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## Articles of Faith: Freedom of Expression and Religious Freedom in Contemporary Multiculture

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### ABSTRACT

This article examines the relationship between freedom of religion and freedom of speech and expression within contemporary multicultural liberal democracies. These two fundamental human rights have increasingly been seen, in public and political discourse, in terms of tension if not outright opposition, a view reinforced by the *Charlie Hebdo* killings in January 2015. And yet in every human rights charter they are proximate to one another. This essay argues that this adjacency is not coincidental, that it has a history and that, in illuminating this history, it is possible to explore how the contemporary framing of these two rights as being in opposition has come about. Looking back to the framing of the First Amendment of the US Constitution, the essay offers an historical perspective that, in turn, facilitates a reappraisal and re-evaluation of these two liberties that is the necessary, albeit insufficient, predicate to the task of addressing the problematic of multicultural ‘crisis’ in the contemporary liberal democracies of Western Europe, North America and Australasia, in which the presence of certain religious communities (Muslims, in particular) and the role of religion in public and political life more generally (and, conversely, of secularism) has assumed a central importance.

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The murderous events at the offices of *Charlie Hebdo* in January 2015 highlighted once again how the polarized justifications of both those claiming to act in the name of religious freedom (howsoever that is understood by them) and those claiming to defend freedom of speech and expression have led to the framing of the relationship between these two fundamental rights as one of tension, if not outright opposition. They have become separated, in popular and political understanding and use, by what appears to be an unbridgeable and irreconcilable gulf, a zero-sum game in which the exercise of the one appears to many nowadays to necessarily be at the expense of the other. This has led to the belief that one should take priority over the other and yet, in every single convention, covenant or charter in which these two ‘universal’ human rights are recorded – such as the Declaration of the Rights of Man (articles 10 and 11), the Universal Declaration of Human Rights

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(articles 18 and 19), the International Covenant on Civil and Political Rights (18 and 19), the European Convention on Human Rights (ECHR; 9 and 10) and the Charter of the Fundamental Rights of the European Union (10 and 11) – they appear proximate to one another. Is this morphological proximity in the documentary archive of human rights instruments simply coincidental? Or does it speak to a more profound – and complex – relationship between the two liberties than is currently understood in much public discourse, and even in contemporary jurisprudence and academic scholarship and commentary? In this essay I shall argue that this adjacency in the documentation of religious liberty and freedom of expression is not coincidental, that it has a history and that, in illuminating this history, we may explore how the contemporary framing of these two ‘universal’ rights as being in opposition has come about through a process in which the development of understandings about each of these liberties has profoundly shaped the nature and scope of the other. This long view, in turn, facilitates a reappraisal and re-evaluation of the relationship between these two liberties, as a necessary, albeit insufficient, predicate to the task of addressing the problematic of multicultural ‘crisis’ in the contemporary liberal democracies of Western Europe, North America and Australasia, where the presence of certain religious communities (Muslims, in particular) and the role of religion in public and political life more generally (and, conversely, of secularism) has assumed a central importance (Lentin and Titley 2011).

Contemporary free speech advocacy is unequivocal about the hierarchy of liberties, and therefore about which liberty ought to take priority. In the writings of free speech champions – in the UK (with which I am most familiar), figures such as authors Salman Rushdie and Lisa Appignanesi, journalists such as Nick Cohen and David Aaronovitch, and the intellectual Kenan Malik are highly visible commentators on the issue – the priority of free speech over all other freedoms rests on the assumption that freedom of expression, as Kenan Malik puts it, ‘is not just an important liberty but the very foundation of liberty’ (2009, 155). Although Peters (2005) has traced the antecedents of what he calls the ‘free speech story’ back as far as Paul of Tarsus and the Stoic philosophers of Antiquity – Seneca and Cicero, in particular – the first iteration of this particular formulation of free speech as *the* foundational liberty can be found in the oft-quoted line from Milton’s *Areopagitica*, ‘Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties’ (1644 [2012], 604). This emphasis was subsequently reiterated in *Cato’s Letters*, and can be found in Mill’s *On Liberty*, although not without some accompanying ambivalence.<sup>1</sup> Mill does indeed seem to suggest, at times, that ‘liberty of thought and conscience’ is a crucial precondition for any other liberty because, as the feminist philosopher Abigail Levin puts it, once this liberty is protected ‘individuality flourishes; once individuality flourishes, diversity arises; and once diversity arises, we can begin to assess competing visions of the good’ (Levin 2010, 51). But Mill recognized that there is a difference between ‘thought and conscience’ and freedom of expression insofar as the latter passes from the wholly individual realm of personal experience to the social realm, where others may be affected. This is why he qualifies freedom of expression with his famous ‘harm principle’. At other times, Mill seems to suggest that both freedom of thought and conscience and freedom of expression are both conditional upon the right to security, since the utilitarian goal of both thought and expression is somewhat nullified if one has to spend all one’s mental energies on finding ways to ensure one is still alive come the next morning. By the time George Orwell has

Winston Smith write an entry in his diary that reads, ‘Freedom is the freedom to *say* two plus two equals four. If this is granted *all else follows*’ (Orwell 1987, 84 emphasis added), Mill’s qualifications and hesitations have retreated into the quieter corners of liberal opinion, and have remained there since (Mill 1859 [2011]).

This central assumption of contemporary free speech discourse is conceptually dubious; given that even the most ardent free speech advocate would not suggest that it should encompass direct incitement to murder, for example, it is difficult to see how such a ‘qualified’ right can be the *foundation* of all other liberties: if it were, it should be absolute and not qualified. Another key argument in contemporary free speech advocacy is that freedom of expression has a prior legitimacy over freedom of religion, for example, because it vouchsafes the latter: without freedom of expression, freedom of religion would not be possible (Malik 2009). Although this argument does correctly link the two liberties rather than sequestering them in their own juridical domains as legal scholarship is wont to do (for understandable practical reasons), historically speaking it is more plausible to suggest that freedom of speech emerged out of the debates concerning religious toleration in the seventeenth and eighteenth centuries. Moreover, even if John Locke’s arguments for religious toleration and pluralism are customarily seen as a decisive intervention in the ‘free speech story’, it is nevertheless debatable whether an argument for freedom of expression can in fact be derived from them.

Locke’s solution to the problem of religious conflict was two-fold: inaugurating the private–public distinction that would become the basis for secular-liberalism, he, on the one hand, re-conceptualized the nature and scope of religion as a matter of private conscience, and, on the other, argued for the limitation of the state’s authority to regulate such matters of conscience. The sole locus of religious truth is, therefore, the private belief of each individual. In this, Locke was amplifying the importance of conscience and the strength of the individual believer’s faith above all else, which had been instituted by the Reformation, but which had deep roots reaching back to St Paul. The idea of the separation of earthly and spiritual sovereignty also had deep roots stretching back to the early Church Fathers, grounded in the ‘give unto Caesar’ verse in the New Testament, but, after nearly two centuries of bloody religious strife, the effects of religious schism and intolerance had become a matter of great political urgency, and the maintenance of public peace was the foremost of Locke’s considerations. As a result, his idea of toleration was based on the premise that the avoidance of civil and political disorder required the public sphere to be vacated of controversy and, correspondingly, that a person’s deepest convictions and beliefs should be held sincerely and privately. As McConnell (1990) notes, he wished ‘to keep the peace by making religion irrelevant to the things of this world – other than a reasonable, uncontroversial advocacy of good morals’.

