Leiter’s Book Questions Religion’s Preferential Legal Treatment

The Western democratic practice to single out religious liberty for special treatment under the law is not in sync with the world we live in today, argues University of Chicago Law School professor Brian Leiter in his new book, *Why Tolerate Religion?*

All people, both religious and nonreligious, have certain kinds of beliefs about things they feel they absolutely must do, something he calls “claims of conscience.” In the book, Leiter, the Karl N. Llewellyn Professor of Jurisprudence, explores whether there are good reasons behind the tendency to grant legal exemptions to religious claims of conscience while largely rejecting nonreligious ones.

“The current status quo is predicated on a fundamental inequality,” said Leiter, using as an example the differing treatment two boys caught wearing a dagger at school would receive if one carried it as part of his Sikh religion and the other as a family tradition.

“Namely, your claim of conscience counts if it is based in religion. My claim of conscience doesn’t count if it is not based in religion. That, it seems to me, is a pernicious and indefensible inequality in the existing legal regime.”

**Historical Roots**

Leiter first became interested in the preferential treatment religion receives under the law as a professor at the University of Texas–Austin. He began to consider the place of religion and toleration in society after noting how conservative Christians in the state were increasingly trying to influence politics and public education.

The origins of religious toleration can be traced back hundreds of years to the European wars of religion, a time when people were killed over religious differences, says Leiter. The wars’ ends gave rise to greater acceptance of others’ religions, an important achievement of Western democracies. However, the West’s preferential treatment for religious toleration over that of other beliefs is not in step with changing times, maintains Leiter.

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“While we understand the historical reasons why our constitution singled out religion and religious liberty 200-plus years ago, in the world we live in today, you don’t have to be religious in order to have a conscience,” he said.

In leading philosophical literature, Leiter found compelling moral arguments for the important role toleration plays in general in a society. He explores the arguments of John Rawls, who defends liberty of conscience as a basic right, and the utilitarian arguments of John Stuart Mills, who underlines the importance of toleration of differing views to society’s search for truth and knowledge.

“Both schools of thought reach the same conclusion: that liberty of conscience is sufficiently important to individuals, that a just and decent society is going to protect a sphere for the liberty of conscience,” said Leiter.
Conversely, Leiter could not find an equally forceful argument as to why religious conscience has been treated as more deserving of protection. What makes religious beliefs distinctive from other claims of conscience are two things: some beliefs in every religion are not evidence based and some beliefs provide followers with “existential consolation,” helping them cope with suffering and death. He argues that neither the Rawlsian nor Millian argument would warrant a special legal status for beliefs with these characteristics over other conscientious beliefs.

The Way Forward

While some might wish there was a way to grant exemptions to all claims of conscience, realistically, Leiter says, this would lead to almost insurmountable practical problems. “It would be tantamount to legalizing civil disobedience,” said Leiter, explaining that while courts can verify a person’s involvement in a religion and that religion’s particular beliefs, nonreligious claims would be much more difficult to verify. “We don’t have a way to peer into a man’s soul to see if his claim of conscience is really a legitimate claim of conscience.”

Exemptions from neutral laws also often defeats society’s promotion of the general welfare. Leiter gives the example of mandatory vaccination laws, where the widespread granting of religious exemptions has led to the return of previously rare diseases, such as whooping cough. Given the unfairness of the special treatment given religious liberty, Leiter argues the fairest path forward is to allow no exemptions, religious or otherwise, that challenge laws that promote the public good, unless those exemptions do not shift burdens onto others.

“Doesn’t the state have the right to pass laws that are supposed to promote the general welfare without having to carve out exemptions that basically undermine the promotion of the general welfare?” Leiter asks, although cautioning courts to monitor for laws that have as their real purpose intolerance, such as France’s ban on Islamic headscarves. “If we start carving out exemptions, we defeat the purposes of those legitimate objectives.”