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NOTE

WAGERING ON RELIGIOUS LIBERTY

INTRODUCTION

Oliver Wendell Holmes once declared, “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”¹ At the opening of the twenty-first century, the constitutional protection of religious liberty seems anemic at best.² If, as Holmes suggests, the current jurisprudence stems from the “actual feelings . . . of the community,”³ then a more robust protection for religion will require more than sophisticated doctrinal analysis. Referring to the concept of liberty generally, Friedrich A. Hayek wrote:

If old truths are to retain their hold on men’s minds, they must be restated in the language and concepts of successive generations. What at one time are their most effective expressions gradually become so worn with use that they cease to carry a definite meaning. The underlying ideas may be as valid as ever, but the words, even when they refer to problems that are still with us, no longer convey the same conviction.⁴

Something like this seems to have happened to the concept of religious freedom. The old justifications for religious liberty no longer have the force that they once did, and our current discourse has yet to find a plausible way of defending religious liberty in terms that “convey the same conviction.”⁵

This Note is concerned with the government’s punishment of religiously motivated behavior. People routinely act in particular ways because of their religious beliefs. Often the government punishes that behavior. The most basic question of religious liberty is whether religious behavior in conflict with the law should be punished or whether there is some justification for giving religion special protection. The answer that we give to this question may be important to constitutional doctrine. However, it also has implications for how legislatures

¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 36 (Mark Dewolfe Howe ed., Back Bay Books 1963) (1881).

² See Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 36 (2000) (“Under the Free Exercise Clause, the impact of [the Supreme Court’s current emphasis on] formal neutrality is clearly detrimental, because it limits the protection of religiously motivated conduct.” (citations omitted)); see also *infra* Part I.

³ HOLMES, *supra* note 1, at 36.

⁴ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 1 (1960).

⁵ *Id.*

write laws. When drafting statutes, should a legislature choose to exempt the religious practices of its citizens from otherwise general regulations? This is a question of religious liberty that is related to but nevertheless different from questions of constitutional doctrine. Thus, while much has been written about the legitimacy of using religion in policy debates⁶ and the intricacies of the free exercise doctrine,⁷ this Note addresses the simpler and rawer question of why a liberal state would want to protect religious conduct.

This Note will try to identify the problem with current thinking about religious liberty, trace its origins, and offer a possible justification for religious freedom based on the thought of the seventeenth-century French philosopher Blaise Pascal. Part I sketches the source of the current problem with the concept of religious freedom. Part II lays out Pascal's wager and uses it as an analogy for an argument in favor of religious freedom. Finally, Part III seeks to respond to the most powerful objection to the argument in Part II.

I. THE ORIGINS OF (THE INCOHERENCE OF) RELIGIOUS LIBERTY

Finding origins is always a tricky business, but in the American experience, religious liberty emerged as a key theme from the very beginning. As early as 1620, religious liberty appeared as a central question in the founding of the Plymouth Plantation by English separatists seeking refuge from English laws aimed at dissenters.⁸ Later in the century, Roger Williams dissented from the orthodoxy of Massachusetts's congregationalism and founded the colony of Rhode Island.⁹ Several decades after Williams, Lord Baltimore founded the colony of Maryland at least in part to provide a refuge for English Catholics.¹⁰ A similar impetus lay behind William Penn's creation of the Quaker colony of Pennsylvania.¹¹ In all of these cases, the primary arguments

⁶ Compare JOHN RAWLS, *POLITICAL LIBERALISM* 212–54 (1996) (discussing the idea of public reason), and BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 280–82 (1980) (arguing that religious arguments may not legitimately be used in public debates), with RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1984) (arguing that religion has a legitimate place in public discussion), and Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 38–43 (Michael W. McConnell et al. eds., 2001) (responding to Ackerman's arguments).

⁷ See, e.g., MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION: CASES AND MATERIALS* (2002).

⁸ See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 50 (1998).

⁹ See *id.* at 54.

¹⁰ See *id.*

¹¹ See *id.*

in favor of what religious freedom there was were explicitly theological. The Puritans, Williams, Baltimore, and Penn were all motivated by their own distinct readings of the Christian gospel.

John Locke's influential *Letter Concerning Toleration*¹² provides an example of these theologically based justifications for religious freedom. His letter is illuminating for two reasons. First, Locke influenced later American thought. Second, his letter neatly illustrates the explicitly Christian context of early arguments for religious freedom. "I esteem [the mutual Toleration of Christians] to be the chief Characteristical Mark of the True Church," he wrote.¹³ Locke argued on the basis of the New Testament that true Christianity could not justify coercion of religious belief. Rebuking those who persecute others in the name of religious truth, he explicitly appealed to the example of Jesus:

If, like the Captain of our Salvation, they sincerely desired the Good of Souls, they would tread in the Steps, and follow the perfect Example of that Prince of Peace, who sent out his Soldiers to the subduing of Nations, and gathering them into his Church, not armed with the Sword, or other Instruments of Force, but prepared with the Gospel of Peace, and with the Exemplary Holiness of their Conversation.¹⁴

Locke went on to affirm that voluntary belief is superior to forced belief and, furthermore, is a condition of salvation. Religion, he argued, cannot "be available to the Salvation of Souls unless [it] be thoroughly believed But Penalties are in no ways capable to produce such Belief."¹⁵

Arguments remarkably similar to those advanced by Locke became the foundation for religious freedom in the early United States. "Whether or not embodied in the First Amendment as originally understood, the substantive idea of religious liberty was firmly rooted in the founding period, and it was firmly rooted not in secular philosophy, but rather in theology."¹⁶ For example, in a 1777 draft of *A Bill for Establishing Religious Freedom*, Thomas Jefferson justified the concept of religious freedom with reference to "the plan of the holy author of our religion"¹⁷ and attacked the "impious presumption of legislators and rulers . . . [who] hath established and maintained false religions over the greater part of the world and through all time."¹⁸ The arguments offered were not only profoundly religious, but also tied to

¹² JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (James H. Tully ed., Hackett Publ'g Co. 1983) (1689).

¹³ *Id.* at 23.

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 27.

¹⁶ Conkle, *supra* note 2, at 3.

¹⁷ Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1777), reprinted in THOMAS JEFFERSON, *WRITINGS* 346 (Merrill D. Peterson ed., 1984).

¹⁸ *Id.*

a certain brand of voluntaristic Protestantism manifested in America by sects such as the Baptists and the Mennonites.¹⁹

These theological justifications for the paramount value of religious freedom were rhetorically powerful because they were able to draw on Christianity's assessment of its own value. In short, they provided a coherent theory of why we should protect religion qua religion: false religion is marked by religious coercion; true religion is marked by religious voluntarism. Religious freedom is thus a way of avoiding impiety (Jefferson) and following Jesus to salvation (Locke).

