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**THE "SPECIALNESS" OF RELIGIOUS CONSCIENCE: AN EGALITARIAN RESPONSE**

by

**JOSEPH MARSDEN DUNNE**

**DISSERTATION**

Submitted to the Graduate School

of Wayne State University,

Detroit, Michigan

in partial fulfillment of the requirements

for the degree of

**DOCTOR OF PHILOSOPHY**

2018

MAJOR: PHILOSOPHY

Approved By:

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Advisor

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Date

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## **DEDICATION**

This dissertation is dedicated to the family and friends who constitute the “great cloud of witnesses” that have surrounded and supported me throughout my time in graduate school. This work is dedicated to you because, without you, this work would have been impossible.

## ACKNOWLEDGEMENTS

First, I would like to thank my advisor Dr. John Corvino. His mentorship and direction over the past several years have catalyzed my philosophical development and helped me to accomplish what were, at one time, distant dreams. By his own example, he has taught me how to be civil towards people with whom you disagree, how to be charitable and consider your opponent's best arguments, how to bridge gaps between seemingly unbridgeable camps, and, perhaps most importantly, how philosophers can be relevant to public discourse about significant issues. I would do well to mimic his virtues within my own career as well – and lucky if I can channel his playful and snarky wit.

Second, I would like to thank the rest of my committee: Dr. Eun-Jung Katherine Kim, Dr. Sean Stidd, and Professor Chris Lund. A lot of the ideas within this dissertation were developed and honed through conversations both inside and outside of their classrooms. Their ongoing input over the years has been crucial to this project.

Third, I would like to thank several other, key persons not mentioned above. In particular, I would like to thank Jonathan A. Jones, Rev. David W. Jones, Dr. Lucas Lockard, Dr. Bruce Russell, Dr. Kevin Vallier, Dr. Andrew Koppelman, Dr. Ryan T. Anderson, Dr. Timothy McGrew, Dr. Paul Hedeem, and Dr. John Piippo. All of these individuals served important and memorable roles at pivotal moments throughout the development of this dissertation.

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Last, I would like to thank my parents – Dr. Tim and Dr. Cindy – and my wife Hannah. From an early age, my parents taught and modeled for me the value of education and hard work. Much of what has been accomplished here is the fruit of what they sowed in me years ago. Their ongoing support of me has been second only to my wife Hannah who deserves more gratitude and recognition for the realization of this project than anyone else. Her example and encouragement to me over the years is unrivaled and have upheld me in moments when nothing else seemed to. Truly, “strength and dignity are her clothing.”

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## INTRODUCTION

Religion is often singled out for special legal treatment in Western societies. This is certainly true in the United States where religion enjoys a special place in the First Amendment to the Constitution. Specifically, the guidelines for state interaction with religion are expressed in the Free Exercise and Establishment Clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”<sup>1</sup> Through Free Exercise guarantees, for example, the Supreme Court held in *Wisconsin v. Yoder* (1972) that Amish children were entitled to an exemption from compulsory school attendance laws after the eighth grade, emphasizing that this was a uniquely “religious” exemption that did not apply to everyone.<sup>2</sup> Religion enjoys special legal treatment in other ways too. Both the US federal government and 21 individual states have passed Religious Freedom Restoration Acts<sup>3</sup> that protect religious persons from having their sincere beliefs substantially burdened, barring some compelling governmental interest that cannot be met by less restrictive means. Nonreligious persons, to the contrary, fail to possess equal or similar RFRA-like protections for their sincerely held beliefs. Consider also the example of legal exemptions to otherwise mandatory vaccination laws. In the United States, 47 states currently offer nonmedical exemptions to persons who object to these mandatory vaccine

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<sup>1</sup> The U.S. Constitution, Amendment I

<sup>2</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)

<sup>3</sup> RFRA contains a three-pronged exemption test for religious objectors. If the objector can answer “yes” to all of the following conditions, then they can receive a legal accommodation: (a) Substantial Burden: Does the individual have a sincere belief that is being substantially burdened? (b) Compelling Interest: Does the government have a very good reason (e.g. health or safety) to interfere? (c) Least Restrictive Means: Is there a reasonable alternative to serve the compelling interest?



laws for religious reasons. 29 of these states offer legal exemptions to religious objectors only while the other 18 states offer legal exemptions to nonreligious conscientious objectors as well.<sup>4</sup> So if both an Atheist and a Christian conscientiously object to some mandatory vaccine law in New York, a legal exemption may be granted to the Christian but not the Atheist under New York's current legal framework.

The special treatment of religious beliefs is similarly at the heart of an important thought-experiment raised by Brian Leiter.<sup>5</sup> He asks us to imagine the following: a young rural boy enters his school classroom on the first day of the year wearing – as usual – a family knife that has been passed down to him from his father. This knife is a family heirloom that designates the arrival of maturity for the males in his family such that, to be a “man” is to receive that dagger from one's father, just as he received it from his, and so on. The boy's identity as a man in his familial community turns on his carrying the family knife, both marking his maturity and bond with the past. Now, consider a young Sikh boy entering his school classroom on the first day of the year wearing – as usual – his *kirpan*. The *kirpan* is a small dagger or knife given to young men in the Sikh religion as a symbol of their religious devotion. As was the case with the rural boy, carrying these small knives similarly demarcates the Sikh boy's maturity, strengthens his bond with the past, and constitutes at least part of his communal, familial, or religious identity. This thought-

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<sup>4</sup> For a more detailed analysis of these vaccine exemptions, see Mark Navin (2018).

<sup>5</sup> Brian Leiter (2013), 1-3

experiment raises an interesting question: why might it be permissible for the Sikh boy to carry his dagger in school but impermissible for the rural boy?<sup>6</sup>

In fact, all of the above cases, both real and imagined, raise an important question: *what, if anything, is “special” about religious conscience beliefs that justifies their special legal treatment?* That is the central question this dissertation seeks to answer. Overall, I’m not interested in answering the *broad version* of the specialness question – that is, whether or not conscience beliefs more broadly, like religious beliefs, should receive a defeasible special status before the law. The broad version of the specialness question asks us to broadly compare and contrast religious beliefs with conscience beliefs in order to see whether one set of beliefs deserves special legal solicitude over the other set of beliefs. Instead, I am interested in answering the *narrow version* of the specialness question – that is, whether or not religious conscience beliefs in particular should receive comparatively special legal treatment over and above nonreligious conscience beliefs. The narrow version of the specialness question asks us to narrowly compare and contrast religious conscience beliefs with nonreligious conscience beliefs in order to see whether one kind of conscience belief deserves special legal solicitude over the other kind of conscience belief.

Additionally, I am not necessarily interested in whether the state should grant legal exemptions – for I assume that it is morally permissible to grant at least some conscientious objections. Nor is my focus centrally on how the state decides which requests for accommodation should be granted either. Just how the state should decide whether or not to grant conscientious exemptions is a related though separate question that varies in

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<sup>6</sup> Brian Leiter (2013): “There is no Western democracy, at present, in which the [rural] boy ... has prevailed or would prevail in a challenge to a general prohibition on the carrying of weapons in the school.” (3)

answer. For example, some approaches deemphasize the particular content of the conscientious objection and may grant equal protections to religious and nonreligious conscientious objectors as a result. Approaches in this vein emphasize relevant extrinsic features (e.g., the infringement of rights or harm caused to third-parties) over relevant intrinsic features (e.g., the uniquely religious content of the objector's conscience) when determining whether granting a legal exemption is justified. Other approaches consider the particular content of a conscientious objection as significant and, in some way, determinative of whether or not a legal exemption is justified. Approaches in this vein may consider the religiosity of the objector's conscience as a relevant and good reason for permitting a legal exemption. Conversely, approaches in this vein may also consider the religiosity of the objector's conscience as a relevant and good reason for withholding a legal exemption.<sup>7</sup>

In this dissertation, I offer an *Egalitarian Response* to the narrow question about religion's "specialness" before the law. My central claim is that, because religious and nonreligious conscience beliefs are sufficiently similar in nature, there is no good reason to treat them differently before the law. Put another way, I contend that there are no salient features of the religious conscience that justifies affording it special legal treatment. As noted above, this central claim is separate from the question of whether a state should grant legal exemptions to conscientious objectors and separate from the question of how a state should determine whether to grant exemptions if permitted.

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<sup>7</sup> See Yossi Nehushtan (2011a) for a more detailed analysis of the varying approaches to answering the question concerning how the state should decide which requests for accommodation should be granted.

Of course, it's possible to address these further questions by combining the central, egalitarian claim with further premises. If the state has good reasons to grant a defeasible *positive* special legal status to all conscience beliefs, for example, and we believe that there is good reason to adopt the Egalitarian Response, then the state would thus have good reasons to grant a defeasible *positive* special legal status to both religious and secular conscience beliefs. The same is true if the state has good reasons to grant a defeasible *negative* special legal status to all conscience beliefs as well. Though my considered view is that the state has good reasons to grant a defeasible positive special legal status to conscience beliefs, the aim of my dissertation is to defend an Egalitarian Response to the narrow question about religion's "specialness" before the law – leaving these further questions open for further research. Surely the arguments and claims within this dissertation may be useful in support of further arguments for one of these positions. Nevertheless, my aim is to establish the narrower egalitarian conclusion. As I understand it, even this narrow conclusion may be attractive to the religious and secular alike – for granting equal protections to both kinds of conscience beliefs under the broader umbrella of conscience rights could make "religionists and secularists into partners in developing a workable theory of the limited state."<sup>8</sup>

In the first chapter, my aim is to highlight a few historical discussions concerning religion's specialness. I begin by detailing the account of how we ended up with Constitutional protections for religion but not explicitly for conscience in the US – only to show that the historical account is inconclusive at best. I then explain that once religion was afforded special legal protections, it only made sense that we ended up with Court

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<sup>8</sup> Ira Lupu and Robert Tuttle (2014), 180

cases like *Seeger* and *Welsh* – where conscientious objectors to military service were granted religious exemptions even after denying that their objections were religious in the traditional sense. While these cases would try to reverse the trend of legally privileging religious conscientious objectors by extending equal protections to nonreligious conscientious objectors, the *Yoder* case – which came after *Seeger* and *Welsh* – would incidentally end up defending the opposite position. These seemingly inconsistent verdicts only serve to bring our primary question back to center stage. I end the chapter by giving an overview of Brian Leiter’s contemporary analysis of this question in order to set up an evaluation of his claims in a later chapter.

My goal in the second chapter is to develop and defend an account of conscience against competing notions in order to better navigate the narrow version of the specialness question in subsequent chapters. My account of ‘conscience’ is historically informed, predicated upon the work of Richard Sorabji – a key historian of philosophy working within the history of ethics. The account that I defend is not an attempt to define a neat and tidy set of necessary and sufficient conditions for ‘conscience,’ but is instead an attempt to capture the more historically central or core aspects of the concept. Once I formulate an account of ‘conscience,’ I then compare, contrast, and defend this account of conscience against common, competing notions of conscience present in the contemporary discussion of the concept. I end the chapter by comparing and contrasting this historically grounded account of conscience with a more conservative Christian account of conscience given that the majority of religious individuals in the United States engaging with these pertinent questions are Christian.

In chapters three and four, I provide support for my central claim by analyzing several possibly demarcating features of religious conscience beliefs taken to be legally relevant by theorists in the field. Overall, I contend that there are no features held by either kind of conscience that give us good grounds to adopt an Inegalitarian Response to the original specialness question. Instead, I argue that a comparative analysis between the two kinds of conscience actually gives us good reason to adopt an Egalitarian Response to the specialness question since they are sufficiently similar in nature.

In the third chapter in particular, I narrow in on two of Brian Leiter's main features of the religious conscience: categoricity and insulation from evidence respectively. After initially interacting with Leiter's categoricity feature, I turn my attention to Leiter's arguments that religious beliefs are insulated from evidence, and as a result, are not worthy of special legal treatment. I argue that he fails to show that religious conscience beliefs are both in principle responsive to empirical evidence and in practice typically more insulated from this evidence than secular conscience beliefs. If I am right about this, then Leiter fails to sufficiently distinguish the religious conscience from the secular conscience and fails to answer the "central puzzle" of his book *Why Tolerate Religion?* Second, I look at whether or not it is plausible to understand the religious conscience as insulated from other forms of evidence. Following the research of social-psychologist Jonathan Haidt, I argue that, typically, both forms of conscience seem to be similarly insulated from a relevant kind of evidence – namely, moral argumentation. I also show that, while it seems as though the religious conscience usually draws from a larger set of moral values when compared to the secular conscience, this should make no legal difference overall. Lastly, I consider whether religious conscience beliefs uniquely appeal either directly or indirectly

to private evidence. In response, I conclude the chapter by offering a few cursory arguments why we might prefer content-neutral approaches without making a complete case – hopefully curtailing any lingering questions about comparative evidence.

In the fourth chapter, I narrow in on three further, possibly delineating features of the religious conscience that theorists take to be legally relevant. First, I investigate whether religious conscience beliefs are more central to our identity – and relatedly, whether they are more central to our moral integrity. Ultimately, I argue that both religious and nonreligious conscience beliefs are sufficiently central to our identity and moral integrity such that there is no obvious reason to grant preferential legal treatment to one over the other. Second, I investigate whether religious conscience beliefs are more primordial, unchosen, or non-voluntary. I contend that granting legal exemptions on the grounds that the belief or practice in question is primordial or non-voluntary is problematic for at least three reasons. First, I argue that non-voluntariness should not be classified as a necessary condition for obtaining a legal exemption. Second, I argue that non-voluntariness should not be understood as a sufficient condition for obtaining a legal exemption either. And third, I argue that, even if we grant non-voluntariness as a sufficient condition, it should not be understood as the only sufficient condition for obtaining a legal exemption.

