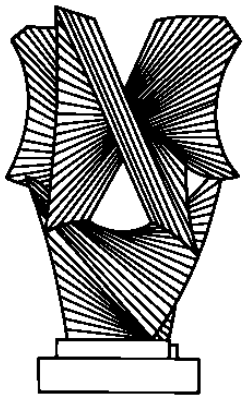
2015

Designing Regulatory Experiments

Jennifer Nou

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 514



REPLY TO FIVE CRITICS OF *WHY TOLERATE RELIGION?*

Brian Leiter

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

August 2014

forthcoming in *Criminal Law & Philosophy*

REPLY TO FIVE CRITICS OF *WHY TOLERATE RELIGION?*

Brian Leiter
bleiter@uchicago.edu
draft of August 13, 2014
please do not cite or quote without permission

I am grateful to the editors of this journal (especially Massimo Renzo and Veronica Rodriguez-Blanco) for organizing this symposium and to the contributors for their intelligent and instructive essays on my book *Why Tolerate Religion?* (hereafter WTR).[1] I will start with the most skeptical of the four essays, by François Boucher and Cécile Laborde,[2] then proceed to the complementary essays by Frederick Schauer and Corey Brettschneider, which press, respectively, on the utilitarian and egalitarian considerations at work in my arguments; and then conclude with some reactions to the insightful essay by Peter Jones on burden-shifting, especially in British law pertaining to "indirect discrimination."

Reply to Boucher and Laborde

Boucher and Laborde offer a philosophically serious and incisive critique; of those skeptical about the arguments in the book, their objections have taught me the most. Unlike some critics,[3] they

[1]Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013). I first broached the basic ideas in a paper of the same name in *Constitutional Commentary* 25 (2008): 1-27, though I modified the original analysis of religions for purposes of the book, as well as adding discussions of alternative accounts of the moral foundations of religious liberty and about the relationship between principled toleration and religious establishment.

[2]"Why Tolerate Conscience?", *Criminal Law & Philosophy* __ (2015): __-___. Cited hereafter by page number in the text.

[3]Cf. the incompetent review by Susan Mendus in *Political Theory* 41 (2013): 766-769. Mendus, in the space of only a few pages, mischaracterizes the argument of my colleague Martha Nussbaum's book *Liberty of Conscience* (failing to realize that Nussbaum agrees with me that religion is *not special*, that it is conscience that is special), wastes time arguing that not *all* religious beliefs are insulated from reasons and evidence (even though my claim was only that only *some* beliefs in all religions are), and says that I "impl[y] that religious believers are not only stupid, but wilfully stupid" (769). She can cite no actual text in support of that point, since it is quite inconsistent not only with reality, but with an abiding Nietzschean theme of my book, namely, that false and unwarranted beliefs are *essential conditions of human life* (cf. WTR, pp. 90-91). Her attempt to support this

almost always have a firm handle on the actual dialectical structure of the arguments and the philosophical issues at stake. More importantly, they identify a crucial ambiguity in my claim that all religions include some beliefs that are "insulated from reasons and evidence," and have persuaded me that I erred in a claim I made on p. 35 of WTR. I am especially grateful for their identifying the ambiguity in my original presentation, and for the opportunity now to refine the view to meet their objection.

In WTR, I argued that religions are distinguished (for purposes of their moral claim on toleration[4]) by three characteristics: religions make some *categorical* demands on their adherents; *some* of the beliefs in every religion are insulated from reasons and evidence as those are understood in the sciences and common sense (call this a "naturalistic" conception of reasons and evidence); and religions provide existential consolation, that is, they help reconcile people to the terrible truths about the human situation, namely, loss, suffering and death. Boucher and Laborde usefully distinguish two senses in which some religious beliefs might be "insulated from reasons and evidence." In one sense, insulation is a "subjective epistemic attitude" (p. 4), in the sense that it is the *believer* who will not consider reasons and evidence, even if they might bear on the belief. In another sense, however, it is the religious beliefs themselves that are insulated, because (as Boucher and Laborde quote me saying in a related context) they "neither claim support from empirical evidence nor purport[s] to be constrained by empirical evidence" (WTR, p. 47). Non-cognitive judgments, even when they look synactically like expressions of beliefs, would be a paradigmatic instance.

Let us call the former sense of "insulation from beliefs and evidence" a case of *Believer Insulation* and the latter *Belief Insulation*. My considered view, in fact, is that it is Believer Insulation that is crucial to the second of the three characteristics of religion, though, of course, in some cases

---

fabricated "implication" consists in claiming that I "denounc[e] much religiosu belief as 'culpably false' or even 'perniciously false'" without noting that this was offered *only* as a possible interpretation of an argument of Simon Blackburn's, which I go on to reject. None of these mistakes are repeated in any of the thoughtful critiques in this symposium.

[4]I allow, of course, that for purposes of other kinds of inquiry, such as sociological ones, these may not be the relevant features. See WTR, pp. 28-30.