For a variety of reasons, the Christian arguments advanced in the seventeenth, eighteenth and nineteenth centuries are no longer adequate. First, they provided (Protestant) Christianity with a privileged position that decisively excluded unorthodox faiths. For example, during the mid- and late nineteenth century, when such arguments continued to hold sway, the Mormons were nevertheless subject to massive and brutal persecution by state authorities²⁰ and the federal government²¹ precisely because they deviated from the Protestant norm.²² Furthermore, regardless of one's position on the intricate debates over the role of public reason and the legitimacy of professions of faith in public discussion,²³ appeals to a particular form of Protestantism are unlikely to gain broad support in a pluralistic society.²⁴ Finally, such overtly theological justifications for state action seem to go beyond simply protecting (some) religious believers. To modern ears

¹⁹ Cf. Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 66 (2000) ("We might roughly describe the religious beliefs in which Madison's argument was grounded as theistic — and not merely theistic but Christian, and not merely Christian but Protestant, and not merely Protestant but reflective of a sort of nonstatist, voluntaristic Protestantism akin to that of the Baptists whom Madison had earlier defended against persecution and who later provided the votes to elect Madison to Congress.")

²⁰ In 1838, after several months of violence and unrest, Governor Lilburn Boggs of Missouri issued an extermination order against the Mormons. "The Mormons must be treated as enemies," he ordered the state militia, "and must be exterminated, or driven from the State if necessary for the public peace." AMONG THE MORMONS 103 (William Mulder & A. Russell Mortensen eds., 1958).

²¹ See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002) (recounting the legal battles between the Mormon church and the federal government over the practice of polygamy). According to one account of the period, "the legal war waged over polygamy was one of the titanic . . . struggles of American legal history." Nathan B. Oman, Note, *The Story of a Forgotten Battle*, 2002 BYU L. REV. 745, 746.

²² See Oman, *supra* note 21, at 745 (noting that nineteenth-century anti-polygamists justified punishing the Mormons in part because "Mormonism was not really a religion").

²³ See sources cited *supra* note 6.

²⁴ Nevertheless, the force of such arguments in the United States, where Protestantism remains a major religion and where many citizens are religiously active, should not be underestimated. Cf. William Stuntz, *Christian Legal Thought*, 116 HARV. L. REV. (forthcoming Apr. 2003) (noting that, despite the secularization of the legal academy, many Americans subscribe to some version of Protestant Christianity).

they seem to create an official theology, albeit a tolerant one in the model of the early Baptists.

Yet, shorn of their ability to appeal to religious self-understanding, modern justifications for religious liberty have been largely unsuccessful at explaining why religiously motivated behavior deserves protection. Appeals to the "plain meaning" of the text of the Constitution have failed to gain the support of textualists on the Supreme Court.²⁵ Some commentators have argued that religious freedom is necessary to create a "secular public realm," but fail to explain why such a realm is inconsistent with neutral, generally applicable laws that criminalize religious sacraments.²⁶ Others have suggested that religion is valuable because it serves to inculcate virtue,²⁷ but such a justification is unlikely to protect unorthodox religions whose practices are labeled immoral by democratic majorities. Yet such unorthodox minorities are precisely the religious groups that the state is most likely to target.²⁸ Finally, some, building on the work of Alexis de Tocqueville, reason that religion should be protected because it provides the social capital necessary to overcome the atomizing force of liberal individualism.²⁹ But political scientists have argued persuasively that such communal glue can be provided equally well by bowling leagues and social clubs.³⁰

Ultimately, current justifications of religious freedom fail because they do not take religion seriously on its own terms. No Muslim believes that he should make a pilgrimage to Mecca to raise the general level of civic virtue. He does it because his faith that there is no God but Allah and that Mohammed is his Prophet teaches that only by completing the *hadj* can he qualify for entry into paradise.³¹ Likewise,

²⁵ Compare Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) ("For whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism."), with *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (Scalia, J.) (rejecting the claim that the text of the Free Exercise Clause requires states to exempt religiously motivated conduct from generally applicable, neutral laws).

²⁶ See Kathleen Sullivan, *Religion and Liberal Democracy*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 195 (Geoffrey R. Stone et al. eds., 1992).

²⁷ See generally RICHARD VETTERLI & GARY BRYNER, *IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT* (1987) (describing the importance of religion as a guarantor of civic virtue in the thought of the founders).

²⁸ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (striking down a law punishing religiously motivated animal sacrifice); *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding the criminalization of religiously practiced polygamy).

²⁹ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 35-43 (rev. ed. 1994).

³⁰ See generally ROBERT PUTNAM, *BOWLING ALONE* (2000) (discussing "social capital" as a necessary element of democratic society and the ways in which it is formed in voluntary associations).

³¹ As one scholar of Islamic jurisprudence has written:

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.³² Buddhist temples are not factories for the production of social capital but places where people attempt to follow the example of Buddha to nirvana.³³ Christian churches are not components of some philosophy of the "secular public realm" but meetings of "fellow citizens with the saints, and of the household of God"³⁴ seeking salvation through Jesus Christ the Son of God. In short, the current arguments generally offered in favor of religious liberty have nothing to do with the ultimate concerns that are at the heart of religious belief. They simply do not take such concerns seriously.

The Supreme Court's leading Free Exercise cases from the 1990s illustrate how this problem is played out. *Employment Division v. Smith*³⁵ concerned an Oregon law that criminalized the use of peyote, a drug made from cactus plants. The Native American Church, however, uses peyote as a sacrament.³⁶ Two members of the church employed as drug counselors were dismissed from their jobs because of peyote use.³⁷ When they applied for unemployment benefits, the state denied their claims on the ground that they were terminated for "work-related misconduct."³⁸ They sued, arguing that the Oregon law violated their right to the free exercise of religion under the First Amendment.³⁹ In the words of the Supreme Court's majority opinion, the discharged members of the Native American Church claimed "that prohibiting the free exercise of religion includes requiring any individual to observe a generally applicable law that requires (or forbids) the

While political legislation considers social problems in terms of the effects of an individual's behaviour upon his neighbour or upon the community as a whole, a religious law looks beyond this to the effect that actions may have upon the conscience and eternal soul of the one who performs them. In short, the primary purpose of the Qur'ān is to regulate not the relationship of man with his fellows but his relationship with his Creator.

N.J. COULSON, A HISTORY OF ISLAMIC LAW 12 (Edinburgh Univ. Press 2001) (1964).

³² See MENDELL LEWITTES, JEWISH LAW: AN INTRODUCTION 11 (1987) ("The cornerstone of traditional Judaism, more particularly Rabbinic or Halakhic Judaism, is its faith in the revelation of God's word to Israel at Sinai as recorded in the Pentateuch.").

