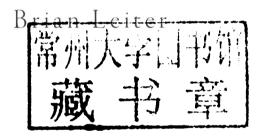
## Why Tolerate Religion?

BRIAN LEITER

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### For Samuel who had to endure a "day in hell" with the intolerant

My interest in the topic of religious toleration arose when teaching at the University of Texas—Austin and witnessing in the years 2001 to 2008 the pernicious influence of reactionary Christians on both politics and public education in the state. Although some of their conduct might well fall beyond the protection of the principle of toleration defended in this book, reflection on religion and toleration led me to conclusions friendlier to religious belief than I would have imagined before undertaking systematic work on the topic.

Because I am centrally interested in the question of whether there is a moral reason to single out matters of religious conscience for special legal consideration and solicitude, I made the decision to consider moral

arguments deriving from the two major, modern traditions of moral thought—the Kantian or deontological, and the utilitarian—without taking a side with either. This will, I hope, give the conclusion of the argument a broader resonance than would a partisan account of the moral foundations of religious liberty. As a representative of the deontological tradition, I have focused on John Rawls's account in his 1971 book A Theory of Justice, eschewing the later, and to my mind unfortunate, development of Rawls's views in Political Liberalism. The account in A Theory of Justice has the virtue of grounding liberty of conscience in considerations with immediate intuitive resonance and it also avoids the later Rawls's conflation of questions of political psychology and sociology (e.g., how can a liberal political and social order be made legitimate in the eyes of its subjects?) with questions about the correct or most plausible justification of fundamental political institutions. 1 For the utilitarian tradition, I draw on John Stuart Mill, and some more recent utilitarianderived treatments of liberty of conscience. I also assume, as will become clear, that religious belief always involves some degree of false or at least unwarranted belief, but unlike some recent writers, it seems to me this fact about religious belief does nothing to settle the question of the scope of toleration. So, too, we can acknowledge that religion has often been the source of war, civil strife, and persecution, and yet recognize that it has also been the source of courageous resistance to injustice and movements for social and moral progress. Neither the putatively "bad" effects of religion nor the putatively "good" effects of religion will easily settle the question of the moral justification for distinctively *religious* liberty. Nor will they settle the question, taken up in chapter 5, of when and whether the establishment or disestablishment of religion is incompatible with principled toleration.

Because I am interested in making the argument accessible to scholars outside philosophy, I have largely avoided going into the minutiae of internecine debates among academic philosophers in the various camps. (I have also tried to keep the text free of technical debates among legal scholars.) I have occasionally noted some complications presented by such debates in the notes, but the aim has been to make the text readable by scholars in other disciplines interested in these issues, and perhaps also by educated laypeople.

The text incorporates—though with significant revisions to the account of religion—material from two earlier articles I have written on this subject: "Why Tolerate Religion?" *Constitutional Commentary* 25 (2008): 1–27, and "Foundations of Religious Liberty: Toleration or

Respect?" San Diego Law Review 47 (2010): 935–59. I am grateful to those journals for permission to incorporate some of that material in this book.

The material in these essays and in other parts of the book has benefitted from presentations on many occasions, including: the 'Or 'Emet Lecture at Osgoode Hall School of Law, York University, Toronto; the Leon Green '15 Lecture in Jurisprudence at the University of Texas School of Law; a keynote address at the Graduate Conference sponsored by the Department of Philosophy at Virginia Polytechnic Institute and State University; a public lecture sponsored by the Department of Philosophy at Colgate University; the Kline Colloquium sponsored by the Department of Philosophy at the University of Missouri-Columbia; the conference "Respect, Global Justice, and Human Rights" at the University of Pavia, Italy; the Law and Philosophy Workshop at the University of Michigan, Ann Arbor; the MacMillan Center Initiative on Religion, Politics, and Society at Yale University; a session of the Society for Applied Philosophy at the Eastern Division meeting of the American Philosophical Association in New York; the Analytic Legal Philosophy conference at New York University; the conference "Freedom of Conscience" sponsored by the Institute for Law and Philosophy at

the University of San Diego; the Second Annual Law and Religion Roundtable at Northwestern University School of Law; the Legal Theory Workshop at Columbia Law School; and faculty workshops at the University of Chicago Law School (on three occasions), Cornell Law School, Chicago-Kent College of Law, University of Minnesota Law School, Fordham Law School, the Dickinson School of Law at Pennsylvania State University, and Queen's University Faculty of Law in Kingston, Ontario.

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#### Introduction

A boy, age fourteen, enters his new middle school class-room on the first day of the year, wearing, as usual, his dagger. The teacher, alarmed, alerts the principal, who phones the police: carrying weapons is, of course, forbidden in school, and the police promptly confiscate the boy's dagger.

A straightforward case, perhaps, but not if the boy in question is a devout Sikh. For in the Sikh religion, male believers must wear a *kirpan*, a dagger or sword, as a symbol of their religious devotion. In many jurisdictions, in both North America and Europe, Sikhs have had to challenge laws that prohibit the carrying of weapons in school, since these laws would block discharge of their

religious obligations. And on many occasions, Sikhs have been granted exemptions from those laws, on the grounds that freedom of religion requires the state to tolerate an exception to the general prohibition. The conscientious obligation a devout Sikh has to wear a kirpan is thought to be too serious—too important for the integrity and identity of this religious believer—to require him to forgo it because of the general prohibition on what anyone else would see as a weapon and danger to school safety.

But now suppose that our fourteen-year-old boy is not a Sikh but a boy from a rural family whose life "on the land" goes back many generations. As in almost all cultures, this boy's community has rituals marking the arrival of maturity for males in that community. A central one is the passing of a dagger or knife from father to son, across the generations. To be a "man" at the age of thirteen or fourteen is to receive that dagger from one's father, just as he received it from his, and so on, stretching back for decades, perhaps centuries. A boy's identity as a man in his community turns on his always carrying the family knife, for it marks his maturity and his bond with the past. There can be no doubt in this case about the conscientious obligation every boy of knife-bearing age feels to carry his knife with him, even in school. And there can be no doubt that were his ability to carry his knife abridged, his identity as a man devoted to his community would be destroyed.

There is no Western democracy, at present, in which the boy in our second scenario has prevailed or would prevail in a challenge to a general prohibition on the carrying of weapons in the school. Were he a Sikh he would stand a good chance of winning. But if he can only appeal to a century-old tradition, central to his identity, to which he feels categorically bound by his family traditions and upbringing, he is out of luck. The central puzzle in this book is why the state should have to tolerate exemptions from generally applicable laws when they conflict with *religious* obligations but not with any other equally serious obligations of conscience.

I start out by assuming that the moral ideal of toleration—of "putting up with" practices of which one disapproves because it is morally right to do so—provides the best justification for our Western ideal of religious liberty. I develop some familiar (at least to moral and political philosophers) arguments for that ideal. I then ask whether there is any reason to think that moral ideal would only single out religious claims of conscience, protecting our Sikh boy but leaving our rural boy with no legal remedy. This requires an account of what makes religious claims of conscience distinctive, the subject of