THE ACTION-BELIEF DICHOTOMY AND FREEDOM OF RELIGION

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On 24 April 1986, the New South Wales Equal Opportunity Tribunal handed down a decision that became the subject of a public debate.[1] The decision and the subsequent controversy concerned the case of joint owners of a unit who, on religious grounds, refused to let rental premises to an unmarried couple. The owners indicated that they would compromise their Christian principles by "making money out of something" that they did not believe was right. The rejected unmarried couple argued successfully that the refusal of the owners represented a violation of section 48(1) of the Anti-Discrimination Act, 1977 which made it unlawful to withhold accommodation simply because a person is married or unmarried. The complainants claimed damages for, among other things, loss of wages due to taking time off work to find alternative accommodation, and hurt, humiliation and injury to feelings. The owners, however, claimed exemption from the application of the Act. They relied on section 56 of the Act according to which any "practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion" is not affected by the Act.

The Tribunal, however, decided that "sec. 56 protects the members of religious orders or bodies established to propagate religion in relation to its own members and its own structures." The Tribunal went on to say that the section "does not operate to allow the members of any religion to impose their beliefs on secular society, so as to exempt them from the operation of the law." Whilst the statements of the Tribunal are unambiguous, they are potentially wide enough to accommodate and support a number of possibly incompatible and perhaps even unintended implications. For example, the statements of the Tribunal in its decision could be interpreted as implying that a refusal to let premises to an

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[1] *Burke* v. *Tralaggan and Anor* [1986] E.O.C. 92-161.

unmarried couple, who do not belong to the same religious order or body as the owners of the unit, constitutes discrimination on the ground of marital status, whereas such refusal would be legally permitted if the unmarried couple are members of the defendants' church. Thus, subject to the validity of this interpretation, the application of the Tribunal's statements would necessitate a judicial examination of the religious affiliation of both the complainant and defendant in order to determine whether the defendant is exempted from the application of the law.

Rather than developing arguments in favour of the proposition that an exemption from the application of section 48(1) depends upon the religious affiliation of the rejected unmarried couple, the Tribunal sought to justify its decision by reference to, what was regarded by the Tribunal as, a self-explanatory example. The Tribunal stated that even though "it may be the practice of a religious body to promote the interests of persons of white skin colouring to the disadvantage of all others," such practice "would not operate to exempt an employer who was a member of that religious body from the Anti-Discrimination Act and thus enable the employer to refuse employment to persons of black skin colouring." This approach raises a number of problems. As observed before, the judgment apparently distinguished between members and non-members of a religious body. As to members of the defendant's religion, discrimination on the ground of marital status, is legally permitted. In the light of the Tribunal's willingness to equate racial discrimination with discrimination on the ground of marital status, it makes sense to speculate whether it is legal for an employer, who is a member of a religious body which promotes the interests of persons of white skin colouring to the disadvantage of all others, to refuse accommodation or employment to a black person who professes to be a member of that same religion. Of course, the likelihood of a black person being a member of a religious body that promotes the interests of whites to the disadvantage of blacks is highly conjectural but it certainly reminds us of the necessity to consider the consequences as well as the underlying principles, if any, of the Tribunal's judgment.

This case involves a conflict between the right to freedom of religion, on the one hand, and the right to be free from discrimination on the ground of 'marital' status, on the other. The latter right prevailed because the State, in explicitly prohibiting discrimination on the ground of marital status, gave legislative precedence to this right even though it prohibited people from acting on their religious belief. The case merely involves an interpretation (and as some would argue, an erroneous interpretation) of sections 48(1) and 56 of the Act. The judgment however, alerts us to a more fundamental issue, namely the issue of how the demands of the state could be accommodated with the rights of individuals to act on their religious beliefs. It is an issue which does not admit of easy answers even though courts have attempted to deal with it by the adoption of splendid, yet vacuous, statements about the proper balance of liberty and restraint. Indeed, even a perfunctory study of this issue reveals that

the law reports, literature and legal documents are full of indeterminate and even question-begging statements of this kind. In the main, the courts have met the challenge of reconciling the demands of the State with the right of individuals to the free exercise of their religion by applying what is known in the relevant literature as the action-belief dichotomy to the religiously grounded action. The dichotomy briefly summarised, means that the legislator is deprived of all power over *belief* but is free to regulate *action* that is inimical to State-determined priorities or social policy. The action-belief dichotomy has also found expression in a number of international legal documents. For example, Article 18(1) of the International Covenant on Civil and Political Rights stipulates that "[e]veryone shall have the right to freedom of thought, conscience and religion" and that this right includes the freedom "to manifest his religion or belief in worship, observance, practice and teaching." And by virtue of Article 18(3) of the Covenant, religious beliefs may be subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

The jurisprudence of the United States' courts, and in particular the Supreme Court, offers many illustrations of how the action-belief dichotomy could be used to subject religious practices, which are incompatible with social policy, to the regulatory power of the State. This jurisprudence usually involves a consideration of the First Amendment to the United States Constitution according to which "Congress shall make no law . . . prohibiting the free exercise" of religion. As the First Amendment has been interpreted for almost two centuries, it is desirable to review the relevant American jurisprudence in order to obtain a better understanding of the application of the action-belief dichotomy. This understanding, in turn, may facilitate an examination of section 116 of the Australian Constitution, which is based on, but different from, its American counterpart. Section 116, in its relevant part, stipulates that the "Commonwealth shall not make any law . . . for prohibiting the free exercise of any religion".

In this article, I will argue that the action-belief dichotomy is conceptually unsound and, in any event, has been judicially overhauled in the United States and is inconsistent with recent Australian High Court decisions. Subject to the validity of the arguments which I propose to develop in this article, the action-belief dichotomy does not provide guidelines which will enable us to determine whether, and if so, to what extent reliance on the right to religious freedom is strong enough to resist attempts by the State to subject religiously motivated action to State-determined priorities or social policies. The development of these themes necessitates a brief consideration of the application of the action-belief dichotomy in the United States and Australia; this description is the subject of the following two sections of this article. Sections three and four deal respectively with the demise of the action-belief dichotomy in the United States' courts and with the conceptual difficulties pertaining to the dichotomy.