For Haworth (1998), this is the philosophy of ‘minding one’s own business’, but, as I have argued elsewhere (Mondal 2014), this is diametrically opposed to the liberal notion of the public sphere, which is a philosophy of *not* minding one’s business, an arena in which people put their deepest convictions to the test in an unending battle of ideas and beliefs for supremacy (Haworth 1998; Mondal 2014). But if public controversy is central to liberal free speech theory, it also lays claim to ‘tolerance’ as one of its most important virtues and, in the writings of some, liberalism and tolerance are mutually synonymous. For Peters (2005, 108), this is part of liberalism’s performative claim to moral superiority, in which tolerance offers the opportunity for liberals ‘to show off

their advanced state of their self-mastery' in the service of 'civic righteousness', precisely because of its departure from prevailing ideas of religious *toleration*. However, liberal tolerance needs a convincing pedigree and Locke, whose restructuring of the public and private realms of experience anticipated and laid the foundations for later liberalism, was a natural candidate, although, if his place in the liberal pantheon is assured because he established the structural parameters of liberal discourse, his role in the story of free speech is less clear and more contestable.

Ironically, Locke's ideas on toleration did have a profound influence on the development of freedom of expression, although not in the way that many contemporary liberals might imagine. If his contribution to the development of freedom of speech is more ambiguous and less decisive than many take it to be, his influence on the development of religious liberty is more profound, not least because of his influence on Jefferson, who diligently and profusely annotated his copies of Locke's *Letters on Religious Toleration* and *Reasonableness of Christianity*, and through him upon his protégé, James Madison, the drafter of the First Amendment of the Constitution of the USA. But Locke also helped to draft the Fundamental Constitutions (1669) of the Carolina colony on behalf of its proprietors, one of a handful of late seventeenth-century charters and constitutions in colonial America that safeguarded the right to religious liberty (McConnell 1990, 1426–1430). These were precursors to the various religious freedom clauses manifest in the state declarations of rights following the Revolution that, in turn, shaped the 'free exercise' clause of the First Amendment. Yet even here Locke's significance is ambiguous. If later theorists of liberty, constitutional historians and jurists have taken the US Constitution to be a classic example of Lockean contractualist principles, recent historical scholarship on the origins and emergence of the First Amendment has suggested that, in many ways, it instead reflects popular American understandings of religious liberty and toleration in the eighteenth century that went beyond Locke and broke new ground in ways that would also shape notions of 'freedom of speech'. As McConnell (1990, 1431) notes, '[t]he ways in which American advocates of religious freedom departed from Locke ... were as significant as the ways in which they followed him'.

The principal departure concerned religious establishment. Locke's ideas on toleration accepted and even advocated an established church, and the Carolina constitution he helped draft established the Church of England as the 'only true and orthodox' church. Differences of religious 'opinion' and 'belief', which rested on freedom of conscience, were to be tolerated against this backdrop of 'official' and institutionalized religious authority. Although the Carolina document extended toleration towards 'Jews, heathens and other dissenters from the purity of Christian religion' (quoted in McConnell 1990, 1429), it did not include atheists or non-institutionalized, individual forms of religious belief. Nevertheless, the scope of religious liberty in Carolina was considerably greater than in many other colonies. Although it is a commonplace observation that the first colonial settlers in north America left England seeking religious liberty, they did not always – or even often – extend that liberty to others once they arrived. The New England colonies, Massachusetts in particular, established what were, to all extents and purposes, Puritan theocracies, which tolerated little or no religious dissent; Virginia, Maryland and the southern colonies established the Church of England, and displayed varying degrees of toleration: Virginia was the most repressive, expelling Puritan ministers and Roman Catholics, and preventing public worship and preaching by other Protestant dissenters, such as

Baptists, Presbyterians and Quakers, whereas Georgia extended tolerance towards these Protestant groups and even towards Jews. New Jersey and New York had established the Church of England but followed a policy of de facto toleration, largely because to do otherwise, in an area of remarkable religious diversity, would have been impracticable. Carolina abandoned Lockean toleration early in the eighteenth century, and established the Church of England in a manner similar to Virginia. Maryland, the first colony to pass a ‘free exercise of religion’ clause in a statute (Act Concerning Religion, 1649) soon went the same way. Only three of the colonies – Rhode Island, Pennsylvania and Delaware – did not have established religions and sustained this over the long term, and it was here that the concept of religious liberty as a legal principle was articulated and developed (McConnell 1990, 1421–1430).

It is not surprising that Pennsylvania and Delaware were established as sanctuaries for Quakers. (Rhode Island, for all sorts of reasons and in all sorts of ways was absolutely unique, not least because its founder, the Puritan minister, theologian and philosopher, Roger Williams, was a truly extraordinary individual.) Since the seventeenth century, ‘extreme’ nonconformist Protestant dissenters had been heavily persecuted in the American colonies. The most prominent of these were the Quakers, Baptists and Presbyterians. Eldridge (1994, 9) has noted that throughout that century, and into the eighteenth, ‘[e]xpressing unorthodox beliefs was ... a fairly common offense’ that was systematically prosecuted by the authorities, often with harsh penalties. It was in order that Quakers might be able not just to confess their religious beliefs in private without molestation, as Locke would have it, but also to profess them in public that William Penn established Pennsylvania and Delaware. Following the principles of toleration outlined in his *The Great Case of Liberty of Conscience* (1670), he saw no reason to establish yet another orthodoxy against which other groups could be measured and found wanting. These colonies subsequently attracted large numbers of settlers from elsewhere and with this came an extraordinary degree of prosperity, something which people in other colonies (particularly Jefferson and Madison, in Virginia) took note of as the eighteenth century progressed. As a result, the greater religious diversity of these colonies meant that no one single group could prevail in imposing itself on the others, a situation not easily replicated in colonies where only two or three groups co-existed and the majority could exert its authority over the minorities. Open toleration, on the other hand, enabled an expansion of religious freedom so that it encompassed not only the free expression of religious beliefs and opinions, but also conduct (McConnell 1990).

Herein lie the deep roots of the substitution of Madison’s original phrasing of ‘the rights of conscience’ with ‘free exercise of religion’ in the First Amendment, a phrase which goes beyond the Lockean framework to encompass a much more radical notion of religious freedom and, as a consequence, of free speech. ‘Liberty of conscience’ speaks to a minimalist notion of religious liberty, one entirely compatible with religious establishment, but which in turn makes it vulnerable to deployment by religious majorities as an instrument of oppression and persecution. At the very least, it makes religious liberty conditional upon the goodwill of the state. This much is evident in Locke, who formally separates the secular and spiritual spheres of authority by allowing a safe haven within individual conscience that lies beyond the reach of the state, but who nevertheless suggests that, in the service of public peace and order, when there is a conflict between the claims of conscience and those of the state, the state should always prevail. As Walter Berns puts it, this



‘renders unto Caesar whatever Caesar demands and to God whatever Caesar permits’ (McConnell 1990, 1434). In effectively privatizing religious liberty, mere ‘liberty of conscience’ also attenuates freedom of expression because the ability to preach is subject to state control. This was particularly obvious, notes McConnell (1990, 1438), in those ‘states of the Anglican establishment, including Virginia, where the governor, legislature, and gentry exercised direct authority over the established church and the power of licensing over preachers of dissenting denominations’. Baptist objections to this situation in Virginia explicitly made the link between religious and expressive liberty and their mutual vulnerability, ‘those whom the State employs in its Service, it has a Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach’ (1439). ‘Free exercise of religion’, on the other hand, offers stronger protection against such control and, although it does not necessarily equate to an implicit argument for disestablishment (following independence several states, including Virginia, used the term ‘free exercise of religion’ in their declarations of rights alongside an established church), it does turn the tables on the state and attenuates its ability to control and curtail religious liberty by extending it beyond mere ‘liberty of conscience’ to encompass expression of opinions and beliefs, public worship and other forms of religiously mandated conduct. This contains several implications for the scope of religious liberty insofar as it opens the way for religious exemptions from and accommodations to secular laws that may infringe a religious believer’s ability to *practise* their faith according to the dictates of their conscience. Moreover, as McConnell (1990, 1490) argues, ‘conscience’ refers to an individual, but ‘religion’ refers to a collective and communal entity, a ‘community of believers’, so that the ‘free exercise’ clause suggests ‘that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience’. This is a radical departure from and extension of Lockean toleration, to the point where it might be said to move *beyond* toleration. As I shall argue in the concluding section, this has some major implications for our considerations of religious liberty in contemporary multicultures.

