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Belief
An Essay in Understanding

SHUBHA GHOSH†

INTRODUCTION

Undoubtedly someone will disagree, but the most striking statement contained in the founding documents of the American Republic is "[w]e hold these truths to be self-evident . . . ." The words that follow have resonated throughout American history, with their most recent and memorable invocation by the Reverend Martin Luther King in 1963. But equally intriguing is the notion that anything

† Professor of Law, SMU Dedman School of Law, Dallas, Texas. I would like to thank Anshu Pasricha, Editor-in-Chief, for inviting me to contribute an essay to the third essay issue of the Buffalo Law Review. I apologize in advance to him and to any readers of this piece for using his gracious invitation as an opportunity to present the following speculations on a topic that is somewhat outside my usual area of scholarship. But, what better use of an invited essay than to explore ideas that are alluring and enticing, which may otherwise find no justification for expressing? For those seeking a clue on how to classify this piece, for whatever reason, consider the following exchange:

Indian middle-man (to Author): Sir, if you do not identify your composition a novel, how then do we itemise it? Sir, the rank and file is entitled to know.

Author (to Indian middle-man): Sir, I identify it a gesture. Sir, the rank and file is entitled to know.

Indian middle-man (to Author): Sir, there is no immediate demand for gestures. There is immediate demand for novels. Sir, we are literary agents not free agents.


G. V. DESANI, ALL ABOUT H. HATTER 12 (McPherson & Co. 1986) (1948). Substitute “essay” for “novel” as appropriate. For those who are comfortable with more familiar cultural references, try the following: "Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot." MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN (New York, Charles L. Webster and Co. 1885).
is "self-evident." As academics, as trained lawyers, as professional skeptics, we may find it difficult to accept anything as true on its face, as clearly evident and right without the dissection of reason and analysis. Is anything really self-evident anymore? Or, are these just words we repeat ironically?

In 1993, Professor Stephen L. Carter published The Culture of Disbelief, a major book by a major legal academic that advocated taking religion seriously.\(^1\) Chapter Eleven, entitled (Dis)Believing in Faith, presented an important criticism of the elevation of reason over faith in liberal political thought and a call for recognizing epistemic diversity and the role of moral thinking in formulating political and social judgments that connect with one's lived experience.\(^2\) As a claim that we cannot base judgments on reason alone, the call for epistemic diversity is an appealing and assuredly a correct one. Emotions, intuitions, passions, each inform how we live and how we should structure society as much as objective evidence. But if unfettered reason is misguided, so must be unchecked belief. If the Culture of Disbelief is problematic, as Professor Carter so convincingly demonstrates, we have to ask what does the Culture of Belief look like and what dangers does it hold. In his book, Professor Carter is a very careful critic of religious fundamentalism in American politics, pointing out that the problem with religious rhetoric in the Republican Convention of 1992 was not the invocation of religion, but the questionable secular ends to which religion was put.\(^3\) But in moving away from a Culture of Disbelief, what keeps us from the dangerous shoals of the Culture of Belief? Only a careful understanding of belief can help us to avoid those uncertain currents.

By posing the question "what is belief?" I do not have an agenda to endorse any particular set of beliefs. My concern is solely with understanding what we mean when we use the word "belief" or when we say we believe in X, whatever X may be. I am distinguishing belief from the concept of faith, which is a form of belief, but one with different, and

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2. Id. at 213-32.
3. Id. at 49-50.
perhaps deeper, obligations. More importantly, belief may not be grounded in religion at all. Instead, it may include secular commitments, such as a commitment to eradicating poverty, or toward improving the environment. The contemporary use of the word “belief” is often a watered down, perhaps even bastardized, version of the term “self-evident.” While “self-evident” suggests that there are some claims that no one can dispute because they are so true on their face, belief implies a subjective system of validation. A belief is something that an individual holds to be true, for whatever reason, but most importantly, for a reason that does not necessarily have to be justified to a non-believer. That belief is not completely subjective is demonstrated by the existence of communities of believers—groups of people who share a set of beliefs that need not be validated to those outside the group. To believe in this day and age is to hold some truths to be self-evident to one’s own community; there is no claim beyond those boundaries of social and personal solidarity.

Belief resonates in many other ways that leads us to ask what we mean when we use this word. At a recent conference at which I was presenting on economic theory and intellectual property, a commentator asked why I did not solely teach economics in my intellectual property classes since I “obviously believe[d] in the stuff.” The notion that economics—or any discipline—is something one believes in, reflects not only how disciplines are viewed in the law, but also how we do not understand what we mean by belief. The commentator, I think, was trying to draw a distinction between claims that one must make a leap to accept and those that follow solely from common sense. He was using the word “belief” in the same way we sometimes refer to a legal zealot as a “True Believer,” the title by the way of a fairly good law movie with a fictionalized Tony Serra played by the actor James Woods. A True Believer is a lawyer who pursues a cause to the bitter end, beyond what might be sensible, and stands in contrast, I presume,


5. TRUE BELIEVER (Columbia Pictures 1989).

6. Woods often portrays wild and wooly characters caught up with their beliefs. See, e.g., SALVADOR (Helmdale Film Corp. 1986) (his character of a journalist in the Oliver Stone movie).
with the more staid, stolid rational attorney, balancing every cost and benefit, to Justice Holmes' delight.

