

HOW COULD RELIGIOUS LIBERTY BE A HUMAN RIGHT?***

ABSTRACT

A growing number of scholars think “religious liberty” is a bad idea. The unfairness objection is that singling out religion for special protection is unjust to comparable nonreligious conceptions of the good. The distraction objection asserts that religious liberty is a misleading lens: oppression sometimes occurs along religious lines, but the underlying conflicts often are not really about religious difference. Both objections are sound, but under certain conditions religious liberty should nonetheless be regarded as a right. Law is inevitably crude. The state cannot possibly recognize each individual’s unique identity-constituting attachments. It can, at best, protect broad classes of ends that many people share. “Religion” is such a class. Where it is an important marker of identity for many people, it is an appropriate category of protection.

A growing number of scholars think “religious liberty” is a bad idea. They oppose religious persecution but think that a specifically “religious” liberty arbitrarily privileges practices that happen to resemble Christianity and distorts perception of real injuries.

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** Republished with permission of the author and the Oxford University Press. Andrew Koppelman, 'How Could Religious Liberty Be a Human Right?' (2018) 16(3) International Journal of Constitutional Law 985-1005, doi: 10.1093/icon/moy071 See the link: <https://academic.oup.com/icon/article/16/3/985/5165819>. For permissions, please e-mail: journals.permissions@oup.com Translation: Oxford University Press and the author are not responsible or accountable in any way for the accuracy of the translation, the Georgian translation of this republication is prepared by Aleksandre Jugheli and Nika Usupashvili - interns at the Institute for Comparative and Transnational Criminal Law of Faculty of Law of Ivane Javakhishvili Tbilisi State University. Therefore, the translator is responsible for its accuracy. Translation editing is completed by Giorgi Dgebuadze and Rusudan Tsagareli.

One criticism, the *unfairness objection*, is that singling out religion for special protection is unjust to comparable nonreligious conceptions of the good.¹ Another, the *distraction objection*, is primarily aimed at international human rights regimes. It asserts that religious liberty is a misleading lens: oppression sometimes occurs along religious lines, but the underlying conflicts often are not really about religious difference, so focusing on religious liberty leads to misunderstanding and policies that make matters worse.² Both doubt that there is anything special about religion that justifies singling it out as a right.

Yet religious liberty has obvious attractions. Some intuitively powerful claims are hard to articulate in any other terms. The discourse of religious liberty has helped people with radically different values to live together peacefully. That is one reason why Americans and Europeans are so keen to export it.

I shall argue that both objections are sound, but that religious liberty is nonetheless appropriately regarded as a right. Religion is not uniquely valuable.³ Other interests are similarly weighty. A focus on religion can divert attention from injuries to those interests. “Religion” is a crude category. But law is inevitably crude. The unfairness objection implies that the state ought to recognize each individual’s unique identity constituting attachments. The state can’t possibly do that. It can, at best, protect broad classes of ends that many people share. Religion is such a class. Philosophical first principles lose nuance when refracted through law.

American law has been a principal target of the objections. Understanding why they fail here will show why they might fail, and religious liberty might appropriately be regarded as a right, elsewhere.

First Amendment doctrine has used “neutrality” as one of its master concepts, but it treats religion as a good thing. Religious conscientious objectors are often accommodated. Disestablishment protects religion from manipulation by the state. The law’s neutrality is its insistence that religion’s goodness be understood at a high enough level of abstraction that (with the exception of a few grandfathered practices, such as “In God We Trust” on the currency) the state takes no position on any live religious dispute. America, the most religiously diverse nation on earth, has been unusually successful in dealing with its diversity.⁴

¹ On the increasing number of scholars who are persuaded of this objection, see Kathleen Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (Cambridge University Press 2015) 17–55; Andrew Koppelman, *Defending American Religious Neutrality* (Harvard University Press 2013) 120–165.

² Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton University Press 2016); Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press 2015); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2007); see also: the essays collected in *Politics of Religious Freedom*, Winnifred Fallers Sullivan and others (eds), *Politics of Religious Freedom* (University of Chicago Press 2015).

³ Some of course will disagree. See, e.g., Brady, *supra* note 1. Such people of course have no objection to special treatment of religion.

⁴ Koppelman, *supra* note 1, *passim*.

The American approach elicits two versions of the unfairness objection.⁵ One of these is that other goods are as important as religion. Another relies on the influential view, commonly called *liberal neutrality*, that state action should never be justified on the basis of any contested conception of the good. Both motivate the search for substitutes that do not privilege “religion.”

Plenty of substitutes have been proposed, notably equality, conscience, and integrity. All founder on Hobbes’s objection that human impulses are so various that there can be no reasonable basis for prioritizing any of them as a basis for exemption from the law. Hobbes is wrong, of course. But without relying on contestable and imprecise categories such as “religion” (which each of the substitutes tries to do without) it is impossible to show that he is wrong. We are less opaque to one another than he thinks because there are *intersubjectively intelligible* goods, which all of these substitutes ignore, whose value transcends individual preferences. Charles Taylor calls these *hypergoods*. People are entitled to be free to pursue those ends. Religion is an example.⁶ That is bad news for liberal neutrality. Many human rights claims (religious liberty among them) are unintelligible without reliance on hypergoods.

Blocking someone’s access to hypergoods is a serious injury. Different hypergoods are, however, salient for different populations. Hence the dangers of unfairness and distraction.

Religion is an important marker of identity for many, perhaps most, Americans. Where religion thus denotes hypergoods that are the focus of local attachments, religious liberty is appropriately regarded as a right. The term does not honor the full range of valuable human commitments. No regime can do that. American law responds to the specific circumstances of American religious diversity.

Religious liberty could be an appropriate category of protection elsewhere if like conditions exist elsewhere.

I. WHAT IS A HUMAN RIGHT?

There is no consensus on the criteria for specifying human rights. One influential account argues that a person must have certain rights if they are to have any kind of life

⁵ I note in passing that these are inconsistent, though sometimes made together: liberal neutrality precludes the state from deeming some ends especially deep and valuable.

⁶ It is not a single hypergood, but, as I explain below, a cluster of them.

at all.⁷ Whatever your ends, you cannot achieve them if you are enslaved, arbitrarily imprisoned, beaten, starved, tortured, or killed.⁸

Such minimal rights must omit a lot of important ones. Article 16 of the 1948 Universal Declaration of Human Rights cites “the right to marry and to found a family.”⁹ Female genital mutilation is broadly agreed to be a human rights violation,¹⁰ even though, if practiced under sanitary medical conditions (as it sometimes is), its only effect is to deprive the victim of the capacity for sexual pleasure. Violation of these rights does not block every avenue to a decent life.¹¹ Some people don’t care about either family or sexual pleasure.

On the other hand, these capacities are valued under precisely this description, by many people in every culture of which we are aware, and governments have sometimes unjustly restricted them. Their source, then, is not an abstract idea of agency but the valuations that people happen to hold.

Joseph Raz has argued that a right should be understood as an aspect of human well-being that “is a sufficient reason for holding some other person(s) to be under a duty.”¹² If this is correct, and if religious liberty is a universal right, it would have to protect some universal, urgent aspect of human well-being.

Religious liberty is in fact enshrined in many international treaties.¹³ Article 18 of the 1948 Universal Declaration holds that each person has the right “to manifest his religion or belief in teaching, practice, worship and observance.”¹⁴ That has been repeatedly reaffirmed. The US State Department monitors it in every country.¹⁵

⁷ Even some of these, such as a right to basic health care, are surprisingly controversial. During oral argument in the Obamacare case, when the Solicitor General argued that Americans could legitimately be required to purchase health insurance because the country is obligated to provide care when they get sick, Justice Antonin Scalia responded: “Well, don’t obligate yourself to that.” Andrew Koppelman, *The Tough Luck Constitution and the Assault on Health Care Reform* (Oxford University Press 2013) 1.

