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**No Respect:
Brian Leiter on Religion**

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Is there any moral justification for the way American law singles out of religion for special protection? What is the appropriate moral attitude to take toward religion?

In two recent papers,¹ Brian Leiter argues that there is no good reason for law to single out religion for special treatment, and that religion is not an apt candidate for respect in the "thick" sense of being an object of favorable appraisal. Special treatment would be appropriate only if there were some "moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action."² Favorable appraisal would be called for "[o]nly if there were a *positive* correlation between beliefs that were *culpably without epistemic warrant* and valuable outcomes."³

Both arguments depend on a radically impoverished conception of what religion is and what it does.

In this paper, I will explain what Leiter leaves out, and offer an hypothesis about why. I will also engage with some related reflections by Simon Blackburn and Timothy Macklem, both of whom influence, in different ways, Leiter's analysis.

I. Toleration and Conscience

In his earlier article, Leiter frames the problem as whether religion should be singled out for "special

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. I am doubly grateful to Brian Leiter, for his essays that have challenged me to clarify my position, and for generous comments on two earlier drafts. Thanks also to Marcia Lehr for research assistance, and to Al Alschuler, Kenworthy Bilz, Valerie Quinn, and Regina Schwartz for helpful conversation.

¹ *Foundations of Religious Liberty: Toleration or Respect?*, draft of Sept. 15, 2009, available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474324; *Why Tolerate Religion?*, 25 Const. Comm. 1 (2008).

² *Why Tolerate Religion?*, at 25.

³ *Foundations*, at 27.

consideration as opposed to other matters of conscience."⁴ The moral basis for religious toleration, he claims, must be "that religious beliefs are often matters of *conscience*, and thus would fall within the scope of any argument, like the Rawlsian one, for protecting liberty of conscience."⁵ Religion is of moral interest only because and insofar as it is a species of conscience.⁶ The puzzle, then, is why "[f]eatures that *all and only* religious beliefs have"⁷ should provide reasons for singling them out for special protection.

This way of setting up the problem generates his working definition of religion:

- (1) Religious belief issues in *categorical* demands on action, that is, demands that must be satisfied, no matter

⁴ *Why Tolerate Religion?*, at 7.

⁵ *Id.* at 12; for other formulations that emphasize conscience, see also *id.* at 20, 24 n.58, 25, 26.

⁶ There are two passages in *Why Tolerate Religion?* in which he indicates that he has a different set of concerns. He states that he will "confine my attention to the principled reasons why the state should refrain from a distribution of benefits and burdens that has as its intended consequence the disfavoring of religion or of particular religions." *Why Tolerate Religion?*, at 5. This has nothing to do with conscience. The state can burden conscience without intending to. That is the issue in the religious accommodation cases. If your central concern is burdens on conscience, why should it matter what the state intends? There are also many ways of distributing burdens that disfavor some religions without encumbering anyone's conscience, such as religious displays or the official endorsement of religious propositions. See my *Religious Establishment and Autonomy*, 25 *Const. Comm.* 291 (2008).

This statement of his purpose is puzzling for other reasons: if his worry is unjustified singling out of religion for special favor, then he should be equally worried about a distribution of benefits and burdens that has as its intended consequence the *favoring* of religion or of particular religions. (The Court has gone back and forth about whether such singling out of religion is constitutionally required, but it has been steadfast in holding that it is permissible.)

The second passage says that questions about legal accommodation will be addressed in a later paper, and notes with approval the idea (argued by Martha Nussbaum) "that 'equal respect' considerations are likely to demand substantial religious accommodation, given the ease with which 'neutrality' considerations will favor the *de facto* dominant religious culture." *Why Tolerate Religion?* at 27 n.60. Here the concern is majoritarian bias: for example, in a society suspicious of recreational drugs but in which there is a large Catholic population, drug use favored by the dominant religion, such as the consumption of wine, will not be criminalized, while minority drugs such as peyote are likely to be less well treated. This argument, to work, needs further specification. The fact that you're on the losing side of a political debate does not state an equality claim in any other context. Why is losing a religiously inflected debate different, unless religion is something distinctively important?

Because he never returns to these themes, but instead focuses fairly consistently on conscience, I will ignore these passages hereafter.

⁷ *Why Tolerate Religion?*, at 12.

what an individual's antecedent desires and no matter what incentives or disincentives the world offers up; and, (2) Religious beliefs do not answer ultimately (or at the limit) to evidence and reasons, as evidence and reasons are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on "faith," are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common-sense and in science.⁸

Part (1) of the definition isolates those aspects of religion that generate conscientious objections to laws. Part (2) then tries to delimit the pertinent quality that makes a subset of the demands described in part (1) religious.

As a semantic matter, this is a curious definition of religion. The emphasis on conscience focuses excessively on duty, which is only a small part of religious motivation. Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation, and guilt, curiosity about religious truth, a desire to feel connected to God, or happy religious enthusiasm, rather than a sense of duty prescribed by sacred texts or fear of divine punishment.⁹ The most recent Congressional pronouncement on religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000, declares that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."¹⁰

But perhaps Leiter is uninterested in the semantic meaning. He cites with approval Timothy Macklem's objection to reliance on the semantic meaning of religion as a moral category.¹¹ Macklem observes that the question of what "religion" conventionally means is a semantic one, but the question of what beliefs are entitled to special treatment is a moral one, and it requires a moral rather than a semantic answer. So Leiter may

⁸ *Why Tolerate Religion?*, at 15.

⁹ See Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 25-26; William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 321 (1991); Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 27.

¹⁰ 42 U.S.C. § 2000cc-5(7)(A). Some of the state statutes mandating religious accommodation have similar language. See Ariz. Rev. Stat. Ann. §41-1493 (West 2004); Fla. Stat. Ann. §761.02 (West Supp. 2004); Idaho Code §73-401 (Michie Supp. 2004); 775 Ill. Comp. Stat. Ann. 35/5 (West 2001 & Supp. 2004); Mo. Ann. Stat. §§1.302 (West Supp. 2004); Tex. Civ. Prac. & Rem. Code Ann. §§110.001 (West Supp. 2004). But see 71 Pa. Cons. Stat. Ann. §§2403 (West Supp. 2004) (adopting a more restrictive definition of a substantial burden).

¹¹ *Why Tolerate Religion?*, at 13 n.30, citing TIMOTHY MACKLEM, INDEPENDENCE OF MIND 120-26 (2006).

be untroubled by the oddness of his definition.¹² The definition of "religion" just discussed is meant to capture what is singled out for "the special treatment it [religion] is accorded in, for example, American and Canadian constitutional law."¹³

If American law is what he's interested in, however, conscience is a misleading place to begin. Some special treatment of religion can easily fit under the rubric of conscience; some much less so. It is most relevant if one is considering religious accommodation, such as the exemption of Quakers from the military draft, and there is some evidence that this is what Leiter has in mind.¹⁴ This was once constitutionally required. It is no longer, but religion still gets special protection not accorded to other beliefs,¹⁵ and the state is allowed to single out religion for accommodation.

