saying that the Constitution gives them a right. The right does its work by forcing the government to offer an unusually good reason for interfering. An Amish employer like Edwin Lee has a right to religious freedom. Because of the importance of this right, Congress actually exempted self-employed Amish from having to participate in Social Security.[40] But it couldn't exempt employers of third parties without undermining the entire system. To that extent, the concerns of the public outweighed Lee's right.

This kind of conflict will occur often in a large, advanced, and pluralistic society like ours. The government in twenty-first-century America regulates breakfast cereals and automobile emissions, longshoremen and stockbrokers, salmon fisheries and free-roaming wild horses and burros. And there are something like 2300 American religious groups, from Adventists to Zen Buddhists.[41] Believers this numerous and varied are bound to rub up against government regulators with some frequency.

We shouldn't take alarm at the first evidence of Congress or the Court siding with the government in these conflicts. Even devoutly religious people will concede the principle that this must happen from time to time. The author of the Court's opinion in *Employment Division v. Smith* was Justice Scalia, a practicing Catholic. His decision to side with the government did not arise from any antipathy toward religious claims, but rather from a judgment that the legislature could do a better job of carving out exemptions than a court could. We should only begin to worry when the government

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ion," the Court stated, would "offend the common sense of mankind." *Id.* at 342. "Crime is not the less odious because sanctioned by what any particular sect may designate as religion." *Id.* at 345. The Court once again invoked the belief/conduct distinction it proposed in *Reynolds*:

> The term "religion" . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper . . . . It was never intended . . . as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.

Id. at 342.

40 *See* United States v. Lee, 455 U.S. 252, 255–56 (1982).

41 *See* MELTON'S ENCYCLOPEDIA OF AMERICAN RELIGIONS, at xv (J. Gordon Melton ed., 8th ed. 2009).

wins too often, or when the interests it advances seem too flimsy. The danger we face then is the besetting sin of big government: that its petty bureaucrats, pashas, and functionaries value all the concerns of their agencies and programs above the private interests of religious people.

But something very different is going on when people start to agree that Notre Dame is not a "religious employer," or that a photographer can have no religious objection to being drafted into the nuptials of a same-sex couple. When this happens, we have a much more serious problem. Disputes about how to balance freedom against concerns of the state are limited and fact-specific. Disputes about the meaning of religion are all-or-nothing affairs. Acts that don't count as "religious" for constitutional (or statutory, or cultural) purposes are entitled to no more legal protection than trout fishing. When we settle the definitional issue adversely, we resolve all future cases.

That is not all. We have a background understanding that it is up to believers to say what their faith holds, and who belongs to the faithful. That is the most sensible arrangement for a society as pluralistic as ours. As Justice Douglas once put it, "[m]an's relation to his God was made no concern of the state."[42] If we hold true to that understanding, and the scope of religion begins to shrink, then the erosion of religious liberty is happening from within the religious camp. That kind of reduction could prove fatal. It is like a country fighting a war, whose citizens have lost the will to win, or worse, the belief in the cause they were fighting for.

III. Why This Shift in Perspective?

When the Olympics were held in Mexico City in 1968, there were two memorable jumps. Bob Beamon broke the world record for the long jump by almost two feet. His jump of 29'2½" remained the record for twenty-two years. Dick Fosbury won the gold medal in the high jump with a technique (the Fosbury Flop—head first, back to the bar) that revolutionized the sport. Before that, jumpers used the straddle technique (leg first). What inspired Dick Fosbury? Probably the use of foam matting in landing pits instead of sand or low piles of mats. You used to have to land on your feet, or at least very carefully, in order to avoid injury. Fosbury didn't have to worry about how he came down, so he could experiment with going up.

Is there some comparable development that explains this new shift in the legal freedom debate—from balancing public concerns ("freedom from") to shrinking the domain of religion ("freedom to")? I think there is. The culture itself cares less about religion, and because it does, the proponents of religious freedom find themselves asking for protection of an activity that is unimportant, or worse.

