

## FOUNDATIONS OF RELIGIOUS LIBERTY: TOLERATION OR RESPECT?

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Most Western Constitutions, including the American, single out religious beliefs and practices for special kinds of legal solicitude and protection. In this essay, I want to ask a question about the *moral* foundations of such a legal practice. Should we think of what I will refer to generically as “the law of religious liberty”<sup>1</sup> as grounded in the moral attitude of *respect* for religion or on the moral attitude of *tolerance* of religion? My question will *not* be which of these moral ideals best explains the existing law of religious liberty in the United States, or elsewhere, though legal doctrine is a relevant data point for the inquiry. Instead, I want to ask

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\* John P. Wilson Professor of Law and Director of the Center for Law, Philosophy, and Human Values, University of Chicago. The paper owes its existence to a presentation by Martha Nussbaum at the Law and Philosophy Workshop at the University of Chicago Law School in fall 2008, and to a question posed on that occasion by Jim Staihar, our Law and Philosophy Fellow at the Law School during 2008-09. My thinking about the issue was also aided by Simon Blackburn’s presentation of his views at a different session of the Workshop. My thanks to them all, and to the students and discussants, for the stimulus of their ideas. The present version of the paper benefitted from comments by audiences at the MacMillan Center Initiative on Religion, Politics & Society at Yale University; at the Law & Philosophy Workshop at the University of Michigan, Ann Arbor; at the conference on “Respect, Global Justice, and Human Rights” at the University of Pavia in Italy; and at a session of the Society for Applied Philosophy at the Eastern Division meeting of the American Philosophical Association in New York. I should mention especially helpful suggestions or comments from Robert Audi, Emanuela Ceva, N.A.T. Coleman, Rainier Forst, Scott Hershovitz, Andrew Koppelman, and Peter Railton. Finally, I should acknowledge the influence of Nietzsche on my thinking about these issues in two respects: first, in emphasizing that the falsity of a belief does not decide the question of its value; and second, in impressing upon me that the deleterious effects of religion should not obscure its salutary ones (though Nietzsche had in mind different ones from those I emphasized).

<sup>1</sup> The capacious “law of religious liberty” will thus encompass special legal protections for religious practices, exemptions from generally applicable laws for some religious practices, and limitations on state endorsements or ‘establishments’ of religion and religious practices. The moral argument for anti-establishment provisions may, of course, differ from that in support of ‘free exercise’ provisions.

which of these moral attitudes makes the most sense given what religion is. Of course, our legal practices offer some evidence about “what makes the most sense” since they are, quite obviously, not detached from our moral attitudes.<sup>2</sup> But the law is but one data point among others, and if it were to turn out that aspects of existing legal doctrine in the U.S. should yield before the best account of the moral foundations of religious liberty that is a conclusion I am happy to endorse.

I begin by explicating the relevant moral attitudes of “respect” and “toleration.” With regard to the former, I start with a well-known treatment of the idea of “respect” in the Anglophone literature by the moral philosopher Stephen Darwall.<sup>3</sup> With respect to the latter concept, toleration, I shall draw on my own earlier discussion,<sup>4</sup> though now emphasizing the features of toleration that set it apart from one kind of respect. In deciding whether “respect” or “toleration” can plausibly serve as the moral foundation for the law of religious liberty we will need to say something about the nature of religion. American courts have dodged the question of what “religion” is for obvious political reasons, but too many scholars have also fallen back on the lazy Wittgensteinian habit of not even attempting an analysis of “religion” on the grounds

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<sup>2</sup> Laws are some evidence of the moral sensibilities of individuals, and since moral attitudes are nothing more than certain kinds of psycho-social artifacts, the best we can do in normative moral theory is consider various bits of evidence about what these artifacts are and see if, and how, they hang together. I will not defend this general meta-ethical position here, though for some discussion see Chapters 7 and 8 of my *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007).

<sup>3</sup> Stephen L. Darwall, “Two Kinds of Respect,” *Ethics* 88 (1977): 36-49. Cited hereafter by page number in the text. Darwall has since revised his views. See, e.g., his “Respect and the Second-Person Standpoint,” *Proceedings and Addresses of the American Philosophical Association* 78 (2004): 43-59. Since I find the metaphysics of second-personal reasons a bit mysterious, I am going to concentrate on the earlier version of Darwall’s view, which at least makes a certain intuitive sense.

<sup>4</sup> Brian Leiter, “Why Tolerate Religion?” *Constitutional Commentary* 25 (2008): 1-27. Cited hereafter by page number in the text.

that it is a family resemblance concept.<sup>5</sup> I shall propose a fairly precise analysis of what makes a belief and a concomitant set of practices “religious” (again drawing on my earlier work). That will then bring us to the central question: should our laws reflect “respect” for religion” or only “toleration”? Martha Nussbaum has recently argued for “respect” as the moral foundation of religious liberty,<sup>6</sup> though, as I will suggest, her account is ambiguous between the two senses of respect that emerge from Darwall’s work. In particular, I shall claim that in one “thin” sense of respect, it is compatible with nothing more than toleration of religion; and that in a “thicker” sense (which Nussbaum appears to want to invoke), it could not form the moral basis of a legal regime since religion is not the kind of belief system that could warrant that attitude.

## I. Respect and Toleration

“I really respect her intellect” and “You should show some respect for his feelings” both employ the same word, but express two different concepts of “respect”: the former I will call the “thick” concept of respect, the latter the “thin” concept. Nussbaum has defended an account of the moral foundations of the law of religious liberty as based on a principle of “equal respect for conscience” (pp. 19-21), which she takes to be different from “mere” toleration of religion (p.

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<sup>5</sup> Wittgenstein’s paradigm example was that of “games,” though a Canadian philosopher, Bernard Suits, has offered an extremely clever analysis even of “games,” one which is a considerable advance over the empty gesturing at “family resemblance.” See Bernard Suits, *The Grasshopper: Games, Life, and Utopia* (1978). Here is the crux of the analysis: “To play a game is to attempt to achieve a specific state of affairs [prelusory goal], using only means permitted by rules [lusory means], where the rules prohibit use of more efficient in favour of less efficient means [constitutive rules], and where the rules are accepted just because they make possible such activity [lusory attitude].” *Id.* at 54-55.

<sup>6</sup> Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008). Cited hereafter by page number in the text. Nussbaum’s framework is an essentially Rawlsian one, so “equal respect for conscience” is supposed to be embodied in the basic structure of society, not necessarily in interpersonal relations. I am not sure that point affects the analysis that follows.

