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978-1-107-11272-8 - Taking Rites Seriously: Law, Politics, and the Reasonableness of Faith

Francis J. Beckwith

Excerpt

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I

## Introduction: Faith Seeking Understanding

I do not endeavor, O Lord, to penetrate your sublimity, for in no wise do I compare my understanding with that; but I long to understand in some degree your truth, which my heart believes and loves. For I do not seek to understand that I may believe, but I believe in order to understand. For this also I believe, – that unless I believed, I should not understand

St. Anselm of Canterbury (1033–1109)<sup>1</sup>

I want atheism to be true and am made uneasy by the fact that some of the most intelligent and well-informed people I know are religious believers. It isn't just that I don't believe in God and, naturally, hope that I'm right in my belief. It's that I hope there is no God! I don't want there to be a God; I don't want the universe to be like that.

Thomas Nagel (1937–)<sup>2</sup>

In February 2004 I was invited to give an address at the Texas Tech University School of Law. The title of my talk, “Law, Darwinism, and Public Education,” was based largely on my book of the same name.<sup>3</sup> News of the event had apparently reached the university's biology department, and several of its members had shown up, accompanied by a local attorney from the American Civil Liberties Union (ACLU). My lecture focused on whether the controversial theory of “Intelligent Design” (ID), a view embraced almost exclusively by religious scholars,<sup>4</sup> could pass constitutional muster if a school board either

<sup>1</sup> St. Anselm of Canterbury, *Proslogium*, trans. Sidney Norton Deane (1903) (Internet Medieval Source Book), ch. 1, available at <http://www.fordham.edu/halsall/basis/anselm-proslogium.asp>.

<sup>2</sup> Thomas Nagel, *The Last Word* (New York: Oxford University Press, 1977), 130.

<sup>3</sup> Francis J. Beckwith, *Law, Darwinism, and Public Education: The Establishment Clause and the Challenge of Intelligent Design* (Lanham, MD: Rowman & Littlefield, 2003).

<sup>4</sup> What I mean by “religious scholars” is not “scholars of religion.” Rather, what I mean are scholars, from a variety of disciplines, who happen to be personally religious.

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required or permitted it to be taught in its science classes. Although I had nagging doubts about ID as a theory, and I did not think that as a matter of policy it was a good idea for the government to require the teaching of it, the focus of my talk, as with the book, was to answer a question of constitutional jurisprudence. On that question I concluded that I could not find a persuasive reason to believe that the Constitution forbids the teaching of ID in public schools. (As un-luck would have it, the following year [2005] a Federal District Court in Pennsylvania thought otherwise,<sup>5</sup> a point that I address in Chapter 6 of this present volume).

Nevertheless, the biology professors in the audience seemed to miss these subtle distinctions. During the question and answer session, one of them issued this public judgment, “Your talk consists of cleverly disguised religious arguments.” I promptly replied, “I’m relieved. I was afraid you were going to accuse me of making *bad* arguments.” The audience laughed.

Another professor, in private conversation with me and other audience members after the talk, accused me of being a “creationist.” It was an odd charge, because I had for years never hidden the fact that I believed that evolution and God’s existence were perfectly compatible<sup>6</sup> and that I was sympathetic to St. Pope John Paul II’s anti-creationist understanding of the relationship between Darwinism and Christian theology.<sup>7</sup>

That lecture and the encounters that followed occurred over eleven years ago. (I am writing in July 2015). Since that time my nagging doubts about ID have developed into full-blown criticisms, and much of what I wrote in my 2003 book about the relationship between science and theology I would write much differently today (as I explain in Chapter 6). Nevertheless, the queries raised by the two professors point to deeper questions that are of enormous importance to how those of us who live in liberal democracies ought to conduct our public disagreements that touch on religious beliefs and their attendant notions. In my reply to the first professor, my caustic quip was implying that however one wants to assess the quality of my arguments, applying the adjective “religious” to those arguments contributes nothing to making that assessment or advancing a respectful conversation about it. Arguments, depending on their level of formality, are either sound or unsound, valid or invalid, strong or weak. Pope Emeritus Benedict, for example, is religious, and he is known to make arguments, even religious ones. But when it comes to the quality of his arguments, religious or otherwise, they stand or fall based on the

<sup>5</sup> *Kitzmiller v. Dover*, 400 F. Supp. 2d 707 (2005).

