

# An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates Against Non-Religious Worldviews†

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Western legal systems typically provide legal protection in the form of a constitutional right that specifically protects religious freedom. For example, Article 10 of the European Charter of Fundamental Rights provides:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.<sup>1</sup>

Similarly, the First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>2</sup>

The First Amendment right to religious freedom might be thought to be *special* in the sense that it provides protections for religious worldviews that are not provided for non-religious worldviews by the constitutional rights to speech, belief, conscience, association, and other relevant liberty rights.<sup>3</sup> Insofar as religious worldviews also receive the protections that non-religious worldviews receive from the aforementioned rights, a distinct right that protects only religion would be duplicative, if not superfluous, *if* it does not provide some additional protections not provided to non-religious worldviews. This does not mean that there could be no legitimate rationale for expressly protecting religious worldviews with a right to religious freedom that provides no additional protection to religious worldviews than to non-religious worldviews; there might be many reasons for doing so. But the

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1. 2000 O.J. (C 364) 1.  
2. U.S. CONST. amend. I.  
3. *See id.*

justification for a *special* right to religion would have to be that religious worldviews implicate different interests than non-religious worldviews that are not adequately protected by those rights that protect all worldviews. If the First Amendment right to religious freedom is a special right, then it would have to protect religion, as a matter of political morality, for different reasons from those justifying legal protection of speech, conscience, thought, association, and other activities of social, political, and moral significance.

In this Article, I will argue that a special right to religious freedom is not morally warranted, and that hence such a right illicitly discriminates against non-religious worldviews. The principal argument here is that there is no adequate reason to think that religious worldviews implicate any interests distinct from those implicated by non-religious worldviews. While it is certainly true that religious worldviews warrant, as a matter of political morality, all the protections that non-religious worldviews receive, there is good reason to question what seems to have become a dogma among Western nations—namely, that religious worldviews deserve special protection.

Even so, the argument of this Article should be considered just a *prima facie* case against a special right to religious freedom. The argument rests on identifying distinct interests implicated only by various religious worldviews. Although I consider a number of possible interests we have in religious, but not non-religious, worldviews, it is simply not possible in an article of this scope to identify all the various candidates for religious interests that might figure into a successful justification for protecting religious freedom with a special right. Nevertheless, the argument considers a sufficient number of potential candidates for such an interest as to constitute a *prima facie* case against protecting religious freedom with a special right that requires rebuttal.<sup>4</sup>

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4. One might respond by arguing, on democratic grounds, that it could be legitimate to protect religious worldviews with a special right. On this line of argument, if a majority of people votes to afford religious worldviews protection by a special right, then such protection is morally legitimate. I am indebted to Andrew Koppelman for this line of objection. See Andrew Koppelman, *Nonexistent and Irreplaceable*, COMMONWEAL (Mar.

[<https://perma.cc/G65E-4TF8>]. There are two problems with this line of objection. First, it incorrectly presupposes that anything a majority might decide to do through the law is morally legitimate; the history of slavery in the U.S. is a decisive counterexample to that presupposition—if one is really needed. The theory of legitimacy that best coheres with our constitutional democracy is one that posits moral limits on what a majority can

It bears emphasizing here that the thesis should not be construed to deny that religious worldviews should be protected by constitutional rights. The thesis, rather, is only that religious worldviews should not be afforded protection denied to non-religious worldviews. On my view, a constitution, other things being equal, should treat religious worldviews no differently from non-religious worldviews in terms of the liberty rights that protect pursuit and expression of non-religious worldviews. Accordingly, I argue that the law should afford equal protection, to the extent that this is possible, to both religious and non-religious worldviews.<sup>5</sup>

## I. THE RIGHT TO RELIGIOUS FREEDOM AS A *SPECIAL* RIGHT

Moral and legal rights are conceptually distinct but typically related, as a contingent empirical matter, in legal practice.<sup>6</sup> Moral rights protect interests that are sufficiently valuable from the standpoint of morality to warrant moral constraints on the behaviors of others. In contrast, legal rights typically, though not always, protect interests thought by judges or legislatures to be sufficiently valuable, from a moral point of view, to society to warrant recognition and enforcement by law.<sup>7</sup> Although legal and moral rights are conceptually distinct, the issue of whether an interest is protected by a moral right is always relevant in deciding whether that interest should, as a matter of political morality, be protected by a legal right. Indeed, in the vast majority of cases, whether the law should protect an interest will depend, to some extent, on the moral importance of that interest;<sup>8</sup> while there might be some exceptions, the assessment of an

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do through democracy through the mechanisms of constitutional rights. Second, assuming the objection is otherwise unproblematic, the thesis of this Article can be construed to claim that it is *irrational* to afford special protection to religious worldviews.

5. There might be practical elements associated with religious worldviews that are lacking entirely in non-religious worldviews that require protection. This would not be a special protection in the sense explained above, as the additional protection is not needed for non-religious worldviews since they lack the relevant practical elements. I am skeptical of such a claim, but this is not an issue that can be explored here in any detail.

6. See, e.g., Kenneth Einar Himma, *Final Authority To Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism*, 24 *LAW & PHIL.* 1, 9, 12, 29, 45 (2005).

7. This is not to deny that some legislators or judges might be motivated by non-moral and prudential considerations in deciding what content the law should have; however, it is reasonable to hypothesize that the positions officials support are justified by their views, at least in part, by considerations of political morality. Indeed, Supreme Court Justices characteristically frame their disagreements in moral language referring to their theories of what is morally legitimate for the Court to do. See, e.g., *id.*

8. Although it might be true that every moral *right* should be protected by a legal right, the mere importance of an interest does not necessarily entail that the interest should be protected by some kind of legal right; however, that is one of the most important considerations. One could argue that there are many important interests that should not be

interest's importance in considering whether law should protect it will take into account its moral significance.

The articulation of a specific constitutional right to religious freedom *suggests* that it is distinct from the other rights enumerated alongside it and hence that it is special in the sense that it provides protections to religious worldviews and associated practices that are not provided to non-religious worldviews and associated practices.<sup>9</sup> Each of the constitutional provisions quoted above lists a number of other rights in addition to the right to religious freedom.<sup>10</sup> The separate enumeration of rights suggests that each of these rights is separate from the others in virtue of some distinctive feature that warrants some distinct or *special* protection that cannot be derived from those other rights.

Nevertheless, the distinct articulation of a right in a constitution does not *imply* it is special in character. Which rights are separately articulated in a constitution depends on the contingent motives and intentions of those who articulate, ratify, and interpret the relevant rights. These motivations could require articulating a separate right even though it might be that all of the protections of that right can logically be derived from other rights. One reason for this might be that the fact that one protection can logically be derived from another protection does not, by itself, entail that the courts make the proper deductions or derivations in interpreting the right. If the courts fail to enforce the derived protections and thereby fail to provide adequate protection for the relevant interests, then other relevant officials can step in and rectify that failure by proposing an amendment to the constitution that defines a distinct and express protection of what would otherwise be—or, ideally, should be—merely a derived right. The right would be enumerated and named in the constitution despite the fact that *all* the protections could, if the courts interpreted the other relevant rights properly, be derived from those other rights.

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protected by a legal right, such as the interest we have in food or water. Although I believe that every affluent society should use the law to ensure that everyone has adequate food and water, the point is sufficiently contentious that I want to acknowledge, while remaining agnostic on the issue, that more might be needed. One possibility, of course, is that there might be competing interests of greater importance. Fortunately, the argument of this Article does not depend on identifying competing interests of agnostics or atheists; for this reason, the point does not really apply here. I am indebted to Andrew Koppelman for calling my attention to this potential concern. *See* Koppelman, *supra* note 4.

9. *See* U.S. CONST. amend. I.

10. *See supra* text accompanying notes 1–2.

Although this is one possible justification for articulating a distinct constitutional right to religious freedom, it is probably not the operative justification for the articulated rights to religious freedom stated in the European and U.S. Constitutions. There are a number of ways to see this. Consider, for example, Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.<sup>11</sup> Title VII can arguably be viewed as a statutory extension of interests antecedently protected by the U.S. Constitution to include private employers, as well as public employers. For example, the Equal Protection Clause of the Fifth and Fourteenth Amendments prohibits public discrimination on the basis of such “immutable characteristics” as sex, race, color, and national origin.<sup>12</sup> Similarly, the Free Exercise Clause of the First Amendment would prohibit public discrimination on the basis of religious views.<sup>13</sup>

There are two particularly salient features of Title VII: (1) what protections it provides religious worldviews; and (2) what protections it provides non-religious worldviews. As to (1), Title VII requires employers to attempt to accommodate religious worldviews; it provides that employers have a legal duty to “reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>14</sup> As to (2), Title VII does *not* require employers to attempt to accommodate non-religious worldviews.<sup>15</sup> Because the relevant views will usually be moral in character, Title VII, in essence, protects moral views that are derived from religious worldviews but not moral views that are secular in character.<sup>16</sup> Accordingly, Title VII, following and extending existing constitutional protections, treats moral views conditioned by religion more favorably than it treats moral views not conditioned by religion.

Insofar as the Constitution and federal statutory law treat religious worldviews more favorably than non-religious worldviews, these laws *discriminate* against non-religious worldviews. Care should be taken here. To say that the law “discriminates” against non-religious worldviews, as the term is used here, is not to say that the law is morally wrong or illegitimate; on this usage, only *unjust* discrimination is morally wrong or illegitimate.

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11. Civil Rights Act of 1964 §§ 701–716, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

12. U.S. CONST. amends. V, XIV; *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

13. U.S. CONST. amend. I.

14. 42 U.S.C. § 2000e(j).

15. *See id.*

16. Insofar as a classically theistic religion, for example, makes participating in some practice a necessary condition for salvation, it seems reasonable to think that participation in the relevant practice is a moral obligation. Otherwise, it is hard to see why that practice would in any way be relevant in divine judgment of a person’s life.

“Discrimination” is thus used here in a purely descriptive sense connoting no more than that two groups are, as a matter of principle or policy, being treated differently.

Nevertheless, there is a question of whether such differential treatment—that is, discrimination—is morally legitimate or unjust. A recent controversy in the U.S. sheds light on the very real moral issue that arises in connection with such discrimination. Consider the accommodations offered to Rowan County Clerk, Kim Davis, who refused to comply with the Supreme Court decision that established marriage equality as the law of the land.<sup>17</sup> Davis refused to issue marriage licenses to gay couples on the ground that issuing marriage licenses to gay couples would violate her religious beliefs.<sup>18</sup>

Initially, the state handled the Davis case in the manner one might expect.<sup>19</sup> When Davis refused to comply with a court order to issue marriage licenses to gay couples, the state successfully sought a court order compelling her to perform her duties under her job description.<sup>20</sup> When she declined, she was held in contempt of court and incarcerated for a brief period of time.<sup>21</sup>

Over time, the state response assumed a shape that one might not expect. Eventually, the judge released her, and she returned to work.<sup>22</sup> Instead of terminating her employment or asking her to resign, the state allowed her to have her name removed from marriage certificates, so that she could avoid any appearance of endorsing same-sex marriage.<sup>23</sup> In effect, if not intent, Davis was rewarded for refusing to comply with lawful orders with which she was obligated to comply; the state simply changed her job responsibilities *without changing her position or pay-grade* so that she could avoid what she took as the sublimely distasteful task of treating same-sex and different-sex couples equally.