As I end chapter four, I investigate whether religious conscience beliefs are uniquely linked to unjustified intolerance and prejudice so that differential treatment before the law is warranted. I argue that, because both religious and nonreligious conscience beliefs have similar propensities for unjustified prejudice and intolerance, their differential treatment before the law is plausibly unwarranted. First, I argue that unjustified prejudice and

intolerance are similarly correlated to religious and nonreligious conscience beliefs insofar as the driving force behind the prejudice and intolerance is, at least in principle, shared by both kinds of conscience. Second, I argue that we should be skeptical that religious conscience beliefs enjoy a uniquely strong in-practice-link to unjustified prejudice and intolerance. If these claims are right, then it seems like we should accept an anti-intolerance approach over an exclusively anti-religious approach. And if the anti-intolerance approach is adopted, then we have no reason to treat religious conscientious objectors with special, negative treatment. Nevertheless, I conclude by highlighting a further problem for both the anti-religious approach and the anti-intolerance approach: just how relevant or how weighty should content-based reasons be in the exemption calculus if we discover unjustifiably intolerant content in a person's conscience belief, practice, or ideology?

Having argued for the Egalitarian Response, in the last chapter I address several lurking objections to this position. In the first section, I address the multifaceted critique of the Egalitarian Response advanced by Kathleen Brady. In particular, I address her claims that: religious conscience beliefs should enjoy special legal treatment because they enjoy a distinct relationship with the divine; that accepting the Egalitarian Response results in weaker protections for both religious and secular conscience beliefs; and that accepting the Egalitarian Response limits liberty more broadly and religious liberty in particular. In the second section, I address the Feasibility Objection which worries that the implications of accepting this response may be pragmatically or legally unworkable – possibly leading to something like legal anarchy. There, I discuss responses to this objection raised by Douglas Laycock and Nadia Sawicki. In the final section, I offer two responses to the



Underinclusiveness Objection as raised by Simon May – which just claims that there is no principled moral reason to grant legal accommodations to conscience beliefs that are not equally good reason to grant legal accommodations to non-moral projects.

## CHAPTER 1: THE SPECIALNESS OF RELIGION

*Religion is unlike other human activities, or at least the founders thought so. The proper relation between religion and government was a subject of great debate in the founding generation, and the Constitution includes two clauses that apply to religion and do not apply to anything else. This debate and these clauses presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.*

*– Douglas Laycock, “The Remnants of Free Exercise,” p. 16*

### **I. Introduction**

In this chapter, my aim is to highlight a few historical discussions concerning religion’s specialness. I begin by detailing the account of how we ended up with Constitutional protections for religion but not explicitly for conscience in the US – only to show that the historical account is inconclusive at best. I then explain that once religion was afforded special legal protections, it only made sense that we ended up with Court cases like *Seeger* and *Welsh* – where conscientious objectors to military service were granted religious exemptions even after denying that their objections were religious in the traditional sense. While these cases would try to reverse the trend of legally privileging religious conscientious objectors by extending equal protections to nonreligious conscientious objectors, the *Yoder* case – which came after *Seeger* and *Welsh* – would incidentally end up defending the opposite position. These seemingly inconsistent verdicts only serve to bring our primary question back to center stage. I end the chapter by giving an overview of Brian Leiter’s contemporary analysis of this question in order to set up an evaluation of his claims in a later chapter.

## II. Religion's Specialness in the Framing Era

In the United States, the “specialness” of religion dates back to its very founding – and as we will see later – sets the stage for cases like *Seeger*, *Welsh*, and *Yoder* that affect us even in our contemporary era. When New Hampshire became the ninth and last necessary state to ratify the Constitution on June 21, 1788, that document officially became the law of the land. Somewhat surprisingly, that original Constitution contained “no provision protecting the general freedom of religion.”<sup>9</sup> The absence of such a protection became one of the major points of contention and debate not only during the ratification process, but after the ratification process as well. The Baptist General Committee, for example, opposed the proposed Constitution solely on the grounds that it had not “made sufficient provision for the secure enjoyment of religious liberty.”<sup>10</sup> Thus, part of the intention of adding a Bill of Rights thereafter was to ameliorate this problem.

Seven states ended up drafting proposals for amendments to the Constitution, and five of them contained religious freedom guarantees.<sup>11</sup> Some also contained protections for general conscience. For example, New Hampshire proposed that “Congress shall make no laws touching religion, or to infringe on the rights of conscience.”<sup>12</sup> Virginia’s proposal, modeled after its own Declaration of Rights, also included protections for “religion” and “the dictates of conscience” – though, given its language, it is not clear how they differ:

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<sup>9</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

<sup>10</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

<sup>11</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

<sup>12</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

That religion, or the duty to which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence: and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience.<sup>13</sup>

In the First Congress, James Madison was the primary draftsman of a Bill of Rights.<sup>14</sup> Among his several proposals were two amendments relevant to religious liberty and the rights of conscience in particular:

Art. I, § 9: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Art. I, § 10: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.<sup>15</sup>

Madison's proposals were first sent to a select committee, and then, on August 15, 1789, the House of Representatives met as a Committee of the Whole to consider the select committee's original proposal.<sup>16</sup> Five days later, the House adopted a motion to alter the wording of Madison's above amendment (Art. I, § 9) as follows:

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<sup>13</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

<sup>14</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 58

<sup>15</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 60

<sup>16</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 60

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.<sup>17</sup>

Once in the Senate, Madison's proposal was amended once again. Unlike the House debates, Senate debates were, unfortunately, not recorded at that time.<sup>18</sup> This means that the particular reasons as to why certain motions passed or failed are unknown; we only know whether they were passed or not. On September 3, 1789, a first motion was made to amend Madison's proposal to read: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect of society."<sup>19</sup> This proposed amendment passed in the negative and was rejected. A second motion was given that same day to amend the proposal to read: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."<sup>20</sup> This second motion was likewise rejected – and like the previous defeated motion, for unknown reasons.

On September 9, 1789, after an unsuccessful session on September 3, the Senate finally amended Madison's proposal to read:

Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom

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<sup>17</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 62

<sup>18</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 62

<sup>19</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 62

<sup>20</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 62

of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances.<sup>21</sup>

Notice that the original language concerning “the rights of conscience” was excluded in Senate debates, but that the passed motion included protections for speech, press, assembly, and petition. Unfortunately, Senate journal records for September 9 only indicate that the above amendment was passed in the affirmative, and fails to give any sort of detailed account of the debate and conversations surrounding the motion. Shortly thereafter, the proposal was sent back to the House where it was further amended to read as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.<sup>22</sup>

On September 25, 1789, the Senate agreed with the House’s proposal, and the amendment was approved for transmission to the States for ratification.<sup>23</sup> Following ratification by the state of Virginia on December 15, 1791, the first 10 amendments to the Constitution – which included the final amendment detailed above – were added to the law of the land.

This historical account raises an important question: why did the Senate exclude the rights of conscience to the proposed amendment? And why did the House agree with the Senate if its original proposal included protections for conscience? One possible

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<sup>21</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 62-3

<sup>22</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 63

<sup>23</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 63

explanation is that, while the rights of conscience may have been seen as altogether separate from the other rights, they were nevertheless unnecessary to protect constitutionally. Another possible explanation is that perhaps it was believed that protecting all these other rights – and the freedom of religion in particular – was sufficient for protecting the rights of conscience, thus making an additional protection for the rights of conscience superfluous.

The first explanation seems comparably less plausible than the second for the simple reason that the “rights of conscience” were not likely seen as unnecessary to protect. In a House debate over Madison’s second proposal (Art, I, § 10), Madison himself argued that this amendment was “the most valuable amendment in the whole list.”<sup>24</sup> Not only so, but contrary to the claims made by his debate interlocutors in the House, Madison thought that “if there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments.”<sup>25</sup> Thus, these statements give us good reason to believe that the rights of conscience were seen both as “essential” and necessary to protect from both Federal and State Governments.

Perhaps Congress excluded the rights of conscience because they believed that protecting religious freedom was sufficient for protecting the rights of conscience. That is, perhaps conscience was understood to be limited to religious beliefs or convictions, so protecting religious freedom was sufficient for protecting the rights of conscience. The Virginia Declaration of Rights might serve as a good example of this view making its way

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<sup>24</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 63

<sup>25</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 63

into legislation. While this second explanation seems comparably more plausible than the first, it nevertheless falls short important ways. First, if protecting religious freedom was sufficient for protecting the rights of conscience, then why did states like New Hampshire propose that “Congress shall make no laws touching religion, or to infringe on the rights of conscience” separately? Likewise, why did so many of the drafts of what would become the First Amendment explicitly and often differentiate between the “free exercise of religion” and the “rights of conscience” if they were just going to protect the same sorts of things? Why, for example, would Madison originally propose an amendment (Art. I, § 9) protecting the rights of “religious belief or worship” in addition to protecting “the full and equal rights of conscience?” Using language that separates religion and conscience strongly suggests that these two concepts were understood to be different and to apply to different things, and that one could not simply be subsumed under the other.

Perhaps there was no official view during the framing era about the relationship between religion and conscience. Clearly, some people (e.g., George Mason in Virginia Declaration of Rights) seemed to have more of an *encompassing view* in that they seemed to think that ‘conscience’ was encompassed by ‘religion’ – conceptually, legally, and so on. Other people (e.g., Roger Williams or even James Madison in Art. I, § 9) seemed to have more of an *overlapping view* in that they seemed to think that ‘religion’ and ‘conscience’ were not completely encompassed by each other, but rather that they shared conceptual overlap. The best explanation might just be that, as a historical fact, we happened to get protections for religion but not for conscience because something like the encompassing view was adopted after the conceptual waters had been waded in Congress.



It's worth noting, however, that if the explanation for why we ended up with protections for religion but not for conscience is that the encompassing view was ultimately adopted in Congress, then Madison seems to be an enigma. Remember that Madison proposed rights of conscience as separate from religious freedoms in his amendment proposals and had the opportunity to re-amend his proposals when the Senate sent what was to become the First Amendment back to the House. Nevertheless, he didn't seem to fight the Senate's exclusion of conscience rights when he had the opportunity to. Why didn't he fight their exclusion? As noted above, he seems to be an example of someone who held an overlapping view given the language of his amendments and the recorded arguments he made for the essentiality of conscience rights and the necessity of protecting them. So why did he concede to the Senate's exclusion of conscience? Madison's lack of action is an enigma if he, in fact, held something like the overlapping view. Madison's lack of action might make sense if he instead held something like the encompassing view, but the evidence that suggests he held this latter view seems comparatively weaker than the evidence that suggests he held the overlapping view.<sup>26</sup>

Whatever views Madison might have held, the reasons why Congress would include the "free exercise of religion" and exclude the "rights of conscience" are simply unclear. In the end, the surprising omission of religious freedom in the original Constitution had been

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<sup>26</sup> There may be other evidences pointing to the fact that Madison may have actually held a more encompassing view – e.g., his co-authorship on the Virginia Declaration of Rights, and the fact that he began the argument in his *Memorial and Remonstrance Against Religious Assessments* by quoting the definition of 'religion' found in the Virginia Declaration of Rights. But George Mason – not Madison – was the primary author of the Virginia Declaration of rights, and the amendments that Madison himself crafted suggest that he held something like the overlapping view instead.

corrected. Yet, the omission of the rights of conscience in the Constitution remains to this day.<sup>27</sup> We should not be surprised, then, when we see religion afforded special protections over and above their nonreligious counterparts in other legal spaces even to this day. After all, when religion is considered special constitutionally, it only makes sense that religion would be considered special in other legal ways. But just as it was important to question why religion was afforded special constitutional protections, it will be important to question why religion is afforded special treatment in other legal spaces as well.

### **III. Religion's Specialness in Conscription Cases**

As noted above, the “specialness of religion” question would continue to come up in other legal spaces – such as statutory jurisprudence – as well. For example, in *United States v. Seeger* (1965), the US Supreme Court attempted to navigate through some of these tough questions concerning the comparative protections for religion and conscience. In this case in particular, Mr. Seeger claimed an exemption from the armed forces as a conscientious objector, declaring that he was conscientiously opposed to participating in war in any form by reason of his “religious belief” even though he preferred to leave the question as to his belief in a Supreme Being open, “rather than answer ‘yes’ or ‘no’.”<sup>28</sup> Seeger claimed that his “skepticism or disbelief in the existence of God [did] not necessarily mean lack of faith in anything whatsoever” and that his was a “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”<sup>29</sup> He cited such persons as

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<sup>27</sup> For a further analysis of this historical point, see Michael McConnell (1990) and Noah Feldman (2002).

<sup>28</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 769

<sup>29</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 769

Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity “without belief in God, except in the remotest sense.”<sup>30</sup>

Seeger’s exemption claim was initially denied solely because it was not based upon a “belief in a relation to a Supreme Being” as required by § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. §456(j).<sup>31</sup> The phrase “belief in a relation to a Supreme Being” was understood to involve “duties superior to those arising from any human relation,” but did not include “essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>32</sup> Additionally, between 1940 and 1948, two courts of appeals upheld the view that the phrase “religious training and belief” as written in the statute did not include political, social, or philosophical beliefs.<sup>33</sup> The original statute and the two subsequent court cases upheld the view that the only sorts of objections or beliefs that are eligible for legal exemptions are those that clearly possess religious content.

The court ended up overturning Seeger’s initial denial, claiming that “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”<sup>34</sup> In short, the exemption was found *not* to cover those who oppose war from a merely “personal moral code, nor those who decide that war is wrong on the basis of essentially political, sociological or economic considerations, rather than religious belief”

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<sup>30</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 769

<sup>31</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 769

<sup>32</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 769

<sup>33</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 770. See also *United States v. Kauten*, 133 F2d 703, 708 (2d Cir 1943) and *Berman v. United States*, 156 F2d 377, 380- 81. (9th Cir 1946).

<sup>34</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 771

but *would* cover those who had a “sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption.” Overturning the view that the only sorts of beliefs that are eligible for legal exemptions are those that are religious in *content*, the ruling in *Seeger* instead supported the view that beliefs that *function* like traditional religious beliefs in the life of their possessor are eligible for legal exemptions as well.

