Against Free Exercise
Reductionism

By W. Cole Durham, Jr.*

“[O]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”**

I. Introduction

In my lifetime, which began after the second World War, there have been certain moments in which I learned what democracy was about. The first came as I watched crowds surging through the Berlin wall in 1989. I was just over forty that year, and by then had spent a tenth of my life in Germany. I had been able to learn at first hand how much Germany had learned about democracy, and I was as moved by the events as the Germans I watched on television. A second came in December of 2004, as I watched the tent city of Kiev’s Orange Revolution. Kiev has long been a kind of spiritual home for me, in large part because of many friends in that country who have worked for religious freedom and the broader panoply of human rights. A third came when I watched people in Iraq, who had been threatened with their lives if they chose to vote, holding up inked fingers in triumph in January of 2005, or later, when I met many of the drafters of the Iraqi constitution, for whom the cost of working on that document was the daily threat of assassination—people who understood that constitutional documents are written not with paper and ink, but with courage.

* Susa Young Gates University Professor of Law, J. Reuben Clark Law School, Brigham Young University and Director, International Center for Law and Religion Studies at BYU. A.B., Harvard College, 1972; J.D. Harvard Law School. The author wishes to thank Peter Petkoff for arranging this lecture, and Ken Pike, for research assistance with this paper.

** Letter from Benjamin Franklin to the Abbés Chalut and Arnaud (Apr. 17, 1787), in Memoirs of Benjamin Franklin 604 (1834).
Significantly, our feelings about such moments have little to do with the facts of power. We are moved not because of sympathy with the winner of an election or even of a longer term ideological rivalry. And the memory of such moments survives subsequent shifts in power, the return of normalcy, and all too often, disappointment. These moments transcend politics. I believe we are moved because at such moments we feel the significance of human beings taking hold of their freedom. We have learned enough to know of the incredibly hard work that must follow such triumphant moments if their promise is to endure. But we cannot help feeling the deepest respect and even reverence for such achievements of human spirit. Such moments are forged by particular people, making particular choices, but they belong to all mankind, and so hopefully all of us, even those from outside, can be allowed to reflect about their meaning.

In my paper today, I want to say something about such moments and their relation to a puzzle, or a set of related puzzles, about one of our most fundamental human rights: the right to freedom of religion or belief. In the United States, we often refer to this as a first freedom, or even the first freedom. It is spoken of as such not simply because it is in the First Amendment of the U.S. Constitution. That, after all, is somewhat of an accident of history. In some early drafts, it was the third amendment. It is a first freedom, or the first freedom, because of its profound links to the core of human dignity, to the very center of our normative consciousness, to conscience, to the sacrality of human persons, and to all that calls us to what is highest in human affairs.

But in the very stating of this right’s importance is a hint of what causes the puzzlement. Why should religion, or freedom of religion, have such priority status? This is rapidly becoming a cross-cultural issue. To be politically correct these days, we always speak of “freedom of religion or belief,” because we know that it is not only religious believers who hear and respond to the call of conscience. We are also conscious of what Scott
Appleby has described as “the ambivalence of the sacred”—the fact that while the sacred can elicit the highest in human nature, but all too often, it has elicited just the opposite—the darkest manifestations of man’s inhumanity to man, and to woman. The puzzle I am concerned about today, however, goes to the core of liberal theory. The puzzle for me has been how to defend the claim that religion is special, deserving of special protection in the pantheon of human rights. Whatever answer one might give to the question, “Why is religion special?” how does one respond to reductionist claims that the right to freedom religion or belief is essentially redundant in a constitutional world with robust protections for freedom of expression (including symbolic conduct), association, and strong anti-discrimination norms. In this paper, I want to describe some possible answers to this puzzle. I confess that articulating answers is not easy. I have been reflecting on this for roughly thirty years. But this is still very much a work in progress, and suggestions will be appreciated. In particular, it is always helpful to have concrete examples of why it is that the Free Exercise Clause of the U.S. Constitution, and the religion clauses of most other constitutions and international human rights instruments are not redundant.

II. The Puzzle of Free Exercise Reductionism

Freedom of religion or belief is generally recognized as the oldest of the internationally protected human rights. It can well be called the grandparent of other human rights, though it has become a sometimes neglected grandparent in our times.

