Legal Theory, **15** (2009), 215–244.
© Cambridge University Press, 2009 0361-6843/09 $15.00 + 00
doi:10.1017/S1352325209990061

CONSCIENCE, VOLITIONAL NECESSITY, AND RELIGIOUS EXEMPTIONS

Andrew Koppelman*
Northwestern University School of Law

Why do we grant religious exemptions? Many distinguished scholars and judges have been drawn to the idea that conscience is entitled to special protection, because a person in its grip cannot obey the law without betraying his deepest, most identity-defining commitments. The weakness of this justification is shown by philosopher Harry Frankfurt's account of what he calls "volitional necessity," which clarifies the structure of the argument that invocations of conscience imply. Frankfurt shows that a person can be bound in this way by allegiances that there is no reason to respect; volitional necessity can arise from anything at all that a person cares about. Conscience is thus a poor basis for claims upon other people. Accommodation must rather depend on some idea of the value of religion.

Federal law and the law of every state sometimes grant exemptions from laws when those laws place a burden on the free exercise of religion. Is this practice defensible? Is it possible to give a principled account of why this is done—one that not only justifies religious exemptions as a general matter, but also fits well with commonly held intuitions about the cases in which those exemptions are granted?

Many distinguished legal theorists and philosophers have been drawn to the idea that it is conscience rather than religion that is entitled to special protection, and the U.S. Supreme Court has sometimes embraced the same position.[1] Yet "conscience" is not a good explanation for the core exemption cases; it is present in cases that almost no one would want to accommodate,

*Thanks to Marcia Lehr for research assistance, to Michael McConnell and Elliott Ashton Welsh II for enlightening conversations, and to Ron Allen, Dan Brudney, Sam Fleischacker, Rick Garnett, Jon Garthoff, Kent Greenawalt, Richard Kraut, Anthony Laden, Martha Nussbaum, Michael Perry, Richard Ross, Regina Schwartz, Winnifred Fallers Sullivan, audiences at the World Congress of Constitutional Law, Athens, and the Northwestern University, University of Chicago, and Emory University law schools' faculty workshops for helpful comments on earlier drafts. Special thanks to Steven D. Smith, who commented on multiple drafts.

1. *See, e.g.*, Amy Gutmann, Identity in Democracy 151–191 (2003); William Galston, The Practice of Liberal Pluralism 45–71 (2005); Kwame Anthony Appiah, The Ethics of Identity 98 (2005); Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 65–71 (1996); Martha Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality (2008); Rogers M. Smith, *"Equal" Treatment? A Liberal Separationist View, in* Equal Treatment of Religion in a Pluralistic Society 190–194 (Steven V.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

and it fails to justify exemption in many cases where the claim for exemption seems strong. This suggests that a different justification is at work.

A second puzzle is that there has been remarkably little explanation of why conscience is a legitimate basis for objecting to the application of a law. Any such claim must rely on assumptions about political theory, about morality, and perhaps even about theology, but these are rarely stated. "Conscience" has been something of a black box.

In short, the common valorization of conscience gives rise to two problems: Can conscience explain the settled exemption cases? And if it cannot, why does the idea of "conscience" have such power for so many people?

An increasingly prominent justification for the reliance on conscience is that conscience is entitled to deference because the person in its grip cannot obey the law without betraying his deepest, most identity-defining commitments. I will argue here that this justification fails. To see why, one must expose the unstated premises of the argument. I do this by drawing upon Harry Frankfurt's account of what he calls "volitional necessity." Someone in the grip of volitional necessity cares about something so wholeheartedly that he cannot form an intention to act in a way that is inconsistent with that care. Such a person must say, in the words attributed to Martin Luther, "Here I stand; I can do no other."[2]

Frankfurt's account clarifies the structure of the argument that this kind of invocation of conscience implies. It thus contributes two important points to the debate about conscience. First, it shows that a person can be bound in this way by allegiances that are not moral: volitional necessity can arise from anything at all that a person cares about. Its object may be amoral or even wicked. It is defined entirely by a description of the internal mental state of the agent who is in its grip. Second, because volitional necessity need not have any connection to objective value, it is a poor basis for claims upon other people.

Conscience may be relevant to the determination of whether a claim should be accommodated. People's life-defining commitments, moral or otherwise, should be accommodated where reasonably possible, but the deference this calls for is weak. The will to be moral is another way of understanding conscience. It is valuable, and it warrants some deference even if we think the agent mistaken about what morality requires. But this has more to do with its moral character than with its importance to the individual. And this moral character cannot provide a full account of religious accommodation. Religion is more than a set of moral injunctions

Monsma & J. Christopher Soper eds., 1998); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645. The Supreme Court cases are discussed below.

2. Luther probably never actually said it. *See* DIARMAID MACCULLOCH, THE REFORMATION 127 (2004).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

and less than everything that people think important. Religion has an erotic as well as a punitive aspect. It involves hope as well as fear. That aspect is not captured by the language of conscience.

I follow Thomas Hill in regarding "conscience" as a general concept that is capable of being specified in various particular conceptions. The general concept, Hill observes, is "the idea of a capacity, commonly attributed to most human beings, to sense or immediately discern that what he or she has done, or is about to do (or not do) is wrong, bad, and worthy of disapproval."[3] This general idea leaves open many further questions. It is the answer to those questions that specifies particular conceptions of conscience.

Part I of this essay explains why conscience has been attractive to those trying to make sense of the religion clauses but shows that it cannot explain the full range of cases that it is being asked to cover. Part II shows that there are in fact several different available conceptions of conscience, each relying on different assumptions about the nature of conscience, its relation to political obligation, and the basis of legitimate moral claims against the state. Part III examines the approach that treats conscience as volitional necessity, and shows its weaknesses. Part IV considers a different conception, relying on respect for moral motivation as such, and shows that it can do some but not all of the work of explaining the religious accommodation cases. Part V tries to offer a better explanation.

I. THE ATTRACTIVENESS OF CONSCIENCE

Much of the attractiveness of conscience arises from its perceived capacity to resolve a tension between free exercise and establishment principles. The Supreme Court has declared that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[4] The Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion."[5] But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."[6] This generates a puzzle. It is not

3. Thomas E. Hill, Jr., *Four Conceptions of Conscience*, *in* NOMOS XL: INTEGRITY AND CONSCIENCE 14 (Ian Shapiro & Robert Adams eds., 1998). My analysis of multiple conceptions of conscience is in some ways similar to Hill's, but he is concerned about different accounts of the role of conscience in morality, whereas I am interested in different accounts of the role of conscience in the law's treatment of persons.

4. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

5. Epperson v. Arkansas, 393 U.S. 97, 103–104 (1968).

6. Thomas v. Review Bd., 450 U.S. 707, 713 (1981); *see also* Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.").

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself.[7] Call this *the free exercise/establishment dilemma.*

The dilemma is pressing because religion is ubiquitously given special treatment. A classic case is Quaker and Mennonite objections to participation in war, which have been accommodated since colonial times. But there are plenty of other cases. Persons whose religions place special value on the ritual consumption of peyote or marijuana (or wine, during Prohibition) seek exemption from drug laws. Landlords who have religious objections to renting to unmarried or homosexual couples want to be excused from antidiscrimination laws.[8] Churches seeking to expand sometimes want exemption from zoning or landmark laws. The Catholic Church wants to discriminate against women when ordaining priests. Jewish and Muslim prisoners ask for kosher or halal food. These scruples have often been deferred to, and religious objectors have frequently been exempted from obligations that the law imposes on all others. (There is considerable dispute about whether the decision about when to accommodate ought to be one for legislatures or courts, but that debate rests on the assumption, common to both sides, that *someone* should make such accommodations.)

The sentiment in favor of such accommodations is nearly unanimous in the United States. When Congress enacted the Religious Freedom Restoration Act, which attempted to require states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate.[9] After the Supreme Court struck down the Act as exceeding Congress's powers, many states passed their own laws to the same effect.[10] Many of those opposed to judicially administered accommodations, such as Justice Antonin Scalia, think it is appropriate for such accommodations to be crafted by legislatures. Each of these measures raises the same dilemma. If government must be neutral toward religion, then how can this kind of special treatment be permissible?

"Conscience" promises a way out of the dilemma by describing the basis of free exercise in a way that specifies only the internal psychology of the person exempted, without endorsing any claims about religious truth. Thus it is possible to give religion special treatment without favoring religion as

7. As the Court put it in a recent pronouncement, "the two Clauses . . . often exert conflicting pressures." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).

8. I address this specific issue in Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

9. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 160 (1997).

10. For a survey, *see* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211–212 & nn.368–373 (2004).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

such. I shall now examine how the Supreme Court came to be drawn to this strategy. Then I will examine its limitations.

A. Seeger and Welsh

The free exercise/establishment dilemma was presented to the Supreme Court most strikingly in a pair of draft exemption cases during the Vietnam War, and those cases have provided powerful support for the view that conscience is the appropriate object of constitutional protection. The first of these concerned Daniel Seeger, who claimed the conscientious-objector exemption from the military draft but was uncertain of God's existence. In a statement he attached to the draft board's questionnaire, which had asked whether he believed in a Supreme Being, he wrote that "the existence of God cannot be proven or disproven, and the essence of His nature cannot be determined. I prefer to admit this, and leave the question open rather than answer 'yes' or 'no.'"[11] (He explained years later that "I didn't make any particular connection between my theological beliefs and my determination not to fight in the army.")[12] He was quite clear, however, in his views about war:

> I cannot participate in actions which betray the cause of freedom and humanity. Experience with the past indicates that our armament policy will lead to war, and war, with its indiscriminate crushing of human personality, cannot preserve moral values. . . . To resort to immoral means is not to preserve or vindicate moral values, but only to become collaborators in destroying all moral life among men.[13]

The question of the appropriate basis of exemption was presented starkly by the Selective Service Act, which exempted from the draft anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." The Act defined its terms in a problematic way: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[14]

The court of appeals thought that the statute was unconstitutionally discriminatory: "for many in today's 'skeptical generation,' just as for Daniel Seeger, the stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God."[15] When the case was appealed to the U.S.