⁸ See James Griffin, *On Human Rights* (Oxford University Press 2008); Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 90, 173. Here I consider only the philosophical question whether religious liberty is an appropriate basis for judging a regime. I take no position on whether institutions or treaties that specifically guarantee such rights are effective, or whether some desiderata are more important than respect for rights. For skeptical views, see Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014); Wendy Brown, “The Most We Can Hope For . . .”: *Human Rights and the Politics of Fatalism* (Duke University Press 2004) 103 *S. Atlantic Q.* 451.

⁹ Art. 16, Universal Declaration of Human Rights <<http://www.un.org/en/universal-declaration-human-rights/>> [10.02.2023].

¹⁰ U.N. Office of the High Commissioner on Human Rights et al., *Eliminating Female Genital Mutilation: An Interagency Statement* (2008) 8-10 <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> [10.02.2023].

¹¹ Andrew Koppelman, ‘The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?’ (2009) 71 *The Review of Politics* 459.

¹² Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 166.

¹³ For an enumeration, see Lorenz Zucca, ‘Freedom of Religion in a Secular World’ in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 402.

¹⁴ Art. 18, Universal Declaration of Human Rights <<http://www.un.org/en/universal-declaration-human-rights/>> [10.02.2023].

¹⁵ U.S. Department of State, ‘International Religious Freedom Report’ (2014) <<http://www.state.gov/j/drl/>

Various specifications of the right have been offered¹⁶: freedom from punishment for one's religious beliefs, relief from facially neutral laws that are intended to harm religious minorities, a right to exemption from laws to which one has a religious objection.¹⁷ The last of these, because it involves ad hoc balancing, is probably a poor candidate for a human right. The others, which involve deliberate injury on the basis of religion, are more promising. That kind of purposive harm does happen, and in a lot of places. But the categories are not neatly bounded: sometimes indifference to manifest need amounts to malevolence. Any specification implies that religion is something special: forced conversion would not be oppressive unless religion mattered to people.

What turns on whether any of these is a right? On some accounts, rights limit state sovereignty, authorizing various sorts of sanctions if the right is violated. On other, more modest views, which are all we will rely on here, they are moral imperatives that states are obligated to respect.¹⁸ Is religious liberty such an imperative?

II. THE SPECIFICITY OF RELIGIOUS LIBERTY

Robert Audi defends this right in Razian terms: “the deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments.” This can ground a right to religious liberty, because “as a matter of historical fact and perhaps of human psychology as well, religious commitments tend to be important for people in both ways: in depth and in determining the sense of identity.” This, Audi claims, is true of “few if any non-religious kinds of commitment.”¹⁹

If only. The world is a dense jungle of commitments and identities. Many have nothing to do with religion. “Religion” is a culturally specific category that emerged from

<https://www.irs.gov/irf/religiousfreedom/index.htm#wrapper> [10.02.2023].

¹⁶ The ambiguity of its scope is one reason to doubt its value as an international human right. See Zucca, *supra* note 13, at 395–397. On the other hand, it is widely valued: In the 2007 Pew Global Attitudes Survey, publics in 34 countries covering five different regions were asked about the importance of practicing their religion freely. The response was extremely high, ranking from 84 percent in Eastern Europe to 98 percent in Africa. On average across the 34 countries, 93 percent indicated that it is important to be able to live in a country where they can practice their religion freely, with less than 2 percent indicating that it wasn't important. Brian J. Grim, *Religious Freedom: Good for What Ails Us?* (2008) 6 *The Review of Faith & International Affairs* 3. Thanks to Pasquale Annicchino for the reference.

¹⁷ Another proposed specification is a right to be free from “defamation of religion.” This raises issues I can't address here.

¹⁸ James Nickel, *Human Rights in Stanford Encyclopedia of Philosophy* §2.1. (2017) <[http:// plato.stanford.edu/entries/rights-human/](http://plato.stanford.edu/entries/rights-human/)> [10.02.2023].

¹⁹ Robert Audi, *Religious Liberty Conceived as a Human Right* in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 418. Others have made similar arguments. See, e.g., Brady, *supra* note 1; Michael W. McConnell, ‘The Problem of Singling Out Religion’ (2000) 50 *DePaul Law Review* 1.

encounters with foreign belief systems associated with geopolitical entities with which the West was forced to deal.²⁰ Audi is vulnerable to both the unfairness and distraction objections. Religion is very important to some people and a matter of indifference to others, with most somewhere between. Even forced conversion is regarded by some who undergo it as a minor inconvenience.

The notion of a human right to religious liberty has often been deployed to reflect Christian priorities. European powers invoked it in the nineteenth century to undermine Ottoman sovereignty in the name of protecting Christians.²¹ During the occupation of the Philippines, it was centrally focused on Americans' right to evangelize. It was used to protect European ethnic minorities, notably Jews, after World War I, and later still to demote Shinto from its official status in post-World War II Japan.²² Although the Universal Declaration aspired to be acceptable to a broad range of foundational views,²³ article 18 was largely drafted by American evangelicals and European missionaries who sought support for their struggles against Communism and Islam.²⁴

The lived religion of many people is not about professing propositions. It is their entire way of life. There is no separable category of doings that one could protect as distinctively religious. If one tries, one will distort the concerns of the people one thinks one is protecting, picking out and arbitrarily prioritizing those that can be shoehorned into the category "religion."²⁵

Consider the 2014 annual State Department International Religious Freedom Report. It collects atrocities: murders, kidnappings, torture, slavery, the usual train of human rights abuses.²⁶ Horrible. But what have they got to do specifically with religious freedom? They are sometimes religiously motivated. The report begins with an awful story of ISIL militants seizing a toddler from a Christian woman. It's ugly, but the religious motivation is not what's ugliest about it.

²⁰ Jonathan Z. Smith, *Religion, Religions, Religious* in Mark C. Taylor (ed), *Critical Terms for Religious Studies* (University of Chicago Press 1998) 269; Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Johns Hopkins University Press 1993).

²¹ Mahmood, *supra* note 2, at 31–65.

²² Anna Su, *Exporting Freedom: Religious Liberty and American Power* (Harvard University Press 2016).

²³ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks 2001) 73-78.

²⁴ Mahmood, *supra* note 2, at 48–49; Linde Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights' (2013) 4 *Humanity - An International Journal of Human Rights, Humanitarianism, and Development* 429. The Christian paradigm also dominated the drafting of the religious liberty provision of the European Convention on Human Rights. Samuel Moyn, 'Religious Freedom and the Fate of Secularism', in Jean Cohen and Cécile Laborde (eds), *Religion, Secularism, & Constitutional Democracy* (Columbia University Press 2016) 27.

²⁵ Hurd, *supra* note 2, offers numerous illustrations, of which I give only a sample.

²⁶ International Religious Freedom Report, *supra* note 15.

The report details the plight of the Rohingya people in Myanmar, a Muslim minority who have been subjected to violence, harassment, and forced displacement, and denied Burmese citizenship even though they have lived there for generations. The 2016 Report acknowledges: “Because religion and ethnicity are often closely linked, it was difficult to categorize many incidents as being solely based on religious identity.”²⁷ Yet all are counted as violations of religious liberty.