³³ See Michael W. Meister & Nancy Steinhardt, *Buddhist Temple Compounds*, in 14 THE ENCYCLOPEDIA OF RELIGION 373-80 (Mircea Eliade ed., 1987) (discussing the history and religious significance of Buddhist temples).

³⁴ *Ephesians* 2:19.

³⁵ 494 U.S. 872 (1990).

³⁶ OMER C. STEWART, PEYOTE RELIGION: A HISTORY (1990) (discussing the religious importance of peyote).

³⁷ *Smith*, 494 U.S. at 874.

³⁸ *Id.*

³⁹ *Id.*

performance of an act that his religious belief forbids (or requires)."⁴⁰ *Smith* thus presented the fundamental question whether religious believers are entitled to engage in illegal activity because it is religiously required.

The Court ruled that religious believers were not entitled to such freedom.⁴¹ In so doing the majority emphasized that the prohibition at issue was "a valid and neutral law of general applicability."⁴² Halting the operation of the law in the case of religious conduct, the Court warned, "would be courting anarchy."⁴³ Such an exemption would "make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, . . . permitting him, by virtue of his beliefs, to become a law unto himself."⁴⁴

A few years later, the Court considered whether the subordination of religious conduct to the demands of law set out in *Smith* was absolute. In *Smith*, the Court had suggested that a law targeting a particular practice because it was religiously motivated might run afoul of the Free Exercise Clause.⁴⁵ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁴⁶ the Court squarely addressed this issue. The Florida town of Hialeah passed an ordinance forbidding the killing of animals in religious rituals.⁴⁷ The law was aimed at the ritual sacrifices of the Santeria religion that is common among Florida's Caribbean immigrant population.⁴⁸ Faced with a law singling out a particular group of religious believers, the Court ruled decisively that the law violated the Constitution's guarantee of "free exercise of religion."⁴⁹ As opposed to the cold shoulder given to the members of the Native American Church in *Smith*, the *City of Hialeah* Court wrote, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief

⁴⁰ *Id.* at 878 (internal quotation marks omitted).

⁴¹ *Id.*

⁴² *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

⁴³ *Id.* at 888.

⁴⁴ *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)) (internal quotation marks omitted).

⁴⁵ See *id.* at 877.

It would be true, we think (though no case of ours has involved the point), that a State would be prohibiting the free exercise [of religion] if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Id. (internal quotation marks omitted).

⁴⁶ 508 U.S. 520 (1993).

⁴⁷ *Id.* at 527.

⁴⁸ *Id.* at 524-27.

⁴⁹ *Id.* at 524.

is essential to the protection of the rights guaranteed by the Free Exercise Clause."⁵⁰

Ironically, the concept of religious freedom articulated in the *Smith-City of Hialeah* duet in no way provides any unique *liberty* for religious conduct. With these cases the Free Exercise Clause was, in effect, transformed into a subspecies of equal protection. The opinions conceptualize religious liberty entirely in terms of equality and discrimination. The focus is not on the religious believer but on the government. It is a question whether the government is using an impermissible classification in creating its laws. Religion becomes a "suspect classification" akin to race⁵¹ or — to a lesser extent — gender,⁵² triggering a stricter level of judicial scrutiny.⁵³ The believer, in contrast, occupies a secondary place in the analysis. There is a sense in which the facts of the cases are identical from the point of view of the believers: both are faced with a choice between obeying God and obeying Caesar,⁵⁴ because a person punished by a neutral law is just as punished as a person who is targeted.

The Court's failure to protect religious conduct as religious conduct is part of the wider problem of justifying religious freedom. Writing for the Court in *Smith*, Justice Scalia reasoned that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."⁵⁵ The clear implication is that legislatures can carve out protection for religiously motivated conduct if they wish.⁵⁶ However, both robust protection for religious conduct under the Free Exercise Clause and the kind of legislative protections envisioned by Justice Scalia require some justification for protecting religious conduct *qua* religious conduct. What is needed is an answer to the question of "[w]hy is it a good thing, for us Americans . . . that government may [not] prohibit the free exercise of religion."⁵⁷

⁵⁰ *Id.* at 543.

⁵¹ *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that racial classifications are subject to strict scrutiny).

⁵² *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 531–34 (1995) (applying heightened scrutiny to gender classifications).

⁵³ *Cf.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-2 to -6, at 1439–54 (2d ed. 1988) (discussing various levels of scrutiny under the Equal Protection Clause).

⁵⁴ *Cf. Matthew* 22:15–22.

⁵⁵ *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

⁵⁶ Indeed, the Supreme Court has repeatedly upheld the constitutionality of legislative exemptions for religious conduct. *See, e.g.,* *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding the exemption of religious organizations from federal antidiscrimination laws); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding tax exemptions for churches).

⁵⁷ Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295, 296 (2000).

Among some proponents of religious freedom there seems to be a deep pessimism about whether we can answer this question. For example, one commentator has argued:

[V]arious justifications for [giving special protection to religion] are no longer plausible, and thus can no longer account for religious exemptions. In the face of increasing scrutiny and growing criticism, these justifications no longer persuasively explain why religious people are constitutionally entitled to exemptions from laws that burden their religious practices, but non-religious people are not . . .⁵⁸

Others have articulated a similarly bleak picture of the contemporary prospects for justifying religious freedom: "[T]here is something approaching unanimity on the proposition that the prevailing *discourse* of religious freedom — or the official framework and language within which issues of religious freedom are argued and judicially resolved — is deeply incoherent."⁵⁹ Professor Steven Smith demonstrates this idea with a thought experiment. Imagine a polity in which the spiritual dominates the temporal and theological arguments are used to justify the privileged place of religion. Such a polity would be what "we would call . . . a 'theocracy.' And we are accustomed to treating 'theocracy' not as a version of, but rather as the antithesis of, 'religious freedom.'"⁶⁰ At the other extreme, in a polity in which the temporal is decisively superior to the spiritual, it may be possible to provide protection for religious conduct under the rubric of things like "free speech" or "equality," but "the purified temporal community would not now claim to have, or to operate according to, any 'theory of religious freedom.'"⁶¹ "[N]either perspective actually recognizes the value of 'religious freedom' in a meaningful sense. That value is associated, rather, with a dualist position — one that regards both the spiritual and the temporal as independently valuable."⁶² Such a dualist position cannot provide a coherent account of when the spiritual subordinates the temporal or vice-versa.⁶³

⁵⁸ Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 556 (1998) (footnote omitted).

⁵⁹ Smith, *supra* note 19, at 61.

⁶⁰ Steven D. Smith, *Is a Coherent Theory of Religious Freedom Possible?*, 15 CONST. COMMENT. 73, 78 (1998).