But does that archetypal staid attorney really not believe anything, except the virtues of utilitarian balancing? The Holmesian bad man is a die-hard nihilist, but is also, thankfully, a fiction. The opposite of the True Believer is not the technician. We each do believe something, but differ to the extent that we display our beliefs and let ourselves be guided solely by them. Dare I say, it is self-evident that we are all true believers to a certain degree, and the harder question is understanding why we believe what we believe and, more importantly, what we mean when we say we believe something.

Given Holmes' love of economics, it is important to note that Laurence A. Iannaccone, an economist whose scholarship focuses on the economics of religion, provides some encouragement for an exploration of the meaning of the word "belief." “Although beliefs lie at the core of every religion,” he writes, “economists have yet to say much about the formation of beliefs, religious or otherwise, nor have they given much attention to the process by which religions seek to shape people's beliefs and values.” 7 I do not pretend to even come close to addressing the full research project proposed by Professor Iannaccone. Nor do I fully endorse it. Some fine work in this vein has been carried out fruitfully by Timur Kuran, an economist who writes on preference formation and preference falsification. 8 But Iannaccone's proposal did challenge me to think about the question of belief and how it is used in the domain of law. The economics of religion, as articulated by Professor Iannaccone, is a field that seeks to explode two myths: “that of homo economicus as a cold creature with neither need nor capacity for piety, and that of homo religiosus as a benighted throwback to pre-rational times.” 9 To the extent that homo economicus has an analogue in jurisprudence, which often also seeks to banish homo religiosus, I have a similar goal for understanding the place of belief in law.

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9. Iannaccone, supra note 7, at 1492.
The inherency of belief, even in an ostensibly utilitarian world view, is demonstrated by how much our ordinary day to day, arms-length, self-interest driven transactions are based on claims that cannot completely be justified by reason alone. This point was made clear to me during a law school class in which I was discussing the economic and legal foundations of money. The particular focus was on currency that was not backed by a commodity like gold, the so called “fiat money” because a state authority has simply designated something to be used as money. The student, a bright person with, I later learned, a philosophy background from a fairly strong institution on the East Coast, stated despondently that the whole economic system could collapse at any moment because nothing was holding it together other than what people believed. Other students seemed to start down that path of despair as well. I tried to assure them that while such a catastrophe was possible, it was highly unlikely given the institutional safeguards in place to keep it from happening. I am not sure if any of them slept better after my attempts at consolation, but the point is made. The economic system does rest on the, perhaps fragile, belief that the system will work. But the beauty, or so we are told, is that the system is designed to coordinate these beliefs in self-reinforcing ways. You believe that the bank teller will in fact deposit your cash and not run off; that the credit card company will honor your transactions; that the vendor will provide the right specifications; that the caterer will arrive on time; and that the pension fund will be relatively intact when the time comes. In many of these instances, the force of law may support your beliefs. But we could then continue to unpack all the beliefs that underlie the rule of law. The point, however, is that we are all believers of sorts, but at the same time, we do not necessarily think the world is just a charade, or a fantasy. Or perhaps we do, and that is part of what makes the believing necessary.10

Whether we understand what we mean by belief or not, the notion of belief underlies much of what we do and take for granted—even institutions that we deem to be

10. For an analysis of the relationship between economic and religious thinking, and the development of the argument that economics is a religion, see ROBERT H. NELSON, ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND (2001).
wholly rational and utilitarian. So can we understand what belief is? I will explore three possible definitions: (1) belief as a rational justification, (2) belief as an emotional leap, and (3) belief as an organizing principle. The first two are unsatisfactory; the third is more helpful. After analyzing the three definitions, I will discuss what relevance understanding belief has for how we think about legal institutions. In reading the following, I hope that the reader will take my argument as intended: an essay—or experiment—on ideas that I have been working over in a relatively rigorous way. Development of the various arguments will occur, if at all, in future installments as “articles.”

I. BELIEF AND REASON

Pascal's wager provides some insight into the meaning of belief by posing the question as one of an inexorable choice that points in favor of God. The God is, without a doubt, a Christian God, and Pascal presents his wager as an explanation for Christian faith.\textsuperscript{11} "Who," Pascal writes, "will then blame the Christians for being unable to provide a rational basis for their belief . . . ?"\textsuperscript{12} But, Pascal continues that rationality is not the point—seeking reason for faith would undermine the very basis of faith. The question is posed as one of choice. Since one has to live, one has to make a choice, and so how to choose? The choice, as framed by Pascal, is simple: "Let us weigh up the gain and the loss by calling heads that God exists. Let us assess the two cases: if you win, you win everything; if you lose, you lose nothing. Wager that he exists then, without hesitating."\textsuperscript{13}

Pascal distinguishes his argument from one based on reason, and to the extent that reason means a series of deductive steps following logically from set principles, his characterization is correct. Pascal's wager is a persuasive

\textsuperscript{11.} See Peter Kreeft, Christianity for Modern Pagans 12-13 (1993) (describing Pascal's relevance for modern pagans seeking to understand Christianity).

\textsuperscript{12.} Blaise Pascal, Pensées and Other Writings 153 (Honor Levi trans., Oxford Univ. Press 1995) (1670).

