

## EDITOR'S NOTE

The NORTH DAKOTA LAW REVIEW is pleased to present the following Letter in response to the Jeffrey Omar Usman analysis of *United States of America v. Daniel A. Seeger*. Mr. Usman's analysis appeared in V. 83, Number 1 of the NORTH DAKOTA LAW REVIEW.

Because the letter is a personal document, the LAW REVIEW somewhat suspended its usual editing process to preserve the author's work. Nonetheless, there are some variations between the original letter and this version. For example, in some instances, non-substantive word refinements have been made, and formatting has been adjusted to conform to LAW REVIEW presentation style and to ensure accuracy. These variations do not change the meaning or substance of the Letter.

RECONCILING RELIGIOUS FAITH  
AND DEMOCRATIC PRACTICE:  
THE PROBLEM OF THE ELUSIVE DEFINITION OF RELIGION

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Certain words and concepts, in spite of their common usage in daily life, defy crisp and satisfying definition. What is art? What is a Christian life? What is community? What is pornography? What is religion? There adhere to these concepts elements of humanity's evolving self-understanding, an awareness-expanding process which presumably will never cease, and so pinning them down with neat, work-a-day definitions is both impossible and frustrating.

Nevertheless, as Jeffrey Omar Usman observes in his excellent article "Defining Religion" (*North Dakota Law Review*, Volume 83, Number 1), the courts must act even though their definition of something like religion will never be perfect. After an insightful survey of the difficulties inherent in church/state jurisprudence, Usman offers seven governing principles which he feels will advance coherence and justice in this area of law, and includes in his recommendations a retreat from the broad definition of religion set forth by the United States Supreme Court in the case of *United States of America v. Daniel A. Seeger*.

Usman's analysis is very useful, and I have no wish to refute it. I am writing in response to my belief that his seven point summary does not do justice to the deft and insightful discussion with which he introduces it. In seeking to define parameters governing the concept of religion so that courts can proceed with the practical tasks their functioning requires, Usman acknowledges that it is impossible to avoid some degree of imperfection, but I believe he makes a few more concessions to imperfection than are absolutely necessary. I do agree with Usman, however, that some element of imperfection is inevitable.

Before offering a modification of Usman's seven points, it is necessary to elaborate somewhat on his preceding analysis.

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*The Secular Origins of American Constitutional Government*

Although the founders of the Republic may have had varying attitudes toward the then-prevailing religious cultures, and some may have derived their idea of the separation of church and state from their own religious philosophies, the overwhelming historical evidence would seem to indicate that the essential principles upon which our nation was founded did not spring from any religious culture. Rather, religious cultures adopted them and adapted to them, both because these principles became increasingly popular in their own right, and because they offered relief from the sort of religious strife that characterized European history up until the Treaty of Westphalia and the Age of the Enlightenment. Concepts of the Rights of Man (*sic*), the social contract theory of government, and the idea of the separation of governmental powers did not arise out of Jewish or Christian or Muslim culture over the many hundreds years they had available to discover them.

Rather, in the eighteenth century, a new spirit of science and empiricism, an affinity for rationalism, skepticism about progress-impeding superstitions inherited from the past, and rebellion in the face of despotism, generated a philosophical and political movement of great power and insight. It inspired many of the key founders of the United States, most of whom, although they did not reject the earlier religious traditions outright, were very skeptical of their historic institutional forms, their frequent apologetics for monarchy, and their intolerance and superstition, which often led to violence and oppression.

While many people who lived in the colonies during the Revolutionary period were devout Christians, they had to look beyond Christianity to invent the constitutional Republic we enjoy. In fact, one might argue that their Christianity was an impediment to their seeing the way forward to free speech, the rights of a free press, and religious toleration. Hinduism is arguably a way of life that honors diversity in religious belief and practice. But it could not be argued, on the basis 1700 years of Christian history at the time of the American Revolution, that the concepts upon which our Republic was founded, including the separation of Church and State, had occurred to very many Christians. As Columbus set sail for America, less than two hundred years before the drafting of the United States Constitution, Jews and Muslims were being driven from Spain. Martin Luther's relentless diatribes against Jews are well known. As late as 1864 the papal encyclical *Quanta Cura* condemned as insanity (*deliramentum*)

the view that liberty of conscience was a universal right that ought to exist in every well-governed state.

The frequent assertion that there is something innately Christian about the American form of government is simply a false and misleading reading of history. Most eighteenth century Christians who came to see religious toleration as an aspect of their faith were responding to cultural influences from outside of Christianity. The Quakers, and perhaps a few other marginalized sects, were the only exception to this. Most Christians have come to reconcile democratic practice with their faith and now see the two as inextricably linked. But to project this linkage back to earlier centuries is an error.