The discrimination and abuse the Rohingya confront, Elizabeth Shakman Hurd observes, “is ethnic, racial, economic, political, postcolonial, and national.”²⁸ The discourse of religious liberty, by focusing on the fact that the oppressors are Buddhist and the victims are Muslim, obscures a complex history in politically malign ways:

Promoting religious rights, in this case, effectively strengthens the hand of a violently exclusionary set of nationalist movements that depend for their existence on perpetuating the perception of hard-and-fast lines of Muslim-Buddhist difference and immutable ties among majoritarian (Buddhist) religion, race, and Burmese national identity. In other words, the logic of religious rights fortifies those who are most committed to excluding the Rohingya from Burmese society.²⁹

Similarly in Syria. The US Commission on International Religious Freedom issued a report in 2013, calling for projects there to promote religious tolerance and to “help religious minorities to organize themselves.” Hurd observes: “To reduce the multiplex grievances of the Syrian people to a problem of religious difference, and their solution to religious freedom, is to play into the hands of the Assad regime, which has benefitted for decades from the politicization of sectarian difference to justify autocratic rule.”³⁰

“Religious liberty” tends to privilege beliefs rather than practices—and among beliefs, those that are parts of large, ancient orthodoxies, which may not be the beliefs most important to their adherents or most prone to persecution. The reification of religious divisions obscures political possibilities that are not predicated on such divisions. Pressure to honor religious liberty thus can impose a Procrustean grid upon, and sometimes even exacerbate, local conflicts. The push to organize minority religious groups also tends to arbitrarily empower those religious leaders who know how to work the system, and so to violate its own commitment to equal treatment of religions. Distraction produces unfairness.

When the American Baptists and Deists converged on the idea of disestablishment, they had specific evils in mind: the levying of religious taxes upon those who did not

²⁷ U.S. Department of State, Burma 2016 International Religious Freedom Report <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>> [10.02.2023].

²⁸ Hurd, *supra* note 2, at 48.

²⁹ *ibid*, 46-47.

³⁰ *ibid*, 115.

subscribe to the established religion and the jailing of unlicensed preachers.³¹ The idea of “free exercise of religion” was a nicely tailored response to those grievances. It is less helpful—it is a distraction—in Myanmar.

III. DOING WITHOUT “RELIGION”

How to respond to the unfairness and distraction objections? One answer is that freedom of religion ought to be protected indirectly, under the description of more familiar general rights (so that heresy, for example, is protected as free speech),³² or disaggregated into its component goods.³³ The injuries of the Rohingya or of the victims of ISIL are best described without much reference to religion.

This approach, however, will not protect religion in some of the most salient American cases. It is no help for Quaker draft resisters, or Native Americans who want to use peyote in their rituals, or Muslim prisoners who want to wear beards, or even Catholics who wanted to use sacramental wine during Prohibition.³⁴ Cases like that arise outside North America and Europe. Brazilian courts in 2009 considered whether Jews were entitled to an alternate date for a national college admission exam that is given on Saturdays.³⁵

Some attractive claims are hard to characterize in nonreligious terms. Hurd sometimes uses the rhetoric of religious liberty in spite of herself. In Guatemala, the K’iche’ are a Maya ethnic group whose land rights have been routinely violated by multinational mining operations in collusion with the police and the state. The State Department reports “no reports of abuses of religious freedom” in the country, Hurd complains, because, even though the land is sacred to them, “they are perceived as having no

³¹ Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50 *William and Mary Law Review* 1831, 1862-1864.

³² Ira Lupu and Robert Tuttle, *Secular Government, Religious People* (Wm. B. Eerdmans Publishing Co. 2014) 177-210; James Nickel, ‘Who Needs Freedom of Religion?’ (2005) 76 *University of Colorado Law Review* 941.

³³ Cécile Laborde, ‘Religion in the Law: The Disaggregation Approach’ (2015) 34 *Law and Philosophy* 581.

³⁴ Nickel argues that individual exemptions can be created without using the category of “religion,” for example when it is decided “to give scientific researchers exemptions from drug laws in order to allow them to study controlled substances.” Nickel, *supra* note 32, at 958. It is not obvious, however, and Nickel does not explain, how one could justify classic religious accommodations, such as sacramental wine, under a nonreligious description. Laborde suggests (responding to me) that sacramental wine could be protected by freedom of association. *Supra* note 33, at 598 n. 45. This mischaracterizes that freedom. A group that gathers for the purpose of violating the law is not constitutionally protected. Rather, it is guilty of the additional crime of conspiracy.

³⁵ *Jewish Center for Religious Education v. The Union* (2009), in Steven Gow Calabresi and others (eds), *The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials 1200* (Foundation Press 2016). A lower court granted relief, but it was reversed on appeal.

(recognizable) religion.”³⁶ This argument implies not that we should stop talking in religious terms but that the K’iche’ ought to be recognized as a religion, with legal protections following from that. But then we would once more have to address the fairness objection.³⁷

Another response is to supplement the familiar rights of speech, association, and so forth, with an additional right that captures the salient aspect of religion but is not confined to religion (thus avoiding the unfairness objection). This entails substituting some right X for religion as a basis for special treatment, making “religion” disappear as a category of analysis.³⁸ Many candidates for X are on offer: individual autonomy, mediating institutions between the individual and the state, psychologically urgent needs, norms that are epistemically inaccessible to others, and many more.

Here I focus on the three most prominent, which I’ll call Equality, Conscience, and Integrity.

Begin with Equality. Christopher Eisgruber and Lawrence Sager build their whole approach around the unfairness objection. The privileging of religion is wrong because “religion does not exhaust the commitments and passions that move human beings in deep and valuable ways.”³⁹ They claim that the state should “treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.”⁴⁰ When religion is burdened, they write, courts should ask whether comparably deep nonreligious interests are being treated better: where a police department allowed an officer to wear a beard for medical reasons, it also was appropriately required to allow a beard worn for religious reasons.⁴¹

Eisgruber and Sager never explain what “deep” means—how to tell which concerns are “serious” and which are “frivolous.”⁴² Even if one takes the term commonsensically, to signify interests that are intensely felt, their principle cannot be implemented. Thomas Berg observes that the same police department did not allow beards “to mark an ethnic

³⁶ Hurd, *supra* note 2, 51.

³⁷ Hurd rejects “a more encompassing, new and improved ‘International Religious Freedom 2.0’” because it would “(re)enact a modified version of the same exclusionary logic.” *Ibid*, 63. Any possible rights claim will however generate remainders. See Section 6.

³⁸ Some also propose to keep the category of religion while supplementing it with some additional basis for accommodation, such as conscience. See *infra* note 104.

³⁹ Christopher L. Eisgruber and Lawrence G. Sager, ‘The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct’ (1994) 61 *The University of Chicago Law Review* 1245.

⁴⁰ *ibid*, 1285.

⁴¹ Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard University Press 2007) 90-91.

⁴² *ibid*, 101. See: Cécile Laborde, ‘Equal Liberty, Nonestablishment, and Religious Freedom’ (2014) 20 *Legal Theory* 52; Andrew Koppelman, ‘Is It Fair to Give Religion Special Treatment?’ (2006) *University of Illinois Law Review* 571.

identity or follow the model of an honored father.”⁴³ So the requirement of equal regard is incoherent: “When some deeply-felt interests are accommodated and others are not, it is logically impossible to treat religion equally with all of them.”⁴⁴ Eisgruber and Sager are reluctant to specify a baseline, but they can’t do without one.

Our two other candidates for X avoid this error by answering the “equality of what?” question.