11. *Quoted in* United States v. Seeger, 326 F.2d 846, 848 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

12. *Quoted in* Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court 169 (1988).

13. *Seeger*, *supra* note 11, 326 F.2d at 848–849.

14. *Id.* at 847, quoting 50 U.S.C.A. §456(j) (rev. 1948).

15. *Id.* at 853.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

Supreme Court, that court avoided the conclusion that the law was unconstitutional but only by construing the term "Supreme Being" very broadly, so that the test was "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[16] The Court concluded that Seeger was entitled to the exemption "[i]n light of his beliefs and the unquestioned sincerity with which he held them."[17]

A few years later, the Court revisited the exemption issue in the case of Elliott Ashton Welsh II, who also conscientiously objected to participation in any war but who stated that he did not believe in God and that his beliefs were not religious. The Court decided that Welsh, too, should be exempted. A four-judge plurality concluded that Welsh's beliefs were "religious" as that term was defined in the statute. What was necessary was "that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."[18] The common denominator was conscience:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under [the statute] as is someone who derives his conscientious opposition to war from traditional religious convictions.[19]

The plurality concluded that the law "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[20]

Justice Harlan, concurring in the result, thought that the Court's removal of the statute's theistic requirement was "a remarkable feat of judicial surgery"[21] that was inconsistent with the clear intentions of Congress. But he joined the result because he thought, as the Court of Appeals had thought in *Seeger*, that the law impermissibly discriminated on the basis of religion—that it drew "a distinction between theistic and nontheistic religions."[22] If Congress was going to create exemptions, Harlan thought, it was constitutionally required to show "equal regard for men of nonreligious

16. *Seeger*, *supra* note 11, 380 U.S. at 166.
17. *Id.* at 187.
18. Welsh v. United States, 398 U.S. 333, 340 (1970).
19. *Id.*
20. *Id.* at 344.
21. *Id.* at 351 (Harlan, J., concurring).
22. *Id.* at 348.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

conscience."[23] As he explained, "The common denominator must be the intensity of moral conviction with which a belief is held."[24] A dissenting judge in the court of appeals below had come to the same conclusion, noting that Welsh was "willing to go to jail rather than do violence to his beliefs, which is more than can be said for many who profess a belief in a Supreme Being."[25]

B. What Conscience Cannot Explain

So the reliance on conscience produced a result that the Supreme Court found satisfying in the draft cases. If one surveys the broader range of exemption cases, however, one finds that conscience works less well as a functional substitute for religion.

One problem is that, as Christopher Eisgruber and Lawrence Sager observes, conscience can generate exorbitant demands: "Both good and evil can emanate from conscience: the feeding of the poor, perhaps, but also the purification of the caucasian race."[26] A pointed illustration comes from a prison interview with Dan Lafferty, who, in response to a religious revelation reported to him by his brother Ron, murdered his sister-in-law and her fifteen-month-old daughter:

23. *Id.* at 360 n.12. Harlan here conflates "nontheistic religion" with the "nonreligious." This is confused. A nonreligious religion is an oxymoron.

24. *Id.* at 358.

25. Welsh v. United States, 404 F.2d 1078, 1092 (9th Cir. 1968) (Hamley, J., dissenting); *rev'd*, 398 U.S. 333 (1970). There were limits to the accommodation the Court would mandate. In Gillette v. United States, 401 U.S. 437 (1971), it upheld the exemption's restriction to conscientious objectors who objected to all wars but not those who objected to particular wars. There is also one dictum possibly retreating from the broad understanding of the scope of accommodation mandated in *Seeger* and *Welsh*. Wisconsin v. Yoder, 406 U.S. 205 (1972), mandated an exemption from truancy laws for Amish parents who wanted to withdraw their children from high school. The Court declared that "purely secular considerations" would not warrant an exemption:

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Yoder at 216. Justice Douglas objected that this passage was inconsistent with *Seeger* and *Welsh*. *Yoder* at 247 (Douglas, J., dissenting in part). The majority did not respond.

26. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1269 (1994). Slavery and white supremacy have been understood at various times to represent aspirations of the highest order. *See* Jane Dailey, *Sex, Segregation, and the Sacred after* Brown, 91 J. AM. HIST. 119 (2004); Mark Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 310–315 (1997); FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY (1990). The basic problem is a familiar one. *See, e.g.*, G.W.F. HEGEL, PHILOSOPHY OF RIGHT 90–92 (T.M. Knox trans., Oxford University Press, 1952).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

> It was like someone had taken me by the hand that day and led me comfortably through everything that happened. Ron had received a revelation from God that these lives were to be taken. I was the one who was supposed to do it. And if God wants something to be done, it will be done. You don't want to offend Him by refusing to do His work.[27]

Conscience thus includes some claims that almost no one would want to respect. This difficulty can be accommodated by noting that the claim for accommodation is only presumptive and can be defeated by a strong enough state interest. As the case of Lafferty shows, even theism will sometimes generate unworthy claims.

A deeper objection is that conscience *excludes* some claims that are widely recognized as valid. Many religious claims that are uncontroversially weighty, claims that nearly everyone would want to accommodate, are not conscientious. A paradigm case for religious exemption for most proponents of such exemptions is the ritual use of peyote by the Native American Church, which the Supreme Court declined to protect in Employment Division v. Smith[28] but which received legislative accommodation shortly thereafter.[29] Yet neither of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.[30]

The emphasis on conscience focuses excessively on duty. Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation, and guilt, curiosity about a religious truth, a desire to feel connected to God, or happy

27. *Quoted in* JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH xxi (2003). Lafferty is less idiosyncratic than one might hope. Perpetrators of "honor killings" of female relatives accused of unchastity, who are responsible for thousands of murders annually worldwide, typically defend their deeds in similar terms. Thus a Jordanian convict who had strangled his sister for leaving her husband for another man explains:

> I reminded myself that this act had the backing of the whole family. Even my mother agreed that it had to be done to restore our honor and, as my hands tightened, I recited the Koran. I also reminded my sister that if she said "Allah is great and Mohammed is the only prophet" then she could still go to Paradise. Thanks God she listened and did what I asked her. I pray every day for God to forgive her. What you have got to get into your head is that this is our way. It had to be done.

Quoted in Sue Lloyd Roberts, *Honour Killing*, SUNDAY MAIL (Queensland, Australia), Nov. 15, 1998, at 4.

28. Employment Division v. Smith, 494 U.S. 872 (1990). This result was reversed, with respect to federal law, by statute, which the Court has willingly followed. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

29. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 243 (2007).

30. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L. REV. 953, 959–965, 978–985 (1998).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

religious enthusiasm rather than a sense of obligation or fear of divine punishment.[31] The most recent congressional pronouncement on religious liberty, the Religious Land Use and Institutionalized Persons Act of 2000, declares that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[32]

Conscience is also underinclusive because it focuses on those cases in which the agent feels impelled by a duty that she is capable of performing without depending on external contingencies. "Conscience" is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in City of Boerne v. Flores.[33] Conscientious resistance to the law was not an option. The reconstruction could not be done without the help of architects and contractors, whom the city could prevent from doing the work merely by withholding the necessary permits. The problem is even more pronounced in Lyng v. Northwest Indian Cemetery Protective Association,[34] a widely criticized decision[35] in which Native Americans objected to a proposed logging road that would pass through an ancient worship site sacred to their tribe. The logging road, the Court conceded, would "virtually destroy" the ability of the Native Americans "to practice their religion."[36] Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden because the logging road had "no tendency to coerce individuals into acting contrary to their religious beliefs."[37] Once more, this result was quickly reversed by Congress.[38]

So conscience cannot be the basis for accommodation. It fails to fit the cases in which most people want to accommodate religion. It is both

31. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 25–26; William Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 321 (1991); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 27.

32. 42 U.S.C. §2000cc-5(7)(A). Some of the state statutes mandating religious accommodation have similar language. *See* ARIZ. REV. STAT. ANN. §41–1493 (West 2004); FLA. STAT. ANN. §761.02 (West Supp. 2004); IDAHO CODE §73–401 (Michie Supp. 2004); 775 ILL. COMP. STAT. ANN. 35/5 (West 2001 & Supp. 2004); MO. ANN. STAT. §1.302 (West Supp. 2004); TEX. CIV. PRAC. & REM. CODE ANN. §110.001 (West Supp. 2004). *But see* 71 PA. CONS. STAT. ANN. §2403 (West Supp. 2004) (adopting a more restrictive definition of a substantial burden).

33. City of Boerne v. Flores, 521 U.S. 507 (1997).

34. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

35. *See, e.g.*, EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 29, at 91–92, 242–244; 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 192–200 (2006); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125–126 (1992).

36. *Lyng*, *supra* note 34, at 451.