The moral issue arises because Title VII does not protect conscientious objections grounded in non-religious worldviews and hence would not

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17. See, e.g., Pete Williams, *Does Kim Davis, Kentucky Clerk Blocking Gay Marriages, Have Legal Grounds?*, NBC NEWS (Sept. 3, 2015, 5:56 AM), <http://www.nbcnews.com/news/us-news/does-kentucky-clerk-kim-davis-have-legal-leg-stand-n420606> [https://perma.cc/X6QD-9N27].

18. *Id.*

19. See, e.g., *id.*

20. *Id.*

21. Mariano Castillo & Kevin Conlon, *Kim Davis Stands Ground, but Same-Sex Couple Get Marriage License*, CNN (Sept. 14, 2015, 4:24 PM), <http://www.cnn.com/2015/09/14/politics/kim-davis-same-sex-marriage-kentucky/> [https://perma.cc/L56P-6VHS].

22. *Id.*

23. *Id.*

require an employer to accommodate objections to same-sex marriage grounded in secular moral convictions. Accordingly, a public (or private) employer *could* terminate an employee who refused to perform some duty that falls within the core responsibilities of the employment position on moral grounds that are purely secular in character.<sup>24</sup> On my view, this should have been Davis's fate; if one is not prepared to carry out the responsibilities in one's job description, one should not take the job.

Specifically, the issue is what would morally justify differential treatment of religious and non-religious conscientious objection. At first glance, it seems arbitrary and therefore unfair to require employers to accommodate religion-based conscientious objections but allow employers to terminate employees for secular conscientious objections.<sup>25</sup> Of course, initial appearances might be deceiving, as there might be some morally salient property that distinguishes conscientious objection grounded in religious worldviews from conscientious objection grounded in non-religious worldviews. In particular, religious worldviews might possess some distinctive property lacked by non-religious worldviews that endow the former, but not the latter, with the kind of moral significance that warrants a special protection. But this is not something that can simply be assumed without argument.

What is needed, then, to justify state discrimination in favor of religious worldviews—and hence against non-religious worldviews—is an argument that identifies some morally salient feature that distinguishes religious worldviews from non-religious worldviews and warrants special protection of the former. In what follows below, I will consider whether there are any such distinguishing features of religion that would justify special

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24. It is reasonable to conjecture here that many employers, in the absence of a legal compulsion to accommodate secular conscientious objection, would terminate an agnostic or atheist for doing what Davis did. First, accommodation frequently comes at some cost to employers; removing Davis's name from marriage certificates certainly cost something in terms of time and money. See, e.g., Gary Minor, *Kim Davis, Religious Freedom and Accommodations*, PUB. SAFETY (Nov. 13, 2015), <http://inpublicsafety.com/2015/11/kim-davis-religious-freedom-and-accommodations/> [<https://perma.cc/9VYM-ZPME>]; Samuel Smith, *Kim Davis Finally Gets Religious Freedom Accommodation to Keep Name off Gay Marriage Licenses*, CHRISTIAN POST (Apr. 15, 2016, 11:32 AM), <http://www.christianpost.com/news/kim-davis-gets-religious-freedom-accommodation-keep-name-off-gay-marriage-licenses-161821/> [<https://perma.cc/F6GQ-3ZKG>]. Second, atheists are commonly distrusted by theists, who vastly outnumber atheists. See, e.g., Justin McCarthy, *In U.S., Socialist Presidential Candidates Least Appealing*, GALLUP (June 22, 2015), <http://www.gallup.com/poll/183713/socialist-presidential-candidates-least-appealing.aspx> [<https://perma.cc/AA95-N9TF>]. But nothing in the Article turns on such conjecture on my part.

25. Even if that is not likely, Title VII allows this, because it does not require accommodation of secular conscientious objection. See 42 U.S.C. §§ 2000e to 2000e-17 (2012); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”).



constitutional and statutory protection of religious worldviews and would hence validate state discrimination against non-religious worldviews.

## II. JUSTIFYING PROTECTING AN INTEREST WITH AN ENUMERATED CONSTITUTIONAL RIGHT: MORAL AND EPISTEMIC CONSIDERATIONS

Legal protection of one person's right typically, if not necessarily, imposes legal constraints on the autonomy or freedom of other persons.<sup>26</sup> For example, a statutory right to life held by X entails legal obligations on the part of other persons not to engage in acts contrived to kill X without what is, as a matter of law, just cause. Similarly, constitutional rights typically impose constraints on what democratic majorities can enact through their elected officials. The right to speech, most obviously, limits what elected officials can do with respect to regulating expressive behaviors, but in a democracy it also limits what citizens can do *through* their elected officials—whose duty is to *represent* those citizens—with respect to regulating expressive behaviors.

Accordingly, the issue of whether an interest *should* be protected with a constitutional right is, at least in part, an issue of political morality. There is nothing controversial about this. As laws typically regulate behavior by restricting options otherwise available to autonomous moral agents, the enactment of a new law should be morally justified. Although a special constitutional right to religious freedom, on its face, seems to be concerned with expanding freedom, it *also* restricts the political freedom and power of citizens by constraining what they can do through their elected officials with respect to enacting laws. For this reason, a special constitutional right to religious freedom requires a moral justification, as restrictions on the freedom of competent adults is presumptively problematic from the standpoint of political morality.

The issue of how to justify a constitutional right is a difficult one, but this much should be clear. Rights of any kind are intended to protect interests that all rational persons can be presumed to have. The right to life, for example, protects the interests that all rational persons have in the continuation of their biological lives, while the right to property protects the interests all rational

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26. For a general discussion of the relationship between legal rights and legal obligations, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–59 (1913). The discussion here follows Hohfeld's still influential analysis.

persons have in being able to accumulate material things that satisfy important wants and needs.

Accordingly, whether or not a constitutional right is justified will clearly depend, at least in part,<sup>27</sup> on the nature and importance of the interest protected. Our interests in the continuation of our lives and in being able to exclude other persons from consuming what properly belongs to us are clearly of a character and importance that warrant legal protection in the form of constitutional rights. The nature of the interest, of course, includes some reference to the legitimacy of the interest; I might have prudential interests in another person's property (perhaps, for example, I covet her big flat-screen television), but those interests are not legitimate in an appropriate sense and hence do not morally warrant protection by a special legal right.

The idea that an interest warrants protection by a special constitutional right seems to entail that there is something distinctive about the interest in the sense that it is logically independent from other interests that warrant protection by constitutional rights. Insofar as an interest warrants protection by a right that cannot logically be derived from other rights, the interest would have to be different from those protected by other rights. Accordingly, the idea that religious freedom warrants protection by a special constitutional right implies that the *relevant* interest in religious freedom is different from those protected by constitutional rights to freedom of speech, conscience, thought, association, and other liberty rights.

This means that the claim that an interest in X morally warrants protection by a special constitutional right implies that there is something that distinguishes X from others things giving rise to distinct interests that warrant protection by special rights. Insofar as there is an interest in religious freedom that warrants protection by a special right, there would have to be something distinctive about religion *per se*. If  $I_1$  is an interest we have in X but not Y, and  $I_2$  is an interest we have in Y but not X, then there would have to be a property or set of properties that distinguish what it is to be an X from what it is to be a Y. In such a case, X and Y would, then, have to be conceptually distinct in the sense that the natures of X and Y are constituted by a set of properties that differ with respect to at least one property.

Here, it is important to notice that the conceptual inquiry is important because the properties that distinguish X from Y would have to explain the different interests that people have in X and Y. As a logical matter, the only way to explain how we would have an interest in X that we do not have in Y is to identify some property that X has and Y lacks. Any properties

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27. See discussion *supra* note 8.

that X and Y share could not give rise to different interests in X that we do not also have in Y. Thus, in assessing whether a special right to religious freedom is warranted, it is necessary to try to get clear on what constitutes something as a religious, as opposed to non-religious, worldview.

Of course, the mere fact that two things give rise to distinct interests does not imply that either or all the relevant interests morally warrant protection in the form of a special right. People have many interests in many different things, and it should be clear that not all of them warrant special protection by a constitutional right. We have interests in being told the truth, but it seems clear that the law should not protect us against all deceptions—and certainly not by providing a special constitutional right to always being told the truth.

Accordingly, one necessary consideration in deciding whether an interest warrants protection by a special right has to do with the importance or strength of the value in the interest. The reason that the interest in property warrants protection by a special right is the importance of that interest. An interest in something that can be used to achieve ends that are morally and prudentially *trifling* simply does not rise to the level of something that would warrant protection by a special right. As a matter of political morality, it would rarely, if ever, make sense to afford constitutional protection to an interest that is trivial in value. Obviously, only interests that rise to some threshold level of importance morally warrant constitutional protection in the form of a special right.

Nevertheless, as we shall see below, moral considerations are not the only considerations that are relevant with respect to the question of whether the interest in religious freedom should be protected by a special right. Epistemic considerations, of course, are always relevant with respect to making an argument that would constitute a justification of any conclusion—including conclusions having to do with whether an interest in an object should, as a matter of political morality, be protected by a constitutional right; after all, every argument is subject to epistemic standards of good reasoning. But epistemic considerations will figure more prominently in my argument than is usual in discussions as to whether an interest should be protected by a special constitutional right.

III. A FIRST STEP TOWARDS EVALUATING WHETHER  
RELIGIOUS FREEDOM SHOULD BE PROTECTED  
BY A SPECIAL RIGHT: EXPLICATING THE  
CONCEPT OF RELIGION

Traditionally, theorists have sought to determine whether the law should provide special protection to religious freedom by attempting to identify what is distinctive about religion *as such* in order to determine whether there is something distinctive about religion that, as a matter of political morality, warrants legal protection.<sup>28</sup> As Brian Leiter puts the matter:

In asking whether there is something *special* about religion that bears on religious toleration, we are not asking whether there is some feature (or features) of religious belief and practice that warrant principled toleration of religion on either *moral* or *epistemic* grounds. There plainly are such features, for example, that religious beliefs are often matters of *conscience* . . . . If there is a special reason to tolerate religion it has to be because there are . . . features that *all and only* religious beliefs have, either as a matter of (conceptual or other) necessity . . . .<sup>29</sup>

There are thus two issues that need to be addressed. The first is to identify those properties common to all and only religions that *constitute* something as a religion—or, otherwise put, to explicate the concept or nature of religion. The second is to determine whether those properties, either singly *or jointly*, have sufficient moral value that warrants protecting the associated interests with a special constitutional right to religious freedom.

