

# CONSCIENTIOUS OBJECTIONS IN NORMATIVE JURISPRUDENCE: ANALYZING THE ETHICAL ARGUMENTS FOR TOLERATING LIBERTY OF CONSCIENCE

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## 1. INTRODUCTORY REMARKS

The issue of whether and to whom the state should permit exemptions from neutral laws of general applicability is a contentious issue, with authors frequently trading salvos in contemporary discussions of legal philosophy, normative jurisprudence, and constitutional scholarship. In *Why Tolerate Religion?*<sup>1</sup> Brian Leiter considers the case for permitting such exemptions under the aegis of religious claims of conscience, claiming,

[N]o one has been able to articulate a credible principled argument for tolerating religion, that is, an argument that would explain why, as a matter of moral principle, we ought to accord special legal and moral treatment to religious practices.<sup>2 3</sup>

What Leiter is after, then, is a sound normative precept which justifies the privileged status religious claims of conscience are accorded in legal systems within Western liberal democracies. Michael McConnell aims to justify this privilege, citing the inherent uniqueness of religion itself, in that injunctions are prescribed to adherents from a transcendent authority.<sup>4</sup> These claims are thereby “prior to and of greater dignity than the claims of the state.”<sup>5</sup> Yossi Nehushtan summarizes a complementary argument, which he terms *The ‘Special Harm’ Argument*: “[T]here is something special about the anguished state of the religious believer who is forced to act against his beliefs and therefore takes the risk of eternal suffering in the afterlife.”<sup>6</sup> I will argue, in concert with Leiter, that while we have sound moral reasons for permitting liberty of conscience, there are no commensurately sound reasons for privileging religious over secular claims of conscience. Moreover, I will argue that despite their *prima facie* plausibility, neither of these arguments for the uniqueness of religion sufficiently justifies the special protections religious claims of conscience are accorded.

The paper will begin with considerations of the meaning and content of toleration, supplied by semantic and conceptual analysis. I will then canvass the two broad philosophical traditions of deontology and utilitarianism for moral arguments in support of

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<sup>1</sup> Brian Leiter. *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013). Henceforth, *Religion*.

<sup>2</sup> Leiter. *Why Tolerate Religion?* p. 6.

<sup>3</sup> Considerations of toleration will be limited to contexts of normative jurisprudence. I will not be addressing tolerance in interpersonal or professional contexts.

<sup>4</sup> Michael McConnell. “Accommodation of Religion,” *The Supreme Court Review* 1985 (1985): 1-59.

<sup>5</sup> McConnell, “Accommodation of Religion,” p. 15

<sup>6</sup> Yossi Nehushtan. “Religious Conscientious Exemptions,” *The Journal of Law & Philosophy* 30 (2011): 143-166. p. 151.

tolerating claims of conscience. Having established reasons for countenancing toleration, I will then develop normative constraints intended to limit and qualify our toleration. Next, I will consider whether any of these arguments justify privileging religious over secular claims of conscience. I will then address two arguments *for* privileging religious claims of conscience on account of their inherent uniqueness. Finally, I will consider what ethical implications can be extracted from these arguments.

## 2. TOLERATION: SEMANTIC & CONCEPTUAL ANALYSIS

In the block quote from §1, Leiter asserts that there is no *principled argument* for *tolerating* religious claims of conscience. Before addressing Leiter's actual arguments for this claim, some conceptual and semantic groundwork is in order. Toleration is commonly taken to mean 'indifference' or 'ambivalence' toward particular individuals or communities whose actions or beliefs are disapproved of but abided nonetheless. We may consider this variety of toleration as a species of benign neglect. However, these are not components of toleration as we will be defining it. "I do not 'tolerate' my neighbors who are nonwhite or gay," Leiter clarifies, "because I am *indifferent* as to the race or sexual orientation of those in my community."<sup>7</sup> The implication is that toleration can only be recognized when one group "*actively* concerns itself with what the other is doing, believing, or 'being'"<sup>8</sup> With our concept of toleration fleshed out, what does it mean to say we have a *principled reason or argument* for toleration?