1 R. Scott Appleby, The Ambivalence of the Sacred: Religion, Violence, and Reconciliation, Lanham/Boulder/New York/Oxford: Rowman & Littlefield Publishers, Inc. (2000).
2 See, e.g., Steven G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75, 78 (1990).
3 See, e.g., William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545 (1983).
4 Marshall, 67 Minn. L. Rev. 545.
5 See W. Cole Durham, Jr., Perspectives on Religious Liberty: A Comparative Framework, in Religious Human Rights in Global Perspective: Legal Perspectives (Johan D. van der Vyver and John Witte, Jr., eds., The Hague/Boston/London: Martinus Nijhoff Publishers, 1996).
The ideal of religious freedom was incorporated in the First Amendment of the U.S. Constitution with the phrase, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

Over the past quarter century, there has been increasing evidence of a reductionist move that argues that “free exercise of religion”—the key phrase in the U.S. Constitution covering the protection of freedom of religion—has become largely redundant in light of other constitutional developments. I first encountered this argument in an article by Prof. William P. Marshall in 1983. Essentially, the argument was that if freedom of speech is interpreted with sufficient breadth, using a broad notion of symbolic speech to cover religious conduct, the free speech clause could be used to cover everything that is protected by free exercise clause.

This argument has been given added force by subsequent developments. After the Supreme Court downgraded free exercise protections in 1990 in the Smith case so that virtually any neutral and general law could trump religious liberty claims, one could make the argument that free speech provided even stronger protection than free exercise. The better view is that freedom of religion claims should receive protection at least as strong as that provided by freedom of speech, freedom of association, and equal protection norms, but so long as those

6 U.S. Const., amend. 1.
7 Kauper; McConnell.
8 William P. Marshall, __ Minn. L. Rev. ____ (1983).
9 Employment Division v. Smith, 494 U.S. 872 (1990).
10 The idea was that strict scrutiny analysis might apply if free exercise was buttressed by another constitutional right such as freedom of speech or family rights. But of course, where that is the case, the other right alone is sufficient to prevail, so the religious right becomes not only redundant but irrelevant.
11 In the Smith case, the Supreme Court explicitly noted that it was not overruling a long line of cases that affirmed the right of religious communities to autonomy in their own affairs (e.g., with respect to church property disputes and internal issues such as ecclesiastical appointments). For an overview of these issues, see [[[Durham, in Seritella volume.
12 See, e.g., Frederick Mark Gedicks, Towards a Defensible Free Exercise Doctrine, ___ Geo. Wash. L. Rev. (2001).
norms are available, the argument runs, why is an additional right to freedom of religion necessary?

A more recent version of this argument has been advanced by Professor Mark Tushnet. He asks, “Suppose the Free Exercise Clause were simply ripped out of the Constitution. What would change in contemporary constitutional law?” His response: not much. After noting that the scope of the Free Exercise Clause is quite narrow after Smith, he goes on to document how “other constitutional doctrines protect a wide range of actions in which religious believers engage.” These include direct protection of speech, bans on coerced speech, symbolic speech (i.e., expressive conduct that is intended to communicate and is so understood by others), free speech doctrines that proscribe viewpoint discrimination, require equal access to public resources, or proscribe disparate regulatory impacts. Also significant are rights of expressive association, which can help explain legal doctrines such as the ministerial exception to legislation forbidding employment discrimination (religious groups can engage in preferential hiring of their own members) and more generally, the right of religious communities to autonomy in their own affairs.

Tushnet acknowledges a few areas where coverage may be inadequate. For example, symbolic speech may not be sufficient to cover certain activities merely motivated by religious

13 Mark Tushnet, The Redundant Free Exercise Clause?, 33 Loy. U. Chi. L.J. 71 (2001).
14 Id., 71.
15 Id.
16 Id. at 72.
17 Id. at 73-80.
18 Id. at 74.
19 Id. at 75.
20 Id. at 75-76, 80-83.
21 Id. at 84-90.
22 Id. at 84-86. For a recent case summarizing developments with regard to the ministerial exception, see Petruska [[3d Cir., cert. denied ___ U.S.____ (2007). See also Corporation of the Presiding Bishop v. Amos, ___ U.S. ____ (1987).
23 See Tushnet, supra note 21, at 85.
Similarly, expressive association cases may not provide full protection to church-related employment cases, because American law respects the autonomy of religion with respect to all employment decisions, not merely those in which direct religious expression activities are involved. But in general, he concludes that “[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant.”