Believer Insulation will not be a problem if the beliefs in question are marked by Belief Insulation. Boucher and Laborde aptly note the textual evidence that Believer Insulation is what I intended (p. 6), but they correctly identify (p. 7) a passage where I endorse, wrongly I now see, the Belief Insulation reading. At p. 35 of WTR, I say, incorrectly, that insulation should be understood "as a claim about the religious doctrine rather than about the typical epistemic attitudes of beliefs." In this context, I was concerned to address the following worry:

> Obviously, fanatics will hold any set of beliefs *regardless of the evidence,* and we often characterize fanatical adherence to a doctrine, pejoratively, as a kind of "religious" devotion to it. But a fanatical defender of the theory of gravity, for example, who does not even worry about how evidence of the expansion of the universe squares with his theory, would hardly show that we ought to characterize the theory of gravity as a religious doctrine, insulated from reasons and evidence. (p. 35)

Here I mistakenly assumed that the only way to save the "theory of gravity" from being a "religion" (given my account) was to emphasize that the theory of gravity is *not* characterized by Belief Insulation (e.g., it is not a non-cognitive, non-descriptive, non-referential body of judgments). But now I see that the correct thing to say is that the theory of gravity is *not* a religion because it does not make categorical demands on its adherents and it offers no existential consolation. At the same time, as I noted in the original text, it is perfectly apt to describe the fanatical adherent (even of the theory of gravity!) as exhibiting "religious" devotion precisely in the sense that he exemplifies Believer Insulation in his embrace of the theory.[5]

[5]The only other place in WTR that Boucher and Laborde point to as exemplifying a mistaken endorsement of Belief Insulation is my discussion (pp. 48-49) of the idea that a "metaphysics of ultimate reality" might be an additional characteristic of religious belief. I argue, instead, that it should be subsumed under the insulation criterion. Of course, as Boucher and Laborde note, for some logical positivists, metaphysical claims were marked by Belief Insulation. But one need not endorse that view to recognize that many (not all) metaphysical claims are marked by Believer Insulation, i.e., believers hold to their metaphysics of ultimate reality regardless of whether it enjoys any support from naturalistic reasons and evidence. (In the most substantial and interesting of the

With this clarification, most of their other worries about "insulation from reasons and evidence" as a marker of some religious beliefs can be dismissed. For example, as Boucher and Laborde note (p. 8), it is possible (and plausible) to dismiss intellectualist traditions in theology as involving Believer Insulation, as I do.[6] Their most ambitious claim, however, is that my attempt to explain why morality generally is not a "religion" on my account (WTR, pp. 50-52) fails. Moral systems *typically* involve (like religion) categorical demands, and some (like Kant's) arguably involve existential consolation (that Kant's view is essentially a religious view I do not take to be an objection to my account). But are moralities insulated from a naturalistic conception of reasons and evidence? I argue that this turns ultimately on what one thinks is the most plausible metaphysics, epistemology, and semantics of morality. Even granting the important distinction between Believer and Belief Insulation, the latter is still relevant in the case of morality for the simple reason that I do not think we can meaningfully generalize about the subjective epistemic attitude of Believers in morality: unlike Believers in religion, who hold at least some of their beliefs in the sense captured by Believer Insulation,[7] I do not know that there is any meaningful generalization to be made about ordinary attitudes about moral beliefs. (Do most moral believers, apart from those whose moral beliefs are explicitly religious, describe their moral

---

unsympathetic reviews, Robert Adams complained about my endorsement of "an empiricist epistemology that does not clearly allow more room for metaphysical belief than the Vienna Circle did." Review of WTR, *Notre Dame Philosophical Reviews* 01.06.2013 (http://ndpr.nd.edu/news/36599-why-tolerate-religion/). Adams, a leading figure in the revival of metaphysics, and in the epistemology of religious belief, is correct in his diagnosis: unfashionably, I suppose, I think the Vienna Circle had the broad outlines of the correct epistemology, though mostly for the wrong reasons. We should embrace a naturalistic conception of reasons and evidence because of its success, and we should treat as good evidence whatever successful sciences, natural or cognitive, produce. But given that epistemology [but not the semantic doctrines of the Vienna Circle], it follows that the kinds of metaphysical claims at issue could only be embraced by someone in the grips of Believer Insulation.)

To be sure, some of the metaphysical claims may be non-cognitive to the extent they are primarily normative in character. I return to that issue in the text.

[6]Contrary to what Boucher and Laborde appear to think, while all the classic proofs of the existence of God abide by the "laws of logic," and the laws of logic are certainly partly of a naturalistic conception of reasons and evidence, it is equally clear that they all involve premises that have no standing in logic or in a naturalistic epistemology; thus, these classical proofs are not cases of theistic belief based on the kinds of reasons and evidence operative in common sense and the sciences.

[7]Peter Jones, in his essay "Accomodating Religion and Shifting Burdens," *Criminal Law and Philosophy* __ (2015), p. 7, puts it aptly: "there is clearly more to religious belief than the evidence obliges us to believe. If there were not, religion would not be a matter of faith." Cited hereafter by page number in the text.

beliefs as grounded in "faith"?) I suggest, therefore, that we ask about insulation of morality from the standpoint of two broad families of metaethical views. On cognitivist naturalist realist views, moral beliefs are not insulated at all from naturalistic standards of reasons and evidence;[8] on non-cognitivist views, they are insulated, *but not because of Believer Insulation*, but because they are not the kinds of propositional attitudes that have truth-values.