Five years later, in *Welsh v. United States* (1970), Elliott Ashton Welsh II was convicted by a United States District Judge for refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462(a).<sup>35</sup> Like *Seeger*, Mr. Welsh was unable to sign the statement printed within the Selective Service form that stated “I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form.”<sup>36</sup> Whereas *Seeger* could only sign after striking the words ‘training and’ and putting quotation marks around the term ‘religious,’ Welsh could only sign after striking the words ‘my religious training and.’<sup>37</sup> Neither definitively affirmed nor denied that they believed in a “Supreme Being,” yet both affirmed on their applications that they harbored deep moral scruples and conscientious objections against war, believing that killing in war was wrong, immoral, and unethical.<sup>38</sup> As in *Seeger*, the exemption claim made by Welsh was initially denied because his belief was in some sense insufficiently “religious” to qualify for

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<sup>35</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 777

<sup>36</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 777

<sup>37</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 777

<sup>38</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 777

conscientious objector exemptions under the terms of § 6(j) – though Welsh was far more insistent and explicit than *Seeger* in denying that his views were uniquely religious.<sup>39</sup>

Moreover, *Welsh* was further distinguished from *Seeger* in that Welsh’s views were more easily identified as “political, sociological, or philosophical views or a merely personal moral code.”<sup>40</sup> Ultimately, the Supreme Court reversed the initial denial because of the “broad scope of the word ‘religious’ as used in § 6(j)” and because they did not think that § 6(j)’s “exclusion of those persons with ‘essentially political, sociological, or philosophical views or a merely personal moral code’ should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.”<sup>41</sup> On the basis of these claims and the conclusion from the Court of Appeals that Welsh held his beliefs “with the strength of more traditional religious convictions,” the Court ended up granting Welsh the conscientious objector exemption that he originally sought.<sup>42</sup> Thus, *Welsh* also supported the view that beliefs that function like traditional religious beliefs in the life of their possessor are eligible for legal exemptions as well.<sup>43</sup>

The verdicts of *Seeger* and *Welsh* are admittedly confusing in their own right. So, when the *Yoder v. Wisconsin* (1972) decision came down only two years later, the confusion was only amplified. In this case, the Court held that Amish children were entitled to an

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<sup>39</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 777-78

<sup>40</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 778

<sup>41</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 778

<sup>42</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 778-79

<sup>43</sup> For a good overview of cases in the U.S. involving exemptions from military service, see Kent Greenawalt (2016), Chapter 2: “Exemptions for Military Service,” 23-46.

exemption from compulsory school attendance laws after the eighth grade, emphasizing it as a uniquely “religious” exemption that did not apply to everyone.<sup>44</sup> The Court wrote:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations...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 Religious Clauses.*<sup>45</sup>

Given the Court’s words here, how different, really, were Thoreau’s beliefs from Welsh’s? Ironically, Thoreau is being used as a contrast to the Amish in *Yoder* as a paradigmatic example of what isn’t “religious.” Yet it seems obvious that his “philosophical and personal” beliefs are functionally equivalent to those held by the conscientious objector in *Welsh* whose beliefs were found by the Court two years earlier to be religious enough to fall under the exemption statute. In *Yoder*, then, we

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<sup>44</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 783

<sup>45</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 783; emphasis added. The position upheld in *Yoder* (1972) was unanimously reaffirmed later in *Frazee v. Illinois Dep’t of Emp’t Sec.*, 489 U.S. 829, 833 – 34 (1989). See also *Marsh v. Chambers*, 463 U.S. 783, 812 (1983), Justice Brennan 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.”

see a return back to the view that the only sorts of beliefs that are eligible for legal exemptions are those that are religious in content.

In *Seeger*, the Court decided to exempt those who had a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualified for the exemption. In *Welsh*, the Court decided to further exempt those who opposed war from a merely personal moral code, or those who decide that war is wrong on the basis of essentially political, sociological, philosophical, or economic considerations, rather than just religious belief. And in *Yoder*, the Court decided that the beliefs and values that motivated Thoreau's choice to live at Walden Pond were too philosophical and personal to be considered sufficiently religious like the claims made by the Amish even though his claims mirror those made by the objectors in *Seeger* and *Welsh*.

If there was some sort of principled precedent that the courts were trying to set here, it is altogether unclear. Nevertheless, a few points are clear. First, these cases and their seemingly inconsistent verdicts highlight just how difficult it is to determine *what* exactly it might mean for some conscientious claim to be uniquely 'religious.' In order to be 'religious,' must a belief have religious content or is religious functionality enough? Not only so, but even when some conscientious claim is categorized as 'religious,' the further issue of whether or not it is sufficiently religious is also nearby. This elusive line of religious demarcation is in question in all these cases, and one's eligibility for these exemptions is always determined by where these lines end up being drawn. Second, these cases all seem to be operating under the same general assumption that we saw in the framing era: that religion and religious objections deserve special legal protections above their nonreligious counterparts. The central question in *Seeger* and *Welsh* was not whether or not their

conscientious objections deserved legal accommodations in their own right, but whether or not they were sufficiently “religious” – either in content or function – in order to qualify for a statutory exemption that was only allotted to religious objectors. The important question concerning religion’s specialness raised in the framing era is present in these cases too.

#### **IV. Religion’s Specialness in Contemporary Scholarship**

On today’s scene, one of the best examples of a contemporary author aiming to bring clarity to the sticky problem of religion’s specialness is Brian Leiter. In his book *Why Tolerate Religion?* Leiter contends – alongside other notable voices in the contemporary scholarship<sup>46</sup> – that there are no good reasons to treat religious beliefs with special legal solicitude. His argument for this conclusion is that “[i]f there is a special reason to tolerate religion it has to be because there are features of religion that warrant toleration...that all or only religious beliefs have... [or] that other beliefs have...but [whose] possession...would not warrant principled toleration.”<sup>47</sup> His argument can be summarized as follows:

- (1) If we should treat religious beliefs with comparatively special legal treatment, then it is because there are features of religious beliefs that distinguish them from other kinds of belief that warrant such treatment.
- (2) But there are no features of religious beliefs that distinguish them from other kinds of belief that warrant such treatment.
- (3) Therefore, we should not treat religious beliefs with comparatively special legal treatment.

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<sup>46</sup> Ronald Dworkin (2013), Micah Schwartzman (2013), Christopher L. Eisgruber and Lawrence G. Sager (2007); Anthony Ellis (2006)

<sup>47</sup> Brian Leiter (2013), 26-7



As other contemporary writers have done,<sup>48</sup> Leiter advances his own account of ‘religion’ and discusses at length what he takes to be the three most distinctive features of religion that “single out ‘religious’ states of mind from others.”<sup>49</sup> The first distinctive feature of religion is what he calls the *categoricity of religious commands*, meaning that demands on action “must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up.”<sup>50</sup> The second distinctive feature of religion, which he calls the *insulation from evidence* feature, is that religious beliefs generally “do not answer ultimately to evidence and reasons.”<sup>51</sup> He calls the last feature of religion the *existential consolation* feature, which refers to the fact that there are some beliefs in religion that “render intelligible and tolerable basic existential facts about human life, such as suffering and death.”<sup>52</sup>

With these three features of religion in place, Leiter spends the rest of his time looking at whether there are principled arguments, either moral or epistemic, for *tolerating* or *respecting* religion *as such*. By tolerance, Leiter doesn’t mean the practice of one group simply being indifferent to another group, but rather the practice of one group putting up with the perceivably wrong, mistaken, or undesirable beliefs, actions, etc. of another group.<sup>53</sup> Moreover, his concern is with the principled grounds of state toleration as opposed to just interpersonal or group toleration. As noted above, Leiter concludes that

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<sup>48</sup> Ronald Dworkin (2013)

<sup>49</sup> Brian Leiter (2013), 33

<sup>50</sup> Brian Leiter (2013), 34

<sup>51</sup> Brian Leiter (2013), 34

<sup>52</sup> Brian Leiter (2013), 52

<sup>53</sup> Brian Leiter (2013), 8

there are no principled arguments, either moral or epistemic for specially tolerating or for specially respecting religious beliefs as he understands them.<sup>54</sup>

How does he reach such a conclusion? He begins by noting that moral arguments for toleration usually either claim that there's a *right* to the liberty to believe and practice that which must be tolerated, or that toleration of those beliefs and practices is "important to the realization of morally important goods."<sup>55</sup> As is the case with other moral arguments, these predictably divide up into Kantian and utilitarian forms. Standing in as the representative for the Kantian position, John Rawls explains that "toleration...follows from the principle of equal liberty," which is one of the two fundamental principles of justice that rational persons would choose in the "original position."<sup>56</sup> As Leiter points out, nothing in Rawls' argument, however, seems to be specific to religion such that religious beliefs would receive any special protection over other beliefs more generally. In fact, Leiter shows that Rawls' argument is about securing the "liberty of conscience," which would actually include protecting both religious and nonreligious conscience beliefs.<sup>57</sup>

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<sup>54</sup> Brian Leiter (2013): "There are, to be sure, principled arguments for why the state ought to tolerate a plethora of private choices and conscientious commitments...but none of these single out religion for anything like the special treatment it is accorded in existing Western legal systems. So why tolerate religion? The answer in this book is: not because of anything that has to do with it being religion as such..." (7)

<sup>55</sup> Brian Leiter (2013), 15

<sup>56</sup> Brian Leiter (2013), 15

<sup>57</sup> Brian Leiter (2013): "Indeed, Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not that they will accept distinctively religious ones..." (55)

Leiter argues further that utilitarian arguments don't obviously single out religious beliefs for special protection either. These kinds of arguments all share "in one form or the other, the core idea that it maximizes human well-being – however exactly that is to be understood – to protect *liberty of conscience* against infringement by the state."<sup>58</sup> As was the case with the Kantian argument, the liberty given to conscience would here include both religious and nonreligious conscience beliefs.

On the other hand, epistemic arguments for toleration emphasize the contribution that tolerance makes to knowledge.<sup>59</sup> Leiter here draws from J.S. Mill, who argues that toleration is necessary because (a) truth-discovery (or believing what is true *in the right kind of way*) contributes to overall utility [moral premise]; and (b) truth discovery is only possible when differing beliefs and practices are permitted to flourish [epistemic premise].<sup>60</sup> The justification Mill provides for (b) is: (i) we are fallible when it comes to truth-discovery; (ii) if our beliefs are *partially* true, then exposure to differing beliefs will help us to discover other parts of the *whole*; and (iii) if our beliefs are *completely* true, then exposure to differing beliefs will help us hold them for the right kinds of reasons and better confront false beliefs too.<sup>61</sup> Via Mill, Leiter argues that tolerating this wide of a range of beliefs and practices as a means to truth discovery would likely not be limited to just religious beliefs.

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<sup>58</sup> Brian Leiter (2013), 17; emphasis added

<sup>59</sup> Brian Leiter (2013), 19

<sup>60</sup> Brian Leiter (2013), 19

<sup>61</sup> Brian Leiter (2013), 20

In light of his particular account of religion, Leiter wonders whether there is really any reason to think that the expression of beliefs that are insulated from epistemically relevant considerations like evidence and reasons will actually promote knowledge of the truth. After all, religious belief, on his account “is marked by its insulation from the *only* epistemically relevant considerations.”<sup>62</sup> He notes that even if there was a viable epistemic argument for tolerating beliefs that are insulated from the “familiar standards of evidence reasons,” it would nonetheless fail to “help single out religious belief for special protection.”<sup>63</sup>

He later becomes concerned about how potentially harmful and liberty-infringing these insulated categorical moral demands of religion could be to society if we continue not only to tolerate them, but to treat them with legal privilege as well. On this point, he writes:

*If what distinguishes religious beliefs from other important and meaningful beliefs held by individuals is that religious beliefs are both insulated from evidence and issue in categorical demands on action, then isn't there reason to worry that religious beliefs, as against other matters of conscience, are far more likely to cause harms and infringe on liberty? And might that not even form the basis of an argument for why there are special reasons not to tolerate religion?*<sup>64</sup>

If it is true that beliefs that support categorical demands that are insulated from evidence have potential (perhaps even a *special* potential) for harms to well-being, then that would

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<sup>62</sup> Brian Leiter (2013), 57

<sup>63</sup> Brian Leiter (2013), 58

<sup>64</sup> Brian Leiter (2013), 59

be reason to doubt whether any utilitarian argument for tolerating religion qua religion will succeed.<sup>65</sup>

As Leiter sees it, the only possible utilitarian rationale for tolerating religion as such would come if we'd be willing to bite what he calls the "speculative bullet."<sup>66</sup> Biting this bullet would entail asserting *both* the claim that the "existential consolation functions" of religion would ultimately produce more utility than the harm produced by the insulated categorical moral demands of religion *and* the claim that the "preceding net gain in utility" would be greater than some other possible alternative way of producing existential consolation that doesn't involve the "conjunction of categoricity and insulation from evidence."<sup>67</sup> "It's not obvious," Leiter writes "why one would bite the speculative bullet, absent an antecedent bias in favor of religion."<sup>68</sup>

Interestingly, the above points made by Leiter actually seem to lean him toward the conclusion that we should treat religion with special legal treatment – but in this case, with *negative* legal treatment, not *positive* legal treatment. Leiter stops just short of actually claiming that we should treat religion with some sort of special scrutiny, but it's clear that he leans this direction. Remember that he accepts the antecedent to the above conditional, namely, that what "distinguishes religious beliefs from other important and meaningful beliefs held by individuals is that religious beliefs are *both* insulated from evidence *and* issue in categorical demands on action." As such, he thinks that there is, in fact, at least

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<sup>65</sup> Brian Leiter (2013), 61

<sup>66</sup> Brian Leiter (2013), 63

<sup>67</sup> Brian Leiter (2013), 63

<sup>68</sup> Brian Leiter (2013), 63

some reason to “worry that religious beliefs, as against other matters of conscience, are *far more likely* to cause harms and infringe on liberty,” and that this might “form the basis of an argument for why there are special reasons *not* to tolerate religion” barring one’s willingness to bit his “speculative bullet.” Leiter stops just short of the conclusion that we should treat religion with special scrutiny because he never takes a position on biting the speculative bullet – though his view is nevertheless implied.