37. *Id.* at 450. David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 796, 826–834 (1991), suggest that *Lyng* may reflect a volitionalist conception of religion, according to which only the free choices of individuals could be the basis of significant religious consequences. That view, they note, is theologically controversial, rejected not only by some Native American religions but also by Judaism and Calvinism. The inappropriately exclusive focus on conscience that I am describing is at least highly consistent with the inappropriate discrimination among religious beliefs that they describe; perhaps they and I are offering different descriptions of the same pathology.

38. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 29, at 243–244.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

overinclusive and underinclusive. Yet any account of religious exemptions will need to explain why the idea of "conscience" so dominates the discourse.

C. The Intensity Hypothesis

Recall that in *Welsh* the plurality and Justice Harlan agreed that the basis for exemption is conscience. There are, however, many foundational questions that these opinions left unaddressed. Why is conscience the appropriate object of protection? The plurality does not explain, while Harlan suggests a clear answer: conscientious objections are the ones that are felt most intensely.[39] But this answer gives rise to questions of its own. Why should intensity matter so much?

Harlan's focus on intensity raises a problem analogous to that of the "welfare monster," who constitutes a classic objection to utilitarian ethics. The welfare monster is someone who happens to be so constituted that she gets more happiness per unit of resources consumed than anyone else does (with no diminishing marginal utility). If utilitarian principles are accepted, the monster gets an unfairly large share of resources; in the limit case, no one else will get anything.

Harlan's opinion implies a sort of modified utilitarianism in which particularly intense preferences are understood to make a particularly strong claim. This is, however, not all that far from the original utilitarianism of Jeremy Bentham, which sought simply to maximize pleasure and minimize pain and which has been rejected as excessively crude by most modern philosophers.[40] Bentham did not think that pleasures and pains were identical in weight but that they could be distinguished by their intensity, duration, certainty or uncertainty, propinquity or remoteness, and likelihood of being followed by sensations of a like or of an opposite kind.[41] Harlan ignores every dimension except intensity. This is even cruder than Bentham.

39. Harlan's position is not altogether clear. When he focuses on "the intensity of moral conviction with which a belief is held," *Welsh*, *supra* note 25, 398 U.S. at 358, it is unclear whether the intensity matters only because it concerns morality. The ambiguity persists when he speculates that the reason for exempting religious conscientious objectors is "the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source," combined, however, with "the assumption that beliefs emanating from a religious source are probably held with great intensity." *Id.* at 366. So Harlan invokes both morality and intensity without explaining what they have to do with one another. On the other hand, when he concludes that he will vote to reverse the conviction, he explains that he does so because "petitioner's beliefs are held with the required intensity," *id.*, implying that this is the decisive factor. In the discussion that follows, in order to have a clear position to address, I am assuming that the position stated in the text is the one held by Harlan.

40. For a taxonomy of utilitarian positions, *see* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 13–20 (2d ed. 2002).

41. *See* JEREMY BENTHAM, *The Psychology of Economic Man*, *in* 3 JEREMY BENTHAM'S ECONOMIC WRITINGS 435 (W. Stark ed., 1954).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

For our purposes, Harlan's formulation, like conscience, is both overinclusive and underinclusive. Galen Black's desire to participate in the peyote ceremony was not particularly intense, while Dan Lafferty's urge to kill a mother and her child was very intense. Evidently Lafferty's conscience would have given him no rest or peace if he had not committed those murders.

A variation on the intensity hypothesis is the claim that the law ought to defer to a believer's fear of extratemporal consequences. The burden of obeying a law, so the argument goes, is greater for a person who believes that doing so will put his soul in jeopardy for eternity.[42] But (aside from the problem that this approach leaves out Seeger and Welsh—while still covering Lafferty!) here we seem to have lost the idea that conscience has any special dignity. This approach recasts conscience as a kind of prudent response to duress, God as a big thug who will thwack anyone who disobeys him, and conscientious objection as a strategy to escape thwacking.[43] What is more, it is not clear why deference is called for. If, for whatever reason, you are not deterred by official punishment, then you should be willing to accept that punishment. The state's nastiest thwack is gentler than God's.

II. THE VARIETIES OF CONSCIENCE

If not intensity, then what is special about conscience? Historically, "conscience" has been a protean notion with different meanings for different people. So there have been different answers to this question. What follows is not an exhaustive catalogue but rather a brief sketch of a few ideal types to clarify the main options that are on offer.

A. Aquinas-Conscience

The idea of conscience has its origins in the thought of the Stoics. The Latin word *conscientia* originally referred to some knowledge, especially some secret or private knowledge, shared with another. In Stoicism, *conscientia* refers to a person's awareness of the natural moral law and his own actions' correspondence or lack of correspondence with that law.[44] Early Christians such

42. JESSE CHOPER, SECURING RELIGIOUS LIBERTY 74–80 (1995); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 52–54 (1996). For criticism of this idea, *see* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 130–132 (2006); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 803–804 (1984).

43. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE (Harper, 1960) (1794), famously heaped scorn on this conception of religion.

44. MICHAEL G. BAYLOR, ACTION AND PERSON: CONSCIENCE IN LATE SCHOLASTICISM AND THE YOUNG LUTHER 24–25 (1977). For earlier uses of the concept, *see* LINDA HOGAN, CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION 36–42 (2000).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

as Paul and Jerome used the same word to refer to the soul's faculty that made a person aware of his own sinfulness.[45]

Peter Abelard made conscience central to his conception of sin; objectively, sin was contempt of God, but it consisted in consenting to that which, it is believed, ought not to be consented to. It followed from this that sin consisted only in acting against conscience. Ignorance of God's will excuses sin; it is not sinful to fail to possess moral knowledge. Thus even the crucifiers of Christ were not guilty of sin because they were ignorant of the divinity of Christ.[46]

The most influential early formulation of the authority of conscience was that of Aquinas, who regarded it as a judgment by the rational part of the soul about the goodness or badness of an action. For Aquinas, conscience was not a feeling, intense or otherwise, but an exercise of the reason. This act of judgment relied on a person's innate knowledge of natural law. The judgment of the practical intellect was morally binding, and moral wrong consisted of the will's refusal to consent to that judgment: "every act of will against reason, whether in the right or in the wrong, is always bad."[47]

Aquinas acknowledged that conscience could err, either by misunderstanding the correct moral principles or by misapprehending the circumstances in which one was to act. Such error would be culpable either if it were directly voluntary (because the agent deliberately avoided uncomfortable information) or if the agent were negligent about knowing what he ought to know. If, however, a person's ignorance were inevitable, that person would be excused if he acted on his erroneous conscience.[48]

The basic idea of the supreme authority of conscience had already been endorsed, in stronger terms than ever appeared in Aquinas, by Pope Innocent III (1198–1216):

45. For overviews of Catholic uses of the term, *see* HOGAN, *supra* note 44; Charles E. Curran, *Conscience in the Light of the Catholic Moral Tradition*, *in* CONSCIENCE: READINGS IN MORAL THEOLOGY 3–24 (Charles E. Curran ed., 2004).

46. PETER ABELARD, *Ethics*, *in* ETHICAL WRITINGS 24, 29 (Paul Vincent Spade trans., Hackett, 1995); Baylor, *supra* note 44, at 27–28; Hogan, *supra* note 44, at 73–75.

47. THOMAS AQUINAS, SUMMA THEOLOGIAE, Ia IIae, q. 19, a. 5, v. 18, 63 (McGraw-Hill/Blackfriars, 1966).

48. For Aquinas, this excuse was available only in very specific circumstances: "ignorance does not excuse, in the case of an erroneous conscience, if it is either ignorance of the moral principles involved, which all men are obliged to know, or if it is ignorance arising from negligence in perceiving the factual circumstances of the act in question." Baylor, *supra* note 44, at 55. Aquinas appears to have been implicitly responding to Peter Abelard's very broad understanding of excusable ignorance, in which error appeared always to excuse sin. *See id.* at 53. However, Abelard's views were in this respect identical with those of Aquinas, since Abelard also thought that knowledge of natural law was innate. *See* JOHN MARENBON, THE PHILOSOPHY OF PETER ABELARD 265–281 (1997). In assuming that everyone shares an innate knowledge of right and wrong, both of them were perhaps too optimistic. *See* GARY WATSON, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, *in* AGENCY AND ANSWERABILITY: SELECTED ESSAYS 219–259 (2004).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

> One ought to endure excommunication rather than sin. . . . no one ought to act against his own conscience and he should follow his conscience rather than the judgment of the church when he is certain. . . . one ought to suffer any evil rather than sin against conscience.[49]

Here one sees the beginnings of the idea that conscience can trump even the objective law. Noah Feldman observes that the idea of freedom of conscience is already being suggested here: "If it was sinful to act against conscience, then there might be reason to avoid requiring anyone to act against conscience."[50] Perhaps individuals should endure anything rather than sin against conscience, but the more you make them endure, the more likely it is that they *will* sin against conscience.

But here this idea is only inchoate. Aquinas did not suggest that conscience entailed religious toleration. On the contrary, he supported the persecution of heretics.[51] Even modern neo-Thomist defenses of religious toleration only reject religious coercion intended as such; they do not necessarily entail religious exemptions from religiously neutral laws.[52] In Aquinas, conscience trumps positive law only in the eyes of God, for whom even the person who has committed a serious moral wrong is redeemed if his ignorance of moral truth is not culpable.