Even accommodation is not just about conscience, however. Many religious claims that are uncontroversially weighty, and

¹² He does, however, work hard to show that his definition fits the semantic meaning, conceding that it would be problematic if it included Marxism or morality as such.

¹³ *Why Tolerate Religion?*, at 2. It is not clear how important the special treatment of religion in constitutional law is to his argument; in the preceding sentence he refers to the problem as whether "we ought to accord special legal and moral treatment to religious practices," *id.*, as if this were the same thing. In fact, American law does pervasively give special legal and moral treatment to religious practices, although much of this is not constitutionally compelled. For example, federal law (with respect to federal statutes) and many state statutes require that burdens on religion be lifted unless they are the least restrictive means for achieving a compelling state interest. For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 211-12 & nn.368-73 (2004).

¹⁴ The one specific example of special treatment of religion that he discusses is the case of Sikhs who feel obligated to carry ceremonial knives, even in school. *Why Tolerate Religion?*, at 11-12, 26 n.59. He is right that the Canadian court that took up this issue may have been too deferential to the Sikhs, but this is a distraction from the issue that should really concern him: the fact that the Sikhs had a right to bring a claim to court in the first place, a claim that would have been summarily dismissed had it been nonreligious.

¹⁵ The privileged status of religion is somewhat diminished after *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that there is no right to religious exemptions from laws of general applicability. Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was the suppression of a religious practice. *Id.* at 542, 547. The result would have been different if the law had targeted a club that did exactly what the Santeria did, not as part of a religious ritual, but because its members thought that killing animals was fun.

which nearly everyone would want to accommodate - which American law does accommodate - are not conscientious. A paradigm case for religious exemption, for most proponents of such exemptions, is the ritual use of peyote by the Native American Church, which the Supreme Court declined to protect in *Employment Division v. Smith*,¹⁶ but which received legislative accommodation shortly thereafter.¹⁷ Yet neither of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.¹⁸

Conscience is also underinclusive because it focuses on those cases in which the agent feels impelled by a duty that she is capable of performing without depending on external contingencies. "Conscience" is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in *City of Boerne v. Flores*.¹⁹ Conscientious resistance to the law was not an option. The reconstruction could not be done without the help of architects and contractors, whom the city could prevent from doing the work merely by withholding the necessary permits. The problem is even more pronounced in *Lyng v. Northwest Indian Cemetery Protective Association*,²⁰ a widely criticized decision²¹ in which Native Americans objected to a proposed logging road that would pass through an ancient worship site sacred to their tribe. The logging road, the Court conceded, would "virtually destroy" the ability of the Native Americans "to practice their religion."²² Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden, because the logging road had "no tendency to coerce individuals into acting contrary to their

¹⁶ 494 U.S. 872 (1990). This result was reversed, with respect to federal law, by statute, which the Court has willingly followed. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

¹⁷ Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 243 (2007).

¹⁸ See Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L. REV. 953, 959-65, 978-85 (1998).

¹⁹ 521 U.S. 507 (1997).

²⁰ 485 U.S. 439 (1988).

²¹ See, e.g., Eisgruber and Sager, *Religious Freedom and the Constitution*, at 91-92, 242-44; 1 Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* 192-200 (2006); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 125-26 (1992).

²² 485 U.S. at 451.

religious beliefs."²³ Once more, this result was quickly reversed by Congress.²⁴

In fact, as I have argued at greater length elsewhere, American law singles out religion by treating it as a good thing.²⁵ The fact that conduct is religious counts as a reason to accommodate it, conscientious or not. Defer for now the question whether this treatment is defensible. It is in fact what American law does.²⁶

Leiter is not alone. Many distinguished legal theorists and philosophers have been drawn to the idea that it is conscience, rather than religion, that is entitled to special protection, and the Supreme Court has sometimes embraced the same position.²⁷ Perhaps Leiter is simply following their lead. Their reasons for emphasizing conscience are not helpful to Leiter, however.

Leiter's own attraction to conscience is undertheorized. Why might conscience ever be entitled to any special consideration? We would need to know that before we could decide whether *religious* conscience is something special.²⁸

²³ Id. at 450.

²⁴ Eisgruber and Sager, *Religious Freedom and the Constitution*, at 243-44.

²⁵ *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831 (2009); *The Troublesome Religious Roots of Religious Neutrality*, 84 Notre Dame L. Rev. 865 (2009); *Is It Fair to Give Religion Special Treatment?*, 2006 U. of Ill. L. Rev. 571; *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI-KENT L. REV. 729 (2003); and *Secular Purpose*, 88 VA. L. REV. 87 (2002).

²⁶ For this reason, it is a fundamental mistake to describe this singling out as "toleration," in Leiter's sense of believing a group's practices to be wrong or undesirable and yet putting up with them. *Why Tolerate Religion?*, at 2. American law does not treat religion, even minority religion, as wrong or undesirable. Toleration in this sense is not the central idea of the contemporary American regime or even a component of it, merely an historical precursor.

²⁷ See, e.g., Gutmann, *Identity in Democracy*, at 151-91; William Galston, *The Practice of Liberal Pluralism* 45-71 (2005); Kwame Anthony Appiah, *The Ethics of Identity* 98 (2005); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 65-71 (1996); Rogers M. Smith, "Equal Treatment? A Liberal Separationist View," in *Equal Treatment of Religion in a Pluralistic Society* 190-94 (Steven V. Monsma & J. Christopher Soper, eds., 1998); Ira C. Lupu, *The Trouble With Accommodation*, 60 Geo. Wash. L. Rev. 743 (1992); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 Case W. Res. L. Rev. 917 (1993); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience"*, 1996 BYU L. Rev. 645. The idea was endorsed by the Court in *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970). In footnote 78 *infra*, I will show that even there, the Court's view of religion is not confined to conscience.

²⁸ Colonial and founding-era sources are completely unhelpful and potentially misleading on this question, because at that time "conscience" was taken to refer only to religious matters, and the possibility of nonreligious

Perhaps the will to be moral is valuable, and it warrants some deference even if we think the agent mistaken about what morality requires.²⁹ Perhaps people's life-defining commitments, moral or otherwise, should be accommodated where reasonably possible.³⁰ There are many other accounts of the appropriate role of conscience in the law's treatment of persons.³¹ Leiter never tells us which of these is his. He assumes that conscience is morally significant, but he never explains why.