Regardless, if there’s no reason to *tolerate* religion as such, then perhaps there is reason to *respect* it. As Leiter points out,<sup>69</sup> the term ‘respect’ can have two different senses: a more affirmative notion of respect<sup>70</sup> and a more minimalistic notion of respect.<sup>71</sup> The minimalistic notion of respect is satisfied when, roughly, one person gives the minimally appropriate consideration that is contextually required to another person. Understood in this way, this notion doesn’t seem to help morally differentiate religious and nonreligious claims of conscience any better than tolerance did. On the other hand, the affirmative notion of respect is satisfied when, roughly, one person admires, esteems, praises, or highly regards another person, their work, etc. Given these definitions, Leiter then asks whether there is any reason to uniquely respect religious beliefs in the affirmative sense.

The difficulty with respect *as such* is that there are conceivable cases where someone’s religious beliefs are morally praiseworthy<sup>72</sup> as well as cases where someone’s

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<sup>69</sup> Brian Leiter (2013), 68-9

<sup>70</sup> As in “I really respect her creativity as expressed in her photographs.”

<sup>71</sup> As in “You should really show some respect for them in their time of grief.”

<sup>72</sup> For example: when someone opposes the unfair treatment of women on uniquely religious grounds.

nonreligious beliefs are morally praiseworthy.<sup>73</sup> Moreover, there are conceivable cases where both are morally blameworthy.<sup>74</sup> In other words, there are times when the reasons for respecting religious beliefs will apply equally to nonreligious beliefs and times when the reasons for disrespecting religious beliefs will apply equally to nonreligious beliefs. Accordingly, there does not seem to be an obvious reason why we should *respect* one and not the other.

Leiter concludes his project by considering what we should legally do if there is no “principled argument that picks out distinctively *religious* conscience as an object of special moral and legal solicitude.”<sup>75</sup> “One obvious solution,” he writes, “would be to extend the breadth of exemptions from generally applicable laws to all claims of conscience, religious or not.”<sup>76</sup> According to this commonly proposed solution – what Leiter calls the *Universal Exemptions View* – both the Sikh and rural boy from Leiter’s fictitious story could file for a legal exemption. Likewise, under such a legal regime, both the Christian and the Atheist in New York could file for an exemption from mandatory vaccine laws as well.

Ultimately, Leiter rejects the Universal Exemptions View in favor of what he calls the *No Exemptions View* for three reasons. First, he offers a practical objection, arguing that instantiating a legal regime with universal exemptions for any claim of conscience – religious or otherwise – would “be tantamount to constitutionalizing a right to civil

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<sup>73</sup> For example: when someone opposes the unfair treatment of women on uniquely deontological grounds.

<sup>74</sup> For example: when either of them support mass infanticide on their own, unique grounds.

<sup>75</sup> Brian Leiter (2013), 92

<sup>76</sup> Brian Leiter (2013), 93

disobedience, a posture it is hard to imagine any legal system adopting.”<sup>77</sup> He says that from a principled point of view, “there may be no difference among all the preceding claims of conscience, but it seems unlikely that any legal system will embrace this capacious approach to liberty of conscience that would involve according all these claims of conscience equal legal standing.”<sup>78</sup>

Second, Leiter thinks that the Universal Exemptions View suffers from an epistemic problem as well. Specifically, “the specter that haunts any legal regime governing liberty of conscience,” Leiter thinks, is that “courts must adjudicate whether a claim of conscience *is really a claim of conscience*.”<sup>79</sup> Whereas religions “typically have texts, doctrines, and commands, either written or passed down orally among many adherents” that help serve as a proxy for authenticity, claims of conscience usually fail to be in an analogous epistemic and evidential position.<sup>80</sup> Leiter suggests that, given the unequal epistemic and evidential position of religious and nonreligious claims of conscience, “we should simply extend legal protection for liberty of conscience *only* to claims of conscience that are rooted in communal or group traditions and practices that mimic, from an evidential point of view, those of religious groups.”<sup>81</sup> The objection then becomes that, under a legal regime with universal exemptions for all claims of conscience, we might suffer from the unacceptable

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<sup>77</sup> Brian Leiter (2013), 94

<sup>78</sup> Brian Leiter (2013), 94

<sup>79</sup> Brian Leiter (2013), 95-6

<sup>80</sup> Brian Leiter (2013), 95

<sup>81</sup> Brian Leiter (2013), 96. In this way, Leiter actually supports something roughly close to the view that beliefs that function like traditional religious beliefs in the life of their possessor are eligible for legal exemptions as well.



consequence of “treating genuine claims of conscience unequally before the law, simply based on how practicable it is for courts to adjudicate their genuineness, and nothing else.”<sup>82</sup>

Lastly, Leiter offers a sort of third-party harm objection to the Universal Exemptions View, calling it the “Rousseauian worry about exemptions.”<sup>83</sup> He explains that “exemptions from generally applicable laws often impose burdens on those who have no claim of exemptions,” and that “if general compliance with laws is necessary to promote the ‘general welfare’ or the ‘common good,’ then selective exemptions from those laws is a morally objectionable injury to the general welfare.”<sup>84</sup> In particular, Leiter is not so much concerned with those exemptions that would fail to shift any sort of burden onto a third-party, but rather on burden-shifting exemptions like those found in the conscription cases above. In those sorts of cases, “if those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or cannot successfully establish their conscientious claim.”<sup>85</sup>

Given these objections to the Universal Exemptions View, Leiter asks the following question:

If there is no good moral reason to treat *religious* conscience as special – indeed, no reason (except practical and evidential) to treat *communally*

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<sup>82</sup> Brian Leiter (2013), 97

<sup>83</sup> Brian Leiter (2013), 99

<sup>84</sup> Brian Leiter (2013), 99

<sup>85</sup> Brian Leiter (2013), 99

*sanctioned* claims of conscience as special – and if there are Rousseauian reasons pertaining to the general welfare for the state to enact and enforce its laws, then perhaps we should simply abandon the idea that there should be exemptions from generally applicable laws, except when no burden-shifting is involved?<sup>86</sup>

So, the force of the above objections, in conjunction with his slightly amended claim that there is no good moral reason to treat “community sanctioned claims of conscience” as special, leads Leiter to believe that the best legal response is to abandon the idea that there should be exemptions at all from generally applicable laws – except in cases where no burden is shifted to some third party. Of course, this No Exemptions position doesn’t necessarily imply that states could therefore pass laws silencing claims of conscience, and its conclusion is consistent with states pursuing neutral objectives like the safety, health, and well-being of its people through legislation. While it may be true that a No Exemptions legal regime might impose an unfortunate and unfair burden on matters of minority conscience, Leiter thinks that the legal alternative of Universal Exemptions is still worse. He remarks: “At least generally applicable laws *unintentionally* burden minority claims of conscience, whereas a regime of exemptions *intentionally* privileges religious claims of conscience, to the exclusion of others, even though there is no moral reason to do so.”<sup>87</sup>

Lastly, Leiter considers one more passing worry about the No Exemptions View. He asks, “[A]re not religious claims of conscience especially resilient and fierce, especially

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<sup>86</sup> Brian Leiter (2013), 100-01

<sup>87</sup> Brian Leiter (2013), 102

likely to provoke backlash, disobedience, and the proverbial ‘blood in the streets?’”<sup>88</sup> In essence, this last worry just cites as the possible reason for uniquely tolerating religious claims of conscience the likeliness that they are the very ones “least likely to accede to a No Exemptions regime.”<sup>89</sup> Leiter responds by simply noting that the categoricity of conscience beliefs are not unique to religious claimants, so anyone caught in the snares of a strong conscience – religious or otherwise – is likely to be the kind of person who doesn’t accede to this regime. That there might be some especially conscientious individuals within a society “constitutes no argument against the No Exemptions approach,” especially when we “can as little justify exemptions from generally applicable laws to ‘those most likely to make trouble’ as we can justify exemptions from those laws to ‘those who have religious claims of conscience.’”<sup>90</sup>

## **V. Conclusion**

In this chapter, I highlighted a few historical discussions concerning religion’s specialness. I began by detailing the account of how we ended up with Constitutional protections for religion but not explicitly for conscience in the US – only to show that the historical account is inconclusive at best. I then explained that once religion was afforded special legal protections, it made sense that we ended up with Court cases like *Seeger* and *Welsh*. While these cases would try to reverse the trend of legally privileging religious conscientious objectors by extending equal protections to nonreligious conscientious objectors, the *Yoder* case would incidentally end up defending the opposite position. These

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<sup>88</sup> Brian Leiter (2013), 131

<sup>89</sup> Brian Leiter (2013), 131

<sup>90</sup> Brian Leiter (2013), 132

seemingly inconsistent verdicts only served to bring our primary question back to center stage. I ended the chapter by giving an overview of Brain Leiter's contemporary analysis of this question in order to set up an evaluation of his claims in a later chapter.

## CHAPTER 2: THE NATURE OF CONSCIENCE

*I know I've got a face in me / Points out all my mistakes to me / You've got a face on the inside too / Your paranoia is probably worse / I don't know what set me off first but I know what I can't stand / Everybody acts like the fact of the matter is I can't add up to what you can / But everybody has a face that they hold inside / A face that awakes when I close my eyes / A face that watches every time they lie / A face that laughs every time they fall / It watches everything / So you know that when it's time to sink or swim / That the face inside is watching you too / Right inside your skin / It's like I'm paranoid lookin' over my back / It's like a whirlwind inside of my head / It's like I can't stop what I'm hearing within / It's like the face inside is right beneath my skin.*

*– Lyrics from "Papercut" by Linkin Park*

### **I. Introduction**

My goal in this chapter is to develop and defend an account of conscience against competing notions in order to better navigate the narrow version of the specialness question in subsequent chapters. My account of 'conscience' is historically informed, predicated upon the work of Richard Sorabji – a key historian of philosophy working within the history of ethics. The account that I defend is not an attempt to define a neat and tidy set of necessary and sufficient conditions for 'conscience,' but is instead an attempt to capture the more historically central or core aspects of the concept. Once I formulate an account of 'conscience,' I then compare, contrast, and defend this account of conscience against common, competing notions of conscience present in the contemporary discussion of the concept. I end the chapter by comparing and contrasting this historically grounded account of conscience with a more conservative Christian account of conscience given that

the majority of religious individuals in the United States engaging with these pertinent questions are Christian.

## **II. The Birth of Conscience: The First 600 Years**

Accounts detailing the historicity of the concept of conscience within the Western tradition have often begun with the Hebrew Old Testament, citing stories involving well-known figures such as King David.<sup>91</sup> Though the Ancient Hebrews lacked a specific word for conscience, it is nevertheless evident that they had the concept.<sup>92</sup> In Psalm 51, for example, we see David caught up in the snares of a guilty conscience, lamenting his sinful decision to both commit adultery with Bathsheba and order the wrongful death of her husband Uriah:

Be gracious to me, O God, according to Your lovingkindness; according to the greatness of Your compassion blot out my transgressions. Wash me thoroughly from my iniquity and cleanse me from my sin. For I know my transgressions, and my sin is ever before me. Against You, You only, I have sinned and done what is evil in Your sight, so that You are justified when You speak and blameless when You judge. Behold, I was brought forth in iniquity, and in sin my mother conceived me. Behold, You desire truth in the innermost being, and in the hidden part You will make me know wisdom. Purify me with hyssop, and I shall be clean; wash me, and I shall be whiter than snow. Make me to hear joy and gladness, let the bones which You have broken rejoice. Hide Your face from my sins and blot out all my iniquities.

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<sup>91</sup> Richard Sorabji (2014), 11; John Cottingham (2013), 731

<sup>92</sup> Modern Hebrew has since introduced the term 'matzpun' to denote the concept of conscience.

Create in me a clean heart, O God, and renew a steadfast spirit within me. Do not cast me away from Your presence and do not take Your Holy Spirit from me. Restore to me the joy of Your salvation and sustain me with a willing spirit. *Then* I will teach transgressors Your ways, and sinners will be converted to You. Deliver me from bloodguiltiness, O God, the God of my salvation; *then* my tongue will joyfully sing of Your righteousness. O Lord, open my lips, that my mouth may declare Your praise. For You do not delight in sacrifice, otherwise I would give it; You are not pleased with burnt offering. The sacrifices of God are a broken spirit; a broken and a contrite heart, O God, You will not despise.<sup>93</sup>

As historian of philosophy Richard Sorabji points out, most of the examples highlighted from the Hebrew Old Testament, including Psalm 51, “used for conscience only the general word for heart, the seat of many different emotions.”<sup>94</sup>

John Cottingham argues that three key features of conscience can be readily gleaned from a reading Psalm 51. “First,” he claims that conscience involves “a directing inwards by the subject of the kind of disapproval characteristically felt at the untoward behavior of another.”<sup>95</sup> As the language of the Psalm demonstrates, David is directing a disapproving attitude toward his own self once he reflects upon the behaviors done to both Bathsheba and Uriah. “Second, it is linked to remorse and repentance, which is in turn made possible

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<sup>93</sup> Psalm 51:1-17, NASB. For more on the story of David, Bathsheba, and Uriah see 2 Samuel 11.