Boucher and Laborde offer a variety of objections to this approach. First, they complain the options I present constitute a "false dichotomy" (p. 12), pointing to non-naturalist realisms like G.E. Moore's as an example of a third view. That Moore's view is implausible, for reasons P.F. Strawson identified several decades ago,[9] goes unmentioned. I am agnostic as between the alternatives I present, but it is incorrect, as Boucher and Laborde believe, that I am agnostic about all metaethical options: such a posture would be philosophically irresponsible. Second, they note (p. 14) that religions typically involve moral judgments as well (that is how they make categorical demands on their adherents, after all), and thus my approach to moral judgments as either non-cognitive (and thus Belief Insulated) or naturalist realist (and thus not Belief or Believer Insulated) would apply also to religious moral judgments. [10] This is correct, but also irrelevant. For what is crucial is that all religions involve non-moral judgments about *the way the world is* that can not be interpreted in non-cognitive terms: e.g., that Christ rose from the dead after his resurrection, that one or more supernatural beings exist, that everything that lives is the reincarnation of a prior living being, and so on. These claims are cognitive, and systematically false or, at best, unwarranted. They are also distinctive of religion as against moralities.

---

[8]Boucher and Laborde appear to doubt that Railton's kind of naturalistic moral realism is really naturalistic, suggesting that counterfactual claims about one's psychological states are immune to empirical evidence (p. 13). I have no idea why they think this, though perhaps it is because they think that naturalists have reason to disregard the cognitive sciences.

[9]P.F. Strawson, "Ethical Intuitionism," *Philosophy* 24 (1949): 23-33.

[10]I note that their account of non-cognitivist expressivism is not entirely satisfactory, but the details do not matter for purposes of the issues here.

Third, and finally, they claim (p. 15) that some ethical outlooks provide existential consolation, citing Thomas Nagel and Ronald Dworkin, and invoking, more vaguely, unnamed "philosophers since the Ancient period" (p. 15).[11] Nagel's and Dworkin's views strike me as dubious,[12] but I am happy to allow[13] that they think their views *could* provide existential consolation—i.e., a way of making sense of death and suffering—even though how they do so remains a bit opaque.[14] Let us grant, too, that their views are also insulated from reasons and evidence, understood naturalistically, and that their views involve categorical demands on their adherents.[15] It would follow that their views are essentially religious in character, notwithstanding their lack of adherents (beyond a few academic philosophers and graduate students). This does not strike me as worrisome since, as I said early on, "if the best analysis of religion…requires us to forfeit some of our pretheoretical intuitions, that may be the cost fo clear thinking about religiosu toleration and its parameters" (WTR, p. 30). My own pretheoretical intuitions, in any case, were that views like Dworkin's had a strong religious flavor, and Dworkin himself near the end of his life was happy to claim the label "religious" for his views--a rare moment, in my view, of self-

[11]The strongest case could be made for the Stoics, but even in that case it is doubtful that Stoic imperatives are categorical, and the Stoics certainly do not understand them to be insulated from naturalistic reasons and evidence.

[12]Nagel, unsurprisingly, badly misunderstands Nietzsche, who does not believe existential consolation of the kind religion aspired to is possible. See generally, my "The Truth is Terrible," in *Nietzsche on Morality and the Affirmation of Life*, ed. Daniel Came (Oxford: Oxford University Press, forthcoming). On the implausibility of Dworkin's views about the objectivity of value, see my "Objectivity, Morality, and Adjudication," reprinted in my *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007).

[13]Indeed, I acknowledge that "philosophical reflection" could be a source of existential consolation (WTR, p. 62).

[14]Contrast Catholic existential consolation: death is not *really* death, just passage to another life, where all those who survive the deceased will again be reunited with him.

[15]How categorical the demands really are should be considered in light of Nagel's extraordinary response to the arguments of G.A. Cohen: "I have to admit that, although I am an adherent of the liberal conception of [justice and equality], I don't have an answer to Cohen's charge of moral incoherence. It is hard to render consistent the exemption of private choice from the motives that support redistributive public policies. I could sign a standing banker's order giving away everything I earn above the national average, for example, and it wouldn't kill me. I could even try to increase my income at the same time, knowing the excess would go to people who needed it more than I did. I'm not about to do anything of the kind, but the equality-friendly justifications I can think of for not doing so all strike me as rationalizations . . . " Nagel, "Getting Personal: Why Don't Egalitarians Give Away Their Own Money?" *Times Litearry Supplement* (June 23, 2000), p. 6. This strongly suggests that the moral requirements of the liberal, egatliarian view that Nagel endorses are more akin to advice than categorical requirements.

reflective honesty in his corpus. And I would be happy to concede that if there were any adherents of the Church of Dworkin and they claimed exemption from laws of general applicability, they would be as entitled to legal solicitude as the adherents of the Catholic Church. The fact remains that most ordinary moral views are not embedded within a systematic view that purports to offer existential consolation and that most ordinary moral views admit of one of the two metaethical interpretations I suggested.