The distinction between principled and unprincipled reasons is parsed along moral and pragmatic lines. Group A has pragmatic – which is to say, *instrumental* – reasons for tolerating Group B when a cost-benefit analysis determines that it runs contrary to Group A's interests to exterminate Group B's beliefs and practices. Leiter terms this a "Hobbesian Compromise," which is when "one group would gladly stamp out the others' beliefs and practices, but has reconciled itself to the practical reality that it can't get away with it – at least not without the intolerable cost of the proverbial 'war of all against all.'"<sup>9</sup> Excepting ethical theories which define moral behavior as pursuing one's own self-interest, there are no purely normative – or as Leiter prefers, *principled* – reasons, whether ethical or jurisprudential, animating this iteration of tolerance. Thus, "Where a genuine 'principle of toleration' gets its purchase," Leiter concludes,

[I]s in the cases where one group (call it the "dominant" group) actively disapproves of what another group (call it the "disfavored" group) believes or does; where that dominant group has the means at its disposal to *effectively* and *reliably* change or end the disfavored group's beliefs or practices; and yet still the dominant group acknowledges that there are *moral* or *epistemic* reasons (that is, reasons pertaining to knowledge or truth) to permit the disfavored group to keep on believing and doing what it does. That is "pure" or "principled" toleration, and the question, then, is whether there is such a reason to tolerate religion.<sup>10</sup>

<sup>7</sup> Leiter, *Why Tolerate Religion?* pp. 8-9 (emphasis added)

<sup>8</sup> Leiter, *Why Tolerate Religion?* p. 9

<sup>9</sup> Leiter, *Why Tolerate Religion?* p. 10

<sup>10</sup> Leiter, *Why Tolerate Religion?* p. 13.

Leiter commonly runs together ‘beliefs with practices and actions’ in *Religion*. While actions are, to some extent, the children of beliefs, these categories are both conceptually and practically distinct. I do not take Leiter to be arguing that intolerance should be extended to *beliefs*. In addition to the intractable issues associated with policing and prosecuting beliefs,<sup>11</sup> it is not beliefs *qua* beliefs that are of material harm, but rather beliefs *qua* impetuses for action, which inflict harm.<sup>12</sup>

### 3. THE MORAL ARGUMENTS FOR TOLERATION

Arguments for tolerating claims of conscience go largely uncontested in Western liberal democracies. It would be a strange *liberal* democracy indeed which did not admit of considerations of individual claims of conscience. John Rawls offers an ethical argument for toleration from a broadly Kantian standpoint, asserting that rational individuals in his ‘original position’<sup>13</sup> would choose to endorse toleration, as it “follows from the principle of equal liberty.”<sup>14</sup> Spinning out the ‘original position’ thought experiment, Rawls concludes that the only way to guarantee that each individual would be permitted claims of conscience in the society they were engineering would be to permit *everybody* equal liberty of conscience, that is, each citizen is accorded the same basic rights and liberties.<sup>15</sup>

From a utilitarian perspective, the paradigmatic case for liberty of conscience comes from John Stuart Mill. Leiter introduces Mill’s argument with a disclaimer: “Many arguments trade, at bottom, on a simple idea: namely, that *being able to choose what to believe and how to live*...makes for a better life.”<sup>16</sup> While not amenable to *a priori* demonstration, the idea here appears pretty uncontroversial. If we value freedom of conscience, and accept the notion that believing according to the dictates of your conscience is indispensable to your quality of life, then we must countenance a sort of conscience pluralism. Granting that Mill’s thesis is at least plausible, we have then a utilitarian argument for toleration. Mill’s argument for toleration, however, is not completely unqualified. In considering the limits of toleration, Mill invokes the Harm Principle, which allows the state to exercise

<sup>11</sup> Orwell’s notion of ‘thought-crime’ in 1984 strikes me as paradigmatic of this practice.