Leiter identifies three distinguishing features, or essential properties, of religious belief thought to explain why law should tolerate religion *qua* religion. First, a religion makes *categorical* demands on action—that is, demands that “must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up.”<sup>30</sup> Second, a religion contains certain views immune from the claims of reason or evidence in the following sense: these claims are not held in virtue of satisfying ordinary standards of epistemic justification.<sup>31</sup> Third, a religion provides “existential consolation” by providing “solutions” to the problem of death, the problem of pain, and the problem of explaining and sanctioning a community’s morality.<sup>32</sup>

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28. See, e.g., Thomas C. Berg, “*Secular Purpose*,” *Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24, 25 (2013); Andrew Koppelman, *Religion’s Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 73 (2012); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–55 (2012).

29. BRIAN LEITER, WHY TOLERATE RELIGION? 26–27 (2013).

30. *Id.* at 34.

31. *Id.*

32. *Id.* at 51–52 (quoting JULIAN YOUNG, NIETZSCHE’S PHILOSOPHY OF RELIGION 13 (2006)).

The difficulty with this analysis is that there are non-religious worldviews exhibiting all three of the features that putatively distinguish religion from non-religion. First, while it is true that religion makes categorical demands of followers, so do other non-religious systems of norms, such as the norms of morality. This is most obviously seen in *negative* moral norms, which prohibit the commission of certain acts. The norm “Do not kill innocent persons” must be satisfied “no matter what incentives or disincentives the world offers up.”<sup>33</sup>

Second, while certain claims of religion might be thought insulated from the demands of epistemic justification, hereinafter “epistemic immunity,” certain claims of morality seem to share this property. It is commonly accepted that a moral theory must cohere with certain foundational principles if a system of principles is to count as “morality.”<sup>34</sup> One common line of objection to the act-utilitarian principle is to identify counterexamples that purport to refute this principle.<sup>35</sup> For example, it seems to be morally permissible, under act-utilitarianism, to kill an innocent person if doing so would maximize community utility, but such an implication is regarded as a reason for rejecting act-utilitarianism on the ground that killing an innocent person violates her moral right to life and is thus wrong. These foundational principles seem, like religious claims, to enjoy some degree of epistemic immunity.

Such immunity is not absolute, of course, but it is not absolute in the case of religious worldviews either. Christianity has evolved with respect to many issues—although there are denominational disputes on a number of these issues. Certainly, all denominations of Christianity accept that the world is round, rather than as having “four corners,”<sup>36</sup> and have thereby evolved from a geocentric view of the material structure of the universe to a heliocentric view. Likewise, some denominations, such as Catholicism,

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33. *Id.* at 34.

34. *See, e.g.*, Bernard Gert & Joshua Gert, *The Definition of Morality*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/spr2016/entries/morality-definition/> (last revised Feb. 8, 2016).

35. *See, e.g.*, Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/archives/win2015/entries/consequentialism/> (last updated Oct. 22, 2015). The reason for citing one of the leading internet encyclopedias of philosophy is to show that a philosophical claim made in the discussion enjoys widespread acceptance among the relevant communities of theorists.

36. *Revelation 7:1* (King James).

have accepted, while fundamentalist denominations have not, that evolution is compatible with the creation story of Genesis.<sup>37</sup>

It is true, of course, that there are some limits to what can be changed within Christianity without changing it so much that it can no longer be characterized accurately as “Christianity.” There are some claims essential to Christianity that distinguish it from other religious traditions and non-religious worldviews. Necessary constituents of Christianity include the idea that God exists and that Jesus is one of the three divine persons constituting the triune God.<sup>38</sup>

But the same is true of any substantive theory of morality that posits the existence of constraints on other people’s behaviour for which they are accountable. One could not call a theory a substantive theory of morality without there being some obligations owed to other people or without assuming that people are accountable in virtue of having certain characteristics, usually thought to be rationality and free will.<sup>39</sup> This is true regardless of whether one is an objectivist or relativist about the ultimate nature of moral principles. Morality and religion are in much the same boat with respect to insulating some claims from revision.

Finally, there are a number of problems with the idea that a religion must provide a narrative that affords existential comfort to believers. Many religions, of course, do this with promises of heavenly bliss, nirvana, or the cessation of existence entirely, but there is no reason to think that a religion must provide such a narrative. There is nothing in the nature of a religion that ensures that a happy ending must be possible for everyone. For example, the Calvinist doctrine of pre-election asserts that every person’s ultimate fate has been pre-determined by God;<sup>40</sup> insofar as this implies that there is nothing one can do in this world to change one’s predestined fate, this doctrine, together with the traditional doctrine of hell, could elicit anxiety about one’s ultimate fate as easily as provide

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37. See, e.g., POPE PIUS XII, *HUMANI GENERIS* [THE HUMAN RACE] ¶ 36 (1950).

38. For example, the Nicene Creed purports, like other creeds, to state the essential claims of Christianity. See, e.g., *ENGLISH LANGUAGE LITURGICAL CONSULTATION, PRAYING TOGETHER* 17 (1988).

39. See, e.g., William K. Frankena, *The Concept of Morality*, 63 *J. PHIL.* 688, 688–89 (1966).

40. See, e.g., VICTOR A. SHEPHERD, *THE NATURE AND FUNCTION OF FAITH IN THE THEOLOGY OF JOHN CALVIN* 39–47 (1983). Likewise, one could view a cycle of unending reincarnations as something other than reassuring. Personally, and this might say more about me than about people in general, but I would prefer not to have any kind of life after death: not heaven, not hell, and not reincarnation into a form that depends on the moral quality of the life I led. That might be somewhat idiosyncratic on my part, but an idiosyncratic opinion is enough to support the point here, as long as it expresses a view that is not irrational. Perhaps, my reasons are not the best, but they are plausible enough to make this a rational view—and that is all that is needed here.

existential comfort. Further, many theories of morality are also equipped to provide a foundation for a narrative that affords existential comfort. Questions about the meaning of life, for example, are typically concerned with the *moral* point of life. “What is the point of my life?” is a moral question. It is true that some moral theories might provide a discomfiting answer, but many will identify the meaning of life, as Aristotle did, as living the morally good life.<sup>41</sup> As far as my own view is concerned, the meaning of my life consists in the help and kindness I offer to other people and in the relationships I enjoy with them provided these acts and relationships satisfy the relevant moral norms.

The problem here is not so much with Leiter’s analysis as it is with the difficulties in identifying a set of properties that would distinguish religious worldviews from non-religious worldviews. As we just saw, above, the properties identified by Leiter as putatively distinguishing religious worldviews from non-religious worldviews<sup>42</sup> simply do not succeed in doing so. Morality shares all three of the candidate distinguishing properties with religion. One could add other properties, of course. One might think, for example, that one of the distinguishing conceptual properties about religion is that it provides an account of how the world began. But even if this is true of every religion, there are clearly other areas of thought that do exactly the same thing—such as the Big Bang Theory in physics.<sup>43</sup> Combine the appropriate scientific claims with an appropriate theory of morality, and the result seems to be a non-religious worldview that shares all these properties with religious worldviews.

Similarly, one might think that the difference between the two is that religion makes claims about “ultimate reality,” but there is no account of this notion that would clearly distinguish religious worldviews from non-religious worldviews that contain science and morality. A scientific theory—perhaps with the aid of some philosophical metaphysics—can make claims about what is ultimate about reality in an intuitive sense. One might think, on the strength of such a view, that ultimate reality consists in the set of material objects that are contained in the universe; the assumption in this case, which is not a necessary component of a non-religious worldview,

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41. See Sarah Broadie, *Philosophical Introduction to ARISTOTLE, NICOMACHEAN ETHICS* 12–13 (Sarah Broadie & Christopher Rowe eds., Christopher Rowe trans., Oxford Univ. Press 2002) (c. 384 B.C.E.).

42. See *supra* notes 29–32 and accompanying text.

43. JULIO A. GONZALO, *THE INTELLIGIBLE UNIVERSE: AN OVERVIEW OF THE LAST THIRTEEN BILLION YEARS* 111 (2d ed. 2008).

would be that there are no non-material objects in the universe. Insofar as such a non-religious worldview contains all the descriptive and normative elements that explain the existence of the world and guide us through its complexities and are thought to give religious worldviews their significance, the interests to which both worldviews give rise, at the conceptual level, are the same—on the assumption that all the potential distinguishing conceptual properties have been identified here.

The relevant result of this inability to provide a rigorous conceptual account of the nature of religion that distinguishes religious from non-religious worldviews is that existing conceptual accounts do not pick out an interest that persons have in all and only religious worldviews that would morally warrant protection by a special right to religious freedom.<sup>44</sup> Insofar as the four properties identified above exhaust what we can say about the nature of religion, the only morally salient interests to which religious worldviews give rise would be shared by a non-religious worldview formed by a set of claims that include scientific and moral claims. This, of course, would not imply that religious freedom should not be protected by an enumerated constitutional right; there might be many reasons for providing such protection to religious freedom.<sup>45</sup> What it does imply is that we have no grounds for thinking, based on *just* an analysis of what is distinctive about the nature of religion, that such a right should be *special* in the sense defined here.

This, of course, falls short of the claim I wish to defend in this Article. Although I ultimately argue that religious freedom does not morally warrant protection by a *special* right, it would be premature to draw that conclusion at this stage of the analysis. Pre-theoretically, we understand that there is a difference between a religious worldview and a non-religious worldview and can usually distinguish one from another, even if the concept is somewhat vague, when we see core examples of both. And a pre-theoretical understanding of the notion of religion is reliable enough to ground an inquiry into whether religious freedom should be protected by law; after all, we do not need more than a pre-theoretical understanding of the notion of law to coherently discuss that same issue.

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44. See LEITER, *supra* note 29, at 26–27.

45. It is worth noting that a distinct right to religious freedom might be warranted by a failure on the part of courts and legislatures to view the rights to speech and other relevant liberty rights as affording the same protections to religious worldviews as non-religious worldviews. Likewise, a distinct right to religious freedom might be warranted if, despite existing protections of speech, thought, etc., a religious tradition were being persecuted. But such considerations would warrant only explicitly including a distinct right to religious freedom; since it would not warrant any protections of religious worldviews not afforded to non-religious worldviews, such a right would not be special in character.