<sup>6</sup> Francis J. Beckwith, “Are Creationists Philosophically and Scientifically Justified in Postulating God?: A Critical Analysis of Naturalistic Evolution,” *Interchange* 46 (1989). In this article I distinguish between “naturalistic evolution” and “theistic evolution,” maintaining that evolution as a scientific theory – uncoupled from the philosophical position of naturalism – is perfectly compatible with the existence of God.

<sup>7</sup> John Paul II, “Truth Cannot Contradict Truth,” Address to the Pontifical Academy of Sciences (22 October 1996), available at [http://www.newadvent.org/library/docs\\_jpo2tc.htm](http://www.newadvent.org/library/docs_jpo2tc.htm).

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rules by which we assess all arguments, religious or otherwise. The professor, for some reason, thought that labeling my arguments “religious” was equivalent to showing that they were “bad.”

The other professor, rather than focusing on my arguments, focused on what he mistakenly thought were my religious motivations and convictions. By suggesting that I was a champion for a scientifically disreputable point of view, creationism, he was relieved of the burden of assessing the content of the legal case I was making and the subtle philosophical issues that percolated beneath that case. He seemed unwilling to entertain the possibility that a view, such as ID, pregnant with positive implications for one sort of theism, may in fact rest on arguments, untouched by Scripture or personal piety, that in an earlier and more learned age would have been labeled as *natural theology* or *metaphysics*. For this reason, he did not seem to appreciate, or even remotely understand, the numerous and contentious debates among theologians, philosophers of religion, philosophers of science, and biblical scholars over the relationship between natural theology, biblical interpretation, science, and the philosophy of nature. (I touch on this in Chapter 6). The range of views and the sophistication of the ongoing conversation in which these views are assessed, considered, and critiqued were outside this professor’s ken. From where I stood, it seemed that for him anyone who takes theology seriously – or, God forbid, may believe in God – is a “creationist.”

Unfortunately, this diminished understanding of religious belief exhibited by these professors is ubiquitous in the way in which the most educated and respected citizens in our liberal democracies conduct their public disagreements. The point of this book is to address this problem. This is a book about how religious beliefs and religious believers are assessed by powerful actors in our public life,<sup>8</sup> and how those beliefs and believers are sometimes mischaracterized and seemingly misunderstood by mostly (although not exclusively) those who are critical of the influence of religion and religious citizens in politics or the formation of law.

As should be evident by the story that opened this introduction, what I mean by religious beliefs is not merely those doctrines that we associate with the world’s great faiths such as Christianity – that is, that God exists, that Jesus of Nazareth was his Son, or that the Torah is the inspired Word of God – but also those moral and philosophical beliefs that are tightly tethered to a variety of religious traditions, and that are in most cases thought defensible by their adherents apart from the religious tradition from which these beliefs and believers herald.

<sup>8</sup> What I mean by “powerful actors” includes not only those who have real legal and political power – for example, judges, political office holders – but also highly respected and influential academics, writers, and media figures, some of whom – like Steven Pinker, Ronald Dworkin, and Martha Nussbaum – fit in two or three categories.