<sup>12</sup> Perhaps because Leiter limited the scope of his treatment of religious liberty to American jurisprudence he did not feel compelled to address and develop this line. Removed from the American legal system, however, we see instances of Western liberal democracies actually prosecuting violators of such laws. It is illegal in Germany, for example, under *Strafgesetzbuch* (German Penal Code) §130 Incitement to Hatred, to “approve of or deny” the holocaust.

<sup>13</sup> By “Original Position” Rawls conceives a thought experiment where citizens select the principles which will determine the basic structure of the various social, legal, economic, and political institutions in a well-ordered society. These decisions are made behind a “veil of ignorance,” an epistemic constraint depriving participants information concerning their socioeconomic status, gender, ethnicity, doctrinal commitments, etc. The idea is to cultivate from scratch a perfectly just society unsullied by prejudice and biases. See §4.6, “John Rawls” entry in *Stanford Encyclopedia of Philosophy*.

<sup>14</sup> John Rawls. *A Theory of Justice, Revised Edition*, (Cambridge, MA: The Belknap Press of Harvard University Press, 1971). p. 214. All references are to this edition.

<sup>15</sup> Rawls. *A Theory of Justice*, pp. 206-7.

<sup>16</sup> Leiter. *Why Tolerate Religion?* pp. 17-8.

power “over any member of a civilized community, against his will, to prevent harm to others.”<sup>17</sup>

From 3.1 and 3.2 we should extract two related but distinct theses. The first is that there are morally sound reasons to support individual liberties of conscience. The second, and for our purposes the more significant point: though these arguments give us clear reasons for countenancing liberty of conscience, *they do not provide any reasons for privileging religious over secular claims of conscience.*<sup>18</sup>

#### 4. THE LIMITS OF TOLERATION

Liberal theories tend to discourage excessive intolerance, and often at their peril. In order to accommodate this tendency, a convoluted balancing act ensues, which requires exercising principled tolerance to a point. The question is, Where is that point? What is called for, then, is a normative criterion which legitimates exemptions emanating from claims of conscience if they satisfy certain conditions. In §3.2 we saw that, for Mill, toleration is limited by considerations of harm. Put simply, the Harm Principle stipulates that my freedom to swing my fist ends at your nose.<sup>19</sup> Leiter offers the *burden-shifting* criterion, where exemptions are considered burden-shifting when they “impede the lawful pursuit of the general welfare – whether it is exemptions from zoning regulations for religious institutions or from mandatory vaccination schemes.”<sup>20</sup> Conversely, examples of *non-burden-shifting* exemptions would permit individuals the right to “wear certain religious garb, or to use certain otherwise illegal narcotics in rituals.”<sup>21</sup> It is important to note that whether an exemption is classified as burden-shifting is context-dependent. For instance, if a Catholic pharmacist refuses to dispense birth control, and she is the only pharmacist in town, then it is burden-shifting and she should not be exempted from discharging the obligations of her office; however, if there are any number of pharmacists in that area, all capable of dispensing these very prescriptions, then there is no significant burden being shifted to the consumer should that same pharmacist refuse.<sup>22</sup> The operating assumption here, and one I submit should be taken as morally axiomatic, is that “we should require people to bear the costs of their beliefs rather than transfer those costs to others.”<sup>23</sup>

While I completely accept Leiter’s burden-shifting criterion, I would add a further proviso, which requires that considerations of exemptions should be non-discriminatory. A NDC has two components. First, the decision to exempt coercive cooperation from a law of general applicability on the basis of conscientious objections should be made in

<sup>17</sup> John Stuart Mill. *On Liberty*. Indianapolis: Hackett Publishing, 1978. p. 9.