IV. TAKING A LESS GENERAL APPROACH: INTERESTS IMPLICATED BY  
VARIOUS PARTICULAR RELIGIOUS TRADITIONS

At this point, then, it seems that the best way to proceed is to look at various cases of religious content to see whether the interests to which they give rise could ground a special right to religion. The idea here is to try to examine all the interests to which different sets of religious doctrines could give rise, and to show that none will provide adequate support for the idea that the state is justified in discriminating in favor of religious worldviews by providing a special right to religious freedom. If this can be done, then it follows that religious worldviews do not warrant the protection of a special right.

One useful place to begin is with purely materialistic worldviews that might be characterized as “religious.” Although it is true that many paradigmatic cases of religious worldviews posit the existence of immaterial beings and forces, it is not obvious that this is a necessary condition for a set of doctrines to count as being “religious” in character. Whether such views are properly called “religion” is, of course, likely to be contentious. Regardless of whether these views are properly construed as “religious,” it should be clear that they do not pick out any interest that is lacked by paradigmatically non-religious worldviews that include an appropriate set of morally normative and descriptive claims. Either way, it seems clear that all of the relevant interests are adequately protected by the other liberty rights—assuming that non-religious worldviews are adequately protected by such rights.<sup>46</sup>

Spinoza’s idiosyncratic conception of God helps to make this point. Spinoza famously took the view that the name “God,” properly used, simply picks out the totality of things in the universe.<sup>47</sup> As the view is described by Steven Nadler:

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46. If non-religious views are not adequately protected, then the appropriate response to protect all of these materialistic views would be to strengthen the protections associated with the relevant liberty rights, and not provide these views with a special right to religious worship. After all, the problem is that non-religious worldviews are not adequately protected. Insofar as materialistic religious worldviews do not involve any interest that materialistic non-religious worldviews lack, there is nothing warranting the extension of protections to religions that are not purely materialistic in character.

47. See Steven Nadler, *Baruch Spinoza*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/spinoza/> (last revised July 4, 2016).

In propositions one through fifteen of Part One, Spinoza presents the basic elements of his picture of God. God is the infinite, necessarily existing (that is, uncaused), unique substance of the universe. There is only one substance in the universe; it is God; and everything else that is, is in God.<sup>48</sup>

Spinoza can non-standardly be interpreted as committed to the claim that only material things exist in the universe, and hence as affirming a materialistic conception of God and the world. As should be clear, it is hard to see how such a view would give rise to any interests that would warrant protection different from that afforded to non-religious worldviews with the appropriate components.

But philosophers usually interpret Spinoza as claiming that the universe consists of two kinds of objects: material things—characterized by “extension”—and ideas.<sup>49</sup> On this interpretation, Spinoza could be interpreted as a dualist to the extent that he believes that ideas are “substances,” rather than attributes or properties, and hence are properly included in an ontological account of the world. Either way, it is hard to see how this view gives rise to any interests that are not antecedently and adequately protected by the liberty rights that protect non-religious worldviews. Whether ideas are attributes or substances, no one doubts that they are part of our world. Although a materialistic view would reject that they are substances that should be included in the ontology of the world, nothing of relevance seems to turn on that difference. Either way, it is difficult to discern how Spinoza’s worldview would give rise to any interests that are distinct from those to which non-religious worldviews give rise. For this reason, if Spinoza’s view amounts to a religion, there is little reason to think it would warrant the protection of a special right to religious freedom.

One might be tempted to think that if mental entities are substances, the existence of such substances gives rise to interests distinct from those to which non-religious worldviews give rise. In its most familiar version, first made famous by Descartes, ontological dualism takes the following shape.<sup>50</sup> There are two kinds of substances in the world, mental and material. Human beings, in particular, are a combination of material body and immaterial soul capable of mutual causal interaction; on this view, it is logically—as opposed to nomologically—possible for souls to exist independently of bodies.<sup>51</sup>

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48. *Id.* (discussing BARUCH SPINOZA, *Ethics*, in THE COLLECTED WORKS OF SPINOZA 408–20 (Edwin Curley ed. & trans., Princeton Univ. Press 1985)).

49. *See id.*

50. Rene Descartes, *Meditations on First Philosophy*, in THE PHILOSOPHICAL WORKS OF DESCARTES 190 (Elizabeth S. Haldane trans., Cambridge Univ. Press 1911) (1641).

51. *Id.*

What is particularly noteworthy here is that many of the most familiar religions to people in the Western World are commonly interpreted to incorporate an ontological dualism between bodies and souls.<sup>52</sup> Although this might seem to suggest that these religious views give rise to interests distinct from those to which non-religious worldviews give rise that require the protection of a special right, this is a mistake for two reasons. First, it is simply not clear how knowing that what I take to be a mind is a substance and not merely an attribute or mental process, by itself, would give rise to some new interest that requires the protection of a special right; that piece of information alone seems normatively insignificant. Second, although ontological dualism is more common in religious worldviews than non-religious worldviews, ontological dualism is logically independent of paradigmatically religious considerations.<sup>53</sup> One can be either an atheist or an agnostic and coherently hold ontological dualism.<sup>54</sup> Accordingly, the claim that immaterial objects or forces exist, which is common to many views pre-theoretically understood as “religious,” does not seem to give rise to any interests that non-religious worldviews do not give rise to. Therefore, that claim would not help to justify the claim that religious worldviews warrant protection by a special right to religious freedom.<sup>55</sup>

Of course, everyone has an interest in religious freedom insofar as some religious doctrine might be true, and it is reasonable to think we have a strong interest in having the freedom to pursue the truth—and one that should be protected by a special constitutional right. The problem, however, is that this interest is already protected by constitutional rights to speech and thought that do not discriminate among religious and non-religious worldviews. Insofar as such interests are already adequately protected by these other rights, the interest in truth cannot bear the weight of justifying a special right to religious freedom, which, as we have seen, requires the

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52. *See id.* at 191.

53. COLIN CAMPBELL, *THE EASTERNIZATION OF THE WEST: A THEMATIC ACCOUNT OF CULTURAL CHANGE IN THE MODERN ERA* 63–64 (Routledge 2016) (2007).

54. *See, e.g.,* Kenneth Einar Himma, *Explaining Why This Body Gives Rise to Me qua Subject Instead of Someone Else: An Argument for Classical Substance Dualism*, 4 *RELIGIOUS STUD.* 431, 436 (2011). The argument is one for ontological dualism that does not rely on any presuppositions that there exists anything plausibly called God. Although the argument is certainly vulnerable to objections, there is little reason to think that no such argument could succeed without assuming the existence of a supreme being.

55. As we will see below, such views are vulnerable to the same evidentiary objection that I will make with respect to classically theistic views. *See infra* Part VI.

identification of an important interest that arises out of religious worldviews, but not out of non-religious worldviews.

Further, one might think that religious worldviews give rise to an interest in ensuring that one has the proper relationship with God; evangelical Christian views frequently emphasize as the foundation of faith that one has a “personal relationship with Jesus.”<sup>56</sup> The idea here is a morally normative one: insofar as one is subject to divine punishment for lacking such a relationship, having such a relationship is morally required, and we have a strong interest in ensuring that we have the appropriate liberty rights to do what is morally required.

That we have a strong interest in ensuring that we have the appropriate liberty rights to do what is morally required is not enough to warrant a special right to religious freedom. *Everyone* has a strong interest in doing what is morally required and hence in having sufficient liberty rights to allow that. But a special right to religious freedom is not needed to protect those interests, as the other liberty rights, including a right to conscience, afford sufficient protection to that interest, while the rights to free speech and association afford protection for the interest in being able to access religious doctrines and participate, other things being equal, in relevant church practices.

One remaining place to look for an interest that will do the relevant work is to religions with a doctrine of the afterlife that is connected to the satisfaction of certain normative ethical standards, as it is well-established that one of the most common motivations for religious belief is a concern to deny the permanency of death.<sup>57</sup> It is clear, as a conceptual matter, that any worldview that contains such doctrines is “religious” in character; indeed, the inclusion of a moralized doctrine of the afterlife is a conceptually sufficient condition for characterizing a worldview as “religious”—although it is not a conceptually necessary condition.

It is obvious that at least two of the classically theistic religions,<sup>58</sup> Islam and Christianity, contain such doctrines, but other religions do too, including Hinduism, Buddhism, Jainism, and Sikhism.<sup>59</sup> On these latter

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56. See, e.g., John Suk, *A Personal Relationship with Jesus?*, 20 PERSPECTIVES, no. 9, Nov. 2005, at 5, 5.

57. See, e.g., Mark Jordan Landau et al., *The Motivational Underpinnings of Religion*, 27 BEHAV. & BRAIN SCI. 743, 743–44 (2004); Ara Norenzayan & Ian G. Hansen, BULL. 174, 174–75 (2006).

58. The term “classically theistic religions” is used here to refer to those worldviews that include the existence of a divine being who is omnipotent, omniscient, morally perfect, and both creator and moral sovereign of the world.

59. For a general explanation of the doctrine, along with the religious traditions that contain this doctrine, see, for example, *Karma*, NEW WORLD ENCYCLOPEDIA, <http://www>.

religious views, people are reincarnated into a new life after the death of one life.<sup>60</sup> The quality of one's next life, on these views, is determined by Karma, an impersonal moral force in the world that addresses the balance of justice in the world and seeks, so to speak, to correct those injustices.<sup>61</sup>

Here it is important to note that the *quality* of a person's afterlife, on *all* such accounts, is determined by the moral worth of the life he or she led in this world. In the case of Christianity and Islam, those who live morally worthwhile lives (which include, on standard accounts, as necessary constituents the requirement that one have faith in God) are rewarded with eternal bliss, while those who live morally unworthy lives are rewarded with eternal torment.<sup>62</sup> In the case of religious traditions that include the doctrine of Karma, persons who lead morally worthwhile lives will be reincarnated into circumstances that are happier and more pleasurable, while those who do not will be reincarnated into circumstances that are not.<sup>63</sup> Such doctrines, always absent from non-religious worldviews, would obviously give rise to interests to which non-religious worldviews do not. The next few sections are concerned with such views.<sup>64</sup>

## V. IN FAVOR OF A SPECIAL RIGHT TO RELIGIOUS FREEDOM: THE NATURE AND STRENGTH OF THE INTEREST IN RELIGIOUS FREEDOM ON CLASSICALLY THEISTIC VIEWS

### A. *Classical Theism and Other Kinds of Religious Doctrine*

As will be recalled, the nature and strength of the interest in religious freedom must be considered in determining whether that interest warrants, as a matter of political morality, protection by constitutional entrenchment of a special fundamental right.<sup>65</sup> Inasmuch as we lack a conceptual account of religion that would adequately distinguish religious from non-religious worldviews, we cannot, as we have seen, identify an interest that is common

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newworldencyclopedia.org/entry/Karma [https://perma.cc/U94S-WT7S] (last visited Mar. 21, 2017).