The most commonly invoked substitute for “religion” is Conscience.⁴⁵ This doesn’t really address the unfairness problem, because it uncritically thematizes one principal theme of Christianity. Many who propose it treat its value as so obvious as not to require justification. Unstated and perhaps unstatable (because theologically loaded) premises are at work. They also implausibly assume that the will to be moral trumps all our other projects and commitments when these conflict, and that no other exigency has comparable weight.⁴⁶

Conscience is also underinclusive, focusing excessively on duty. Many and perhaps most people engage in religious practice out of habit, family loyalty, adherence to custom, a need to cope with misfortune and guilt, curiosity about metaphysical truth, a desire to feel connected to God, or happy enthusiasm, rather than a sense of duty prescribed by sacred texts or fear of divine punishment. Conscience is salient for some people, but others have needs equally urgent that can’t be described in those terms, and so the fairness problem is simply transcribed into a different register. Conscience, like religion, is one exigency among many.

The Integrity approach avoids these difficulties by broadening the focus still further, beyond conscience. Raz thinks that “[t]he areas of a person’s life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his self-respect.”⁴⁷ Paul Bou-Habib relies

⁴³ Thomas C. Berg, ‘Can Religious Liberty Be Protected as Equality?’ (2007) 85 Texas Law Review 1185, 1194.

⁴⁴ *ibid.*, 1195.

⁴⁵ Amy Gutmann, *Identity in Democracy* (Princeton University Press 2003) 151-191; William Galston, *The Practice of Liberal Pluralism* (Cambridge University Press 2005) 45-71; Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2005) 98; Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (The Belknap Press 1996) 65-71; Michael J. Perry, *Human Rights Theory*, 4: *Democracy Limited: The Human Right to Religious and Moral Freedom* (Emory Legal Studies Research Paper No. 15-355 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610942> [10.02.2023]; Rogers M. Smith, ‘Equal’ Treatment? A Liberal Separationist View’ in Steven V. Monsma and J. Christopher Soper (eds), *Equal Treatment of Religion in a Pluralistic Society* (Eerdmans Pub Co; NEW STIFF WRAPS 1998) 190.

⁴⁶ Bernard Williams spent much of his career refuting that. Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge 1985).

⁴⁷ Joseph Raz, ‘A Right to Dissent? II. Conscientious Objection’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 280.

on the value of acting in light of one's deepest commitments.⁴⁸ Ronald Dworkin claims that laws are illegitimate if "they deny people the power to make their own decisions about matters of ethical foundation—about the basis and character of the objective importance of human life. . . ."⁴⁹

Jocelyn Maclure and Charles Taylor offer the most detailed account of Integrity. "Core beliefs" are those that "allow people to structure their moral identity and to exercise their faculty of judgment."⁵⁰ "Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions."⁵¹ There is no good reason to single out religious views, because what matters is "the intensity of the person's commitment to a given conviction or practice."⁵²

This avoids both the unfairness and the distraction objections. By asking what any person's commitments really are, it avoids the assumptions about the salience of religion that entangle both Audi and the State Department in the distraction objection.

There is, however, reason to doubt whether wholehearted commitment, without more, should warrant deference. Its object might be worthless.⁵³ There is also an epistemic problem. How can the state discern what role any belief plays in anyone's moral life? What could the state know about my moral life? About which decisions of mine involve matters of ethical foundation?⁵⁴

Proponents of Integrity tend to think that religion is always a matter of intense commitment. Religion, however, does not hold the same place in the lives of all religious people. An individual may not think much about his religion until a crisis in middle age. If commitment were what matters, then there would be no basis for protecting spiritual exploration by the merely curious. As noted earlier, the notion that religion is central to everyone's identity also has pernicious ideological uses.

⁴⁸ Paul Bou-Habib, 'A Theory of Religious Accommodation' (2006) 23 *Journal of Applied Philosophy* 109. He focuses on moral duties, but his argument's logic entails Integrity rather than Conscience.

⁴⁹ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press: An Imprint of Harvard University Press 2013) 368. Dworkin confidently declares that these include "choices in religion." Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press 2003), claims that he wants to protect "conscience," but he understands this term so capaciously that he is more appropriately classified as an Integrity theorist.

⁵⁰ Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 76.

⁵¹ *ibid.*

⁵² *ibid.* 97. All these accounts leave unresolved many questions about the value of integrity, which I cannot explore here. See Cheshire Calhoun, 'Standing for Something' (1995) 92 *The Journal of Philosophy* 235.

⁵³ Andrew Koppelman, 'Conscience, Volitional Necessity, and Religious Exemptions' (2009) 15 *Legal Theory* 215.

⁵⁴ Some Supreme Court opinions and commentators have similarly suggested deference to each person's "ultimate concerns," with similar difficulties. Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (University of Chicago Press 1995) 69-74.

Any defense of religious accommodations must confront Thomas Hobbes's classic argument for denying all claims of conscientious objection. For Hobbes, human beings are impenetrable, even to themselves, their happiness consisting in "a continually progressive of the desire, from one object to another; the attaining of the former, being still but the way to the later"⁵⁵; their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."⁵⁶ Concededly some people have unusually intense desires of various sorts. But "to have stronger, and more vehement Passions for any thing, than is ordinarily seen in others, is that which men call MADNESSE."⁵⁷ No appeal to "such diversity, as there is of private Consciences"⁵⁸ is possible in public life for Hobbes.⁵⁹

Part of Hobbes's objection to any reliance on Conscience or Integrity is epistemic: he doubts that the law can discern "the diversity of passions, in divers men."⁶⁰ But this epistemic skepticism is parasitic on his skepticism about objective goods: "since different men desire and shun different things, there must need be many things that are *good* to some and *evil* to others . . . therefore one cannot speak of something as being *simply good*; since whatsoever is good, is good for someone or other."⁶¹ When there are disagreements, "commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he, or they, that have the sovereign power."⁶² What is most exigent in other minds is not knowable, because there is nothing coherent there to know.⁶³

At least at the architectonic level, and perhaps at the operational level as well, Hobbes's political philosophy is consistent with the constraint of liberal neutrality: in Dworkin's

⁵⁵ Thomas Hobbes, *Leviathan* (C.B. Macpherson ed. 1968) 160.

⁵⁶ Thomas Pfau, *Minding the Modern: Human Agency, Intellectual Traditions, and Responsible Knowledge* (University of Notre Dame Press 2013) 189.

⁵⁷ Hobbes, *supra* note 55, 139.

⁵⁸ *ibid.*, 366.

⁵⁹ Pfau, *supra* note 56, 194-195.

⁶⁰ Hobbes, *supra* note 55, 161.

⁶¹ Thomas Hobbes, *Man and Citizen* (Hackett Publishing Company 1972) 47; cf. Hobbes, *supra* note 55, 120.

⁶² Thomas Hobbes, *The Elements of Law Natural and Politic* (2nd Edition, Ferdinand Tonnies Edition, 1969) 188; cf. Hobbes, *supra* note 55, 111.

⁶³ Hobbes, *supra* note 55, 83: for the similitude of the thoughts and passions of one man, to the thoughts and passions of another, whosoever looketh into himself and considereth what he doth when he does think, opine, reason, hope, feare, &c., and upon what grounds; he shall thereby read and know what are the thoughts and Passions of all other men upon the like occasions. I say the similitude of Passions, which are the same in all men, desire, feare, hope, &c.; not the similitude of the objects of the Passions, which are the things desired, feared, hoped, &c.: for these the constitution individuall, and particular education, do so vary, and they are so easie to be kept from our knowledge, that the characters of mans heart, blotted and confounded as they are, with dissembling, lying, counterfeiting, and erroneous doctrines, are legible onely to him that searcheth hearts.

classic formulation, “the government must be neutral on what might be called the question of the good life,” so that “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”⁶⁴ Hobbes thinks the state can ignore the question of the good life, whose answer is merely the gratification of appetite. His psychology entails his rejection of special treatment of religion—or Conscience, or Integrity. If you want to embrace a different conclusion, you can’t embrace his psychology.