\textsuperscript{13.} Id. at 154.
argument, rather than a logical one, but his persuasion rests on an appeal to what we would now call utilitarianism. Pascal appeals to a balancing of the benefits and costs of belief in God. In his formulation, believers have everything to gain and very little to lose, while non-believers face the risk of losing it all. In modern terms, the wager is a question of expected gains and losses. If one believes and God does exist, then one gains infinite salvation. If one believes and God does not exist, then one loses nothing, except for living a life according to Christian principles, rather than a hedonistic alternative. If one does not believe, and God does exist, then one faces infinite damnation. Since one's best guess is that it is equally likely that God does or does not exist, then the comparison of the alternatives of believing and not believing is a comparison of infinite riches and infinite losses. Therefore, place the chip on believing.

As utilitarian arguments go, Pascal's wager suffers from particularly troubling assumptions. Like a game in Vegas, Pascal's wager is stacked in favor of the house. When comparing infinite gains and infinite losses, one's choice is inevitable. Students of mathematics are aware of the dangers of arguments based on infinity. The mathematical problem is confounded by the assumption that it is equally likely that God exists and does not exist. Is that true? Given the scant evidence in favor of an after life, ghostly sightings and séances as the exceptions, one may think that it is more likely that God does not exist than that God does. In such a situation, one needs to know something more about the relative magnitudes of the infinite gains and the infinite losses relative to the probability of God's existence to know whether to bet on believing. If the infinite loss of damnation is slightly smaller than the infinite gain of salvation when weighted by the small probability that God does exist, then one may choose differently. But even if one accepts that the odds of God's existence are fifty-fifty, one need still worry that Pascal's wager could justify any set of beliefs. Pascal frames the choice in terms of Christian beliefs, but substitute Christian dogma with other possible belief systems, such

14. See KREEFT, supra note 11, at 291 ("The Wager is not an attempt to prove that God exists. . . . Rather, it tries to prove that it is eminently reasonable for anyone to 'bet' on God . . . .")
as, for example, a belief that God has chosen the believer to smite all non-believers. Given the infinite gains from following God’s dictate, Pascal’s wager could justify all sorts of horrors. Furthermore, the belief in question need not be religious for Pascal’s wager to work. Suppose that conforming to professional or social beliefs leads to substantial material gain while not conforming leads to ostracism and great material loss. What would one choose? Pascal’s wager can support betting on Christian beliefs, but it can also support betting on believing in racial intolerance, or Social Darwinism, or some other troubling ideology. The wager does not distinguish between belief and false consciousness.

Pascal presents his wager as a matter of choice. In order to live in this world, he assumes that one must choose whether one believes in God or not. But he presents the wager in such a way that the choice is illusory. In presenting us with the choice between infinite gain and infinite loss, we can choose only one way. Free will is vanished quickly through Pascal’s utilitarian balance. Perhaps one way to understand Pascal’s wager is an explanation for why belief persists from a cultural evolutionary perspective. Philosopher Daniel Dennett has recently proposed that religion can be understood through the principle of natural selection as applied to cultural evolution. According to Dennett, religious belief survives because it provides a strong survival strategy for groups. By satisfying the need for meaning in one’s life, and in the world, religious belief strengthens group solidarity and cohesion in contrast to the weak social bonds and investment in cultural survival among non-believers. Although he does not mention Pascal, the utilitarian foundation of the wager provides valuable support for Dennett’s argument. Betting on God dominates betting against God in terms of maximizing utility. If utility is understood at the social, rather than the individual level, Pascal’s wager explains why religious belief persists consistent with Dennett’s evolutionary explanation.

Even at the cultural level, Pascal’s wager does not satisfactorily clarify what belief is. The problem is not

simply that Pascal's wager, and Daniel Dennett's theory, can support almost any belief system that results in infinite gains, though this is a pretty big flaw. The real problem is that explanations of belief based on reason justify belief, whatever belief might be, rather than really provide insight into what it means to believe something. Falling back on utilitarianism raises the issue of infinite regress. If I should believe in God because of the greater utility I or society gets, why should I believe that greater utility is the goal? Will the self that survives Death really feel pain and pleasure as the self that lived? How do we know? Who should we believe?

Even though Pascal's wager and Daniel Dennett's evolutionary argument share a common and reinforcing structure, they, perhaps not too surprisingly, lead in opposite directions. Pascal wants to make a believer out of us. Dennett, on the other hand, wants to "break the spell" that religion has cast on society through its evolutionary advantage. According to Dennett, religious belief has lived past its usefulness. The fact that Pascal and Dennett are so different, despite parallels in their argument, suggests that there is a flaw in trying to understand belief through reason alone. As I show in the next section, however, it is equally flawed to adopt the opposite position and base our understanding of belief solely on emotion.

II. BELIEF AS A LEAP OF FAITH

When asked to define what we mean when we say we "believe in something," the natural answer would be that we find the "something" comforting or intuitively satisfying, rather than the result of utilitarian analysis. As one author, in his book on fundamentalist thinking in American religion and law, states: "Belief, the experience of belief, always defies description and evaluation, particularly when it is attributed to others. Indeed, the personal attestation of belief—'I believe in,' 'I believe that'—obtains much of its force from its resistance to description and in consequence our reluctance to evaluate it."¹⁶

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Christian existentialists, like Soren Kierkegaard, are often characterized as speaking about a leap of faith. Admittedly, our notion of what it means to believe something often does rely on a sense that we are willing to leap to a certain belief because of its attractiveness.\(^1\) We may try to unpack these intuitions by appealing to our upbringing or our social milieu, but all of these variables are in some sense redundant. They may help in understanding why we have adopted the particular set of beliefs that we have, but they do not really add to the basic notion that we believe in something because of an emotional or intuitive appeal, rather than a rational choice. I want to suggest in this section that this conception of belief grounded in emotion is as troubling as the conception grounded in reason.