There is ample evidence of a shift in popular convictions about religion. We have not yet given up the faith to the degree the French have,[43] but we

42 United States v. Ballard, 322 U.S. 78, 87 (1944).

43 Weekly mass attendance by Catholics in France is in the single digits. *See During Benedict's Papacy, Religious Observance Among Catholics in Europe Remained Low but Stable*, PEW

are trending in that direction. Consider the most recent report by the Pew Research Center, *America's Changing Religious Landscape*,[44] a survey of changes in America's religious attitudes since 2007. The two most significant trends in that eight-year period are the decline in the Christian population, particularly Catholics and mainline Protestants, and the growth in the number of the religiously unaffiliated. "Nearly 23% of all U.S. adults now say they are religiously unaffiliated, up from about 16% in 2007."[45] That group, fifty-six million strong, is larger than either Catholics or mainline Protestants. It is now the second largest sector in our demographic pie (after evangelical Protestants).[46]

We are likely to see still more growth in the same direction, because younger millennials (those born after 1990) are twice as likely to be religiously unaffiliated as baby boomers, and four times as likely as the generations before that.[47] Fully 36% of younger millennials identify themselves as unaffiliated.[48]

Alongside this demographic shift we see a change in the way the culture talks about religion. Consider, for example, the spate of atheistic tracts published in the last decade.[49] Writers like Richard Dawkins,[50] Daniel Dennett,[51] Sam Harris,[52] and Christopher Hitchens[53] have drawn a surprising degree of popular attention. Dawkins's *The God Delusion* was on the New York Times bestseller list for fifty-one weeks.[54]

There is an evangelical fervor to these appeals. That might be too temperate a description. The typical tone is angry, belittling, and critical. Thus Richard Dawkins: "The God of the Old Testament is . . . a misogynistic, homophobic, racist, . . . malevolent bully."[55] Or Christopher Hitchens: "One

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RESEARCH CTR. (Mar. 5, 2013), http://www.pewforum.org/2013/03/05/during-benedicts-papacy-religious-observance-among-catholics-in-europe-remained-low-but-stable/; *see also* CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE, INTERNATIONAL MASS ATTENDANCE (2014), http://cara.georgetown.edu/CARAServices/intmassattendance.html.

44 *See* PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE (2015), http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf.

45 *Id.* at 20.

46 *Id.* at 10.

47 *See id.* at 11.

48 *Id.* at 11, 69.

49 *See generally* RELIGION AND THE NEW ATHEISM: A CRITICAL APPRAISAL (Amarnath Amarasingam ed., 2010); *The New Atheism and Its Critics*, 37 MIDWEST STUD. PHIL. 1 (Peter A. French & Howard K. Wettstein eds., 2013).

50 *See* RICHARD DAWKINS, THE GOD DELUSION (2006).

51 *See* DANIEL C. DENNETT, BREAKING THE SPELL (2006).

52 *See* SAM HARRIS, FREE WILL (2012); SAM HARRIS, LETTER TO A CHRISTIAN NATION (2006); SAM HARRIS, THE END OF FAITH (2004); SAM HARRIS, THE MORAL LANDSCAPE (2010).

53 *See* CHRISTOPHER HITCHENS, GOD IS NOT GREAT (2007); THE PORTABLE ATHEIST (Christopher Hitchens ed., 2007).

54 Marcella Dooney, *Religion Is in This Year's Most Popular Books*, NAPLES DAILY NEWS (FL) (Nov. 7, 2007), http://www.naplesnews.com/community/religion-is-in-this-years-most-popular-books-ep-403213112-332001922.html.

55 DAWKINS, *supra* note 50, at 31.

must state it plainly. Religion comes from the period of human prehistory where nobody . . . had the smallest idea what was going on."[56] Or Sam Harris: "most Muslims are *utterly deranged by their religious faith*."[57]

There is not much in these contemporary arguments that is new. But I want to highlight two points common to most of the accounts. The first is an assertion that religion is an inferior way of knowing.[58] It is, Harris says, belief "without evidence."[59] For adherents of the New Atheism, the only true answers are to be found in science. Dawkins argues in *The God Delusion* that science can actually disprove "the God hypothesis."[60]

I don't want to get drawn into the merits of this argument. I see no conflict between Christian beliefs and evolution, or the big bang theory.[61] And our knowledge about God is not the kind of understanding that science is in a position to contradict. But the point I want to stress is that the New Atheism doesn't just see faith as an alternative way of knowing, no longer generally accepted, but still appealing to some intelligent people of good will. It views faith as a delusion, and its adherents as morons or suckers.

The second point is an inversion of the old argument that religion is a necessary support for moral behavior.[62] The New Atheists argue that religion is a unique cause of immoral behavior. Here is Nobel laureate Steven Weinberg: "Religion is an insult to human dignity. With or without it you would have good people doing good things and evil people doing evil things. But for good people to do evil things, that takes religion."[63]

Some of the impetus for this seemingly upside-down view of ethics probably comes from the violence wrought in recent years by Muslim terrorists. Harris says he wrote *The End of Faith* in response to the attacks on 9/11.[64] Dennett claims "that religious belief leads to a dangerous sense of moral certitude that lends itself to abuse in the hands of fanatics."[65] Some of it gets laid at the feet of the Catholic Church, whose moral authority suffered a blow after the sexual abuse crisis. That has led to claims like the seemingly illogi-

56 HITCHENS, *supra* note 53, at 64.

57 HARRIS, LETTER TO A CHRISTIAN NATION, *supra* note 52, at 27 (emphasis added).

58 *See* A.W. Moore, *Varieties of Sense-Making*, 37 MIDWEST STUD. PHIL. 1, 5–6 (2013); Massimo Pigliucci, *New Atheism and the Scientistic Turn in the Atheism Movement*, 37 MIDWEST STUD. PHIL. 142, 143 (2013).