Much of the attractiveness of conscience for contemporary theorists arises from its perceived capacity to resolve a tension between free exercise and establishment principles. The Court has declared that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."³² The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."³³ But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."³⁴ This generates a puzzle. It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have

conscience was not even considered. See William Lee Miller, *The First Liberty: Religion and the American Republic* 122-23 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1494 (1990). Modern readers are often tempted to read these sources anachronistically.

²⁹ See, e.g., Amy Gutmann, *Identity in Democracy* 151-91 (2003).

³⁰ See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* 280-81 (1979). Leiter comes close to this view in one footnote, where he concedes that many religious believers "in the industrialized nations" have beliefs that are "rarely categorical in their commands." Whatever reasons there are for tolerating these believers, they are unlikely to be "peculiar to this 'softer' form of religious belief and practice, which is harder to distinguish from other exercises of conscience that figure in people's lives." *Why Tolerate Religion?*, at 24 n.58. Here "conscience" no longer refers to categorical commands; it seems to be broadened to anything that someone might want to do. Some writers understand "conscience" this broadly; see, e.g., David Richards, *Toleration and the Constitution* 140-44 (1986); but there is no evidence outside this footnote that this is Leiter's view.

³¹ For a survey, see my *Conscience, Volitional Necessity, and Religious Exemptions*, *Legal Theory* (forthcoming 2010). There are also multiple conceptions of conscience in moral reasoning. See Thomas E. Hill, Jr., *Four Conceptions of Conscience*, in *Nomos XL: Integrity and Conscience* (Ian Shapiro & Robert Adams, eds., 1998).

³² *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)

³³ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

³⁴ *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981).

therefore regarded the First Amendment as in tension with itself.³⁵

"Conscience" promises a way out of the dilemma by describing the basis of free exercise in a way that specifies only the internal psychology of the person exempted, without endorsing any claims about religious truth. Thus it is possible to give religion special treatment without favoring religion as such. This has great attractions for the commentators, but the Supreme Court has never rejected the protection of religion as such, and has rather declared that it is permissible for the legislature to single out religion for special treatment. So the focus on conscience is appropriate if Leiter is trying to criticize the commentators who have focused on it as a reason to protect religion, such as Michael Sandel³⁶ or Michael McConnell,³⁷ but it is not appropriate if he is trying to criticize American law.

Once Leiter has assumed that only conscience is the object of religious accommodation, then the problem immediately arises why only religious exercises of conscience are singled out for special protection. Unsurprisingly, he concludes that there is no justification for special tolerance for religion thus understood. "Singling out religion for toleration is tantamount to thinking we ought to encourage precisely this conjunction of categorical fervor based on epistemic indifference."³⁸

The conclusion is tautological, because the initial decision to focus on conscience takes its appeal precisely from the fact that it does *not* single out religion. In short, the whole argument of "Why Tolerate Religion?" appears to be based on a mistake about its object.

There is still an argument to be had about whether it is *fair* to single out religion for special treatment. In that inquiry, "conscience" turns out not to be a terribly important category.³⁹

II. Appraisal Respect and Semantic Meaning

In his newer paper, Leiter takes up a different question: is a person's religion an appropriate object of what Stephen Darwall calls "Appraisal Respect," which "consists in an attitude of positive appraisal," such as "esteem or a high

³⁵ "[T]he two Clauses . . . often exert conflicting pressures." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

³⁶ Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 65-71 (1996).

³⁷ Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DePaul L. Rev.* 1, 30 (2000).

³⁸ *Why Tolerate Religion?*, at 26.

³⁹ See Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 *U. of Ill. L. Rev.* 571.

regard for someone"?⁴⁰ Leiter concludes that such respect is not warranted.

Leiter is writing, in part, in reaction to his University of Chicago colleague Martha Nussbaum's claim that tolerance is "too grudging and weak" an attitude toward religion, and we need "special respect for the faculty in human beings in which they search for life's ultimate meaning." This respect is related to the thought that "everyone has inside something infinitely precious, something that demands respect from us all, and something in regard to which we are all basically equal."⁴¹ To this, Leiter responds that what Nussbaum has described is not an appropriate object of respect: "Humans are roughly equal in many faculties, but it seems odd to think that deficient exercises of those faculties should elicit a moral attitude beyond that of tolerance."⁴²

Leiter's impatience is understandable. Nussbaum's exposition of her position - which, I will argue here, is right - is summary and underdefended. (This may be intentional, since she may fear that any deeper specification will lose part of her intended audience; she aims at an overlapping consensus, and the price of this is some vagueness.⁴³) She does not explain why respect for a faculty must mean respect for any particular way that the faculty is exercised. Respect for religion depends on something more than respect for capabilities as such. So Nussbaum ends up treating religion as something special, though that is not her official position.⁴⁴ In that position, Nussbaum is not really that far from Leiter, since her claim is that the power to find meaning, not that of finding religious meaning, is what is entitled to respect.

How do we know that religion is "deficient"? The answer is tied to Leiter's narrow definition of "religious belief." In the second paper, he transplants the definition of "religion" nearly verbatim from the first.⁴⁵ Why?

⁴⁰ Leiter, *Foundations*, at 4, quoting Stephen Darwall, *Two Kinds of Respect*, 88 *Ethics* 36, 38-39 (1977).

⁴¹ Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 24, 19, 52 (2008), quoted in Leiter, *Foundations*, at 9-10.

⁴² Leiter, *Foundations*, at 10.

⁴³ On the peculiar kind of overlapping consensus that Nussbaum proposes - very different from that envisioned by Rawls - see my *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 *Rev. Pol.* 459, 480-81 (2009).

⁴⁴ See Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 *U. of Ill. L. Rev.* 571, 597-601.

⁴⁵ In the first sentence, he has inserted the qualifier "some": "Religious belief issues in some *categorical* demands" Leiter, *Foundations*, at 11-12. The definitions are otherwise identical.

When the issue was legal accommodation, our hypothesis, above, is that Leiter understandably followed the lead of some commentators who thought that what was being accommodated was conscience. In the context of determining Appraisal Respect, however, why does conscience have any role at all in the argument? At this point, whatever reason there may have been for defining religion narrowly has disappeared.⁴⁶ In particular, it is puzzling why religious practice is left out of account, and the definition focuses only on belief - and not all belief, but only belief that lacks epistemic warrant, and that generates categorical commands. On the other hand, since belief's lack of epistemic warrant is what most troubles Leiter, it is not clear why he persists in keeping categorical commands in his definition. Would not belief without epistemic warrant be culpable even if it issued in no commands at all? Sometimes⁴⁷ religion leads people to believe things that are manifestly wacky: the Creation Museum in Kentucky depicts a triceratops with a saddle.⁴⁸ It's pretty clear what Leiter thinks of that, but it isn't "religion" according to his definition.