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Among these moral and philosophical beliefs are beliefs about what counts as knowledge, whether the physical world is all that exists, the nature of the human being and when does he become a moral subject, whether natural objects include formal and final causes, and whether our sexual powers have a proper function and are ordered toward a particular good end. Beliefs about these questions are at the heart of the political and legal disputes that dominate what sociologist James Davison Hunter calls “the culture wars.”<sup>9</sup> Take, for example, the contentious question over the morality of abortion, an issue that I address in several places in this book. Those who oppose abortion (or pro-life advocates) typically ground their conviction in the belief that each human being begins his existence at the moment of conception (or at least very early in pregnancy),<sup>10</sup> and each human being is a person with immeasurable worth and intrinsic dignity. Although typically not disagreeing with the abortion opponent’s *biological* claim that an individual human being begins his existence at the moment of conception (or at least very early in pregnancy), supporters of abortion rights (or prochoice advocates) *dispute* the prolife’s *moral* claim that all human beings are persons with immeasurable worth and intrinsic dignity. Most prochoice advocates make a distinction between being a *human being* and being a *person*. What makes one a moral subject is not one’s humanity but, rather, one’s personhood. The latter, according to its champions, arises either gradually or at some decisive moment in fetal development or after birth. As I point out in Chapter 2, prochoice advocates disagree among themselves as to when personhood arises and what sorts of characteristics a being must possess for us to attribute personhood to it. But a dominant view in the literature – one embraced by several distinguished philosophers including Michael Tooley<sup>11</sup> and Peter Singer<sup>12</sup> – is that human beings are not persons until they are “able to make aims and appreciate their own life.”<sup>13</sup> So, even though a vast majority of prolife advocates would agree that their position is informed by their theological traditions, the conflict between their view and those that oppose it is not a conflict between “religion” and “nonreligion.” It is a dispute over two contested philosophical understandings of the nature of the human person, one of which finds its more natural home in certain theological traditions.

<sup>9</sup> James Davison Hunter, *Culture Wars: The Struggle To Control The Family, Art, Education, Law, And Politics In America* (New York: Basic Books, 1991).

<sup>10</sup> I say “at least very early in pregnancy” to take into consideration (1) the fact that twinning may occur after conception, and thus one (or two) human being(s) begin(s) his (or their) existence after conception (depending on whether one thinks that the original conceptus survives twinning or two new ones arise from it), and (2) those opponents of abortion who, because of the phenomenon of twinning (and recombination), do not believe that an individual human being exists until twinning (and recombination) is (are) no longer possible.

<sup>11</sup> Michael Tooley, *Abortion and Infanticide* (New York: Oxford University Press, 1983).

<sup>12</sup> Peter Singer, *Practical Ethics*, 2nd ed. (New York: Cambridge University Press, 1993), 169–174, 181–191.

<sup>13</sup> Alberton Giubilini and Francesca Minerva, “After Birth Abortion: Why Should The Baby Live?,” *Journal of Medical Ethics* 39.5 (May 2013): 262.

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Yet, with few exceptions, this is not the way in which the abortion debate – or virtually any other bioethical issue – is approached in the public square, or even in the enclaves that our more sophisticated and cerebral analysts inhabit. Take, for example, comments made by Cornell law professor Sherry F. Colb on the debate over federal funding of embryonic stem cell research during the first year of the second Bush administration (2001). Rather than presenting the differing views of the embryo’s personhood as contrary philosophical accounts of the nature of the human person, she writes: “The particular pro-life position to which [President George W.] Bush referred – the idea that full-fledged human life begins at conception – is a religious notion, and it is one to which some, but not all, religions subscribe. The idea of ‘ensoulment’ is, of course, a purely religious concept. The notion that life begins at conception is counterintuitive if understood in secular terms.”<sup>14</sup>

Colb reframes the philosophical dispute as a conflict between “religion” and “secularism.” By arguing that the “religious” view is counterintuitive to the secular understanding, Colb need not go any deeper in assessing the prolife case. For “secular” is presented as virtually equivalent to “deliverance of reason.” The implication is clear: the differing views of the nature of the embryo are not two contrary accounts of the same subject – each the result of rational argument – but rather, each view is about a different subject, one religious and the other rational. (This will come up again in Chapter 5.)