⁶¹ *Id.* at 81.

⁶² *Id.* at 82.

⁶³ According to Professor Smith:

Since both the spiritual and the temporal make a claim, any solution will necessarily reject one of those claims by giving primacy to the competing perspective.

And precisely because it recognizes that the spiritual and the temporal are *both* valuable, and that they are *independently* valuable (as opposed to one being derived from or a subset of the other), dualism cannot dictate which perspective should prevail. If the spiritual and the temporal are both real and autonomous, in other words, then there is no more encompassing principle to which they are both subordinate.

Id. at 84.

II. WAGERING ON RELIGIOUS FREEDOM

We do not seem to have a theory that allows the state to take the concerns of religion seriously without creating the kind of state-sponsored orthodoxy that renders the original theological justifications for religious liberty problematic. However, the seventeenth-century French philosopher Blaise Pascal may provide a model of how we might do so. Pascal reasoned that, for a rational agnostic, faith in God is the best option, even in the face of religious uncertainty. If the state is truly agnostic, it can neither affirm nor reject the truth claims of religion. However, like Pascal's rational agnostic, it can still reason probabilistically about the value of religion. Such reasoning suggests that religiously motivated behavior should be entitled to special protection after all.

A. *Pascal's Wager*

Pascal has never fit comfortably into the theological and philosophical tradition of which he is a part. His own career illustrates something of the tension inherent in his thought. Pascal was a brilliant mathematician whose precise and technological mind produced the first programmable computer, which used mechanical gears to compute equations.⁶⁴ At the same time, he was a religious mystic passionately devoted to Christianity and deeply skeptical of the powers of human reason.⁶⁵ Upon his death, it was discovered that for most of his adult life he wore a talisman next to his skin containing the parchment upon which he had recorded his conversion to Christianity on the night of a mystical religious experience.⁶⁶ Like his life, Pascal's thought is an amalgamation of scientific rationalism and religious mysticism that has defied easy classification through the centuries.

Pascal's famous wager argument illustrates this synchronism, coupling the hope of eternal bliss with mathematical calculations. During the final years of his life, Pascal began work on an apology for Christianity.⁶⁷ He never completed the book, but after his death his notes were arranged and published as the *Pensées*.⁶⁸ His famous wager appears in these posthumously published notes. Pascal stated the core of his argument in a few simple sentences:

You must either believe or not believe that God is — which will you do?
Your human reason cannot say. A game is going on between you and the nature of things which at the day of judgment will bring out either heads

⁶⁴ See MARVIN R. O'CONNELL, *BLAISE PASCAL: REASONS OF THE HEART* 26 (1997).

⁶⁵ See *id.* at 152.

⁶⁶ See *id.* at 95.

⁶⁷ See *id.* at 155.

⁶⁸ See *id.*

or tails. Weigh what your gains and your losses would be if you should stake all you have on heads, or God's existence: if you win in such case, you gain eternal beatitude; if you lose, you lose nothing at all. If there were an infinity of chances, and only one for God in this wager, still you ought to stake your all on God; for though you surely risk a finite loss by this procedure, any finite loss is reasonable, even a certain one is reasonable, if there is but the possibility of infinite gain. Go, then, and take holy water, and have masses said; belief will come and stupefy your scruples Why should you not? At bottom, what have you to lose?⁶⁹

Pascal's wager has had more than its share of detractors over the years.⁷⁰ One scholar has noted that "philosophers feel it somehow as a professional obligation not to accept [the wager's] cogency."⁷¹ The objections have generally taken one of two forms. First, there are those who object to the (supposedly) implicit premise of the argument that one can choose whether to believe in God. One philosopher articulated this criticism, writing:

Does it not seem preposterous on the very face of it to talk of our opinions being modifiable at will? Can our will either help or hinder our intellect in its perceptions of truth? Can we, by just willing it, believe that Abraham Lincoln's existence is a myth We can say any of these things, but we are absolutely impotent to believe them⁷²

The second criticism is that the wager implicitly assumes that the only possibilities are atheism or a God that would reward the wagerer. However, as one critic puts it, "[f]or all we know God may be reserving a special circle in hell for those who 'believe' in Him for the cynically selfish purpose of getting into heaven."⁷³

Although there is some force to these arguments, Pascal's wager can be viewed in a more charitable light. To understand how, it is useful to contrast Pascal with his contemporary, René Descartes. According to one modern philosopher, "[the wager's] drama is played out on the stage of Cartesian skepticism."⁷⁴ Like Descartes, Pascal started by emphasizing the position of the subject. The primary question is not

⁶⁹ This is the "free translation" of William James, which clarifies the passage nicely. WILLIAM JAMES, *The Will to Believe*, in *SELECTED WRITINGS* 249, 252 (G.H. Bird ed., 1995). Because the *Pensées* is a collection of Pascal's notes, the text is often cryptic. For a more literal translation, see BLAISE PASCAL, *PENSÉES* 122-25 (A.J. Krailsheimer trans., rev. ed. 1995) (1670).

⁷⁰ One modern scholar chronicles the condemnation of the argument at a dinner using the standard objections. "[T]he mathematics was dismissed as 'punk'; its argument, as fanatical and naïve; its influence, as weak. . . . [T]he argument is hypocritical and it is that of a man of no faith." George Anastaplo, *Law & Literature and the Christian Heritage: Explorations*, 40 *BRANDEIS L.J.* 192, 371 (2001).

⁷¹ NICHOLAS RESCHER, *PASCAL'S WAGER: A STUDY OF PRACTICAL REASONING IN PHILOSOPHICAL THEOLOGY* 2 (1985) (quoting TERENCE PENELHUM, *GOD AND SCEPTICISM* (1983)).

⁷² JAMES, *supra* note 69, at 251.

⁷³ John Hart Ely, *Ely's Wager*, 5 *GREEN BAG 2D* 393, 395 (2002).

⁷⁴ RESCHER, *supra* note 71, at 3.

what is the world like, but rather how do we know the world. This basic methodological move led both Descartes and Pascal to a philosophical position of radical doubt. Descartes's response to this result was epistemic and in some sense Aquinian. He rescued knowledge with classical arguments for the existence of God and then extrapolated the possibility of human knowledge as a logical consequence of God's nature.⁷⁵

Pascal's response was practical and Augustinian. Unlike Descartes, Pascal did not believe that it was possible to construct a "proof" of God's existence.⁷⁶ However, following Augustine, he was interested in justifying faith rather than proving certainty, and accordingly, the absence of a "proof" in response to skepticism worried him far less than it did Descartes.⁷⁷ Having in some sense given up on the epistemic enterprise, Pascal turned his attention to practical reasoning. In the face of doubt, rather than ask about knowledge, Pascal asked about action. This pragmatism led Pascal to formulate the wager not as a way of convincing the doubter, but as a way of guiding the doubter's choices. Pascal thus would have agreed with the claim that we cannot simply choose to believe, but would have responded that by engaging in a religious life we open ourselves to the possibility of faith through divine grace⁷⁸ and sheer force of mental habit.