This reading of the First Amendment does, however, raise two specific problems. The first is that if religious liberty a priori encompasses freedom of speech, then the First Amendment is somewhat tautological with respect to the relationship between the ‘free exercise’ and ‘free speech’ clauses, and the latter becomes redundant. The second is one that has acquired particular prominence for latter-day interpreters of the Constitution and may not have had quite so much purchase on the predominantly religious sensibilities of the Framers and their constituencies. For if the free exercise clause is rooted in conscience but encompasses speech and conduct as well, then it seems to be singled out for special protection *vis-à-vis* nonreligious or secular claims of conscience. This would put religious believers at an advantage and non-believers at a disadvantage, even though the Constitution upholds the fundamental principle that all citizens are equal, and this problem assumed greater urgency and weight as American society increasingly secularized, particularly during the twentieth century. In addressing these problems, however, one is able to reveal other strands to the history of the First Amendment, which illuminate the intricate relationships between the different liberties encoded in it. It is not just that ‘free speech’ emerged out of struggles for religious liberty and, in that process, is necessarily related to and associated with it; it is also the case that ‘free speech’ as a concept in its own right is in the process of formation during the pre- and post-Revolutionary period

(Bogen 1983, 458; Smith 1991), and that the intersection of struggles for religious liberty with other struggles for political liberty, as well as the influence of emergent forms of secularism and proto-liberalism (embodied particularly in the person of Thomas Jefferson), increasingly gave 'free speech' a particular force (if not precision), related to but distinct from notions of religious freedom, that was sufficient to warrant its inclusion in the First Amendment as a specific form of liberty.

For the early American religious dissenters, freedom of religion was never just a religious issue; it was always a political as well as a spiritual matter. Campaigns for religious liberty were also always campaigns for political liberty. Quakers and other nonconformist denominations were, in the seventeenth century, 'widely regarded ... as a threat to civil government', in New England, Virginia and elsewhere because, as Eldridge (1994, 13–14) suggests, Quaker trial defences demonstrate that 'challenging government and its officials was intrinsic to the Quakers' theology'. More the pity, then, that he excludes the articulation of 'the honest spiritual beliefs of such people' from his consideration of 'seditious speech cases' in the seventeenth century for it would have revealed the 'mutual reinforcement' of 'struggles for civil and religious liberty', as Bailyn (1992, 268) puts it. This long predated the 1760s, which is when Bailyn (1992, 95–96) suggests that suspicion of the Anglican church as 'an arm of the English state' and 'fear of the imposition of an Anglican episcopate' galvanized religious dissidents and political revolutionaries alike into arguing for disestablishment. Certainly, religious non-conformists were enthusiastic political rebels during the revolutionary period, and staunch advocates of disestablishment during the ratification conventions, but their political pedigree stretched back further into the past, into the seventeenth century, which is when Eldridge (1994, 3–4) suggests the 'peculiar conditions' of the colonial governments of that time resulted in a 'dramatic expansion of [Americans'] freedom to criticize government and its officials', which in turn, 'established the essential foundation in practical colonial experience for a flowering of dissent against English authority, and for the intellectual justification that sprang up around that dissent, in the eighteenth century'. Bogen (1983) argues that there were several sources for this 'intellectual justification' that fed into the development of a concept of freedom of speech and the press during the course of the eighteenth century, including parliamentary privilege, *Cato's Letters*, the theory of natural rights, the removal of pre-publication licensing, and, of course, ideas about religious toleration and liberty. Smith (1991) argues that, in addition to *Cato's Letters*, the wide dissemination and influence of James Burgh's *Political Disquisitions* fed into the notion that freedom of speech extended far beyond the parliamentary privilege of legislators and the removal of pre-publication licensing to encompass all forms of political speech and publication, which, in the words of section 35 of the Frame of Government that supplements article 12 of the 1776 Pennsylvania Declaration of Rights, 'undertakes to examine the proceedings of the legislature, or any part of government'.<sup>2</sup> This, says Smith, is the basis for the free speech clause in the First Amendment, which means that by this time 'freedom of speech' has come to acquire a specifically political provenance that nullifies the possibility of seditious libel.

There is, however, an additional meaning that can be adduced for 'freedom of speech' in the First Amendment, albeit somewhat speculatively. In the first draft of the Bill of Rights, the amendment in relation to 'free exercise of religion', which Madison put before Congress on 8 June 1789, did not actually contain the phrase 'free exercise of religion', even



though his own state of Virginia's Declaration of Rights *did* include that phrase. Instead, Madison proposed:

The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed. (McConnell 1990, 1481)

This was soon replaced by another, pithier, version proposed by Fisher Ames of Massachusetts: 'Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience' (1482). Both Madison and Ames ('a notoriously careful draftsman', according to McConnell [1990, 1483]) use 'religion' and 'conscience', implying a distinction between the two, whereas the final version does not, implying that 'conscience' has been subsumed into 'religion'. Later, the Senate debated several different versions of the free exercise clause, none of which included any reference to 'conscience', which had been dropped from the provision altogether in the course of its tortuous journey through the committees and Houses of Congress. Why?

It is worth quoting in full McConnell's (1990, 1491–1492) statement of the problem:

The question is therefore whether the principle of free exercise, as enacted by the framers and ratifiers of the first amendment, was a specific instantiation of a wider liberty of conscience encompassing individual moral judgments rooted in nonreligious as well as religious sources, or whether religious conscience is different in some fundamental respect from other forms of individual judgment, in which case the free exercise clause would provide no warrant for protecting a broader class of claims. The question is all the more significant for the practical reason that if the exercise of religion extends to 'everything and anything,' the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight. To protect everything is to protect nothing.

And yet, on the other hand, the removal of 'rights of conscience' singles out religious claims of conscience for special treatment and disadvantages non-religious claims of conscience. It is here that the prevailing tendency within historical and legal scholarship to examine the free exercise and free speech clauses separately induces a kind of *aporia* that it cannot resolve. Having argued (quite convincingly, in my opinion) that historical analysis of the context suggests that the free exercise clause could not possibly be taken to refer to non-religious or secular claims of conscience, McConnell (1990, 1499) is still left with the question 'of what free exercise protection might mean for a person who does not recognize any form of transcendent, extrapersonal authority – to a person who does not "exercise" a religion'. His only response is a rather weak one, that '[f]or the most part, the prohibition on an establishment of religion should suffice ... There should be no doubt that government action that abridges the unbeliever's right not to engage in or support a religious practice is unconstitutional' (McConnell 1990, 1499). And yet this leaves the inequality of protection issue unresolved, for the consciences of religious believers and the social practices (including expression) that issue therefrom are protected, whilst it would appear that non-religious consciences are not, or, if they are, they are protected to a lesser degree.