<sup>94</sup> Richard Sorabji (2014), 11

<sup>95</sup> John Cottingham (2013), 731

by a deepening both of self-awareness and empathy.”<sup>96</sup> Cottingham notes that, once David is confronted for his by the prophet Nathan, his “previously shallow grasp of the significance of his actions was altered under the imaginative stimulus of being presented with a vivid analogue of his own conduct, which made him start to appreciate how being treated in such a way would feel for the victim.”<sup>97</sup> Lastly, Cottingham notes that “the required response is not simply implanted from the outside by the prophet’s condemnation but is partly elicited from within.”<sup>98</sup> Once the prophet Nathan lifts some of David’s “emotional and cognitive barriers” by having him identify with the characters of a parable, “it is David’s own conscience that convicts him.”<sup>99</sup>

Just like the Ancient Hebrews, the Early Greeks likewise failed to have a specific term for conscience, but this did not mean that they lacked the concept. In fact, Sorabji contends that early Greeks “equally have supplied examples of moral conscience without [invoking] the word.”<sup>100</sup> The basic conceptual expression that eventually came to be the standard term for conscience began to appear earliest in the Greek playwrights of the fifth century BC.<sup>101</sup> This basic expression involved the metaphor of *one sharing knowledge with oneself, usually of a moral defect, as though one were split into two*. The metaphor explains that when we possess knowledge of a moral defect, or possess a *guilty* conscience, it feels

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<sup>96</sup> John Cottingham (2013), 731

<sup>97</sup> John Cottingham, (2013), 731. See 2 Samuel 12:1-23 for the rebuke that Nathan gives to David.

<sup>98</sup> John Cottingham, (2013), 731

<sup>99</sup> John Cottingham, (2013), 731

<sup>100</sup> Richard Sorabji (2014), 11; 15-30 contains examples from Aristophanes, Euripides, Sophocles, Socrates, Plato, Aristotle, the Epicureans, the Stoics, and Cicero.

<sup>101</sup> Richard Sorabji (2014), 11-12



like we're split in two and composed of two people: "one of them knows of the defect but is keeping it a secret; the other shares the secret – in cases of moral conscience, a guilty one."<sup>102</sup> Another common expression similarly detailing the nature of a guilty conscience is found in the phrase "I could not live with myself."<sup>103</sup> Over time, who or what it is that the guilty knowledge was shared with would predictably vary. Despite this, Sorabji argues that the meaning of the conscience metaphor "is at first unambiguous" and standardly "involves one's own knowledge of one's own fault."<sup>104</sup>

By contrast, possessing a *clear* conscience implies *not* sharing knowledge with oneself of a moral defect, or simply failing to possess guilty knowledge altogether. This, however, shouldn't be confused with the idea of sharing knowledge with oneself of a moral *merit*, or "sharing knowledge with ourselves of being practitioners of noble and good works."<sup>105</sup> So, we might say that there are three basic states of conscience: sharing knowledge with oneself of a moral defect (the *guilty* conscience), failing to share knowledge with oneself of a moral defect (the *clear* conscience), and sharing knowledge with oneself of a moral merit (the *joyful* conscience).<sup>106</sup>

As noted above, this basic metaphor was eventually expressed terminologically – "by a particular form of the [Greek] verb for knowing, *suneidenai*, to share (*sun-*) knowledge (*eidenai*), coupled with the reflexive pronoun in the dative (e.g., *heautoi*

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<sup>102</sup> Richard Sorabji (2014), 12

<sup>103</sup> James F. Childress (1979), 315-35

<sup>104</sup> Richard Sorabji (2014), 12; C.A. Pierce (1955), 38

<sup>105</sup> Richard Sorabji (2014), 15

<sup>106</sup> Richard Sorabji (2014), 30. Sorabji points out that when Cicero speaks of sharing knowledge of *merit*, he also speaks of a correspondingly *joyful* conscience.

[oneself]).”<sup>107</sup> This Greek idiom concerning conscience would fortunately translate seamlessly into Latin. The *con-* in the Latin noun *conscientia* is a simple translation of the Greek *sun-* and the *scientia* is a simple translation of the Greek *eidesis*. Thus, in Latin: *con + scientia = conscientia* (sharing knowledge with oneself). As Sorabji points out, it was “[b]y strange good fortune [that] a literal translation, not a paraphrase, of the Greek term was used.”<sup>108</sup> And with such a seamless translation, Latin thus “avoided importing its own presuppositions into the very choice of word.”<sup>109</sup>

As with most concepts, conscience would develop, mature, and be pruned through time. For example, though the concept of conscience started off as merely sharing knowledge with oneself of a *past* moral defect, it would later include knowledge of what would put one at fault *in the future* as well. Some like St. Paul argued that the conscience was intimately tied, though not identical to, a general moral law existing in our hearts. The conscience would draw from this moral law in order to accuse or excuse our behaviors in the present and would also act as the agency responsible for witnessing to God concerning our fidelity to this law after death.<sup>110</sup> Moreover, the conscience was normally understood, especially in Christian circles, as *fallible* in its endeavors. Thus, in being open to error, conscience is best understood as *a belief* that may or may not amount to genuine

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<sup>107</sup> Richard Sorabji (2014), 12

<sup>108</sup> Richard Sorabji (2014), 14

<sup>109</sup> Richard Sorabji (2014), 14

<sup>110</sup> Richard Sorabji (2014), 34

knowledge.<sup>111</sup> In time conscience became “a belief about what it was, or would be, wrong or not wrong for one to do or not to do” – and this applied to one’s past or future *attitudes* as well.<sup>112</sup> Additionally, the conscience came to be ascribed with *motivating force* even though it was admittedly a belief, and thus cognitive in nature. Sorabji explains that we can understand this marriage of affection and cognition in the beliefs of conscience if we understand how “rational knowledge of evaluative propositions about what is or is not wrong can itself be motivating, for example, if I know that some action to which I am tempted or which I have performed is *wrong*.”<sup>113</sup>

In summary, Sorabji thinks that the “first six hundred years of the development of the idea of moral conscience identified some attributes which remained comparatively stable features over the next two thousand years.”<sup>114</sup> These eight, core features – some of which clearly overlap with the features of Cottingham’s analysis of Psalm 51 – are as follows:<sup>115</sup>

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<sup>111</sup> Richard Sorabji, (2014), 35. Sorabji defines the conscience as “a person’s *belief* about what actions or attitudes had been in the past, or would be in the future, wrong for him to adopt or not adopt in a particular situation.” However, he also claims that conscience could just be “the *capacity* for such beliefs. The beliefs may be the things believed or the believing of them.” (215) In the remainder of the dissertation, I aim to split the difference between these two approaches by understanding conscience as the capacity that produces such beliefs and identifying conscience beliefs with such beliefs.

<sup>112</sup> Richard Sorabji (2014), 35

<sup>113</sup> Richard Sorabji (2014), 35

<sup>114</sup> Richard Sorabji (2014), 36

<sup>115</sup> Richard Sorabji (2014), 36

(1) Conscience is a form of *personal self-awareness* that is not invariably an awareness of *others*.

(2) Conscience draws on values not necessarily shared by others.

(3) Conscience originally involved the idea of *a person split into two*, with one self-hiding a guilty secret, and the other self-sharing it. The idea of conscience as involving a split person was to recur in different forms and with different rationales in Adam Smith, in Kant, and in Freud, and is found in the expression “I could not live with myself.”

(4) The original function of the conscience was *retrospective*, but very soon *prospective* functions developed and all of these were retained.

(5) Although conscience drew on general values, it was very much concerned with what was or would be wrong for the *particular* individual in a *particular* context.

(6) The concept of conscience started off secular, originating in the Greek playwrights of the fifth century BCE, and remains capable of being secular.

(7) Conscience was traditionally viewed in Christianity as *fallible*.

(8) Though a belief and hence cognitive in character, conscience nonetheless had *motivating* force.

### **III. Two Major Deviations**

Sorabji contends that, even though the concept of conscience has been subject to various interpretations since its genesis – including “the recent secularization of conscience,” – it nevertheless does “not necessarily require all that many revisions” from

the original picture.<sup>116</sup> Though the history of the concept of conscience reveals two “prolonged deviations” from its basic structure in the first 600 years, these deviations fortunately “did not last indefinitely.”<sup>117</sup>

### A. Conscience and *Synderesis*

The first deviation was “the need to accommodate *synderesis* alongside conscience, which made one difference if *synderesis* took over the motivational role from conscience, or another difference if it relegated conscience to the act of drawing a conclusion rather than holding a belief.”<sup>118</sup> The second deviation “was the idea that conscience was a *sentiment* of approval or disapproval, or even a sensation of pain, rather than a *belief* or capacity for belief about what conduct or attitude was or would be wrong for one, a belief that might *cause* sentiments or pain.”<sup>119</sup>

The first deviation was most prominent in the Middle Ages and arguably stemmed from Origen’s interpretation of Ezekiel’s vision of the four-faced creatures in Ezekiel 1:10.<sup>120</sup> The creatures in this passage are described as having the face of a human, lion, ox, and eagle – and Origen interpreted the first three faces as corresponding to the three parts of Plato’s tripartite soul (rational, spirited, and appetitive parts).<sup>121</sup> Whereas Origen interpreted the fourth part as “the human’s spirit (*spiritus*) presiding over the other

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<sup>116</sup> Richard Sorabji (2014), 215

<sup>117</sup> Richard Sorabji (2014), 215

<sup>118</sup> Richard Sorabji (2014), 215

<sup>119</sup> Richard Sorabji (2014), 215

<sup>120</sup> Ezekiel 1:10 NASB – <sup>10</sup> Their faces looked like this: Each of the four had the face of a human being, and on the right side each had the face of a lion, and on the left the face of an ox; each also had the face of an eagle.

<sup>121</sup> Richard Sorabji (2014), 59

three,”<sup>122</sup> Jerome would later “refer the eagle to a fourth part, for which the Greeks have a name, and which is the ‘spark of conscience’ by which we recognize that we are sinning.”<sup>123</sup> So Jerome, likely drawing upon Origen and his followers, mistakenly distinguished between *conscience* (*conscientia*) and *the spark of conscience* (*synderesis*).

Bonaventure would later distinguish between *conscientia* and *synderesis* as well, where the basis of his distinction was that conscience played a more cognitive role and *synderesis* played a more affective role. Similarly, Aquinas would distinguish between conscience and *synderesis*, but would give them different functions. For Aquinas, *synderesis* supplied universal premises from the natural law and was “never mistaken, but in effect infallible.”<sup>124</sup> Conscience, on the other hand, was simply the “*act* of applying the universal premise to a particular situation.”<sup>125</sup> As opposed to Bonaventure, Aquinas would grant conscience “no less than *synderesis* motivational force,” believing that *synderesis* “warns, inclines, incites, and deters” and that conscience “can prospectively prod, urge, or bind, and retrospectively accuse or cause remorse.”<sup>126</sup> Ultimately, William of Ockham would later dispense of *synderesis* on the basis of his famous *Ockham’s Razor* – a trend that was upheld by the Protestant reformers Luther (at least beyond 1519) and Calvin.<sup>127</sup>

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<sup>122</sup> Richard Sorabji (2014), 59

<sup>123</sup> Richard Sorabji (2014), 59

<sup>124</sup> Richard Sorabji (2014), 63

<sup>125</sup> Richard Sorabji (2014), 63-4

<sup>126</sup> Richard Sorabji (2014), 64

<sup>127</sup> Richard Sorabji (2014), 66. Luther never mentioned *synderesis* after 1519 and Calvin never mentioned it in his *Institutes*.

Sorabji thinks that “the division of labor” between synderesis and conscience is simply “not needed for the purpose of explaining motivation.”<sup>128</sup> He writes:

For knowledge or belief is itself motivating, provided it is the knowledge or belief that some action would, or would not, be wrong for one to perform in an expected situation calling for decision. Bonaventure has found a task for synderesis to perform, but if I am right, the task could have been performed without it.<sup>129</sup>

For this reason, Sorabji thinks that St. Paul’s simpler distinction between “the law in our hearts with its *general* knowledge of right and wrong [and] the conscience that accused or excused us as *individuals*” had supplied all that was needed.<sup>130</sup> Additionally, Sorabji objects to Aquinas’ account insofar as it is just not true that “we have a disposition to recognize the law infallibly.”<sup>131</sup> St. Paul, Origen, nor Augustine “thought that conscience made us infallible,” and Sorabji agrees alongside them that “humans are not infallible.”<sup>132</sup> Unfortunately, Aquinas’ account implies this, though narrowly.

## **B. Conscience as Sentiment**

The second deviation was “the idea that conscience was a *sentiment* of approval or disapproval, or even a sensation of pain, rather than a *belief* or capacity for belief about what conduct or attitude was or would be wrong for one, a belief that might *cause*

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<sup>128</sup> Richard Sorabji (2014), 61

<sup>129</sup> Richard Sorabji (2014), 61. See Paul Thagard and Tracy Finn (2012) where conscience is described as “a kind of moral intuition” that is “both cognitive and emotional.” (156, 168)

<sup>130</sup> Richard Sorabji (2014), 65-6

<sup>131</sup> Richard Sorabji (2014), 65-6

<sup>132</sup> Richard Sorabji (2014), 66

sentiments or pain.”<sup>133</sup> This deviation can trace its roots back to the views of seventeenth and eighteenth century moral sentimentalists like Shaftesbury, Hutcheson, and Hume – in addition to the later English philosopher Mill. Shaftesbury, for example, argued that we have “a natural sense of right and wrong,” emphasizing that “our sense of right and wrong is a *sense*.”<sup>134</sup> Hutcheson would agree with Shaftesbury, commonly speaking of “moral *sentiment*, and of the moral *sense*, which is *pleased* or *displeased* by good or evil.”<sup>135</sup> Likewise, Hume also spoke of a “moral *sense* and connected conscience with *passion* instead of *reason*.”<sup>136</sup> Mill would end up defining “the *essence* of conscience” as a “feeling in our own mind; a pain more or less intense, attendant on violation of duty,” implying that Mill also thought about conscience as a *sensation*.<sup>137</sup>

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<sup>133</sup> Richard Sorabji (2014), 215

<sup>134</sup> Richard Sorabji (2014), 168-69. Sorabji also points out here that “Shaftesbury thinks it *horridly offensive and odious* to a rational creature to have the ‘Reflection in his Mind of any unjust Action or Behaviour, which he knows to be naturally odious or non-deserving,’ and this *state of mind* is what he thinks it properly called conscience.” (168)