The autonomy of conscience from law is thus an entirely internal matter, or at least a matter that is only between the person and God. "His conscience is man's most secret core and his sanctuary," the present catechism of the

49. Brian Tierney, *Religious Rights: An Historical Perspective*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 25 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (quoting the Ordinary Gloss to the Decretals, which explained two judgments by Innocent). "Aquinas did not make clear whether he believed that a well informed conscience could ever be in conflict with ecclesiastical authority." Baylor, *supra* note 44, at 57 n.138. That problem, of course, came to a head with Martin Luther. The present paper does not discuss Luther because in all respects that are pertinent here, his ideas about conscience resemble those of Aquinas. *See* Baylor, *supra* note 44, at 261–262. Luther's most important innovation in this area was his view that invincible ignorance does not excuse: one is obligated to follow conscience, but doing so is not the path to salvation. Absent faith and grace, all action is sinful. *See* Baylor, *supra* note 44, at 152–153, 243–244.

50. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 357 (2002).

51. ST. THOMAS AQUINAS, SELECTED POLITICAL WRITINGS 77–79 (A.P. D'Entreves ed., Barnes and Noble, 1981). There is some tension within this position, since the heretic may be exercising his own rational faculties to the best of his ability. Aquinas found it necessary to deny this and to claim that the heretic is willfully denying the truth. *See* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 87–88 (1986).

52. Thus John Finnis thinks that the more sound inference from Aquinas's premises is that faith must be "voluntary and free from coercive pressures." JOHN FINNIS, AQUINAS 293 (1998). Similarly, Vatican Council II, Dignitatis Humanae [Declaration on Religious Freedom] (1965), says: "the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind." This forbids laws that aim at religious coercion, but one can agree with all this while being dubious of exemption from otherwise valid, generally applicable laws. *See, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

Catholic Church declares. "There he is alone with God whose voice echoes in his depths."[53] Call this *Aquinas-conscience*.

B. Locke-Conscience

The modern idea of freedom of conscience as a limit on the state's legitimate power received its most influential formulation in John Locke's *Letter Concerning Toleration*, which argues that "the Care of Souls is not committed to the Civil Magistrate, any more than to other Men."[54] Part of the reason was the limited responsibilities of the state, which existed solely in order to protect life, liberty, and property. But another was that "no Man can, if he would, conform his Faith to the Dictates of another."[55] Locke radicalizes Aquinas's argument that the individual has an obligation to obey his conscience, and concludes that coerced worship would be "Hipocrisie, and Contempt of his Divine Majesty."[56] Coercion of worship is absurd, because what it produces has no religious value:

> Although the Magistrates Opinion in Religion be sound, and the way that he appoints be truly Evangelical, yet if I be not thoroughly perswaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in, against the Dictates of my Conscience, will ever bring me to the Mansions of the Blessed.[57]

Here conscience is not simply a matter between the person and God; it is a constraint upon what the state may legitimately do. Call this *Locke-conscience*.

Locke's argument is, of course, loaded with religious premises: that conscience is valuable because it is a way of discovering God's will; that it is sinful to act against conscience; that the rights of conscience are inalienable; and that no one can legitimately grant to another the right to make one's religious decisions.[58] And in keeping with seventeenth- and eighteenth-century usage, "conscience" refers only to religious matters.[59] Locke's vision of conscience extends only to *religious* decisions, decisions about religious worship, which he claims are not the legitimate concern of the state. It is not a basis for exemption from otherwise legitimate laws. On the contrary, if a legitimate

53. CATECHISM OF THE CATHOLIC CHURCH §1776, 438 (United States Catholic Conference, 1994), quoting Pope Paul VI, Gaudium et spes §16 (1965).

54. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully ed., Hackett, 1983) (1689).

55. *Id.*

56. *Id.* at 27.

57. *Id.* at 38. As noted above, the Vatican's Declaration on Religious Freedom reaches a similar conclusion.

58. This is emphasized in STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 64–67 (1995); and Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255, 2258–2269 (1997).

59. The shifting meaning of the term is noted in WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 122–123 (1986).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

law offends anyone's conscience, that person is in the position of Innocent III's heretic:

> such a private Person is to abstain from the Action that he judges unlawful; and he is to undergo the Punishment, which it is not unlawful for him to bear. For the private judgment of any Person concerning a Law enacted in Political Matters, for the publick Good, does not take away the Obligation of that Law, nor deserve a Dispensation.[60]

C. McConnell-Conscience

But if Locke's view does not justify religious exemptions, it bears the seeds of such a justification. James Madison, in *Memorial and Remonstrance*, asserts that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him," and that "every man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign."[61] Michael McConnell makes this a premise for an argument (never stated by Madison) that religion ought to be a basis for exemptions because it involves a duty to God:[62]

> If the scope of religious liberty is defined by religious duty (man must render to God "such homage . . . as he believes to be acceptable to him"), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable.[63]

60. LOCKE, *supra* note 54, at 48. Steven Smith explains in greater detail why Locke's separate-spheres and futility rationales for toleration do not entail any protection for conscience as such. Steven D. Smith, *What Does Religion Have to Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 917–922 (2005). Premises like Locke's may, however, generate suspicion of government's claims to be pursuing legitimate public interests; one may worry that such claims are sometimes a mask for religious persecution. This was the view of Roger Williams; *see* TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 103–111, 120–121 (1998). Williams was solicitous of conscience, but that solicitude was rooted in his theology, was specific to religion, and did not imply exemption from legitimate, generally applicable laws. *See* EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 126–135 (1967).

61. James Madison, *Memorial and Remonstrance against Religious Assessments*, *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 7 (Marvin Meyers ed., rev. ed. 1981).

62. When he presents his argument for exemptions, he frequently begins by quoting this passage from Madison. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453, 1497 (1990); Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 29 (2000); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1246–1247 (2000). He deploys the same quotation to different effect in Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 425–426, there using it to argue that religion is an important bulwark against totalitarianism because it holds that government is not the highest authority. That argument does not necessarily entail exemptions. Nor is it specific to religion; any human want not dictated by the state can be a basis for resisting state power. Sexual desire is one example. *See* GEORGE ORWELL, 1984 (1949).

63. McConnell, *Origins*, *supra* note 62, at 1453.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

He claims that religion has a unique claim to accommodation, because "[n]o other freedom is a duty to a higher authority."[64] Even those who do not believe in God should understand the value of avoiding "conflicts with what are perceived (even if incorrectly) as divine commands."[65] Here we do have a justification for exemptions.[66] Call this *McConnell-conscience*.[67]

McConnell-conscience is bad news for Seeger and Welsh, who did not think that their objections derived from divine commands.[68] Their objections are not "conscientious" even in the sense intended by Locke and Madison. Some early American sources are quite clear about this. Cotton Mather thought that "[t]o live without any Worship of God, or to Blaspheme and Revile his Blessed Name, is to be chastised, as abominably Criminal, for there can be no pretence *of Conscience* thereunto."[69] A Connecticut Congregationalist argued in 1755 that it would be:

> absurd, to speak of allowing Atheists Liberty of Conscience. Because he who professeth himself to be an Atheist, at the same time professes that he has no Conscience. For what Conscience can a Man have; who believes that there is no God, no moral Obligations, no future Rewards, and Punishments?[70]

64. McConnell, *Problem*, *supra* note 62, at 30; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1151–1152 (1990).

65. McConnell, *Problem*, *supra* note 62, at 30. Note here the appeal to the intensity of the desire to disobey the law (as opposed to the soundness of the conscientious objection). McConnell here comes dangerously close to Harlan's position.

66. McConnell offers it as an interpretation of the original sources, but none of them state this general principle as clearly as he does, so his originality here should be admitted. Perhaps the principle was inchoate in some early practice, but that is different from saying that it was consciously adopted and followed. McConnell's claims about original intent are rebutted in Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). His specific reading of Madison is challenged in Vincent Phillip Munoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17 (2003).

67. This coinage is offered with acknowledgment of the many other scholars who have also defended religious exemptions. McConnell's defense is, in my view, the most thoroughly worked-out of these.

68. The withholding of protection from nonreligious conscience is defended in McConnell, *Origins*, *supra* note 62, at 1488–1500; and McConnell, *Establishment*, *supra* note 62, at 455–456. When he discusses the *Seeger* and *Welsh* cases, he does not directly address the merits but he writes that "in those cases, the Court relied on the interpretation of a statute, and only Justice Harlan took the position that the Constitution forbids the singling out of religion." McConnell, *Problem*, *supra* note 62, at 6; *see also* McConnell, *Origins*, *supra* note 62, at 1491 n.420. That McConnell's rationale does not reach the *Seeger* and *Welsh* cases is also argued in detail in Smith, *What Does Religion*, *supra* note 60, at 922–924. McConnell argues that claims of nonreligious conscience were specifically and deliberately rejected by the framers of the First Amendment, but this is anachronistic. As he admits, "[t]here was no recorded controversy in preconstitutional America in which the right of 'conscience' was invoked on behalf of beliefs of a political, social, philosophical, economic, or secular moral origin." McConnell, *Origins*, *supra* note 62, at 1494. The framers could not have specifically rejected an argument that never occurred to them.