It is possible, however, that the question of non-religious or secular conscience was, in fact, displaced onto the 'free speech' clause, which was originally a separate amendment and only later came to be fused into the extant First Amendment, although there is apparently no record of how this came about or why. But if we consider that the eighteenth-

century American understanding of free exercise of religion is rooted in ‘conscience’, and that the contemporaneous usage of the term ‘conscience’ was synonymous with ‘opinion’ or ‘belief’ (McConnell 1990, 1489), then we might suggest that, just as free exercise of religion refers to the expressions of religious conviction in both speech and conduct, so too does ‘freedom of speech’ encompass the right to express non-religious or secular claims to conscience. For if religious conscience can be manifest in both word and deed (e.g. in worship or a refusal to work on a particular day, or undertake military duties), then how might secular claims to conscience be similarly manifest if not through some form of expression, usually that of writing or speech, but also perhaps through forms of conduct such as refusal of the draft. Interestingly, resistance to the draft during the Vietnam War was constitutionally protected by the Supreme Court by extending the exemptions accorded to pacifist religious groups such as Quakers. The point was made quite explicitly by St George Tucker as early as 1803 in his commentary on American constitutional law: ‘[t]he right of personal opinion’ is divided into ‘liberty of conscience in all matters relative to religion’ on the one hand, and ‘liberty of speech and of discussion in all speculative matters, whether religious, philosophical or political’ on the other (cited in McConnell 1990, 1494).<sup>3</sup>

My argument, then, is that, regardless of whether it was consciously intended or not, a careful reading of the morphology of the First Amendment as we currently have it within the historical context of its development and formulation reveals a quite profound understanding of the ways in which different kinds of liberty are mutually interdependent. If all the other human rights conventions and charters obscure somewhat the conceptual and historical intimacy of the relationship between freedom of religion and freedom of expression, the First Amendment, in concisely juxtaposing a series of rights that are elsewhere enumerated separately for clarity and distinction, reveals the dense latticework of relations that binds them together: proceeding from within the framework of disestablishment of religion (‘Congress shall make no law respecting an establishment of religion’), the First Amendment holds in a fine balance (in both senses of the term) the individual rights of conscience encoded in the second and third clauses (free exercise of religion; freedom of speech and the press), the communal rights of conscience of the second clause (free exercise) and the civil and political rights vouchsafed by the third, fourth and fifth (free speech, right to assembly, and the right to petition government for redress of grievances).<sup>4</sup> Within this morphology, then, ‘free speech’ is a fulcrum, a pivot point between the internal and external, the public and the private, between the demands of Caesar and those of God.

The history of the first amendment presented here stands in ironic counterpoint to the ‘free speech story’ that Peters (2005, 912) characterizes as a series of interventions by Protestant men called John: Milton, Locke, Mill, Dewey and Rawls. For one thing, it contests the Anglo-centric emphasis that early ideas about free speech emerged almost exclusively in Shakespeare’s ‘blessed isle’, and argues instead for its specifically American provenance. More importantly, it displaces the centrality of free speech itself, suggesting instead that it emerged out of much stronger, and politically more urgent debates about religious liberty, to which it was, in many respects, an adjunct. What we see in this alternative genealogy of free speech is that the concept of free speech was, at the time of its encoding in the First Amendment, something of a work in progress, a nebulous and liminal concept that encompassed both liberty of conscience on the one hand, and political liberty on the other. Indeed, there lay its value for the framers of a constitution fit for a nascent

society in which political and religious liberty went hand in hand. But it would soon supplant all the other adjacent liberties and become the definitive, even foundational, liberty in the liberal imagination and the twist in the tale is that this was ironically already anticipated in the very tradition of toleration that focused first and foremost on religious liberty, and to which expressive liberty had been almost incidental. Locke had already rehearsed the transformation of religion into the form it would come to assume within secular-liberalism: as Asad (1993) and Fitzgerald (2007), among others, have noted, the pre-Enlightenment conceptualization of 'religion' that integrated belief and social practice has been re-conceptualized, over a long period of social, political and cultural transformation, in 'cognitivist' and 'rationalist' terms as a collocation of beliefs in and opinions about a set of 'propositions' held by an individual in the walled garden of their private conscience, accompanied by the sequestering of this conscience from the public sphere in which secular interests assumed prominence and pre-eminence.

In contrast to the religious non-conformists who did so much to establish religious liberty as a constitutional right, and for whom Locke's formal resolutions would have made little sense, Jefferson would carry forth the flame of religious rationalism and proto-secular-liberalism. Although Madison was much more attentive to the claims of religious liberty than his mentor (who happened to be in France during the framing of the Constitution) and ensured the rights to religious liberty were more capacious than Jefferson might have envisaged, the potentiality of 'free speech' as a secular equivalent of religious liberty is apparent in embryo in the First Amendment, awaiting activation as an independent principle in a more secularized social environment. It was already apparent in St George Tucker's 1803 remarks, and, as societies on both sides of the Atlantic became increasingly secularized, Mill's intervention in the mid-nineteenth century paved the way for 'free speech' to come into its own in the early part of the twentieth (Peters 2005). Since then free speech, in popular culture, political discourse and even sometimes jurisprudence, has grown to eclipse and encompass the adjacent liberties with which it was hitherto always associated. As the concept of free speech has grown so as to become almost synonymous with the First Amendment, so has the meaning of religious liberty shrunk.<sup>5</sup> Current understandings of the relationship between religious liberty and freedom of speech as one of tension or even opposition, and the notion that free speech is the guarantor of religious liberty because it is assumed to be the foundational liberty, is the denouement to this story in the UK and other Western countries as much as in the USA. These two processes – the imbalancing (perhaps even reversal) of the relationship between religious freedom and freedom of speech, and the increasingly secularized notion of religion as a private, individual faith – frames an event that demonstrates the ways in which these two transformations shape our contemporary understanding of how the right to religious freedom now relates to the right to freedom of expression. This event is the rather long and tortuous introduction of legislation prohibiting incitement to religious hatred, which was signed into UK law in October 2007 as the Racial and Religious Hatred Act 2006. Although, on the face of it, this legislation appears to address and bolster freedom of religion by extending incitement legislation to cover religion as well as race, a closer inspection reveals that the legislation is, in fact, about nothing other than the protection of freedom of expression. Nothing, I would argue, demonstrates more clearly how article 19 now eclipses article 18 in terms of social and political importance – with all the implications that ensue not just for religious minorities, but for faith communities in general.<sup>6</sup>

## II

In the UK, a Labour government with massive parliamentary majorities needed three attempts to pass the Racial and Religious Hatred Act 2006 (hereafter RRHA) into law. It eventually succeeded only because it accepted four amendments proposed by the House of Lords, known as the ‘Lester amendments’. First, the provisions relating to incitement of religious hatred were to be separated from the existing provisions for the incitement of racial hatred; second, unlike the racial hatred provisions, the new offence would be confined to the use of ‘threatening’ words or behaviour, and not extend to words that were ‘abusive and insulting’; third, the prosecution would need to prove the *intent* to stir up religious hatred rather than – as is the case with racial hatred – demonstrate that it was ‘likely’ to do so; fourth, a new clause was introduced explicitly protecting freedom of speech – ‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents’ (2006, 29J).