1. The action-belief dichotomy in the United States' courts

A good judicial example of the regulatory power of the State is offered by Justice Field in *Crowley* v. *Christensen*,[2] decided by the Supreme Court in 1890:

> But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.[3]

Justice Field's statement implies that the enjoyment of rights presupposes "the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[4] In the area of religion, the temper of judicial statements has, until recent decades, been constantly hedged by such words of prudence. Thus, in an ofted quoted statement, the Supreme Court said in *Cantwell* v. *Connecticut*[5] that the First Amendment "embraces two concepts, freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[6] Another example is provided by *Jones* v. *Opelika*:[7]

> Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing. Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right.[8]

The action-belief dichotomy implicit in this quotation means that, if governmental regulations serve a valid secular purpose, it can be enforced against a free exercise of religion claim, and as a result effectively override the freedom to manifest one's religion.[9]

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[2] [1890] 137 U.S. 86, 34 Law. Ed. 620.

[3] *Id.* 623.

[4] *Cox* v. *New Hampshire* [1941] 312 U.S. 569 at 574.

[5] [1940] 310 U.S. 296.

[6] *Id.* 303-304.

[7] [1942] 316 U.S. 584.

[8] *Id.* 618.

[9] See, for example, *Cleveland* v. *United States* [1946] 329 U.S. 14; *United States* v. *Ballard* [1944] 322 U.S. 78.

A classic description and example of the application of the action-belief dichotomy is found in *Reynolds* v. *United States*,[10] decided by the Supreme Court in 1878. Reynolds, in obedience to the commands of his Mormon religion, which required its adherents to practice polygamy, had married a second wife. He justified his 'action' on the ground that it was the duty of a male Mormon to practice polygamy when circumstances permitted and that refusal would be followed by damnation in the life to come. He even obtained permission from his church authorities for the second marriage. Further, the marriage ceremony was performed by a person who was authorised by his church to perform marriages. The Supreme Court, however, decided that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[11] Furthermore, the Supreme Court pointed out that the unconditional exercise of religious beliefs would result in making the "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself",[12] thereby endangering the existence of civil government. Chief Justice Waite said that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[13] Thus, the Chief Justice interpreted the First Amendment of the United States Constitution according to which "Congress shall make no law . . . prohibiting the free exercise" of religion to mean that the government "cannot interfere with mere religious belief and opinions" but did not forbid interference with religious 'practices'. He referred to religious practices which involved human sacrifices and strongly endorsed the view that civil government had the right to interfere to prevent such practices. He went on to say that polygamy was "almost exclusively a feature of the life of Asiatic and African people" and that "from the earliest history of England polygamy has been treated as an offence against society."[14]

Reynolds was followed in 1890 by *Davis* v. *Beason*.[15] Davis, a member of the Mormon Church, was indicted because he had obstructed the administration of the laws of the territory of Idaho. He had made a false declaration to the effect that he was not a bigamist or polygamist nor a member "of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy."[16] Following his declaration, Davis was registered as an elector. During his trial, Davis challenged the validity of the Idaho statute which required an oath abjuring bigamy

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[10] [1878] 98 U.S. 145.

[11] *Id.* 164.

[12] *Id.* 167.

[13] *Id.* 166.

[14] *Id.* 164.

[15] [1890] 133 U.S. 333, 33 Law. Ed. 637.

[16] *Id.* 638.

or polygamy as a condition to the right to vote. The Supreme Court opined that polygamy destroyed the purity of the marriage relation, disturbed the peace of families and degraded women. It also held that an exemption from punishment for such crimes would shock the moral judgment of the community. Thus, the Court made clear that religion-mandated action is limited by the morals of the community and majoritarian values:

> It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.[17]

It is not the purpose of this article to trace the twists and turns by which, in relation to the differing circumstances of cases in succeeding decades, the American courts sought to mould the action-belief dichotomy. There exists an already rich and engaging literature on this development. It suffices to say that the courts in the United States until recently, have consistently held that the State's power to protect and to promote the welfare and safety of its people is paramount, and consequently that religiously motivated action, inconsistent with this interest, may be regulated.[18] As an example, it has been held that snake handling, although religiously mandated, is not protected by the religion clauses of the American Constitution.[19] Also, it has been decided in a number of cases that the State has power to protect the health and welfare of children.[20] Accordingly, a belief in divine healing is not a sufficient justification for parents to refuse to seek medical treatment for their children.[21]

The action-belief dichotomy is aptly applied in *Martin* v. *Industrial Accident Commission.*[22] This case, decided by a Californian District Court of Appeal, is an illustration of how the dichotomy has been applied in cases dealing with the refusal by Jehovah's Witnesses to accept a blood transfusion on religious grounds.[23] The decision in this case is especially

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[17] *Id.* 640.

[18] *Prince* v. *Massachusetts* [1944] 321 U.S. 158; *Baer* v. *City of Bend* [1956] 292 P.2d 134.

[19] *Harden* v. *State of Tennessee* [1949] 216 S.W.2d 708; *Lawson* v. *Commonwealth* [1942] 164 S.W.2d 972.

[20] *Jacobson* v. *Massachusetts* [1905] 197 U.S. 11 at 26-29; *State ex rel. Holcomb* v. *Armstrong* [1952] 239 P.2d 545.

[21] *Craig* v. *State of Maryland* [1959] 155 A.2d 684; *Anderson* v. *State of Georgia* [1951] 65 S.E.2d 848; *People* v. *Pierson* [1903] 68 N.E. 243.

[22] [1957] 304 P.2d 828.

[23] See, for example, *Application of Georgetown College, Inc.* [1964] 331 F.2d 1000; *In re Brooks' Estate* [1965] 205 N.E.2d 435; *Raleigh Fitkin Hospital* v. *Anderson* [1964] 201 A.2d 537; *State* v. *Perricone* [1962] 181 A.2d 751; *Erickson* v. *Dilgard* [1962] 252 N.Y.S.2d 705; *People* v. *Labrenz* [1952] 104 N.E.2d 769.

interesting in the light of Chief Justice Waite's comment in *Reynolds* that the right of free exercise of religion does not extend to the right to commit suicide.[24] Charles Martin had been hurt, but not fatally, in an industrial accident in the course of his employment. He and his wife were Jehovah's Witnesses. He died because he refused a blood transfusion, which would have saved his life. His wife then sought workers' compensation benefits for herself and the children of their marriage. Benefits were refused under section 4056 of the Labor Code:

> No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury.