An anecdote illustrates these issues.\(^2\) I attended a Catholic secondary school, a liberal Catholic one, that still, I am happy to report, tries to maintain its progressive values. Like my classmates, I had to take a religion class that, for the most part, was a combination of ethics and comparative religious traditions. One of the classes was taught by what I would describe as a hip cleric, in the fashion of the progressive, questioning Seventies. During the course, a classmate, who was fairly devout then, less so now, said that it was pointless to try to explain what faith is, since faith is ultimately a mystery. The teacher responded, quite harshly I remember: "If your faith is a mystery to you, I feel


\(^{18}\) I debated whether to include this anecdote because of its autobiographical elements. One cannot banish one's self from what one writes, but there is a danger in revealing too much. The main fear I have is what people will read into the facts presented. For example, it would be easy to read into the fact that I attended a Catholic school, and that this Essay, therefore, flows out of the stereotypical Catholic guilt and related neuroses. Walker Percy and Flannery O'Connor are two great writers who revel in Catholic guilt while also peeling away its absurdity. But I am not Catholic, in the capital letter sense, although I have hung out with many, some fitting the stereotype, others not. I was tempted to bring in other more personal elements that reflect my agnosticism basted with a heavy syrup of twentieth century Hindu practice and some Buddhist thinking (largely through a professor in college). I decided not to go in that direction for the fear of being considered a proselytizer. Hence, the compromise of this cautionary footnote to not read too much into autobiography or background. If that warning does not work, let me remind of you of Mark Twain's words in the "dagger" footnote.
I recounted this memory to a law and religion reading group that I was a part of in New York, and some members of the group were appalled at the teacher's response. Faith, after all, is a mystery, and the teacher's attempts at applying reason, in the progressive Seventies mode, seemed misguided to some of the members of the reading group. While the teacher perhaps should not have been as harsh in his tone as he was, he had a point. Faith, and *a fortiori* belief, cannot be purely a matter of mystery. Just like the unexamined life is not worth living, unexamined belief is not worth endorsing. One has to understand what one believes, its implications, its origins, its flaws, and that understanding requires reason as well as the recognition of mystery.

While it is perhaps true that the unexamined life is not worth living, it is also the case that the unlived life is not worth examining. In other words, we need to balance our analyzing how we live with actual living. The same is true for belief. If rational scrutiny were applied to every single one of the beliefs you or I hold, at some point we would each stop believing and simply start rationalizing. This is precisely the problem highlighted in the last section. Pascal himself pointed out that requiring Christians to provide a reason for their belief contradicted the very concept of faith, and his wager was intended as a persuasive argument to support Christian faith.

This response, however, attempts to prove too much. To say that the unlived life is not worth examining does not mean that we should live without thinking. Similarly, believing is not a blind leap. If it were, then it would be very difficult to distinguish belief from false consciousness, unless our emotions and intuitions are so finely honed that we can always be assured of the difference. Reason, however, needs to intercede to ensure that we understand what we believe and that our beliefs are not guiding us astray. Reason is the internal check on our emotions. Or reason may act through objective third parties that police our beliefs, from doing harm to ourselves, or to others.

On this point, Professor Carter's advocacy of epistemic diversity becomes crucial. While Professor Carter was seeking epistemic alternatives to liberal rationalism, I am suggesting that epistemic diversity needs to include multiple perspectives on belief, grounded in intuitions, in reason, and in psychological hybrids of the two. Instead of
accepting that beliefs are mere leaps, we should be prepared to question our beliefs and to have them questioned. By having to explain our beliefs to others and to have them subjected to scrutiny, we can strengthen our understanding and appreciation of what we believe and why we believe it. Therefore, it is unsatisfactory to think of belief solely as a matter of emotions.

But what about mystery? By subjecting beliefs to the overpowering force of reason, are we in danger of losing the emotional resonance that our beliefs supply? I think mystery need not be sacrificed. As with loving a person, holding a belief can be strengthened once the flaws are exposed and examined. The true mystery is why we still believe what we do, and cherish those we do, even after the greatest defect has been revealed for us and others to see.

III. BELIEF AS PRINCIPLE

Since belief cannot be understood solely in terms of reason or emotion, the answer must be in some hybrid of the two. I suggest that the word "belief" means the underlying principle or set of principles that guide our choices. That does not mean we cannot choose our beliefs. It is not paradoxical to say we choose how we decide to choose, even though that phrasing does sound a bit confusing. Once we recognize that believing entails a process of analytical examination of what we believe combined with the guidance of the emotional and intuitive appeal of our beliefs, we can come close to understanding belief as principles that guide our choices. The problem is that reason and emotion are so often seen as polar opposites, that we have difficulty in recognizing how they can co-exist and reinforce each other. The difficulty of understanding what we mean by belief stems from the often insurmountable tension, both real and imagined, between reason and emotion.

