

2014

Preface to the Paperback Edition of Why Tolerate Religion?

Brian Leiter

Follow this and additional works at: https://chicagounbound.uchicago.edu/public_law_and_legal_theory

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

Recommended Citation

Brian Leiter, "Preface to the Paperback Edition of Why Tolerate Religion?" (University of Chicago Public Law & Legal Theory Working Paper No. 465, 2014).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 465



PREFACE TO THE PAPERBACK EDITION OF WHY TOLERATE RELIGION?

Brian Leiter

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

February 2014

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:
<http://www.law.uchicago.edu/academics/publiclaw/index.html>
and The Social Science Research Network Electronic Paper Collection.

Preface to the paperback edition of *Why Tolerate Religion?* (Princeton University Press, forthcoming fall 2014; cloth edition, 2013)

Brian Leiter

February 10, 2014

Internationally, this book has enjoyed a warm reception, with French and Italian translations already in progress and appreciative reviews in newspapers in Britain, Sweden, Denmark, Italy, and elsewhere. This is not wholly surprising since, as I note in Chapter 1, the European countries typically recognize the equality of religious and non-religious claims of conscience in their foundational charters, if not in the cases actually litigated in the courts. But in the United States, with its high level of public religiosity (despite the absence of an established church), the idea that religious and non-religious claims of conscience should have equal moral standing has proved more controversial.

For example, the Family Research Council, a very conservative religious organization in Washington, D.C. (it was denominated a “hate group” by a leading civil rights organization because of its vicious defamation of gay men and women) denounced this book last year as, “[O]ne of the most troubling and intellectually discreditable books by a serious American scholar in some time.” More soberly, *First Things*, a conservative Catholic magazine of ideas, worried (in their April 2013 issue) that I had outlined “what may well become the theoretical consensus used to reinterpret the First Amendment [of the U.S. Constitution].” That would entail that the U.S. Supreme Court recognize the equality of religious and secular claims of conscience, something I think unlikely in my lifetime. In October 2013, an Elder of the Mormon Church gave a major public address at the Brigham Young University Law School, in which he discussed this book, concurring with its defense of liberty of conscience, but disagreeing with its conclusion that religion is not special when it comes to liberty of conscience.

It should not be surprising that some (certainly not all) religious readers object to my argument that religious claims of conscience are not more important, from a moral point of view, than non-religious claims of conscience. It has been more surprising the extent to which even some conservative Christian scholars have been unable to engage the actual arguments of the book. Michael McConnell, a conservative Christian law professor at Stanford, a former Federal Judge appointed by President Bush, and an unabashed apologist for the inequality at the core of American First Amendment jurisprudence, went so far as to try to smear my book by writing, falsely, that "[w]hat [Leiter] defends is the establishment of secularism."¹ This is not scholarly engagement, but political advocacy, as readers of the book will see: Chapter 5, among other points, argues that toleration is compatible with the establishment of religion and specifically disclaims whether the establishment of religion or non-religion is justified. Some conservative Christian scholars have done better. Michael Stokes Paulsen, a law professor at the University of St. Thomas in Minnesota, wrote in the *Michigan Law Review* (April 2014) that the argument of the book was, *given its assumptions*, "obviously" correct, since,

Religious freedom only makes full, rational sense on the premise that God exists (or well may); that God's nature and character is such (or may well be) as to give rise to obligations with respect to human conduct; that the true commands of God, whenever knowable, are, in principle, prior to and superior in obligation to the commands of men; and that human civil society, acknowledging the priority of God's true commands yet conceding the inability of human institutions to know them perfectly, must accommodate the broadest possible sphere of religious liberty, often including conduct in conflict with society's usual rules.

Professor Paulsen is, I think, right: if these claims about religion were true, or even reasonable, then the argument of this book fails. Paulsen does not realize how much this concedes to my position, however.