The Commission held that the refusal of the deceased to accept a transfusion was unreasonable even though to have accepted a transfusion would have been against his religious beliefs. The petitioners contended that despite these facts the Commission could not find Martin's refusal to be unreasonable without finding that his religious beliefs and the tenets of his religion were unreasonable, and that it was beyond the province of the Commission to so find. This argument, which is based on the premise that action and belief cannot be neatly separated from each other lest a person's right to religious freedom be violated, would later emerge as a formidable objection to the continued application of the action-belief dichotomy. The importance of this argument necessitates its further consideration in greater detail in sections three and four of this article. However, in 1957, when *Martin* was decided, the courts were still sluggishly and mechanically applying the dichotomy. The Court declined to entertain the petitioners' argument and decided that, although freedom to believe is absolute, the freedom to act upon one's beliefs is not:

> There is no merit in this contention, for "[a]lthough freedom of conscience and the freedom to believe are absolute, the freedom to act is not." . . . Under the statute here Martin was free to believe and worship as he chose, and he was further free, if he so chose, to practice his belief; but if he exercised that choice and his death resulted from his choice, petitioners were not entitled, as a matter of right, to the benefits of the workmen's compensation laws.[25]

The principle applied by the American courts, namely that governments have the right to interfere with religious practices as opposed to religious beliefs, transcends these specific examples of, arguably, odious practices which were discussed above. Therefore, the principle, because

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[24] *Supra* n. 10 at 166.

[25] *Supra* n. 22 at 830.

of its generality, may be a *non sequitur.* According to this principle, the fact that practices are required by one's religion is no excuse for disobeying the law of the State because, using the language of Chief Justice Waite, "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[26]

The development of the action-belief dichotomy need not be attributed to judges alone. A discussion of the dichotomy, coupled with an uncritical assumption of its usefulness, can also be found among philosophers and political theorists of considerable stature. For example, in searching for a central 'principle' capable of reconciling Reynold's free exercise of religion claim with the interest of the State in maintaining monogamy, Chief Justice Waite invoked the classic words of Jefferson. Jefferson, after announcing that as to his religion man "owes account to none other for his faith or his worship", added that "the legislative powers of the Government reach actions only, and not opinions."[27] John Stuart Mill writes in his celebrated essay *On Liberty* that liberty comprises "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological" and that "liberty of expressing . . . opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people."[28] Similarly, Isaiah Berlin tells us that "a frontier must be drawn between the area of private life and that of public authority" and that "[w]here it is to be drawn is a matter of argument, indeed of haggling."[29] Milton Konvitz, a perceptive commentator, has pointed out that "the limits on the legitimate powers of government are not frozen" and that lines "are constantly being redrawn, and no one can foretell where the line will be in the next decade or even in the next year."[30] The constant redrawing of these lines continues to occupy the American courts. The conflicts between individual claims based on religion and State claims based on police power are somehow, but not always satisfactorily, resolved. This lack of satisfaction stems, at least in part, from the fact that the action-belief dichotomy, as stated by Chief Justice Waite, is not always capable of identifying those practices which justify State interference. Hence, the formal application of the dichotomy could be used as a convenient smokescreen behind which religious practices could be subjected to the regulatory power of the State.

The American Courts, however, were also aware of the fact that the action-belief dichotomy could be used to threaten the free exercise of religion. They responded by extending the protective umbrella of

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[26] *Supra* n. 10 at 166-167.

[27] *Id.* 164.

[28] J. S. Mill, *On Liberty*, London, J. M. Dent and Sons Ltd., 1962 at 75.

[29] I. Berlin, *Two Concepts of Liberty*, London, Clarendon Press, 1958 at 9.

[30] M. R. Konvitz, *Religious Liberty and Conscience*, New York, The Viking Press, 1968 at viii.

'religion' to cover beliefs which, although not tied to any institutionalised religion, nor even to acceptance of the existence of a God, are nevertheless sincere and meaningful beliefs in relation to a "Supreme Being" which occupies, for the claimant, a place parallel to that filled by the God of those whose religious beliefs are more orthodox.[31] Another response frequently resorted to by the American courts has resulted in the judicial development of the 'compelling interest' test.[32] This test, which is used to qualify the action-belief dichotomy, requires that for the law of the State to override action inspired by religious conviction the State must have a compelling interest in the objectives of the law which would be frustrated by exempting an individual complainant from its operation. I do not propose, due to the limitations placed upon the length of this article, to discuss how the development of the 'compelling interest' test facilitated the protection of religious freedom. It suffices for the present purposes of this article, to note that a study of the 'compelling interest' test reveals that the American courts, using the language of Chief Justice Burger in the 1972 case of *Wisconsin* v. *Yoder* "[b]y preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses . . . have been able to chart a course that preserved the autonomy and freedom of religious bodies."[33] *Yoder* is also responsible for the demise of the action-belief dichotomy. The demise of the dichotomy, and the role played by *Yoder*, is the subject of section three of this article, which follows a consideration of the application of the dichotomy in Australian courts.

2. The action-belief dichotomy in Australian courts

The extensive American literature and jurisprudence on the action-belief dichotomy and on its potential use as a means to subject religiously motivated action to the regulatory power of the State, have influenced Australian jurisprudence. The Australian jurisprudence which involves an interpretation of section 116 of the Constitution, is substantially less extensive than the relevant American jurisprudence; the extent of the impact cannot be gauged by the number or volume of cases which discuss or apply the action-belief dichotomy. Rather, the impact on Australian jurisprudence is to be found in the inclination of Australian courts to describe the dichotomy as a self-evident principle, the validity of which is beyond doubt.

As seen before, section 116 reads in part that the "Commonwealth shall not make any law for establishing any religion . . . or for prohibiting

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[31] *Welsh* v. *United States* [1969] 398 U.S. 333; *United States* v. *Seeger* [1965] 380 U.S. 163.

[32] See, for example, *Sherbert* v. *Verner* [1963] 374 U.S. 398; *Braunfeld* v. *Brown* [1961] 366 U.S. 599; *West Virginia State Bd. of Education* v. *Barnette* [1943] 319 U.S. 624; *People* v. *Woody* [1964] 394 P.2d 813; *Shapiro* v. *Dorin* [1950] 99 N.Y.S.2d 830.

[33] *Wisconsin* v. *Yoder* [1972] 406 U.S. 205 at 221.

the free exercise of any religion."[34] Section 116 has been a relatively insignificant provision of the Australian Constitution because, by virtue of its specific language, it applies only to Commonwealth legislative power. This well-known limitation was reinforced in 1984 by the South Australian Full Supreme Court in *Grace Bible Church* v. *Reedman.*[35] The appellant in that case appealed against a conviction for running an unregistered private school in violation of section 72f of the *Education Act*, 1972 (S.A.). He argued that the wide discretion granted to the relevant registration board, even though not used to interfere with or to diminish religious freedom, is incompatible with section 116 of the Constitution. The court pointed out that section 116 has no application to South Australian legislation and further decided that there is no inviolable right to religious freedom under the common law. It would appear, however, that section 116 applies to the Territories, because the Commonwealth Parliament, when exercising its section 122 Territories power is acting as the normal Commonwealth Parliament under the one Constitution.[36] Further, since 'religion' is not listed in section 51 of the Constitution as an enumerated specific head of Commonwealth power, the Commonwealth could not constitutionally regulate 'religion'. But the restraint is effective if Commonwealth legislation which is based on a specific head of power involves a breach of the prohibition expressed in section 116.