Hobbes is at least right about this: we are too opaque to one another, our depths are too personal and idiosyncratic, for the state to know for certain which commitments and passions really merit respect. There are, of course, familiar legal devices for detecting Conscience or Integrity. Look how crude they are. Sometimes the law has interrogated individual conscientious objectors. American draft boards used to do that.⁶⁵ They were mighty fallible, and eventually a cottage industry of draft counselors defeated them by teaching inductees what to say. In 1972, the year the draft ended, more young men were exempted from the draft than were inducted.⁶⁶

There is also wholesale accommodation of large groups. That’s clumsy, too. During Prohibition, the Volstead Act exempted sacramental wine. No attempt was made to examine individual Catholic priests and parishioners to determine the depth of their conviction.

The various integrity principles that have been proposed can’t be administered— at least not with any precision. Maclure and Taylor write that “The special status of religious beliefs is derived from the role they play in people’s moral lives, rather than from an assessment of their intrinsic validity.”⁶⁷ If the state is supposed to defer to identity-defining commitments, how can it tell what these are?⁶⁸ Simon Cabulea May hypothesizes a draft resistor for whom military service would prevent the perfection

⁶⁴ Ronald Dworkin, *Liberalism, in A Matter of Principle* (Harvard University Press 1985) 191. For Hobbes, there are no individual rights against the state, but the sovereign’s interests entail a broad field of liberty for the subjects. Ian Shapiro, *The Evolution of Rights in Liberal Theory* (Cambridge University Press 1986) 29-40.

⁶⁵ Andrew Koppelman, ‘The Story of *Welsh v. United States: Elliott Welsh’s Two Religious Tests*’ in Richard Garnett and Andrew Koppelman (eds), *First Amendment Stories* (Foundation Press 2012) 293; Maclure and Taylor, *supra* note 50, 97-99.

⁶⁶ Koppelman, *supra* note 65, 314-315. Sometimes the exigency will be clear. “A finding that a claimant is sincere should be easy if one cannot discern any secular advantage from a person’s engaging in the behavior she asserts is part of her religious exercise.” Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton University Press 2006) 122-123. But that is true of only some accommodation cases.

⁶⁷ Maclure and Taylor, *supra* note 50, 81.

⁶⁸ Raz understands the difficulty of discerning anyone’s conscience, and so advocates less intrusive devices, such as “the avoidance of laws to which people are likely to have conscientious objection.” Raz, *supra* note 47, 288. This is not possible: there are too many kinds of objection.

of his skills at chess, which he regards as “a most vivid manifestation of the awesome beauty of the mathematical universe.”⁶⁹ Perhaps chess really does play a quasi-religious role in his moral life.

Of course, courts judge internal mental states all the time, more or less imperfectly, and law’s imprecision is not usually troubling. The Integrity view, however, is motivated at its core by a protest against the law’s failure to honor individual differences.

John Rawls thought that, for purposes of theorizing about justice, we must regard one another with a model of agency as opaque as that of Hobbes, in which for all we can tell the man who compulsively counts blades of grass is pursuing what is best for him.⁷⁰ If people are thus incommensurable, then it is not apparent how some of their desires can legitimately be privileged over others, leaving Rawls’s “liberty of conscience” indeterminate. Conscience, at least as it is understood in the original position, is the same black box that it was in Hobbes.⁷¹

*Sherbert v. Verner*⁷² held that a state unemployment bureau could not deny compensation to a Seventh-Day Adventist who refused to work on Saturdays: “to condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”⁷³ Suppose someone quits his job because he claims that integrity requires him to spend his days counting blades of grass. What is the state supposed to do?

IV. DELIVERING THE HYPERGOODS

We are in our depths mysterious to one another. But we are similar enough to know where the deep places are likely to be.

Those deep places consist, in large part, of goods toward which we are drawn. The sources of value in terms of which people tend to define themselves are not as idiosyncratic as Hobbes imagined.

Maclure and Taylor eschew any reliance on contestable goods, instead embracing liberal neutrality: the democratic state must “be neutral in relation to the different worldviews

⁶⁹ Simon Cabulea May, ‘Exemptions for Conscience’ in Cécile Laborde and Aurelia Bardon (eds), *Religion in Liberal Political Philosophy* (Oxford University Press 2017) 191.

⁷⁰ John Rawls, *A Theory of Justice* (2nd Edition, Belknap Press: An Imprint of Harvard University Press 1971) 379-380. Michael Sandel observes that among the “circumstances of justice” that motivate Rawls’s liberalism is an “epistemic deficit” in “our cognitive access to others.” *Liberalism and the Limits of Justice* 172 (1982).

⁷¹ In Rawls, this problem is remediable at the constitutional stage of the four-stage sequence, but only because at that stage liberal neutrality must be abandoned. Andrew Koppelman, ‘Why Rawls Can’t Support Liberal Neutrality: The Case of Special Treatment for Religion’ (2017) 79 *Review of Politics* 287.

⁷² *Sherbert v. Verner*, 374 U.S. 398 (1963) <<https://supreme.justia.com/cases/federal/us/374/398/>> [10.02.2023].

⁷³ *ibid*, 406.

and conceptions of the good—secular, spiritual, and religious—with which citizens identify.”⁷⁴ In his earlier work, Taylor took a very different line: “a society can be organized around a definition of the good life, without this being seen as a depreciation of those who do not personally share this definition,” and such a society can be liberal if it respects fundamental liberties.⁷⁵

If the state hopes to respect people’s moral identities, as Maclure and Taylor advocate, it cannot accomplish this without relying on the earlier Taylor’s observation that identity is necessarily grounded not on a person’s brute preferences but rather upon her orientation toward sources of value that transcend those preferences.⁷⁶ It can only protect Integrity that is oriented toward some intersubjectively intelligible end—which is to say, some good, of the kind that liberal neutrality demands that the state ignore. Equality, Conscience, and Integrity are all designed to respect liberal neutrality. That is what leaves them vulnerable to Hobbes’s objection.

The difficulties of implementing Integrity have thus brought us to the distinction, articulated by Taylor, between strong and weak evaluation.⁷⁷ Strong evaluation involves “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.”⁷⁸ Thus, for example, I may “refrain from acting on a given motive—say, spite, or envy—because I consider it base or unworthy.”⁷⁹

Hobbes’s skepticism can be avoided—generally is avoided because we pursue ends outside ourselves that we can know and share.⁸⁰ Hobbes thought there were no such ends.

⁷⁴ Maclure and Taylor, *supra* note 50, 9-10.

⁷⁵ Charles Taylor, *Multiculturalism and “The Politics of Recognition”* (Amy Gutmann Edition, Princeton University Press 1992) 59. This is a more realistic aspiration than liberal neutrality. Most regimes in the world support some religions more than others. Jonathan Fox, *A World Survey of Religion and the State* (Cambridge University Press 2008).

⁷⁶ Charles Taylor, *The Ethics of Authenticity* (Harvard University Press 1991) 31-41. For further critique of Maclure and Taylor’s embrace of liberal neutrality see Andrew Koppelman, *Keep It Vague: The Many Meanings of Religious Freedom: 140 Commonwealth* (Northwestern University School of Law 2013).