59 HARRIS, THE MORAL LANDSCAPE, *supra* note 52, at 59–73, 85.

60 DAWKINS, *supra* note 50, at 30.

61 And I have a hard time seeing how the theory of creation is less scientific than the theory of multiple universes, or extra dimensions of space-time that have escaped detection.

62 *See, e.g.*, President George Washington, Farewell Address (Sept. 19, 1796).

63 Michael Ruse, *Making Room for Faith: Does Science Exclude Religion?*, 37 MIDWEST STUD. PHIL. 11, 11–12 (2013) (quoting Steven Weinberg, Address at the Conference on Cosmic Design, American Association for the Advancement of Science (Apr. 1999)).

64 HARRIS, THE END OF FAITH, *supra* note 52, at 333.

65 Gregory Peterson, *Ethics, Out-Group Altruism, and the New Atheism*, *in* RELIGION AND THE NEW ATHEISM, *supra* note 49, at 162 (citing DENNETT, *supra* note 51, at 294–97).

cal (and empirically unsubstantiated) charge that the Church's discipline of celibacy has caused more, rather than less, sexual sinning.[66]

Whatever the cause of this ethical inversion, we can see its effects in current debates about marriage and reproductive freedom. There are no longer two views about the moral valence of these practices, one held by the progressive sector of the culture, the other by adherents of traditional religion. A merchant who declines to participate in a same-sex wedding is said to be guilty of discrimination, period. The same is true about contraception and abortion. The Supreme Court's decision in *Hobby Lobby* "allow[ed] employers to discriminate against employees by denying contraception coverage."[67]

Conclusion

All this leads me to an odd conclusion for an audience of lawyers. If I'm right in observing a new trend in how we argue about religious freedom; and if I'm right in concluding that it results from a loss of faith by American culture, then the future of the First Amendment (at least this part of it) is not entrusted to the legal profession.

In my discussion I have been fairly casual about mixing First Amendment cases (*Lee* and *Smith*, *Elane Photography* and *Masterpiece Cakeshop*), RFRA cases (*Hobby Lobby* and the HHS mandate), state law cases (Memories Pizza), and political (rather than legal) battles, because my primary interest has been in the way we frame disputes over religious freedom. Deep down, all of the ramparts we erect—constitutional, statutory, regulatory, cultural—rest on the same foundation. As Mark DeWolfe Howe said of the First Amendment, "[t]hough it would be possible . . . that men who were deeply skeptical in religious matters should demand a constitutional prohibition against abridgments of religious liberty, surely it is more probable that the demand should come from those who themselves were believers."[68]

This is undoubtedly right. It suggests that if we don't care about religion, we probably won't care about religious freedom. That proposition goes for all the venues in which religious freedom issues might arise: the courts (which enforce the Free Exercise Clause), legislatures (RFRA), executives and their agencies (the HHS, the NLRB, the EEOC, the Department of Justice, the governor of Connecticut), the press, and the culture. What we are seeing in the latest phase of our contemporary quarrels is an increasing skepticism about religion. It matters to fewer people, and in fewer parts of their lives.

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66 Ruse, *supra* note 63, at 12.

67 Press Release, ACLU, Employers Allowed to Use Religious Beliefs to Refuse to Comply with Law Requiring Contraception Coverage (June 30, 2014), https://www.aclu.org/news/supreme-court-allows-employers-discriminate-against-employees-denying-contraception-coverage.

68 Mark DeWolfe Howe, The Garden and the Wilderness 15 (1965).

Lawyers can't make it matter more. That's what churches are for. The only really effective response to the contemporary assault on religious liberty is prayer. I don't mean this in a despairing or a pious sense. I mean to say that the practice we are defending has to matter to us above all things. If it does, our institutions will protect it. If it doesn't, the case is lost. This is the point that Learned Hand spoke so eloquently about in a speech he gave in Central Park to newly naturalized citizens during World War II.

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. . . .
>
> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which . . . remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned but never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[69]

69 Billings Learned Hand, The Spirit of Liberty (May 31, 1944) (transcript available from the Foundation for Economic Freedom), http://fee.org/articles/the-spirit-of-liberty/.