Section 116, in specifically referring to the Commonwealth, operates as a fetter upon the exercise of legislative power. It is an issue of considerable interest whether the section has operation in relation to executive acts of the administration. Barwick C.J., speaking about the establishment of religion clause of section 116, said in *Attorney-General (Vict.) ex rel. Black* v. *Commonwealth*[37] that even though section 116 is directed at legislative action, administrative action that comes "within the ambit of the authority conferred by the statute, and does amount to the establishment of a religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending section 116."[38] Although this statement applied to the establishment of religion, there is no compelling reason why his remarks should not equally apply to 'freedom of religion'. Thus Jackson J. in *Minister for Immigration and Ethnic Affairs* v. *Lebanese Moslem Association*[39] recently suggested that "the true situation is that if an enactment permitted executive action under it which amount to a prohibition upon the free

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[34] For a general discussion of s. 116, consult M. Hogan, "Separation of Church and State: Section 116 of the Australian Constitution" (1981) 53 *The Australian Quarterly* 214-228; C. L. Pannam, "Travelling Section 116 with a U.S.-Road Map" (1963) 4 *M.U.L.R.* 41-90; F. D. Cumbrae-Stewart, "Section 116 of the Constitution" (1946) 20 *A.L.J.* 207-212.

[35] [1984] 36 S.A.S.R. 376; see G. de Q. Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 *A.L.J.* 276-284.

[36] *Lamshed* v. *Lake* [1958] 99 C.L.R. 132 at 143.

[37] [1981] 146 C.L.R. 559.

[38] *Id.* 581.

[39] [1987] 71 A.L.R. 578.

exercise of any religion, the enactment to the extent that it permitted such action . . . would be invalid."[40] The legislation must, however, permit or authorise such administrative behaviour in order to satisfy the purposive content of the expression 'for prohibiting'. Jackson went on to say that "if executive action in conflict with the content of section 116 is authorised by statute, the statute to the extent to which it authorises that action may be treated as being in conflict with section 116 and invalid."[41] In this case, the Court held that the decision of the Immigration Department to deport a Moslem church leader was neither 'intended' or 'designed' to prohibit the free exercise of religion by the members of the church. There is also authority in favour of the proposition that the word *for* in section 116 does not only refer to 'intention' or 'design' but also 'purpose' or 'effect' or 'result'.[42] The authority implies that the purpose of a law can be gathered from the 'effect' or the 'result' which the law achieves, thereby obliterating the distinction between intended and unintended results.

In *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth*,[43] the Witnesses relied upon section 116 of the Constitution to challenge the validity of the National Security (Subversive Associations) Regulations. These regulations, among other things, prohibited the advocacy of doctrines which were prejudicial to the prosecution of the Second World War in which the Commonwealth was then engaged and provided for dissolution of associations that propagated such doctrines. Latham C.J., although admitting that section 116 protects action as well as beliefs, decided that the free exercise of religion does not allow individuals to break the law of the country. In reaching his decision, the Chief Justice relied heavily on American decisions, which legitimated the application of the action-belief dichotomy for the purpose of regulating action that is inimical to social policy. He held that section 116 did not accord immunity to the religiously grounded action of the Jehovah's Witnesses. The judgment of Latham C.J., then, makes it clear that 'religious freedom' cannot be relied upon in order to exempt a person from compliance with the ordinary civil and criminal law. Although the Chief Justice expressed misgivings about the validity of the action-belief dichotomy, he decided that "[t]here is, therefore, full legal justification for adopting in Australia an interpretation of section 116 which . . . leaves it to the court to determine whether a particular law is an undue infringement of religious freedom".[44] The limits of the protection offered by section 116 were succintly stated by Starke J.:

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[40] *Id.* 584.

[41] *Ibid.*

[42] *Supra* n. 37 at 579.

[43] [1943] 67 C.L.R. 116.

[44] *Id.* 131.

> The liberty and freedom predicated in s. 116 of the Constitution is liberty and freedom in a community organized under the constitution. The constitutional provision does not protect unsocial actions or actions subversive of the community itself. Consequently the liberty and freedom of religion guaranteed and protected by the Constitution is subject to limitations which it is the function and the duty of the courts of law to expound. And those limitations are such as are reasonably necessary for the protection of the community and in the interests of social order.[45]

The Jehovah's Witnesses case has been preceded and followed by other cases which applied the action-belief dichotomy. For example, the dichotomy was dealt with in the early case of *Krygger* v. *Williams*.[46] This case concerned a conscientious objector who refused military service on religious grounds. The High Court decided that, whilst the law cannot reach beliefs, it can control the actions of people that are in conflict with civic and social duties. Griffiths C.J., dismissing Krygger's appeal, relied on the action-belief dichotomy when he said that "a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116."[47] Equally, section 116, as the following cases indicate "does not prevent a court exercising jurisdiction under Commonwealth legislation (e.g. family law legislation) from adjudicating on the conduct of parties based on religious beliefs and practices, when this is necessary for the effective exercise of its jurisdictions."[48] By way of illustration, the case of *Mauger* v. *Mauger*[49] may be considered. *Mauger* involved ancillary proceedings for the custody of three children of a marriage dissolved in the same proceedings. The majority of the Supreme Court of Queensland, in upholding the trial court judge's decision that custody should be awarded to the mother on the ground that the religious practices of the father were likely to be "harmful to the children and harmful to the community" and "also contrary to public policy,"[50] implicitly supported the action-belief dichotomy. The conclusion of the court that the religious practices of the appellant were a "sinister and destructive influence"[51] on him and that he would fanatically indoctrinate the children with them if given access, could only be justified on the ground that his actions were socially undesirable. Similarly, in *Evers* v. *Evers*,[52] the Supreme Court of New South Wales specifically endorsed the action-belief dichotomy as a

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[45] *Id.* 155.

[46] [1912] 15 C.L.R. 366.

[47] *Id.* 369.