69. COTTON MATHER, OPTANDA 46 (1692), *quoted in* Feldman, *supra* note 50, at 376.

70. MOSES DICKINSON, A SERMON PREACHED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT 35 (1755), *quoted in* Feldman, *supra* note 50, at 376.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

And Locke himself concluded that "those that by their Atheism undermine and destroy all Religion, can have no pretence of Religion whereupon to challenge the Privilege of a Toleration."[71]

The accommodations that were given did not even rely on this abstract concept. Only a small number of accommodations were ever asked for,[72] and of these, only those related to military service were granted in state constitutions.[73] Considerations of convenience and compassion rather than principle supported the original practice of religious accommodation.[74]

McConnell-conscience does not avoid the free exercise/establishment dilemma so much as squarely run into it. For this reason, McConnell-conscience is not a good candidate to be the modern common denominator that helps us escape the dilemma. Exemptions thus conceptualized could only be available to theistic religions, because only those religions can generate the unique source of moral authority that this theory demands.[75] And the implied endorsement of theism violates the rule that government is not to endorse religious propositions.

Not all religions involve belief in God. The Supreme Court held long ago that the Establishment Clause forbids government to "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[76] The Court noted that "[a]mong religions in this country, which do not teach what would generally be considered a belief

71. LOCKE, *supra* note 54, at 51.

72. MICHAEL WALZER, *Conscientious Objection*, *in* OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 126 (1970) observes: "As long as the conscience was Protestant, it moved within a limited historical tradition, and this was a tradition with which the legislators were entirely familiar. There were a number of things besides war-making that certain Christians scrupled at (the taking of oaths, for example), but not an infinite number."

73. Hamburger, *supra* note 66, at 929 n.64, 940.

74. See generally id.

75. At one point, McConnell adopts a broader definition of religion, stating that "[t]he essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole." McConnell, *Religious Freedom*, *supra* note 35, at 172–173. He states that he does not mean to exclude nontheistic religions and that all he means by God is "the ultimate object of religious devotion." *Id.* at 172 n. 248; *see also* McConnell, *Origins*, *supra* note 62, at 1493, 1497. But absent God, it is not clear how a conscientious objection can be religious on his account. "From the religious point of view, the difference between religious and secular forms of conscience is that the former represent an obligation to an authority higher than the individual, while the latter are manifestations of mere individual will or judgment." McConnell, *Origins*, *supra* note 62, at 1498–1499. A personal and monotheistic God appears to be the only entity that could hold such authority. The moral requirements of Theravada Buddhism, for example, which are offered as an insight into reality available to any person simply by reflection on experience, would, on this account, necessarily be a manifestation of mere individual judgment.

On another reading of "normative authority," McConnell might be taken to be referring to what CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 4 (1989), calls "strong evaluation"—discriminations of better and worse that are independent of our desires and offer standards by which those desires are to be judged. That does acknowledge a moral authority beyond the individual, but strong evaluation takes secular as well as religious forms. *See* Andrew Koppelman, *Naked Strong Evaluation*, 56 DISSENT 105–109 (Winter 2009) (reviewing CHARLES TAYLOR, A SECULAR AGE (2007)).

76. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[77] Hinduism is only the most prominent of many polytheistic religions.[78] The Buddha did not even regard the existence of God as an interesting question.[79]

In sum, neither Aquinas-conscience, nor Locke-conscience, nor McConnell-conscience can help us out of our dilemma. Aquinas-conscience is not a constraint on the state at all. Locke-conscience objects only to laws that specifically restrict religion and it is no basis for exemptions from generally applicable laws. McConnell-conscience violates the Establishment Clause. If conscience is to be the basis for exemptions, then we must seek other descriptions of its salient characteristic. What other descriptions are available?

D. Sandel-Conscience

Michael Sandel offers a description of conscience that seems carefully calibrated to avoid the difficulties of McConnell's specification. Sandel observes that a person in the grip of conscience has such a strong need to act in accordance with it that he really has no other option. The aim of accommodation is "to prevent persons bound by moral duties they cannot renounce from having to violate either those duties or the law."[80] Such protection recognizes "the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity."[81] This explanation of the force of conscience evidently is broad enough to justify the results in Seeger and Welsh. Sandel quotes *Seeger* with approval.[82]

77. *Id.* at 495 n.11. To say that Buddhism rejects theism is something of an overstatement. While the historical Buddha had no interest in theological questions, some forms of Buddhism make theological claims, sometimes assigning divine status to Buddha himself. For a general overview of these issues, *see* Masao Abe, *Buddhism, in* OUR RELIGIONS 69–137 (Arvind Sharma ed., 1993).

78. There are, concededly, monotheistic interpretations of Hinduism, but not all Hindus subscribe to these.

79. He was utterly indifferent to such metaphysical issues. *See* WALPOLA SRI RAHULA, WHAT THE BUDDHA TAUGHT 13–14 (rev. ed. 1974). To the extent that Buddhism (at least in its original form, which survives as Theravada Buddhism, but also in some forms of Mahayana Buddhism) takes any position on the existence of God, it regards God as a projection of psychological needs that are themselves in need of taming. *Id.* at 51–52.

80. SANDEL, *supra* note 1, at 68.

81. *Id.* at 67. Sandel inconsistently insists both on the primacy of conscience because of its importance to individual identity and on the value of religion because of "its place in a good life or, from a political point of view, its tendency to promote the habits and dispositions that make good citizens." *Id.* at 66. These are obviously not the same thing: conscience as Sandel describes it refers only to the internal mental state of the possessor, while the habits-and-dispositions argument rests on external contingencies that may not be present. Lafferty is bound by duties he cannot renounce, but that is not enough to make him a good citizen.

82. *Id.* at 68 & n.66. As we see above, McConnell is unwilling to draw this conclusion, but it is not clear why; Seeger's and Welsh's moral compunctions do not appear to have been within their control.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

William Galston offers a similar account of conscience. There are, he argues, two features of religion that are relevant to the exemption question: "First, believers understand the requirements of religious beliefs and actions as central rather than peripheral to their identity; second, they experience those requirements as authoritative commands."[83] Nonreligious beliefs that are characterized by identity formation and compulsory power should be similarly accommodated, Galston thinks.

Kwame Anthony Appiah likewise argues that religious practices should be accommodated because they are "likely to represent deeply constitutive aspects of people's identity, rather than something like a taste for one candy over another. We can make distinctions between [those] who, with Luther, declare, *Ich kann nicht anders*, and the Mr. Bartlebys who simply 'prefer not to.'"[84]

This argument from the imperative character of one's beliefs is attractive enough that at one point even McConnell is drawn to the same argument: "The free exercise claus accords a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control."[85]

This conception of conscience—call it *Sandel-conscience*—avoids the difficulties of the accounts of conscience considered above. It is a basis for political claims, unlike Aquinas-conscience. It is a claim against even laws that are legitimately enacted, unlike Locke-conscience. It is not based on theological propositions, unlike McConnell-conscience. Indeed, it is not based on anything beyond the internal psychological makeup of the actor, which is tightly bound up with the action that the actor wishes to take. These advantages are doubtless why so many sophisticated philosophers are drawn to it.

Sandel-conscience, however, raises new and intractable difficulties.

III. CONSCIENCE AS VOLITIONAL NECESSITY

People may indeed be constrained in the inescapable way that Sandel, Galston, and Appiah describe. But morality is not the only source of such constraint. Harry Frankfurt observes that the demands of love, of what we happen to care about, can be just as forceful as the demands of moral obligation.[86] Sandel's explanation of the force of conscience is underinclusive in its own way: the exigency that it points to sometimes arises from moral duties but it arises from other sources as well.

83. GALSTON, *supra* note 1, at 67.
84. APPIAH, *supra* note 1, at 99.
85. McConnell, *Origins*, *supra* note 62, at 1497.
86. Harry Frankfurt, *Duty and Love*, 1 PHIL. EXPLORATIONS 4 (Jan. 1998).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

A. The Idea of Volitional Necessity

"Conscience" is an imprecise word for an internal compulsion to act that is specified only by the possessor's internal psychology. A better term is what Frankfurt calls "volitional necessity": "Someone who is bound by volitional necessity is unable to form a determined and effective intention—regardless of what motives or reasons he may have for doing so—to perform (or to refrain from performing) the action that is at issue."[87] Frankfurt's paradigmatic case of volitional necessity is the declaration attributed to Luther: "Here I stand; I can do no other." What Luther could not muster, Frankfurt observes, "was not the *power* to forbear, but the *will*."[88] Unlike an addict's compulsion, Luther accedes to the constraining force "because he is *unwilling* to oppose it and because, furthermore, his unwillingness is *itself* something which he is unwilling to alter."[89] This double unwillingness is what defines volitional necessity.

The advantage, for our purposes, of focusing on volitional necessity is that it brings forth with clarity the implications of a view of internal compulsion that is entirely denuded of any external referent. Volitional necessity thus completes the work of abstraction that "conscience" promises. An examination of volitional necessity and the limits of the work it can do will help to make clear the corresponding limits of conscience.

Frankfurt originally comes to focus on the concept of volitional necessity in the course of an effort to develop a defensible conception of free will. What distinguishes humans from other species, Frankfurt claims, is that humans have desires about desires, what Frankfurt calls "desires of the second order." Humans "are capable of wanting to be different, in their preferences and purposes, from what they are."[90] A person has free will if "he is free to will what he wants to will, or to have the will he wants."[91] If a person "is performing an action that he wants to perform," and if "his motive in performing this action is a motive by which he truly wants to be motivated," then "the person is enjoying as much freedom as it is reasonable for us to desire."[92] Obedience to volitional necessity is freedom: if one's will is undivided, then one cannot choose otherwise than one does, and yet one is entirely free. The freedom thus exercised is "as close to freedom of the will as finite beings, who do not create themselves, can intelligibly hope to come."[93] Moral responsibility, thus understood, can exist even in a

87. HARRY G. FRANKFURT, THE REASONS OF LOVE 46 (2004).

88. HARRY G. FRANKFURT, *The Importance of What We Care About*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 86 (1988).