Boucher and Laborde pursue a second line of critique that I find less instructive than the penetrating questions they raise about insulation from reasons and evidence. In WTR, I consider two moral bases for exemptions for religious claims of conscience: what I call "principled toleration" (Chapter 1) and "appraisal respect" (Chapter 4). I argue that religious conscience is not, *contra* Martha Nussbaum, a proper object of appraisal respect, and so focus on principled toleration. Boucher and Laborde have two objections: first, that principled toleration is not an adequate foundation for exemptions; and second, that there are other possible moral foundations I do not consider.

On the first point, Boucher and Laborde primarily rely on appeals to authority. They note, correctly of course, that Locke did not conceive of toleration as requiring exemptions (p. 17) (I did not claim he did, needless to say). They invoke Michael Sandel (p. 19), who has a kind of "appraisal respect" view, the view I argue against in Chapter 4 and to which Boucher and Laborde offer no rejoinder. And they make some startling and somewhat mysterious claims about what Rawls and Mill "intended" (p. 21) by the arguments of theirs that I invoke, without actually considering the dialectical structure of those arguments and their entailments. Their crucial claim, though, is that the case for exemptions "is more demanding than toleration as it is usually understood" (p. 18). The only relevant question, however, is whether the usual understanding of toleration as meaning that one group puts up with the beliefs and practices of another group of which it disapproves (see WTR, p. 8, invoking Bernard Williams

as 'authority') is apt for the case of exemptions from laws of general applicability.[16] It so obviously is that I am perplexed by Boucher and Laborde's resistance. Consider the example I use repeatedly in my book: the state disapproves of children carrying weapons in the schools, yet Sikhs demand an exemption from the law prohibiting weapons in the schools because of a religious obligation that Sikh boys acquire at the age of maturity to carry the Kirpan, a ceremonial dagger that, in many cases, is an actual knife. The state, in other words, is asked to put up with a practice of which it otherwise disapproves. Toleration is exactly what is demanded, and so it is reasonable to ask whether principled reasons for toleration would single out only religious obligations of conscience.[17]

On the second point—that there are alternatives to principled toleration—I agree in general that such foundations are possible. Indeed, as I note in Chapter 5 when discussing religious establishment (WTR, p. 116), "equality values" are clearly implicated there, and so I confine my argument *only* to the question whether religious or non-religious establishment is compatible with principled toleration (I argue that both can be). Boucher and Laborde do not, however, make the case for an alternative moral foundation for exemptions; they assert, only that in the "literature…exemptions are justified by appealing to basic liberal ideals of freedom, equality and inclusion…" (pp. 22-23). Of course, not *all* the literature takes that approach (*vide* Peter Jones!), but more significantly, none of the examples they briefly invoke (p. 23) explain why "freedom, equality, and inclusion" single out *only* religious claims of conscience—a point Peter Jones presses effectively in his contribution to this symposium (see Jones, pp. 19 ff.). Having failed to show that principled toleration does not apply quite obviously to exemptions, and having failed to make the case that other normative foundations would

[16]I note that Peter Jones agrees with me on this score (Jones, p. 1), and he makes a strong case that even "indirect discrimination" law can not be subsumed under principles of equality or distributive justice.

[17]In their note 46, Boucher and Laborde note the possibility that, as I believe, "toleration provides the moral foundation of religious liberty," but suggest instead that it is "more likely that religious liberty is the moral foundation of toleration." I find this perplexing, and it is not made clearer by the observation that in the Rawlsian original position, contracting parties care about "their freedom of *conscience*" (emphasis added).

explain why religious conscience demands special legal solicitude, Boucher and Laborde are unpersuasive in their second line of critique.

I conclude with a brief comment on Boucher and Laborde's final worry that I am guilty of what they call "'the status-quo neutrality' fallacy" (p. 24) in my opposition to non-burden-shifting exemptions for all claims of conscience. I predicated my opposition to such exemptions on what I called the "Rousseauian worry about exemptions," namely that sometimes they frustrate pursuit of the general welfare, and thus constitute "a morally objectionable injury to the general welfare" (WTR, p. 99). Exemptions from schemes requiring mandatory vaccination against many diseases are a familiar case in point: vaccination schemes only work if almost everyone is vaccinated, but those who seek exemptions want to free-ride on the fact that most of their fellow citizens are vaccinated. According to Boucher and Laborde, the fallacy in question consists in "assum[ing] that currently existing laws and institutional arrangements are already fair and constitute an appropriate baseline against which demands for exemptions can be evaluated from a moral point of view" (p. 24). I assume nothing of the kind. My point pertains only to laws that *actually* promote the general welfare; if existing laws do not promote the general welfare, then the analysis in my book is irrelevant: the problem with such laws is not that they do not provide exemptions, it is that they are bad laws, which should perhaps be disobeyed. I also assume, though did not make explicit, that any compelling considerations of fairness would be part of a defensible conception of the general welfare. I do not have a theory of the general welfare, but as in most matters of moral interest, we do not require a comprehensive theory to single out central cases[18]: for example, mandatory vaccination schemes promote the general welfare; regressive taxation schemes do not. In any case, I am happy to go on record that I think many of the laws of the United States and other complacent Western democracies do not promote the general welfare, on any reasonable

[18]This is one reason moral and political philosophy is mostly irrelevant to practical life.

conception, and that, in consequence, the question of conscientious exemptions from those laws is less morally important than the question of whether they should be obeyed at all, by anyone.