[48] R. D. Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4 ed. 1986) at 368.

[49] [1966] 10 F.L.R. 285.

[50] *Id.* 286.

[51] *Id.* 291.

[52] [1972] 19 F.L.R. 296.

convenient means to subject undesirable actions to the regulatory power of the State. Carmichael J. considered the question whether a Jehovah's Witness should be denied custody of his child who, consequently, might become a Jehovah's Witness. Although the judge was unable to find evidence, sufficiently strong enough to convince him that "a Jehovah's Witness, by the practice of his religion, tends to destroy our social order",[53] his apparent approval of the dichotomy is worthy of quotation:

> It remains to add that the freedom which is protected is not an absolute freedom. If it were, anarchy might soon prevail. The limitations are those, so often defined by the United States Supreme Court when dealing with the First Amendment Freedoms of the United States Constitution, and which for us were defined by the High Court in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth.* They are "such as are reasonably necessary for the protection of the community and in the interests of social order." . . . I believe the very basis of our social order is the family unit, being a man and a woman, who in union procreate and nurture their children until those children become self-supporting. That religion which by its practice renders asunder the family unit can be said to be so contrary to our social order that its proliferation is to be prevented for the protection of the community itself.[54]

3. The demise of the action-belief dichotomy in the United States

The position that one's religious freedom does not inhibit the competence of the state to regulate action, rather than mere belief and opinion, was overhauled in 1972 in *Wisconsin* v. *Yoder.*[55] The Supreme Court upheld the reversal of the convictions of defendants of the Amish faith for refusal to send their 14-15 year old children to school beyond the eighth grade. The compulsory education law of Wisconsin required children to attend school until they were 16 years old. The Amish, whose lifestyle has recently been popularised in the movie *Witness*, do not object to a compulsory elementary education through the first eight grades, but oppose every form of State education beyond the eighth grade because it would threaten their way of life and violate their religious beliefs. The Supreme Court decided that the compulsory education law requiring children to attend a school up to the age of 16 could not be justified constitutionally. The State of Wisconsin argued in the still sanctified language of Chief Justice Waite that, despite the absolute freedom from state control of religious beliefs, actions even though religiously grounded, are not so protected.[56] The State was also able to cite comparatively

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[53] *Id.* 303.

[54] *Id.* 302-303.

[55] [1972] 406 U.S. 205.

[56] *State* v. *Yoder* [1971] 182 N.W.2d 539 at 546.

late decisions in support of its argument.[57] The Supreme Court recognised that religiously grounded 'actions' are often subject to state legislation aimed at maintaining and promoting the health, safety and welfare of its citizens. Nevertheless, Chief Justice Burger also decided that religion-directed 'conduct' is not always outside the protection of the freedom of religion guarantee of the American Constitution:

> But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.[58]

Thus, the fact that the convictions were for actions was not decisive. Chief Justice Burger effectively discredited the action-belief dichotomy when he stated that "in this context belief and action cannot be neatly confined in logic-tight compartments"[59] as is suggested by the *Reynolds* case. Moreover, the mere fact that a school attendance law did not discriminate against religion in general or against a particular religion, or that its objectives were legitimate, secular, and that it was neutral on its face, did not mean that it might not offend the Religion Clause if it unduly burdens the free exercise of religion.

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.[60]

"Where fundamental claims of religious freedom are at stake," even the argument, that the State interests behind the school attendance law were compelling was not strong enough to override these claims. Whether these claims were compelling enough depended not only on the importance of the State's objectives but on whether those objectives could not be substantially attained if the Amish were exempted from them. Since the Court opined that such exemption would not defeat those objectives, the convictions of the Amish defendants were quashed.

I submit that the protection accorded to the action involved in this case, namely the refusal of the Amish defendants to obey Wisconsin's compulsory school attendance law, is extremely relevant to a better understanding of contemporary religion-directed challenges to legal ordering.

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[57] See, for example, *State* v. *Garber* [1966] 419 P.2d 896; *State* v. *Hershberger* [1955] 144 N.E.2d 693; *Commonwealth* v. *Beiler* [1951] 79 A.2d 134.

[58] *Supra* n. 33 at 220.

[59] *Ibid.*

[60] *Supra* n. 33 at 221.

On this point, the *Yoder* decision is found at the opposite extreme from Chief Justice Waite's unequivocal statement in *Reynolds* that laws "while they cannot interfere with mere religious belief and opinions, they may with practices."[61] The importance of *Yoder* lies in Chief Justice Burger's decision that "there are areas of conduct . . . beyond the power of the State to control."[62] One might be forgiven for thinking that as a consequence of this decision, the action-belief dichotomy is relegated to the dustbin of history. It is, I think, an unwarranted conclusion for reasons which I will now provide.

Chief Justice Burger emphasised in *Yoder* that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief,"[63] thereby suggesting that philosophical and personal as opposed to religious beliefs may not be so protected. The Chief Justice then correctly pointed out that "a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question".[64] Thus, the Court recognised the intricate problems associated with any attempt to distinguish religion and philosophical and personal beliefs. Nevertheless, the Court concluded that, subject to our ability to make such a distinction, as to beliefs not qualifying as religious, "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[65] Hence, if the claims of the Amish defendants had been based only on philosophical and personal rather than religious rejection of contemporary secular values, like Thoreau's rejection at Walden Pont of the social values of his times, these claims would have to yield to the exigencies of ordered liberty. The Amish claims, however, were based on "deep religious conviction, shared by an organized group, and intimately related to daily living."[66] Moreover, this religion for them was not simply or even mainly expressed in beliefs and opinion, but controlled their entire way of life. The Amish religion required adherence to a continuing life style. And it was this religious life style which sought protection as an exercise of religion, from invasion by the law compelling attendance of children at school beyond eighth grade up to the age of 16. By requiring the Amish to expose their children to other (and to them alien) values at this crucial adolescent stage, the compulsory school attendance law compelled them under threat of severe penalties "to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[67] Following this consideration of the impact of compulsory formal education on the Amish, the Court was satisfied that such education "after the eighth grade would

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[61] *Supra* n. 10 at 166.

[62] *Supra* n. 33 at 220.

[63] *Id.* 215.

[64] *Ibid.*

[65] *Id.* 215-216.

[66] *Id.* 216.