<sup>135</sup> Richard Sorabji (2014), 168-69

<sup>136</sup> Richard Sorabji (2014), 169. See David Hume (2007): “Reason is wholly inactive and can never be the source of so active a principle as conscience, or a sense of morals.” (295; bk. 3, pt. 1, sec. 1, par. 10)

<sup>137</sup> Richard Sorabji (2014), 169. See Mill (1998): “The internal sanction of duty, whatever our standard of duty may be, is one and the same – a feeling in our own mind; a pain, more or less intense, attendant on violation of duty, which in properly cultivated moral natures rises, in the more serious cases, into shrinking from it as an impossibility. This feeling, when disinterested, and connecting itself with the pure idea of duty, and not with some particular form of it, or with any of the merely accessory circumstances, is the essence of Conscience; ...[Conscience’s] binding force, however, consists in the existence of a mass of feeling which must be broken through in order to do what violates our standard of right, and which, if we do nevertheless violate



Contrary to the sentimentalists and Mill, Sorabji sees this position – that conscience is essentially a sentiment or sensation, not a belief or capacity for beliefs – as not only a derivation from the original concept, but a misguided view in its own right. Sorabji argues that a “sensation can indeed motivate, but if conscience is only a sensation, it will presumably be *produced by* value judgments about wrong, which are now no longer incorporated within conscience itself.”<sup>138</sup> From Antiquity through the Middle Ages, the “bites of conscience” were understood as a mere “*effect* of bad conscience, with bad conscience itself being a belief about one’s wrongdoing.”<sup>139</sup> Thus, relegating conscience to a mere sensation would amount to equating it with what was once understood as an effect that it produced. Even if one believes that conscience gives rise to sentiments and sensations of approval or disapproval (as Sorabji does) “such a sentiment will presumably be an *effect* of value judgments about wrong or not wrong which caused the sentiments.”<sup>140</sup>

It’s worth noting that in the eighteenth century, especially through Shaftesbury and Hutcheson, our moral sense was understood as independent of our knowledge of God.<sup>141</sup> In this way, the concept of conscience started to become, as it was with the early Greeks, an areligious, secular concept once again. Shaftesbury argued, for example, that our moral sense is “*not* due to knowledge of God, but is in us before we acquire any knowledge of God,

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that standard, will probably have to be encountered afterwards in the form of remorse. Whatever theory we have of the nature or origin of conscience, this is what essentially constitutes it.” (74-75; ch. 3, sec. 4)

<sup>138</sup> Richard Sorabji (2014), 169

<sup>139</sup> Richard Sorabji (2014), 169

<sup>140</sup> Richard Sorabji (2014), 169

<sup>141</sup> Richard Sorabji (2014), 168, 185

or of his rewards and punishments.”<sup>142</sup> Hutcheson followed suit, arguing that our moral sense senses moral good and evil, and responds to it “independently of any self-interest, including self-interest in God’s reward or punishment, and independently of any desire to follow his will.”<sup>143</sup> Sorabji notes that these were some of the earliest steps toward the resecularization of the concept of conscience – though Hutcheson “allowed that religious reading and belief can *confirm* our moral sense.”<sup>144</sup> While Joseph Butler and Adam Smith utilized arguments in the rehabilitation of conscience that secularists could adopt, they were themselves not secularists.<sup>145</sup> “By the end of the [eighteenth] century,” Sorabji notes, the resecularization was basically complete insofar as “Kant was able to describe conscience independently of God’s *objective* existence.”<sup>146</sup>

#### **IV. The Core Concept of Conscience**

“The core conception of conscience,” Sorabji writes, “which I have found to be most influential contains the following ideas:”

(1) It is a person’s *belief* about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for him to adopt or not adopt in a particular situation. It could also be the *capacity* for such beliefs. The beliefs may be the things believed or the believing of them.

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<sup>142</sup> Richard Sorabji (2014), 168

<sup>143</sup> Richard Sorabji (2014), 168

<sup>144</sup> Richard Sorabji (2014), 168

<sup>145</sup> Richard Sorabji (2014), 185

<sup>146</sup> Richard Sorabji (2014), 168

(2) The beliefs require *personal* self-awareness and are in the first instance beliefs about what would be wrong for *oneself*.

(3) Conscience is *motivating* because it is a *value* belief about what was or would be wrong for oneself. It can therefore cause both sentiments of approval or disapproval and painful or comforting sensations.

(4) This connection with being in the *wrong* accounts for the *force* of, and respect for, conscience of others, for no one wants to be in the wrong. We do not have to look for something contingently and variably connected, such as its sometimes being central to people's identity, or causing intensity of feeling, or contributing to self-direction.

(5) Conscience is *acquired*, not innate, not present from birth.

(6) It draws on values which need not take the form of laws, but which are in danger of reflecting merely local convention, and therefore require constant reflection and awareness of other values.

(7) It is not the voice of God, and its value does not depend on whether the values derive from God.

(8) It is not infallible.

(9) Conscience creates an obligation, but not always an overriding obligation, since there can be counter-obligations, so that one is in a double bind, wrong if one does follow conscience and wrong if one does not.

(10) Freedom of conscience is the absence, within limits, of forcible constraint by authority not only on one's value beliefs, but also on the *actions* which those value beliefs forbid or require.

(11) Freedom of conscience is a narrower term than toleration. Toleration can be recommended on many grounds besides the desirability of freedom of conscience, such as the need for peace.

(12) Freedom of religion is not the same as freedom of conscience, but the two overlap and many of the same arguments can be given for both. Conscience, however, can be secular, and there are some advantages in its being so.

(13) Freedom of conscience has different meanings.<sup>147</sup>

Other chapters will focus more on the above features that relate to conscience's value and legal status. In what follows, I will focus on the features that have more to do with conscience's particular nature, focusing on the legal implications of its nature in later chapters.

First, Sorabji argues that we should understand conscience not as the *supplier* of our values, but instead as the *applier* of our values.<sup>148</sup> In this way, conscience is actually a value-neutral capacity insofar as it applies our values – whatever they might be and however we came to hold them – to our actions or attitudes to produce beliefs about how they measure

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<sup>147</sup> Richard Sorabji (2014), 215-16

<sup>148</sup> Richard Sorabji (2014): "It is not conscience (at least not conscience in the core sense) that has to *supply* our values in the first place. St. Paul ascribes the inner law to God; a secular view should agree that conscience is never the original source of our values, even though particular decisions of conscience can lead to new reflection on general values, without being their original source. Conscience rather *applies* values to the conduct and thoughts of the individual." (218)

up to those values.<sup>149</sup> If this is true, then perhaps a differentiating feature of the religious conscience is that it applies different or else additional values typically emphasized in or derived from religious texts, institutions, or traditions in order to produce beliefs about our actions or attitudes. In short, a religious conscience may be demarcated by its application of uniquely religious values to produce uniquely religious conscience beliefs. An example of a uniquely religious value might be maintaining a positive relationship with the divine. The corresponding religious conscience beliefs would therefore reference the rightness of corresponding actions and attitudes. Thus, a basic account of the religious conscience likely involves a conscience applying uniquely religious values to our actions and attitudes in order to produce beliefs about how our actions and attitudes measure up to the standards that the values seemingly imply.

You might suspect that the values emphasized in religious texts, institutions, or traditions are not necessarily that different from those emphasized in nonreligious texts, institutions, or traditions. That is, you might think that religious and nonreligious values are not altogether that dissimilar. For example, both a Quaker and a Pacifist would be objecting to the draft on conscientious grounds if they did so because they believed that being drafted would force them to participate in violence and that participating in violence would be wrong for them to do. However, though their norms are evidently the same – i.e.,

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<sup>149</sup> Yossi Neushtan (2011a) points out the following concerning conscientious objections to laws: “...the conscientious objector seeks an exemption from the law not because of his status (as is sometimes the case with ‘general’ constitutional exemptions). Rather he seeks an exemption from the law because he holds and alternative set of basic values or an alternative way of balancing basic values that derive from his conscience and conflicts with the ends, the means, or the values of a specific law.” (143-44)

that one shouldn't participate in or facilitate violent actions – the equivalence of their underlying values remains open. Where their values may differ could be in how they are conceived: the Quaker would likely understand the value underlying their actions as having its origin in some religious source, narrative, or worldview whereas the Pacifist might understand the value underlying their actions as having its origin in some altogether different source, narrative, or worldview. Functionally, these values might produce the same sort of actions and behaviors from different people, and this may lead us to understand the values as more or less the same. But I think this would be mistaken: while the norms of the Quaker and Pacifist might be indistinguishable, the values are simply not in virtue of the fact that each person *conceives* of their value differently. The separate question of whether or not this difference, if true, should amount to differential treatment before the law will be addressed in a later chapter.

Second, the values that conscience applies need not “take the form of laws” – in the way that they do with St. Paul, for example<sup>150</sup> – but are nevertheless “in danger of reflecting local convention, and therefore require constant reflection and awareness of other values.” Incidentally, Sorabji thinks that this is the greatest criticism against conscience: that the values it applies to our actions are derived from custom or superstition.<sup>151</sup> In response to this proposed criticism, we can say two things. First, we can highlight the fact that the value of conscience – especially its *legal* value – need not be tied to the truthfulness of the beliefs

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<sup>150</sup> Romans 2:14-15 NASB – <sup>14</sup> For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, <sup>15</sup> in that they show the work of the Law written in their hearts, their conscience bearing witness and their thoughts alternately accusing or else defending them.

<sup>151</sup> Richard Sorabji (2014), 220

it produces. Instead, the value of conscience could just lie in merely possessing the capacity. The content-independent value of conscience is supported when we stop to consider not whether conscience reliably produces the right beliefs, but rather when we stop and think about someone who altogether fails to possess the capacity to form any such beliefs.<sup>152</sup> Second, we can recommend education and cultural exposure to help us reflect upon – and hopefully correct – our accustomed and superstitious values. Without free discussion, even our true opinions remain accustomed or superstitious, and even when we retain our views after education and exposure, our understanding of them will transform.<sup>153</sup> In this way, then, “it is up to us” whether or not our moral values depend on custom or superstition.<sup>154</sup>

Third, Sorabji argues that “freedom of religion is not the same as freedom of conscience, but the two overlap and many of the same arguments can be given for both.” This means that Sorabji straightforwardly adopts something like the *overlapping view* – and given the historical account of conscience articulated above – perhaps for good reason. We should consider, then, that a general freedom of conscience would only protect conscience beliefs – religious or otherwise – but would fail to likewise protect non-conscience beliefs. Crucially, this means that a separate freedom of religion would also be necessary if we wanted to protect the other kinds of religious beliefs; after all, not all religious beliefs are religious conscience beliefs. Of course, there are religious beliefs that are not conscience beliefs, but instead something like ontological beliefs concerning the sorts of things that are

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<sup>152</sup> Richard Sorabji (2014): “When we consider such an absence of the capacity to make judgments of right and wrong...we can hardly doubt that it is a desirable capacity for humans.” (220)

<sup>153</sup> Richard Sorabji (2014), 223

<sup>154</sup> Richard Sorabji (2014), 223

real,<sup>155</sup> epistemological beliefs concerning the sorts of things we can know,<sup>156</sup> and so on. Therefore, given their difference in scope, “freedom of conscience should therefore be recognized as a claim independent of freedom of religion.”<sup>157</sup>

Because conscience is a secular concept whose scope includes both religious and nonreligious beliefs, it is right to understand religion and conscience as two separate concepts that can sometimes overlap. Accordingly, it is plausible to adopt the *overlapping view*, which claims neither religious beliefs nor conscience beliefs – and thus freedom of religion nor freedom of conscience – are conceptually contained within the other. Instead, they should be understood as two separate sets of beliefs that sometimes overlap.<sup>158</sup> Relatedly, Sorabji thinks that emphasizing the secularity of conscience – and thus its conceptual distinctiveness from religion – can actually be advantageous for both conscience and religion. “One possible benefit of resecularization,” he writes, “is that it may reduce dogmatism about one’s own values, if we do not believe in a God-given law in our

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<sup>155</sup> For example: whether Theism is true, or whether materialism is false, or whether abstract objects exist, etc.

<sup>156</sup> For example: whether we can know that Jesus is the Son of God, whether we are one of God’s elect, etc.

<sup>157</sup> Richard Sorabji (2014), 201. Sorabji adds: “But equally freedom of religion needs independent recognition. For as Andrew Koppelman has pointed out, claims for exemptions based on religion do not always involve conscience. His examples include those who wished to take up the smoking of a dangerous drug, peyote, as a religious sacrament of their ethnic group. People might legitimately want a religious exemption for an outward practice that made them feel closer to God. Other religious people again had appealed to enlarge a religious building into a restricted area, or to avoid a logging road obliterating their only available place of worship. Religion could not easily be protected in these cases by an appeal to freedom of *conscience*.” (201)

<sup>158</sup> Christopher Lund (2017): “Religion and moral conscience are not nested categories. Instead, they are overlapping but distinct, like circles in a Venn diagram.” (506)



hearts, and it may encourage us to revise mistaken values.”<sup>159</sup> Sorabji thinks that any sort of legal regime that aims to protect conscience – especially one that might be operating within a climate of religious pluralism – would need a conception of conscience that is “itself secular enough to be open between different religious beliefs” such that the concept can be used “in considering claims for protection independently of any particular religious views.”<sup>160</sup> This, of course, would not imply that such a regime would commit itself to protecting every sincere belief, however disruptive.”<sup>161</sup>

## **V. Competing Conceptions of Conscience**

In what follows, I will contrast the above view of conscience against some competing notions of conscience present in the contemporary discussion of the concept.

### **A. Quasi-Religion and Quasi-Conscience**

The first competing notion that I will focus on is the tendency to define conscience so broadly such that what is described as ‘conscience’ ends up being more appropriately labeled as quasi-conscience. That is, the tendency is to define ‘conscience’ too broadly and to assign it features that have not been historically attributed to the concept. Interestingly, this trend of broadly defining conscience mimics a tendency to broadly define religion in the same sort of way such that what is described as ‘religion’ ends up being something more akin to quasi-religion.