Note that this is not a parochial problem of American constitutional law. The redundancy problem is likely to arise in most modern constitutions, because by and large, these also include rights covering freedom of expression, freedom of association, and protecting against non-discrimination. This is also true at the level of international human rights law. Professor James Nickel has argued that freedom of religion is adequately covered by a constellation of nine basic liberties that are widely recognized in international law: (1) freedom of belief, thought and inquiry; (2) freedom of communication and expression; (3) freedom of association; (4) freedom of peaceful assembly; (5) freedom of political participation; (6) freedom of movement; (7) economic liberties; (8) privacy and autonomy in the areas of home, family, sexuality, and reproduction; and (9) freedom to follow an ethic, plan of life, lifestyle, or traditional way of living. In Nickel’s view, once this full set of basic liberties is in place, no separate mention of freedom of religion is necessary to protect the interests traditionally covered by freedom of religion.

For Nickel, this approach has at least four advantages. First, it clarifies that no special religious reasons need to be given for grounding religious freedom, which has the same

24 Id. at 76-77.
25 Arrowsmith.
26 See Tushnet, supra note 21, at 86, citing Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1, 20 (2000)
27 Tushnet, supra note 21, at 73.
28 See, e.g., German Basic Law, Grundrechte.
29 ICCPR, arts. 18-21; ECHR, arts. 9-11. Plus anti-discrimination norms.
30 James W. Nickel, Who Needs Freedom of Religion?, 76 U. Colo. L. Rev. 941, 943 (2005).
31 Id.
general grounding as other basic liberties. Second, it provides a “broad and ecumenical scope for freedom of religion that extends into areas such as association, movement, politics, and business,” further underscoring the multifaceted character of religious freedom. Third, this approach transcends a clause-bound approach to religious freedom that sees its contours as defined by the happenstance of the wording of constitutional and international documents. And fourth, it resists “exaggerating the priority of religious freedom,” setting it on a more equal footing with other rights.

Free exercise reductionism was given added impetus last year in the argumentation used by the Obama Administration in its challenge to the ministerial exception in the Hosanna-Tabor case. Briefly stated, the administration lawyers took the position that long-settled doctrines of religious autonomy could be trumped by anti-discrimination norms, in part because in their view, religious autonomy principles succumbed to the reasoning in Employment Division v. Smith, namely that neutral and general laws trump religious freedom norms, but also because in their view, religious freedom norms provided no greater protection than secular freedom of association norms. During oral argument in Hosanna-Tabor, Chief Justice Roberts asked the lawyer representing the government whether the administration thought there was anything ‘special about the fact that the people involved in this case are part of a religious organization.’ The government lawyer responded that ‘there was no difference whether the group was a religious group, a labor group, or any other association of individuals.’ Justice Scalia responded by exclaiming, ‘That’s extraordinary. That is extraordinary. We are talking here about the free exercise clause and about the establishment clause and you say they have no special application?’ Even former Obama Solicitor General Elena Kagan was ‘amazed’ by the Administration’s opinion. The Court’s formal opinion in the case echoed this colloquy. Writing for a unanimous Court,
Justice Roberts stated, ‘We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.’ Despite the firmness of this statement, and despite the unanimity of the Supreme Court’s decision in Hosanna-Tabor, the position advocated by the government, that religious autonomy deserves no special protection beyond what is afforded by freedom of association continues to find support in academia and wider circles, and threatens to erode religious freedom rights. This is particularly troubling when one realizes that the freedom of association rights with which the administration was seeking to equate with religious freedom rights are precisely the rights that the same voices said should not have been strong enough to protect the expressive rights of the Boy Scouts of America in the heavily criticized Dale case. That is, the strategy seems to be first, reduce religious freedom rights to a secular equivalent, and then give that secular right an equalitarian twist that it no longer provides the protection to religion that had been provided in the past.