60. *Reincarnation*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Reincarnation> [https://perma.cc/LT6W-TZKP] (last visited Mar. 21, 2017).

61. *Id.*

62. Linda M. Tober & F. Stanle Lusby, *Heaven and Hell*, in 6 ENCYCLOPEDIA OF RELIGION 3884, 3884–85 (Lindsay Jones ed., 2d ed. 2005).

63. *Karma*, AN INTRODUCTORY DICTIONARY OF THEOLOGY AND RELIGIOUS STUDIES 706–07 (2007).

64. *See infra* Parts V–VII.

65. *See supra* Part II.

to all and only religious worldviews.<sup>66</sup> Accordingly, the last section attempted to identify interests that arise out of certain doctrines that are prominent in some, but not all, religions. This section is concerned with one clear interest that arises under classically theistic views, such as Christianity and Islam. In particular, this section is concerned with the interests that arise from the moralized doctrines of the afterlife common to these religions.<sup>67</sup>

The notion of an afterlife implies, albeit in different ways depending on other elements of the relevant doctrines, the existence of certain *immaterial* forces (such as Karma) or entities (such as an immaterial God or immaterial souls); the same problems that I raise for the two classically theistic traditions I consider will be problems for other traditions positing the existence of immaterial forces and objects. Insofar as something fairly characterized as a “religion” does not posit immaterial forces or entities, it would not seem to give rise to any interests that are distinct from those implicated by certain non-religious worldviews and would adequately be protected as derived from existing special rights to speech, belief, conscience, thought, association, et cetera. Accordingly, in this section, I will consider only interests implicated by two classically theistic religions: Christianity and Islam.<sup>68</sup>

### *B. Identifying the Relevant Interests in Traditional Christianity and Islam*

Traditional Christianity and Islam share a conception of the consequences of belief and non-belief. Both hold that the consequence of correct belief is an eternal reward.<sup>69</sup> Any person with a genuine saving faith has an eternity of pleasure in the form of what is usually called “heaven” as her reward; such pleasure is usually thought to exceed anything that can be experienced during an earthly life.<sup>70</sup> Both religions hold that the consequence of non-belief is an eternity of suffering in the form of what is usually called “hell”; such suffering is usually thought to be unmatched by anything that can be experienced during an earthly life.<sup>71</sup> Whether a person has what is

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66. See *supra* text accompanying note 44.

67. By “moralized” here, I mean only the view that what kind of afterlife one experiences is determined by the moral quality of one’s life before physical death.

68. Judaism does not appear to have a well-developed and deeply entrenched doctrine of an afterlife and hence implicates somewhat different interests. See, e.g., Tracey R. Rich, *Olam Ha-Ba: The Afterlife*, JUDAISM 101, <http://www.jewfaq.org/olamhaba.htm> [<https://perma.cc/5RBZ-ACJM>] (last visited Mar. 21, 2017). To the extent that there is a doctrine of the afterlife similar to those included in Christianity and Judaism, the argument below applies to it.

69. See Tober & Lusby, *supra* note 62, at 3884–85.

70. *Id.*

71. *Id.*

usually called heaven or hell as her ultimate fate is a matter of divine justice.

The relevant interests, then, implicated by Christianity's and Islam's conception of divine justice are the interests in experiencing intense pleasure, such as occurs with heaven, and in avoiding intense pain, such as occurs with hell.<sup>72</sup> Accordingly, the magnitude of the value of, or strength of the interest in, religious freedom would seem the highest that is logically possible. There simply could not be a stronger prudential interest than in avoiding the torment of hell; complete cessation of conscious existence seems preferable to eternal torment as conceived by these religions. The suffering associated with hell, according to these religious traditions, exceeds the earthly suffering associated with being tortured, dying of cancer, clinical depression, the grief of losing a loved one, and any other pain that one can imagine *combined*. Regardless of the strength of an interest in eternal bliss, there could be no stronger narrowly *prudential* interest than the interest in avoiding hell.

Accordingly, the interest in religious freedom, if Christianity or Islam is true, is of a *nature* and *strength* that would clearly warrant, as a matter of political morality, legal protection in the form of a special constitutional right. The value of the distinctive interests in achieving eternal bliss and avoiding eternal torment are, clearly, of sufficient strength to warrant protection by a special constitutional right. Further, as these doctrines entail the existence of these interests that are special in the sense that they do not arise in connection with ordinary worldly existence, the rights to which they give rise would seem to warrant a distinct protection. At this stage in the analysis, the evidence would seem to entail that the interests in religious freedom warrant the protection of a special constitutional right.

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72. This is not to claim that these are the only relevant interests that arise in connection with these doctrines of the afterlife. One might think that the relevant interests have to do with maintaining the proper relationship with the deity or with living a morally good life. All but one of these interests, however, were considered and rejected in the last section. *See supra* Part IV. The interest in living a morally good life is considered below. *See infra* Part VII.

VI. AGAINST A SPECIAL FUNDAMENTAL RIGHT TO RELIGIOUS  
FREEDOM: THE ABSENCE OF ANY PERSUASIVE REASON  
TO THINK CLASSICAL THEISM IS TRUE

A. *The Importance of the Epistemic Issue of Whether There  
is Reason to Accept Classical Theism in Assessing  
Whether Religious Freedom Warrants  
Special Protection*

The reasoning in the last section overlooks a question of potentially decisive importance: what reason do we have to think that we actually have an interest in religious freedom that *could be threatened* without the protection of a fundamental constitutional right? Whether or not the law should protect an interest depends on whether we have reason to think there is a threat to that interest that should be protected against. If there exists a being that punishes disbelief with eternal torment, then we clearly have an interest in having the freedom to do what is needed to avoid eternal torment, and one that should be protected by law. But if there does not exist such a being, then we clearly do not have such an interest—regardless of what some privileged text in the form of a “scripture” might say.

But the only way for us to determine whether such a being exists is through whatever arguments or evidence there might be on both sides of the issue. It is not just that if we have adequate reason to think that such a being *does not exist*, we should not protect religious freedom with a special constitutional right. It is also that if we *do not have adequate reason* to think that such a being exists, we should not protect religious freedom with a special constitutional right. From the standpoint of political morality, it makes no sense whatsoever to impose *special* legal constraints on what the state or citizens can do by way of regulating religious freedom if we have no reason to think religious freedom implicates any distinctive important interests, as would be the case with respect to the classically theistic religions considered here if we have no reason to believe that there exists a divine being who punishes sin with eternal torment.

The importance of this epistemic issue can be seen from another ongoing controversy with respect to an ostensible conflict between the interest in religious freedom and important interests of other persons. Pharmacists have argued that they should not be compelled by law to fill prescriptions for medications that violate their religious beliefs, such as birth control



pills or the “morning-after” pill.<sup>73</sup> If pharmacists had a good reason to believe that filling such prescriptions would increase the risk that they will be consigned to hell, that would also be a reason to think that they should be able to decline such prescriptions even though doing so might cause significant detriment to the patient; the reason, of course, is that the interest in avoiding eternal torment would outweigh the interest in avoiding any detriment to the patient by being denied access to the relevant medication. However, if there is no good reason for thinking that pharmacists will be divinely punished for filling such prescriptions because there is no plausible reason for thinking their religious beliefs are true, it would be wrong for the *law* to allow pharmacists to impose the detriments *we know* will occur on patients who cannot get those medications.

Indeed, it would be as wrong, as a matter of political morality, to allow the imposition of such effects on others on the basis of a pharmacist’s religious beliefs as it would be to allow this on the basis of a unjustified belief that an alien from another planet will kill her if she did not fill the prescription. It is crucial that we have adequate reason to believe that the relevant claimed interests can be threatened before we enact laws that allow persons who are licensed to provide critical public services to refuse to do so in cases where they believe such interests are threatened. Laws must be grounded in reasons for thinking they are justified; and this requires an examination of whether all the underlying support has sufficient epistemic justification.

The issue, then, is whether we have sufficient reason to believe that any of these religious traditions are true. The justification for any special right includes non-moral epistemic considerations having to do with whether there is reason to think we have an interest that could actually be threatened. In most cases, the epistemic issue is so easily and obviously settled that it does not require argument. It is obvious we have an interest in the continuation of conscious life because it is obvious that everybody dies and everybody has a strong presumptive desire to continue living.<sup>74</sup> It is obvious we have an interest in being able to use certain material things and in excluding others from appropriating them because it is obvious that we need to use

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73. See, e.g., *Pharmacist Conscience Clauses: Laws and Information*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx> [<https://perma.cc/RY3B-B8FV>] (last updated May 2012).

74. I use the term “presumptive” here to indicate that there may be circumstances in which a person’s interest in continuing life is extinguished, such as when one has a rapidly degenerative condition causing suffering that cannot be alleviated and that inevitably culminates in death.

certain things in order to continue to live and thrive. The justifications for special legal protections of life and property include these facts, although they are so obvious that we lose sight of them because the underlying epistemic justification is, from the standpoint of the law, conclusive.<sup>75</sup>

In the absence of sufficient reason to think we have a *distinct* interest in X that can actually be threatened, legal protection in the form of a special right to X is not warranted. Accordingly, there are two issues that have to be addressed, although in most cases only one requires explicit attention, in providing an adequate justification for providing legal protection of an interest through a special constitutional right: (1) the *moral* issue of whether the value of the putative interest in X is of the correct type and of sufficient importance to warrant protection by law; and (2) the *epistemic* issue of whether we have sufficient reason to think the relevant interest in X can actually be threatened by some thing or behavior in this world. These issues, then, set two requirements for justifying such protection of X that are necessary conditions for justifiably protecting X with a special constitutional right.

It remains, then, to apply (1) and (2) to the case of religious freedom as it pertains to the relevant religious traditions. The doctrine of divine justice, common in broad outlines to both Christianity and Islam, ostensibly satisfies the moral condition (1), which has to do with the nature and strength of the relevant interests.<sup>76</sup> Nevertheless, there remains the issue—addressed extensively in the literature in philosophy of religion but not in the literature in normative political philosophy concerning the justification of a right to religious worship—of whether, and to what extent, we have reason to believe that there exists a personal God who carries out such a doctrine of divine justice. Accordingly, the next subsection attempts a somewhat cursory explication and assessment of the arguments from the extensive literature in philosophy of religion pertaining to whether God, as classical theism conceives it, exists.<sup>77</sup>

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75. See U.S. CONST. amend. XIV.

76. See Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUD. L. & LITERATURE 139, 143–44 (1996) (discussing “divine justice” in Christianity and Judaism).