Stephen Jay Gould makes an invaluable and compelling case for reconciling reason and emotion in Rocks of Ages: Science and Religion in the Fullness of Life, one of the last books he wrote before succumbing to cancer in 2002. Professor Gould was a zealous advocate against the various pseudo-sciences, such as creationism or intelligent design, which are effectively masked religions. He also sparred with many evolutionary theorists, such as E.O. Wilson and, particularly in recent years, Daniel Dennett. I mention this
because Professor Gould’s life-long work demonstrated acuity both in the scientific and cultural debates raised by the theory of natural selection. His insight is especially apparent in *Rocks of Ages*, where he argues that science and religion can co-exist in their respective domains, what he calls “Non-Overlapping Magisteria,” abbreviated as NOMA.\(^{19}\) Science and religion each have their place, according to Gould, but they reinforce each other. By recognizing the ways in which science and religion complement each other, Gould avoids the potential problems of dualism posed by NOMA. An excellent example of how science and religion can co-exist is provided in Gould’s discussion of William Jennings Bryan, the attorney who prosecuted Scopes in the famous trial.\(^{20}\) While Gould, obviously, does not endorse Bryan’s position in the trial, he corrects the stereotype of Bryan as a reactionary conservative who adopted a fundamentalist reading of The Old Testament, contrary to his earlier stance as a political progressive. As Gould demonstrates, Bryan’s response to Darwinism arose from his concerns with Social Darwinism, itself a pseudo-science that supported conservative social policies. Gould’s book problematizes the traditional dichotomy between science and religion and successfully, in my reading, develops an irenics—a reconciliation—between the two domains.

The following passage from Professor Gould’s book illustrates how science and religion can be understood together and provides a nice basis for my position on belief:

> What can be more deluding, or even dangerous, than false comfort that blinds our vision and inspires passivity? If moral truth lies “out there” in nature, then we need not struggle with our confusion, or with the varying views of fellow humans in our diverse world... But if NOMA holds, and nature remains neutral (while bursting with relevant information to spice our moral debates), then we cannot avoid the much harder, but ultimately liberating, task of looking into the heart of our distinctive selves.\(^{21}\)


\(^{20}\) *See id.* at 150-70.

\(^{21}\) *Id.* at 204.
There are two types of passivity that Gould is challenging in this passage. The first is the passivity of a certain type of religion that requires us to accept certain truths about the world without question. The second passivity is one that comes from science, which reduces human experience to deterministic, material forces that take away human choice and free will. Once religion and science are understood more richly with respect to their separate, but self-reinforcing, domains, then human life can be pursued more fully, as we are forced through our hearts and our heads to better understand the world we live in and make.

Belief fits squarely within Professor Gould’s challenge to passivity. Belief is not mere justification for how we live. Nor is belief a blind acceptance of dogma. Instead, when we say we believe something, whatever the object, we are adopting a set of principles that guide what we do and who we are. The concept of belief requires us to recognize that human agents act both through reason and through emotions—each acting on the other—in guiding and shaping behavior. With this analysis of what belief and believing mean, I turn next to what belief implies for legal theory and practice.

IV. BELIEF AND LAW

Since this Essay appears in a law review, I should try to give these ideas some relevance for law. The purported applications that follow are meant to illustrate some of the legal questions that lead me to think about the question of belief and to pursue the topic of this Essay. No grand doctrinal exegesis is intended or even attempted. To refer back to the “dagger” footnote, the following are true gestures.

A. The Uninteresting Constitutional Question

The most obvious question—what does this discussion of belief say about the constitutional jurisprudence of the Free Exercise and Establishment clauses—is the least interesting, at least for me. The jurisprudence of religion, as I understand it, attempts to solve two problems. First, as state regulation has expanded to intrude on self-regulation through private institutions, such as religious ones, and
through individual conscience, the interpretation of the Free Exercise Clause has attempted to make room for religious accommodation while pursuing the primary goal of assimilation of individuals and groups into comprehensive regulatory schemes. The current law, as articulated in the decisions of Smith\(^2\) and Lukumi,\(^3\) does not allow for religious exceptions from generally applicable and neutral regulatory schemes but does police regulatory schemes that target or single out certain religious practices. Second, as exceptions are created from state regulatory schemes, these exceptions must be designed so as not to favor or endorse particular beliefs. Hence, the dialectic of the two clauses allows the state to create general regulatory schemes that neither target any particular religious practices nor endorse any particular religion. This dialectic, of course, is carried out against a political and legal tradition that is thoroughly Christian except for some tolerance of minority religions that can fit into a Catholic or Protestant mold.\(^4\)

The constitutional questions are uninteresting to me because much of the debate on religion seems to be settled within the broad framework I have discussed in the previous paragraph and is therefore carried out in almost predictable ways depending upon the interests and background of the specific debater. One point to consider, however, is that the question of what we mean by belief may become of greater importance depending on how Justice Samuel Alito's views on religion affect the current


\(^4\) This last statement may seem harsh, but reflects the way in which Supreme Court opinions attempt to fit non-Christian religions into the Christian mold. Justice Kennedy's description of Santería, as some offshoot of Catholicism, in Lukumi is an example of this disconcerting trend. See Lukumi, 508 U.S. 520. The Supreme Court's recent decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal is an important counterexample. 126 S. Ct. 1211 (2006). In that case, the Court recognized the claim under the Religious Freedom Restoration Act of 1993 (RFRA) of a religious group that attempted to bring into the country hoasca, a hallucinogenic tea prohibited by the Controlled Substances Act, for religious uses. Id. The Court rejected the Government's argument that uniform application of federal law was a compelling interest to burden religion. Id. The opinion, noteworthy for its treatment of an "oddball" religion, does not discuss belief, and rests largely on the statutory language of RFRA. Id.
balance of the Court. Justice Alito, to my mind, takes a tack that is quite different from Justice Scalia, who advocates interpreting the Free Exercise and Establishment Clauses weakly. Justice Alito, on the other hand, has shown as a circuit court judge a greater willingness to protect individual beliefs through the Free Exercise Clause.