The inadequacy of this and similar approaches to controversial cultural issues that touch on religious beliefs is the focus of this book. Aside from its introductory and concluding chapters (1 and 8, respectively), this book consists of three main sections: (I) Reason and Motives; (II) Dignity and Personhood, and (III) Nature and Sex. Each section, representing a general category in which these contested cultural issues dwell, addresses two of these issues in each of its two chapters. Part I concerns beliefs: the rationality of religious beliefs and those beliefs we call motives. Part II engages the good of life: the reality of human dignity and the nature of personhood. And Part III addresses the end of life (as in “its purpose” or “that to which it is ordered”): the nature of nature and the nature of human sexuality.

Part I (Reasons and Motives) begins with Chapter 2 (“*Juris, Fides, et Ratio*: What Judges and Some Legal Scholars Miss About Reason and Religious Beliefs”). In this chapter I present and critique the claim made by certain jurists and a growing number of legal scholars that religious belief is irrational. This understanding of religion has implications for how we think about the public participation of religious citizens as well as how courts may assess policies and laws that are tightly tethered to religious traditions. If religious beliefs are irrational, not only do these beliefs have no intellectual content, it does not seem

<sup>14</sup> Sherry F. Colb, “A Creeping Theocracy: How The U.S. Government Uses Its Power To Enforce Religious Principles,” *FindLaw* (21 November 2001), available at <http://writ.news.findlaw.com/colb/20011121.html>.

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far fetched to suggest that those who embrace and are motivated by those beliefs, religious citizens, could be justly excluded from the public square in order to ensure the primacy of reason in our political life.

In Chapter 3 (“Theological Exclusionary Rule: The Judicial Misuse of Religious Motives”) I critically assess what I believe is a modest application of this sort of exclusion. Over the years several courts have declared certain statutes and policies in violation of the Establishment Clause of the First Amendment because these laws have a religious purpose. These courts, however, do not find the law’s purpose in its text, but rather, in the motives of its supporters in either the government or the general public. This, I argue, is, ironically, a violation of the spirit of the U.S. Constitution’s article VI prohibition of religious tests for office (when it comes to the law’s advocates in the government).<sup>15</sup> Moreover, because motives are types of beliefs, the courts cannot appeal to a citizen’s motives in order to deprive her of her political right to participate in deliberative democracy. This conclusion, as I argue in the chapter, is based on the Supreme Court’s own interpretation that the Constitution forbids the government (including the judiciary) from depriving citizens of their fundamental rights simply based on their religious beliefs.

Part II (Dignity and Personhood) focuses on issues in bioethics, an area of study and research in which one finds many questions over which citizens of good will strongly disagree (e.g., abortion, embryonic stem cell research, euthanasia, distribution of health care resources). In Chapter 4 (“Dignity Never Been Photographed: Bioethics, Policy, and Steven Pinker’s Materialism”), I address an argument offered by renowned Harvard psychologist, Steven Pinker.<sup>16</sup> He maintains that the concept of human dignity contributes nothing to the field of bioethics that cannot be achieved by the principle of autonomy. As is well known, the idea of human dignity is often associated with religious world-views, such as Christianity and Judaism, in which the concept of the *imago dei* (the image of God) is central to the equal dignity that many of us believe our fellow human beings possess by nature. Pinker, like many of his colleagues in the academy, embraces an understanding of metaphysics (Philosophical Materialism) and political institutions (Political Liberalism) that grounds his rejection of human dignity as ultimately irrational and inconsistent with government neutrality on religious belief. I do not argue for the falsity of Pinker’s position. But rather, I make the case that his account of dignity and autonomy is not the only deliverance of reason on these matters, and thus, the religious

<sup>15</sup> I say “a violation of the spirit” because, as I point in chapter 3, Article VI applies only to the federal government, and it was only after the U.S. Supreme Court began applying the First Amendment’s free exercise and establishment clauses to the states that religious tests for office were forbidden in all governments in the United States, federal, state, and local. These nonfederal prohibitions of religious tests are not literally an application of Article VI, but “in its spirit.”

<sup>16</sup> Steven Pinker, “The Stupidity of Dignity,” *The New Republic* Vol. 238 Issue 9 (28 May 2008): 28–31.

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worldview that grounds human dignity, which he enthusiastically rejects, cannot be so easily dismissed.