24). I shall argue that the “thin” concept of respect does not, at least with regard to religion, move us far beyond the moral ideal of “toleration,” and that only if religion warrants the “thick” concept of respect would we have reason to think our law of religious liberty should answer to a more demanding moral standard.<sup>7</sup> In the section of the paper that follows, I argue that there is no case for application of the “thick” concept.

The “thin” concept of respect—as expressed in “You should show some respect for his feelings”—maps on to what Darwall dubbed many years ago “Recognition Respect.” This kind of respect, in Darwall’s formulations, involves “giving appropriate consideration or recognition to some features of its object in deliberating about what to do” (38), for example, “by being willing to constrain one’s behavior in ways required by” those features (45). In short, “Recognition respect for persons...is identical with recognition respect for the moral requirements that are placed on one by the existence of other persons” (45).

Darwall’s “Recognition Respect” is a thin form of respect in two regards: first, it is agnostic about any other dimension of value that might attach to the particular manifestations of the features of the object to which the respect is owed; and second, it is silent on the nature of the “moral” constraints on behavior that are demanded by the respect. The first kind of thinness is central to demarcating Darwall’s “Recognition Respect” from its thicker cousin, what Darwall calls “Appraisal Respect” (about which more momentarily). The second kind of thinness is what makes it hard to distinguish “Recognition Respect” from toleration, as I shall argue below.

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<sup>7</sup> Is there some middle conceptual ground between the two? Perhaps, but it is clear to me what it is.

If the claim that “You should show some respect for his feelings” invokes the thin concept of respect, the statement, “I really respect her intellect” depends on a thicker concept, what Darwall dubs “Appraisal Respect.” In Darwall’s terminology, “[s]uch respect...consists in an attitude of positive appraisal of that person either as a person or as engaged in some particular pursuit” (38); as a result it “is like esteem or a high regard for someone” and it is compatible with having no “particular conception of just what behavior *from oneself* would be required or made appropriate by that person’s having the features meriting such respect” (39).<sup>8</sup> When you “respect her intellect,” you admire and appraise highly the caliber of her mind, whereas when you “respect his feelings,” you act in such a way as to show an appropriate moral regard for how your actions might affect them.

Notice, again, that the thin concept of respect—Darwall’s “Recognition Respect”—makes no substantive *moral* demand on the kind of action that is appropriate: it requires only that one honor whatever “moral requirements...are placed on one by the existence of other persons.” The substantive content of these moral requirements is open; indeed, it seems that Recognition Respect is morally otiose, “only an exhortation to do the (other) duties that we already owe” as Leslie Green puts it.<sup>9</sup> Yet “Appraisal Respect” also makes no substantive moral demand on action, but for a different reason: it demands only “esteem” or high appraisal of certain features of persons, not that one act towards them in a certain way. Yet “Appraisal Respect” 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. One ought to “respect”

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<sup>8</sup> Darwall introduces a further, obviously Kantian element to the account according to which “the excellences must be thought to depend in some way or other on features of character” (42).

<sup>9</sup> Leslie Green, “Two Worries About Respect,” *Ethics* (forthcoming) (p. 3 of MS)..

genius, and the more genius there is in the world, the greater the well-being of persons, or so one might think. So a certain kind of consequentialist might think that Appraisal Respect for someone's genius generates *prima facie* obligations towards that person.

“Toleration” as a moral attitude operates somewhat differently, and we need to start, again, by distinguishing it from superficially similar attitudes. The key to the attitude of “toleration” is *disapproval* of another group's belief or practice, yet “putting up” with that belief or practice nonetheless.<sup>10</sup> Thus, in the first instance, toleration is not at issue in cases where one group is simply *indifferent* to another. I do not “tolerate” my neighbors who are non-White or who are gay, because I am *indifferent* as to the race or sexual orientation of those in my community. “Toleration,” as an ideal, can only matter when one group *actively* concerns itself with what the other is doing, believing, or “being.” Obviously, in many cases, the attitude of “indifference” is actually morally preferable to that of “toleration”: better that people should be indifferent as to their neighbors' sexual orientation than that they should disapprove of it, but “tolerate” it nonetheless.

Many practices, however, that seem to mimic toleration are not grounded in the view that there are *moral* reasons to tolerate differing points of view and practices, that permitting such views and practices to flourish is *itself* a kind of good or moral right, notwithstanding our

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<sup>10</sup> I take the claim in the text to mark the *core* case of toleration, though there are ordinary usages of the term that are a bit different. For example, strong *dislike* need not be the same as disapproval: some people strongly *dislike* the smell of some French cheeses (though it would be odd to say they disapprove of the cheese!), but they will *tolerate* others consuming them. It is not that they disapprove of the smell, they just *really* don't like it, but the fact that they “put up with it” might count as toleration. Or a different case: my neighbors have built a fence that encroaches a bit across the property line. I could ask them to remove the fence, but think it not worth the bother: I'd rather just tolerate the encroachment. I am inclined to think that the sense of toleration emphasized in the text is the one that matters especially in the case of religion. (Thanks to Robert Audi and Peter Railton for helpful thoughts on this topic.)

disapproval. Much that has the appearance of principled toleration is nothing more than pragmatic or, we might say, “Hobbesian” compromise: one group would gladly stamp out the others’ beliefs and practices, but has reconciled itself to the practical reality that they can’t get away with it, at least not without the intolerable cost of the proverbial “war of all against all.” To an outsider, this may look like toleration—one group seems to “put up” with the other—but it does not embody what I will refer to as “principled” toleration, since the reasons for putting up are purely instrumental and egoistic, according no weight to moral considerations. One group “puts up” with the other only because it wouldn’t be in that group’s interest to incur the costs required to eradicate the other group’s beliefs and practices.

It is not only Hobbesians who mimic commitment to a principle of toleration. On one reading of Locke,<sup>11</sup> his central non-sectarian argument for religious toleration is that the coercive mechanisms of the state are ill-suited to effect a real change in *belief* about religious or other matters. Genuine beliefs, sincerely held, can’t be inculcated at gunpoint, as it were, since they respond to evidence and norms of rational justification, not threats.<sup>12</sup> In consequence, says the Lockean, we had better get used to toleration *in practice*—not because there is some principled or moral reason to permit the heretics to flourish, but because the state lacks the right tools to cure them of their heresy, to inculcate in them the so-called “correct” beliefs.