He explains that he treats beliefs as central because "it is hard to see how mindless or habitual religious *practices* could claim whatever respect, thick or thin, is due matters of *conscience*."⁴⁹ Once again, conscience is inseparable from his understanding of religion; any religious practice that is not based on conscience is dismissed as "mindless or habitual." Religious action can be divided without remainder into the mandates of conscience and mindless habit. This is a weird way to map human action. When somebody writes a silly creationist tract, he is probably not required to do so by conscience, but his activity is hardly mindless. (He is vigorously using his

⁴⁶ Also, he sets the task of the paper as determining what moral attitude toward religion "makes the most sense given what religion is." Leiter, *Foundations*, at 1. This way of posing the problem makes no sense if he is referring to anything other than the semantic meaning.

⁴⁷ Actually, quite a lot of the time. Only 39% of Americans believe in the theory of evolution, smaller than the roughly 44% who think that God created humans within the last 10,000 years. This superstition divides on party lines, affecting 60% of Republicans and 38% of Democrats. See Frank Newport, *On Darwin's Birthday, Only 4 in 10 Believe in Evolution*, Gallup Poll, Feb. 11, 2009, available at <http://www.gallup.com/poll/114544/darwin-birthday-believe-evolution.aspx> (visited Sept. 30, 2009); Frank Newport, *Republicans, Democrats Differ on Creationism: Republicans much more likely than Democrats to believe humans created as-is 10,000 years ago*, Gallup Poll, June 20, 2008, available at <http://www.gallup.com/poll/108226/Republicans-Democrats-Differ-Creationism.aspx> (visited Sept. 30, 2009).

⁴⁸ For a photograph, see *Creation Museum*, Wikipedia, available at http://en.wikipedia.org/wiki/Creation_Museum (visited Oct. 1, 2009).

⁴⁹ Leiter, *Foundations*, at 12.

mind, just not very well.) Neither is a grieving mother's decision to place a religious marker on the grave of her child.

Practices, religious and otherwise, are often fraught with significance for the persons who perform them, even if the practices are not conscientiously compelled. Core religious practices often have nothing to do with conscience. One illustrative bit of data: When a survey asked Catholics why they attended Mass, the largest group, 37 percent, pointed to "the feeling of meditating and communicating with God," while only 20 percent referred to "the need to receive the Sacrament of Holy Communion," and only 6 percent said "the Church requires that I attend."⁵⁰ This experience-based religiosity is increasingly common in the United States across all religious denominations.⁵¹

I have been beating up on Leiter's definition of religion, but let's be fair: nobody's definition works very well.⁵² Leiter denounces the "lazy Wittgensteinian habit" of some scholars of "not even attempting an analysis of 'religion' on the grounds that it is a family resemblance concept."⁵³ In a footnote, he

⁵⁰ Joseph Gremillion & Jim Castelli, *The Emerging Parish: The Notre Dame Study of Catholic Life Since Vatican II* 132 (1987). For an argument that this feeling of connection is central to modern American Catholic practice, see Andrew Greeley, *The Catholic Imagination* (2001).

⁵¹ See Alan Wolfe, *The Transformation of American Religion: How We Actually Live Our Faith* (2003); Robert Wuthnow, *America and the Challenges of Religious Diversity* (2005).

⁵² Including mine. Leiter observes that a formulation I once proposed, "all belief systems that make ultimate claims about the meaning of human existence," is obviously overinclusive. *Why Tolerate Religion?*, at 13 n.30, citing Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 135 (2002). His criticism is accurate. My article incoherently both endorses the "family resemblance" idea, *id.* at 129, and attempts what looks like a definition (which, it should have been made clear, was really just a gesture in the direction of the family), *id.* at 135. I had not yet fully absorbed the Wittgensteinian point that I make in the text below.

⁵³ Leiter, *Foundations*, at 2. I don't know if he plans to number me among the guilty here (many of the footnotes in his SSRN draft still need to be filled in), but I confess. I have adopted and developed the family resemblance concept in a series of articles. See, most recently, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831, 1905-08 (2009). The laziness that Leiter deplores is epidemic. For example:

Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . . We must be content, then, in speaking of such subjects and with such premisses to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premisses of the same kind to reach conclusions that are no better. In the same spirit, therefore, should each type of statement be received; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is

cites with approval Bernard Suits's claim that even Wittgenstein's classic example, the word "game," actually is susceptible of precise definition. It is hard to tell what Leiter is trying to say here. Even if it were conceded that Wittgenstein is wrong about "game," it would not follow that every word is susceptible of precise definition, and that there are no cluster concepts. So the implication must be that, even if there are clusters, religion can be shown not to be one of them if we only think hard enough. And Leiter cashes this out with his own definition.

Whether any definition is satisfactory, as noted earlier, will depend on what it is for. If its aim is to capture a word's normal semantic meaning, by displaying the necessary and sufficient conditions for its use, then Leiter's definition is a failure, for the reasons already discussed. If it is a term of art, then its specialized purpose needs to be made clear. In *Why Tolerate Religion?*, as we have seen, he does use it as a term of art, though his reasons for doing so evidently rest on a mistake about American law. In *Foundations*, neither the semantic nor the specialized meaning suits his purpose. He sticks to his definition, but the object of his negative evaluation can only be a subset - an arbitrarily drawn subset - of religious activity.

The Wittgensteinian idea that religion is a cluster concept is related to Wittgenstein's idea that words are tools, and that "the meaning of a word is its use in the language."⁵⁴ Since a word may be used for any of a wide variety of purposes, far beyond the purpose for which it was originally devised, there is no reason to presume that there must be a neat and closed list of necessary and sufficient conditions for the appropriate use of a word, any more than there is a neat and closed list of necessary and sufficient conditions for the appropriate use of a knife or a rock.

Religion is a peculiarly bad candidate for an essence. As Jonathan Z. Smith has observed, the term "religion" denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal.⁵⁵ Arising thus out of a specific historical situation, and evolving in unpredictable ways

evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs. Aristotle, *Ethics* I.3, 1094b11-27 (W.D. Ross tr.).

⁵⁴ Ludwig Wittgenstein, *Philosophical Investigations* 20 (G.E.M. Anscombe trans., 3d ed. 1958).

⁵⁵ *Religion, Religions, Religious*, in *Critical Terms for Religious Studies* 269 (Mark C. Taylor ed. 1998).

thereafter, "religion" would be surprising if it had any essential denotation. And it covers such a huge range of human practices that it would be equally surprising if "religion" and "religious belief" were equivalents.