The primacy of this pragmatic stance also suggests how one might respond to the second criticism. In deciding how to act, Pascal viewed actors as irreducibly situated. The practical question is always how one should act given one's current knowledge and beliefs. His argument was not meant to be universally persuasive. Rather, it was meant to guide the actions of people who already had a specific set of beliefs. Pascal's audience was not the committed skeptic or even the disinterested investigator. Rather, it was the lapsed, nominal Christian for whom Pascal's God was a real possibility. William James formulated a vocabulary that is helpful here.⁷⁹ According to James, all hypotheses are either "live" or "dead" to people.⁸⁰ This quality does not

⁷⁵ See ROBERT C. SOLOMON & KATHLEEN M. HIGGINS, *A SHORT HISTORY OF PHILOSOPHY* 181–82 (1996) (discussing Descartes's philosophy and the role of God in his epistemology).

⁷⁶ See RESCHER, *supra* note 71, at 4–5 ("[I]n Pascal's opinion [a rational demonstration to 'prove' to skeptical outsiders that God exists is] a hopeless endeavor — as the skeptics have established . . .").

⁷⁷ See *id.* at 4 ("Pascal substitutes an Augustinian concern for the validation of *belief* in a God who is beyond the reach of the unaided human intellect and outside the grasp of feeble human reason.").

⁷⁸ Cf. O'CONNELL, *supra* note 64, at 91 ("The first stirring . . . that God inspires in the soul he truly condescends to touch leads to a knowledge . . .") (quoting BLAISE PASCAL, *ON THE CONVERSION OF THE SINNER* (1654)) (internal quotation marks omitted).

⁷⁹ See JAMES, *supra* note 69, at 249.

⁸⁰ *Id.* at 250.

refer to anything intrinsic in a hypothesis; it refers to whatever it is in the background of those considering the hypothesis that lets them consider it as a real intellectual possibility.⁸¹ James wrote:

A live hypothesis is one which appeals as a real possibility to him to whom it is proposed. If I ask you to believe in the Mahdi, the notion makes no electric connection with your nature — it refuses to scintillate with any credibility at all. As an hypothesis it is completely dead. To an Arab, however (even if he be not one of the Mahdi's followers), the hypothesis is among the mind's possibilities: it is alive. This shows that deadness and liveness in an hypothesis are not intrinsic properties, but relations to the individual thinker. They are measured by his willingness to act.⁸²

Employing this vocabulary, Pascal's wager is only meant to appeal to those for whom Pascal's God is a "live hypothesis."

B. *The State's Wager*

The practical structure of Pascal's wager has attracted legal theorists in the past,⁸³ but no one has explicitly applied its probabilistic reasoning to the problem of valuing religious truth claims. As one scholar has noted, "[Pascal's] wager nicely illustrates a significant problem in philosophy: because reason cannot determine the authenticity of religious truths, the philosopher confronting religion must deal with important choices in the context of profound uncertainty."⁸⁴ However, such uncertainty does not mean that the state should treat religious truth claims as valueless. Rather, it suggests that religious freedom can be justified as a wager by the state in the face of the *possibility* of religious truth.

In his passage on the wager in the *Pensées*, Pascal responds to one obvious criticism of the hypothetical choice that he sets up for his religious agnostic: why not simply refuse to choose to believe in God or not to believe in him? This criticism speaks to precisely the kind of pragmatic issue that Pascal seeks to address. In the face of uncertainty, it would seem that the best course would be to take no action at all. An agnostic following this argument would not condemn a be-

⁸¹ See *id.*

⁸² *Id.*

⁸³ See generally Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347 (1995). In justifying the place of religion in America's constitutional structure, Eisgruber draws an analogy to the wager argument. According to Eisgruber, the Constitution instantiates "Madison's Wager," a system of complex institutional arrangements that "restrict the role of religious argument in public affairs, but the restriction operates largely through self-executing structural mechanisms independent of judicial doctrine." *Id.* at 350. Eisgruber's concerns are therefore peripheral to the rawer question discussed by this Note, but his article does illustrate the usefulness of using Pascal's wager as a prism for dealing with the issue of how the government should act in the face of uncertainty about religious truth claims.

⁸⁴ *Id.* at 349.

liever for believing falsely, but rather for acting precipitately on the basis of imperfect information: "I will condemn them not for having made this particular choice, but any choice, for, although the one who calls heads and the other one are equally at fault, the fact is that they are both at fault: the right thing is not to wager at all."⁸⁵ Pascal's response is to deny the possibility of this unengaged stance: "Yes, but you must wager. . . . [Y]ou are already committed."⁸⁶ To refrain from wagering is — for all practical purposes — to wager against God's existence. The choice not to act is "none the less a choice."⁸⁷

In the face of religiously motivated behavior that violates the law — or violates a proposed law — the state encounters an analogous situation. It cannot avoid the "raw question" posed at the outset of this Note. The state must choose — through courts or through legislatures — either to refrain from sanctioning religious conduct or to punish it. The reason is simple: inaction in such a case is "none the less a choice."⁸⁸ Allowing the law to go forward and punish religious behavior is not neutral. Nor is the decision to exempt religious practice. The state cannot retreat from the issue.

All religions claim to offer their adherents something of ultimate value — salvation, nirvana, entrance to paradise, righteousness before God. William James argued that religion is, among other things, the belief "[t]hat the visible world is part of a more spiritual universe from which it draws its chief significance; . . . [and] [t]hat union or harmonious relation with that higher universe is our true end."⁸⁹ The historian of religion Mircea Eliade identified religion with the cosmic orientation of the believer, an orientation that lets the believer participate in the transcendent order of the universe:

[R]eligious man lives in an open world and . . . his existence is open to the world. This means that religious man is accessible to an infinite series of experiences that could be termed cosmic. Such experiences are always religious, for the world is sacred.

. . . .

. . . In other words, "he who knows" has at command an entirely different experience from that of the profane man.⁹⁰

⁸⁵ PASCAL, *supra* note 69, at 122–23.

⁸⁶ *Id.* at 123. The insight here is similar to the state action paradoxes of constitutional law. See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49–71 (1996).

⁸⁷ *Cf.* *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (holding that a decision by a state not to act is nevertheless a choice).

⁸⁸ *Id.*

⁸⁹ WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 475 (Modern Library 1936) (1902).