The power of the ideas from secular culture upon which the United States was founded can evoke a religious-like devotion. As we are frequently reminded, many have fought and died to preserve our democratic way of life in a way they presumably would not have done to preserve the French or English monarchies, both sanctioned by the religious authorities of their day. As has also frequently been observed, the Marxist movement, atheist in its metaphysics, nevertheless practiced rituals and inspired devotion that had a religious-like quality among its adherents.

The term “religious belief” may once have been loosely sufficient to describe those aspects of personhood, which were so sacred as to be placed beyond the reach of any governmental intrusion, even if supported by a democratic majority, under a social contract theory of communal organization. But clearly in today’s world such “ultimate concerns,” while functioning in people’s lives as religion once did, are no longer confined to religion as opposed to philosophy. Those founders whom Usman cites who sought to include atheists under the mantle of the protection of freedom of religion had at least some glimmering of this reality. Americans who volunteered to fight in the Spanish Civil War against Franco were presumably responding to a “religious-like” devotion to democratic principles; their sacrifices can hardly be dismissed as “merely” philosophical.

Usman’s article mentions Buddhism once or twice, but does not dwell on that significant component of religious culture. Buddhism is frequently dismissed by some Christians as “merely a philosophy” rather than a religion because of the professed agnosticism of Suddhartha Gautama, Buddhism’s founder. Yet can we believe that any sensible expression of American democratic practice would afford Buddhism, adhered to by about one-eighth of the human race, any less freedom or protection than the other major religions? It is no longer possible to establish a bright line between religion and philosophy in cases where philosophy fundamentally orients a person to his or her essential human nature and selfhood, if ever it was.

Was Socrates' acceptance of his death sentence, when he could easily have escaped, a religious act? Even though Patrick Henry referred from time to time to a deity, when he cried "Give me liberty or give me death," was this a philosophical statement or a religious statement? Could it have plausibly been derived from Christianity as it was known in that day? Up until that time, many religious people had suffered martyrdom for specific religious dogmas or ideas, but few had done it for a generalized idea of human liberty.

If there is to be a single definition of religion which must cover both the non-establishment and free exercise provisions of the First Amendment, as Usman persuasively argues there should be, surely it must be such as to protect the rights of people who hold to systems of thought and to practices which are largely congruent with or parallel to conventional religious beliefs in respect to the way they function in the life and self-identity of the citizen. Richard Dawkins, the well-known geneticist who recently published the book *The God Delusion*, were he an American, would have the right to be afforded the same measure of protection for his views about religion as anyone else, even though he explicitly denies that there is any "reality beyond the ordinary," to use a phrase from one of Usman's concluding parameters. Nor would merely affording Dawkins the right of free speech alone be sufficient protection from other imaginable impositions that might be made upon him in the name of religion.

### *The Prophetic Voice in Religious Life*

Obviously, very broad definitions of religion raise the specter of the many practical difficulties which might arise if the courts had to deal on a case-by-case basis with "one-person religions." Every individual can have his or her own unique but profoundly felt religious views. Every home or tent where a person meditates on the mysteries of life might claim itself to be a sanctuary.

But alas, this difficulty cannot be so easily dismissed by appeals to practicality. For the great moments in religious history revolve exactly around such solitary spirits in their tents. Lao-Tzu, reportedly disillusioned by the failure of anyone in society to respond to his teaching, exiled himself to a cave hermitage and wrote a scripture that eventually became a key foundation of Chinese civilization. Siddhartha was meditating quite alone under a fig tree, abandoned even by his very small handful of followers, when he achieved enlightenment. Jesus, after his baptism by John, spent time alone in the desert before beginning his public ministry. Mohammed, too, retired to a cave hermitage where he received his first, and many of his

subsequent, religious visions. We might also include Moses with his burning bush and on Mount Sinai. Francis of Assisi, deemed delusional by his family and acquaintances, was praying alone in a ruined and abandoned church when a voice from the decaying crucifix spoke to him: “Go, Francis, and repair my house, which is everywhere in ruins.” Only later was this message properly understood as referring to the spiritual fabric of the entire institution of the church, and not merely to the physical condition of the particular lonely edifice in which Francis heard the voice.

In fact, practically all these great spiritual visionaries were to some degree or another regarded as mad with respect to the cultural milieu in which they existed.