The conflation of religion and belief is likewise an artifact of a particular historical moment. During the Reformation, an immediate consequence of Luther's objections to Church authority was a growing, and eventually obsessive, focus on doctrinal disputes. Elaborate theological edifices such as Calvin's *Institutes of the Christian Religion* and the pronouncements of the Council of Trent brought about an understanding of religion that was based less on piety and ritual than on intellectual assent.⁵⁶ Religious persecution during the Reformation was based centrally on the victims' refusal to accept specified philosophical claims. This conception of religion is shared by modern atheists, who understand religion to consist essentially of dubious factual claims.⁵⁷ But however important propositions were to lived religious experience during the age of religious wars, it is not, as we have seen, central to what religion means to Americans today.⁵⁸ It's my impression rather that adherence to propositions is something of an embarrassment for many contemporary Americans, which they tolerate because of the benefits that religious practice provides.

Leiter observes that the singling out of religion has been justified by some writers (myself included) because it is good, for society or the believer or both. He dismisses this strategy, because it "begs the question of what religion is, and the answers these writers offer turn out to be over- and under-inclusive in rather obvious ways."⁵⁹ The answer to this objection is the Wittgensteinian one: there is no definition. We know it when we see it.

How unsatisfactory is this answer? It depends on how much doubt there is about the term's application. Leiter works hard to show that his definition does not include Marxism or morality more generally, but this is a worry only because the semantic meaning is not doubtful; everyone already knows that these are not religions. Foreign courts have done no better than American

⁵⁶ James Turner, *Without God, Without Creed: The Origins of Unbelief in America* 23-25 (1985).

⁵⁷ Indeed, as Turner shows, modern atheism was made possible by this conception of religion.

⁵⁸ Or to most people on most of the planet during most of human history. See Wilford Cantwell Smith, *The Meaning and End of Religion* (1963).

⁵⁹ *Why Tolerate Religion?*, at 13 n.30.

courts at devising a definition.⁶⁰ Even the Internal Revenue Service uses an analogical criterion.⁶¹ Yet the consequence is not ambiguity or confusion about what the law is singling out for special treatment. The list of reported cases that have had to determine a definition of "religion" is a remarkably short one.⁶²

Leiter's Procrustean strategy may still be useful as a way of isolating a specific problem, which is how to assess that precise subset of religious ideas that do fit within his definition. So let's stick to that. Leiter thinks "religious belief is a *culpable* form of false belief" in light of the "ordinary epistemic standards" that are followed "in common sense and the sciences."⁶³ Those standards, "the standards of evidence that have been vindicated a posteriori since the scientific revolution,"⁶⁴ are evidently all anyone needs to make his way in the world. Basing one's behavior on anything else is culpable.

This condemnation does not just extend to religious beliefs. It obviously would extend to nonreligious beliefs, such as Holocaust denial, that are based on a failure to adhere to the same epistemic standards. Just how far does it extend?

Pretty far. Far enough, in fact, that it is not clear that a decision that one has an obligation to act morally is not culpable in just the same way. It is far from clear that the existence of any particular moral obligation can be demonstrated using the ordinary epistemic standards that are followed in common sense and the sciences. Leiter recognizes this problem when he defends his definition. "For is not morality characterized both by categoricity of its commands and its insulation from reasons and evidence (as reasons and evidence are understood, e.g., in the sciences)?"⁶⁵ He does not want to

⁶⁰ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* 110-26 (2005); T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189 (2003).

⁶¹ See *Defining "Religious Organization" and "Church,"* 868 Tax Mgm't & Port. (BNA) III (2007).

⁶² See *Religion*, 36C Words and Phrases 153-57 (2002 & supp. 2008). The reference I rely on here, *Words and Phrases*, is a 132 volume set collecting brief annotations of cases from 1658 to the present. Each case discusses the contested definition of a word whose meaning determines rights, duties, obligations, and liabilities of the parties. See *Words and Phrases*, in *West's Encyclopedia of American Law* (2d ed. 2008). Some words have received an enormous amount of attention from the courts. Two examples, drawn at random from the first volume of this immense compilation, each exceed 100 pages: *Abandonment*, 1 Words and Phrases 37-147 (2007); *Abuse of Discretion*, id. at 323-462 and, in the 2008 supplement, 8-25.

⁶³ Leiter, *Foundations*, at 24-25.

⁶⁴ *Why Tolerate Religion?*, at 23.

⁶⁵ *Why Tolerate Religion?*, at 20.

drift too far away from the ordinary semantic meaning of religion, so he must show that his definition does not encompass all of morality.

He responds that the two leading philosophical schools of thought about the nature of morality agree that morality is not insulated from evidence in the way that religion is. Cognitivist realists think that moral judgments can be justified in the same way as any other judgments. For noncognitivist antirealists, the mental states expressed by moral judgments are "not truth-apt, i.e., are *insulated* from reasons and evidence," and this distinguishes them from religious judgments, which "do express beliefs and so, *in principle*, could be answerable to reasons and evidence, but are held to be insulated from them."⁶⁶

But this does not epistemically exculpate the moral behavior of most people, who are unfamiliar with this philosophical literature. They are not *relying* on the fact (if it is a fact) that the philosophers have established that moral judgments are ontologically and epistemologically distinguishable from religious judgments. The conclusions of contemporary philosophy are far more esoteric than those of contemporary science. If one is culpable for not being familiar with the former, than most of humanity is invincibly culpable, if that label is even coherent.⁶⁷ On a practical and phenomenological level, the basis for moral judgments is often hard to distinguish from the basis for religious judgments. In each case, people rely on some combination of testimony and intuition,⁶⁸ and even moral heroes may be deeply inarticulate about the basis of their intuitions.⁶⁹

But here we are once again speaking of conscience, and as noted earlier, religious people (and most nonreligious people as well) think that they live in a world that has moral

⁶⁶ *Why Tolerate Religion?* at 20-21; *Foundations*, at 18-19.

⁶⁷ I think it is not. The old theological idea of invincible ignorance referred to the problem of persons (such as pagans and infants) who are ignorant of the Christian message because they have never had any opportunity to hear it. Such people were not thereby made culpable for the same reason that "invincible culpability" makes no sense: ought implies can.

⁶⁸ See Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 San Diego L. Rev. 763 (1993).

⁶⁹ David Velleman observes that people who took terrifying risks in order to save Jews from the Holocaust "often disappointed postwar interviewers who asked about their reasoning and motives," because they often failed to invoke any moral concepts such as obligation or virtue. Instead they offered such unsatisfactory answers as, "I cannot give you any reasons. It was not a question of reasoning. Let's put it this way. There were people in need and we helped them." David Velleman, *How We Get Along* 155-56 (2009), quoting Samuel P. Oliner & Pearl M. Oliner, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* 216 (1988).

significance that reaches far beyond the very limited field of categorical commands.