III. Responses to Redundancy Claims

The question, then, is how to respond to free exercise reductionism and the redundancy claims that have been arising. The redundancy arguments have growing force in our equalitarian environment, and I believe pose a genuine threat to religious freedom. We are witnessing a paradigm shift from freedom to equality norms as the deep structure of human rights, and key dimensions of freedom of religion or belief disappear or suffer deemphasis as a result of this shift. Defenders of religious freedom need to be vigilant against these arguments, which are being made with increasing frequency around the world. I am convinced that in the end the arguments are flawed for a variety of reasons. In general, freedom of speech, association, and non-discrimination norms capture many of the values of the secular enlightenment, but relying on these “children” or

36 132 S.Ct. at 706.
37 See Durham and Scharffs, Japan paper.
“grandchildren” of the deeper religious freedom right risks leaving a deeper strata of values unrecognized and unprotected. In what follows, I list counterarguments I have identified thus far. Additional counterarguments are welcome.

A. Redundancy Arguments Further Secularism, Not Secularity

The redundancy arguments are virtually always made in support of a secularist agenda, and they typically foster secularism as opposed to secularity. That is, the concern is to advance secularism as an ideology and end in itself, as opposed to secularity conceived as a neutral framework welcoming a wide range of world views. This results in a series of related but equally problematic misapplications of the ideal of secularity. Thus, instead of being understood as a key to forming the framework for a society that is welcoming to all beliefs, as well as those without beliefs, secularism becomes an ideology promoting secular and anti-religious objectives. Instead of providing a neutral framework, secularism presses to neutralize any signs of religion, particularly in public space. Instead of the American notion of separation of church and state that aims at protecting both religion and the state, one get’s French-style laïcité, which views the presence of religion in the public sector as anathema. Instead of welcoming religion in an open public sphere, secularism consigns religion to the private sphere alone. Instead of providing flexible accommodation of conscience, secularism calls for rigid separation of religion and state. Finally, instead of providing protecting substantive equality, recognizing that the dictates of conscience call for substantively different treatment, secularism insists on formal equality, and refuses to recognize distinctive religious needs.

In most areas, the tendency is toward generating greater specificity in human rights norms. Excessive abstraction leaves too much room for discretion. This helps to explain why most constitutions around the world are much more detailed today than similar documents were in the 18th century. Some see this as a loss of elegance, but in large part it is a result of increased
experience and a desire to clearly resolve known issues.

Whatever attitude one has toward originalism in constitutional interpretation, this is surely an area where it should not be ignored. Non-originalists sometimes argue for expanded interpretation or shifts in meaning over time to adapt to new circumstances, but arguing that a provision should simply be ignored would seem particularly brazen.

Rights grow in legitimacy with age, particularly when they protect core values such as human dignity and the right to freedom of religion or belief. Rights have historical associations and help entrench clear meanings regarding key protections. Different rights, although no doubt providing some overlapping coverage, do not necessarily have the same range of coverage and gravitational influence with regard to subsequent cases. Sometimes they cover similar cases, but without lending the same degree of weight to the protection. In general, freedom of speech and association, and non-discrimination norms, capture many of the values of the secular enlightenment, but relying on these “younger” rights risks leaving deeper strata of values unrecognized and unprotected.

2. Coverage Shortfalls

Marshall, Tushnet, and Nickel all recognize that the freedom of religion right—the legitimacy of which none of them questions—can only be covered by other rights if some stretching of the other rights is allowed. For example, the absolute protection associated with the inner core of belief—with Forum Internum—is not entrenched in other areas. Moreover, the conduct dimension of religious freedom is covered only with some stretching of alternative doctrines such as the protections available for symbolic speech. Rights that have different centers of gravity may not allow the same flexibility for doctrinal growth that the original freedom of religion doctrine has. “Stretched” rights are thinner, more easily overridden. Loss of historical reference points means that clear and pivotal cases may lose their relevance. Redundancy is an important safeguard against such shortfalls in coverage. The following paragraphs identify
several potential shortfalls that are easily imaginable if a separate religious freedom right is not maintained.

Reconceptualizing protections in terms of secular rights may result in reduced coverage. Although the headscarf cases in the European Court of Human Rights have been dealt with under the European Convention’s religion provision, the freedom was for all practical purposes analyzed in terms of secular priorities, and religious concerns were given relatively little weight. Removing explicit reference to religious freedom would weaken the protections even further. Indeed, whether intended or not, treating religious freedom as redundant would send a powerful message that religious values have dropped in legal importance.