[67] *Id.* 218.

gravely endanger if not destroy the free exercise of respondents' religious beliefs."[68]

The Supreme Court's contrast between the religious nature of the Amish claims and claims that are merely philosophical and personal rather than religious leads to a clarification of thought. Merely philosophical and personal views remain subject to the laws of society, which preclude allowing every person to make his own standards on matters of conduct in which society as a whole has important interests, whereas religious claims may successfully resist State interference. Subject to the validity of my understanding and interpretation of the *Yoder* case, *Yoder* represents a reversal, as to claims protected by the Religion Clauses of Chief Justice Waite's bland assertion that those clauses do not forbid government interference with "actions . . . in violation of social duties or subversive of good order."[69]

The approach by the Supreme Court is not without difficulties. For example, a distinction between religious and philosophical claims presupposes that it is possible to define satisfactorily the concept of religion. If the Court really wanted to convey the idea that religious claims need not yield to the concept of ordered liberty, thereby establishing a lawful resistance to the law, the issue of what constitutes religion is unavoidable. This important issue raises formidable challenges which I do not propose to discuss in detail in this article. But some of the flavour will be conveyed in the next section which deals with a second reason as to why the action-belief dichotomy has lost much of its usefulness in modern society. This second reason concerns the conditions which must be met in order to apply the dichotomy effectively to religiously grounded action.

4. Conceptual difficulties concerning the action-belief dichotomy

As indicated before, the action-belief dichotomy has been applied by the American courts for many decades since *Reynolds*. In *Reynolds*, the Supreme Court emphasised that the practice of polygamy was unacceptable to the majority of Americans and was incompatible with the entrenched values of most people. In the second half of the last century, most Americans (as well as Australians, I think) practiced what I would like to call 'traditional' Christian religions, the values of which were accepted by most citizens. These traditional religions presupposed and involved an unquestioned belief in the superior value of monogamy. Under

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[68] *Id.* 219. It could be argued that the result in *Yoder* violates the no-establishment clause of the First Amendment according to which "Congress shall make no law respecting an establishment of religion." The argument could be based on the consideration that the Amish are exempted from penalties which are imposed on other parents who fail to send their children to a school. Conversely, it could be argued that the Amish' free exercise of religion becomes real *only if* they are exempted from Wisconsin's compulsory school attendance law. But if other groups that are similarly situated are not exempted as well, then the Amish' exemption from the compulsory school law could be characterised as preferential treatment which violates the no-establishment clause.

[69] *Supra* n. 10 at 164.

these circumstances it became understandable that the exotic religious practice of polygamy, which was disapproved of by most people, was outlawed through the formal application of the action-belief dichotomy. Through this formal technique, actions, which are repugnant to the established and entrenched religious behaviour of the majority of people, could easily be subjected to the regulatory power of the State. Indeed, the action-belief dichotomy has the potential to strike down any form of behaviour that the State finds undesirable. However, even though the dichotomy has the potential to strike down indiscriminately all kinds of unwanted religious behaviour, it cannot be anticipated that this would actually happen since there is no need to strike down dominant religious practices which are strongly approved of by most people. In a nearly homogeneous society, then, the likelihood that the application of the dichotomy, as a means to proscribe unwanted religiously grounded practices, would undermine the cohesiveness of society, is negligible. In fact, the dichotomy may well have been used to maintain cohesiveness!

Today, the United States and Australia are often described as pluralistic societies in which religious cultures and subcultures, from the most traditional to the most extravagant, burgeon. It can be argued reasonably that the proliferation of (what their proponents claim are) religions, is due, at least in part, to the adoption of a number of international and national documents which proclaim that every person has a right "to have or to adopt a religion or belief of his choice" without coercion of any kind, and to manifest that "religion or belief in worship, observance, practice and teaching", whether individually or in community with others and whether in public or in private.[70] From a formal point of view, the dichotomy could still be applied in a pluralistic society, but because of the great number of different religions and religious cultures, its application would almost necessarily result in the need to exercise discretion in the sense that the paramount social values would be selected on the basis of preference rather than on their acceptance by a majority. For, when dominant values break down, there is no obvious criterion anymore to decide what actions are exotic or extravagant and thus a rational criterion for deciding to what kind of actions the formal dichotomy technique should be applied is not available.

As argued before, the dichotomy seemed to work very well in the past because it was known what actions were extravagant in the light of the paramount social values. The courts then, wittingly or unwittingly, applied an external definition of religion in the sense that what was considered to be religion was drawn from social values existing in society, being *external* to the beliefs under scrutiny. In my opinion, the observable change is precisely that today people tend to describe religion as something individual and thus apply an *internal* definition to the concept. The cases

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[70] Article 18(1) of the International Covenant on Civil and Political Rights.

dealing with conscientious objector status, both in the United States and Australia, clearly demonstrate that religion is increasingly seen as an 'individual' rather than as a collective exercise. As the definition of 'religion' has become more internal, the problems involved in deciding cases dealing with religion and conscience will, more and more, traverse similar grounds.

The action-belief dichotomy is difficult to apply if the concept of 'religion' is interpreted liberally so as to embrace any set of practices and ideas which one believes will lead to liberation or fulfilment of one's being. The difficulty was acknowledged by Latham C.J. in *Jehovah's Witnesses*, when he said that "[i]t would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world."[71] For example, 'religion' could be interpreted as embracing any set of ideas which are oriented towards utopian or higher ideals. In this respect it would appear to apply as much to an idealistic advocate of a drug culture as it would to belief in an after-life. A liberal definition of religion could also result in, or lead to, the elevation of 'feminism' to the status of a religion. But a liberal and wide definition of 'religion' is open to the objection that it is operationally meaningless since it is incapable of being used to recognise different kinds of beliefs. Moreover, the application of the action-belief dichotomy requires the identification of the aggregate of those religious practices which enjoy majority support. This identification, in turn, acts as a barometer which enables a determination to be made about the undesirability of certain religious practices. A liberal (as opposed to a narrow) definition of religion, in greatly extending the range of practices which could be described as 'religion', would frustrate any attempts to discover a consensus on the desirability of certain religious practices. Hence, the application of the dichotomy would be rendered impossible. At the other end, a narrow definition is open to the objection that it discriminates among religions or against non-religion and could be seen as violating the establishment clause of section 116 according to which the "Commonwealth shall not make any law for establishing any religion." In addition, it is fair to say that religious beliefs are not always regarded by their adherents as 'static' or 'unchangeable'. The increased acceptance among people that 'religious' beliefs are not necessarily held for life, whilst enhancing a person's adaptability and flexibility to deal with the problems of the modern world, promotes the pluralistic nature of our society, thereby inhibiting the application of the action-belief dichotomy. Thus, the more liberal an interpretation of the concept 'religion', the more likely it will be that the action-belief dichotomy is incapable of determining the extent to which governments can regulate religious practices.