III. What Good is Religion?

The relevant category is not categorical command, but what Charles Taylor calls "strong evaluation," a set of assessments that involve "discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged."⁷⁰ A person who did not make any such discriminations, a "simple weigher of alternatives,"⁷¹ would be a very strange sort of person; it is not clear whether there could be a person so lacking in depth.⁷²

For many, Taylor observes, strong evaluation is inseparable from religion: "their highest sense of the good has been developed in a profoundly religious context," and "is inconceivable without God."⁷³ Their understanding that the world makes sense, that they live significant, morally intelligible lives in a significant, morally intelligible world, is closely tied to their religious beliefs and practices.

The basic social function of religion, Peter Berger observed long ago, is one of a distinctive kind of legitimation: "Religion legitimates social institutions by bestowing upon them an ultimately valid ontological status, that is, by locating them within a sacred and cosmic frame of reference."⁷⁴ This entails a personal function for individuals as well: "the cosmization of the institutions permits the individual to have an ultimate sense of rightness, both cognitively and normatively, in the roles he is expected to play in society."⁷⁵ This way of putting matters sounds conservative, but the point applies equally to the roles of social critic, reformer, and revolutionary.

One may object that this is epistemically culpable: there is no basis for any confidence that anything in the world ultimately is validated by a transcendent frame of reference.

⁷⁰ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 4 (1989).

⁷¹ Charles Taylor, *What is Human Agency?*, in *Human Agency and Language: 1 Philosophical Papers* 23 (1985).

⁷² *Id.* at 28; *Sources* at 27. Even utilitarians who are officially committed to such simple weighing tend to be animated by motives of a loftier sort; they cannot account for their own existence. See *Sources* at 76-86, 322-45.

⁷³ Charles Taylor, *A Secular Age* 544 (2007).

⁷⁴ Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* 33 (Anchor ed. 1969).

⁷⁵ *Id.* at 37.

We just have to learn to live without any ultimate sense of rightness. But this is also a kind of faith: there is no basis for confidence in the *rejection* of a transcendent frame of reference, either. The old agnostic point, that a finite being cannot know an infinite one, cuts both ways. How can you *know* that there is no transcendent frame?⁷⁶ What epistemic warrant is there for that bold claim? It is possible to be a strong religious adherent while fully acknowledging one's lack of epistemic certainty.⁷⁷

What is really indispensable is hope.⁷⁸ There is no epistemic warrant to assert with confidence that the religious person's hope is groundless. If this is true - and the arguments for agnosticism are familiar - then the insistence upon the contrary is itself a culpably false belief.

This is part of what is wrong with Leiter's claim that "the (*de facto*) establishment of atheism or non-religiosity ought to

⁷⁶ I have always been fond of the following two-line joke:

Q. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. If I knew the truth, the whole truth, and nothing but the truth, I would be God.

⁷⁷ Many illustrations are available. One is the present Pope, Benedict XVI: [B]oth the believer and the unbeliever share, each in his own way, doubt *and* belief, if they do not hide from themselves and from the truth of their being. Neither can quite escape either doubt or belief; for the one, faith is present *against* doubt; for the other, *through* doubt and in the *form* of doubt. It is the basic pattern of man's destiny only to be allowed to find the finality of his existence in this unceasing rivalry between doubt and belief, temptation and certainty. Perhaps in precisely this way doubt, which saves both sides from being shut up in their own worlds, could become an avenue of communication. It prevents both from enjoying complete self-satisfaction; it opens up the believer to the doubter and the doubter to the believer; for one, it is his share in the fate of the unbeliever; for the other, the form in which belief remains nevertheless a challenge to him.

Joseph Cardinal Ratzinger, *Introduction to Christianity* 40-1 (rev. ed. 2004).

⁷⁸ The Supreme Court has quoted with approval Paul Tillich's description of God as "the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation." *United States v. Seeger*, 380 U.S. 163, 187 (1965), quoting Paul Tillich, *The Shaking of the Foundations* 57 (1948). That is already a more capacious idea than "conscience," even though *Seeger* is often cited for the proposition (supported by other passages in the opinion) that conscience is what the Court is protecting. A few pages later in the same essay, Tillich writes: "Perhaps you should call this depth hope, simply hope. For if you find hope in the ground of history, you are united with the great prophets who were able to look into the depth of their times, who tried to escape it, because they could not stand the horror of their visions, and who yet had the strength to look to an even deeper level and there to discover hope." Tillich at 59.

be an option for government."⁷⁹ Aside from the fact that such establishment would be bitterly divisive, the government has no basis for knowing that atheism is true.⁸⁰

We know that religion is not indispensable to intelligibility: many individuals, and even a few national cultures, function perfectly well without it. But the ability to do without religion is a late and peculiar historical formation. Modern humanism is itself shot through with quasi-religious longings and even rituals.⁸¹ For most people, liberation from religious belief would produce only anomie and despair.

Leiter shares, and seeks to clarify, Simon Blackburn's concern about "respect creep," an unfortunate cultural pathology in which the reasonable demand for minimal toleration gets transmuted into an unreasonable demand for deference and reverence.⁸² But Blackburn's discussion leaves open the question when reverence is appropriate. Blackburn himself positively admires religious artists such as Donne, Milton, and Bach, who "try to give voice to the great events and emotions of human life" in religious terms.⁸³ His essay is fascinating because it begins with a stance of suspicious hostility toward religion and slowly works its way toward a complex ambivalence, in which religion perhaps simply stands for "remembrances and pieties that it is human to have and that desperately need protection against the encroaching world of cost-benefit analysis and the surrendering of unbridled power to economic interest."⁸⁴ Leiter

⁷⁹ Leiter, *Foundations*, at 28.

⁸⁰ In *Why Tolerate Religion?*, at 13 n.30, Leiter offers, as evidence that my understanding of religion is overbroad, the fact that I include as an example of a religious view Nietzsche's claim that "[t]he total character of the world . . . is in all eternity chaos—in the sense not of a lack of necessity but of a lack of order, arrangement, form, beauty, wisdom, and whatever other names there are for our aesthetic anthropomorphisms." Friedrich Nietzsche, *The Gay Science* 168 (Walter Kaufmann trans., Vintage Books 1974) (1887), quoted in Koppelman, *Secular Purpose*, at 131. There is no doubt, however, that the teaching of Nietzsche's view as correct, in the public schools, would violate the ban on establishment of religion. Part of the reason is that there's no basis for confidence that Nietzsche is right. Another large part is that religion is regarded as a good thing which is likely to be damaged by deliberate government manipulation. See my *Corruption of Religion and the Establishment Clause*.

⁸¹ Charles Taylor, *A Secular Age* (2007); Regina Mara Schwartz, *Sacramental Poetics at the Dawn of Secularism: When God Left the World* (2008).