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<sup>159</sup> Richard Sorabji (2014), 219

<sup>160</sup> Richard Sorabji (2014), 219. To illustrate what can go wrong when one fails to have a secular concept of conscience, Sorabji points to Origen: “The concept of *conviction or faith (pistis)* in Origen was so *unsecularized* that heretical belief was called credulity rather than conviction.” (219)

<sup>161</sup> Richard Sorabji (2014), 219

Remember that in the *Seeger* and *Welsh* cases, for example, the Court ended up treating nonreligious conscience beliefs as quasi-religious conscience beliefs so that they might qualify for the statutory exemption whose scope was narrowly written. What was evidently not a religious belief ended up being classified as such because it occupied “a place parallel to” traditional religious beliefs in the life of their possessor.<sup>162</sup> As such, these Court decisions overturned the view that the only sorts of beliefs that are eligible for legal exemptions are those that are religious in *content* and instead supported the view that beliefs that *function* like traditional religious beliefs in the life of their possessor are eligible for legal exemptions as well. In so-doing, these decisions effectively expanded concepts like ‘religion’ or ‘religious beliefs’ into something like quasi-religion or quasi-religious beliefs.

Oddly enough, this trend of defining religion so broadly such that it ends up being understood as something more like quasi-religion continues on into the contemporary literature as well. Ryan Anderson and Sherif Girgis, for example, argue that ‘religion’ consists of “efforts to align your life with the truth about whatever transcendent source (or sources) of being, meaning, and value there might be” and “efforts to honor or find harmony with that source – call it the ‘divine.’”<sup>163</sup> As one can imagine, overly broad definitions of religion like this are problematic for at least a few reasons – some of which are more or less mirrored in overly broad definitions of conscience too. First, Anderson and

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<sup>162</sup> Incidentally, Richard Sorabji (2014) notes that “the difficulty of stretching the meaning of religious belief until it becomes quasi-religious has certainly supplied one good reason for [redressing the omission of freedom of conscience in the First Amendment].” (205, fn. 7) Perhaps this offers some explanation for why the conceptual move from religion to quasi-religion preceded the move from conscience to quasi-conscience.

<sup>163</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2107), 131

Girgis' definition seems underinclusive in important ways. In defining religion as the effort to align our lives with some *transcendent* source (or sources), they are being needlessly narrow. Most likely, such a definition of religion would counterintuitively exclude some of the most prominent Eastern religions like Buddhism and Confucianism due to their naturalistic leanings.

Second, their definition seems overinclusive in important ways. Girgis and Anderson argue that people are engaged in religious activities when they make efforts to align, honor, or find harmony with the transcendent source of being, meaning, and value that there might be – thus explaining why agnostics, atheists, and anti-theists are considered religious under their definition.<sup>164</sup> But this criterion of religion seems problematic insofar as these last three groups would likely understand themselves as *nonreligious* or even *anti-religious*. So, if Girgis and Anderson's definition of religion concludes that self-identified nonreligious and antireligious individuals are religious, then it seems problematic. Moreover, atheists, agnostics, and anti-theists might just simply deny any sort of transcendent source of ultimate value and meaning – and Anderson and Girgis even say as much. But we should note that with these sorts of individuals, there would therefore be no source(s) of being, meaning, and value – nothing “divine” – with which to align their life, honor, or find harmony with. Thus, it seems like their definition must include doing more than just aligning, honoring, or finding harmony with some transcendent source and would have to include something like aligning, honoring, or finding harmony with the truth about the

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<sup>164</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 131. Anderson and Girgis write: “Even those who end up atheist or agnostic are compelled to search by a sense of the value of achieving harmony with whatever ultimate source of meaning there might be.” (131)

absence of anything divine. In such cases, we're back again to counterintuitively defining an individual who denies the existence of anything divine as 'religious.'

Lastly, Girgis and Anderson seem to believe that these investigative efforts into this possible transcendent source(s) must result in something like alignment, honor, or harmony. This criterion also seems problematic insofar as it seems like the religious individual need not arrive at a position of alignment, honor, or harmony in order to be considered religious. For example, some individual might zealously look for the transcendent source of being, meaning, and value that there might be, conclude that atheism is true, and experience disharmony as a result of this realization – and even dishonor this conclusion with contempt and resist aligning with it. Additionally, it would seem odd to categorize an individual that is consistently on a sort of investigative theological quest, working through comparative theological questions, and wrestling through theological conundrums – without ever coming to a final harmony or alignment about any of them – a nonreligious person.

As noted above, this trend of broadly defining religion mirrors a similar tendency to broadly define conscience in the same sort of way such that what is described as 'conscience' ends up being something more akin to quasi-conscience. Martha Nussbaum, for example, claims that 'conscience' is "the faculty in human beings with which they search for life's ultimate meaning."<sup>165</sup> Moreover, she notes that this faculty "is identified in part by

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<sup>165</sup> Martha Nussbaum (2008), 19-20. Nussbaum notes: "This faculty was held to be present in all human beings in such a way as to make human beings equal: anyone who has it (and all humans do) is worthy of boundless respect, and that respect should be equally given to high and low, male and female, to members of the religions one likes and also to members of religions one hates. Conscience is precious, worthy of respect,

what it does – it reasons, searches, and experiences emotions of longing connected to that search – and in part by its subject matter – it deals with ultimate questions, questions of ultimate meaning.”<sup>166</sup> The first and primary objection against Nussbaum’s view is that it is overinclusive. Historically speaking, we’ve seen that conscience has been understood most fundamentally as a person’s capacity to form beliefs about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for him to adopt or not adopt in a particular situation. Nussbaum, however, believes that conscience is instead a person’s capacity to form value beliefs about what is ultimately meaningful in life. Whereas traditional conscience beliefs have been limited to beliefs about what actions or attitudes might be wrong for us to adopt or not adopt, the beliefs of conscience according to Nussbaum are something much more than these beliefs – but it may include them. Nussbaum’s conscience beliefs would include *any* beliefs about what is or is not meaningful to an individual independent of what actions or attitudes they might take to be wrong or not wrong for them to adopt or not adopt. Beliefs about what an individual takes to be meaningful would likely imply or else contain conscience beliefs in the historical sense, but they should not be understood as the same.

Additionally, Nussbaum’s conscience will likely have a hard time squaring away with several of the historical features typically attributed to conscience. First, conscience in

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but it is also vulnerable, capable of being wounded and imprisoned. The tradition [of “liberty of conscience” or “equal liberty of conscience”] argues that conscience, on that account, needs a protected space around it within which people can pursue their search for life’s meaning (or not pursue it, if they choose). Government should guarantee that protected space.” (19)

<sup>166</sup> Martha Nussbaum (2008), 168-69

the historical sense is understood to be the applier and not the supplier of our values. Nussbaum's conscience seems to reverse this role: conscience now seems to be the capacity that primarily supplies our values – or something like our answers to these questions of ultimate meaning. Second, whereas conscience in the historical sense creates obligations for its possessor, Nussbaum's conscience fails to do as much. Perhaps we could understand Nussbaum's conscience as derivatively producing hypothetical imperatives given whatever answers to these questions of ultimate meaning that it produces. But even if we stretch this far, it seems like Nussbaum's conscience falls short of producing the strong, overriding obligations that we see in the historical description.

Third, conscience in the historical sense actively judges your actions or attitudes, confirms whether our actions or attitudes measure up to our values, and delivers acquittals or accusations as a result. As the capacity to just generally “search for life's ultimate meaning,” Nussbaum's conscience falls comparably short of conscience's historical description here as well. Nussbaum doesn't seem to ascribe to conscience the same, traditional cognitive roles of measurer, judge, accuser, acquitter, etc. Lastly, conscience in the historical sense – in addition to possessing a multi-faceted cognitive role – also possesses a multi-faceted affective role. Specifically, the conscience in the historical sense can share knowledge with oneself of a moral defect and produce guilt or remorse, share knowledge with oneself of a moral merit and produce something like pride or joy, or fail to share knowledge with oneself of a moral defect or merit and produce something like a sense of relief. In short, the historical notion of conscience produces more than just “emotions of longing” connected to a search for ultimate meaning or value. In this way,

perhaps Nussbaum's conscience is, generally speaking, affectively much nicer and kinder to its possessor than its historical depiction.

### **B. Conscience as Volitional Necessity**

Lastly, we should note a further definitional trend in the literature on conscience – namely, the tendency to define conscience as “volitional necessity.” Andrew Koppelman, for example, argues that “conscience” is “an imprecise word for [the] internal compulsion to act that is specified only by the possessor's internal psychology.”<sup>167</sup> He thinks a better term for conscience is what Harry Frankfurt calls “volitional necessity.”<sup>168</sup> Frankfurt defines someone who is bound by volitional necessity as someone who 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.”<sup>169</sup> Accordingly, Koppelman thinks that an individual in the grip of a volitional necessity – and so in the grip of conscience by his definition – “cares about something so wholeheartedly that *he cannot form an intention to act in a way that is inconsistent with that care.*”<sup>170</sup> This suggests that volitional necessities are demands that someone feels like they *must* do because they “care about something so wholeheartedly.”

The conception of conscience sketched above differs from Koppelman and Frankfurt's account of volitional necessity in at least two important ways. First, since conscience beliefs are perceived obligations, we can understand them as demands that

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<sup>167</sup> Andrew Koppelman (2009), 234

<sup>168</sup> Andrew Koppelman (2009), 234

<sup>169</sup> Harry Frankfurt (2006), 46

<sup>170</sup> Andrew Koppelman (2009), 216; emphasis added

someone believes they must perform. However, conscience beliefs differ from volitional necessities in that the demands of the former must be satisfied even if the individual does not desire or “care” about performing the demand at all. Overall, this means that desire and duty are largely separable within the demands of conscience but not so separable within volitional necessities. Put another way, volitional necessities are demarcated by second-order desires – or “desires about desires”<sup>171</sup> – such that we not only desire to do X, but we also desire to desire to do X. Demands of conscience, on the contrary, just tell us that we ought to do X – regardless of whether we actually desire to do X or not. Whereas the conscience places requirements on individuals independent of their desires, volitional necessities are just desires all the way down. Unfortunately, when we define conscience as volitional necessity, we risk reducing conscience to what John Henry Newman has referred to as mere “self-will.”<sup>172</sup>

Moreover, because volitional necessities “can arise from anything at all that a person cares about,” it is possible for the object of the volitional necessity to be amoral or value-neutral.<sup>173</sup> Another difference thus arises: whereas the demands of conscience cannot be value neutral, the demands of volitional necessities “need not have any connection to...value.”<sup>174</sup> Thus, the value-neutral nature of volitional necessities stands in contrast with the value-dependent nature of demands of conscience beliefs. Whereas volitional necessities are value-neutral desires to act in a way that is consistent with that

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<sup>171</sup> Andrew Koppelman (2009), 234

<sup>172</sup> John Henry Newman (1897), 250

<sup>173</sup> Andrew Koppelman (2009), 216

<sup>174</sup> Andrew Koppelman (2009), 216



care, the beliefs of conscience are value-dependent requiring us to act in a way that is consistent with them. Moreover, this second difference between the demands of conscience and the volitional necessities is important when discussing the value of moral integrity before the law: if a volitional necessity is thwarted by law, it may not necessarily involve an imperilment to moral integrity because it is possible that no moral values were involved. But when a demand of conscience is thwarted by law, it necessarily involves an imperilment to moral integrity because moral values must always be involved. Insofar as the demands of conscience require that individuals do things that they otherwise might not want to do and necessarily involve imperilments to moral integrity, they should be understood as different from volitional necessities.

### **C. The Christian Conscience**

The idea that the conscience is a value-neutral capacity that is also neutral toward religious values may be challenged by religious believers. Not only so, but it is also true that majority of religious believers engaged in discussions about the freedoms of religion and conscience in the United States are explicitly Christian. Accordingly, it thus seems appropriate to engage with the concept of conscience as understood by Christians in order to see if there is a fundamental disagreement with the account sketched above, and if so, where the disagreement may lie. In what follows, I will show that even the most conservative Christian accounts of conscience fail to sufficiently deviate from the account of conscience sketched above. As such, I will conclude that even the most conservative Christians have no reason to object to the account of conscience as a value-neutral capacity that is neutral toward religious values or object to the legal implications of adopting such an account.

I will take as the most representative account of the conscience from a conservative Christian perspective the account advanced by Andrew Naselli and J. D. Crowley.<sup>175</sup> Their definition of the conscience – which is fundamentally constituted by verses from the New Testament<sup>176</sup> – is “your consciousness of what you believe is right and wrong.”<sup>177</sup> When we compare this to the first feature of Sorabji’s definition of conscience – namely, that it is a person’s *belief* or else *capacity* to form beliefs about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for him to adopt or not adopt in a particular situation – we see that they are very similar. Worth noting, however, is the fact that Naselli and Crowley simply emphasize the conscience *beliefs* that the *capacity* of conscience produces in their definition of conscience. Of course, their definition is not incompatible with, but perhaps only reflects one aspect of Sorabji’s definition of conscience – which remains agnostic about whether conscience refers specifically to “the things believed or the believing of them.” A simple synthesis of their views, which is my considered view, is as follows: *conscience* refers to the *capacity* to form beliefs about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for

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<sup>175</sup> Andrew Naselli and J. D. Crowley (2016)

<sup>176</sup> Specifically, Naselli and Crowley (2016) note – as Sorabji did – that in the New Testament, conscience translates as *syneidēsis*, “a word that occurs thirty times in the Greek New Testament...twice in Acts, twenty times in Paul’s letters, five times in Hebrews, and three times in 1 Peter.” (32-33) Their views also align with Sorabji’s concerning the Old Testament usage of conscience as well: “*Conscience* is also one of the few theologically significant New Testament words that lacks a parallel word or group of words in the Hebrew Old Testament. But the concept of conscience is certainly in the Old Testament even if no word itself is present.” (32-33)

<sup>177</sup> Andrew Naselli and J. D. Crowley (2016), 42

him to adopt or not adopt in a particular situation and *conscience beliefs* or *the beliefs of conscience* just refer to these *beliefs*. The case for the overall similarity of both accounts is all the more justified when we emphasize the second feature of Sorabji's conscience in conjunction with the first: that these beliefs require *personal* self-awareness and are in the first instance beliefs about what would be wrong for *oneself*. Both definitions overall emphasize that conscience involves beliefs that we are aware of concerning what actions or attitudes are right or wrong for us to adopt – either in the past, present or future – in a given situation.