Although the Act is meant to extend incitement legislation to cover religious as well as racial hatred, it does so by way of distinction rather than analogy. Each of the amendments distinguishes and distances the two: religious hatred is to have its own provisions; it is to be restricted to threatening words only; and the emphasis is on intent rather than effect. The fourth amendment, introducing a special reservation protecting freedom of expression, is ‘a unique addition to the criminal code’ (Lord Lester, quoted in Goodall 2007, 107). This exceptionalizes the legislation still further, distinguishing it not only from incitement of racial hatred, but also from all legislation pertaining to the restriction of expression even though it ‘should have been unnecessary, given the emphasis on freedom of expression in prior law and given that [the Act] is now worded more restrictively than the law on racial hatred’ (Goodall 2007). Clearly, then, there is something exceptional about *religion* that induces an especially intense anxiety amongst contemporary legislators, and among wider constituencies of public opinion, about its relation to freedom of expression – something thrown into sharp relief when it is remembered that greater restrictions on freedom of expression (concerning the right to protest within the vicinity of Parliament and other locations) were passed into law as part of the Serious Organised Crime and Police Act 2005, from which the previous attempt to introduce incitement of religious hatred provisions were dropped (Hare 2006, 523 fn16).

According to most legal commentators, these amendments and the anxieties they represent have rendered the RRHA a ‘dead letter’ (Hare 2006, 529). Goodall (2007, 113) notes that ‘the Lords have pruned this statute so hard they have left it a stump’, and even the Attorney General characterized it as ‘practically useless’ (Hare 2006, 529). Commenting on the acquittal of the British National Party (BNP) leader, Nick Griffin, under existing racial incitement legislation, he added that ‘the Crown Prosecution Service believes Mr Griffin would have walked free, even if he had been prosecuted under the new Act’ (Maer 2009, 5).

But why would legislators expend so much time and effort in order to construct legislation that is unworkable and ineffective? I would suggest that such an apparent paradox symptomatically reveals the separation of religious freedom from free speech, indicating a prioritization of the latter over the former, even though human rights jurists constantly warn against a ‘hierarchical approach to rights, which places some over others’ (Malik

2011, 33). In doing precisely this, however, the framing of the RRHA closely follows twentieth-century First Amendment jurisprudence, which has increasingly sequestered the right to free expression from other rights, considering it almost in isolation through a kind of purely formalist categorical analysis. Fish (1994, 125) has pointed out, for instance, that First Amendment jurisprudence proceeds by first asking the question, 'Is it speech?' If it is, then that is that – speech is protected come what may.

In short, the RRHA reframes the relationship between religious liberty and freedom of expression in terms of a zero-sum game: it assumes that to extend the liberty of one requires a diminishing of the other. There are two precepts at work here, both related to a secularism that has accompanied the ascendancy of liberalism in modern societies, and, indeed, has assumed the status of a foundational epistemology that constitutes modern governmentality and the disciplinary franchises of social power. The first is that religion is associated with power, and with the state. Liberal conceptualizations of liberty assume that freedom is only substantiated if it involves freedom *from* power. Following that line of thought, it is entirely logical to assume that any protection of religion is a protection of power and this *ipso facto* is an attenuation of freedom. And it is an attenuation of freedom of expression *in particular* because, second, religion is conceptualized in terms of 'belief'.

The framing definition of 'religious hatred' in the RRHA is 'hatred against a group of persons defined by reference to religious belief or lack of religious belief' (2006, 29A). Religious identity, therefore, is grounded in belief, and this opens up freedom of speech questions in a way that does not pertain to 'involuntary' identities such as 'race', because it rests on the idea that differences in religious identities are due to differences in beliefs that are voluntarily and therefore rationally and consciously professed rather than socially constituted and affectively experienced. This in turn means that religious identity is open to rational 'debate' in the 'marketplace of ideas' in a way that racial identity is not, and so the harmful effects of restricting expression with regard to the former is therefore far more pronounced than it would be for the latter. As David Davis, the Shadow Home Secretary at the time, leading the Opposition to the Bill put it, 'Religion, unlike race, is a matter of personal choice and therefore appropriate for open debate', a view echoed in most of the opinion pieces and editorials opposing the Bill in the national press (Kelly 2005, 27–28; Meer 2008).

But if religious identity – and therefore religious hatred – is grounded in belief, then it becomes difficult to disentangle expressions of hatred from legitimate criticism. Unlike racial abuse and insults, which do not contribute to a debate but simply denigrate and subordinate their object, abuse and insult on religious grounds must, at least implicitly, offer a criticism of religious beliefs, since these are the very basis of the identity that is being attacked. Hence the insistence, as the Bill passed through the Lords, on the removal of 'abuse and insult' from the provisions, leaving only 'threatening' words that are amply covered by existing restrictions on speech in any case. Conversely, it also becomes impossible to criticize religious beliefs without in some way offending against the person who holds them. Responding to the government claim to be 'protecting the person and not the belief', Lord Hunt asked, 'Is it possible to draw a distinction between a group of people who share a religion or ideology and ... the religion or ideology itself? If someone insults my beliefs, I can perfectly well argue that they insult me too' (Maer 2009, 10).

This was a central argument in the wider public discourse as well, and key to the anxiety that the Bill would have a ‘chilling’ effect on ‘legitimate criticism’ of religion, even though it actually undermines the very distinction between legitimate and illegitimate criticism in the first place. The manner of the speech, its form, is negated as a basis for discriminating between legitimate and illegitimate criticism because they both potentially have the same effect – offence – and one cannot therefore really distinguish between reasoned criticism and abuse/insult because the latter *must* contribute to ‘open debate’ as much as the former. Consequently, ‘intent’ becomes the only means of discriminating between legitimate and illegitimate forms of expression.

What is occluded, of course, is the possibility that religious identity has, in fact, little or nothing to do with ‘belief’ for most people but instead involves what Weir (2013, 132–133) calls ‘inhabiting connections’ or modes of *belonging*. Such connections might be established, for instance, by an intimate and deeply affective connection – identification – with the Prophet Muhammad (Mahmood 2012). The offensive force of an assertion that the Prophet was a paedophile (a common trope in anti-Muslim discourse) targets this connection, abusing the person by abusing the object of their affective relation. It is difficult to see how this involves any criticism of any *belief* held by any Muslim. And even if it is held that the insult in fact criticizes the belief that the Prophet is worthy of veneration, if the basis of that veneration is affective rather than rational, it is difficult to see how the insult is a contribution to a ‘debate’ as opposed to merely a vehicle for denigration and subordination, thereby aligning it with the ‘wounding’ intent of racial abuse.

Both sides of the main argument advanced in opposition to the Bill – that abuse and insult are, in fact, forms of criticism of belief, and that it is impossible to criticize beliefs without insult or causing offence to believers – derive from the voluntarist assumption that people ‘choose’ their religious identity by subscribing to a set of beliefs. This, of course, implies that beliefs and the persons who hold them are separable, but it also leads, as we have seen, to the conclusion that they are also *not* separable. The grounding of religious identity in belief therefore constitutes an *aporia* that reveals the limits of secular-liberal thought about cultural and religious difference, which rests on the idea that religious ‘belief’ is a zero-sum game: if my beliefs are true then yours cannot be (Reddy 2007). Whilst for many religious persons this may indeed be true, it does not follow that it is structurally fundamental to religious identity as these accounts suggest it to be, nor does it require that one must therefore ‘incite hatred’ or cause ‘offence’ to other believers even if one believes their beliefs to be wrong. In ruling out the possibility that religious identity is not a zero-sum game, that the profession of one’s beliefs does not *necessarily* lead to the giving of offence or incitement of hatred against others, this line of argument forecloses the possibility of religious pluralism and effectively reserves the idea of pluralism itself as a *secular* value that is truly enabled and vouchsafed only by the ideology of secular-liberalism, because it can only emerge from a *lack* of belief.