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<sup>11</sup> Jeremy Waldron, “Locke: Toleration and the Rationality of Persecution,” in *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988).

<sup>12</sup> Locke puts a distinctively Protestant “spin” on this epistemological point, since he believes that salvation can *only* come through a free (i.e., uncoerced) embrace of religious doctrine. On that Protestant view, there would be *no point* in non-toleration, since it would not accomplish any meaningful religious objective given the prerequisites for salvation.

Locke, it is fair to say, did not fully appreciate the extent to which states and—in capitalist societies—private entities can employ sophisticated means to effectively coerce belief, means that are both more subtle and more effective than he imagined. That history offers up so many examples of societies in which the tyranny of the few over the many is *accepted* by the many as a quite desirable state of affairs is compelling evidence that states can successfully inculcate beliefs, even dangerously false beliefs. Locke’s “instrumental” argument for a practice of toleration should provide little comfort to the defender of toleration given Locke’s (understandable) failure to appreciate the full complexity of the psychology and sociology of belief inculcation.

Not only Hobbesians and Lockean, however, mimic principled toleration. A variation on the Lockean *instrumental* argument for toleration is apparent in a popular theme in American political thinking—one that receives a well-known articulation in Frederick Schauer’s defense of free speech<sup>13</sup>—according to which government *can’t be trusted* to discharge the task of intolerance “correctly,” that is, in the right instances. Speech can harm, in all kinds of way, notes Schauer, and the various rationales for putting up with these harms—from Mill’s “marketplace of ideas” to Meiklejohn’s conception of free speech as essential to democratic self-government—almost all fall prey to objections of one kind or another. But, says Schauer, there is still a reason to demand that the state “tolerate” many different kinds of speech (even harmful speech), and that is because *there is no reason to think the state will make the right choices* about which

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<sup>13</sup> Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1983). See also Ch. IV of Mill’s *On Liberty* for similar considerations.

speech ought to be regulated. Schauer calls this “the argument from governmental incompetence”<sup>14</sup> and says,

Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.<sup>15</sup>

It is not, then, as in the Lockean argument, that government lacks the right *means* for bringing about intolerant ends, it is rather that government is not *competent*, that is, can not be relied upon, to deploy its means in the right cases. Perhaps this kind of *instrumental* argument for state toleration is more plausible, but its justificatory structure makes it no different from that of the Lockean’s: it doesn’t tell us why we, morally, ought not to crush differing beliefs or practices, it tells us only that we (through the instrumentality of the state) are unlikely to do it right.

Where a genuine “*principle of toleration*” gets its purchase is in the cases where one group (call it the “dominant” group) actively disapproves of what another group (call it the “disfavored” group) believes or does; where that dominant group has the means at its disposal to *effectively* and *reliably* change or end the disfavored group’s beliefs or practices; and yet still the dominant group acknowledges that there are *moral* or *epistemic* reasons (that is, reasons pertaining to knowledge or truth) to permit the disfavored group to keep on believing and doing

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<sup>14</sup> Schauer, *op cit.*, at 86.

<sup>15</sup> *Id.*

what it does. That is moral or “principled” toleration,<sup>16</sup> and it is this attitude I want to compare with one of “respect.”

“Recognition Respect” demands only, to quote Darwall again, that one honor whatever “moral requirements...are placed on one by the existence of other persons.” But surely among the “moral requirements” one has to abide by are those demanded by principled toleration. Has one discharged all one’s moral obligations of respect towards the religious beliefs and practices of a person if one tolerates them? Only an argument that morality demands more by way of our attitudes and practices towards religion would support an affirmative answer.

Martha Nussbaum, in her recent lengthy defense of religious liberty (more precisely, liberty of conscience), thinks that “tolerance” of religion is “too grudging and weak” an attitude (p. 24). We need, she thinks, a “special respect for the faculty in human beings in which they search for life’s ultimate meaning,” namely, their “faculty” of conscience (p. 19). We should follow Roger Williams in “rever[ing]...the sincere quest for meaning” (p. 52) since “everyone has inside something infinitely precious, something that demands respect from us all, and something in regard to which we are all basically equal” (p. 52). But how can we distinguish “respect” here from toleration, the attitude Nussbaum deems “too grudging and weak”? We are all probably more-or-less equal in our capacity for self-deception, for example, but that demands nothing more than toleration: as long as your self-deception doesn’t harm someone else, we ought to let it alone. So, too, it might seem with “conscience” and the “sincere quest for meaning”: that ought to be tolerated, even when your “sincere quest for meaning” leads you to

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<sup>16</sup> “Pure” or “principled” because the reasons for toleration are not based on self-interest, at least not directly.

feel disgust for homosexuality as violating the dignity of the family.<sup>17</sup> 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.<sup>18</sup> That is the dilemma that afflicts something like Nussbaum's view of liberty of conscience<sup>19</sup>: yes, the faculty of conscience, which we all possess (however deficiently we exercise it), might be thought to elicit a kind of thin Recognition Respect from others. But why is that thin notion of respect not fully discharged by the moral attitude of toleration?

We can not, however, address the question of what kind of respect religious conscience warrants without addressing what *religion* is. It is to this question we now turn.

## II. What is “Religion”?

I want to here revisit an account of religious belief and conscience developed in an earlier essay.<sup>20</sup> That account drew on suggestive (though, I argued, ultimately incomplete) proposals in the work of the legal philosopher Timothy Macklem<sup>21</sup> and the legal scholar John Witte, Jr.<sup>22</sup>

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<sup>17</sup> Whether you can act on that attitude consistent with the Harm Principle is a separate question.

<sup>18</sup> Hitler, let us remember, was a man of conscience too, so committed, on principle, to the extermination of European Jewry, that even when it would have been prudent to use the Jews as slave labor to free up German manpower for the war, he persisted, to the bitter end, in exterminating them. Does Hitler's failed exercise of conscience warrant any respect? (It does not even warrant toleration!)

<sup>19</sup> It afflicts not only her view, of course—Nussbaum here follows Kant, and related rhetoric is embedded in the Universal Declaration of Human Rights. Such rights undoubtedly maximize human well-being, but it is less clear whether the concept of “respect” can be cogently motivated as their moral foundation. As with Darwall's “Recognition Respect,” talk of respect seems to be morally otiose.