89. *Id.* at 87; *see also* HARRY G. FRANKFURT, TAKING OURSELVES SERIOUSLY AND GETTING IT RIGHT 43–45 (Debra Satz ed., 2006).

90. HARRY G. FRANKFURT, *Freedom of the Will and the Concept of a Person*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 12 (1988).

91. *Id.* at 20.

92. FRANKFURT, REASONS, *supra* note 87, at 20.

93. *Id.*; *see also* FRANKFURT, TAKING, *supra* note 89, at 14–16.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

deterministic world: "if someone does something because he wants to do it, and if he has no reservations about that desire but is wholeheartedly behind it, then—so far as his moral responsibility for doing it is concerned—it really does not matter how he got that way."[94]

The root of volitional necessity, Frankfurt argues, is love. If a person loves something, this gives his life meaning and purpose. Frankfurt suggests that what distinguishes Luther's case is the fact that it involves an end that receives his undivided endorsement, such that it is unthinkable to act otherwise.[95] Luther embraces it wholeheartedly; his will is undivided with respect to it. This necessity is a liberating one:

> As long as we are uncertain, we hold ourselves back. Discovering how things must necessarily be enables us—indeed, it requires us—to give up the debilitating restraint that we impose upon ourselves when we are unsure what to think. Then there is no longer any obstacle to wholehearted belief. Nothing stands in the way of a steady and untroubled conviction. We are released from the blockage of irresolution and can give ourselves to an unimpeded assent.[96]

Volitional necessity constitutes an agent's integrity in a way that some other, equally intense preference, such as an addiction, would not. And this would be true whether or not the source of the necessity is a moral imperative, as in the case of conscience.[97]

Over the course of Frankfurt's career, T.M. Scanlon observes, there has been "a shift of emphasis . . . from concern with an agent's 'ownership' of his or her desires as a precondition of moral appraisal to a concern with an ideal of psychic health."[98] The object of the inquiry now is the good life. A person's life is (at least in that respect) good if the person is "enjoying the inner harmony of an undivided will."[99]

Frankfurt thinks that volitional necessity is the marker of a person's identity: "As the set of its essential characteristics specifies the limits of what a triangle can be, so does the set of actions that are unthinkable for a person specify the limits of what the person can will to do. It defines his essence as a volitional creature."[100] A person who will do anything if the price is

94. Harry Frankfurt, *Reply to John Martin Fischer*, *in* CONTOURS OF AGENCY: ESSAYS ON THEMES FROM HARRY FRANKFURT 27 (Sarah Buss & Lee Overton eds., 2002).

95. *See* HARRY G. FRANKFURT, *Rationality and the Unthinkable*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 177–190 (1988).

96. FRANKFURT, REASONS, *supra* note 87, at 65.

97. Nor need it be Taylor's "strong evaluation." Volitional necessity can be present in someone who has no strong evaluations, so long as their inclinations are wholehearted.

98. T.M. Scanlon, *Reasons and Passions*, *in* Buss & Overton, *supra* note 94, at 167. *See also* Sarah Buss and Lee Overton, *Introduction*, *in* Buss & Overton, *supra* note 94, at xii.

99. FRANKFURT, REASONS, *supra* note 87, at 97. Similarly, in an essay defending the value of truth, Frankfurt several times digresses to note the gratified feeling of confidence conferred by the conclusive demonstration of a proposition. HARRY G. FRANKFURT, ON TRUTH 11–12, 55–56, 87–93 (2006).

100. FRANKFURT, *Rationality*, *supra* note 95, at 188.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

right has only accidental characteristics; he has no stable identity at all.[101] Following volitional necessity is itself a highest-order interest: one's integrity is at stake.

B. Volitional Necessity and Identity

Here Frankfurt offers us an avenue to address a very old problem in legal theory. For a long time, theorists have wanted to ground a right to individual privacy and autonomy, with respect to such matters as sexual liberty, in a right to personhood—a sphere that the state may not invade. The basic claim of personhood, as Jed Rubenfeld notes, is that "some acts, faculties, or qualities are so important to our identity as persons—as human beings—that they must remain inviolable, at least as against the state."[102] But, as Rubenfeld notes, this argument proves too much and has anarchic implications: "Virtually every action a person takes could arguably be said to be an element of his self-definition."[103]

Frankfurt's argument implies a response. A person's identity is constituted not by all her actions but only by those things that she most cares about and cannot help caring about. This does narrow the field of application in a way that could answer Rubenfeld. It is the move that Sandel makes in defense of conscience.[104] If the state accommodates that, the free exercise/establishment dilemma is avoided, because the state is remaining neutral among identities.

But this is a poor basis for legal exemption because it is potentially so idiosyncratic. People identify with a lot of things.[105] As Frankfurt cheerfully

101. For elaboration, *see* HARRY G. FRANKFURT, *Autonomy, Necessity, and Love*, *in* NECESSITY, VOLITION, AND LOVE, 138–139 (1999).

102. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989).

103. *Id.* at 754–755.

104. A similar move, which, however, does not emphasize volitional necessity, is made by Joseph Raz and Steven D. Smith. Both focus on the importance to the actor of what he wants to do. Raz thinks that the case for accommodating conscientious objectors depends on self-definition: "The areas of a person's life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his self-respect." JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 280 (1979). But Raz understands that this rationale entails nothing specifically about conscience. "A law preventing dedicated novelists from pursuing their vocation with the freedom essential to it is bad, and bad for the same reasons, as a law conscripting pacifists to the army." *Id.* at 281. Smith would support exemptions because "having and acting on core beliefs is central to what makes us 'persons,"' and conscience, which he takes to refer to this integration of belief and acting, therefore should be protected. Smith, *What Does Religion*, *supra* note 60, at 932. Core beliefs need to be moral, of course, so Smith's position here may be the same as Raz's.

105. "Even though a person's interests are contingent, they can belong to the essential nature of his will." FRANKFURT, *Autonomy*, *supra* note 101, at 135. Frankfurt observes that "[p]eople care about many of the same things because the natures of human beings, and the basic conditions of human life, are grounded in biological, psychological, and environmental facts that are not subject to very much variation or change." FRANKFURT, REASONS, *supra* note 87, at 65; *see also id.* at 29–30; FRANKFURT, TAKING, *supra* note 89, at 37. But he also concedes that "there are likely to be some people who genuinely and wholeheartedly love what we ourselves fear

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

admits, the object of one's love can be deeply unworthy. "Being wholehearted is quite compatible not only with being morally somewhat imperfect, but even with being dreadfully and irredeemably wicked."[106] Here again is the Lafferty problem. Neither conscience (in any of its varieties surveyed above) nor volitional necessity necessarily points toward anything that other people have any obligation to respect. Both produce analogues of welfare monsters. Perhaps it is very hard for someone to resist the force of volitional necessity, and perhaps that counts as a (rebuttable!) reason not to ask them to do it. But in that case, the appropriate response is not respect. It is pity.

C. The Emptiness of Volitional Necessity

Note the difference between volitional necessity and Aquinas-conscience. Aquinas-conscience is good because the actor is doing all he can to follow God, Who is the source of all goodness. Frankfurt uses Luther's "Here I stand" quote effectively several times,[107] but he does not capture the aspect of Luther's volitional necessity that Luther himself regarded as most important. Luther would not have agreed that he was drawn toward what he loves only by what Susan Wolf calls its "affinity," its suitability to be an object of care.[108] Rather, he thought that the basis of his motivation was something genuinely good—in fact, the source of all goodness. "Unless I am convicted by Scripture and plain reason—I do not accept the authority of popes and councils, for they have contradicted each other—my conscience is captive to the word of God," said Luther (here radicalizing Aquinas's deference to conscience in a way that would have scandalized Aquinas). "I cannot and I will not recant anything, for to go against conscience is neither right

and despise." FRANKFURT, REASONS, *supra* note 87, at 30; *see also* FRANKFURT, TAKING, *supra* note 89, at 50.

106. FRANKFURT, REASONS, *supra* note 87, at 98. Two illustrations from Nazi Germany may be helpful. Rudolf Hoess, who was in charge of Auschwitz, explained as he awaited execution that "[w]hether this mass extermination of the Jews was necessary or not was something on which I could not allow myself to form an opinion, for I lacked the necessary breadth of view." RUDOLF HOESS, COMMANDANT OF AUSCHWITZ: THE AUTOBIOGRAPHY OF RUDOLF HOESS 144 (1959). Magda Goebbels, explaining in her last letter her decision to kill herself and her six children in Hitler's bunker, is a model of wholeheartedness:

> Our splendid idea is being destroyed, and with it everything beautiful, admirable, noble, and good that I have known. The world that will come after the Führer and national socialism won't be worth living in, and that's why I've brought the children here. They're too good for the life that will come after us, and a merciful god will understand me when I give them salvation myself.

Quoted in RALF GEORG REUTH, GOEBBELS 357 (1993).

107. FRANKFURT, *Importance*, *supra* note 88, at 86; HARRY G. FRANKFURT, *Concerning the Freedom and Limits of the Will*, *in* NECESSITY, VOLITION, AND LOVE 80 (1999).