We therefore find ourselves confronting a paradox. The RRHA suggests, by its very existence on the statute book, that religious identities *do* deserve protection under incitement legislation; on the other hand, the very thing that is to be protected – religious identity – is defined in such a way as to remove the very protection that the RRHA supposedly provides. In the RRHA, this amounts to the eclipse of article 18 by article 19, such that the right to religious freedom with respect to speech acts has been attenuated almost to the point of nullity. (I say ‘almost’ because certain anomalies remain in which religious



groups that are also defined as racial groups [Jews and Sikhs, primarily] *do* receive this protection.) This is not only because this law subordinates religious freedom to freedom of expression, but rather because it also implicitly prescribes a *particular form* of religiosity – as a matter of private, personal belief – as the only permissible kind. Only *this* kind of religiosity is protected because other more public, collectivist, and communal kinds are simply not recognized. This is not to say that freedom of religion no longer exists in Britain, but it does suggest that such freedom is only properly protected within certain parameters beyond which religious liberty is vulnerable to restriction, as evidenced, for example, in the various *burqa* bans enacted throughout Europe. Indeed, France’s use of *laïcité* as an explicit justification for such restrictions on religious liberty dramatically illustrates the point, because the same secular-liberal assumptions are at work as in the debate surrounding the RRHA, only in this case they are more pronounced and visible. Britain’s legal traditions and popular understandings of liberty have so far resisted the lure of such restrictions even though, within the problematic of multicultural ‘crisis’, such restrictions on religious dress, diet, ritual and education are regularly called for.

### III

In her recent examination of the rise of religious intolerance in Europe and the USA, Nussbaum (2013, 94) argues that this intolerance is more marked in contemporary Europe because ‘European nations tend to conceive of nationhood and national belonging in ethno-religious and cultural-linguistic terms. Thus new immigrant groups, and religious minorities, have difficulty being seen as full and equal members of the nation’. This, in turn, determines these nations’ conception of religious liberty, since this underlying idea of nationhood has, as its corollary, an established church (and arguably French *laïcité* is itself a form of establishment). ‘When a nation has an established church’, writes, Nussbaum (2013, 92),

it may easily create a regime of unequal liberty. Even if it does not aggressively limit liberty for minorities, it may well make minorities jump through hoops that the majority does not have to jump through ... That’s quintessential modern Establishmentarianism: power and tolerance.

European nations, she suggests, struggle to conceive of religious liberty in terms that go beyond *mere* tolerance. The effects of this kind of tolerance, in which ‘others get their rights at the sufferance of the majority’, are plain to see in the contours of the multicultural ‘crisis’ animating contemporary Europe. Noting the rise not only in intolerance but also in accompanying discriminatory laws, she draws attention to situations where religious discrimination becomes embedded in social practice, even when there are no legislative restrictions on the rights of Muslims, in particular, to practise and express their religion. In Finland, for example, ‘discrimination in employment against women who wear the Muslim headscarf is a common complaint ... [s]ome employers (the police and certain food stores) say openly that they will not employ a woman wearing a headscarf (5). The constriction of religious liberty here extends to the denial of other fundamental rights, notably article 14 of the ECHR and article 21 of the Charter of Fundamental Rights of the European Union, which prohibit discrimination and yet which are openly transgressed. More generally, and broadly, if permissible religiosity is defined in

secular-liberal terms as ‘private belief’, then any manifestation of a religiosity that traverses the sanctioned dichotomy between public and private identities is positioned as operating on the boundaries of the tolerable and thus permitted only at the sufferance of not only the majority *religion*, but also of the secular-liberal juridico-political arrangements with which established religions in Western Europe have, over the course of the nineteenth and twentieth centuries, come to a *rapprochement*. As Malik (2011, 26) puts it, ‘although liberal democracies guarantee freedom of religion and belief, they seem to do so from a position of superiority where the framework and terms of debate are unilaterally dictated by secular liberalism’. Malik points out that this holds true for elements of the majority religion that move beyond the secular-liberal paradigm (e.g. evangelical or fundamentalist Christianity) as well as for minority religions, but it is also the case that in practice there are hierarchies of tolerability that roughly map on to the hierarchies of belonging mobilized as part of the ensemble of neo-liberal racisms that constitute integrationist politics in Europe today (Lentin and Titley 2011). Thus, while the headscarf may not be worn by public employees – including teachers – in parts of Germany, Holland, Spain and Belgium, ‘nuns are permitted to teach in full habit’ (Nussbaum 2013, 4). This, in turn, also restricts the freedom of speech of religious minorities in practice, if not in theory, because, if such groups are systematically subordinated and marginalized, their moral worth is devalued, and consequently their contributions to the public debate (of protest, or explanation, for example) will be discounted and discredited by virtue of the fact that their views, if given room for articulation in the first place, will not be taken as seriously as the views of those who occupy the centre of public discourse (Mondal 2014, 42).

Wendy Brown has amplified these points in her analysis of the discourse of tolerance as a technique of modern liberal governmentality, and has brought it to bear on contemporary US politics and society as well, much more acutely and critically than Nussbaum. Noting that ‘the cultural-political field of tolerance as a civic practice is largely inside the domain demarcated as legal’, she argues that ‘tolerance discourse ... while posing as both a universal value and an impartial practice, designates certain beliefs and practices as civilized and others as barbaric, both at home and abroad’ (Brown 2006, 12) and ‘it operates from a conceit of neutrality that is actually thick with bourgeois Protestant norms’ (7). This is not so very different from the European establishmentarianism identified by Nussbaum, and Brown goes on to argue that the function of tolerance is to depoliticize ‘inequality, subordination, marginalization, and social conflict, which all require political analysis and political solutions’, by rendering them as ‘personal’ challenges to be overcome by individuals, on the one hand, or construing them as the ‘natural’ outcome of religious and cultural difference on the other. Seen from this perspective, ‘all objects of tolerance are marked as deviant, marginal, or undesirable by virtue of being tolerated, and the action of tolerance inevitably affords some access to superiority’ (14).

Brown’s intervention is salutary, and I shall return to some of the implications of contemporary ‘tolerance discourse’ in due course; nevertheless, Nussbaum’s contention that the USA has historically developed political arrangements and legal instruments to go beyond mere toleration is one that concurs with the argument presented in the first section of this essay, and, indeed, the emergence of tolerance as a technique of liberal governmentality in the current conjuncture further corroborates my central contention that the balance between the various liberties encoded in the First Amendment has been

upset, at least in the civic-political field. In large measure, the wording and structure of the First Amendment reflects the influence of a more radical thinker on religious liberty than Locke on figures such as Madison and Washington, in particular, and pre- and post-Revolutionary American society more generally. If Washington, in his famous Letter to the Newport Hebrew Congregation (1790), was able to write,

All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as it was, by the indulgence of one class of people that another enjoyed the exercise of their natural rights, (quoted in Nussbaum 2013, 69)

it was because the ‘accommodationist’ view of religious freedom first put forward by the seventeenth-century theologian, philosopher, religious dissident and founder of Rhode Island, Roger Williams, had gained enough traction to become absorbed into the Bill of Rights.