<sup>20</sup> Leiter, “Why Tolerate Religion?”

<sup>21</sup> Timothy Macklem, *Independence of Mind* (Oxford: Oxford University Press, 2007).

<sup>22</sup> John Witte, Jr., *Religion and the American Constitutional Experiment*, 2<sup>nd</sup> ed. (Boulder, Colorado: Westview, 2005), p. 250.

Following their leads, I propose that two features single out “religious” states of mind from others. The first pertains to the *normativity* of (at least some) religious commands; the second pertains to the relationship between religious belief and evidence. On the proposed account, what distinguishes religious belief from other kinds of beliefs is that:

- (1) Religious belief issues in some *categorical* demands on action, that is, demands that must be satisfied, no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up;<sup>23</sup> *and*,
- (2) At least some 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.<sup>24</sup>

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<sup>23</sup> The claim is *not* that all beliefs commonly denominated “religious” issue in such commands, but that it is characteristic of religion that at least some of the commands in which it issues are *categorical* in character. It may be more accurate, though, to say that religious belief issues in *as-if categorical demands* on action, since it is familiar enough that religions can impose other-worldly incentives to produce action *in this world* that seems “as if” it were a response to a categorical reason, when it is really a response to an instrumental reason for achieving an other-worldly objective. As Adrienne Martin aptly put it to me in correspondence: “an instrumental reason motivates as strongly as the incentive on which it is contingent,” and other-worldly incentives can, of course, provide a very powerful instrumental reason! Indeed, as I note later on, to the extent that a *metaphysics of ultimate reality* is also a distinguishing feature of religion, it may supply believers with *instrumental* reasons for acting insofar as acting in the right kinds of way enables believers to stand in the right kind of relationship to that ultimate reality.

<sup>24</sup> Religious beliefs presumably do answer to evidence in *instrumental* contexts, that is, when there are questions about what means would be effective to the realization of the *categorical commands* of the religion. So, too, one suspects that the interpretation of categorical commands is *causally influenced* by the *experiences* of the interpreters: so, e.g., “liberation theology” arose as a strand of Catholicism in the context of the horrific poverty and vicious oppression that characterized U.S. client states in Latin America after World War II. But this phenomenon trades on an ambiguity between “evidence” as *justification* for the proposition it supports and “evidence” as the experiences which explain why particular propositions are embraced. An adequate socio-historical explanation of liberation theology

I shall refer to this first feature as the *categoricity of religious commands* and the second as religious belief's *insulation from evidence*.<sup>25</sup> The categoricity of religious commands accounts for both one of the most admirable and one of the most frightening aspects of religious commitment, namely, the willingness of religiously motivated believers to act in accordance with religious precepts, notwithstanding the costs. Thus we find the devoutly religious among those who were at the forefront of domestic resistance to Nazi oppression in the 1930s,<sup>26</sup> and the injustice of apartheid in South Africa from the 1960s onward and in America in the 1950s and 1960s.<sup>27</sup> We also, of course, find the devoutly religious among those who bomb abortion clinics and fly airplanes into buildings. These religiously inspired individuals risk (and often suffer) death, injury, and prison in order to comply with their religious conscience. It is painfully familiar, of course, that in all these cases adherents of the very same religion contested whether the actions of these believers were sanctioned, let alone commanded, by the religious doctrine. (Religious leaders, to take but one example, were also at the forefront of defense of apartheid in the U.S. in the 1950s and 60s.) The important fact here, however, is that religious commands--whether rightly or wrongly understood--are taken categorically by their adherents.

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must, of course, make reference to the climate of social and economic oppression in which it arose; but the beliefs constitutive of that religious outlook were not, themselves, presented as *justified* by those experiences. (Thanks to Sheila Sokolowski for raising this issue.)

<sup>25</sup> I treats *beliefs* as central to religion precisely because it is hard to see how mindless or habitual religious *practices* could claim whatever respect, thick or thin, is due matters of *conscience*. It is because of the underlying *beliefs* that we think the actions required by those beliefs deserve special moral and perhaps legal solicitude. No one thinks mindless or habitual behavior *per se* has a claim on special legal or moral consideration.

<sup>26</sup> See, e.g., Mary Alice Gallin, *German Resistance to Hitler: Ethical and Religious Factors* (Washington, D.C.: Catholic University of America Press, 1961), esp. Chapter 6.

<sup>27</sup> See, e.g., John W. de Gruchy, *The Church Struggle in South Africa*, 2<sup>nd</sup> ed. (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1986); David L. Chappell, *A Stone of Hope: Religion and the Death of Jim Crow* (Chapel Hill: University of North Carolina Press, 2004), esp. Chapter 5.

Is religion really alone in this regard? One respect in which Marxism may have been rightly called a “religion” is precisely that in some of the historical contexts just noted, the only other groups as categorically committed to resistance as the religiously inspired were communists, who led resistance to Nazism, as well as apartheid in both South Africa and the U.S., long before other groups joined the battle. More generally, of course, one might think that *all commands of morality* are categorical in just this way. Does that mean, then, that religion is not *special* after all, since it shares the property of categoricity of its commands with Marxism and with one common understanding of morality?

We can easily distinguish the case of moral commands.<sup>28</sup> To be sure, there are theoretical understandings of morality—Kant’s most famously, though not only his—according to which the demands of morality are indeed categorical. What is interesting and important about religion is that it is one of the few systems of belief that *gives effect* to this categoricity. Pure Kantian moral agents are few and far between (I think I can count them on one hand, and probably have fingers left over!), but those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious.

But not all of them are, of course, and this is where the case of Marxists and other similar “believers” become relevant. Here, though, we need to attend to the second purportedly distinctive feature of religious belief, namely, its insulation from evidence and reasons. Whatever the historical and philosophical verdict on the evidence and reasons supporting Marxism, one very clear difference is that Marxism took itself to be answering to—not insulated

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<sup>28</sup> We shall, however, return to a further complication about the moral case, below.

from—standards of evidence and reasons in the sciences, in a way that religion has not.<sup>29</sup> Marx, as is well-known, conceived of his theory as a “scientific” account of historical change, and thus it had to answer to the same standards of evidence and justification as any other scientific theory. (That is why it has been possible to refute historical materialism by counter-example.<sup>30</sup>) Nothing similar, of course, is true of any of the major religious traditions: all countenance at least some central beliefs which are not ultimately answerable to evidence and reasons as these are understood elsewhere (e.g., in common sense, and in science). This is why Professor Macklem was correct to emphasize that the distinctively religious state of mind is that of *faith*, that is, believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it.