⁸² Simon Blackburn, *Religion and Respect*, in *Philosophers Without Gods: Meditations on Atheism and the Secular Life* 179 (Louise M. Anthony ed. 2007).

⁸³ *Id.* at 186.

⁸⁴ *Id.* at 193. Like Leiter, Blackburn deplores the tendency of the religious to believe dubious propositions of fact. Many modern theologians, he observes, try to rescue their position by rejecting such propositional claims as "onto-religion" and instead adopting an "expressive interpretation" in

agrees with Blackburn that religion can produce good outcomes, but Leiter is more transparently instrumentalist: religion is valuable only insofar as some religious people are led by their faith to do good things. The "remembrances and pieties" don't seem to have any intrinsic value for him.

It is not possible to offer a unitary account of what religion is good for. Like a knife or a rock, it is something that people find already existing in the world, which they then put to a huge variety of uses. "Religion" denotes a cluster of goods, including salvation (if you think you need to be saved), harmony with the transcendent origin of universal order (if it exists),⁸⁵ responding to the fundamentally imperfect character of human life (if it is imperfect),⁸⁶ courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps),⁸⁷ a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),⁸⁸ contact with that which is awesome and indescribable (if awe is something you feel),⁸⁹ and many others.⁹⁰ No general description of the good that religion seeks to promote can be satisfactory, politically or intellectually.⁹¹

which religion merely expresses an emotional stance toward the world. In order for this expressive stance to be psychologically sustainable, Blackburn objects, the ontological bit has to persist; without it the emotional part would lose its force. *Id.* at 185. He is probably right about this, but why presume that the amplification comes from *certainty* about the ontological part? Once more, hope may be enough to do the job.

⁸⁵ John M. Finnis, *Natural Law and Natural Rights* 89-90 (1980).

⁸⁶ Keith E. Yandell, *Philosophy of Religion: A Contemporary Introduction* 17-34 (1999).

⁸⁷ Paul Tillich, *The Courage to Be* (1952).

⁸⁸ Immanuel Kant, *Critique of Practical Reason* (1788; Cambridge: Cambridge University Press, 1997); *Religion Within the Limits of Reason Alone* (1794; New York: Harper, 1960).

⁸⁹ Rudolf Otto, *The Idea of the Holy* (2d ed. 1950).

⁹⁰ Here I am in agreement with McConnell, who argues that "[r]eligion is a special phenomenon, in part, because it plays such a wide variety of roles in human life," and elaborates the point with a large collection of heterogeneous illustrations. "[T]here is no other human phenomenon that combines all [the aspects of religion]; if there were such a concept, it would probably be viewed as a religion." McConnell, *The Problem of Singling Out Religion*, at 42.

⁹¹ Charles Taylor has stated the difficulties for any general theory of religion (and incidentally has shown the difficulty with Nussbaum's reduction of it to the search for meaning):

I doubt very much whether any such general theory can even be established. I mean a theory which can gather all the powerful *élans* and aspirations which humans have manifested in the spiritual realm, and relate them to some single set of underlying needs or aims or tendencies (whether it be the desire for meaning or something else). The phenomena are much too varied and baffling for that; and even if they were more tractable, we would have to stand at the end of history to be able to draw such conclusions.

The value of religion will sometimes be a fit occasion for ambivalence, in the same way that one is reasonably ambivalent about any human good that is sometimes abused by its possessor. It is good for people to be clever and resourceful, but it would have been better if Hitler had been less clever and resourceful than he was. Similarly, as Leiter observes, the devoutly religious include, on the one hand, those who opposed Naziism in Germany and apartheid in South Africa and the United States, but on the other, those who bomb abortion clinics and fly airplanes into buildings.⁹² It would be better if the latter's ultimate sense of rightness were replaced by vertiginous disorientation. But that does not mean that the sense of rightness is not a human good, a good for the person who possesses it.

Leiter relies in part on the work of Macklem, but he does not address Macklem's argument that sometimes, a complete set of reasons for action is unavailable, but action would nonetheless facilitate our well-being.⁹³ In such a situation, where commitment is rationally underdetermined, Macklem argues that "faith is valuable where the inability to make the commitments that faith makes possible would have a negative impact on well-being, both because the commitments in question are potentially valuable and because failure to make them would be harmful."⁹⁴ Macklem is right about this.

Macklem nonetheless worries: "The difficulty with faith, secular or religious, is that it often serves as a substitute for knowledge and reason in settings where these are not only available but constitute a sounder basis for action and belief."⁹⁵ He's right about this, too, as we saw in our earlier review of creationist piffle. Reading Leiter, however, one gets the impression that this is the only aspect of religion that he notices.

Macklem is correct that what interests us is not religion's semantic meaning, but its moral significance. Is there any reason to assign moral significance to the contents of the loose baggy sack of heterogenous phenomena that fit within the

Taylor, *A Secular Age*, at 679.

⁹² *Why Tolerate Religion?*, at 16; *Foundations*, at 12.

⁹³ Here he is some distance from Leiter. For Macklem, faith is believing something when reasons are unavailable. The idea that reasons might just be unavailable is never even considered by Leiter: faith is "believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it." Leiter, *Foundations*, at 14, emphasizes in original.

⁹⁴ Macklem, *Independence of Mind*, at 140. Macklem's view of religion is nonetheless condescending: he writes that "for some people the nature of life and the content of morality are unknowable on the basis of reason alone," *id.* at 139-40, implying that he is one of the smart ones who has the nature of life all figured out. Lucky him.

⁹⁵ *Id.* at 140.

semantic meaning of "religion"?⁹⁶ Is there any reason to treat the stuff in the sack as good? Macklem doubts it. The Wittgensteinian mess means that religion as such can't have moral significance. He proposes that courts undertake "a frank examination of the contribution that any doctrine held on the basis of faith, be it traditional or non-traditional, is capable of making to well-being."⁹⁷

There are two decisive objections to Macklem's proposal, one political and one moral. The political objection is that, in a pluralistic society, there are obvious dangers in giving judges the power to assign legal consequences to different religious beliefs based on the judges' own conceptions of well-being. Macklem's own confident withholding of protection from "cults" is not reassuring.⁹⁸ The moral objection is that it is arrogant to assess the entirety of another's lifeworld and confidently conclude that, taken as a whole, it is so silly that the person would be better off with a radical conversion. Perhaps we're entitled to do this with respect to people whose lives are manifestly wretched, such as homeless drug addicts, but we don't know most of our fellow citizens well enough to make such judgments with any degree of confidence. There are enough good things in the sack that there are sufficient reasons to pronounce the sack as such a container of good things, and to respect the other fellow's sack despite - or, perhaps, because - we aren't sure just what is in it.⁹⁹ So the decision to define

⁹⁶ Cf. Shel Silverstein, *What's In the Sack?*, in *Where the Sidewalk Ends* 111 (1974):

What's in the sack? What's in the sack?
Is it some mushrooms or is it the moon?
Is it love letters or downy goosefeathers?
Or maybe the world's most enormous balloon?
What's in the sack? That's all they ask me.
Could it be popcorn or marbles or books?
Is it two years' worth of your dirty laundry,
Or the biggest ol' meatball that's ever been cooked? . . .