In our own day, when a great turning of the ages is occurring, when the old ways of doing things have exhausted themselves, when humankind is in the process of destroying the very planet which sustains life itself, when the mal-distribution of wealth and power eclipses that which prevailed at the time of Louis XVI and Marie Antoinette, is not the time ripe for a deliverer? And is American legal practice to disallow the traditional dynamic through which solitary but prophetic religious visionaries emerge?

#### *Paul Tillich’s Concept of “Ultimate Concern”*

More theologically oriented or philosophically inclined people may have their way of life organized coherently into a neat hierarchy of concerns which endures over years. In such cases it might be easy to identify an “ultimate” concern deserving religious freedom protections, even though no appeal to a supernatural agent may be involved.

Usman challenges the usefulness of Tillich’s term “ultimate concern” when defining religion because most people experience life with a variety of competing and conflicting concerns, and so no “ultimate” one can be identified.

Admittedly most people, as they proceed through life, resonate to a rather loose baggage of ideas which may or may not be coherent. This is true of church-goers as well as of the unchurched. But this commonplace carelessness does not mean that Tillich’s expectation that a religion should be an ultimate concern which one takes seriously without reservation is inapplicable to situations where religious freedom is at issue. Once challenged, one’s clarity about what is more or less important in life may be substantially enhanced. The word “ultimate” in most of its meanings implies a singularity, the top of a hierarchy. Yet as a practical matter one may have several areas of transcendent concern—one’s family, one’s religion, one’s political freedom, the safety and independence of one’s

nation, the fate of the earth—without necessarily being impelled to arrange them hierarchically, except if one is forced into a choice by a tyrannical outside agency. Tillich’s use of the term “ultimate” may be infelicitous, but the idea behind it is practical and useful in terms of identifying a certain quality of which we expect religious beliefs to give evidence.

*Protecting the Rights of Both Very Small and Very Substantial  
Religious Minorities*

Before attempting a refinement of Usman’s seven parameters, one last preliminary observation needs to be made.

Even if we arrive at a unitary definition of religion which applies equally effectively to issues of non-establishment and free exercise, there is a profound practical issue involving whether or not the non-establishment question or the free exercise question pertains to a small minority, or whether it pits very substantial portions of the population against each other. Whether a Native American group may use controlled substances in religious ceremonies, whether Amish people may be excused from secondary education, or whether the Church of Scientology should be granted tax exempt status are questions deserving of careful scrutiny in the interest of justice both for the minority involved and for mainstream society. Both parties have a profound interest in a regime of law that is coherent and just. But granting First Amendment protections to the minority is not apt materially to discommode those with mainstream views, although it may stretch their capacities for toleration.

But very substantial problems arise when the issue of religious freedom pits large segments of society against each other. The teaching of evolution in public schools based on theories derived from Charles Darwin, the practice of universal access to abortion, the treatment and rights of gay and lesbian people, and the protocols associated with death and dying are issues where it seems that honoring the rights of religious conscience of some people profoundly violates the rights of religious conscience of others. Our approach to defining religion must somehow take account of these problems, although it cannot be expected to solve them. But it also should not exacerbate them or make them more intractable.

One interesting aspect of these conflicts is that the religious vocabulary is often asymmetrical. That is, one position tends to be based on traditionalist religious vocabulary much more clearly and self-consciously than the other side. People opposed to extending civil rights and marriage rites to gay and lesbian people, for example, are much more apt to cite conventional religious conviction or texts as the basis of their concern than are people

who support extending these rights to homosexuals. Although the pro-gay and pro-lesbian movement may include people who are motivated by an interpretation of religious principles and tradition, most are apt to base their convictions on arguments derived from social contract theory and from philosophical or Constitutional principles. Are they therefore unworthy of constitutional protection from the intrusive imposition upon them of the religious views of others?

A similar lack of symmetry occurs with respect to abortion. Most opponents of abortion cite religious conviction, while most proponents of free choice cite philosophical concerns about the rights of women and the appropriate limits to the reach of government into intimate private and personal affairs. Pro-choice proponents cite a distinction to be made between an early term fetus and a developed human being, a distinction which abortion opponents do not see.

No one is required to have an abortion. So the legalization of abortion does not directly inhibit the religious freedom of those opposed to it. But the religious convictions of abortion opponents require them to seek to employ the powers of government to prevent anyone from having an abortion, except perhaps in very limited circumstances. Should they succeed in accomplishing this, it is hard not to see how this is not an establishment of religion in that it requires everyone to conform to the religious convictions of some even though they do not share them.

This is not the place to try to resolve the dilemmas that abortion, the movement for gay and lesbian rights, and euthanasia pose. But it is relevant to observe that there are significant areas of human experience where the terrain occupied by the traditionalist religious convictions of one person is quite congruent with the terrain occupied by the philosophical convictions of another person, as far as their innermost concept of their humanity and self-identity is concerned. To enforce through law a hierarchical preference for the traditionalist religious views of some over the primary and fundamental philosophical views of others is, in effect, to establish religion.