Even here, of course, we need to be careful. There are, for example, “intellectualist” traditions in religious thought—Paley’s “natural theology” or neo-Thomist arguments come to mind—according to which religious beliefs (for example, belief in a Creator or, as in America recently, belief in “an Intelligent Designer”) are, in fact, supported by the kinds of evidence adduced in the sciences, once that evidence is rightly interpreted. It is doubtful whether these intellectualist traditions capture the character of popular religious belief, but even if they did, there remain important senses in which they are still “*insulated from evidence.*” First, of course,

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<sup>29</sup> I think this is true notwithstanding the unhappy strand of Marxist thought that took seriously the Hegelian idea that “dialectical reason” was a special kind of reason, as opposed to a metaphysical dogma. For even the idea of “dialectical reason” took seriously the idea of evidence and rational justification, and, in fact, Hegel’s entire philosophical career was an exercise in providing evidence for the purportedly dialectical structure of ideological, and thus historical, evolution. That the Hegelian influence on Marxism produced a *false* picture of evidence and reasons does not alter the fact that Marxism took itself to have an obligation to answer to standards of rational justification.

<sup>30</sup> See, e.g., Joshua Cohen’s review of G.A. Cohen, *Karl Marx’s Theory of History: A Defence* (Princeton: Princeton University Press, 1978), *Journal of Philosophy* 79 (1982), esp. pp. 266-268.

it is dubious (to the put matter gently) that these positions are really serious about following the evidence where it leads, as opposed to manipulating it to fit preordained ends. Second, and relatedly, in the case of the sciences, beliefs based on evidence are also *revisable* in light of the evidence; but in the intellectualist traditions in religious thought just noted, there is no suggestion that the fundamental beliefs will be revisable in light of new evidence. Religious beliefs are *purportedly* supported by evidence, but they are still insulated from revision *in light of evidence*.<sup>31</sup>

Yet there is a different kind of case—pertaining not to the *under*-inclusiveness of the characterization but rather its *over*-inclusiveness--that might raise doubts about whether *categoricity of commands* and *insulation from evidence* are distinctive features of religious belief and practice. Think, for example, of the Maoist personality cult that gripped China during the “cultural revolution” in the 1960s.<sup>32</sup> Here masses of individuals acted on commands from Chairman Mao which they took to be, in effect, “categorical,” and which they carried out without regard to evidence, including evidence of the substantial harms inflicted on individuals and, ultimately, society as a whole (though arguably evidence of these latter harms was less apparent at the time). Does this make the Maoist personality cult a religion? Perhaps we should so describe it, yet this seems to run roughshod over distinctions it seems worth drawing. Pre-theoretically, after all, we might think totalitarian personality cults are distinct from religions, even if in some historical and cultural contexts their nature and effects are the same. But what

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<sup>31</sup>It might be said (as Kenneth Himma pointed out to me) that religious beliefs are “in principle” revisable: if God thundered from the sky that Heaven and Hell do not exist, it might be supposed that this would, in fact, change the minds of some number of religious believers. But “in principle” responsiveness to a kind of evidence that is never in the offing seems indistinguishable in practice from insulation from evidence, *simpliciter*.

<sup>32</sup> See, e.g., Tai Sung An, *Mao Tse-Tung's Cultural Revolution* (New York: Pegasus, 1972).

marks the difference, given that it is not the *categorical* character of their commands or the *insulation* of their core beliefs from evidence? One plausible idea is that religious beliefs not only involve *categorical commands* and *insulation from evidence*, but also:

(3) Religious beliefs involve, explicitly or implicitly, a *metaphysics of ultimate reality*.

But what is it to endorse a “metaphysics of ultimate reality”? A *metaphysics* of an ultimate reality seems to be distinguished, in part, by the relationship in which it stands to the *empirical evidence of the sciences*: namely, that such a view about the “essence” or “ultimate nature” of things *neither claims support from empirical evidence*, nor purports to be constrained by *empirical evidence* (its claims “transcend” the empirical evidence, hence its “metaphysical” character). In this regard, though, (3) seems to be only a variation on the idea that religious belief is *insulated* from evidence—“insulated” *not only* in the sense that it does not answer to empirical evidence, but also in the sense that it does not even *aspire* to answer to such evidence.

The latter point may capture the *metaphysical* character of the beliefs, but it is still silent on the sense in which they concern *ultimate reality*. “Ultimate” in this context has less to do, I think, with metaphysical gradations of what is *essential* (whatever that would mean) than it does with questions of *value*: the “ultimate” reality is the aspect of reality that is most important for valuable/worthwhile/desirable human lives, whether that concerns the transcendent well-being of the “soul,” or the moral value of life in this, the material world. The *categoricity of commands* distinctive of religious beliefs are, in turn, related to this *metaphysics of ultimate reality* in the sense that they specify what *must* be done in order for believers to stand in the right kinds of

relations to “ultimate reality,” i.e., to the reality that makes their lives worthwhile and meaningful.<sup>33</sup>

Will the addition of a third distinctive characteristic of religious belief rule out personality cults of the Maoist variety? There is some reason to think so. First, the Maoist-style personality cults may ordinarily be *de facto* insulated from evidence, but they are less often *de jure* insulated: that is, they *purport* to answer to facts and evidence, in a way that “metaphysical” claims about “ultimate” reality do not even purport to do so.<sup>34</sup> Second, the personality cults, focused as they are on the *personality* of the leader, have an only indirect connection to the nature of ultimate reality, one contingent on the extent to which the “leader” is interested in those kinds of questions. To the extent a personality cult is *de jure* insulated from evidence and the “dear leader’s” commands are directly related to his view of ultimate reality, then to that extent we may need to revise the pretheoretical intuition (if we share it) that personality cults are different from religious beliefs.

Although a *metaphysics of ultimate reality* may be the *third* essential feature that distinguishes religious belief from the beliefs held by participants in personality cults, for purposes of our topic, only the first two features matter. This is because the second feature, *insulation from evidence* (especially *de jure* insulation from evidence), already captures what is significant: namely, the *metaphysical* character of religious beliefs about “ultimate reality.” By contrast, so many different systems of belief involve views about “ultimate reality”—and such

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<sup>33</sup>In this sense, the as-if categorical reasons may really be instrumental ones. See the discussion, *supra* n. \_\_\_.