Reply to Schauer

Frederick Schauer presses me on whether I have taken utilitarian arguments seriously enough, and with a few qualifications, I agree with much that he says, so my response shall be relatively brief.[19] Schauer focuses in particular on my treatment of the possibility that the existential consolation provided by religion might turn out to be a utility-maximizing justification for distinctively religious claims of conscience, qutoing me (p. 7) as follows:

> [T]he *existential consolation* function of religion only generates a utilitarian rationale for tolerating *religion qua religion* if we bite what I will call the "speculative bullett"—that is, only if we are willing to speculate that the exitsential consolation functions of religion produce more utility than the harm produced by the conjunction of categoricty and insulation from evidence; and only if we are willing to speculate that the preceding net gain in utility would be greater than the alternative ways of producing existential consolatioin without the conjunction of categoricity and insulation from evidence. (WTR, pp. 62-63)

My view is that I can see no reason for biting the speculative bullett; the burden of Schauer's complaint is to suggest, in essence, that maybe we should that, perhaps, "this empirical question is [not] as speculative as Leiter supposes" (p. 8).

Schauer begins (p. 8), however, on a misguided note by invoking Marx's famous claim that religion is the "opiate of the masses." That plausible empirical claim does not show, however, that

[19]Frederick Schauer, "On the Utility of Religious Toleration," *Criminal Law and Philosophy* __ (2015): __-__. Cited hereafter by page number in the text. Schauer begins his essay by taking issue with the framing of my question as one about religious toleration, though as I noted in reply to Boucher and Laborde, it is quite natural to frame the question in these terms: if Sikhs ask for the law to permit their boys to carry knives in the school, what they are asking for is precisely toleration of a practice of which the state disapproves, and they are doing so on the ground that the practice is religiously motivated. It is, of course, true that my argument supports religious toleration, as Schauer notes, but that is because I endorse the utilitarian and deontological reasons supporting liberty of conscience, not toleration of religion *qua* religion.

religion is utility-maximizing, except on the crudest Benthamite view in which pleasant subjective feelings are all there is to utility. Marx himself certainly did not understand the import of the remark that way: his point was that capitalism was so clearly harming the well-being of the vast majority, that only a narcotic stupor made it possible for them to carry on. If *the only choices* were between a narcotic stupor and suffering, then a Benthamite would have a reason to prefer the latter. But those are not our choices, and the Benthamite view is, in any case, implausible.[20]

That issue aside, I agree with Schauer (pp. 11, 13) that the facts about the world could turn out to be such that there would be a utilitarian rationale for thinking religion special as against other matters of conscience. But I do not see that Schauer adduces any empirical evidence that would tell us to bite the speculative bullett *in our world*. I think there were probably times in the history of humanity when the speculative utilitarian case would have been clearer, but in the last two hundred years when identity and conscience are so powerfully shaped by political ideology, nationalism, cultural chauvinism, and other forces, it seems speculative, indeed, to suggest that religion is uniquely utility-maximizing for most people, at least in the liberal democracies which are my focus.[21]

Reply to Brettschneider

Brettschneider claims that my arguments for principled toleration involve egalitarian commitments more robust than I allow, ones incompatible, for example, with my claim that state establishment of religion or non-religion could be compatible with principled toleration.[22]

---

[20]There is a further complication, which is that, as Nietzsche argued in *On the Genealogy of Morality*, religion tends to make the suffering worse off in new ways, by instilling in them cripplying guilt and self-loathing.

[21]Schauer thinks, mistakenly, that my focus on "principled toleration" rules out the kinds of utilitarian considerations he wants to press (see Section VII, p. 9). By principled toleration, I mean only toleration grounded on moral considerations, whether utilitarian or deontological. That is quite compatible with, as Schauer puts it, taking account of "the "irrational features of the actual world" in performing the utilitarian calculus. Indeed, since a recurring theme in my book is that religion is hardly unique in involving false and unwarranted beliefs, I would hardly be in a position to complain if the utilitarian took that into account! But for the reasons given in the text, I still do not see that this concession justifies biting the speculative bullett.

[22]Corey Brettschneider, "Equality as a Basis for Religion Toleration: A Response to Leiter," *Criminal Law and Philosophy* __ (2015): __-__. Cited hereafter by page number in the text.

Brettschneider wants to press me towards a view closer to his own,[23] according to which the state can promote the viewpoint that free and equal citizenship is a fundamental value, but no other.