<sup>18</sup> In §5 I will address two arguments which aim to protect religion’s special treatment. It is not my intention to suggest that Rawls’s and Mill’s treatment of toleration is exhaustive; only that neither of these arguments can be used to demonstrate a normative priority for religious claims of conscience.

<sup>19</sup> Zechariah Chafee. “Freedom of Speech in Wartime,” *Harvard Law Review* 32 (1919): 933-973. p. 957

<sup>20</sup> Leiter. *Why Tolerate Religion?* pp. 99-100.

<sup>21</sup> Leiter. *Why Tolerate Religion?* p. 100

<sup>22</sup> Leiter. *Why Tolerate Religion?* p. 162, n. 11

<sup>23</sup> Peter Jones. “Accommodating Religion and Shifting Burdens.” *Criminal Law and Philosophy* (2014): 1-22.

ignorance of the particular ideologies maintained by the objector, whether religious, political, or otherwise. In other words, we should not determine who is eligible for requesting exemptions on the basis of their religious or political commitments – just as we do not discriminate on the basis of socioeconomic status, race, gender, etc. A NDC de-privileges religious claims, thereby equalizing all claims of conscience under the law. Given the theoretical assumptions about, and value of, equality in a just liberal state, the baseline should surely be equality of conscience – which is, incidentally, exactly what Rawls and Mill concluded in their moral arguments for liberty of conscience.

The second component to my NDC states that no exemption shall be permitted if the intention of that exemption is discriminatory. Exempting a practicing Muslim who wishes to wear a veil for her driver's license picture is not discriminatory.<sup>24</sup> Requesting an exemption to refuse service to homosexuals, on the other hand, is clearly discriminatory and, failing to satisfy the NDC, should be rejected. An intellectual debt is owed to Karl Popper in conceiving this criterion. In *The Open Society* Popper articulates the Paradox of Tolerance (PoT):

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.<sup>25</sup>

I would contend, then, with Popper, that the limits of toleration are intolerance, i.e., unjust discrimination. So stated, the 'setback to interests' proviso in Mill's Harm Principle is coterminous with Popper's PoT and my NDC.

A criticism commonly encountered at this point asks us to imagine the following scenario:

Suppose Mary, the owner of a bakery, whose fidelity to scripture requires her to consider homosexuality an abomination, is approached by a same-sex couple hoping to enlist her services in constructing a wedding cake. Per your proposal, Mary would *not* be able to refuse her services to this couple on the grounds that she finds their marriage to be morally unconscionable.

This is correct, as far as it goes. The objector continues:

Suppose, moreover, that Darrell, a Grand Wizard of the KKK, approaches Mary for a cake riddled with swastikas and other paraphernalia of the white supremacist movement. Is Mary obliged to accommodate Darrell as well?

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<sup>24</sup> It is likely, however, that this individual's claim of conscience would fail to meet Leiter's burden-shifting criterion. Driver's licenses contain pictures so that authorities can identify the licensed individual; a veil very clearly defeats that purpose. In so doing, it shifts the burden to the authorities, who would then have difficulty determining whether the individual photographed is the one handling them the license.

<sup>25</sup> Karl Popper. *The Open Society and Its Enemies: Vol. 01*. Princeton: Princeton University Press, 2013. See Notes to Ch: 7, Note 4.

This, it should be clear, is a false equivalency. Mary is in the business of selling wedding cakes to the members of her community. By refusing to offer services to particular individuals that she offers to the wider community, she is practicing discrimination. However, Mary, by refusing to sell a Neo-Nazi cake she is refusing to offer services to Darrell that she would likewise refuse to everybody else. In other words, whereas the same-sex couple is being treated differently than the other members of their community, insofar as Mary refuses to sell Neo-Nazi cakes to *anybody*, Darrell is being treated exactly the same as those other members.