108. Susan Wolf, *The True, the Good, and the Lovable*, *in* Buss & Overton, *supra* note 94, at 233.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

nor safe."[109] Luther's claim is not just one of volitional necessity. Luther thought that conscience points beyond itself. He would ask: What is good about wholeheartedness as such? Why should it warrant deference?

Identity as Frankfurt conceives it is as protean as intensity of desire, though here there is the added proviso that the actor wholeheartedly endorse and identify with the desires that are the basis of his identity. The possibility of a kind of welfare monster has not been eliminated. There is no reason to think that any given identity will be worthy of respect or that all respectable identities will be equally respectable. As Frankfurt says, "Free lives may not be good lives. Freedom is not the only good thing, and there is no reason to deny that there may be circumstances in which it is actually not worth very much at all."[110]

Frankfurt's lack of interest in objective value is one of the most controversial aspects of his philosophy.[111] Gary Watson objects to Frankfurt's conception of free will, arguing that in order for second-order desires to be more truly the agent's own than other inclinations, there has to be something to orient one's second-order desires: "[W]hy does one care about one's second-order volitions? Since second-order volitions are themselves simply desires, to add them to the context of conflict is just to increase the number of contenders; it is not to give a special place to any of those in contention."[112] Second-order desires have no authority unless they are fixed in place by third-order desires, and so on ad infinitum. In order for agency and personhood to be determinate, Watson argues, one must value one's activities as "being the fulfillment of desires that arise and persist independently of what we value."[113]

109. *Quoted in* ROLAND H. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER 185 (1950).

110. Harry Frankfurt, *Reply to Susan Wolf*, *in* Buss & Overton, *supra* note 94, at 251–252. The value of the ideal of wholeheartedness is also questioned by J. David Velleman, who observes that identifying wholeheartedly with one of our motives is a common defensive fantasy, a denial of the ambivalence that is an inescapable part of our emotional life. Coping with such ambivalence is a marker of emotional maturity. J. David Velleman, *Identification and Identity*, *in* Buss & Overton, *supra* note 94, at 91–123. Frankfurt responds that ambivalence need not compromise the coherence of my identity if I stand decisively for some and against other ambivalent emotions. Harry Frankfurt, *Reply to J. David Velleman*, *in* Buss & Overton, *supra* note 94, at 124–128. But ambivalence need not signify "a disease of the will," as Frankfurt claims. Frankfurt, *Reply to Velleman*, at 127. It may be that there is a plurality of values and that an attempt to inconsistently accommodate them all in part is the best way to respond to the value that exists in the world. (The willingness to accommodate conscience, when the conscientious belief is one that the state regards as mistaken, may be a salutary instance of just this kind of ambivalence.) If that is a real possibility, the state has no good reason to privilege wholehearted identities over ambivalent ones.

111. *See* Wolf, *supra* note 108; Scanlon, *supra* note 98; and Barbara Herman, *Bootstrapping*, *in* Buss & Overton, *supra* note 94, at 253; Alan Soble, *Love and Value, Yet* Again, 6 ESSAYS PHIL. (Jan. 2005), *available at* www.humboldt.edu/ essays/soble2rev.html; Christine M. Korsgaard, *Morality and the Logic of Caring*, *in* HARRY G. FRANKFURT, TAKING OURSELVES SERIOUSLY AND GETTING IT RIGHT 55–76 (Debra Satz ed., 2006).

112. GARY WATSON, *Free Agency*, in AGENCY AND ANSWERABILITY: SELECTED ESSAYS 28 (2004).

113. *Id.* at 22.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

Frankfurt refuses this Neoplatonic move in favor of a naturalistic one. Decisive commitment need not arise from reasons; it is enough that one is undivided in one's allegiances. Wholeheartedness could exist without any reason at all. It could and frequently does have biological causes. Once one has made (or finds oneself already having) a decisive commitment, Frankfurt thinks, one avoids any infinite regress and has a stable identity.[114] This may be a coherent account of free will and personhood and to that extent may answer Watson's criticism, but it shows that volitional necessity is entirely unmoored from any objective value.[115]

IV. RESPECT FOR MORAL MOTIVATION AS SUCH

In order for a claim to accommodation to be entitled to respect, it needs that link to objective value. But what objective value could it be? It had better not be specified in a theistic way, because that brings back the difficulties of McConnell-conscience.

One candidate, one that is theologically neutral, is the will to be moral. This looks back to Aquinas but it goes beyond him. Aquinas did not think that conscience could be the basis of claims on other people or on the state, and even his modern followers are able to conclude only that laws that aim to coerce *religious* conscience are per se wrong. But one could argue, following Aquinas, that the desire to do what is morally right is a good thing in itself, and respect for that desire is a part of respect for persons. "Conscience represents the distinctively human effort to conceive and to live an ethical life, which democracy presupposes when it is committed to the ideal of reciprocal respect for persons, manifest in the democratic ideals of civic equality, liberty and opportunity," Amy Gutmann writes. "Without an ethical capacity, it is unclear how anyone can command respect."[116] The impulse to fulfill one's obligations is so valuable (and perhaps so rare) a human motivation that it should be cherished wherever it is found.[117]

114. HARRY G. FRANKFURT, *Identification and Wholeheartedness*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT 159–176 (1988). Such a commitment, if it is to deliver the promised stability, does appear to require grounding in something other than the act of choice, which is always vulnerable to subsequent revision. *See* CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 31–41 (1991). Frankfurt addresses this objection by relying on naturalism: there are things that, for biological reasons, we cannot help caring about, such as our children. *See* the discussion *supra* at note 105. But there are sources of stable identity that this move cannot account for. Biology is a poor explanation for Magda Goebbels's decision to kill her children.

115. *See*, for a particularly clear statement, Harry Frankfurt, *Reply to Gary Watson*, *in* Buss & Overton, *supra* note 94, at 160.

116. GUTMANN, *supra* note 1, at 171.

117. "Conscience," in ordinary usage, need not contain a moral component. TIMOTHY MACKLEM, INDEPENDENCE OF MIND 88 (2006), observes that I may reasonably think that conscience requires me to do the dishes before going to bed or make my bed before going to work, even if I live alone. But conscience without a moral component does not figure prominently in anyone's defense of accommodation of conscientious objection, with the possible exception of Justice Harlan, who is considered above.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

Thus, for example, Pope John Paul II regarded conscience as "the witness of God himself," because it was "a *moral judgment about man and his actions*, a judgment either of acquittal or of condemnation, according as human acts are in conformity or not with the law of God written on the heart."[118]

The desire to be moral is not, however, exempt from the possibility of error.[119] Mark Twain's Huckleberry Finn regarded himself as culpably weak-willed because he disregarded his own specifically moral compunctions about helping a slave to escape. (If it is presumed that one should always obey one's conscience, he *was* culpably weak-willed.)[120] Since conscience describes only an internal state of its possessor, its relation to external reality may be valuable or destructive. So it is not clear why conscience without more states a claim. Conscience, even when its claims are specifically moral, cannot be allowed to have the last word.

Conscience, as the will to be moral, is not only a claim about the inner mental state of its possessor. It also contains within it a claim about what is in fact morally right. That claim cannot be tested by reference only to interior psychology.[121] The Catholic catechism, continuing to work through the implications of Aquinas-conscience, observes that even in cases of invincible ignorance, in which "the moral subject is not responsible for his erroneous judgment," the wrong he commits "remains no less an evil, a privation, a disorder."[122] The puzzle remains: Why should the state accommodate a conscientious objection based on a belief, however sincere, which it judges to be wrong?[123]

Gutmann's answer is that the will to be moral is valuable in itself. It does not trump all other values but it is entitled to some weight.

This is the most attractive account of conscience as a basis for accommodation. It is indeed valuable whenever people decide to act morally, and this form of volitional necessity may therefore be especially eligible for accommodation. A well-functioning human being is disposed to heed her conscience, and this disposition is damaged whenever she succumbs to pressure to violate her conscience. That may sometimes be a reason to accommodate conscience as such.

118. Pope John Paul II, Veritatis Splendor [The Splendor of Truth], Encyclical Letter, Aug. 6, 1993, pars. 58, 59.

119. John Paul understood this perfectly. *See id.* at par. 64.

120. *See* Jonathan Bennett, *The Conscience of Huckleberry Finn*, 49 PHILOSOPHY 123 (1974).

121. Sometimes discussions of conscience optimistically treat it as a reliable guide to moral truth that is inscribed in every human heart. For example, in CHARLES DICKENS, OLIVER TWIST (1837–1839), even the despicable Sykes is tormented by his conscience after he murders Nancy. This is romantic nonsense. Dan Lafferty's conscience is clear.

122. CATECHISM, *supra* note 53, §1793 at 441.

123. This difficulty is pressed in Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005). The official Church response to this difficulty, Dignitatis Humanae, *supra* note 52, insists on the right of individuals to seek the truth in religious matters even if they follow false religions, but the Declaration does not unambiguously take up the issue of religious exemptions from otherwise valid, generally applicable laws.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

Note, however, that this rationale's boundaries are potentially quite elastic. David Richards argues that the moral basis of the free exercise clause is "a negative liberty immunizing from state coercion the exercise of the conceptions of a life well and ethically lived and expressive of a mature person's rational and reasonable powers."[124] His broadly libertarian account entails that "the right to conscience protects the sphere of action when state intervention therein is not justified by the protection of all-purpose goods."[125] For Richards, conscientious objections to law need not be based on morality or religion; it is enough that they arise out of the agent's exercise of his practical reason. This, he acknowledges, entails constitutional protection for "everything and anything."[126]

The concerns that motivate Richards's philosophy are rooted, to a large extent, in his own experience as a young gay man in the 1960s and 1970s, when he took professional risks in order to be forthright and truthful about his sexuality. He was an early defender of gay rights at a time when most gay academics were deeply closeted and terrified of writing about these issues. His moral determination and courage are as admirable as those of any conscientious objector.[127] The right to conscience, he argues, protects "our

124. DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 140 (1986).

125. *Id.* at 144.