¹I discuss some of the responses, including McConnell's, on-line at: <http://leiterlawschool.typepad.com/leiter/2013/12/why-tolerate-religion-has-clearly-touched-a-nerve.html>

Many writers influenced by the later work of the influential American political philosopher John Rawls think that arguments about fundamental political principles must depend on non-controversial, non-sectarian premises; Professor Paulsen's position obviously does not, and thus would be inadmissible as a defense of distinctively *religious* liberty. But I do not share that (later) Rawlsian assumption; I think arguments about rights and liberty should be based on true premises (or premises for which we have good evidence). Paulsen's assumptions are still in trouble, since they are neither true nor justified. If Professor Paulsen is correct about the *only* basis on which "religious freedom...makes full, rational sense," then the unequal privileging of religious freedom is, indeed, in trouble.

The so-called "new atheists" like Richard Dawkins tend to treat the falsity of some religious beliefs—beliefs in a super-natural deity, in reincarnation, in resurrection from the dead, and so on—as decisive reasons to repudiate religion. I agree that all religions are marked by *some* beliefs that are false (or, at best, unjustified), but I do not think that settles any interesting questions about the need for religious toleration. The sphere of toleration is precisely the domain of beliefs (and associated practices) we deem to be false or misguided. And false or irrational belief is hardly proprietary to religion, as I emphasize throughout the book.

I believe, perhaps naively, that philosophy makes occasional progress, and this is partly because, as a philosophical naturalist, I think philosophy has to answer to scientific results. The scientific evidence that there is no immaterial soul, that the dead do not return to life, and that observable physical and biological phenomena are explicable in terms that require no reference to supernatural entities is overwhelming. That anyone still believes in a super-natural being like the Judeo-Christian God is, as the Oxford philosopher John Mackie noted a generation ago, a "miracle," though perhaps that overstates the point: it is no longer rational to believe in gods or other super-natural beings, but it is easily explicable why people (including very intelligent people) do so, a topic on which psychologists,

anthropologists and others have shed light for more than a century. Perhaps most importantly, “the truth is terrible,” as Nietzsche likes to say, and religion has offered one of the most potent consolations for the terrible truths that afflict human existence: pointless suffering and mortality. As I note in Chapter 3, that fact is relevant to the question of whether religious conscience is more important than other kinds, though I argue it does not ultimately favor privileging religious claims of conscience. But that conclusion also underlines the mistake of the atheist zealots like Dawkins who believe, also falsely, that only true beliefs are essential for human life. Religions all involve some false and/or irrational beliefs, but they are none the worse for that in terms of their essential role in the lives of many human beings. What religion can no longer claim is that only the demands it places on conscience deserve special legal solicitude.

Some religious readers complained that the book did not devote more space to recent efforts to defend the rationality of religious belief by a handful of professional philosophers (all theists before they were philosophers, needless to say). Others have written books on this topic, including Mackie, and I take the issue to be well-settled. But I also take seriously Nietzsche’s observation in his 1881 book *Daybreak*, in a section titled “Historical refutation as the definitive refutation”: “In former times, one sought to prove that there is no God—today one indicates how the belief that there is a God could *arise* and how this belief acquired its weight and importance: a counter-proof that there is no God thereby becomes superfluous” (95). The refutations of proofs for the existence of God are legion, the stuff of introduction to philosophy classes throughout the post-Enlightenment world; but once we understand the attraction of false belief, including religious belief, we do not need to continue the endless recycling of bad arguments for incredible conclusions.

In addition to arguing for the moral equality of religious and non-religious claims of conscience, I also argue that just societies must confront squarely the costs of permitting conscientious exemptions,

religious or otherwise, to laws that promote the general welfare. The return of whooping cough and measles in many parts of the United States is tangible evidence of the costs of carving out exemptions to laws of general applicability, like mandatory vaccination schemes. Although the arguments of the book are not concerned with the law of any one jurisdiction, it perhaps bears noting that the United States, in particular, has now moved to a dangerous extreme in its willingness to permit “religious believers” to be exempt from the law. Chapter 5 of this book argues that, at least as far as the moral value of principled toleration is concerned, the U.S. has gone too far. Other democratic societies would do well to learn from the American mistakes.

B.L.

Chicago, IL, USA

February 10, 2014

Readers with comments may address them to:

Professor Brian Leiter
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
bleiter@uchicago.edu

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

For a listing of papers 1–400 please go to <http://www.law.uchicago.edu/publications/papers/publiclaw>.

401. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, September 2012
402. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
403. Aziz Z. Huq, Enforcing (but Not Defending) “Unconstitutional” Laws, October 2012
404. Lee Anne Fennell, Resource Access Costs, October 2012
405. Brian Leiter, Legal Realisms, Old and New, October 2012
406. Tom Ginsburg, Daniel Lnasberg-Rodriguez, and Mila Versteeg, When to Overthrow Your Government: The Right to Resist in the World’s Constitutions, November 2012
407. Brian Leiter and Alex Langlinais, The Methodology of Legal Philosophy, November 2012
408. Alison L. LaCroix, The Lawyer’s Library in the Early American Republic, November 2012
409. Alison L. LaCroix, Eavesdropping on the Vox Populi, November 2012
410. Alison L. LaCroix, On Being “Bound Thereby,” November 2012
411. Alison L. LaCroix, What If Madison had Won? Imagining a Constitution World of Legislative Supremacy, November 2012
412. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
413. Alison LaCroix, Historical Gloss: A Primer, January 2013
414. Jennifer Nou, Agency Self-Insulation under Presidential Review, January 2013
415. Aziz Z. Huq, Removal as a Political Question, February 2013
416. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
417. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
418. Ariel Porat and Lior Strahilevits, Personalizing Default Rules and Disclosure with Big Data, February 2013
419. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
420. Alison L. LaCroix, The Interbellum Constitution and the Spending Power, March 2013
421. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
422. Eric A. Posner and Adrian Vermeule, Inside or Outside the System? March 2013
423. Nicholas G. Stephanopoulos, The Consequences of Consequentialist Criteria, March 2013
424. Aziz Z. Huq, The Social Production of National Security, March 2013
425. Aziz Z. Huq, Federalism, Liberty, and Risk in *NIFB v. Sebelius*, April 2013
426. Lee Anne Fennell, Property in Housing, April 2013
427. Lee Anne Fennell, Crowdsourcing Land Use, April 2013
428. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
429. Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, May 2013
430. Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, June 2013
431. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
432. Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, June 2013

433. Bernard Harcourt, Beccaria's *On Crimes and Punishments*: A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
434. Zachary Elkins, Tom Ginsburg, and Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, July 2013
435. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
436. Rosalind Dixon and Tom Ginsburg, The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps', August 2013
437. Bernard E. Harcourt, The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle, August 2013
438. Brian Leiter, Nietzsche against the Philosophical Canon, April 2013
439. Sital Kalantry, Women in Prison in Argentina: Causes, Conditions, and Consequences, May 2013
440. Becker and Foucault on Crime and Punishment, A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013
441. Daniel Abebe, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, September 2013
442. Brian Leiter, Why Legal Positivism (Again)? September 2013
443. Nicholas Stephanopoulos, Elections and Alignment, September 2013
444. Elizabeth Chorvat, Taxation and Liquidity: Evidence from Retirement Savings, September 2013
445. Elizabeth Chorvat, Looking Through' Corporate Expatriations for Buried Intangibles, September 2013
446. William H. J. Hubbard, A Theory of Pleading, Litigation, and Settlement, November 2013
447. Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples": The Global Origins of Constitutional Preambles, November 2013
448. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
449. Lee Anne Fennell, Forcings, December 2013
450. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Beyond Presidentialism and Parliamentarism, December 2013
451. Nicholas Stephanopoulos, The South after Shelby County, October 2013
452. Lisa Bernstein, Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy, November 2013
453. Tom Ginsburg, Political Constraints on International Courts, December 2013
454. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
455. M. Todd Henderson and William H.J. Hubbard, Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior, January 2014
456. Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine? January 2014
457. Alison L. LaCroix, The Shadow Powers of Article I, January 2014
458. Eric A. Posner and Alan O. Sykes, Voting Rules in International Organizations, January 2014
459. John Rappaport, Second-Order Regulation of Law Enforcement, February 2014
460. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
461. Aziz Huq, Standing for the Structural Constitution, February 2014
462. Jennifer Nou, Sub-regulating Elections, February 2014
463. Albert W. Alschuler, Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix" *Skilling v. United States*, February 2014

464. Aziz Z. Huq, *Libertarian Separation of Powers*, February 2014
465. Brian Leiter, *Preface to the Paperback Edition of Why Tolerate Religion?* February 2014