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# Where's the Beef?

STANLEY FISH\*

A key concern of the papers written for this conference is the relationship between religious beliefs and secular beliefs of the kind that carry with them deep ethical obligations. Are these systems of belief essentially the same or are they different in important respects? The question is typically posed abstractly, and I thought it might be useful to have before us an example of religious belief and the demands that attend it. The example is taken from the beginning of John Bunyan's *The Pilgrim's Progress*.<sup>1</sup> Christian, Bunyan's protagonist, has suddenly become aware that his salvation is imperiled, and he is told that he must flee the wrath to come.<sup>2</sup> But he is does not know in what direction to flee, and when he asks, the answers he receives are confusing and unhelpful.<sup>3</sup> Nevertheless, Bunyan's narrator tells us, Christian feels that he must set out in his journey, even if he is ignorant of the path he should take:

So I saw in my Dream that the Man began to run. Now he had not run far from his own door, but his Wife and Children, perceiving it, began to cry after him to return; but the Man put his fingers in his ears, and ran on, crying, *Life! Life! Eternal life!*<sup>4</sup>

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1. JOHN BUNYAN, *THE PILGRIM'S PROGRESS* (Paul Negri & Susan L. Rattiner eds., Dover Publ'ns, Inc. 2003) (1678).

2. *See id.* at 14–15.

3. *See id.* at 15.

4. *Id.*

It is the putting of his fingers in his ears that tells the story: he is not immune to the appeals of family and loyalty; it tears at him; but with a great effort he discounts it in favor of a higher loyalty—and promise of a higher reward—that is uncompromising and brooks no rivals. Keep that moment in mind.

What kind of question is the question, “Is religion special?” What measure of specialness will be employed in the course of arriving at an answer? What criteria will be the content of that measure? Where will the criteria come from? Articles like Micah Schwartzman’s *Religion as a Legal Proxy*<sup>5</sup> provide at least a negative answer to my last question: the criteria will *not* come from religion, and will especially not come from the claim of religion to be a master discourse, the propositions of which stand in a special—and indeed totalizing—relationship to the actions both of believers and of nonbelievers. In the context of strong, that is uncompromising, religions, nonbelievers do not escape opprobrium and damnation simply because they are out of the fold; they should have been in. In his reply to Andrew Koppelman, Schwartzman acknowledges that this claim “persists”—like a disease that one would have expected to be eradicated by now—and that some continue to believe that they “owe a duty to a transcendent moral authority”;<sup>6</sup> but he quickly dismisses this line of thought, which he labels “divine command theory,” by finding it underinclusive: “It cannot account for nontheistic religions.”<sup>7</sup> But of course it can, in at least two ways: it can deny them the status of religions, or it can acknowledge that they are religions but assert that they are the wrong ones; sorry guys, you did not bet on the right horse.

But of course this kind of “accounting” is not what Schwartzman has in mind, for it amounts to nothing more than re-rehearsing the bald assertion of precedence in the manner either of Mohammed Ali—“I am the greatest”—or Chevy Chase—“I’m religious and you’re not.” What is required, Schwartzman would say, is a kind of accounting that would support religion’s claim both to be special and to be true by giving reasons that did not borrow from or presuppose the reasons proclaimed by religion. This is a general rule in the rationalist picture of what argument should be like: the vocabulary of validation should not be taken from the policy or discourse whose status is in question; a discourse cannot validate itself. A perspective more general than it must be brought in and it is from the vantage point of that more general perspective that an assessment and a judgment can then be made.

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5. Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014).

6. *Id.* at 1088.

7. *Id.* at 1089.

But here we run up against a difficulty: It is part—and indeed the essence—of religion’s self-presentation that there is no more general perspective than the one it provides. Religions—at least of the theistic kind—do not say, “here is where we stand; what do you think?”; they say, “here is where we stand and you had better stand there too”; and they also say, the reasons you might be tempted to give for standing elsewhere are only reasons if you forget the magisterial truth—God is all-creating, omnipotent, omnipresent, and loving—we are announcing as the good news. If you put that truth front and center and adhere to it, all your supposedly powerful reasons will dissolve like snowflakes in the sun.