In *Blackhawk*, a Lakota Indian named Dennis Blackhawk sought an exemption from a permit fee imposed by the Pennsylvania Game Commission for possession of two black bear cubs that he used in religious ceremonies on his property. Judge Alito begins his unanimous opinion upholding Blackhawk's Free Exercise claim by telling us that "Lakota Indians believe that black bears protect the Earth, sanctify religious ceremonies, and imbue worshipers with spiritual strength." It is against this description of the appellant's beliefs that Judge Alito addresses the Commonwealth's denial of Blackhawk's exemption from the fee on Free Exercise grounds. Although the issue on appeal was solely that of the exemption from the fee, Blackhawk also challenged the Commonwealth's attempt to destroy the bears because they bit one of Blackhawk's neighbors. The district court enjoined the Commonwealth from destroying the bears and ordered their return to Blackhawk. Although the issue of the destruction of the bears was not on appeal, it is worth noting for my discussion of Native American sacred property claims that I discuss below.

The Commonwealth's argument relied heavily on the Supreme Court's decision in *Smith* that a neutral and generally applicable law that burdens religious conduct is reviewed on a rational basis. The Commonwealth emphasized the permitted regulation exceptions based on "hardship or extraordinary circumstance[s] . . . so long as the waiver is consistent with sound game or wildlife management . . . ." Blackhawk did not qualify for this or the exceptions for zoos and nationally recognized circuses. The Third Circuit rejected the application of *Smith*, finding the regulatory scheme to be neither neutral nor generally applicable since the statute included "both individualized and categorical secular exemptions" that triggered strict

26. *Id.* at 204.
27. *Id.* at 205 (internal quotation marks and citations omitted).
The secular exemptions for zoos and circuses undermined the interests served by the statute to the same extent as an exemption for Blackhawk. Furthermore, the Third Circuit found that the individualized exemptions for hardship and extraordinary circumstances were similar to the exemptions in the unemployment compensation cases, in which the Supreme Court applied strict scrutiny for Free Exercise claims. For these reasons, the Third Circuit required the Commonwealth's denial of an exemption to Blackhawk to "advance interests of the highest order" and to "be narrowly tailored in pursuit of those interests." 29

In its ruling against the Commonwealth, Judge Alito's opinion emphasized that Blackhawk sought an exemption "because of his Native American beliefs and because the fee would cause [him] hardship." 30 Nonetheless, he points out, "the Commission concluded that 'Blackhawk would not be entitled to an exemption regardless of his financial circumstances.'" 31 The judge is concerned that Blackhawk's exemption for religious reasons is as compelling as the exemptions expressly provided for secular purposes. The effect of the Commonwealth's ruling against Blackhawk is to infringe on his religious practices, and consequently the denial of the exemption does not survive strict scrutiny.

Judge Alito's opinion demonstrates a sensitivity to religious beliefs and practices, specifically non-Christian beliefs and practices, that is sometimes lacking in Supreme Court Free Exercise cases. In Lyng, 32 a case decided shortly before Smith, the Supreme Court held that the federal government could build a road through a forest that was held to be sacred by Yorok, Karok, and Talowa Tribes. According to the majority, while the Free Exercise Clause prevented the government from discriminating against religions, it did not prevent the government from making use of its own property in a way that interfered with the Tribes' use. Although it would be speculative to guess how Judge Alito would have ruled in the case, and there are

28. Id. at 209, 212.
29. Id. at 213 (citation omitted).
30. Id. at 212 (emphasis in original) (citation omitted).
31. Id. (emphasis in original).
good reasons to think that he would have voted with the majority rather than the three dissenters (Justices Brennan, Marshall, and Blackmun), his opinion in Blackhawk acknowledges the believer's claim, especially when juxtaposed against secular justifications for the regulation. The extensive analysis of alternatives to the regulatory scheme—such as higher fees for secular uses like the zoo or circuses—demonstrates a willingness to accommodate religious beliefs and to question the neutrality and general applicability of law. Consequently, the approach to claims of religious belief developed by Judge Alito may signal a challenge to the current orthodoxy as Free Exercise cases come before the Court that now includes Justice Alito.

B. Recognizing Aesthetics in the Marketplace

A theme of this Essay is that the concept of belief includes not only what is traditionally considered religious belief, but also includes beliefs that may not be grounded in religious faith. My contention is that we all have beliefs, even those who claim to act solely on analysis or reason alone. For example, a professed belief to help the poor may be based on religious faith, but may also be based on purely secular desire to improve the lot of the indigent and furthermore this desire may not be the result of purely rational analysis. Recognizing that beliefs may be secular and that utilitarian and material world views often entertain unquestioned beliefs helps in framing legal problems in terms larger than that of interests and balancing of benefits and costs. The example I would like to consider is from copyright law.

In *Campbell*, the Supreme Court considered whether a parody of Roy Orbison's country and western song, Pretty Woman, made without permission by Two Live Crew, a rap group, was fair use under copyright law. The Court ruled that in determining whether the use was fair, a court had to engage in a multi-factor balancing test rather than make a categorical determination. Central to the inquiry was the likelihood of whether the copyright owner would license the work in question if asked. If there were impediments to

licensing, then the use would more likely be found fair. These impediments could include the insurmountable costs of negotiating a license, like an instructor wanting to photocopy copyrighted educational materials discovered shortly before the start of her class. Impediments could also include psychological costs. If someone, for example, wanted to use my copyrighted work to launch a scathing critique of the arguments in my work, I would, understandably, be quite hesitant in licensing such a critique. Therefore, criticism, including parody, garners close protection for fair use purposes and is more likely to be protected from copyright infringement liability than other uses that may be more likely to be licensed (such as a movie version of a work).