⁹⁰ MIRCEA ELIADE, THE SACRED AND THE PROFANE: THE NATURE OF RELIGION 169–71 (William R. Trask trans., Harcourt Brace & Co. 1959) (1957).

In short, religion understands itself as *the* "ultimate concern."⁹¹ For religious believers, the good offered by religion is both real and substantial. Indeed, the long history of believers willing to sacrifice life, 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 protected by the law. Yet, despite religion's cosmic, spiritual, intellectual, and practical significance, the modern state cannot seem to take account of religion's understanding of its own importance.

Pascal's wager seems to provide a way for the state to appreciate this religious self-understanding without creating the kind of official theology that is anathema to modern liberal democracy. The wager offers a way of making a decision that does not require the state to take a position on the underlying truth of the options at stake. The skeptic in Pascal's wager does not know whether God exists. Likewise, a liberal state cannot take a position on the truth or falsity of religious claims. However, the forced question of religious liberty means that the state cannot simply ignore those claims without treating them *de facto* as false. To punish a member of the Native American Church like any other drug user for taking her sacrament is to treat the transcendent promises of that sacrament as meaningless and valueless.

Legal theorists have long debated the purpose of government regulation. One prominent theory is that government should regulate interactions between citizens to eliminate inefficiency. The lynchpin of much of this reasoning is the concept of Kaldor-Hicks efficiency.⁹² Briefly stated, an activity is Kaldor-Hicks efficient if those who benefit from the activity could fully compensate all those who are harmed from the activity and still reap benefits.⁹³ For example, suppose that a soda pop manufacturer currently uses cans to package its soda but wishes to shift to bottles, which would be three cents cheaper per unit. However, the shift to bottles would cause one accident per 100,000 bottles with a cost of \$10,000. The shift from cans to bottles is ineffi-

⁹¹ Cf. PAUL TILLICH, *Our Ultimate Concern*, in THE ESSENTIAL TILLICH 32-38 (F. Forrester Church ed., 1987).

⁹² For example, Kaldor-Hicks efficiency is the concept that structures the thought of many law and economics scholars, including Richard Posner. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 14 (5th ed. 1998).

⁹³ One pair of legal philosophers offers the following more formalized definition:

S_i is Kaldor-Hicks efficient to S if and only if in going from S to S_i the winners could compensate the losers so that no one would be worse than he or she was in S and at least one person would be better off than he or she was in S.

JEFFREY G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 186 (rev. ed. 1990). Note, however, that Kaldor-Hicks efficiency does not require that the losers actually be compensated.

cient.⁹⁴ This notion of efficiency suggests two possible policy prescriptions. First, the state may simply forbid inefficient transactions. Second, the state may adopt mechanisms that require actors to internalize fully the costs of their actions to others. This, in turn, will create powerful disincentives to engage in inefficient behavior.⁹⁵

The wager provides an officially agnostic state with a way of considering religion's self-assessment of its value in the state's efficiency calculus. It accomplishes this by reasoning probabilistically. The heart of Pascal's argument is that, in the presence of uncertainty about God's existence, the expected value of wagering on God nevertheless exceeds the value of wagering against him.⁹⁶ A state interested in efficient regulation has a similar interest in the expected value of particular options. A truly agnostic state, like Pascal's wagerer, must consider religion as a "live" hypothesis. It must entertain that religion could be either true *or* false. From the point of view of religion, religious behavior can have huge — even infinite — value. In the presence of uncertainty about theological truth claims, the state can, like the wagerer in Pascal's argument, nevertheless consider that value by discounting it by its uncertainty. In other words, the expected value of religious behavior, even from the state's agnostic point of view, is nevertheless very, very great. It is easy, but mistaken, to psychologize this argument. One might characterize the harm suffered by the believer as some negative psychological reaction to state coercion.⁹⁷ This is *not*

⁹⁴ The increased profits to the bottler per 100,000 = \$.03 x 100,000 = \$3,000. The accident costs per 100,000 = \$10,000. This example is adapted from A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 97–98 (2d ed. 1989).

⁹⁵ See generally RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 62 (6th ed. 1995).

⁹⁶ The wager can be formalized to illustrate this point. While not capturing all of the subtleties of the issue, formalization can usefully illustrate the relationships among the different variables. The choice of the wager can be reduced to:

Options	Returns to Chooser	
	If God exists (probability p)	If God doesn't exist (probability $1 - p$)
Bet on God	X	$-Y$
Do not bet on God	0	0

In addition, there is a fixed cost B to betting on God (effort of going to mass, the foregone pleasures of riotous dissipation, and so on), which must be considered. Thus, the expected value of betting on God is:

$$EV(\text{bet on God}) = p(X) + (1-p)(-Y) - B = p(X+Y) - Y - B$$

For Pascal's audience, the value of X is effectively infinite (eternal bliss) and the value of Y is zero (Pascal and his audience assume that no one is punished in the eternities for wagering wrong). Thus, so long as p exceeds zero, the expected value of betting on God exceeds the expected value of not wagering. See RESCHER, *supra* note 71, at 12; see also RICHARD POSNER, *OVERCOMING LAW* 502 (1995) (formalizing Pascal's wager slightly differently).

⁹⁷ See, e.g., John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283–88 (1996) (arguing that burdening religious belief gives rise to especially

the argument this Note advances. The potential value of protecting the confessional is not that it will confer some psychological benefit on a Catholic believer. Rather, the potential value is that the confessional will actually cleanse the believer of sin and give her access to Paradise. Likewise, the potential wrong of burdening the confessional is *not* some psychological damage. It is the danger of hellfire and damnation.

Still, acknowledging that an agnostic state must ascribe great value to the possibility of the ultimate concerns of religion does not mean that the state should never regulate religious activity. After all, even if the expected value of religious activity is very high, it is nevertheless true that religious behavior can impose costs on others. For example, during the nineteenth century, proponents of anti-polygamy legislation aimed at Mormons argued that their religiously inspired polygamy caused grave harms to other members of society.⁹⁸ Likewise, proponents of regulating peyote may point to the costs — crime, medical problems, social ills associated with addiction, and so forth — of drug use. The question is how the state should respond to these externalities in its regulation of religion. First, an efficient state would not want to prohibit religious activity altogether, even if it created some finite level of costs for others. Those made better off by the regulation — in finite terms — would not be able to compensate the potentially infinite loss suffered by believers. For example, if the state takes seriously the possibility that taking peyote provides the transcendent promises of a sacrament, the gain in terms of avoided costs that would come from prohibition would be exceeded by the expected value of allowing members of the Native American Church to take peyote.⁹⁹ Put another way, religious freedom would be efficient.

grievous psychological harms). Professor Gedicks labels such alleged psychological results "Transcendent Consequences." Gedicks, *supra* note 58, at 562. However, these purely subjective effects are *not* what this Note refers to as "ultimate concerns."