I find myself unpersuaded, and suspect that Brettschneider's argument trades on ambiguities about the idea of "equality." Brettschneider correctly observes that there is an egalitarian element to both the Rawlsian argument for justice as fairness, and the Millian utilitarian argument (pp. 4-5), but in both cases, it seems to me to be of the relatively thin kind that is shared by all the major post-Enlightenment thinkers except Nietzsche:[24] namely, that each person has equal moral standing, however that is to be understood. Kant, Bentham, Marx all accept this, though with different accounts of the relevant benchmark of equality (crudely: rational personhood for Kant, sentience for Bentham, human needs for Marx); something similar can be said of Mill and Rawls. But it does not follow from this thin egalitarian ideal that the "distinction between appraisal and recognition respect should be recast to rest on a notion of *equal* respect, as should the principle of toleration itself" (p. 5). Brettschneider says that on his "view religious belief is not a proper object of appraisal respect because that form of respect elevates religious belief as being inherently superior to secular beliefs" (p. 5). That is a possible reason for objecting to making religion an object of appraisal respect, but it is clearly not my reason: as I argue in Chapter IV, the reason that religious toleration can not be grounded in appraisal respect is because religion—marked as it is by the conjunction of categorical demands, Believer Insulation, and existential consolation—is not something to be highly appraised in virtue of these. Comparative judgments about inequality play no role in my argument.

Should they? Brettschneider does not show that the thin ideal of equality at work in the Rawlsian and Millian arguments so commits me. His only other argument is that "[e]mphasizing the centrality of equality to toleration would help to address dilemmas in the law of religious freedom" that

[23]See Corey Brettschneider, *When the States Speaks, What Should It Say?* (Princeton: Princeton University Press, 2012).

[24]See my *Nietzsche on Morality*, 2nd ed. (London: Routledge, 2015), pp. __-__.

are "unresolved" on my view (p. 6). Brettschneider points to *Wisconsin v. Yoder*,[25] a famous American case I do not discuss in WTR. In *Yoder*, the U.S. Supreme Court granted Amish parents an exemption from the requirement that their children attend school past the eighth grade. Surprisingly, Brettschneider suggests initially (p. 6) that this is not a burden-shifting exemption, even though it harms the Amish children. He soon acknowledges, correctly, that the latter might be my view, but says "[t]he best interpretation of this harm is that denying them [the children] education would leave them unable to participate as equals in society" (p. 6), that is, as "free and equal citizens" to use Brettschneider's preferred phrase. This strikes me as implausible: surely the harm to the children is that they will not have the knowledge or skills that will allow them to live a life outside the Amish community into which fate thrust them, and thus are condemned by birth to one and only one possible life. The harm is to their well-being; they would not be better off if everyone else were similarly condemned, and so equality has nothing to do with it. It is true that one of the harms is that they won't be well-equipped to participate in the political processes of a democratic polity, but that is surely not as important as the fact that deprivation of education will insure that their family life, their professional life, their private intellectual life, their social life will be forever sealed by an accident of birth—and that for some or many of these Amish children, their well-being will, in consequence, be diminished.

Brettschneider agrees with me that "any state must inevitably express some viewpoint" (p. 8), but he then argues that only one viewpoint is permissible: namely, the promotion of the value of free and equal citizenship, especially against hate speech. I think that is certainly one viewpoint a state might choose to promote which would be compatible with principled toleration. But I also think, contrary to what Brettschneider says, that a state may endorse, as France does, the secular character of

[25]406 U.S. 205 (1972).

the public sphere as well.[26] Indeed, the French do so on equality grounds, namely, that in the public sphere everyone should interact as equal citizens without regard to their sectarian identities. This illustrates, I fear, how empty the ideal of "free and equal citizenship" really is, absent further substantive normative claims. Freedom and equality seem like normative ideals worth endorsing, by individuals and by the state, but everything turns on their content: Marxists deny (correctly, in my view) that citizens can be free and equal in a capitalist society; libertarians would disagree. In the end, all states, even liberal ones, endorse viewpoints that go far beyond platitudes about free and equal citizenship. We should ask whether they have endorsed worthy viewpoints, not whether they respect a generic equality.

Whether a state should endorse secularism is a question on which I am agnostic, but I am explicit that doing so is compatible with principled toleration (WTR, pp. 120-121). Ideally, a state should endorse views that are proper objects of appraisal respect; even if religion *per se* is not, particular religious views could be (WTR, p. 174 n. 48). While it is true that I agree with Brettschneider that "the state must not accord appraisal respect to religion" (p. 7), it is not because of the inequality that would involve between religion and "secular views," but because religion does not warrant high appraisal. Brettschneider offers no argument to the contrary.

Reply to Jones

I suspect I have learned more from Peter Jones's fine essay than he has probably learned from my book, but I am grateful for his instruction on the many interesting issues he takes up: the law of indirect discrimination in Britain, the inadequacy of equality and distributive justice rationales for the latter, and why people should bear the costs of their beliefs. Apart from commending Jones's essay to anyone interested in the topic of this symposium, I will confine my remarks to one small point of disagreement or, perhaps, simple misunderstanding.

[26]Brettschneider confuses, I fear, my conclusion that the French ban on conspicuous religious symbols in the public schools was a case of impermissible intolerance (see WTR, pp. 114-115) with the claim that the French state can not endorse securalism.