The interesting question is the role belief implicitly plays in the analysis of fair use. Two Live Crew’s song is so diametrically opposed to Roy Orbison’s romantic vision of womanhood that it is not hard to see why the copyright owner would be recalcitrant in licensing the rights to make the song at issue in Campbell. Assume that Roy Orbison is a staunch Democrat (I do not know anything about his politics and this is just an assumption for the sake of argument) and the Republican National Committee (RNC) wanted to use his song to make a pro-Republican ditty. Unless the proposed song was a criticism of Roy Orbison’s work, as opposed to a pean to the Republican party, the RNC’s use is most likely not going to be determined a fair use. In other words, it is more likely that a proposed use of copyrighted work is deemed fair if the use is a criticism of the work than if it is a criticism of something else. Why is that and what does the distinction have to do with belief?

One explanation for the difference is that a criticism of a work will undoubtedly require a citation of specific, copyrighted portions of the work and therefore such copying is necessary and serves its own creative purpose. This may equally be true if the criticism is not of the work, but is using the work in an ironic way. Consider the case of using the song “Happiness is a Warm Gun” in a campaign for firearm regulation. The use is not a criticism of the song since Lennon and McCartney did not view the song as pro-gun. Instead, the use of the song itself highlights the critical commentary and advocacy in favor of firearm regulation. This, however, is not very likely to be considered fair use.
The more coherent explanation is the one described above as psychological. We are less willing to countenance criticism of ourselves even if there is money to be made. Therefore, works that use copyrighted materials to criticize the materials themselves—a self-referential use of copyright—weighs strongly in favor of fair use because such use would most likely not otherwise be licensed. This explanation, however, does not work for the purported song by the RNC in the Roy Orbison example above. In this example, as with the self-referential use, the copyright owner is unlikely to license the use that criticizes his own cherished beliefs even though there might be quite a bit of money to be made. Why then does the psychological explanation not support finding fair use for the RNC?

I propose that fair use for criticism permits challenges to beliefs that are expressed openly and publicly in a particular copyrighted work, but does not permit challenges to beliefs that may be more private. Roy Orbison’s song captures certain beliefs about women and romance more broadly. Whether Roy Orbison believes them or not is irrelevant. What matters is that the work captures those beliefs as penned by the author. Criticisms of these beliefs, whosoever they may belong to, are permissible fair use. However, we do allow the copyright owner to deny licensing of works that may challenge beliefs that are not made public in the copyrighted expression. Put another way, by creating a work, the author makes public certain beliefs that can be subjected to criticism and challenge, but does not open himself to criticism on all fronts, including beliefs that are privately held and not openly expressed.

This distinction is consistent with the notion that copyright supports the broad marketplace of ideas. The distinction allows the copyright owner to define the scope within which his beliefs can be challenged and also define what is off limits by not expressing certain beliefs in her work. Therefore, Margaret Mitchell’s depiction of the South is fair game, including all the depictions of race and gender relations in *Gone With The Wind* that became the subject of criticism in Alice Randall’s *The Wind Done Gone*.34 However, Dr. Seuss did not open up his work to be used as

a critique of the O.J. Simpson trial, the subject of the infringing book *The Cat Not in the Hat*.\(^{35}\) Having not expressed any beliefs about O.J. Simpson in *The Cat in the Hat*, the book's expression is not fair game for critical commentary on the trial. Beliefs are protected, particularly the possible false attribution of beliefs, while still permitting the open exchange of critical commentary on beliefs that are expressed and made public.

The copyright example shows how the concept of belief has implications beyond the intersection of religion and law. The example also shows how aesthetic notions intersect with commercial ones. Copyright law, in its incarnation in the United States, is deemed to be about the commercial exploitation of works. The metric of copyright protection and of fair use is the common one of commercial benefit either for the author or the public. Identifying the role of belief in determining when a use is fair highlights that aesthetic considerations also play a role in copyright. The law does not sacrifice personal beliefs for commercial lucre or transform individual ideas into commodities. Instead, copyright law permits the individual articulation of belief, its criticism, and the protection of a core of beliefs that the copyright owner can exclude from the public domain, forcing the challenger to publicly articulate his own beliefs through original expression. Copyright facilitates not only the literal marketplace of ideas but also the articulation and exchange of personal beliefs in the public sphere.

C. Belief and the Legal Mind

The concept of belief provides not only doctrinal play in sorting through legal cases and conundrums but also possibilities for expanding our understanding of the legal mind. There is of course no longer one legal mind, the unity having been appropriately eroded away by the entrance of myriad disciplinary and personal perspectives into legal theory. Professor Anthony Kronman wrote over a decade ago about the "lost lawyer," the withering away of the ideal of the lawyer statesman and its replacement with the image

\(^{35}\) See Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).
of the lawyer as a tool of powerful interests (if you are a certain type of crit) or as a technician seeking efficient rules (if you are a certain type of law and economics thinker). This anxiety over the role of the lawyer, and of the legal mind more broadly, as articulated by Kronman, has not changed substantively from the vision painted by Jerome Frank, who in 1930 wrote that “[t]he lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision.” The perception of lawyers as highly respected hucksters, tricksters, and quibblers with dignity—as reported by Frank—has arguably affected how the profession views itself.