With respect to the core freedom of “thought, conscience and belief,” should secular thought be the core, and religion the penumbra, or vice versa, or should both be regarded as equally important? Religion has more premises than the secular mind has thought of. While philosophical elegance is attractive, breadth and depth of coverage are even more important. If a particular mental filter is applied, it is too easy to filter out as “noise” the substance of what others are claiming. Alternatively, other premises often resonate across value systems, earning respect and promoting understanding. We cannot afford to arbitrarily exclude some using a criterion of sufficient secularity.

The autonomy rights of religious communities is likely to be inadequately protected by other rights. In the freedom of association area, one thinks of the “Bahá’í Case”—one of the key German precedents in the domain of religious autonomy and the law of registration of religious associations. Under German association law applied as normally interpreted, the distinctive Bahá’í religious structure could not have been approved. One can easily imagine the right to freedom of religion being given a similar interpretation, inconsistent with the religious community’s right to autonomy in organizing its own affairs. Earlier, in a number of communist countries, association laws required “democratic” governance, so Catholic or other hierarchical organizations might not pass muster. Democratic

38 Bahá’í Case, German Constitutional Court, 5 February 1991.
association laws can have similar effect if they are not construed to take religious autonomy rights into account. More generally, freedom of expression and freedom of association values do not necessarily cover neatly the sensitive domain of communal belief and practice typically covered by religious autonomy and self-determination doctrines.\footnote{See Tushnet, supra note 47, at 86.}

Freedom of movement is important to religious communities for a variety of reasons. But freedom of movement can easily be trumped by national security or other considerations. In this regard, Nolan and \textit{K v. Russia}\footnote{ECtHR, App. No. 2512/04, 12 February 2009.} is important in recognizing that while nations have a strong interest in policing their borders, they cannot use border prerogatives.\footnote{Id., at §§ 62-65.} Indeed, national security concerns alone, in the absence of demonstrated concrete risks to public health, safety and order, are not sufficient to override right to travel claims where religious freedom claims are involved.\footnote{Id., at § 73.} The right to travel alone would not be so robust.

Freedom of political participation is also cited at least by Nickle as an area that may provide some overlapping protection. The difficulty in this area is that there is too much pressure in the opposite direction. Governments are as likely to restrict religions on the grounds that they are dangerous as to protect their rights to political participation. When religious groups become a source of tension, the temptation is to resolve the tensions by eliminating pluralism. The reminder in the European Court’s Serif case, mentioned earlier,\footnote{See text accompanying notes 19-20, supra.} that the obligation of the state is to protect religious pluralism rather than repress it, is an important non-redundant reminder of what should be done.

3. Grounding of Claims for Distinctive Treatment

Leaving problems of inadequate coverage aside, religious freedom is vital because it represents a crucial constraint on the social contract. It operates in effect as a reservation clause.

\footnote{See Tushnet, supra note 47, at 86.}\footnote{ECtHR, App. No. 2512/04, 12 February 2009.}\footnote{Id., at §§ 62-65.}\footnote{Id., at § 73.}\footnote{See text accompanying notes 19-20, supra.}

\textit{Educação & Linguagem} • v. 17 • n. 1 • 11-27, jan.-jun. 2014

ISSN IMPRESSO: 1415-9902 • ISSN ELETRÔNICO: 2176-1043

DOI: \texttt{http://dx.doi.org/10.15603/2176-1043/EL.v17n1p11-27}
to use the language of international treaty law. In Madisonian language, it protects the duty that believers owe to the Creator, and as such, it is “precedent both in order of time and degree of obligation, to the claims of Civil Society.”

Dignitatis Humanae is even more explicit. “Religious freedom . . . which men demand as necessary to fulfill their duty to worship God, has to do with immunity from coercion in civil society.” The right to religious freedom “is known through the revealed word of God and by reason itself.” Man should not be “restrained from acting in accordance with his conscience, especially in matters religious,” because “the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind.” Religious freedom relates to an order of obligation that transcends normal civil arrangements, and accordingly deserves distinct protection.