77. As mentioned above, the same considerations adduced below apply with equal force to religions incorporating the doctrine of Karma, as well as any worldview, religious or otherwise, positing the existence of immaterial forces or substances. See *supra* Sec. V.A.

B. A Brief Description of the Arguments for God's  
Existence and Objections to the Arguments

There are five major arguments attempting to show the existence of an all-perfect God that are currently in play among contemporary philosophers of religion: (1) the ontological argument; (2) the cosmological argument; (3) the moral argument; (4) the intelligent design argument; and (5) the fine-tuning argument. The first three arguments are *a priori* in character, while the last two are *a posteriori* in character.<sup>78</sup> The discussion here will have to be somewhat cursory, but it accurately sums up the various arguments and objections in sufficient detail for the reader to decide whether the arguments are successful in providing adequate reason to think that there is a distinct interest that can be protected only by a special right to religious freedom.

The ontological argument is not only *a priori* but also conceptual in this respect: it seeks to validly *deduce* the conclusion that God exists from conceptual claims about the nature of God.<sup>79</sup> Just as the very concept of a bachelor implies that every bachelor is male, the very concept of God, according to the ontological argument, implies that God exists. Descartes gives the most perspicuous formulation of the argument, which can be summarized as follows:

1. It is a conceptual truth that God is all-perfect.
2. A being that exists is more nearly perfect than a being that does not exist.
3. Therefore, God exists.<sup>80</sup>

Kant responded to the argument by challenging Premise 2 above. On Kant's view, existence is not itself a property; existence is, rather, a metaphysical

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78. For more detailed discussion of the ontological argument, see, for example, Kenneth Einar Himma, *Anselm: Ontological Argument for God's Existence*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/ont-arg/> [<https://perma.cc/R7JW-BS95>] (last visited Mar. 21, 2017) [hereinafter Himma, *Ontological Argument*]. For more detailed discussion of the design argument, see, for example, Kenneth Einar Himma, *Design Arguments for the Existence of God*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/design/> (last visited Feb. 15, 2017) [hereinafter Himma, *Design Arguments*].

79. See Himma, *Ontological Argument*, *supra* note 78.

80. See RENE DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 62 (Laurence J. Lafleur trans., Bobbs-Merrill Educ. Publ'g 1960) (1641).

prerequisite for having any properties at all.<sup>81</sup> One would never think to include “*p* exists” in a list of properties that would make someone a good parent, as existence (or possible existence) is presupposed by the task of making such a list. Notably, Kant’s criticism of the Cartesian version of the argument is widely accepted among contemporary philosophers of religion as fatal to the argument.<sup>82</sup>

The Kalam cosmological argument is grounded in the metaphysical idea that every existing thing has a cause of its existence.<sup>83</sup> Its structure is quite straightforward and can be represented as follows:

1. Everything that exists has a beginning and hence a cause of its beginning.
2. The universe exists and has a beginning.
3. Therefore, the universe has a cause of this beginning, and that cause is God.<sup>84</sup>

There are a number of conspicuous problems with this argument, but a brief discussion of one will suffice for our purposes. Even if the premises are true, only the conclusion that the universe has a cause follows. There is nothing in the premises that would tell us anything about the nature of the cause; the prevailing theory in physics is that the material universe in which we live was produced by the “Big Bang,” some kind of event that occurs within the context of an eternally existent multi-verse.<sup>85</sup> It should be clear that there is little here of evidentiary value; not surprisingly, most philosophers of religion reject it.

The basic idea grounding the moral argument is that the only possible explanation for the objectivity of morality<sup>86</sup> is the existence of an all-perfect

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81. See, e.g., Lawrence Nolan, *Descartes’ Ontological Argument*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/descartes-ontological/> (last updated Sept. 2, 2015). As Nolan describes the argument: “Perhaps the most famous objection to the ontological argument is that existence is not a property or predicate. Popularized by Kant, this objection enjoys the status of a slogan [i.e., “existence is not a predicate”] known by every undergraduate philosophy major worth her salt.” *Id.*

82. *Id.* There are contemporary versions of the argument that are somewhat more sophisticated (and devilishly obscure), but all attempt to derive God’s existence from some conceptual truth about God. See, e.g., St. Anselm, *Proslogion*, in ST. ANSELM: BASIC WRITINGS (trans. S.N. Deane, 2d ed. 1962), reprinted in THE ONTOLOGICAL ARGUMENT: FROM ST. ANSELM TO CONTEMPORARY PHILOSOPHERS 6 (Alvin Plantinga ed., Anchor Books 1965).

83. See, e.g., Bruce Reichenbach, *Cosmological Argument*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/spr2013/entries/cosmological-argument/> (last updated Oct. 26, 2012).

84. See *id.*

85. See *id.*

86. A claim is *objective* in character if and only if whether that claim is true or false does not depend on what any person or group of persons believes, desires, or prefers about that claim; indeed, the hallmark of an objective claim is that everyone can simultaneously

God, which somehow defines mind-independent standards of morality that apply across cultures.<sup>87</sup> There are, as is true of the arguments above, various iterations that differ from one another in terms of sophistication, but the basic problem is to identify a mechanism by which God's existence would explain the objectivity of morality. The most direct—and hence the most plausible, simplicity being an epistemic virtue<sup>88</sup>—mechanism is that God manufactures morality by means of his commands: if God exists independently of minds, then God's existence and commands are objective, which would imply that God's moral commands exist objectively.<sup>89</sup>

The most common objection to this theory (known as the Divine Command Theory) is that if anything God commands is morally good, then God could bring it about that it is morally good to torture live infants, an implication that most theistic philosophers of religion regard as fatal to the theory.<sup>90</sup> While there is a more sophisticated version of the argument, the details of this more nuanced version do not rescue the argument.<sup>91</sup> In the absence of some other plausible account of how God's existence could explain the

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be mistaken about the truth-value of an objective claim, as was presumably true when people believed the earth is flat. The truth-makers of objective claims are all mind-independent. Accordingly, the claim that morality is objective asserts that whether or not a moral judgment is true or false does not depend on what any person or group of persons believes, desires, or prefers about that claim.

87. See, e.g., C. Stephen Evans, *Moral Arguments for the Existence of God*, STAN. ENCYCLOPEDIA PHIL. (June 12, 2014), <http://plato.stanford.edu/archives/sum2014/entries/moral-arguments-god/>.

88. See, e.g., Alan Baker, *Simplicity*, STAN. ENCYCLOPEDIA PHIL. <http://plato.stanford.edu/archives/fall2013/entries/simplicity/> (last updated Feb. 25, 2010).

89. For a general discussion of the argument, see Michael Austin, *Divine Command Theory*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/divine-c/> [<https://perma.cc/F9L6-JEQ4>] (last visited Mar. 21, 2017).

90. See *id.*

91. According to Robert Adams's version of the Divine Command Theory, what is right and wrong is determined by the commands of a *loving* God. See Robert Merrihew Adams, *A Modified Divine Command Theory of Ethical Wrongness*, in RELIGION AND MORALITY: A COLLECTION OF ESSAYS 318, 322–23 (Gene Outka & John P. Reeder, Jr. eds., Anchor Books 1973). The problem with this version of the argument is that the relevant concept of loving is moralized. A loving God would not command someone to torture an infant for fun because love involves moral dispositions of concern to promote a loved one's well-being. Adams's formulation of the Divine Command Theory, and this is a standard objection among even theistic philosophers of religion, presupposes some moral truths about love, yet purports to explain the existence and content of all moral truths through God's commands.

objectivity of morality, there is nothing here that would serve as evidence for God's existence.<sup>92</sup>

The most influential remaining arguments among Christian philosophers are teleological arguments: Robin Collins's fine-tuning argument<sup>93</sup> and William Dembski's intelligent design argument ("ID argument").<sup>94</sup> The fine-tuning argument is grounded in uncontroversial scientific studies showing that a multiplicity of properties in the material universe had to be more or less exactly what they are in order for the universe to support life.<sup>95</sup> The idea is that the improbability of this, together with the idea that an intelligent creator would value intelligent beings, provides some reason for thinking that chance is not the best explanation for the existence of life on this planet.

The problem here is that the fine-tuning argument, by its own terms, does very little work. Collins recognizes that the premises cannot bear the work of a proof of God's existence; indeed, Collins explicitly concedes: "the argument does not say that the fine-tuning evidence proves that the universe was designed, or *even that it is likely that the universe was designed.*"<sup>96</sup>

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92. This should not be construed as suggesting there are successful secular arguments for thinking that morality is objective. The issue of whether morality is objective remains a contentious one in moral philosophy.

93. See Robin Collins, *A Scientific Argument for the Existence of God: The Fine-Tuning Design Argument*, in REASON FOR THE HOPE WITHIN 47, 47–75 (Michael J. Murray ed., William B. Eerdmans Publ'g Co. 1999).

94. See generally WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE & THEOLOGY (2002).

95. Consider, for example, what appear to be instances of fine-tuning:

1. If the initial explosion of the big bang had differed in strength by as little as one part in  $10^{60}$ , the universe would have either quickly collapsed back on itself, or expanded too rapidly for stars to form. In either case, life would be impossible. . . .
2. [I]f the strong nuclear force, the force that binds protons and neutrons together in an atom, had been stronger or weaker by as little as five percent, life would be impossible.
3. [I]f gravity had been stronger or weaker by one part in  $10^{40}$ , then life-sustaining stars like the sun could not exist. . . . mak[ing] life impossible.
4. If the neutron were not about 1.001 times the mass of the proton, all protons would have decayed into neutrons or all neutrons would have decayed into protons . . . mak[ing] life impossible.
5. If the electromagnetic force were slightly stronger or weaker, life would be impossible, for a variety of different reasons.

Collins, *supra* note 93, at 49 (footnotes omitted). The intuitive force of this argument can be explained as follows (although this is not, strictly speaking, a premise in Robin Collins's more sophisticated version): it is one thing to get lucky and win a lottery contest on some given day; it is another thing to get lucky and win ten lottery contests in a row. The intuition is that someone must have "cheated" to bring about that result. For more on this, see, for example, Himma, *Design Arguments*, *supra* note 78.