Frank diagnoses the mixed perception of lawyers as stemming from the myth of law, the belief that law can provide definite and certain answers to social problems. He traces this belief to several primitive human needs, particularly the need for an authoritarian father figure that provides meaning to an often absurd, unpredictable world. This need has many roots and parallels, including the consoling influence of religion and religious institutions, which often are in deep and understandable rivalry with legal institutions. Looking to law for certainty, however, leads to inevitable disappointment as the constructs of law can often do little to stave off the chaos of reality. Hence, disappointment with law and lawyers inexorably follows as they fail to satisfy the fantasy.

The quest for certainty in law needs to reconcile itself with reality. For Frank, the key figure of his age who demonstrated this reconciliation was Justice Oliver Wendell Holmes, someone who Frank—with completely unselfconscious irony—presents as a substitute father figure of sorts. Frank expressed great respect for Holmes' ability to be grounded in reality as he worked through legal problems in light of traditions and accepted principles of the profession. Holmes' realism informs contemporary formulations of the legal mind. As a practical matter, law is largely recognized now as a trade, and not a substitute for

37. JEROME FRANK, LAW AND THE MODERN MIND 3 (Brentano's 1930).
38. See id. at 13-21.
39. See id. at 253-60.
religion or the path to certainty. The ambiguities of the law are recognized, perhaps even celebrated, as opportunities for legal craftsmanship or employment. To the extent that law is looked upon with suspicion, or even with disdain, the source is not a betrayal of the promise of certainty but doubts as to whether lawyers or judges are worth their price when they deliver a result that works against our interest or seems to go against our principles. Law is instrumental as a means to satisfy ends which are devised elsewhere. These means might include artful legal persuasion or they may simply be the means to make a comfortable living and perhaps even to secure enough resources so that we can leave the practice and pursue loftier goals. The legal mind in this day and age is assuredly a practical one, hell-bent on getting the job done, whatever that job might be.

I paint perhaps too grim a picture of the legal profession, but the portrayal is designed to contrast with Frank’s depiction of the legal mind fraught with disappointment and sulking at the neglectful father. Once law is recognized as instrumental, disappointment is an inappropriate response. Instead, the unhappy response to law today reflects the difficulties of dealing with mundane reality, the need to make a living, to go through yet another day of drudgery. When the quest for absolutism fails, the vacuum is filled either by anarchy—where anything and everything goes—or by a begrudging acceptance of one’s place in the world. The contemporary legal mind often goes in one direction or the other. On one hand, the need to believe something may lead one to believe anything, and flirtations with various ideologies—both on the left and the right—illustrate this tendency. On the other hand, if law is purely an instrument, what better ends to point that instrument than the accumulation of wealth and pleasure? The windmill is just a windmill and never was or will be anything else, so continue to grind away.

There is no doubt that the search for certainty in law, as diagnosed by Frank, represents a form of infantilism. And it is usually the case that what follows infancy is the wild abandon of adolescence with the unquestioned notion that anything and everything goes. I suppose that once the hormones of adolescence stop raging, we settle into an adult tranquility where we live life as mundanely as possible. Perhaps the legal profession has followed this path since
Frank was writing in the 1930's. But if this is correct, is this how things have to be? A better understanding of belief can perhaps push law from its quiescence and inspire the idealism that seems to have been betrayed. Once belief is seen as a set of principles that guide who we are, engaged in a dialectic between reason and intuition, the possibility exists for translating the notion of belief into the practice of law. Being a true believer does not mean being a zealot. Nor does it entail sacrificing the pragmatic comforts of law for Don Quixotism. Instead, once we recognize that some notion of belief underlies all our actions, even ones that are deemed purely utilitarian, then law can be seen as more than just an instrument, and we can engage in our teaching and our writing to address the question of which beliefs matter and which do not, and how the pursuit of those beliefs can guide how we construct legal institutions.

I am inspired on this last point by Professor Carter's call for epistemic diversity. The question of belief is not simply a question of how we know something to be true. Rather, it is a question of what convictions we are willing to pursue combined with the practical problem of how best to pursue them. Belief, both rational and intuitive, is what guides us and gives us some degree of meaning and sense of control in our lives. To understand what it means to believe is to accommodate ourselves to the facts of the world, markets, governments, and to beliefs that are radically opposed and alien to our own. Neither the quest for certainty nor the descent into anarchy, the study of belief can revivify our existence and transform the otherwise inert instrument of law into a tool for social construction and change.

PARTING THOUGHTS

It is perhaps a quaint notion that anything is self-evident. But despite the quaintness, it is undoubtedly true that we do have beliefs—either religious or secular convictions—that guide and bind us to the obligations of this world. This Essay tries to make the existence of beliefs apparent while asking what it means to believe something. There is much to be said about belief beyond the brief applications here to religious toleration, the marketplace of ideas, and the legal mind. Whether or not anyone finds anything I have said credible, or even self-evident, I hope
that a more careful examination of particular beliefs as well as the phenomenon of believing is sparked by this experiment. Otherwise, I fear what comes after the quiescence of the adult legal mind and the lapse into a fundamentalist conviction that we know what we know, as held by each of us as we go through our days or by our leaders as they continue down the present path.