Although, as Bailyn (1992) suggests, Locke was by far the more decisive influence on mainstream political thought in the 1760s–1770s, Williams’ ideas can be seen at work in the beliefs and practices of the religious non-conformists who, as I have argued above, did so much to impress upon Madison and others the need for as expansive a concept of religious liberty as possible, one that constitutionally guaranteed the right not only to freedom of conscience, but also to put into practice what conscience demands. For Locke, toleration demands that everyone (subject to certain exceptions) is entitled to hold their own beliefs and opinions without persecution or molestation, as long as these do not conflict with the needs or interests of the state, but when there *is* a conflict, the interests of the state take priority; the state cannot compel someone to believe or even act contrary to the dictates of their conscience, but it is entitled to impose a penalty upon them, this being the price of toleration. Williams, on the other hand, suggests that since ‘laws in a democracy are always made by majorities’, they

will naturally embody majority ideas of convenience, in matters ranging from choice of work-days to the legal status of various drugs. Even if such laws are not persecutory in intent, they may turn out to be very unfair to minorities. (as summarized in Nussbaum 2013, 73)

In certain circumstances, argued Williams, only a special exemption from such laws – an ‘accommodation’ – would truly vouchsafe religious liberty, because that liberty can be violated not only by compelling someone to affirm beliefs or convictions they may not hold (which Williams called ‘soul rape’), but also by preventing the outward conduct that their beliefs require (65). Without such exemptions ‘the majority [would be] claiming for itself a liberty much more extensive than it was prepared to grant to others’ (75), and this is why Nussbaum concludes that the accommodationist position ‘reaches subtle forms of discrimination that are ubiquitous in majoritarian democratic life’, that Lockean arguments for toleration do not (87). By contrast, tolerance as a technique of liberal governmentality produces precisely such forms of subtle discrimination through the depoliticization of social exclusion and political marginalization.

Williams contests the belief–conduct distinction that is the foundation of Lockean toleration, and which continues to inform contemporary jurisprudence (Leigh 2011; Malik 2011, 24). And yet, despite the increasing reticence of the US Supreme Court to apply accommodations in relation to ‘free exercise’ cases that come before it (McConnell 1990), Williams’ ideas continue to speak to and inform jurists’ deliberations concerning

the nature and scope of religious liberty, especially when accommodations are felt to be the only way to resolve tricky cases involving conflicting rights. Malik (2011, 24), for instance, cites Lord Nicholls' argument that article 9 of the ECHR 'is not confined to freedom to hold a religious belief. It includes the right to express and practice one's beliefs. Without this, freedom of religion would be emasculated'. Moreover, as Malik (2011, 25) goes on to note,

the distinction between a wide range of latitude for belief, but a more restrictive approach to action, depends on some consensus about the social values that underwrite religion. In increasingly plural societies it will be difficult to apply the doctrine because it provides no substantive guide to what types of manifestation of belief falls within the permissible range.

Unlike Locke, who was not able or willing to extend toleration to atheists and non-Christians, Williams was able to do so (to 'the most paganish, Jewish, Turkish, or antichristian consciences *and worships*') precisely because the mechanism of the accommodation, which rests on the dismantling of the belief-conduct distinction, expands the concept of freedom of conscience itself and tries to account for it; moreover, the inclusion of 'conduct' encompasses a *collective* and *social* dimension to religious liberty such that it is not reducible or equivalent to the beliefs and opinions of an *individual* believer. If part of the multicultural 'crisis' is based on the presence of religious minorities (especially Muslims) whose demands for religious liberty exceed the secular-liberal parameters of individual conscience and blur the public-private and belief-conduct distinctions, then it would seem that religious accommodationism of the kind advocated by Williams seems particularly appropriate in the current conjuncture. And this, in turn, affects the conceptualization of free speech, because it directly bears upon the freedom of expression of religious communities. Unlike the secular-liberal conception of free speech in which expression is merely the externalization of an individual interiority (conscience, belief and opinion) severed from social practices and collective frameworks of meaning, accommodationism attempts to move freedom of expression beyond Milton's (1644 [2012], 566) argument that society as a whole benefits because 'out of many moderate varieties and brotherly dissimilitudes that are not vastly disproportional' truth will necessarily emerge. This concept of toleration and free speech rests on a scale of differences that are 'not vastly disproportional', that is, on a consensus that Malik has noted is no longer available. As Peters (2005) has shown, this strand of Milton's argument in *Areopagitica* persists in modern liberal free speech theory, which is perhaps why it struggles to make sense of its encounter with non-liberal arguments for free speech, often assuming them to be arguments *against* free speech per se rather than different kinds of argument *for* it based on alternative premises (Mondal 2014). But there is also a deeper point to be made: accommodationism, insofar as it extends the scope of religious liberty, also *extends the nature and scope of free expression*, thereby demonstrating once more the indissoluble link between the two freedoms. The extension is qualitative rather than quantitative: it does not so much mean that 'more' speech will be protected (although it might), but rather that freedom of expression can be re-conceptualized in such a way as to move liberal free speech theory beyond its existing parameters by offering a different conception of expression itself, one that is not merely discursive but also a form of action; not simply individual and singular, but also social and relational. This would continue to acknowledge the 'right' of the individual to freedom of expression as a fundamental one, but also situate

such expression in a wider social context where expression can be seen as a *pharmakon* that can be both the cause of social conflicts and the means through which they are addressed and, perhaps, overcome. Conceiving expression as a social *pharmakon* – which is both poison and cure – shifts the emphasis beyond the legalistic framework of ‘rights’ into the space that is ‘off the radar screen of the formally political’ because it is ‘remaindered’ by liberalism’s conflation of the legal and the political (Brown 2006, 12). In this ‘cultural-political’ space one can – indeed must – situate freedom of speech not just as a legal right but as a form of ethical praxis in which the task is to build fragile solidarities and assemblages of consensus out of apparently incommensurable religious and cultural pluralities.

Accommodationism is not without its problems, however. One is practical: it rests on carving out individual exemptions from wider, generally valid laws such that there is an ad hoc element inherent to any juridical praxis that attempts to administer it, and arguably this means that judges are required to create laws rather than interpret them, which presents itself as a democratic – and therefore political – problem, too. Second, as Maleiha Malik has pointed out, contemporary freedom of religion is often in conflict with equality and anti-discrimination legislation, especially when the conflict revolves around religiously motivated/mandated objections to sexual orientation. ‘Although exemptions are the preferred approach in current legislation’, writes Malik (2011, 30), ‘they are not the ideal mechanism for addressing the religion v sexuality conflict’, because ‘the mechanism of granting exemptions delegates the power of definition to religious organisations, who in turn frequently represent the most conservative viewpoints’. Nussbaum (2013, 79), however, does provide a response to this difficulty from within the accommodationist tradition:

For the accommodationist ... the relevant unit theoretically is the conscience of the individual. Thus, if someone has a nonstandard interpretation of his or her religion, it cuts no ice to say that the majority of that religion’s members do not agree.

Thus, an individual’s interpretation, when weighed against the ‘typically’ conservative views of religious organizations, should count for no less in the jurist’s deliberations; on the other hand, neither can the views of ‘conservatives’ be discounted either, on the same principle, and, practically speaking, it is likely to be those views that typically come into conflict with sexual equality legislation. A third problem is that accommodationism seems to favour *religious* claims of conscience over and above analogous non-religious or secular claims. This, as I have argued above, is anticipated and encoded in the First Amendment such that freedom of expression can act as a ballast that balances the liberties of the non-religious, especially if ‘expression’ is conceived of in more capacious ways, and there are other ways of addressing this problem too by, for example, expanding the concept of ‘conscience’ or limiting it to ‘religion’ in relation to certain things (e.g. drugs), whilst expanding it for others (such as conscription) (Nussbaum 2013, 88–89).