## 5. EVALUATING THE ARGUMENTS FOR PRIVILEGING RELIGIOUS CLAIMS OF CONSCIENCE

McConnell argues that religion is unique in that the injunctions imposed on adherents issue from a supernatural authority, which has profound and *sui generis* ramifications for believers. Moreover, when obligations to God conflict with obligations to the state, adherents are bound to invest those duties to God with moral and spiritual priority.<sup>26</sup> Further compounding this argument is the consideration that adherents have to contend with the fear of metaphysical consequences should they choose to honor their obligations to the state before God. This consideration, though, is asking not that we exempt adherents from laws on account of conscientious objections, but rather that we indulge them in protecting their self-interest. Permitting exemptions on the basis of protecting or advancing self-interest, i.e., exempting individuals from laws when it would serve their interests not to follow them, would undermine the entire legal system; the purpose of which is to compel us – particularly in moments where we might be egoistically motivated to promote our self-interest – to constrain our actions by considering the interests and welfare of the public. Christopher Eisgruber and Lawrence Sager similarly reject the ‘Special Harm’ Argument, as

It expects us to treat the religious believer’s very long-term self-interested reason for obedience as motivationally more powerful than other persons’ immediate self-interest and driving passions...it also asks us to accept as true for the believer that heaven and hell are at stake, while holding to the contrary as a matter of our belief.<sup>27</sup>

Another argument supporting my thesis comes from John Rawls’s *Political Liberalism*, where Rawls develops an iteration of liberalism centered on his thesis of public reason. There, Rawls advances the idea that reasons cited for political action – in this case, exemptions – should be shared or publically and epistemically accessible.<sup>28</sup> In other words, they should not rely on or appeal to privately held convictions, which are neither universally shared, nor accessible. When enacting and enforcing generally applicable laws

<sup>26</sup> McConnell, “Accommodation of Religion.” p. 15

<sup>27</sup> Christopher Eisgruber & Lawrence Sager. “The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct.” *University of Law Review* 61 (1994): 1245-1315. p. 1263.

<sup>28</sup> John Rawls. *Political Liberalism, Expanded Edition*. New York: Columbia University Press, 2005. p. 216.

that limit and interfere with claims of conscience, we are compelled to justify our actions with reasons which connect with a reasonable persons' sense of moral values. There is a dual commitment on the part of the state and the citizen: the state's normative authority to enforce laws of general applicability, and an individual's claim to be exempt from them, should appeal to community-shared commitments to rational moral principles and values.

Granting that reasonableness is an indispensable political virtue, even provisional acceptance of Rawls' public reason liberalism entails that the state has certain obligations. Conversely, there are some obligations the state is not obliged to honor. For instance, it is, presumably, not incumbent on the state to compromise the interests of either individuals or the public in general to allow for the accommodation of adherents attempting to discharge their religious obligations.<sup>29</sup> While Rawls' arguments for public reason are powerful, it may be, in this case, that they prove too much. It is not my intention to argue that religious adherents should have no recourse to exemptions on the basis of conscientious exemptions unless they can provide shared and publically accessible reasons. My intention is to argue the more moderate claims that there are 1) sound moral reasons to extend (qualified) toleration to conscientious objectors, and 2) no commensurately sound reasons for privileging religious claims of conscience over non-religious claims of conscience. I am interested in advancing tolerance for, and equalizing the legal standing of, all claims of conscience, not prohibiting them.

## 6. CONCLUDING REMARKS

One of the central assumptions underwriting my thesis – and constituting, therefore, a potentially fruitful line of counter-argument – is a pre-commitment to the value of equality, especially in social and political contexts. I have taken as axiomatic the normative proposition that legal equality is presumptively just, and that deviations from the baseline of legal equality require justification – with increasing levels of inequality requiring proportionately increasing levels of justification. Until and unless a sound moral or epistemic argument is advanced which concludes otherwise, I see no reason to continue the unjust practice of legally privileging the claims of any one conscience over another.

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<sup>29</sup> Nehushtan. "Religious Conscientious Exemptions," p. 152

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