Religious freedom is thus about more than protecting the values of secular enlightenment. Religious values have distinctive dignity, centrality, and importance not adequately captured by enlightenment notions of freedom of speech, association, and equality.

Second, expanding on the first point, freedom of religion is not merely about protecting particular ideas and particularized communications. It is about protecting comprehensive world-views—the frameworks within which individual ideas and norms are born, nurtured, and given meaning. It is about protecting the norm-generating, nurturing, and transmitting process. It protects the seedbeds of pluralism, generating the ideas and social arrangements that give the other rights their content and their significance.

44 Memorial and Remonstrance, supra note 5, at § 1.
45 Dignitatis Humanae, supra note 57, at ¶ 1.
46 Id., at ¶ 2.
47 Id., at ¶ 3.
VIII. Virtue Ethics, Reverence, and the Distinctive Role of Religious Freedom

A final area of erosion and loss is drawn from the domain of virtue ethics, and in particular, from what Paul Woodruff has referred to as the forgotten virtue of reverence.48 Woodruff’s argument for renewing this forgotten virtue can be expanded to provide a powerful additional ground for explaining why religion in general and religious freedom in particular deserve special protection. This provides one additional ground for affirming that religious freedom is not redundant, but for more importantly, it underscores society’s deep need to provide protection to freedom of religion and belief.

As an expert in classical Greek philosophy, Professor Woodruff began to recognize some time ago that the great thinkers of Greece attached a significance to reverence that we moderns seem to have forgotten. At the outset of his book, he states, “Reverence is an ancient virtue that survives among us in half-forgotten patterns of civility, in moments of inarticulate awe, and in nostalgia for the lost ways of traditional cultures.”49 Reverence is not merely about being quiet in church or, more generally, about attitudes of religious believers. In Woodruff’s view, reverence is a universal human capacity or virtue. It is evident in the lives of both believers and non-believers, and sometimes, paradoxically, even in the lives of individuals who pride themselves on being irreverent.

48 Paul Woodruff, *Reverence: Renewing a Forgotten Virtue* (Oxford: Oxford University Press, 2001). Woodruff uses the English word ‘reverence’ to translate three Greek terms with overlapping meanings: *basion*, *eusebeia*, and *aidos*. He notes that in the *Euthyphro*, *basion* is often (but he thinks wrongly) translated as “piety,” but this has a meaning closer to religiosity, which is not the kind of ethical virtue intended by the term. Correspondence from Paul Woodruff in possession of author, July 5, 2011. Woodruff considers reverence to be one of the cardinal Greek virtues. See Ursula Goodenough and Paul Woodruff, “Mindful Virtue, Mindful Reverence,” *Zygon: Journal of Religion and Science* 36 (2001) 585-95, 590. In his introduction to his translation of the *Bacchae*, he states, “Reverence itself, a cardinal virtue in the period [of Greek antiquity], is most deeply the sense of holiness that comes over an individual during initiation.” Euripides, *Bacchae* (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), xiv.

49 Id.
I want to underscore the notion that reverence as I am speaking of it is not necessarily a religious category. Remember the feeling of profound respect I described at the outset with respect to the Berlin Wall, the Orange Revolution, or voting in Iraq. I think such reactions were shared by people worldwide, whether they were religious or not. Tore Lindholm has suggested that it might be better to talk about conscience, or what Hans Joas has referred to as the sacrality of the person.\textsuperscript{50} Joas argues that the emergence of modern human rights commitments is linked to the sacralization of the person, but sacralization understood in a not necessarily religious way—that is, much as I am understanding the notion of reverence.

As Woodruff portrays it, “[r]everence begins in a deep understanding of human limitations; from this grows the capacity to be in awe of whatever we believe lies outside our control—God, truth, justice, nature, even death. The capacity for awe, as it grows, brings with it the capacity for respecting fellow human beings, flaws and all.”\textsuperscript{51} Thus, “[t]he Greeks . . . saw reverence as one of the bulwarks of society . . . .”\textsuperscript{52} “To forget that you are only human, to think you can act like a god—this is the opposite of reverence.”\textsuperscript{53} “Ancient Greeks thought that tyranny was the height of irreverence, and they gave the famous name of hubris to the crimes of tyrants.”\textsuperscript{54} Woodruff points out that much of Greek tragedy is really about hubris, the core of irreverence. It is no surprise, then, that the chorus in Greek drama has so much to say about reverence.\textsuperscript{55}