This is exactly what happens in Book 10 of John Milton’s *Paradise Lost*.<sup>8</sup> Adam and Eve have eaten the apple and God comes down to Eden to ask them why they disobeyed him.<sup>9</sup> Eve is brief and offers no excuse: “The serpent me beguiled and I did eat.”<sup>10</sup> Adam is more loquacious and full of reasons that he elaborates for nineteen lines. You gave me this woman as a helpmeet and a gift; and you made her so fit and beautiful and divine that it never occurred to me that anything she might offer could be bad: “Her doing seemed to justify the deed.”<sup>11</sup> So, as a result of all that, “She gave me of the Tree and I did eat.”<sup>12</sup> To this extended self-extenuation and accusation of deity (he is, in effect, saying, “You should have made her ugly”), the voice of God speaks only four words: “Was she thy God?”<sup>13</sup> That is, was she the proper object of your worship? Are you so besotted by her beauty that you forget who created it and her?

The accusation is of idolatry—the mistake of preferring the created thing for the creator Adam is twice idolatrous—when he prefers Eve and when he prefers reason or the giving of reasons to obedience. Reason’s operations, Augustine reminds us in *De Trinitate*, build on a first premise that they cannot generate and reason’s entailments will only be as good and true as that free-standing first premise is good and true. The issue in the fall is not getting the argument right, but getting the loyalty right. That is why the content of God’s command—you may eat of all the

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8. JOHN MILTON, *PARADISE LOST* (Scott Elledge ed., W.W. Norton & Co. 2d ed. 1975).

9. *Id.* at 234.

10. *Id.*

11. *Id.* at 233.

12. *Id.*

13. *Id.*

fruits of the trees in this garden, but not of this one—is so trivial, so unreasonable; its value is entirely a function of its having been forbidden and of the identity of the forbider. As John Webster, another seventeenth century religious thinker, explains, if the unfallen pair had obeyed because it seemed reasonable to do so, their refraining from eating the apple would have been based on the “rotten vessel of human reason” and they would have received no credit for it.<sup>14</sup> Reason, Webster adds, “is a monster, and the very root and ground of all infidelity.”<sup>15</sup>

Perhaps you can now see why I find the question “is religion special?” curious; for what it asks is that the truths religion proclaims, including the assertion of its primacy, be put to the test of the rotten authority of man’s reason, and especially of the form of reason that marks Rawlsian liberalism.<sup>16</sup> In that system what is reasonable is what contributes to a regime of equal regard: reasons are good reasons if they flow from and lead to the flourishing of that regime; lead, that is, to fairness, where fairness is understood to require that all conceptions of the good be accorded dignity independently of their substantive content.<sup>17</sup> Well, not quite *all* conceptions of the good are honored; only those that wear their claims lightly in the sense that they do not press them on others or enlist the state in an effort to establish them.<sup>18</sup> The more aggressive forms of substantive assertion refuse this liberal modesty; they are, in Rawls’s terms, “unreasonable comprehensive doctrines” and when Rawls comes to think of an example, it is religion that comes most easily to mind: “If it is said that outside the church there is no salvation,” then “we say that such a doctrine is unreasonable.”<sup>19</sup> And indeed it is; it will not listen to reason, it will not submit itself to reason’s correction or limitation, and it is so unreasonable that it will argue for, and accept, privileges and exemptions not granted to its competitors. How unfair is that?

And this is exactly Professor Schwartzman’s concern; he wants, he says, to reconcile “laws that privilege religion”—laws that are unfair—“with the demands of political morality, which require giving equal treatment to those with comparable claims of conscience.”<sup>20</sup> But that of course is the question: are they comparable, or, to be more precise, by what logic can they be made comparable? Schwartzman finds the relevant logic where those on his side of the street often find it—in the conscientious objector

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14. See JOHN WEBSTER, *THE EXAMINATION OF ACADEMIES* 14 (1654).

15. *Id.* at 17.

16. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (extended ed. 2005).

17. See *id.* at 48–66.

18. See *id.* at 60.

19. *Id.* at 138.

20. Schwartzman, *supra* note 5, at 1094.

cases, *United States v. Seeger*<sup>21</sup> and *Welsh v. United States*.<sup>22</sup> In those cases, the Court was faced with (a) the Constitutional text that names religion and not conscience as the object of special regard, and (b) a statute that equates eligibility for conscientious objector status with “religious training and belief,” to wit, the belief in a “Supreme Being involving duties superior to those arising from any human relation,”<sup>23</sup> but not duties related to “political, sociological, or philosophical views or a merely personal moral code.”<sup>24</sup> In spite of this apparently clear and unambiguous language, the Court ends up declaring that a person qualifies for the exemption if he holds a belief that “occupies a place in [his] life . . . parallel to that filled by the orthodox belief in God.”<sup>25</sup> *Parallel* is being used here as if it meant “equivalent to,” but what it actually means is lines that have the same distance between them no matter how far they are extended; they never meet and therefore are never equivalent. Taken in the second, correct sense, the word underlines the incoherence of the *Seeger/Welsh* formulation.