It is not surprising that the Australian High Court, when faced with the issue of determining whether a particular set of beliefs constitutes

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[71] *Supra* n. 43 at 123.

religion, has highlighted the difficulties which are invariably associated with any attempt to define the term. Latham C.J. argued in the *Jehovah's Witnesses* case that, in determining what is religion, the current application of the word must necessarily be taken into account. In *Church of the New Faith* v. *Commissioner for Pay-Roll Tax (Vic.)*,[72] the High Court was asked to determine whether the tenets of the Church of Scientology constitutes religion for the purposes of section 116. An affirmative answer would have made the church eligible to apply for tax-exempt status. Although "an excess of verbiage was devoted to the extrapolation of the tests or criteria of a religion",[73] confusion remained. For example, Mason C.J. and Brennan J. argued that "for the purposes of the law, the criteria of religion are twofold; first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief."[74] This opinion is interesting because it suggests that belief which does not require action in accordance with these beliefs might not be sufficient to constitute a religion. Also, the definition is narrow because it seems to exclude the tenets of a religion which does not ascribe to the existence of a supernatural Thing or Being, for example 'humanism'. Wilson J. and Deane J. admitted that it is not possible to come up with a satisfactory definition or test of religion; they submitted that a set of beliefs which do not relate to things supernatural, is not likely to be recognised as a religion.[75] In this context, it could be asked whether courts have a right to examine whether a set of beliefs constitutes a religion. Indeed, a set of beliefs may be regarded by its adherents as constituting a religion, even though they may not come within the criteria applied by the courts. But the argument that courts should not have the right to determine whether a set of beliefs constitutes religion, is open to the objection that any belief, regardless of its content, would qualify as *de facto* religion. This last point, of course, is nothing else but a restatement of the point made earlier in this article, namely that a wide definition of 'religion' is operationally meaningless, because it is incapable of distinguishing between different kinds of belief.

The central theme, developed in this section, is that the action-belief dichotomy has lost much of its erstwhile usefulness because of our inability to select paramount social values in a pluralistic society. Nevertheless, it is surprising in view of the demise of the dichotomy in the United States, that the action-belief dichotomy still flourishes in Australia. Indeed, the dichotomy is applied to favour minority values which are in accord with the views (and values) of some of the present policy makers and trend setters. The recent judgment of the New South Wales Equal Opportunity Tribunal discussed earlier, is a poignant, but not an

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[72] [1983] 57 *A.L.J.R.* 785.

[73] "The Law and the Definition of Religion" (1984) 58 *A.L.J.* 366.

[74] *Supra* n. 72 at 789.

[75] *Id.* 807.

isolated, example of this trend. The legislature of New South Wales, in prohibiting discrimination on the ground of marital status decided that such discriminatory 'action' was not acceptable in our society. It is stated in the judgment that one's marital status is "irrelevant in a society, based on a philosophy of equality of opportunity between all persons."[76] If it were possible to demonstrate compellingly that the majority of Australians are in favour of (or at least indifferent to) discrimination on the ground of marital status (for example, in relation to letting premises to an unmarried couple), then such legislation would involve the imposition of the will of the minority upon the majority. Of course, the very sensitivity of this issue involved has made the systematic collection of ordinary statistics understandably difficult. And in any event, one could also argue that in a democratic society, citizens cannot possibly expect that their values should prevail in all cases. These considerations, however, despite their obvious plausibility, are irrelevant in this case. The irrelevance stems from the fact that the legislature made it possible in section 56 of the Act for individuals to be exempted from the application of the legislation if such exemption is "necessary to avoid injury to the religious susceptibilities of the adherents of that religion." The Tribunal, however, decided that, in the circumstances of this case, an exemption would represent an imposition of religious beliefs on secular society. Thus, the Tribunal, without actually referring to the action-belief dichotomy, applied the dichotomy in order to favour the right to be free from discrimination on the ground of marital status over the right to exercise one's religion (and, as the owners of the unit might say, their right to enjoy and dispose of their property as they see fit). Even if the Tribunal's judgment were correct from a legal point of view, it would still have the effect of entrenching one right while degrading another.

The theoretical basis of the Tribunal's decision, as indicated before, is unsatisfactory despite its legal plausibility. This dissatisfaction stems from the fact that freedom of religion, as Mason C.J. said "is of the essence of a free society."[77] Why is freedom from discrimination on the ground of marital status given precedence at the expense of freedom of religion? The Tribunal does not address this vital issue and, in fact, avoided any consideration of this issue when it proceeded to apply the now discredited action-belief dichotomy. If the Tribunal believed that freedom from discrimination is somehow more important than freedom of religion, it should have elevated the right to be free from discrimination to the status of an overriding 'principle' and offer this principle as a

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[76] *Supra* n. 1. Similarly, in a case before the South Australian Sex Discrimination Board, an obstetrician and gynaecologist said that, on religious grounds, she would not be able to care for "pregnant single women, separated or widowed women, and women who were living in de facto relationships." The Board, in refusing her application for an exemption from the Sex Discrimination Act, 1975 implicitly applied the action-belief dichotomy to favour the right of prospective patients to be free from discrimination on the ground of sex or marital status in preference to the right to religious freedom (see *Discrimination and Religious Conviction* (New South Wales Anti-Discrimination Board 1984) at 450-451.

[77] *Church of the New Faith* v. *Commissioner for Pay-Roll Tax (Vic.)* [1983] 57 A.L.J.R. 785 at 787.

basis for its decision. Whilst such elevation would, of course, not have involved an accommodation between two competing and conflicting rights, it would have avoided the need to apply the action-belief dichotomy. The application of the dichotomy does not require a detailed analysis of the State's interest in freedom from discrimination. Therefore, it is safe to speculate that, as in the United States, a stricter test might emerge because the action-belief dichotomy has the danger of subjecting one's conscience to the regulatory power of the State. The emergence of such a test in Australian jurisprudence is desirable because it would involve a rational balancing of conflicting rights.