⁷⁷ It is smuggled into Eisgruber and Sager’s notion of “deep” concerns, though there it is intermingled with brute medical needs. See Laborde, *supra* note 42.

⁷⁸ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press 1989) 4.

⁷⁹ Charles Taylor, ‘What Is Human Agency?’ (1985) 1 *Human Agency and Language: Philosophical Papers* 16.

⁸⁰ My argument is anticipated in a way by C. B. MacPherson, who argued that Hobbes failed to anticipate that there could be a group “with a sufficient sense of its common interest that it could make the recurrent new choice of members of the legally supreme body without the commonwealth being dissolved and everyone being thrown into open struggle with everyone else.” Introduction, in Hobbes, *supra* note 55, 55. But MacPherson thought that the common interest could be found in the economic position of the bourgeoisie. There are other possibilities.

Taylor refers to those sources of value as “hypergoods,” “goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about.”⁸¹ They can provide a reasonable basis for singling out certain choices as especially important. If those are the urgent ends that the state ought to respect, then the objectionable unfairness and distraction consist in neglecting those ends.

One way of understanding religious conflict—and the quarrels between the religious and the antireligious—is as a collision of inconsistent hypergoods. Different regimes recognize and orient themselves around different hypergoods. They will often recognize rights to such hypergoods. In many traditions, for example, orphans are entitled to a religious education. Following Raz, we should expect that recognition of any hypergood will entail strong interests in that hypergood, and that these interests could be construed to entail rights.

Call the basis of such rights *locally recognized hypergoods*. This term sounds paradoxical: hypergoods make claims on everyone, and if you don’t see their value, there is something wrong with you. On the other hand, few hypergoods are universally appreciated. Well-being consists of realizing objective goods while recognizing their value.⁸² If different populations value different hypergoods, then they have different paths to well-being.

Claims based on hypergoods are reasonably contestable. Ultimate ends are not the kind of thing people can be argued into seeing.⁸³ That is why defenses of human rights can easily decay into table-pounding, or smuggling teleological premises into arguments that nominally disavow them.⁸⁴

The pursuit of a hypergood is an urgent interest. The urgency of the interest can generate obligations in others, which is to say, a right. If a lot of people in a given polity happen to value the same hypergood, and have reason to regard it as in need of protection, then they have a reason to elevate that hypergood to the status of a legal right. The content of the right is contingent on local values. Some oppressed groups, Saba Mahmood observes, have sought “not so much freedom of conscience as . . . a group’s ability to establish and maintain social institutions that could, in turn, secure the passage of

⁸¹ Taylor, *supra* note 78, 63.

⁸² See the elegant argument to this effect in Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 502.

⁸³ See Robert P. George, ‘Recent Criticism of Natural Law Theory’ (1999) *Defense of Natural Law* 48.

⁸⁴ Steven D. Smith, *The Disenchantment of Secular Discourse* (Harvard University Press 2010). Theistic premises, of course, are no more secure, and so the common claim that human rights must have a religious foundation merely displaces the problem. See Andrew Koppelman, *Naked Strong Evaluation* (University of Pennsylvania Press 2009). For an argument that secular liberals should own up to the reasonably contestable elements of their worldview, see Andrew Koppelman, ‘If Liberals Knew Themselves Better, Conservatives Might Like Them Better’ (2017) 20 *Lewis & Clark Law Review* 1201.

requisite traditions to future generations and the preservation of communal identity.”⁸⁵ Integrity can protect this because it can protect anything. In the United States, we have a large population that feels this way about their interest in publicly brandishing semiautomatic rifles.⁸⁶ Hypergoods sometimes conflict in zero-sum ways.⁸⁷

Of course, we often find one another’s hypergoods repugnant. Then if we respect them we do it under some description having to do with the internal state of the actor: I respect this because I see it’s important to you. This inaccessibility⁸⁸ also produces proposals to banish recognition of hypergoods from politics, notably the claim that a liberal state ought to be neutral toward all contested conceptions of the good. But it is not possible to accommodate people’s attachment to hypergoods without recognizing the hypergoods themselves, under some description that transcends the fact of the attachment.

V. THE POLITICS OF STRONG EVALUATION

If hypergoods are locally salient, then political conditions ought to facilitate access to them. That is one argument for democracy. The shape of the social environment is something that its denizens should have a say about.

America is an illustration. The American idea of religious liberty is rooted in dissenting Protestantism’s bitter conflicts, first with the Church of England and then with state religious establishments. Its central ideas, of state incompetence over religious matters and the importance of individual conscience, are responses to that experience.

Since colonial times, the United States has been religiously diverse, but the overwhelming majority of Americans have felt that religion is valuable.⁸⁹ Early struggles turned on an instrumental dispute over whether its value was best realized by state support for religion or by disestablishment. The proponents of disestablishment won. Their view, that religion is valuable and that the state therefore should be disabled from taking sides in religious disputes, has shaped American law ever since.⁹⁰

⁸⁵ Mahmood, *supra* note 2, 18.

⁸⁶ The American resistance to a right to health care, noted above, reflects an inclination to treat one’s property (which would have to be taxed to support such a right) as a hypergood. See Koppelman, *supra* note 7, *passim*.

⁸⁷ Thus, Justice Breyer observed that, even if there is a fundamental right to bear arms, the compelling interest in public safety can justify its infringement. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer dissenting) <<https://supreme.justia.com/cases/federal/us/554/570/>> [10.02.2023].

⁸⁸ This inaccessibility has led some theorists to justify liberal neutrality on epistemic grounds: it is wrong to justify state action on grounds that some citizens are incapable of cognizing. This argument, too, is defeated by Hobbesian opacity. I don’t and can’t know what you are incapable of cognizing. Andrew Koppelman, ‘Does Respect Require Antiperfectionism? Gaus on Liberal Neutrality’ (2015) 22 *Harvard Review of Philosophy* 53.

⁸⁹ Here I bracket the exclusions from this ecumenism, notably Native American and African religions.

⁹⁰ Koppelman, *supra* note 1, 1-77.

In the United States today, “religious liberty” remains an attractive candidate for protection. That’s why the ACLU and the Christian Coalition unite in wanting to protect it. “Religion” denotes a known set of deeply held values. Religious beliefs often motivate socially valuable conduct. Hardly any religious groups seek to violate others’ rights or install an oppressive government. All religions are minorities and so have reason to distrust government authority over religious dogma. There are pockets of local prejudice, especially against Muslims. “Religious liberty” is a handy rubric for averting abuses.

The protection of religion is based not on the integrity of its adherents or the intensity of their feelings, but religion’s status as an object of strong evaluation. Integrity and intensity signify only the internal states of the actor: hard to detect and possibly worthless. The blockage of intense preferences is the complaint of the utility monster and the grass counter.

So there’s that to be said for democratically recognized rights. International relations however are not democratic. All international norms have the same elitist provenance: they are agreed to, often by oligarchical governments and often with no intention of complying, because doing so is in their interest.⁹¹ In this respect religious liberty is no worse than any other human right, but also no better.

Sometimes, we on this side of a national border notice that people on the other side are being denied something that we think urgently important. That may be a good enough reason to bring pressure on foreign governments to stop blocking their subjects’ access to that good. If we can get enough other governments to agree with ours, we can negotiate an international instrument that declares access to the pertinent hypergood to be a right.

Of course, I have just described the early, naïve Christian evangelizing impulse that produced the first modern claims for religious liberty. One implication of my argument is that modern human rights advocacy is not different in kind from this. It merely involves a broader and vaguer set of hypergoods.