<sup>34</sup> So, e.g., Mao thought forcing educated professionals to labor in the fields was an instrumentally rational approach to promoting the egalitarian values on which the communist revolution was based.

views almost all qualify for toleration under the rubric of “conscience” (subject, of course, to the usual side-constraints)—that the fact that religious beliefs *also* involve such views won’t generate any special reason for toleration that does not attach in virtue of the first two distinctive features of religious belief.

This leaves us, then, with a final possible (and perhaps the most worrisome) case of over-inclusiveness in the proposed account of “religion,” namely morality itself. For is not morality characterized both by categoricity of its commands and its insulation from reasons and evidence (as reasons and evidence are understood in the sciences)? Now as noted earlier, categoricity is not necessarily a feature of morality, though it is, to be sure, central on many theoretical understandings; and religion, as we also observed earlier, may make categoricity socially effective in a way that it would not otherwise be. But what of “insulation from reasons and evidence”? What we say about morality on this score will depend on what we take to be the relevant metaphysics and semantics of morality. For cognitivist realists like Richard Boyd and Peter Railton,<sup>35</sup> for example, moral judgments are not insulated from reasons and evidence as they are understood in the sciences—indeed, just the opposite.<sup>36</sup> So on this view, morality is not at all like religion: it answers to reasons and evidence--and answers successfully! Non-cognitivist anti-realists, by contrast, conceive of moral judgments not as expressing beliefs (which might be true or false) but rather as expressing mental states that are not truth-apt, i.e., are

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<sup>35</sup> See, e.g., Richard Boyd, “How to Be a Moral Realist,” in *Essays on Moral Realism*, ed. G. Sayre-McCord (Ithaca: Cornell University Press, 1988); Peter Railton, *Facts, Values, and Norms* (Cambridge: Cambridge University Press, 2003).

<sup>36</sup> If one takes views like John McDowell’s to be instances of cognitivist realism, then the issue is trickier; but I do not think views like McDowell’s are viable accounts of the objectivity of morality, for reasons discussed in Brian Leiter, “Objectivity, Morality, and Adjudication,” reprinted in my *Naturalizing Jurisprudence*. I shall, in any case, bracket them here.

by their nature *insulated* from reasons and evidence.<sup>37</sup> Religious judgments are still different, on this account, since some religious judgments do express beliefs and so, *in principle*, could be answerable to reasons and evidence, but are held to be insulated from them. So on either of the main contenders for a credible metaphysics and semantics of morality, morality is still different from religion.

If, then, the *categoricity of its commands* and its *insulation from evidence* (not just *de facto*, but also *de jure*) are the distinctive features of religious belief—not, to be clear, the features that make religious beliefs important and meaningful to people, but rather the features that distinguish religious beliefs from other equally important and meaningful beliefs—should we respect religious belief (in the ‘thick’ sense noted earlier) or merely tolerate it?

### III. Can We Respect Religious Conscience?

So can we justify *respect* for religious conscience in some sense stronger than the thin kind of Recognition Respect discharged by toleration? I want to turn, again, to a contemporary philosopher who has grappled with a version of our issue, namely, Simon Blackburn.<sup>38</sup> Blackburn tells the story of being invited to dinner at a colleague’s home and then being asked to participate in a religious observance prior to dinner. Blackburn declined, though his colleague said participating was merely a matter of showing “respect.” His host seems to have viewed this

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<sup>37</sup> Moral judgments, to be sure, may still be *influenced* by evidence, insofar as the attitudes expressed presuppose factual claims that answer to evidence.

<sup>38</sup> Simon Blackburn, “Religion and Respect,” in *Philosophers Without Gods: Meditations on Atheism and the Secular Life*, ed. L.M. Antony (Oxford: Oxford University Press, 2007). [cites are to MS verion] Blackburn’s account concerns an *interpersonal* context calling for respect (or toleration), rather than the context of institutional practices towards individuals. [Note to readers: does this difference matter? A topic for discussion perhaps]

as a matter of simple Recognition Respect, but Blackburn interpreted it (perhaps rightly) as something more:

I would not be expected to respect the beliefs of flat earthers or those of the people who believed that the Hale-Bopp comet was a recycling facility for dead Californians who killed themselves in order to join it. Had my host stood up and asked me to toast the Hale-Bopp hopefuls, or to break bread or some such in token of fellowship with them, I would have been just as embarrassed and indeed angry. I lament and regret the holding of such beliefs, and I deplore the features of humanity that make them so common. I wish people were different.<sup>39</sup>

Blackburn's reaction brings out starkly that Recognition Respect—which requires us to treat others as morality requires in virtue of some morally relevant attribute of theirs—does not entail that we view them as Appraisal Respect might require. Blackburn, himself, remarks that respect “is a tricky term” since it “seems to span a spectrum from simply not interfering, passing by on the other side, through admiration, right up to reverence and deference.”<sup>40</sup> He dubs as “respect creep” the phenomenon by which “the request for minimal toleration turns into a demand for more substantial respect, such as fellow-feeling, or esteem, and finally deference and reverence,”<sup>41</sup> which is what his dinner host expected, and which Blackburn declined to offer.

But given the ambiguity of “respect”—marked by the continuum from “toleration” to “esteem” and “reverence”—what is it that should incline one to one end of the spectrum or the

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<sup>39</sup> *Id.* At p. \_\_\_\_.

<sup>40</sup> *Id.* At p. \_\_\_\_.

<sup>41</sup> *Id.* At p. \_\_\_\_.

other? Here Blackburn's own account of his resistance to offering the Recognition Respect his host asked for is a bit unclear. We can distinguish three considerations:

(1) *Religious belief is false belief*. The falsity of religious belief is clearly part of the reason Blackburn is resistant to offering it respect, but surely *falsity* is not enough. After all, if his host had asked that Blackburn raise his glass in a toast to "my beautiful and intelligent children," surely Blackburn would have raised his glass even if the offspring were homely and dull-witted. We are, all of us, in the grips of a multitude of false beliefs—I believe you are enjoying this paper, you believe your colleagues think well of you, she thinks her research breaks new ground, he believes he is a clever conversationalist—but these usually do not elicit disrespect, contempt or ridicule from our peers. Indeed, one might well admire, e.g., my confidence and her enthusiasm for her research. So the *falsity of belief* is plainly not enough to explain why there is a special problem about respect for religion.