⁹⁷ Macklem, *Independence of Mind*, at 142.

⁹⁸ *Id.*

⁹⁹ Macklem writes:

If a body of people claims that Jesus lives and that they depend upon faith in that fact for their sense of purpose in life, it is possible for us to recognize and respect that claim without either endorsing it or seeing any reason to endorse it, for faith in the Resurrection and its implications is one way of coming to terms with death, an issue that we can all recognize to be in some sense genuinely mysterious. But if a body of people claims that Elvis lives and that they depend upon faith in that fact in order to carry on in life we would be forced to conclude that they needed professional help, for belief that Elvis is still alive and eating cheeseburgers is not a way of coming to terms with death or any other mystery in life but is simply an unfortunate and damaging consequence of the cult of celebrity.

religion vaguely, relying on the fuzzy semantic meaning, itself rests on moral grounds.¹⁰⁰

So there is warrant for deeming the contents of the sack, the whole set of beliefs and practices that constitute "religion," to be worthy of Appraisal Respect. This, then, can justify the special treatment of religion by the law. As Leiter observes, although Appraisal Respect demands only esteem, not any particular action, it "can also result in moral demands on action, when the highly appraised features are ones with moral value or that one has a moral obligation to support or protect."¹⁰¹ In particular, governments are morally obligated "to protect and perhaps even promote those practices that ought

Id. at 145, footnote omitted. I agree that the claim about Elvis is as factually stupid as the triceratops with the saddle, but how can Macklem know that this is not a way of coming to terms with life's mysteries? I'd need to know a lot more about the role of Elvis in these people's lives before I could confidently conclude that nothing about their strange beliefs is worthy of respect. From the standpoint of science, the belief in the resurrection of Jesus is equally indefensible.

Beliefs serve two functions, which we may call epistemic and existential. They can provide accurate maps of the world; they can also help to cope with life's mysteries. These functions sometimes come into tension with one another. It's nice to be able to do both, but evidently that is not so easy for everyone. The creationists' epistemic folly is contemptible, but it is not pointless, and its effectiveness at performing the existential function may be an appropriate object of Appraisal Respect, in the same way I can admire your skill at opening a can with a screwdriver.

¹⁰⁰ Here it is not clear to me just how far I am from Nussbaum. She proposes a complex position, in which the reasons for accommodation are modified by institutional constraints, so that religion receives special treatment only because a broader accommodation for "the faculty in human beings with which they search for life's ultimate meaning" would not be administrable. Liberty of Conscience at 19. Conscience should be protected because it is valuable and vulnerable; it "needs a protected space around it within which people can pursue their search for life's meaning (or not pursue it, if they choose)." Id.; see also id. at 37. This does not single out religion. On the other hand, "fair or unfair," id. at 102, the text of the free exercise clause does single out religion. The best reason for this singling out is that nonreligious reasons for seeking accommodation "are more likely to be personal and individualistic, thus far more difficult to assess for sincerity and significance." Id. at 165. In short, things in the sack are more likely to be humanly important than things outside it. Nussbaum approves of the Court's extension, in *Seeger* and *Welsh*, of the definition of religion to include "forms of committed searching for meaning that had no group affiliation," id. at 171, but she acknowledges that this stretch perpetuates a different kind of unfairness, because it will "reward articulate people and penalize those, equally sincere, who cannot give a good account of themselves." Id. at 172. This unfairness is at least somewhat ameliorated by the singling out of religion, since the protection of religion as such is likely to protect some confused and inarticulate, but sincere, people. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

¹⁰¹ Leiter, *Foundations*, at 5.

to command Appraisal Respect.”¹⁰² If the contents of the sack deserve Appraisal Respect, then the government should protect and perhaps even promote them, too.

Leiter of course is having none of this. He appears to think that it’s easy to live in a morally intelligible universe, and that no one ever needs to go outside the resources of science and philosophy to do so. Those who reach for something transcendent are epistemically culpable. His confidence is strangely reminiscent of that of John Finnis, who has lately managed to convince himself that the truth of the specific claims of Christianity about the events of the Gospels are knowable by any reasonable person.¹⁰³ Neither of them can imagine how a world view can work for them while other people can live in such radically different pictures: the others must be, not only wrong, but demonstrably mistaken!

Life is in many ways perplexing and hard. Finding a language to describe our deepest commitments and hopes is especially hard. Philosophy may possibly have the resources to fill this need for a few people, but it’s a specialized taste.¹⁰⁴ Some people find a full and satisfying meaning of life in the goods of the immanent world,¹⁰⁵ but that is a specialized taste too.

So even when I find that religious people believe things that seem to me incredible, I remind myself that they are simply doing the best they can with the limited information that’s available to all of us, and that I’m not myself doing much better than they.¹⁰⁶ Intelligibility, and the courage we need to act well, is indeed a precious thing, and the fact that it exists at all is far more important than the strange variety of forms that it takes. So I have no trouble at all mustering appraisal respect for other people’s religious beliefs.

Leiter simply doesn’t see the predicament that most people are up against. If there happen to be any holes in the

¹⁰² Id. at 27.

¹⁰³ John Finnis, *Religion and State: Some Main Issues and Sources*, 51 Am. J. Juris. 107, 107-111, 114-16 (2006); see also id. at 111 (specifically criticizing Leiter’s conception of religion). He was once more cautious. See *Natural Law and Natural Rights*, supra.

¹⁰⁴ Even many philosophers who look down on religion are humbler than this. Hegel, for instance, no model of humility, thought that religion, despite its manifest imperfections, was the best way to make what is knowable via philosophy intelligible to ordinary people. He understood (with regret!) that not everyone can be a philosopher. For a clear exposition, see Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* 171-213 (2007).

¹⁰⁵ See, e.g., Blackburn, *Religion and Respect*, at 190-92.

¹⁰⁶ On the comparative weaknesses of theism and humanism, see also my *Naked Strong Evaluation*, 56 DISSENT 105 (Winter 2009) (review of Taylor, *A Secular Age*).

philosophical apparatus in which he finds such comfort, then he is up against it himself, though he doesn't know it. His position is blind to reality. It's hard to have much respect for that.