Jones agrees with me in locating the foundation of religious liberty in a broader liberty of conscience; he then writes:

> Liberty of conscience is most unequivocally at stake when, in the absence of accomodation, we would compel people to act contrary to their consciences, as we would if, for example, we required the pacificst to fight in a war, or the orthodox Jew to testify in court on a Saturday, or the Catholic priest to divulge the confidences of his confessional. A more institutional instance of liberty of conscience is the exemption granted to 'organised religions' by British discrimination law…allowing them to discriminate in employment, not merely on grounds of religion but also on grounds of gender, sexual orientation, transexuality and marital status, provided that such discrimination is required by their doctrines or to avoid conflict with the strongly held voncitions of a significant number of their adherents [citation omitted]….
>
> Even in these sorts of case, Leiter vetoes exemptions if they burden-shift. If we exempt conscientious objectors from mandatory military service, we shift the burden of their service onto others who does not conscientiously object. Hence Leiter would not exempt even the conscientious objector (WTR, pp. 99-100, 162).
>
> I baulk at the severity of Leiter's stance precisely because, in compelling the objector to do what he believes to be wrong, we violate his liberty of conscience. Giving significant value to liberty of conscience seems inconsistent with dismissing it unless it is entirely without cost for society. That is not to say that liberty of conscience should be absolute….[European law] subjects the freedom to mannifest religion or belief to 'such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public

order, health or morals, or for the protection of the rights and freedom of others' [citation omitted]. (pp. 24-25)

I would also baulk at the apparent severity, and so I welcome the opportunity to clarify my view and explain why it is probably not very different from where Jones ends up.

Let us start with exemptions from anti-discrimination law; U.S. law recognizes a similar exemption, under the heading of the "ministerial exemption," which permits religious organizations to appoint "ministers" by almost any discriminatory criteria they choose.[27] One should note, of course, that in British law, discrimination on the basis of race is not among the contemplated exemptions, a telling omission: the liberty of individual conscience as manifest in a religious institution must still yield before anti-discrimination norms that are sufficiently important. I predict a time will come when at least the gender-based discrimination in certain religions currently countenanced by the law in Britian and the U.S. will come to seem similarly abhorrent. Predictions about moral sensibilities aside, it is my view that anti-discrimination norms promote the general welfare, and that exemptions from them shift burdens in objectionable ways. There may still be reasons for democratic societies to permit such circumscribed exemptions—not reasons of principled toleration to be sure. The burdens shifted by something like a ministerial exception are small, and they fall primarily on adherents of the religion in question, adherents who, as Jones himself plausibly argues, must bear the costs of their beliefs. And while the burdens shifted are small, the cost of denying exemptions might be very great, so much so that considerations of Hobbesian compromise come into play. Although I distinguished Hobbesian compromise—putting up with disfavored beliefs and practices because the cost of suppressing them is too great--from principled toleration in Chapter 1 of WTR, I do not deny that Hobbesian compromise is important and, sometimes, the best we can aspire towards. Principled toleration is always preferable for the tolerated group, to be sure, since those who put up with practices of which they disapprove for

[27]See, e.g., *Hosanna-Tabor v. EEOC,* __ (2011)

reasons only of Hobbesian compromise will act differently if they think they can suppress the practice without intolerable costs. But real politics demands recognition of the value of Hobbesian compromise, and that may be where Western democracies are now with respect to discrimination based on gender (among other characteristics) by different religions.

What about compulsory military service? Again, as I emphasized in reply to Boucher and Laborde, there is the threshold question of whether the law in question actually promotes the general welfare. There are times and places where compulsory military service is undoubtedly essential to the general welfare; there are many other times and places where it is not. When the United States invaded South Vietnam in 1962 or the Dominican Republic in 1965, it used its military power for unjust purposes; military conscription for purposes like these could not be justified. The moral issue in such cases is not exemptions, but the fact of unjustified conscription itself. By contrast, some countries probably can justify military conscription in terms of the general welfare, precisely because such conscription is geninely necessary for defense of the nation in which its citizens lead their lives. In such cases, exemptions are intolerably burden-shifting, in my view, and the only reasons to countenance them will pertain to Hobbesian considerations, not ones of principled toleration.

I am skeptical any of this marks a real disagreement with Jones, who endorses the European approach, which acknowledges that liberty of conscience is not absolute, indeed, that it is subject to limitation by laws that are "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of other." If anything, this limitation on liberty of conscience strikes me as excessive, since it countenances the cognitively empty category of "morals" as a reason for limiting liberty of conscience. Purportedly "moral" considerations that have nothing to do with maximizing the well-being of other persons should be off-limits as a basis for limiting liberty of conscience on my view. But since Jones endorses this

European approach, he is likely to agree with my own approach, sketched above, to some of the difficult cases he identifies.