Raz observes that contemporary human rights practice assumes that even if some rights (such as the right to education) cannot be universalized across human history, “human rights are synchronically universal, meaning that all people alive have them.”⁹² If, however, rights are parasitic on interests, then could one object that religious liberty is not thus universal, because the valuation of this liberty, under this description, is not universal?

⁹¹ Posner, *supra* note 8, 59-122.

⁹² Joseph Raz, ‘Human Rights in the Emerging World Order’ in Rowan Cruft and others (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 225.

Religious persecution does happen, and in a lot of places. Rights both have Procrustean effects and can remedy real abuses. Where a right isn't being violated it is pointless and distracting to invoke it. But that is true of all rights. Religious liberty is the right tool for a specialized job. The critics who emphasize distraction have made an important contribution, because the pathologies they describe are less likely to happen if those administering rights are aware of their possibility. On the other hand, if you use the wrong tool, that isn't the tool's fault.

VI. REMAINDERS

What about the unfairness objection—that there are other deep and valuable concerns, and that they are neglected by “religious liberty”?

Sometimes the unfairness complaint is made as if one could reasonably demand that law recognize all pressing moral claims, with no imprecision at all.⁹³ Geertz observes that “the defining feature of legal process” is “the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them.”⁹⁴ Rules, Frederick Schauer writes, are “crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous.”⁹⁵ Human rights claims are like law in this respect: whether or not they can be backed by legal sanctions, they similarly skeletonize facts in order to make people see and care about distant atrocities.

The fairness objection is right: “religion” omits other equally exigent concerns. The distraction objection is right: it draws our attention away from such concerns. The case for religious liberty need not deny these objections. It can concede them and say: look where you end up when you try to do without it.

⁹³ Brian Leiter, for example, thinks that religious accommodation should be based on “features that all and only religious beliefs have,” and complains that, under prevailing understandings of religious liberty, a Sikh will have a colorable claim to be allowed to carry a ceremonial dagger, while someone whose family traditions value the practice will be summarily rejected. Brian Leiter, *Why Tolerate Religion?* (Princeton University Press 2013) 1-3, 27. Under what description could the law accommodate the latter? Much later in his book, Leiter acknowledges the indispensability of legal proxies; *ibid.*, 94–99; but does not examine the impact of that concession on his thesis that singling out religion is unfair. For further critique, see Andrew Koppelman, ‘How Shall I Praise Thee? Brian Leiter on Respect for Religion’ (2010) 961 *San Diego Law Review* 47.

⁹⁴ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (2nd Edition, Basic Books 2000) 170.

⁹⁵ *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* xv (Clarendon Press 1991). Since rights claims are always rule-invoking, they are inevitably underinclusive and distracting. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991). Human rights discourse itself, without more, bespeaks impoverished political ambition. Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

For law's purposes, the term's bluntness has its advantages. Although "religion" is a term that resists definition, American courts have had little difficulty determining which claims are religious, and the question is rarely even litigated.⁹⁶ It has a (mostly) settled semantic meaning. The best accounts of this meaning have held that this denotes a set of activities united only by a family resemblance, with no necessary or sufficient conditions demarcating the boundaries of the set.⁹⁷ Timothy Macklem objects 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.⁹⁸ But in certain contexts, religion may be the most workable proxy for Integrity, which is not directly detectable by the state. All laws are bounded by the semantic meaning of their terms, which only imperfectly capture real moral salience.

Why use this term and not another one? No single factor justification for singling out religion can succeed. As noted earlier, any invocation of any factor X as a justification will logically entail substituting X for religion as a basis for special treatment, making "religion" disappear as a category of analysis. Aside from the epistemic difficulties considered above, this substitution will be unsatisfactory because underinclusive. There will be settled intuitions about establishment and accommodation that it will be unable to account for. Any X will be an imperfect substitute for religion, but a theory of religious freedom that focuses on that X will not be able to say why religion, rather than X, should be the object of solicitude.

There are two ways around this difficulty. One is to say that these are not ends that the state can directly aim at, and that religion is a good proxy. This justifies some imprecision in the law. We want to give licenses to "safe drivers," but these are not directly detectable, so we use the somewhat overinclusive and underinclusive category of "those who have passed a driving test." But this doesn't work for at least some of the substitutes on offer. The state can aim directly at accommodating conscience, say, or autonomy.

The other way is to say that, at least in some parts of the world, religion is an adequate (though somewhat overinclusive and underinclusive) proxy for multiple goods, some of which are not ones that can be officially endorsed.⁹⁹ Each of those goods is, at least,

⁹⁶ Koppelman, *supra* note 1, 7-8.

⁹⁷ See, e.g., Kent Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 *California Law Review* 753.

⁹⁸ Timothy Macklem, *Independence of Mind* (Oxford University Press 2006) 120-126. David Richards similarly argues that commonsense conceptions of religion "hopelessly track often unprincipled and ad hoc majoritarian intuitions of 'proper' or 'real' religion." David A. J. Richards, *Toleration and the Constitution* (Oxford University Press 1986) 142.

⁹⁹ See, e.g., Brady, *supra* note 1, 102: "Religion is directed to the Power that grounds all that is, and religious belief and practice involve a relationship to this reality that overcomes humanity's deepest existential threats through union or communion with this absolute and eternal source. There can be nothing more

more likely to be salient in religious than in nonreligious contexts. The fact that there is so much contestation among religions as to which of these goods is most salient is itself a reason for the state to remain vague about which of the goods associated with religion is most important. Because “religion” captures multiple goods, aiming at any one of them will be underinclusive. That is enough to justify singling out religion.¹⁰⁰ It might be enough to justify a universal human right to “religious liberty,” if that captures hypergoods that cannot be otherwise described.

“Religion” denotes a group of candidates for X, chained together by what may be no more than a semantic contingency. It is an appropriate candidate for protection because it contains interests, not otherwise signifiable, urgent enough to be a basis of rights. Perhaps this cluster concept doesn’t correspond to any real category of morally salient thought or conduct. It is flexible enough to capture intuitions about accommodation while keeping the state neutral about theological questions.¹⁰¹ (My claim that there are multiple hypergoods is anathema to some religious views, which may nonetheless support religious freedom because that freedom does protect the One True Path.¹⁰²) Other, more specific categories are either too sectarian to be politically usable, too underinclusive to substitute for religion, or too vague to be administrable.¹⁰³

The case for any right based on locally recognized hypergoods rests on a distinctive interlocking pattern of mutual transparency and opacity. Were there no transparency, we would not have devised these categories, which transcend our own specific orientations toward the good as we apprehend it. Were there no opacity, we would not be impelled to institutionalize our appreciation of the good under such crude legal categories as “religion.” All are somewhat overinclusive and underinclusive. It would be a mistake to rely solely on any of them. Religion isn’t *that* special.¹⁰⁴

important than the Ultimate Reality by which all things are, and no higher human interest than the salvation or liberation or fulfillment that inheres in this connection.”

¹⁰⁰ Thus, in a way, Audi is right: the right to religious liberty is, for many people, “contingently basic.” Audi, *supra* note 19, 418.

¹⁰¹ Thus, Laborde’s objection to the proxy strategy, that “it is not clear what religion is a proxy for,” actually points to one of its virtues. Laborde, *supra* note 33, 592.