126. *Id.* at 141.

127. He describes his personal history in DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS (2005). Richards's position on the scope of conscience is followed by Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 963 (1995), citing him with approval. According to Underkuffler-Freund, "one begins with the assumption of freedom of conscience (or free religious exercise) and allows state interference only in those cases that present particular extremity or danger." *Id.* at 967. Since she understands conscience to encompass all desires to act that are the product of "free human reason," *id.* at 963, the consequence appears to be that all laws are presumed to be unconstitutional in all their applications. It is anachronistic to attribute this view, as Underkuffler-Freund does, to the framers of the Constitution.

MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19 (2008), proposes a complex position in which the reasons for accommodation are modified by institutional constraints, so that religion receives special treatment only because a broader accommodation would not be administrable. The object of protection, she says, should be "conscience," by which Nussbaum means "the faculty in human beings with which they search for life's ultimate meaning." Conscience should be protected because it is valuable and vulnerable; it "needs a protected space around it within which people can pursue their search for life's meaning (or not pursue it, if they choose)." *Id.*; *see also id.* at 37. On the other hand, "fair or unfair," *id.* at 102, the text of the free exercise clause does single out religion. The best reason for this singling out is that nonreligious reasons for seeking accommodation "are more likely to be personal and individualistic, thus far more difficult to assess for sincerity and significance." *Id.* at 165. Nussbaum approves of the Court's extension, in *Seeger* and *Welsh*, of the definition of religion to include "forms of committed searching for meaning that had no group affiliation," *id.* at 171, but she acknowledges that this stretch perpetuates a different kind of unfairness because it will "reward articulate people and penalize those, equally sincere, who cannot give a good account of themselves." *Id.* at 172.

Nussbaum resists a formulation in which the object of searching is given objective value: "We live in a country in which many people are skeptics, doubting that there is such a thing as the ultimate meaning of life, and where many others have dogmatic anti-meaning views." *Id.* at 168 (here disagreeing with other writings of mine). But absent some account of the value of the object of the search, it is not clear how Nussbaum can maintain the distinction between her

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

moral autonomy in acknowledging the ethical principles that both define personal integrity and give shape indissolubly to the unity of belief and action that is one's life."[128] Conscience thus understood certainly would protect Seeger and Welsh, but it is hard to see whose claims would be excluded: gay men who are less earnest and serious than Richards? The unserious gay man is also exercising his rational and reasonable powers. The *Seeger* and *Welsh* courts clearly had something much narrower than Richards-conscience in mind. Richards himself is driven by concerns of a moral depth that his principle fails to capture. Once more, the object of deference is not defined by the internal psychology of the conscientious objector.

We have not yet accomplished our task of accounting for the religious accommodations that are in fact given (both by courts and by legislatures) in the United States. As explained in Section I.B., above, conscience, as moral compulsion, is both over- and underinclusive with respect to the claims that are accommodated. Even if conscience explains some of the exemptions that are provided, many of the paradigmatic cases remain unexplained. We have not even begun to resolve the free exercise/establishment dilemma, because "conscience" does not explain what free exercise is about.

V. BEYOND CONSCIENCE

If conscience cannot explain America's practices of religious accommodation, then what would a satisfactory account of those practices look like?

Answering that question is obviously beyond the scope of this paper. But our exploration of conscience has provided us with some parameters that any possible answer must satisfy. Unlike Aquinas-conscience, it must be a basis for claims upon other people, not only upon oneself and God. Unlike Locke-conscience, it must be a basis for claims against properly motivated, legitimately enacted laws. Unlike McConnell-conscience, it must not rest on the truth of theism or any other theological proposition. Unlike Sandel-conscience, it must rest on something more than volitional necessity, the internal psychological makeup of the actor. It must, then, rest on some source of value external to the actor. The idea of moral obligation as such is one possible such source of value, but as shown above, that source is over- and underinclusive of the accommodations we are trying to account for. These conditions must be satisfied by any satisfactory defense of religious accommodations.

The *Welsh* plurality's opinion, unlike the conscience-based justifications that have been offered for it, satisfies these parameters. Recall the test

position and that of Richards. Nussbaum, unlike Gutmann, does not give special weight to the will to be moral. Those with dogmatic antimeaning views can hardly be said to be searching for life's ultimate meaning. The boundaries of protection in Nussbaum are thus uncertain.

128. RICHARDS, TOLERATION, *supra* note 51, at 144.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

announced by the plurality: in order for an objection to a law to be entitled to accommodation, it was necessary "[1] that this opposition . . . stem from the [objector]'s moral, ethical, or religious beliefs about what is right and wrong and [2] that these beliefs be held with the strength of traditional religious convictions."[129] Only the second prong of the test looks to the strength of the objector's volitional necessity. Justice Harlan, with his focus on intensity, might have stopped there, but the other judges wanted more than intensity. They wanted to be shown that the objection rested on "moral, ethical, or religious beliefs about what is right and wrong."

This first prong of the *Welsh* test appears to be the more important of the two, since it can explain the accommodation of religious beliefs that are not held with any particular intensity (pace Harlan, who may have wanted to rely solely on the second prong, evidently that prong is not even a necessary condition of a successful demand for accommodation).

What did the *Welsh* plurality mean by "religious beliefs"? Religion is a category that is hard to delimit. Most of the best treatments of the problem of defining "religion" for constitutional purposes have concluded that no dictionary definition will do because no single feature unites all the things that are indisputably religions. Religions just have a Wittgensteinian "family resemblance" to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.[130] Among possible relevant factors are beliefs relating to supernatural powers or matters of ultimate concern, rituals, organizations that promote the tenets of the beliefs, rules of moral practice—and conscience. Thus Kent Greenawalt suggests that in the cases of Welsh and Seeger, neither ultimate concern nor conscience is a necessary condition of religion; both are merely "the decisive aspect of analogy."[131] But if this is right, then conscience is neither necessary nor sufficient to make a claim religious for legal purposes.

In both cases, the Court placed great weight on the conscientious nature of the claims but it also was drawn to a conception of religion that was not confined to theism. The Court quoted with approval David Saville Muzzey's definition of religion as "the devotion of man to the highest ideal that he

129. *Welsh*, *supra* note 18, at 340.

130. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831, 1905–1908 (2009); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 Geo. L.J. 1519 (1983); Greenawalt, *Religion as a Concept*, *supra* note 42; Eduardo Peñalver, Note, *The Concept of Religion*, 107 Yale L.J. 791 (1997); Greenawalt, Religion and the Constitution, *supra* note 42, at 124–156; *but see* Macklem, *supra* note 117, at 120–126; Richards, Toleration, *supra* note 51, at 142. A complication I merely note here is that if the will to be moral is the object of deference, one does not avoid Wittgensteinian vagueness because morality may also lack an essence and be constituted by a set of family resemblances. J. David Velleman, How We Get Along 3, 154–155, 161–162, 183 (2009).

131. Greenawalt, *Religion as a Concept*, *supra* note 42, at 773.

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press

can conceive"[132] and Paul Tillich's description of God as "the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any reservation."[133] The volitional necessities at issue in those cases appeared to plug into some source of value that transcended Welsh's and Seeger's personal preferences, however strong these might be. Here it appears some work is being done by the inherent attractiveness of pacifism.[134] Conscientious objection to, say, serving food to black restaurant patrons would not have been likely to elicit comparable deference.[135]

As for the other free exercise cases that are not explicable by reference to conscience, they can be accounted for by the idea that religion—in its theistic and nontheistic forms—is in some way good. That idea can thus satisfy the parameters I lay down for any coherent account of free exercise accommodations. The goodness of religion is an intelligible constraint on state power, not just an individual concern. As stated here, it does not rely on theism but it does not depend solely on the internal psychological state of the actor either.

Whether it resolves the free exercise/establishment dilemma depends on one's understanding of the Establishment Clause and so is beyond the scope of this paper.[136]

132. *Seeger*, *supra* note 11, 380 U.S. at 183, quoting DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 95 (1951).

133. *Id.* at 187, quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948). Both of these formulations denote ideas more capacious than "conscience," even though *Seeger* is often cited for the proposition that conscience is what the court is protecting.

134. For a discussion that emphasizes this, *see* the defense of accommodation of conscientious objectors to the draft in JOHN RAWLS, A THEORY OF JUSTICE 370–371 (1971).

135. Another factor that helps to account for the result in these cases is that if the statute were construed as requiring theism, it would be drawing its lines in an impermissible way by discriminating among religions. So in order to save the statute, the Court had to broaden it, and once it had done that, the statute was broad enough to exempt Seeger and Welsh, whether or not their claims were religious. This constitutional argument obviously depends on the premise that it is unconstitutional to define "religion" too narrowly.

136. It is not, however, beyond the scope of Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003); and Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

https://doi.org/10.1017/S1352325209990061 Published online by Cambridge University Press