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 Foucauilt'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 Empiritcal 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, March 2014
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, April 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
466. Jonathan S. Masur and Lisa Larrimore Ouellette, Deference Mistakes, March 2014
467. Eric A. Posner, Martii Koskenniemi on Human Rights: An Empirical Perspective, March 2014
468. Tom Ginsburg and Alberto Simpser, Introduction, chapter 1 of *Constitutions in Authoritarian Regimes*, April 2014
469. Aziz Z. Huq, Habeas and the Roberts Court, April 2014
470. Aziz Z. Huq, The Function of Article V, April 2014
471. Aziz Z. Huq, Coasean Bargaining over the Structural Constitution, April 2014
472. Tom Ginsburg and James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty, May 2014
473. Eric A. Posner and E. Glen Weyl, Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms, May 2014
474. Paige A. Epstein, Addressing Minority Vote Dilution Through State Voting Rights Acts, February 2014
475. William Baude, Zombie Federalism, April 2014
476. Albert W. Alschuler, Regarding Re's Revisionism: Notes on "The Due Process Exclusionary Rule", May 2014
477. Dawood I. Ahmed and Tom Ginsburg, Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions, May 2014
478. David Weisbach, Distributionally-Weighted Cost Benefit Analysis: Welfare Economics Meets Organizational Design, June 2014
479. William H. J. Hubbard, Nuisance Suits, June 2014
480. Saul Levmore and Ariel Porat, Credible Threats, July 2014
481. Brian Leiter, The Case Against Free Speech, June 2014
482. Brian Leiter, Marx, Law, Ideology, Legal Positivism, July 2014
483. John Rappaport, Unbundling Criminal Trial Rights, August 2014
484. Daniel Abebe, Egypt, Ethiopia, and the Nile: The Economics of International Water Law, August 2014
485. Albert W. Alschuler, Limiting Political Contributions after *Mccutcheon*, *Citizens United*, and *SpeechNow*, August 2014
486. Zachary Elkins, Tom Ginsburg, and James Melton, Comments on Law and Versteeg's "The Declining Influence of the United States Constitution," August 2014
487. William H. J. Hubbard, The Discovery Sombrero, and Other Metaphors for Litigation, September 2014
488. Genevieve Lakier, The Invention of Low-Value Speech, September 2014
489. Lee Anne Fennell and Richard H. McAdams, Fairness in Law and Economics: Introduction, October 2014
490. Thomas J. Miles and Adam B. Cox, Does Immigration Enforcement Reduce Crime? Evidence from 'Secure Communities', October 2014
491. Ariel Porat and Omri Yadlin, Valuable Lies, October 2014
492. Laura M. Weinrib, Civil Liberties outside the Courts, October 2014
493. Nicholas Stephanopoulos and Eric McGhee, Partisan Gerrymandering and the Efficiency Gap, October 2014
494. Nicholas Stephanopoulos, Aligning Campaign Finance Law, October 2014
495. John Bronsteen, Christopher Buccafusco and Jonathan S. Masur, Well-Being and Public Policy, November 2014
496. Lee Anne Fennell, Agglomerama, December 2014

497. Avital Mentovich, Aziz Z. Huq, and Moran Cerf, The Psychology of Corporate Rights, December 2014
498. Lee Anne Fennell and Richard H. McAdams, The Distributive Deficit in Law and Economics, January 2015
499. Omri Ben-Shahar and Kyle D. Logue, Under the Weather: Government Insurance and the Regulation of Climate Risks, January 2015
500. Adam M. Samaha and Lior Jacob Strahilevitz, Don't Ask, Must Tell—and Other Combinations, January 2015
501. Eric A. Posner and Cass R. Sunstein, Institutional Flip-Flops, January 2015
502. Albert W. Alschuler, Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse, January 2015
503. Jonathan S. Masur and Eric A. Posner, Toward a Pigovian State, February 2015
504. Richard H. McAdams, Vengeance, Complicity and Criminal Law in Othello, February 2015
505. Richard H. McAdams, Dhammika Dharmapala, and Nuno Garoupa, The Law of Police, February 2015
506. William Baude, Sharing the Necessary and Proper Clause, November 2014
507. William Baude, State Regulation and the Necessary and Proper Clause, December 2014
508. William Baude, Foreword: The Supreme Court's Shadow Docket, January 2015
509. Lee Fennell, Slicing Spontaneity, February 2015
510. Steven Douglas Smith, Michael B. Rappaport, William Baude, and Stephen E. Sachs, The New and Old Originalism: A Discussion, February 2015
511. Alison L. LaCroix, A Man For All Treasons: Crimes By and Against the Tudor State in the Novels of Hilary Mantel, February 2015
512. Alison L. LaCroix, Continuity in Secession: The Case of the Confederate Constitution, February 2015
513. Adam S. Chilton and Eric A. Posner, The Influence of History on States' Compliance with Human Rights Obligations, March 2015
514. Brian Leiter, Reply to Five Critics of Why Tolerate Religion? August 2014
515. Nicholas Stephanopoulos, Teaching Election Law, September 2014
516. Susan Nevelow Mart and Tom Ginsburg, [Dis-]Informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act, November 2014
517. Brian Leiter, The Paradoxes of Public Philosophy, November, 2014
518. Nicholas Stephanopoulos, Eric McGhee, and Steven Rogers, The Realities of Electoral Reform, January 2015
519. Brian Leiter, Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature, January 2015
520. Nicholas Stephanopoulos, Arizona and Anti-Reform, January 2015
521. Lee Anne Fennell, Do Not Cite or Circulate, February 2015