You can see why if you think for a moment about what the orthodox belief in God involves. First, if you believe in God you believe that he created you; “who made you?” is the first question in many catechisms. Second, you believe that you are sustained by his indwelling presence and that apart from Him you have no identity: “in Him we live, and move, and have our being.”<sup>26</sup> Third, you believe that God is aware of your every action—he notes even the fall of a sparrow;<sup>27</sup> like Santa Claus, but more so, he knows what you have been doing. And fourth, you believe that in the last days you will have to answer to Him for your actions and be judged accordingly.

So I ask you, exactly what parallel to these convictions can be found in nonreligious systems of value? Let us say that you believe in a duty to help those less fortunate than you. Or, let us say that you are an impassioned environmental activist because you are certain that if we keep doing what we are doing the planet will perish. Or, let us say that you have dedicated your life to eliminating hunger, or illiteracy, or violence against women.

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21. 380 U.S. 163 (1965).

22. 398 U.S. 333 (1970) (plurality opinion).

23. *Seeger*, 380 U.S. at 172 (quoting the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958)).

24. *Id.*

25. *Id.* at 166.

26. *Acts* 17:28.

27. *Matthew* 10:29.

To be sure, these commitments can be totally absorbing; they can fill your life, they can be what gets you up in the morning and prevents you from sleeping easily at night, they can be experienced as claims on your conscience, and you might feel delinquent and even guilty were you to default on them. But the hold they have on you will always fall short of your acknowledging them as your creator or as the guarantor of your personhood or as the ever-vigilant monitor of your moral performance or as the determiner of your fate throughout eternity.

To put the point as baldly as possible, there is not, and could not be, any parallel between religious beliefs and the beliefs that make up what Schwartzman calls the “secular claims of conscience.”<sup>28</sup> As propositions about the world and your relation to it, they are entirely different animals. The assertion that they are “comparable” or “functionally equivalent” can only be made to work if what is distinctive, that is, special, about religion—what Brian Leiter calls its “categoricity”<sup>29</sup>—is regarded as a quaint but now annoying relic of an age of superstition, while the true essence of religion is identified with whatever in its teachings can be squared with liberal rationalism. Then you can say that religion is not special because the specimen laid out on your dissecting table has had the heart cut out of it. When Schwartzman asks, “Is it possible to argue on nontheological grounds for providing religion with special treatment?”<sup>30</sup> he somehow does not see the oddness of requiring that the case for religion’s specialness be made on grounds other than the grounds that make it special, that make it *anything*. Take away or discount religion’s theological grounds and totalizing claims and you will be met with a question from an old television commercial: “Where’s the beef?”

The moral is clear. Being special is the business religion is in. And as it so happens it is a business recognized by the Constitution. So specialness is validated all around. End of story, end of argument. Not, however, the end of the political problem, which is what to do with a discourse marked as special by the Constitution, as well as by its own claims, in a society where the value of obedience to a revered authority is held in slight regard and has been replaced by the values of equal treatment, fairness and human flourishing—or so it would seem if you spend most of your life in elite law schools. Rawls articulates the dilemma in *Political Liberalism*: “How is it possible for those affirming a religious doctrine . . . based on religious authority . . . also to hold a reasonable political

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28. Schwartzman, *supra* note 5, at 1098.

29. Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935, 945 (2010).

30. Schwartzman, *supra* note 5, at 1087.

conception that supports a just democratic regime?”<sup>31</sup> The answer is that it is not possible. Again, end of argument, and end of story. And again, not quite, for cases involving free exercise exemptions and the danger of establishment continue to arise and must be dealt with, and there is no satisfactorily rational way of dealing with them. And that is why we have, both in court decisions and in innumerable law review articles, a dispiriting record of hairsplittings, pendulum swings, ad hoc acrobatics, systematic distortions, strained redefinitions, and just plain logical howlers. What we have, in short, is the ongoing spectacle, bordering on farce, that is religion clause jurisprudence.

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31. RAWLS, *supra* note 16, at xxxvii.