⁹⁸ GORDON, *supra* note 21, at 29–54 (discussing the costs that nineteenth-century anti-polygamists claimed that Mormon plural marriage imposed on society).

⁹⁹ Like Pascal's wager, this result may be usefully formalized to illustrate the structure of the argument. The expected value *in the view of the agnostic state* of forbidding peyote would be:

$$EV(\text{peyote prohibition}) = C - pX$$

where C represents the costs imposed by smoking peyote, X is the value of smoking peyote as defined within the horizon of religious belief, and p is the probability that the truth claims of the religion are true from within the horizon of the agnostic state. So long as X is functionally infinite compared to C , and the value of p exceeds zero (in other words, the state is willing to posit that the religious truth claims *might* be true), the expected value of prohibiting religiously inspired peyote use would be less than zero. If the state is interested in prohibiting only inefficient activities, then it will not prohibit behavior unless those made better off by the prohibition would be better off even after fully compensating those burdened by it. Put another way, it will not regulate unless the expected value of the regulation is positive.

This does not mean, however, that it is never efficient for the state to regulate activity that might in some cases be religiously motivated. For example, if religiously inspired polygamy promised to nineteenth-century Mormons the possibility of infinite eternal rewards, an outright prohibition of religious polygamy would not be efficient. However, Mormons did not claim that nonreligiously motivated polygamy promised the same eternal rewards, and in fact nineteenth-century Mormon defenders of polygamy argued that garden-variety bigamy should be forbidden because of the harm that it caused.¹⁰⁰ If the negative externalities of such nonreligious bigamy were greater than the (now nonreligious) benefit gained by the bigamist, a prohibition would be efficient. Thus, a regime that forbade certain cost-creating behavior while exempting behavior that was religiously motivated but otherwise similar could be justified on the basis of the state's agnosticism and the goal of efficiency.

Even if it is not efficient to prohibit religious behavior, the state may nevertheless want to force religious actors to internalize the costs they impose on others. There are two reasons for this. First, the state may want to use this cost internalization to generate revenue to compensate those harmed by religious activity. Thus, for example, the state might tax peyote use to finance community redevelopment in peyote-ravaged neighborhoods. Alternatively, it might give those harmed by Mormon polygamy a civil cause of action against religious polygamists. Second, the state may be uncertain about the precise value that a religion ascribes to any given behavior. If religious actors must fully internalize the negative externalities they create, however, the state avoids having to make close calls. For example, if the state knows that wine imbibed during mass leads a certain number of people into alcoholism that imposes costs on others, it may impose a tax on the saying of mass equal to those costs. This would allow Catholics to assess the value of the mass against the burden of the tax. If they ascribe sufficient theological value to the mass, they will continue to celebrate the sacraments despite the tax. However, if the rituals are theologically peripheral and of lesser value, then they will be dropped when their cost exceeds their expected benefit. Thus, the state can effectively forbid inefficient behavior even when it is uncertain about precise theological calibrations.

Ultimately, the argument from Pascal's wager inverts the argument against religious compulsion first articulated by John Locke. For Locke, compulsory religion lacked value because it could not lead to

¹⁰⁰ See GEORGE Q. CANNON, A REVIEW OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, IN THE CASE OF GEO. REYNOLDS VS. THE UNITED STATES 29 (1879) (arguing that "a wide distinction exists between the crime of bigamy or polygamy [as defined by the common law] . . . and the . . . [polygamous] marriage of the Latter-day Saints").

genuine religious faith.¹⁰¹ The argument from Pascal's wager asserts that protecting voluntary religious activity is valuable precisely because it might — literally — lead to the "Salvation of Souls." As one modern scholar has written:

[R]eligious claims — if true — are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by "God." For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.¹⁰²

III. THE PROBLEM OF HELL

The "problem of hell"¹⁰³ presents the most difficult challenge to the wager. This problem resembles one of the two classic objections to Pascal's wager: "God might be unimpressed by so opportunistic a worshipper, and a choice of the wrong sect might be as fatal as remaining an agnostic"¹⁰⁴ An analogous problem presents itself in the wager on religious freedom. If the agnostic state is willing to acknowledge that it is possible that religious claims are true, and that the promised ultimate benefits may in fact materialize, it would also seem that the state should consider the possibility that these claims are mistaken. If the state protects religious rituals because they may in fact get people into heaven, should it not also entertain the possibility that allowing people to perform the incorrect religious rituals may speed their souls to hell? After all, the bedrock premise of the wager is that the state must not only refrain from endorsing any particular religious position, but must also refrain from treating any religious position as false; in short, the state must take all religious claims seriously. If the state considers both sides of the issue, is the wager on religious freedom still efficient?

¹⁰¹ Locke wrote:

Neither the Profession of any Articles of Faith, nor the Conformity to any outward Form of Worship . . . can be available to the Salvation of Souls, unless the truth of the one, and the acceptableness of the other unto God, be thoroughly believed But Penalties are no ways capable to produce such Belief.

LOCKE, *supra* note 12, at 27.

¹⁰² Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15.

¹⁰³ Although the idea of "hell" and the examples employed in this section are drawn from Christian theology, the "problem of hell" is not uniquely Christian. Rather, it is concerned with how the state should respond to mutually exclusive theological characterizations of the same activity.

¹⁰⁴ POSNER, *supra* note 96, at 502.

For example, Catholics may believe that the sacraments increase their chances of eternal rewards,¹⁰⁵ but certain anti-Catholic Protestants may believe with equal fervor that such rituals will send practitioners to hell.¹⁰⁶ If the state treats both claims as equally probable, then it is not at all clear that the wager on religious freedom remains efficient. Suppose that there are significant secular social costs to celebrating the mass. (Perhaps the wine increases drunkenness, leading to child abuse.) If one considers both the possibility that the mass may send one to heaven *and* the possibility that it may send one to hell, then the value of "ultimate concerns" may net out to zero, and an outright prohibition might be efficient because of the nonreligious social costs of the mass.¹⁰⁷

One possible response is to invoke some antipaternalist principle with regard to religion. The argument would be that the state should not meddle in personal religious choices. Those favoring more robust protection for religious freedom have repeatedly advanced this argument. Indeed, some have gone so far as to define the concept of religious freedom as the claim that religious choices should be kept purely private, without any nudging one way or another from the state. For example, law and economics scholars have argued that the state should employ an economic model of neutrality to ensure that religion is neither subsidized nor taxed, thus ensuring that religious choices are truly personal.¹⁰⁸ Others have made similar arguments in noneconomic terms.¹⁰⁹ They have argued that a merely formal neutrality actually creates disincentives for certain kinds of religious practice, and that what is required is a substantive notion of equality that makes the state genuinely neutral in the religious calculus of its citizens.¹¹⁰ But the problem with using these arguments to save the wager argument

¹⁰⁵ See CATECHISM OF THE CATHOLIC CHURCH 293 (1994) ("The sacraments are efficacious signs of grace, instituted by Christ and entrusted to the Church by which divine life is dispersed to us.").