#### *Usman's Seven Parameters Guiding the Definition of Religion*

We are now ready to refine Usman's seven parameters for determining the boundaries within which to find a definition of religion.

- 1) The first principle—that the courts cannot avoid defining religion—is unaffected by the foregoing argument.
- 2) Similarly, the idea that the courts should avoid defining religion one way for establishment questions and another



way for free exercise questions is not impacted by the material above.

3) Usman's third and sixth principles are closely related.

a) Usman's argument is that a definition of religion based on Tillich's concept of "ultimate concern," upon which the Supreme Court relied in the *Seeger* case, demands that every person who might draw the attention of the courts on First Amendment questions needs to have a precise hierarchy of convictions so that one of these at the very summit can be identified as "ultimate," and therefore "religious." He properly recognizes that this intellectual and spiritual orderliness is an unreasonable expectation for most people. But I believe Usman's conclusion that the courts' use of the "ultimate concern" concept is unworkable is wrong and stems from an over-reading of the language. The concept that a religious belief should have a sort of primordial importance to a person's self-definition as a human being does not necessarily imply unawareness that life as it is actually lived involves a variety of "ultimate" or "transcendent" concerns, even though many of the meanings attributed to these two words imply singularity. A person might be willing to give up his life for his family, his country, or his religion, for example. Thus, each is an "ultimate" concern in the sense intended by Tillich and by the courts.

b) Usman further argues that Tillich's "ultimate concern" definition is too capacious in that it would admit as religion any intensely held concern—he uses a preoccupation with gathering wealth, which consumes some people's entire spirit, energy and attention, or gathering Star Trek memorabilia, as hypothetical examples. But the Court's concept that an "ultimate concern" should be analogous to, or parallel to, the functioning of religious belief in the life of a traditional adherent certainly mitigates this difficulty somewhat, helping at least intuitively to exclude the Star Trek or money-making preoccupations from the class of religious concerns. I do concede that the Court's language in the *Seeger* case, drawn from Tillich, does suffer somewhat from imprecision regarding a clear boundary or limiting principle.

Usman seeks to correct for this in his sixth parameter. But, unfortunately, in so doing he veers back towards a supernaturalist notion of a Supreme Being as a necessary component of the beliefs of anyone seeking First Amendment non-establishment or free exercise protection, although Usman avoids using Supreme Being language. Thus, he says that the belief or practice in question should be imposed by an authority that is “part of some reality or understanding that is beyond the ordinary.” Such authority must be “sacred, that is not profane, and addressed to the fundamental questions of existence.” A distinction should also be drawn between philosophical and personal beliefs and religious beliefs, according to Usman. The arguments made above explain why this is not a satisfactory approach.

There is a more useful direction to look for a definition of religion, one which acknowledges the constitutional imperative to protect the freedom and liberty of both believers in and non-believers in supernaturalism. It assumes that the First Amendment religious freedom clauses are meant not only to protect some religious people from being tyrannized by people of different religious views who might co-opt the powers of government to enforce their way of life on all, but also to protect people with no religion against intrusions which might be made in the name of some religions or of all religions collectively.

The class of perspectives and beliefs which the First Amendment seeks to protect through its non-establishment and free-exercise clauses have three essential characteristics:

c) They contextualize the human estate within the wider reality of which it is a part. For some people, like the Buddha, we cannot know the furthest reaches of this reality, cannot know if there is a deity, cannot know from whence the world came into existence, and cannot know about life after death. But we exist in an island of light in which we can discern principles of lawfulness which are eternal and inexhaustible, and to which we can resonate through the practice of compassion and other virtues. To materialists such as Dawkins, everything is susceptible to scientific explanations, explanations which will eventually be discovered. This goes for the origins of the universe, for the appearance and demise of vast galaxies in the far reaches of space, for the generation from inanimate matter of life, including human life, and for the explanation of human perceptions, thought, artistic responses and emotions. For traditional Christians, Jews, and Muslims an eternal, omnipotent, all-knowing, all

merciful deity created the cosmos and has given us the rules or principles by which we should live. What is important is not the disparities among these views, but the fact that they have in common that they establish a relationship between the human estate and reality taken as a whole.