Chapter 5 (“Personhood, Prenatal Life, and Religious Belief”) concerns the type of argument raised by both Professor Colb (which I briefly mentioned earlier) as well as by Supreme Court Justice John Paul Stevens.<sup>17</sup> It is an argument that maintains that because the prolife view on prenatal life is tightly tethered to a religious worldview, the separation of church and state is violated if it is employed to guide the protection of prenatal life by our legal and political institutions. In reply, I argue that every position on prenatal life, including the prolife position, is philosophical, and thus the prolife view is no more or less “religious” than its rivals. The bulk of my case is devoted to explaining the intricacies and sophistication of the prolife position by interacting with the works of philosophers Dean Stretton<sup>18</sup> and Jeff McMahan,<sup>19</sup> both of whom reject the prolife understanding of prenatal life. I conclude with a discussion of the 2014 U.S. Supreme Court case, *Burwell v. Hobby Lobby*,<sup>20</sup> in which the Court held that a Health and Human Services Department regulation, allowed by the 2010 Affordable Care Act,<sup>21</sup> violated the 1993 Religious Freedom Restoration Act (RFRA).<sup>22</sup> The regulation required that all businesses that employ over fifty people, and are not exempted from the regulation for other reasons (e.g., they are houses of worship), must provide in their employee health plans a menu of birth control options including some that may result in the death of an embryo soon after fertilization. Hobby Lobby, along with the other defendant, Conestoga Wood Specialties, are family-owned closely held companies whose ownerships consist exclusively of devout Christians who believe that to offer such birth control options to their employees puts them in the position of cooperating with the destruction of nascent human life.

Part III (Nature and Sex) deals with the issues of intelligent design (ID) and same-sex marriage (SSM). In Chapter 6 (“How to Be An Anti-Intelligent Design Advocate: Science, Religion, and the Problem of Intelligent Design”) I offer an analysis of the dispute over ID. Although, as I noted earlier, I was once cautiously sympathetic to ID – although never actually espousing it – I have over the years grown overtly critical of the view.<sup>23</sup> Nevertheless, I argue in this chapter that both sides in the dispute – despite the usual hostility that each has for the other – embrace a common understanding of nature as mechanistic. It is

<sup>17</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 560–72 (1989) (Stevens, J., dissenting).

<sup>18</sup> Dean Stretton, “Critical Notice” – *Defending Life: A Moral and Legal Argument Against Abortion Choice*, *Journal of Medical Ethics* 34 (2008): 793–797.

<sup>19</sup> Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002).

<sup>20</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>21</sup> Patient Protection and Affordable Care Act (2010), Public Law, 111–148.

<sup>22</sup> Religious Freedom Restoration Act (1993), Public Law 103–141.

<sup>23</sup> See Francis J. Beckwith, “Or We Can Be Philosophers: A Response to Barbara Forrest,” *Synthese*. Published Online First: 05 March 2011. doi 10.1007/s11229-011-9891-y.

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an understanding that I argue does not do justice to the theism to which most ID advocates claim they subscribe. For this reason, some of the atheistic critics of ID – such as Richard Dawkins – think that their good reasons to reject ID may also serve as good reasons to reject theism or other ways of thinking about design in nature. I not only argue that such an inference is mistaken, but that the key assumption they make in the process of critiquing ID and its advocates requires a belief in intrinsic purposes in nature, which seems far more congenial to a theistic universe than a materialist one. This chapter also includes a brief critique of a portion of the U.S. District Court opinion in *Kitzmiller v. Dover* (2005),<sup>24</sup> the case that overturned a Pennsylvania school district policy that required its ninth-grade biology teachers to read in class a disclaimer that said that Darwinian evolution was not a fact and that the students should have an open mind and consider the alternative of ID. Because both sides of the ID question – whether in the courts or the public square – think of their dispute as a zero-sum game (i.e., you must choose God or Darwin but not both) they mistakenly think of the deliverances of “science” as a confirmation of either theism or philosophical naturalism (or materialism). But once one abandons this false dilemma and sees that it is practically impossible to forsake intrinsic purpose in nature without undercutting confidence in the normative judgments about proper ends and functions that even hard line materialists do not hesitate in issuing, it seems, as I conclude, that the only way that one can be an anti-ID advocate is to believe in design. (But not the design of the ID advocates!)