¹⁰⁶ See, e.g., Dave Hunt, *A Cult is a Cult*, THE BEREAN CALL, Dec. 1998, at <http://www.thebereancall.org/articles/newpage35.htm> ("The deviation by Catholicism from biblical Christianity goes to the heart of the faith, to salvation itself, and thus affects the eternal destiny of those deceived thereby.").

¹⁰⁷ The issue can be formalized as:

$$EV(\text{wagering on freedom}) = pX - pY - B$$

where p is the probability that the religious claims are true, X is the ultimate value promised by the first theology (heaven), Y is the cost promised by the second theology (hell), and B is the cost of forgoing regulation (the temporal costs imposed on others by the religious behavior). If X and Y are of equal value, then the expected value of the wager on religious freedom becomes negative because of B .

¹⁰⁸ See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 4-14 (1989).

¹⁰⁹ See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

¹¹⁰ *Id.* at 1001-06.

for religious liberty is that they are ultimately inconsistent with it. The wager does not seek to privatize religion. On the contrary, it rests on the idea that the state can take religion seriously when trying to regulate efficiently. In short, it relies on the possibility of considering the value of religion as religion without taking positions for or against claims of religious truth.

A second, more promising, response rests on the idea of comparative competence. Recall that when the state considers the "problem of hell," it nets together both the value of heaven and the cost of hell discounted by the probability of religious truth. In order for "ultimate concerns" to cancel each other out, the state must assign the same probability to each theology. In other words, the state must think that it is equally probable that the mass will send you to heaven or to hell. However, there is no reason that this should be the case. Seen in these terms, the "problem of hell" asks the state to judge the comparative probabilities of various theologies.¹¹¹

At this point, it is tempting to throw up one's hands and say with Pascal's skeptic, "the right thing is not to wager at all."¹¹² However, the state cannot retreat from the choice: choosing not to wager on religious freedom is not neutral. In the case of the mass hypothetical, it is the functional equivalent of assuming that, on the whole, the mass is just as likely to send people to heaven as to hell.¹¹³ Not choosing is thus a choice. If the urge to throw up one's hands stems from genuine uncertainty, simply not wagering is the wrong choice to make.

Assuming that the state takes religion seriously but cannot judge the relative probabilities of religion, the state should want the decision whether to engage in religious activity to be made by the actor with the best information about the matter. However, for precisely the reasons that lead the state to agnosticism, it is not the best actor to make these decisions. The state cannot pray, meditate, engage in theological dialectic, or head down any of the other myriad paths to religious truth

¹¹¹ Suppose that the expected value of wagering on religious freedom is:

$$EV(\text{freedom}) = p_X - p_Y - B$$

This statement assumes that the theologies of *X* and *Y* are equally plausible. The expected value of wagering on religious freedom could thus be given a more nuanced statement by relaxing this assumption:

$$EV(\text{freedom}) = p_x X - p_y Y - B$$

where p_x and p_y represent the probability that theologies *X* and *Y* respectively are true. If we assume that *X* and *Y* have comparable values, then it follows that the wager on religious freedom will be the efficient choice if p_x exceeds p_y by a sufficiently large margin. The central question is thus what values the state assigns to p_x and p_y .

¹¹² PASCAL, *supra* note 69, at 123 (internal quotation marks omitted).

¹¹³ Note, however, that it is not the functional equivalent of treating p_x as less than p_y . Such a belief would lead to the conclusion that religiously motivated behavior should be prohibited (or at least more severely regulated), since it is more likely to send people to hell than to send them to heaven.

— including the path that may lead to justified atheism. These are things that only actual people can do. In wagering on religious freedom, the state functionally treats the probability that freedom will send people to heaven as greater than the probability that it will send them to hell. This may or may not be the correct position to take; however, in so doing the state throws the risk of damnation back onto its citizens.

In a sense, religious freedom becomes a regime of soteriological strict liability. Proponents of strict liability argue that transferring the potential cost of damage onto the party that undertakes a risky activity is justified because, among other things, that party is likely to have the best information about how to prevent accidents.¹¹⁴ Likewise, allowing religious believers to engage in religiously motivated conduct places the religious risk of that conduct on their shoulders. Such risk shifting is justified because these people are likely to be in a better epistemological position than the state. In fact, the state's decision to wager on religious freedom may even create incentives for religious believers to act more carefully, because the state will not intervene to keep them from going to hell.¹¹⁵

CONCLUSION

There are limitations to the wager argument for religious freedom. It is ultimately a pragmatic and loosely utilitarian argument rather than a deontological one. Efficiency is hardly a universally accepted criterion.¹¹⁶ Thus, the wager is unlikely to appeal to those who want all "rights" to be defended in terms of the Kantian commands of individualism.¹¹⁷ However, the wager is not necessarily inconsistent with such arguments, and there is no reason that it could not be one among several arguments in favor of religious freedom. Given the criterion of efficiency, the wager argument provides a possible guide for state action in the face of religious uncertainty. Given this limitation to its appeal, the wager is unlikely to solve the malaise in the current theoretical discussion of religious freedom. The advantage, however, is that the wager argument seeks to respond to the fundamental problem

¹¹⁴ See EPSTEIN, *supra* note 95, at 157.

¹¹⁵ In addition to deontological justifications for individual choice and Locke's argument about the impossibility of coercing belief, this argument from comparative epistemological advantage explains why an agnostic state that takes religion seriously would refrain from using coercion to require its citizens to adopt a particular religion. In choosing from a menu of pro-coercion or anti-coercion theologies and policies, the state would have to make a decision about the comparative probability of religious truth.

¹¹⁶ See, e.g., Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980) (criticizing the concept of efficiency).

¹¹⁷ Cf. JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed. 1999) ("[T]he rights secured by justice are not subject to . . . the calculus of social benefits.").

with the current justifications for religious freedom: the loss of the ability to take account of religion's own understanding of its value. If the wager argument has a virtue, it is that it seeks to find a way of weighing this value without creating an official theology. To the extent that the state is still willing to take religion seriously, the wager argument has some bite. If, however, as some critics have claimed, the modern liberal state at bottom treats religion as a false or merely psychological phenomenon, then the wager is unlikely to do anything to appeal to "the actual feelings . . . of the community."¹¹⁸

¹¹⁸ HOLMES, *supra* note 1, at 36.