96. Collins, *supra* note 93, at 53 (emphasis added).

It tells us only that the observation of fine-tuning provides one reason for favoring the *hypothesis* that God designed the universe over the hypothesis that it has no designer or creator—and one that can be rebutted by other evidence. It is, in essence, grounded in nothing stronger than a principle that determines that some property of the universe is *relevant* with respect to the issue of whether God exists; it provides, as Collins admits, only a weak reason to think God exists and, by his own admission, fails as an argument that could, by itself, show God exists.<sup>97</sup>

The final argument here has few proponents in philosophy of religion but likely remains the most controversial argument—namely, the “ID argument”—because of the increasing tendency among conservative Christians to reject the theory of evolution as fully explaining the existence of intelligent life. The ID argument proceeds by distinguishing two relevant forms of complexity: a system or structure is *cumulatively complex* “if the components of the system can be arranged sequentially so that the successive removal of components never leads to the complete loss of function”;<sup>98</sup> a system or structure is *irreducibly complex* “if it consists of several interrelated parts so that removing even one part completely destroys the system’s function.”<sup>99</sup> Conceived as a system of the relevant type, a city is cumulatively complex since one can successively remove people, services, and buildings without rendering it unable to perform its function.<sup>100</sup> Likewise conceived, a mousetrap, in contrast, is irreducibly complex because the removal of even one part results in complete loss of function.<sup>101</sup>

The idea is that there are irreducibly complex systems in living organisms that cannot develop through a gradual process like evolution:

An irreducibly complex system cannot be produced . . . by slight, successive modifications of a precursor system, because any precursor to an irreducibly complex system . . . that is missing a part is by definition nonfunctional. . . . Since natural selection can only choose systems that are already working, then if a biological system cannot be produced gradually it would have to arise as an integrated unit, in one fell swoop, for natural selection to have anything to act on.<sup>102</sup>

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97. *See id.* at 54.

98. DEMBSKI, *supra* note 94, at 147.

99. *See id.*

100. *See id.*

101. *See id.*

102. MICHAEL J. BEHE, DARWIN’S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION 39 (1996).

Since, for example, a cilium-precursor (i.e. one that lacks at least one of a cilium's parts) cannot perform a function that endows a cilium with adaptive value, organisms that have the cilium-precursor are no "fitter for survival" than they would have been without it.<sup>103</sup> Since chance-driven evolutionary processes would not select organisms with the precursor, intelligent design is a better explanation than evolution, according to the ID argument, for the existence of organisms with fully functional cilia.<sup>104</sup>

This argument is problematic for a number of reasons.<sup>105</sup> First, evolutionary biologists have challenged the idea that there are, in fact, any irreducibly complex systems found in nature,<sup>106</sup> which, if correct, renders the distinction without relevant application to the case at hand; evolutionary biologists have explained how the eye, thought by ID theorists to be a paradigm of irreducible complexity, can have evolved gradually in the way that neo-Darwinianism suggests.<sup>107</sup> Second, there is no reason to think that the probability of evolving irreducibly complex systems is "vanishingly" small, as the matter is sometimes put.<sup>108</sup> Having a non-functional precursor to a functional irreducibly complex system does not necessarily render the organism *less* fit for survival; it might not improve the organism's prospects, but it does not necessarily diminish them. Accordingly, having such a precursor does not necessarily lower the probability of evolving an irreducibly complex system. Third, the claim that some existing thing has a feature, irreducibly complex or otherwise, that *would be* valuable to an intelligent being with certain properties does not imply anything about the probability that such a being exists. Finally, although design inferences are, in fact, utilized in science, they are utilized only in circumstances in which we have sufficient antecedent reason to believe that intelligent agents with the right kinds of ability to cause the relevant events already exist. An anthropologist can infer from a bull-shaped stain of color on a cave that it was made by someone *only* because we already know that there existed people at the time with the ability and motivations to paint pictures of bulls.

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103. See, e.g., Richard A. Wiedenheft, *Evolution vs. Intelligent Design: Scientific Evidence that God Is in the Details*, BIBLE SABBATH, Mar. 2005, at 4, 6, [https://baonline.org/Issues/Archives/BA-2005-2\\_March-Eng.pdf](https://baonline.org/Issues/Archives/BA-2005-2_March-Eng.pdf) [<https://perma.cc/4KBS-4GT3>].

104. See *id.*

105. For an extended discussion of the ID argument and its problems, see Kenneth Einar Himma, *The Application-Conditions for Design Inferences: Why the Design Arguments Need the Help of Other Arguments for God's Existence*, 57 INT'L J. FOR PHIL. RELIGION 1, 1–33 (2005).

106. Kenneth R. Miller, *The Flagellum Unspun*, in DEBATING DESIGN: FROM DARWIN TO DNA 81, 87–88 (William A. Dembski & Michael Ruse eds., 2004).

107. See Detlev Arendt, *Evolution of Eyes and Photoreceptor Cell Types*, 47 INT'L J. DEVELOPMENTAL BIOLOGY 563, 563–71 (2003).

108. Ilya Prigogine et al., *Thermodynamics of Evolution*, 25 PHYSICS TODAY, Nov. 1972, at 23, 23.



The design argument, however, cannot be used to show the existence of something we do not already have antecedently adequate reason to believe exists; design inferences do no more than distinguish things that are done by intelligent beings from things that merely happen. Not surprisingly, the design argument has very few proponents in philosophy or the sciences.

The verdict here—and this is likely one that would be shared by many theistic philosophers of religion—is that the arguments for God’s existence simply fail to succeed in showing that God exists in at least one of two ways. First, one could argue that the arguments all fail to provide evidence of God’s existence insofar as they rely on false premises or invalid inferences; false premises and invalid inferences are logically incapable of providing support for a conclusion. Second, one could argue that the continuing controversies among theist philosophers of religion as to whether these various arguments succeed suggest that the arguments, in their current form, fail to convince a sufficient number of people to consider them successful in providing evidence that God exists. Either way, it seems reasonable to conclude that the arguments for God’s existence fail to provide sufficient reason for that conclusion to warrant the protection of a special right to religious freedom.

It should be noted that ordinary believers, stressing the importance of faith as a moral virtue, are not likely to be troubled by this conclusion. The idea is that the faith of someone who believes without reasons in God is of greater moral worth than the faith of someone whose belief depends on reasons, as the faith of the latter is more likely to be transient than the faith of the former; as Kierkegaard stated the position, faith is valuable because its object is “absurd” and insulated from the ordinary requirements of rationality.<sup>109</sup> This speaks not only to the lack of importance accorded to arguments and evidence, but also to a widespread sense among even theists that the arguments for God’s existence are unpersuasive. Still, if there were such arguments, it is likely that Christians would look past the perceived moral defects of a faith grounded in reason and feature them prominently in their proselytizing in the hope that a belief that begins in reason would culminate in a faith and trust that does not depend on reason.<sup>110</sup>

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109. SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT TO PHILOSOPHICAL FRAGMENTS 210 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1992).

110. In this connection, it is worth noting sociological evidence that shows that arguments play little, if any, role in explaining why people are theists; a recent study in the sociology of religion shows that approximately 82% of adolescents with religious parents tend to be

While there are arguments against God's existence—the most powerful and plausible being the argument that there is more suffering in the world than an all-perfect God need allow to achieve God's purposes—there is no reason to consider them here.<sup>111</sup> Insofar as it has been shown that the arguments for God's existence fail to provide sufficient reason to think that believers have an interest in religious freedom that can *actually* be threatened, that is enough to show that affording special protection to religious worldviews cannot be justified on the strength of interests in religious freedom that require protection because they can be threatened. Accordingly, religious freedom does not warrant, as a matter of political morality, protection by a special right; as we have seen, we have no reason to think religion has a distinguishing feature that implicates an important and unique interest that could be threatened by the behavior of states or citizens.

Although this section explored only the evidentiary issues that arise in connection with classical theism, it seems plausible to think the same issues would arise in connection with any religious view positing the existence of immaterial objects that cannot be adequately justified by scientific or philosophical argument. There are, of course, other traditions that do not hold that a personal God exists, instead holding that justice is administered by some objective non-personal normative force—such as, for example, the doctrine of Karma.<sup>112</sup> Although the argument of this section focused on the classically theistic tradition, it would apply as much to any religious worldview positing, as a core tenet of the view, the existence of immaterial objects or forces that play a role in bringing about ultimate justice, as well as any immaterial substances like souls.<sup>113</sup>

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as active and committed as their parents to the relevant religious views; in other words, the probability that two Christian parents raise a child to have the same beliefs and commitments that a parent has is about 82%. See David Briggs, *Parents No. 1 Influence Helping Teens Remain Religiously Active as Young Adults*, ASS'N RELIGION DATA ARCHIVES (Oct. 29, 2014), <http://blogs.thearda.com/trend/featured/parents-no-1-influence-helping-teens-remain-religiously-active-as-young-adults/> [<https://perma.cc/WNX6-R5YF>]. Arguments for God's existence are simply not relevant, as a sociological matter, in explaining a believer's faith.

111. See, e.g., Walter Sinnott-Armstrong, *Some Reasons to Believe that There Is No God*, in WILLIAM LANE CRAIG & WALTER SINNOTT-ARMSTRONG, *GOD? A DEBATE BETWEEN A CHRISTIAN AND AN ATHEIST* 81, 83–98 (2004).

112. See *supra* notes 58–61 and accompanying text.

113. Andrew Koppelman argues that there are a number of other interests to which religious worldviews give rise that might warrant the protection of a special right to religion. As he puts it:

What else beyond salvation might be the good that religion supposedly delivers? Multiple candidates suggest themselves, including harmony with the transcendent origin of universal order (if it exists); courage in the face of heartbreak (if that kind of encouragement helps); a transcendent underpinning for the resolution to

## VII. AN EPISTEMIC SIMILARITY BETWEEN MORALITY AND RELIGION

The reader may have noticed that the most salient points I have made about the epistemic difficulties involved in showing that a personal God exists who subjects sinners to hell seem equally applicable to theories of morality. For example, whatever reasons support the view that moral principles are objective in character, which remains the most common view among philosophers and laypersons, those reasons fall well short of being characterized as persuasive.<sup>114</sup> Likewise, whatever reasons there are for thinking that moral principles are inter-subjective, conventional, or relative in character, they fall well short of being characterized as persuasive.<sup>115</sup> That is why there is a continuing controversy among moral theorists and laypersons about the nature and character of morality.

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act morally (if that kind of underpinning helps); contact with the awesome and the indescribable (if awe is something you feel), and so on. In the cottage industry of proposals to discard the category of “religion” and substitute something else, however, these candidates haven’t gotten much attention, for the excellent reason that they are theologically loaded. It is not just that they are narrower and more specific than “religion;” it’s that their goodness is a specifically religious goodness that depends on contestable metaphysical premises.