¹⁰² The Catholic church embraced religious liberty for this reason in the early twentieth century. Samuel Moyn, ‘Religious Freedom Between Truth and Tactic’, in Winnifred Fallers Sullivan and others (eds), *Politics of Religious Freedom* (The University of Chicago Press 2015) 135. Those who would rather privilege Conscience or Integrity might likewise consider whether “religious liberty” is close enough to their target to be worth settling for.

¹⁰³ Andrew Koppelman, ‘Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom’ (2015) 142 *Commonweal* <<https://www.commonwealmagazine.org/nonexistent-irreplaceable>> [10.02.2023]; ‘Religion’s Specialized Specialness’ (2013) 79 *University of Chicago Law Review Dialogue* 71 <http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf> [10.02.2023]. “‘Religion’ as a Bundle of Legal Proxies: Reply to Micah Schwartzman’ (2014) 51 *San Diego Law Review* 1079. For a similar argument, see Christopher Lund, ‘Religion is Special Enough’ (2017) 103 *Virginia Law Review* 481.

¹⁰⁴ I am therefore not suggesting that recognition of religious liberty should exclude other categories,

VII. PROTEST

The argument I have just laid out will not satisfy those who are left out—who think that religion is pernicious and false. It is no fun being a remainder.

The special treatment of religion alienates some citizens. Political alienation has been a salient concern in American discussions of religious liberty. Justice O'Connor thought that endorsement of any specific religious view "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."¹⁰⁵

Alienation is, however, an inescapable part of political life. Any action that reduces some citizens' alienation will alienate others, and it is probably impossible to know in advance what the balance will be.¹⁰⁶ Similarly, an appeal to goods that are not universally recognized will produce alienation—that's the claim of much of the public reason literature—but it too is unavoidable, since so few goods are universally recognized.

Political alienation is a chronic condition of all regimes. It must be managed. (A regime without it, in which all citizens uncritically identified with the state, would be a totalitarian nightmare.) The question of which locally valued allegiances ought to be the object of majoritarian recognition is not different in kind from the question of which locally valued hypergoods ought to be the object of rights protection. Both are contingent on what matters urgently to a significant proportion of the locals. The state can recognize categories of hypergoods. Any such categories will inevitably be overinclusive and underinclusive. The only remedy is supplementation by additional

such as conscience. Micah Schwartzman, 'Religion as a Legal Proxy' (2014) 51 *San Diego Law Review* 1085. Conscience, however, cannot be a complete substitute for religion, and even if law accommodates both, it will not and cannot cover the full field of Integrity. There are also circumstances in which legal accommodation is appropriately restricted to religion, because nonreligious claims are too idiosyncratic for law to cognize without defeating the law's purpose. Kent Greenawalt, *Exemptions: Necessary, Justified, or Misguided?* (Harvard University Press 2016).

¹⁰⁵ *Lynch v. Donnelly*, 465 U.S. 668, 687, 688 (1984) (O'Connor, J., concurring) <<https://supreme.justia.com/cases/federal/us/465/668/>> [10.02.2023]. This argument has sometimes been endorsed by a majority of the Court, see, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 592–593 (1989) <<https://supreme.justia.com/cases/federal/us/492/573/>> [10.02.2023] and has a large scholarly following. See, e.g., Eisgruber and Sager, *supra* note 41, 61–62, 122; Noah Feldman, *Divided By God: America's Church-State Problem - And What We Should Do About It* (Farrar, Straus and Giroux 2005) 14–16; Steven G. Gey, 'Life After the Establishment Clause' (2007) 110 *West Virginia Law Review* 1; Steven B. Epstein, 'Rethinking the Constitutionality of Ceremonial Deism' (1996) 96 *Columbia Law Review* 2083.

¹⁰⁶ Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford University Press 1995) 109–115; Richard W. Garnett, 'Religion, Division, and the First Amendment' (2006) 94 *Georgetown Law Journal* 1667.

categories which will themselves be similarly imperfect.¹⁰⁷ All we can do is go on to the next step of long division in order to try to make the remainder smaller.¹⁰⁸

Law inevitably generates subtler pathologies. To the extent that preferential treatment is given under any description, people will inevitably try to recharacterize themselves in order to fit that description. All law has this distorting, Procrustean tendency. People are nudged into the state's categories, their lives insidiously shaped by those categories. Under present American law, prisoners are sometimes entitled to have prison requirements relaxed if they can show that those requirements burden the free exercise of religion.¹⁰⁹ This induces them to think about those claims in religious terms, and disfavors those whose claims cannot be thus categorized. That also sometimes happens with international human rights claims.¹¹⁰

It is unsurprising that this elicits protest. The condemnation of cruelty is one of the primal commitments of liberalism.¹¹¹ Yet liberalism has its own characteristic cruelties. One of these is the bureaucratic bulletheadedness that is inseparable from the rule of law. This paradox demands that liberalism constantly, guiltily interrogate its own geography of pain. The pain and its interrogation are both aspects of the normal functioning of a liberal society.¹¹²

The desire to dispense with "religion" and instead accommodate all deep and valuable human concerns, to create a world in which these are the basis for a pervasive practice of exemptions from generally applicable laws, is reminiscent of Herbert Marcuse's suggestion in *Eros and Civilization* that we should seek to abolish "surplusrepression," repression that exceeds the needs of civilization.¹¹³ Marcuse was thinking of sexual repression, and the ideal of sexual liberation that he articulated in 1955 has rocked our world. Parity for all deep and valuable concerns is an even more radical ambition. Freud was right: you can't please everybody.¹¹⁴ The best we can do is rely on proxies that tend to capture the general areas that are likely to be unfathomable.

Look at where we have come: to a place of exquisite sensitivity to the alienation of very small minorities whose basic rights to personal security are otherwise respected. This is admirable but fussy in a world where much worse things are happening. A right

¹⁰⁷ Another supplement is minority rights to group autonomy. The value of such rights to members is typically underwritten by the availability of exit. This too is imperfect, because of unavoidable uncertainty about when and for whom the costs of exit are prohibitive. Kukathas, *supra* note 49, 110–111.

¹⁰⁸ This is what American law has done, by making its understanding of religion broader and vaguer as the nation's religious diversity has increased. Koppelman, *supra* note 1, 15–45.

¹⁰⁹ Greenawalt, *supra* note 104, 132–145.

¹¹⁰ Hurd, *supra* note 2, offers numerous illustrations.

¹¹¹ Judith N. Shklar, *Ordinary Vices* (Belknap Press 1984) 7–44.

¹¹² This is the real paradox of liberalism, not an inability to confront its enemies, as some have contended. Andrew Koppelman, 'Unparadoxical Liberalism' (2017) 54 *San Diego Law Review* 257.

¹¹³ Herbert Marcuse, *Eros and Civilization: A Philosophical Inquiry into Freud* (Beacon Press 1966).

¹¹⁴ Sigmund Freud, *Civilization and Its Discontents* (James Strachey Translation, W. W. Norton & Company; The Standard Edition 1961).

to religious liberty is properly aimed at those worse things, which are common enough that an aversive reaction is appropriate.¹¹⁵ Since one never knows where the danger will manifest, freedom from it is a plausible candidate for a universal right. Like all other rights, this one is not salient where it is not violated.

The resistance to any alienation or repression whatsoever is reminiscent less of Marcuse than of his daft contemporary Wilhelm Reich. One thing that the secular liberals need to learn from the Christians is that we had better get used to living in a fallen, broken world. Unfairness and distraction you will always have with you.

¹¹⁵ On the importance of negative paradigm cases for the construction of rights, see Andrew Koppelman, 'Originalism, Abortion, and the Thirteenth Amendment' (2012) 112 *Columbia Law Review* 1917.