Despite these problems, there are four major advantages to accommodationism. The first is that in contrast to the depoliticizing procedural formalism of liberal legalism, accommodationism proceeds from the acknowledgment of a political fact: in democracies, laws are made by majorities and are, therefore, never neutral but always implicitly majoritarian. It therefore recognizes that unequal power relations underwrite the formation of the law itself and seeks a mechanism to compensate for that fact and thereby protect

minorities from being implicitly positioned in an unequal position before the law. Unlike liberal or Lockean conceptions of liberty, it does not proceed from the abstract principle of formal equality before the law as if that were itself sufficient to guarantee actual equality. It is thus particularly appropriate for contemporary multicultures in which religious and other minorities are disadvantaged before the law precisely because they are disadvantaged in the civic-political field. The second advantage is rhetorical. It requires a conceptual framework, and therefore discourse, that is at odds with the rhetorical assemblages of political discourses mobilizing neo-liberal integrationist policies in Euro-America and Australasia. In contrast to the discourse of 'tolerance' that is such a key part of such integrationist rhetoric, with its idiom of 'sufferance' that implicitly positions minorities as unequal and 'outside', accommodationism offers idioms of welcome and hospitality, and emphasizes a shared 'dwelling' that obligates both majorities and minorities to observe relations of reciprocity and mutuality, whilst recognizing, of course, that such obligations cannot be reduced to neutrality through legal proceduralism. Third, insofar as accommodationist politics must, in order to be effective, be institutionalized in juridical praxis, it uses the law both as an instrument of political accommodation that redresses the imbalance of power for minorities and as an ethical signal: a law that accommodates difference is one that signals to different peoples that they are truly welcome to participate in society, because their difference is given respect and they are accorded 'equal and ample' liberty to practise that difference, within wide parameters. In its own, limited way, the RRHA offers just such an ethical signal. At the same time, the ethical signal of the law need not be unidirectional. It can be used to 'expand the moral imagination' by nudging majorities into considering or imagining social and political life from the perspective of minorities, something that majoritarian democracy often obstructs (Nussbaum 2013, 114).

Finally, accommodationism is particularly pertinent in addressing the subtle forms of discrimination suffered by religious communities that do not observe the *secularist* – as opposed to *secular* – assumptions that underpin regimes of permissible religiosity. The most notable of these is the distinction between private passion and conviction, on the one hand, and public rectitude on the other, as well as the belief–conduct distinction. From the beginning, accommodationism was always about acknowledging the role of religious motivation and conduct in the public sphere, and not just a matter of individual conscience and belief. Roger Williams, for instance, compared the prevention of outward religious conduct to a 'prison' for the conscience, but he also argued that it could be violated 'within' as a form of 'soul rape'. While a discursive regime of permissible religiosity that determines social and institutional parameters of 'correct' religious behaviour based on secularist assumptions – at its most extreme restricting it to the extent that it must become publicly invisible – can clearly be aligned with the first of Williams' concerns, can it also have effects akin to the latter, to 'soul rape'? It is at least arguable that such a regime, in which public observance of religion beyond the merely ritual and sacerdotal (such as the insistence that to be properly religious one must bring one's faith-based perspective to bear on matters of public ethical and political concern) is deemed impermissible, involves a degree of vulnerability that violates conscience to quite a large extent. If that is the case, the public–private distinction needs to be challenged and erased; those religious communities that occupy or seek to occupy the public space should be allowed to do



so, albeit under the terms of a secular constitution that guarantees a religiously neutral state that has no room for blasphemy laws or an established church.

This, to a very great extent, is precisely the arrangement established by the US Constitution. And yet, as I have argued, the imbalance in the relation between freedom of religion and freedom of expression in public and political discourse is as apparent in the USA as elsewhere in Euro-America and Australasia. And although, to some extent, jurists' professional knowledge of case law precedents and their deeper insights into the principles underlying them has meant that such trends in social commentary have not been replicated precisely in jurisprudence, the latter is nevertheless not fully insulated or separable from the former. Jurists are also members of society and are not removed from or immune to the wider currents of opinion in relation to which they go about their work. That being the case, the priority of freedom of expression over freedom of religion, which is the outcome of a long process of secularization, has to some extent both been replicated in jurisprudence and to an even greater extent impacted upon the legislatures. Through the course of the twentieth century, First Amendment jurisprudence has, for example, incrementally strengthened protections for freedom of expression and weakened religious liberty by becoming increasingly unwilling to allow exemptions and accommodations to secular law (McConnell 1990). The task of rebalancing these liberties thus falls principally not in the juridical realm but in the civic-political sphere, in the space of cultural politics. This is precisely why controversies over the limits of freedom of speech have been especially mobilized by religious communities, because, as I have argued elsewhere (Mondal 2014), the politics of controversy about religiously 'offensive' speech is a signifier of a political effort by some groups, notably Muslims, to challenge what they see as a debilitating imbalance between religious freedom and freedom of speech in contemporary Western multicultures. The protagonists of such controversies may not be aware of the deeper tasks that lie beneath the epiphenomena of their political mobilizations, but such events do offer an opportunity to see the underlying problematic more clearly. Contemporary Muslim dissatisfaction with present arrangements catalytically reveals the sheer scale of the task ahead if freedom of religion and freedom of speech are to be rebalanced in the way that the First Amendment so perspicaciously suggests they should be, one involving nothing less than the fundamental re-evaluation of what liberty is for, and its relationship to (in)equality and social solidarity: should we value liberty above all else, or, in a multicultural, multireligious society, should we rethink liberty so as to achieve, rather than thwart, equality and social solidarity?

## Notes

1. In letter no. 15, 'Cato' (i.e. John Trenchard and Thomas Gordon) write, 'Without Freedom of Thought, there can be no such thing as Wisdom; and no such thing as Publick Liberty, without Freedom of Speech'. Later in the essay, they write another of the recited truths within free speech discourse: 'Freedom of speech is the Bulwark of Liberty; they prosper and die together' (cited in Bogen 1983, 447–448). There is, nevertheless, a slight difference between the two formulations. In the first, free speech is the source and foundation of all 'publick Liberty'; in the second, it is not – a bulwark is not a foundation but an obstruction against slippage back to some prior state.
2. No pagination. I have consulted the open access version posted by Smith at: <http://www.uark.edu/depts/comminfo/cambridge/origins> (accessed 25 September 2015).

3. Note that this does not invalidate the *communal* protections afforded to religious ‘communities of belief’ by the free exercise clause, and the question of whether *secular* ‘communities of belief’ should be protected under this clause is moot, perhaps because they can, on the one hand, receive protection as *individuals* using the free speech clause, and, conversely, would not want to seek protection as a *community* for fear of undermining their ‘secular’ character. In any case, the protection of secular communities can be aligned with protections afforded to ethnicities, races, genders and sexualities.
4. Apart from the first, which is not a right but a constitutional settlement of the relationship of the state to religion (disestablishment) known as the ‘establishment clause’, the rights enumerated are freedom of religion (article 18 in the United Declaration of Human Rights); freedom of speech and the press (article 19); freedom of assembly and association (article 20); and the right to take part in the government of one’s country (article 21).
5. ‘What once appeared to be a jurisprudence highly sympathetic to religious claims now appears virtually closed to them’, writes McConnell (1990, 1417). This is because ‘[s]ince 1972, the [Supreme] Court has rejected every claim for a free exercise exemption to come before it’. This rejection of accommodationism in favour of Lockean toleration has considerable implications for the scope of religious liberty and is symptomatic of a hegemonic secularism that defines permissible religiosity in strictly privatized, individual terms. As I argue in the final section of this essay, this attenuates religious liberty for religious minorities and those that do not observe the private–public distinction.
6. The next section draws heavily on the final chapter of my book *Islam and Controversy* (Mondal 2014).

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