d) People claiming First Amendment protections for their practices or way of life should derive these practices or way of life from such a cosmological perspective as is described above, and have a recognizably coherent view of why they see such a way of life as beneficent should it come to be practiced by many people or by everybody. This need not be persuasive to people of other perspectives to qualify for First Amendment protection. But it should be discernable by an impartial court as having coherence and credibility as a generalizable way of life as understood in the mind of the adherent. A religious or philosophical view which claimed special privileges for a small elect would not qualify for protections under the First Amendment, no matter how much supernatural authority or philosophical proof such an elect claimed for itself. In shorthand, the present discussion advocates retaining definitions of religion which the courts have derived from Paul Tillich and William James, while disallowing the limiting ideas of institutionalism derived from Emile Durkheim, and adding from Emmanuel Kant the powerful concept of the categorical imperative.

e) Finally, the belief should be sincerely held and should find reasonably consistent expression in the life of the practitioner.

It is not argued that these limiting conditions are without difficulty. I agree with Usman that absolute clarity in this area is elusive. The test of sincerity, especially, can open a huge window for subjectivity. Yet no definition of religion avoids this difficulty. The courts have long recognized that mere formal membership in a traditional religious denomination does not mean a person's belief in that denomination's tenets is seriously, deeply, or sincerely held. What is being argued here is that the use of the above boundary conditions for areas of human experience meriting non-establishment and free exercise protections under the First Amendment are clearer and less ambiguous than are Usman's, and they afford necessary

protection for the range of modern views in the area of religion which justifiably deserve it, even under an originalist reading of the Constitution.

- 4) Usman's fourth parameter is not affected by any of the above arguments. The courts cannot limit religious protections only to those individuals or groups whose ideas the courts deem socially constructive.
- 5) Regarding Usman's fifth parameter, it is argued here that the limiting conditions described above are sufficient to focus First Amendment protections reasonably. And, as has been noted, guaranteeing people freedom of speech does not in itself protect them from oppression in the name of another's religious beliefs. If one's own life, liberty and pursuit of happiness was contingent on persuading a majority out of its religious convictions, one might have to wait a very long time. Relying on freedom of speech as an escape from non-establishment and free-exercise difficulties is to concede to a tyranny of the majority.
- 6) Usman's sixth parameter, which would re-introduce "Supreme Being-like" concepts into the law, has been addressed above.
- 7) Usman's seventh parameter, proposing that the Courts define religion cautiously but precisely, and then apply the result consistently and fearlessly, is compatible with the analysis above.

The practice of democracy assumes that reasonable and fair-minded people, after a period of respectful discussion, will be led to enough shared clarity and unity about the problems they face in their common life that a way forward will be identified to which most can adhere.

Yet, as the apostle Paul correctly observes: "Faith is being sure of what we hope for and certain of what we do not see." (Hebrews 11:1—New English Bible). It is hardly likely, therefore, that people of one faith in things unseen will persuade others of their convictions within the time frame required to decide issues of public policy. The dual aspect of certainty and invisibility which characterize matters of faith puts democracy to its greatest test, and it perhaps is not surprising to find ourselves in a situation where church/state jurisprudence has a certain garbled character.

An expansive definition of religion such as is supported here may, at first blush, seem to increase these difficulties by drawing into the sphere of First Amendment jurisprudence many issues which a narrower definition of religion would allow us to dismiss as "merely secular, philosophical or personal" matters—matters subject to simple majority rule.

But in the end, we must acknowledge that reticence about a defining religion at all, or trying to define it very narrowly, will not make disappear the difficulties which ensue from imposing the invisible and unprovable religious certainties of some citizens on other citizens who do not agree with them. Contemporary extremists in several faiths, some of whom occupy high public or ecclesiastical offices and others who come from the radical fringes, have brought disrepute on religion and have elevated the sensitivity of substantial portions of the population to their right not to be tyrannized by those acting on the basis of unprovable propositions which they do not share. To shrink from precision and boldness regarding the true scope of these issues only accelerates our momentum towards a constitutional crisis.

A clear and truthful definition of religion for First Amendment purposes, rather than worsening our difficulties, might actually lessen them. Most Americans are inclined toward fair-mindedness on matters of religious toleration. Most have a clear view of the excesses and injustices which have characterized religious history. Most understand the American experiment in constitutional government to be an attempt, at least in part, to overcome the baleful effects of religious absolutism. Perhaps, if they could see that some of the key issues which divide us today do indeed belong to the class of difficulties which our commitment to democracy challenges us to overcome, and indeed which our American form of constitutional government was expressly designed to overcome, the onus of our efforts with regard to these difficulties would be switched from futile attempts to “win,” where in the nature of things, there can be no authentic victory, and more toward finding an accommodation expressive of the same spirit tolerance and generosity with which our nation was founded.

*December 7, 2007*