For these reasons, Woodruff maintains that “[r]everence has more to do with politics than with religion. . . . [P]ower without reverence—that is a catastrophe.”\textsuperscript{56} Power that seeks

\textsuperscript{50} Hans Joas, \textit{The Sacredness of the Person: A New Genealogy of Human Rights} (Alex Skinner, trans., Washington, D.C.: Georgetown University Press, 2013).
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 4.
\textsuperscript{54} Id.
\textsuperscript{55} See, e.g., Euripides, \textit{Bacchae} (Paul Woodruff trans.) (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 1999), ll. 370-72 (Chorus: “O Reverence [\textit{h\beta\i\i\a}], queen of gods, Reverence, who over earth/spread golden wing . . . .”).
\textsuperscript{56} Woodruff, \textit{Reverence}, supra note 99, at 4.
to manipulate religion for mere political gain, or religion that panders to power for the sake of economic or social gain, is an affront to true reverence.

Woodruff traces this theme through many settings relevant to modern society which cannot be explored in detail here. For my purposes, three connected points need to be emphasized. Joas would make similar points with respect to the sacrality of the human person. The first is that reverence is a virtue that is vital for any human society—particularly any democratic society—that hopes to flourish. Democracy provides rich political machinery for weaving together the diverse values of society into a harmonious community. But the output of that machinery can rise no higher than the vision, the dreams, and the aspirations of the people. That which is highest in this regard emanates from moments of reverence in individual lives. Reverence is crucial to moral striving and envisioning that is essential if democracy is to become more than a chaos of self-interest.

Second, reverence is the best reminder that human things, including states, need to be subjected to limits. The experience of authentic reverence, widely disseminated in the populace, is the best safeguard against the counterfeits of demogoguery. The ideal of the rule of law—that we should be ruled by law and not men—reflects the two sides of what we learn from reverence: that there are things that transcend the human domain, and that human institutions need limitations.

Third, reverence is particularly vital to the flourishing of modern pluralistic societies. Here reverence is vital in pointing the pathway to respect. We may not fully understand the beliefs that other people hold, but we can resonate with their sense of reverence, and when we do, we come to respect them in deep ways that make pluralistic democracy possible. Reverence in this sense contributes to what Joas calls “value generalization”—the process by which one individual’s deeply held values can be broadened or articulated in ways that can be shared with others. What is needed is more than “consensus achieved through rational-argumentative discourse” or “a decision to embrace peaceful coexistence despite insurmountable value differences.” It is the kind of sharing, coming from people with deeply di-
Different value traditions, such as those who framed the Universal Declaration of Human Rights. A society filled with people and subcommunities showing each other such respect can take maximal advantage of the synergies of life in a pluralistic society. People with reverence for very different values can nonetheless respect each other, and find ways to work together in productive and peaceful ways. In contrast, efforts to use state power either to impose or to exploit religion can only breed resentment and patterns of distrust. Conscience coerced is conscience denied.

Religious freedom is vital, and can never be redundant, because it protects and cultivates the insights and the wellsprings of reverence. It is not just one among many human rights; it is foundational for all the others. By protecting the space in which very different individuals and communities experience reverence, freedom of belief opens the possibility for dignity to unfold and for other rights to take root and grow. It provides legal protection for the activities and institutional contexts in which the fragile virtue of reverence can flourish, and without which society is imperiled and impoverished. In so doing, it protects a dimension of human existence that the more secular values of speech, association and equality never fully grasp. It has an ontological depth that corresponds to the magnitude of the human capacity to feel and respond to reverence and sacrality—whether reverence or sacrality take religious or secular forms, and whether it is experienced directly or sensed in the lives of others. It draws on the strength and internal resources of religious communities while calling for respect for the rights of others. It resists the persecution syndrome: the tendency of groups to engage in oppressive behavior when they acquire power. It also recognizes that secular power is as prone to lead to the persecution syndrome as religious power. It recognizes both the sanctity of conscience and the limits that conscience sets. In the end, freedom of conviction is vital because it facilitates the ability of human beings to build social worlds open to the best that human beings can be and become.

Recebido em 01/06/2014
Aceito em 30/06/2014