Koppelman, *supra* note 4. There are a number of problems here. First, Koppelman gives no reason to think that the other liberty rights of the Constitution do not already protect these interests adequately. Second, as he points out, these are themselves religious doctrines that assume the existence of something he describes as “transcendental,” which he admits is a theologically loaded doctrine. The problem is that the very notion of the transcendental presupposes the existence of immaterial forces or substances; as the Oxford Online Dictionary defines the word, it means “relating to a spiritual or nonphysical realm.” See *Transcendental*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/transcendental> [<https://perma.cc/9LZP-CGQ5>] (last visited Mar. 21, 2017). As such, Koppelman’s candidate examples are vulnerable to the same objection being advanced in this section. There is, as was argued above, no epistemically adequate reason to think there is a realm of the transcendental. Intriguingly, in the very same article, Koppelman expressly articulates in a number of places, including the quote above, the epistemic uncertainty about what he characterizes as religious goods. Here is one more example that sums up the problem that is the topic of this section: “‘Religion’, then, is a proxy for the genuine religious good (*if there is one*), and part of its value is that we need not agree about what exactly it is a proxy for.” Koppelman, *supra* note 4 (emphasis added). It is precisely because we lack sufficient reason to believe there is a God—and hence Koppelman’s qualification “if there is one”—that it is morally illegitimate to discriminate against non-religious worldviews in favor of religious worldviews. *Id.*

114. See *supra* note 86.

115. These notions are all intended to express that morality is an artifact manufactured by some group of people—usually thought to be a “culture.” The idea is that whether a moral principle is true or not is determined by what people in the culture generally accept

One might be tempted to think, then, that the same conclusion applies, so to speak, to a moral freedom analogous to religious freedom—namely, that moral freedom does not warrant the protection of a special right. After all, if religious freedom does not warrant such protection in virtue of lacking an adequate evidentiary foundation for the religion’s core claims, then moral freedom, similarly lacking an adequate evidentiary foundation for the moral system’s core claims, does not warrant such protection. Thus, this counterargument might be expressed as follows: the arguments of this Article prove too much because they imply that people have no rights with respect to the freedom to act on their moral beliefs.

In one hyper-technical sense, I suppose this is true. There is no special constitutional right that is expressly characterized as a right to “moral freedom.” Indeed, the very notion of a right to “moral freedom” seems problematic in a number of respects—including, perhaps, a conceptual difficulty in articulating the nature of morality that is analogous to the conceptual difficulty in articulating the nature of religion. It would certainly be odd to express a special constitutional right this way, if only because it would be so unusual.

But the idea that this would imply moral freedom should not be protected by a special right of some kind is problematic. First, assuming that the counterargument succeeds, it succeeds only in showing that we should not protect moral freedom with a *special* constitutional right to moral freedom. It would not succeed in showing that moral freedom does not necessarily warrant protection of a constitutional right; it surely warrants protection as a derived right from other more general rights protecting autonomy, conscience, belief, thought, speech, and association, which, I argue above, is also true of religious freedom.

Second, and more importantly, ordinary psychologically healthy people cannot avoid having moral views that they take into account in deliberating about what they should do. Indeed, moral considerations are deemed important enough that they are commonly thought to win in a conflict with purely prudential considerations<sup>116</sup>—a somewhat remarkable, and civilizing fact that conduces greatly to our being able to live together in peace. If we had to depend only on law to prevent people from trampling each other to achieve their prudential interests, it would not be long before society would deteriorate into something resembling the mythical Hobbesian state

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or believe. Morality is hence, on this view, a social artifact that is determined by what people believe or accept. Thus, the truth-makers of such claims are *not* all mind-independent.

116. See Frankena, *supra* note 39, at 691.

of nature—a coast-to-coast free-for-all in a nation that could not possibly afford a sufficient police presence to keep minimal peace.<sup>117</sup>

Moral freedom, then, involves two features of moral salience missing from religious freedom. First, only someone with a serious mental illness does not care about morality and acting in accordance with her beliefs.<sup>118</sup> One cannot be psychologically healthy without caring about ensuring that her behavior conform, as much as possible, with what she believes to be right; even people we consider “bad” attempt to rationalize their problematic acts as morally justified or excusable. Neither agnosticism nor atheism can plausibly be considered a mental illness. What distinguishes a religion from a morality is that one can lack the former, but not the latter, without being necessarily indicative of serious psychological illness. Morality is distinct from religion in this theoretically salient respect.

Indeed, it is clear that we have strong intrinsically valuable interests protected by constitutional rights that would afford moral worldviews considerable legal protection. Clearly, we have an interest in being able to act autonomously that is both intrinsically valuable and of great importance. This interest in autonomy, which is the general capacity that is ultimately protected by all of the most common constitutional rights, implies interests in freedom of thought, belief, conscience, association, and other activities.<sup>119</sup> Even if there are questions about the epistemic adequacy for accepting any view about the nature or substance of morality, it is simply indisputable that we have interests in acting according to our beliefs and conscience that warrant the protection of constitutional rights. There can be no question that limited “moral freedom” warrants the protection of constitutional rights.

Third, given that morality characteristically operates to constrain the pursuit of self-interest, it requires making sacrifices that conduce to the good of other persons and hence increase the likelihood that people will avoid socially undesirable acts without needing a prudential disincentive in the form of a legal sanction. While the moral views associated with any mainstream religious tradition will function to produce such benefits,

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117. Thomas Hobbes (1588–1679) was an English philosopher best known today for his work on political philosophy and social contract theory. *See generally* THOMAS HOBBS, LEVIATHAN (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (arguing for a social contract and rule by an absolute sovereign); *see also* Richard W. Alexander, *The Myth of Power: Hobbes’s “Leviathan,”* 70 J. ENG. & GERMANIC PHILOLOGY 31, 31 (1971).

118. *See, e.g.*, MARTHA STOUT, THE SOCIOPATH NEXT DOOR: THE RUTHLESS VERSUS 120–28 (2005).

119. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

this is not true of the descriptive claims that explain the nature of ultimate reality. The law requiring people to love their neighbors as they love themselves, if followed, conduces to social order, but the descriptive belief that there exists a God with a triune character contributes nothing to do that—including nothing significant by way of inculcating a concern for morality in a person. While a particular set of descriptive doctrines might lead a person to adopt one moral principle instead of another, that person would, if psychologically healthy, come to adopt and care about moral views that probably agree with mainstream secular views on a number of core issues.<sup>120</sup> Religious freedom offers nothing unique here in this regard.

Finally, the freedom to believe what seems morally right and to act, within limits, on those beliefs form the very basis for the most fundamental right that underlies nearly all existing specific constitutional rights—namely, the right to autonomy.<sup>121</sup> Legal recognition of the moral right to decide what one values and to act, within limits, to achieve those values is the very foundation of a free society.<sup>122</sup> Insofar as a legal system can be legitimate only if it recognizes certain basic freedoms, it must recognize and protect the right to autonomy in some form.<sup>123</sup> In most nations, this takes the form of a number of specifically enumerated constitutional rights: free speech, privacy, physical security, free association, free thought, and, most importantly, conscience.<sup>124</sup> While the right to autonomy is the moral foundation for each of the specifically enumerated rights and should be considered “fundamental” at the deepest level that incorporates moral concerns, the aforementioned constitutional rights are properly characterized, from a legal standpoint, as “fundamental” because not derived from other enumerated rights.<sup>125</sup>

Accordingly, if morality shares some common characteristics with religious views, these common characteristics do not imply either that moral freedom does not necessarily warrant legal protection or that the appropriate legal protection does not take the form of a special constitutional right. The rights to free speech, thought, and association, which, in effect, protect moral freedom, are fundamental constitutional rights and justifiably so. There is nothing in the similarities between morality and religious views that would imply otherwise.

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120. For example, I know of no moral theory or tradition that does not include the principle that intentionally killing a person is presumptively wrong. That presumption can be defeated, but that principle is universal to all known moral systems. *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 83 (H.L.A. Hart ed., 1980).

121. *See Obergefell*, 135 S. Ct. at 2597.

122. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 408–09 (1986).

123. *See id.*

124. *See, e.g.*, 2012 J.O. (C 326) 391.

125. *See Obergefell*, 135 S. Ct. at 2597–98.

## VIII. SUMMARY AND CONCLUSIONS

In this Article, I have argued that religious freedom does not warrant protection by a special right that affords protections to religious worldviews that are not afforded to non-religious worldviews by other constitutional rights. In particular, I have argued that a special right to religious freedom can be justified only insofar as religion *per se* or various religious doctrines give rise to an interest distinct from the interests protected by the rights to free speech, association, press, belief, conscience, and other liberty rights that protect religious and non-religious worldviews alike.

Although the argument is one of political morality, the foundation of the argument was grounded in epistemic considerations. Insofar as a special right to religious freedom would constrain the freedom of others, we must have adequate reason to believe, other things being equal, that we have an interest in pursuing religious worldviews that we do not have in pursuing non-religious worldviews—and this epistemic requirement is not met. Protecting more elements of religious speech and freedom than non-religious speech and freedom is, thus, unjustified discrimination against non-religious worldviews.

This is not to suggest that non-religious worldviews should be afforded more protections than religious worldviews. On my view, they should not, and nothing in the arguments of this Article implies otherwise. The interests in having the freedom to pursue religious worldviews, expression, and activities are no less important, from the standpoint of political morality, than the freedom to pursue non-religious worldviews, expression, and activities. The claim here is that the two types of worldview deserve equal protection under the law. That is a claim that should seem, as an intuitive matter, eminently fair and plausible.

Finally, nothing in this Article should be construed as hostile to religious worldviews. Although the centerpiece of the argument focused on the epistemic difficulties in rationally justifying religious belief, there is nothing in the argument that implies that assent to religious worldviews should be withheld if those worldviews are not epistemically justified. Not every claim one believes is of a type that either can or should be epistemically justified; as I pointed out, the widely believed claim that morality is objective is as lacking in persuasive argumentative support as the relevant religious doctrines are. Indeed, there is nothing in this Article that would imply even that religious faith is not a virtue. The thesis, again, is simply that the law should afford equal protection for religious and non-religious worldviews.

In essence, then, the discussion in this Article can be summed up as follows. This Article has argued that religious freedom warrants protection by a derived right properly inferred from constitutional rights protecting free speech, thought, autonomy, conscience, and association—and not by a special right to religious freedom. In order to justify protecting an interest with a special right to X, other things being equal, three conditions must be satisfied: (1) the relevant interest must arise uniquely out of X; (2) the relevant interest must reach a certain level of value (i.e. must be sufficiently important); and (3) we must have some plausible reason to think that the relevant interest can actually be threatened by something in the world. I have considered a number of interests arising out of religion that might be thought to justify such a right and have argued that they fail to do so.<sup>126</sup>

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126. Before closing, it is worth noting that the argument of this Article has one important implication likely to be controversial. In particular, it implies that churches should not be exempt from paying taxes. To exempt churches from paying taxes that every other non-religious institution must pay, if the argument is sound, is to wrongly discriminate against non-religious worldviews. Although the Establishment Clause of the First Amendment legitimately prohibits improper entanglement of the government with religious institutions, the argument of this Article entails that taxing churches would not constitute improper entanglement with religion.