In Chapter 7 (“Same-Sex Marriage and Justificatory Liberalism: Religious Liberty, Comprehensive Doctrines, and Public Life”) I deal with what is arguably the most contentious issue that tends to divide along religious lines, SSM. Virtually all supporters of SSM, including Ronald Dworkin,<sup>25</sup> Frank I. Michelman,<sup>26</sup> Martha Nussbaum,<sup>27</sup> and Linda McClain<sup>28</sup> appeal to some version of Justificatory Liberalism (JL) as the most fundamental reason why laws that limit marriage to one man and one woman are unjust. JL maintains that the state may not coerce its citizens on matters of constitutional essentials unless it can provide public justification that the coerced citizens would be irrational in rejecting. Because the right to marry is a constitutional essential, and because same-sex couples are not irrational in rejecting marriage as limited to one man and one woman, SSM ought to be legally recognized.

<sup>24</sup> *Kitzmiller*, 400 F. Supp. 2d.

<sup>25</sup> Ronald Dworkin, *Is Democracy Possible Here?: Principle for a New Political Debate* (Princeton, NJ: Princeton University Press, 2006). 1–24, 86–89.

<sup>26</sup> Martha Nussbaum, “A Right to Marry?: Same Sex Marriage and Constitutional Law,” *Dissent* (Summer 2009): 43–55.

<sup>27</sup> Frank I. Michelman, “Rawls on Constitutionalism and Constitutional Law,” in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003), 410–414.

<sup>28</sup> Linda C. McClain, “Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage,” *Fordham Law Review* 66 (1997–98): 1241–1252.



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However, because the issue under scrutiny – the nature of marriage – is deeply embedded in, and in most cases integral to, many of the reasonable worldviews (including religious ones) of citizens who reject SSM, the effects and consequences of legal recognition of SSM will likely include coercion, punishment, and marginalization of these dissenters in a variety of public enterprises and venues found in the plethora of institutions that inhabit the worlds of business, education, government, and law. For this reason, I argue in this chapter that because these dissenters almost certainly will suffer these consequences because of their unwillingness to honor and affirm in their actions a view of marriage that they are not unreasonable in rejecting, legal recognition of SSM will likely require violations of JL as well.

This book's eighth and concluding chapter ("Conclusion: Taking Rites Seriously") includes two parting examples, one fictional and the other concerning what some jurists have called "ceremonial deism."<sup>29</sup> With both examples I hope to reinforce the underlying theme of this book: when it comes to the understanding of religious belief among powerful figures in public life, "a small error at the outset can lead to great errors in the final conclusions."<sup>30</sup>

Not only does it not look as if the hostilities that are endemic to the culture wars will soon abate, it is probably safe to say that they will continue to increase. One reason for this is that one side sees itself and its advocates as the guardians of rationality while it views its adversaries as embracing nonrational delusions that deserve no greater constitutional protections or civil respect than other fanciful beliefs and private self-regarding hobbies.<sup>31</sup> That account of our present cultural conflicts, although popular and unchallenged in some insular circles, is seriously mistaken. It is the burden of this book to show why that is so.

<sup>29</sup> According to Justice William Brennan, "such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." (*Lynch v. Donnelly* 465 U. S. 688, 716 [1984] [Brennan, J., dissenting]).

<sup>30</sup> St. Thomas Aquinas, *On Being and Essence*, trans. Robert T. Miller (Internet Medieval Sourcebook, 1997), prologue, citing Aristotle, *De Caelo et Mundo* cap. 5 (271b8–13), available at <http://www.fordham.edu/halsall/basis/aquinas-esse.asp>.

<sup>31</sup> See Richard Dawkins, *The God Delusion* (New York: Houghton Mifflin, 2006); and Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).

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