(2) *Religious belief is perniciously false belief*. This consideration, I suspect, comes closer to the mark for someone like Blackburn: it is not just that his host has false beliefs—though Blackburn's rhetoric could suggest that *is* the issue—but that he has false beliefs whose falsity is *pernicious*. False beliefs can be pernicious in various ways, for example, in how they affect the believer's behavior or to the extent they are part of an institutional web of false beliefs whose consequences are pernicious—licensing, for example, harassment of and discrimination against gay men and women, attacks on science education in the schools, and opposition to valuable scientific research in a variety of areas. If Blackburn's host had said, "And now let us bow our heads in honor of my personal hero, Adolf Hitler, a great and honest man who led the fight against the poisonous influence of world Jewry," one might easily understand Blackburn's

refusal of Recognition, let alone Appraisal, Respect: his host has a perniciously false belief. And if Blackburn were attending dinner with his host in North Carolina (one of his academic homes) in 1959, and the host had asked everyone to raise a glass “in salute to the brave leaders of the White Citizen’s Council who strive to keep the Negro in the position to which his intellectual and moral character suits him,” we can easily (at least today) understand why Blackburn would refuse, since the beliefs expressed are not only perniciously false but part of an institutional structure that caused immeasurable harm to human beings.

But these are not the dinners Blackburn attended. So our real question is whether there is any reason to think that a Jewish prayer before Friday evening dinner (what was at issue in Blackburn’s case) is a case of comparably *pernicious* false belief in either sense? More generally, is there any reason to think religious belief *per se* is comparably pernicious?

(3) *Religious belief is culpably false belief, i.e., it is unwarranted and one ought to know it is unwarranted.* This is probably the real concern for Blackburn, and it certainly distinguishes the case of religious belief from some of our other false beliefs, such as those involving our children or ourselves. (Blackburn’s host may falsely believe his children are intelligent and attractive, but he is hardly blameworthy for so believing!) Why should *culpably false beliefs* elicit *respect*, rather than indulgence or toleration? That is surely the point of Blackburn’s scenarios such as being asked to “respect” those who believe the Hale-Bopp comet is a recycling facility for dead Californians. These beliefs are false, and ridiculously so, and no one in their right mind should accept them.

But are religious beliefs—say, belief in the resurrection of Jesus Christ, or in the existence of an omniscient, omnipotent, non-material being—such beliefs? They differ from the

Hale-Bopp beliefs in several obvious respects: they have more adherents, are more familiar to non-believers, and are more deeply integrated into the cultural and normative practices of our society, even among the normative practices of those who do not accept the beliefs in question. (Recall Nietzsche's quip about putative "free thinkers" who say, "The church, *not* its poison [i.e., its moral teaching], repels us...Leaving the church aside, we, too, love the poison."<sup>42</sup>.) Is that enough to think they warrant respect in some sense *thicker* than mere toleration?

One might suppose, for all kinds of practical (e.g., Hobbesian) reasons, that the category of *widely accepted culpable false belief* deserves different treatment than the category of *idiosyncratic culpable false belief*, though it is hard to see why that would add up to anything like the thick kind of Appraisal Respect which Blackburn's host expected or Nussbaum's "precious faculty" account would suggest. So perhaps our focus should not be on the *quantity* of culpable false belief involved, but on its *culpability*, which seems to be the morally relevant factor. After all, if I believe that I am Zeus, and you are mere mortals and so should not be so insolent as to ask me hard questions about the paper, then I have a culpably false belief, which does not warrant thick respect (and probably not even tolerance!).

Is our religious believer in the same situation? Certainly any answer depends on the available evidence and thus the standards for what would constitute blameworthy epistemic irresponsibility. In the 14<sup>th</sup>-century, religious belief was quite plainly neither irrational nor unwarranted—and thus *not* culpably false belief—but after the scientific revolution and the Enlightenment, it is less clear. Of course, there is a large literature in Anglophone philosophy

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<sup>42</sup> *On the Genealogy of Morality*, First Essay, section 9.

devoted to defending the rationality of religious belief.<sup>43</sup> I shall not, here, be able to address this literature in any detail. Suffice it to observe that its proponents are uniformly religious believers, and that much of it has the unpleasant appearance of post-hoc, sometimes desperately post-hoc, rationalization. Alex Byrne, a philosopher at MIT, captures the dominant sentiment among other philosophers about this literature rather well:

[I]t is fair to say that the arguments [for God's existence] have left the philosophical community underwhelmed. The classic contemporary work is J.L. Mackie's *The Miracle of Theism*, whose ironic title summarizes Mackie's conclusion: the persistence of belief in God is a kind of miracle because it is so unsupported by reasons and evidence.<sup>44</sup>

Of course, our prior account of what makes a matter of conscience *religious* did not include any reference to theism, but rather to the *categoricity* of at least some religious commands and the fact that some religious beliefs are *insulated from evidence*, as evidence is understood in commonsense and the sciences. (The latter insulation is, to be sure, central to what makes theism possible, as Mackie argues.) The so-called "reformed epistemology" of apologists for religious belief like William Alston and Alvin Plantinga is, thus, predicated on an attack on "Enlightenment-approved evidence."<sup>45</sup> I am going to assume--uncontroversially among most philosophers but controversially among reformed epistemologists--that "reformed epistemology" is nothing more than an effort to insulate religious faith from ordinary standards of reasons and

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<sup>43</sup> See, e.g., Alvin Plantinga, *Warranted Christian Belief* (Oxford: Oxford University Press, 2000) for a recent example.

<sup>44</sup>Alex Byrne, "God," *Boston Review* (January/February 2009), p. \_\_\_\_.

<sup>45</sup> I borrow the phrase from Peter Forrest's generally sympathetic account in "The Epistemology of Religion," *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/religion-epistemology> (version of March 11, 2009).

evidence in common sense and the sciences, and thus religious belief is a *culpable* form of unwarranted belief given those ordinary epistemic standards. Even allowing that that is true, does it follow that such beliefs do not warrant a thicker kind of respect than mere Recognition Respect, which could be discharged by ‘toleration’?