A major conceptual problem, inevitably associated with the application of the action-belief dichotomy, challenges our ability to make the dichotomy in the first place. This problem, identified in the *Martin* and *Yoder* cases, exposes the artificial nature of the dichotomy. Indeed, it may be argued that the dichotomy is artificial in the sense that empirically, a court cannot find the refusal of an Amish defendant to send his children to school (*i.e.* action) unreasonable without finding that the religious beliefs on which the action is based (*i.e.* belief) are unreasonable. Thus, the claim is made that the action cannot be separated from the belief, and that if the action is forbidden, the belief itself is eroded. The outcome of *Yoder* was, of course, reinforced and preceded by repeated statements by scholars who argued that the right to religious freedom cannot be split into 'belief' and 'action'. For example, H. A. Freeman argued in 1958 that every "great religion is not merely a matter of belief; it is a way of life; it is action" and that one of the "most scathing rebukes in religion is reserved for hypocrites who believe but fail to so act."[78] Thus, religious 'belief' and religious 'action' cannot clearly be dissected with scalpel-like language; rather they are stages of the one and indivisible reality: action is articulated belief. The validity of this point is implicitly recognised by Chief Justice Burger in *Yoder* when he said that "belief and action cannot be neatly confined in logic-tight compartments."[79] Thus, as a neat distinction between action and belief cannot be made, the dichotomy has lost much of its usefulness. This objection would also, in my opinion, form a formidable argument against the uncritical acceptance by the New South Wales Equal Opportunity Tribunal that a religiously grounded refusal to let premises to an unmarried couple amounts to an imposition of religious beliefs on secular society. The Tribunal avoided the very issue centrally in question: whether the religious belief is genuinely intact when the action is regulated by the authorities. The courts should ask, however, to what extent the concept 'belief' overlaps with the concept 'action', and what the consequences are for 'beliefs' when 'actions' are penalised.

If the action-belief dichotomy is to be taken seriously as a means to determine whether, and if so, to what extent the State can lawfully

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[78] H. A. Freeman, "A Remonstrance for Conscience" (1958) 106 *Pa. L. Rev.* 806 at 826.

[79] *Supra* n. 33 at 220; *Supra* n. 43 at 124.

interfere with religiously grounded action, the formal application of the dichotomy is redundant. In what sense redundant? As observed before, the dichotomy has been interpreted by the courts as meaning that governments are deprived of all legislative power over mere belief but are left free to reach actions which are in violation of social duties or subversive of good order. If that is what 'action-belief' means, then it could be argued reasonably that the 'belief' component, at least in an international context, is already covered by Article 19(1) of the International Covenant on Civil and Political Rights according to which "[e]veryone shall have the right to hold opinions without interference." The action-belief dichotomy would then give effect to the freedom of religion guarantee by way of the freedom of opinion guarantee and does thus not give the religion guarantee enough of an independent operation in its own right. At the very minimum, the freedom of opinion guarantee of Article 19(1) must allow freedom of belief and this would include therefore freedom of religious belief which is merely one kind of belief. Thus, if one considers the action-belief dichotomy as a formal technique, then the freedom of religion guarantee is redundant since the belief protection is already included in the freedom of opinion guarantee. Subject to the validity of this argument, Article 19(1) of the Covenant protects two freedoms, namely freedom of opinion and freedom of religion. My point is that whenever a court has to decide a question as to the scope of the protection provided by the religion guarantee, the court could answer it in a way that depends on the meaning that the court gives to Article 19(1) of the Covenant.

If one considers the manifold conceptual problems associated with the dichotomy, it is amazing that, at times, theories are developed which aim at resurrecting the action-belief dichotomy. According to one such theory, the dichotomy could be used whenever the law impinges *indirectly* on the free exercise of religion. But a *direct* burden on the free exercise of religion would, still according to this theory, make the application of the dichotomy inappropriate. This theory, although its logic is appealing, does not enable us to discover the limits to the regulatory power of the State. The problems, which are associated with this theory could be clarified by a brief (and therefore, uncomprehensive) comparison of two American cases, namely *Sherbert* v. *Verner*[80] and *Reynolds*, which was discussed in section one of this article. Mrs. Sherbert, a member of the Seventh-Day Adventist Church was discharged by her employer because she refused to work on Saturdays, because Saturday was the sabbath day of her religion. She applied for unemployment benefits; her application was rejected because she refused to work on Saturdays, even though the work which she was offered was otherwise suitable. Mrs. Sherbert was confronted with the following dilemma: the choice between either following the tenets of her religion which would result in forfeiture of unemployment benefits,

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[80] [1963] 374 U.S. 398. See J. M. Clark, "Guidelines for the Free Exercise Clause" (1969) 83 *Harvard L. Rev.* 327.

or violate her religious beliefs and engage in work on Saturdays. It is important to realise that Mrs. Sherbert was not prevented from acting on her belief; her 'action' only resulted in the loss of economic benefits which she would otherwise have enjoyed. *Sherbert* thus involves the question whether people may suffer economic loss because of their religious beliefs. As seen before, *Reynolds* involved the constitutional validity of a law which prevented Mormons from practising polygamy. In *Reynolds*, the anti-polygamy law directly interfered with the practices of the Mormon religion.

The theory, outlined above, suggests that laws which place indirect burdens on religion through the application of the dichotomy are acceptable whereas laws which place a direct burden on the free exercise of religion are reprehensible. The decision in these two cases, however, is incompatible with this theory and therefore challenges its validity. In *Sherbert*, the Supreme Court decided that a person may not suffer economic loss because of his religious beliefs and therefore held in favour of the applicant. Thus, in *Sherbert*, an indirect burden was held to violate religious freedom whereas a *direct* burden was held to be compatible with the religious freedom of the Mormons in *Reynolds*.

5. Conclusion

Although the action-belief dichotomy, from a formal point of view, can be applied in such a way as to obviate the need to consider the dominant religious values, the dichotomy only seems to yield acceptable results if the judges and the wider community tacitly agree on the importance of these values. For example, the true reason for the decision in *Reynolds* was the repugnance of polygamy by the dominant religious as well as social values of the American society at that time, even though the result was expressed in action-belief terms.

In a sense, then, the action-belief dichotomy is simply a category of meaningless reference because the principle by which the courts are purporting to decide cases is in fact incapable of being the rational basis upon which the decision is grounded. The decision is often based on other unarticulated grounds. As Clifford Pannam has correctly pointed out, the action-belief dichotomy "that has been evolved in the American courts can thus be seen as a title for an answer rather than a solution to a problem."[81] The author thereby implies that the action-belief dichotomy has been used by the courts simply as a convenient label or heading upon which to base their decisions. The theory which underpins the application of the action-belief dichotomy is burdened not only by the inability of the courts to separate action from belief, but further, its application has been rendered practically impossible by the very nature of the pluralistic society in which we live.

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[81] C. L. Pannam, "Travelling Section 116 with a U.S.-Road Map" (1963) 4 *M.U.L.R.* 41 at 70.