A Brief Rejoinder to Movsesian on 'The New Thoreaus'

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In a recent article titled 'The New Thoreaus',[1] Professor Mark Movsesian (co-director of the Center for Law and Religion at St John's University) argued for a 'sliding scale' standard when it comes to the 'spiritual but not religious' ('SBNR') and religious freedom. As the very concept of 'religion' has a communal element, Movsesian argues, the further a claimant's beliefs stray from organised religion, the less those beliefs should be protected by constitutional guarantees of free exercise.[2] According to Movsesian:

> The closer one can tie one's beliefs and practices to those of an established religious community, the more one's claims qualify as religious for legal purposes. Conversely, the farther one gets from a religious community, the more idiosyncratic one's spiritual path, the less plausible is the claim that one is exercising a religion.[3]

In contrast, in my book *Fortune-telling, Spirituality, and the Law*,[4] I argued at length that individual, idiosyncratic spiritual beliefs should be afforded the same respect that courts give traditional, mainstream religious beliefs. The core principles of respect for individual conscience, state neutrality towards diverse understandings of faith, and equal citizenship under the law militate, in my view, towards treating new, diffuse, non-hierarchical, and 'a la carte' spiritual beliefs the same way that the law treats longstanding, institutionalised, hierarchical, and 'prix fixe' religious beliefs.[5] Instead of conceiving of 'religion' as a bounded category, law needs to understand it as a social construction that is constantly evolving, and thus legal protections for conscience need to evolve as well.

In the present rejoinder, I would like to discuss these competing positions — Movsesian's and my own — in the context of 'The New Thoreaus'. Movsesian provides five reasons for treating SBNRs differently than claimants who are conventionally religious, and I will briefly address each in turn.

First, he argues that the legal definition of 'religion' should be constructed through an analogical approach by asking 'how closely a phenomenon resembles something everyone would concede to be a religion',[6] and this in turn privileges beliefs formed within the 'existence of a community of believers'.[7] However, even within the peculiar confines of American

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[1] Mark L Movsesian, 'The New Thoreaus' (2022) 54 *Loyola University Chicago Law Journal* 539.
[2] See ibid 539.
[3] Ibid 575.
[4] Jeremy Patrick, *Faith or Fraud: Fortune-telling, Spirituality and the Law* (University of British Columbia Press, 2020) ('*Fortune-telling, Spirituality and the Law*'). See also Jeremy Patrick, 'A La Carte Spirituality and the Future of Freedom of Religion' in Paul T Babie et al, (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar, 2020).
[5] See Patrick, *Fortune-telling, Spirituality and the Law* (n 4) ch 7.
[6] Movsesian (n 1) 569.
[7] Ibid 570.

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constitutional law, there are few questions that have generated as vast a scholarly literature as how to define 'religion': there are functional approaches (asking what role the beliefs play in the believer's life), content-based approaches (asking whether the beliefs contain particular criteria), originalist approaches (asking what the term meant to the framers), and many, many, more. Movsesian's seizing on an analogical approach to understanding religion, with only a couple of paragraphs of justification,[8] simply begs the question of which of these ways of defining 'religion' is the best — if such a task can even be rationally approached at all.

Second, he argues that 'a focus on community jibes with an important goal of religious freedom in the liberal state: promoting private associations that encourage cooperative projects and check state power'.[9] I agree that the existence of private 'communities of virtue' serve as an important bulwark against the totalising effects of the modern nation-state and universalist political ideologies. But this is a valuable *side-effect* of protecting religious freedoms, not the purpose of the protection in and of itself.[10] Freedom of association is the right more closely associated with this value, which is why we have unions, volunteer civic organisations, political parties, private clubs, and many other non-state groups serving this principle. Nor are there any grounds to think that extending legal conceptions of freedom of religion to SBNRs would undermine the valuable role that churches and other religious groups play in this context.

Movsesian's third and fourth points are related: he argues that idiosyncratic beliefs are more likely to be insincere and fraudulent than those associated with a community of believers[11] and that they are less likely to 'be based on deep convictions rather than ephemeral notions'.[12] I believe this fear is speculative and overblown. There's little evidence that courts have been bamboozled by legions of lying SBNRs to gain special privileges. Nor have we ever treated recent converts to a faith as somehow less 'serious' or worthy of protection than long-standing members of the faith. Indeed, the concern is telling of an ingrained prejudice that some mainstream believers have towards SBNRs: that SBNR beliefs are convenient, selfish, and lightly held, whereas 'real' religious beliefs must involve rigour, privation, and sacrifice. Courts are always tasked with assessing the sincerity of claimants who assert religious freedom claims, and 'intensity of belief' is indeed one of many factors they can take into account.[13] But just as it does not make sense for the courts to automatically privilege the Catholic who turns up to Mass every week over the one who only attends on Easter and Christmas,[14] it is not appropriate to automatically privilege the conventionally religious over the 'spiritual but not religious'.

A fifth and final argument is a variation of the classic 'floodgates' argument: 'making the definition of religion turn at least in part on the existence of a religious community can reduce

[8] Ibid 569–70.
[9] Ibid 570.
[10] My position is that freedom of religion should be protected for dual reasons, one of them principled and one of them pragmatic. The principled reason is that our most fundamental beliefs about the nature of reality and the purpose(s) of life (if there are any) should be treated as sacrosanct by the government, and actions made in accordance with those beliefs should be protected unless and until they substantially interfere with the rights of others. The pragmatic reason is that history provides ample evidence of the positive harms that arise when governments take a stand on religious positions and attempt to coerce belief.
[11] See Movsesian (n 1) 571.
[12] Ibid 572.
[13] See Patrick, *Fortune-telling, Spirituality and the Law* (n 4) 48 (listing factors).
[14] The former might do so out of a sense of social obligation and have little belief, while the latter attends rarely but believes deeply.

the potential for administrative disorder'.[15] If anyone can believe anything and gain legal protections for it, the argument goes, anarchy could result! As with all floodgates' arguments in this vein, the fears are speculative and premature. After all, if anarchy does start to manifest, the courts can always change or tighten the standards of analysis they apply. But more to the point, an exemption for an individual who is 'spiritual but not religious' is an exemption for *one person* — whereas an exemption for a member of a mainstream religious faith is potentially (and logically) an exemption for *all members of that faith*! Surely the latter will create more 'administrative disorder' and undermine the efficacy of a law far more than the former.

Concerns over extending religious freedom to SBNRs tend to be broad, diffuse, and abstract. In contrast, the harms suffered by SBNRs in having their claims rejected by the courts are individual, particular, and concrete. It is not always easy for courts, lawyers, and legal scholars to rise above generalisations and stereotypes about SBNRs, but if religious freedom is to be offered generously in the spirit of tolerance, rather than grudgingly in the spirit of suspicion, the effort must be made.

[15] Movsesian (n 1) 572.