To think there is a problem here, we do need to assume that *culpable failure of epistemic warrant* is a reason to withhold Appraisal Respect from a belief. Is that true? Often when we admire someone’s *loyalty* or *devotion* to a cause or a person, we admire their willingness to remain committed to it notwithstanding countervailing evidence. She thinks her son is a wonderful pianist, even though his piano teacher would sooner take gas than give the boy another futile lesson. He continued to support Senator McCarthy’s Presidential bid in 1968, even after it was clear one of the Hawkish candidates would get the nomination. The mother and the supporter *ought* to know better as a purely epistemic matter, but there is something admirable about their stances. In these cases, though, we think the *loyalty* or *devotion* has some value either to the person or the cause so valued, or that it exemplifies a trait of character or habit of mind that is otherwise valuable.

Let us suppose, as seems most plausible, that religious belief in the post-Enlightenment era involves culpable failures of epistemic warrant. Can it be redeemed by the kinds of considerations just noted? This, it seems to me, is the central and hard question about whether the law of religious liberty should embody mere *toleration* or a thicker kind of Appraisal Respect. Do matters of conscience that issue in *categorical demands on action* and which are *insulated from reasons and evidence* have a special kind of *value* that we should appraise highly or *merely* tolerate?

It might be tempting in the United States in the early 21<sup>st</sup> century to think the answer obvious. After all—to take an example close to home—religious believers overwhelmingly supported George W. Bush, one of the worst Presidents in the history of the United States, and a moral monster without peer among leaders of purportedly civilized countries during his reign of criminal military aggressions and domestic mismanagement. Of course, if we really thought there were some connection between religious belief and support for the likes of George W. Bush, then even toleration would not be a reasonable moral attitude to adopt towards religion: after all, practices of toleration are, themselves, answerable to the Millian” harm principle,” and there would be no reason *ex ante* to think that Bush’s human carnage is something one should tolerate.

But such a posture is not warranted: there is no reason to think that beliefs unhinged from reasons and evidence and that issue in categorical demands on action are especially likely to issue in “harm” to others. As we noted earlier, there are plenty of cases—e.g., resistance to Nazism, or opposition to apartheid—where religious believers pursued what now seems the obviously morally correct course long before others. On the other side, take the *au courant* case of Bernard Madoff, who swindled thousands of individuals out of billions of dollars by promising unrealistic returns on purported “investments.” Although Madoff exploited his religious connections, to be sure, it is quite clear that he himself was acting on the basis of hypothetical imperatives (where the consequent of each conditional was his own enrichment) that were keenly attuned to reasons and evidence: he was clearly an astute student of the facts about human psychology! Perhaps beliefs that issue in *categorical demands on action* and that are *unhinged from reasons and evidence* are more harmful, on average, but it seems to me much more empirical evidence would actually be required to support that conclusion.

Do we really need such evidence, though, to answer our initial question? The default position, as I have argued elsewhere,<sup>46</sup> is that we ought to *tolerate*—i.e., show “Recognition Respect”—towards religious beliefs, but do we have any reason to accord them a thicker form of respect, e.g., Darwall’s “Appraisal Respect”? That is the central issue here. And it is now difficult to see how any of the preceding considerations would support the conclusion that religious matters of conscience warrant esteem or reverence. Only if there were a *positive* correlation between beliefs that were *culpably without epistemic warrant* and valuable outcomes would it seem that we should think them proper objects of Appraisal Respect. But the evidence on this score is, to put it mildly, mixed.<sup>47</sup>

#### IV. Concluding (Tentative) Thoughts

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<sup>46</sup> Leiter, “Why Tolerate Religion?”

<sup>47</sup> Perhaps the argument for Appraisal Respect for religious beliefs and practices could be redeemed by the following argument. (Here I am indebted to Peter Railton.) Think of the National Science Foundation or the National Endowment for the Humanities. Most of the work these institutions fund turns out to be of little or no value to anyone, other than the grant recipient. Some of it is positively dreadful or, in retrospect, foolish. Yet we might have reason to appraise these institutions highly because they do make possible some research of great value by anyone’s estimation. Since we have conceded, already, that religious commitment, with its distinctive commitment to *categoricity* and *indifference to reasons and evidence*, is in fact conducive to distinctively good outcomes in certain circumstances (e.g., resistance to fascists and racists), might we not have analogous reasons to appraise highly religion? To be sure, it often leads to horrors and abominations, but it also yields “moral gems.” If this argument is to be persuasive, however, everything turns (again) on questions of degree: does religious belief and practice yield valuable outcomes *often enough* relative to the bad outcomes it yields? If the NSF mostly funded work in alchemy, Intelligent Design, and Lamarckianism, while occasionally footing the bill for genuinely cutting edge research in chemistry or biology, we would not highly appraise the institution, but instead think its existence *barely justified* given the track record. The track record on religion is, quite obviously mixed, sufficiently mixed, that it is hard to see the kinds of considerations noted above supporting the attitude of Appraisal Respect.

So where does that conclusion leave us with regard to the law of religious liberty? Legal regimes regarding religious practices usually provide for exemptions from laws that burden religious practice and prohibit governments from “establishing” one form of religious practice.<sup>48</sup> Good governments, of course, have a variety of moral obligations, but one of those is obviously to to *tolerate* those practices that are morally deserving of tolerance. That obligation might seem to warrant a “free exercise” regime, including exemptions from generally applicable laws for actions demanded by conscience. Since, however, there is no reason to limit claims of conscience to claims of *religious* conscience,<sup>49</sup> the issue becomes considerably more complicated. Exemptions from generally applicable laws for *all* claims of conscience promise both insuperable epistemic problems for adjudicative bodies (which must figure out which claims are claims of *conscience* and which not, and without reliance on proxies like participation in religious rituals) and enormous burdens on the rest of society as exemption claims multiply. Eliminating exemptions, however, would, as Nussbaum notes,<sup>50</sup> impose a burden on matters of minority conscience, since, for obvious reasons, societies will not create legal prohibitions that burden widespread demands of conscience.

A strong anti-establishment principle, along the lines of French *laïcité*, would only be a partial barrier to the latter problem, which arises not from government efforts to promote particular religions, but from the way in which the other regulatory actions of government will be insensitive to infringements upon matters of minority conscience. Perhaps such a burden,

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<sup>48</sup> [connection between religious toleration and establishment is more complicated, so I bracke the issue here, but welcome thoughts on the topic]

<sup>49</sup> The conclusion of Leiter, “Why Tolerate Religion?”, but one accepted also by Nussbaum, *Liberty of Conscience*.

<sup>50</sup> [cite]

however, is the price of not treating religious conscience as special, when no principled argument could support that practice.