Naselli and Crowley also claim that their account of conscience implies that conscience can – and oftentimes does – produce “different results for people based on different moral standards.”<sup>178</sup> They claim that “what you believe is right and wrong is not necessarily the same as what actually *is* right and wrong...So someone's ‘clear’ conscience may actually be evil because it is based on immoral standards.”<sup>179</sup> In essence, what they are highlighting here is something that Sorabji has also noted: that we can hold different beliefs about what is right or wrong for us because we hold to different “moral standards” – or to use Sorabji's language, different moral values. Where Naselli and Crowley seem to differ from Sorabji is in their belief that there is, in fact, some *correct* moral standard or set of values – and in particular, they believe that the correct moral standard or set of values are uniquely Christian values and the moral standards depicted in the Bible.<sup>180</sup> Sorabji might

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<sup>178</sup> Andrew Naselli and J. D. Crowley (2016), 42

<sup>179</sup> Andrew Naselli and J. D. Crowley (2016), 42

<sup>180</sup> Naselli and Crowley (2016) adopt the Pauline position depicted in Romans 2:15: “Gentiles show, by obeying many of God's moral demands even though they have no access to God's revealed law (Romans 2:14),

also believe that there is some correct set or standard of values, but he stops short of claiming as much in his account of conscience. Relatedly, both accounts emphasize that the values that conscience applies – and thus the beliefs that it produces – can, do, and should change over time.<sup>181</sup> Nevertheless, it's clear that both accounts of conscience emphasize the value-neutrality of conscience in that conscience can produce different beliefs about what's right or wrong for us depending on what moral values or standards we adopt – Christian or otherwise.

Naselli and Crowley might disagree with Sorabji on a different point related to conscience, but it seems like even this disagreement should not lead a conservative Christian to reject Sorabji's basic account of conscience as a value-neutral capacity that is also neutral toward religious values. In particular, Naselli and Crowley argue that the origins of the conscience stem from God insofar as God created us in his image with this moral capacity.<sup>182</sup> They write:

You're made in the image of God, and God is a moral God, so you must be a moral creature who makes moral judgments. And what is conscience if not

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that they have a certain consciousness of those moral standards – a consciousness that is clear enough to allow their own mind to either accuse or excuse their actions. It's even clear enough for God to use as evidence of judgment day (Romans 2:16).” (34)

<sup>181</sup> Andrew Naselli and J. D. Crowley (2016): “Your conscience is your consciousness of what you believe is right and wrong *at any given point in time*, and it can change for a complex of reasons, good and bad.” (43)

<sup>182</sup> For a contemporary defense of this claim, see Tapio Puolimatka (2017).

shining the spotlight of your moral judgment back on yourself, your thoughts, and your actions.<sup>183</sup>

In arguing that our conscience is a God-given capacity, Naselli and Crowley might claim that conscience is therefore not secular. But this shouldn't matter much when looking at the particular nature and value of conscience – especially when considering the legal implications of its nature and value. God-given or otherwise, the nature of conscience as a value-neutral capacity that is also neutral between religious values remains consistent between the above accounts regardless of its origin story. And as noted above, the legal value of conscience seems to depend more on possessing and exercising this capacity, not on whether this capacity produces true beliefs. So, it seems that even the most conservative Christians have no reason to resist the account of conscience as a value-neutral capacity that is neutral toward religious values – or reason to object to the legal implications of adopting this account.

## **VI. Conclusion**

In this chapter, I developed and defended an account of conscience against competing notions in order to better navigate the narrow version of the specialness question in subsequent chapters. My account of 'conscience' is historically informed, predicated upon the work of Richard Sorabji. The account is not an attempt to define a neat and tidy set of necessary and sufficient conditions for 'conscience,' but is instead an attempt to capture the more historically central or core aspects of the concept. Once I formulated an account of 'conscience,' I first compared, contrasted, and defended this

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<sup>183</sup> Andrew Naselli and J. D. Crowley (2016), 23

account of conscience against common, competing notions of conscience present in the contemporary discussion of the concept. I ended the chapter by comparing and contrasting this historically grounded account of conscience with a more conservative Christian account of conscience.

### CHAPTER 3: CATEGORICITY AND INSULATION FROM EVIDENCE

*The Puritan mistake is sometimes still with us – religious liberty for my religion, and for sufficiently similar religions, but not for religions or religious views that are too different or too unacceptable.*

– Douglas Laycock, *“The Religious Exemption Debate,”* p. 174

#### **I. Introduction**

In the next two chapters, I provide support for my central claim by analyzing several possibly demarcating features of religious conscience beliefs taken to be legally relevant by theorists in the field. Overall, I contend that there are no features held by either kind of conscience that give us good grounds to adopt an Inegalitarian Response to the original specialness question. Instead, I argue that a comparative analysis between the two kinds of conscience actually gives us good reason to adopt an Egalitarian Response to the specialness question since they are sufficiently similar in nature.

In this chapter in particular, I narrow in on two of Brian Leiter’s main features of the religious conscience: categoricity and insulation from evidence respectively. After initially interacting with Leiter’s categoricity feature, I turn my attention to Leiter’s arguments that religious beliefs are insulated from evidence, and as a result, are not worthy of special legal treatment. I argue that he fails to show that religious conscience beliefs are both in principle responsive to empirical evidence and in practice typically more insulated from this evidence than secular conscience beliefs. If I am right about this, then Leiter fails to sufficiently distinguish the religious conscience from the secular conscience and fails to answer the “central puzzle” of his book *Why Tolerate Religion?* Second, I look at whether or not it is plausible to understand the religious conscience as insulated from other forms of

evidence. Following the research of social-psychologist Jonathan Haidt, I argue that, typically, both forms of conscience seem to be similarly insulated from a relevant kind of evidence – namely, moral argumentation. I also show that, while it seems as though the religious conscience usually draws from a larger set of moral values when compared to the secular conscience, this should make no legal difference overall.<sup>184</sup> Lastly, I consider whether religious conscience beliefs uniquely appeal either directly or indirectly to private evidence. In response, I conclude the chapter by offering a few cursory arguments why we might prefer content-neutral approaches without making a complete case – hopefully curtailing any lingering questions about comparative evidence.

## II. Categoricity

The first feature that is supposed to “single out ‘religious’ states of mind from others”<sup>185</sup> is what Brian Leiter calls the *categoricity* feature. By this, Leiter thinks that religious claims of conscience place heavy demands on action that “must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up.”<sup>186</sup> Additionally, Leiter contends that “those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious.”<sup>187</sup> While this feature is commonplace in most major religions, it is plausibly not unique to religious states of mind. In fact, perhaps the most salient feature of nonreligious moral systems is that the demands of morality are

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<sup>184</sup> See Joseph Dunne (2018) for the previously published portions of this chapter.

<sup>185</sup> Brian Leiter (2013), 33

<sup>186</sup> Brian Leiter (2013), 34

<sup>187</sup> Brian Leiter (2013), 38



categorical insofar as our prior interests and desires must be overridden by some superseding principle, duty, rule, etc.<sup>188</sup> As Kenneth Himma remarks:

On any ordinary pretheoretical understanding of morality, the demands of morality are categorical. Morality is the kind of thing that characteristically requires sacrifice of prudential interests. This is most obviously seen in negative moral norms, which prohibit the commission of certain acts. The norm “Do not kill innocent persons” requires a prudential sacrifice of at least this much: I must give up an option to kill innocent persons no matter what I might gain from it.<sup>189</sup>

Incidentally, Leiter contends that categoricity is a necessary feature “of all claims of conscience, not only religious claims”<sup>190</sup> and that “an experience of categoricity is central to anything that would count as a claim of conscience.”<sup>191</sup> His mature position, then, is that all conscience beliefs are, in principle, categorical, but in practice “those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are

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<sup>188</sup> Kenneth Himma (2014), 4

<sup>189</sup> Kenneth Himma (2014), 4

<sup>190</sup> Brian Leiter (2013), 34

<sup>191</sup> Brian Leiter (2013), 148, fn. 17. Interestingly, squaring these claims away with Leiter’s earlier claim that “those who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious” might be tough. If the people who genuinely conduct their lives in accord with the categoricity of the moral demands they recognize are overwhelmingly religious, then what do we make of nonreligious people whose conscience beliefs are also categorical? According to Leiter, it seems like there just aren’t many nonreligious people genuinely conducting their lives in accord with the categoricity of the moral demands they recognize then.

overwhelmingly religious.” Michael McConnell – a critic of Leiter – likewise argues that “the demands of right and wrong may arise from nonreligious as well as religious systems of belief.”<sup>192</sup> If this is correct, then categoricity should be understood as a necessary condition for all claims of conscience, not just the religious conscience. Furthermore, it would be a mistake to understand categoricity as a sufficient condition for the religious conscience, for possessing this feature would not be enough to make some claim of conscience uniquely religious. Since this feature is shared by both kinds of conscience, something further is needed to differentiate them – e.g., Leiter’s insulation from evidence feature.

Additionally, the view that categoricity is a necessary feature of both forms of conscience is supported by the account of conscience developed in the previous chapter as well. Remember that one of the core features of conscience is that it creates a strong obligation for its possessor to follow. Oddly, Sorabji also categorizes this obligation as one that is “not always an overriding obligation, since there can be counter-obligations, so that one is in a double bind, wrong if one does follow conscience and wrong if one does not.” Orestes of ancient Greek tragedy helps to illustrate the sort of morally binding situation that Sorabji has in mind where Orestes believed himself to be in the wrong if he did not avenge his father’s death, but also in the wrong if he killed his mother – the murderer of his father. So how does Sorabji’s description square with the categoricity of conscience, especially when the obligation that conscience produces is not always an “overriding obligation?”

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<sup>192</sup> Michael McConnell (2013), 783

Sorabji contends that in these sorts of situations, it is “not that one duty is merely prima facie, and that it is cancelled out by the other.”<sup>193</sup> To the contrary, it seems like he thinks it is possible to possess competing conscience beliefs concerning what is wrong or not wrong for us to do or not do such that we are “damned if we do or damned if we don’t” so to speak. This would not necessarily imply that either conscience belief fails to be categorical, however. In fact, the reason these moral double binds seem to be so sticky and troubling is precisely because the possessor feels as though both beliefs “must be satisfied no matter what,” regardless of their “antecedent desires and no matter what incentives or disincentives the world offers up” – which would include satisfying a competing belief of a similar nature. So, while we can still claim that conscience produces categorical obligations, we just might not consider them totally “overriding” only because our conscience can produce competing categorical obligations that might sometimes interfere with each other.

### **III. Insulation from Evidence**

By “insulation from evidence,” Leiter thinks that religious beliefs “do not answer ultimately to evidence and reasons” – and he takes this feature as the primary delineator of religious conscience beliefs from other conscience beliefs.<sup>194</sup> Exactly how might religious states of mind fail to answer to evidence and reasons? There seem to be two ways. On the one hand, insulation from evidence could be understood as “a property of beliefs which, by virtue of their content, cannot be validated or invalidated by empirical evidence.”<sup>195</sup> Understood in this way, the objects of insulation are the religious conscience *beliefs*

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<sup>193</sup> Richard Sorabji (2014), 67

<sup>194</sup> Brian Leiter (2013), 34

<sup>195</sup> François Boucher and Cécile Laborde (2016), 496

themselves, not necessarily the religious *believer*. On the other hand, “insulation from evidence” could be understood as an individual epistemic attitude or state of mind that believes despite the existence of discrediting evidence. Understood in this way, the object of insulation is the religious *believer*, not the religious conscience *beliefs*.

Unfortunately, Leiter is not initially clear about which view he holds. At one point, he claims that “insulation from evidence...will be understood as a claim about the religious doctrine rather than about the typical epistemic attitudes of believers.”<sup>196</sup> At first, it seems as though Leiter thinks religious conscience beliefs are *in principle* insulated from evidence. But at another point, he claims that “the distinctively religious state of mind is that of *faith* – that is, believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it.”<sup>197</sup> Here, he seems to adopt the other view: religious conscience beliefs are just *in practice* more insulated from evidence when compared to their nonreligious counterparts. Thankfully, Leiter clarifies his position in a later piece: “My considered view, in fact, is that it is Believer Insulation that is crucial to the second of the three characteristics of religion, though, of course, in some cases Believer Insulation will not be a problem if the beliefs in question are marked by Belief Insulation.”<sup>198</sup> Given his clarifications, we can conclude that Leiter, in fact, holds the “Believer Insulation” position (i.e., in *practice* insulation) – not the “Belief Insulation” position (i.e., in *principle* insulation).

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<sup>196</sup> Brian Leiter (2013), 34–35

<sup>197</sup> Brian Leiter (2013), 39

<sup>198</sup> Brian Leiter (2016), 548

François Boucher and Cécile Laborde argue that Leiter faces a dilemma about this allegedly demarcating feature no matter which view he holds. They contend that if Leiter accepts Believer Insulation, then “he cannot distinguish religion from fanatical adherence to any set of beliefs.”<sup>199</sup> The same seems true when we narrow our range from ‘religion’ to ‘religious conscience:’ under the first horn, the religious believer refuses to let available evidence stand against their religious *conscience* beliefs, and as such, it would be difficult to differentiate them from any other sort of fanatical adherence to some set of *value* beliefs. If Leiter accepts Belief Insulation – and believes that “religious beliefs...neither *claim support from empirical evidence of the sciences* nor *purports to be constrained by empirical evidence*”<sup>200</sup> – Boucher and Laborde contend that then “he cannot distinguish secular from religious conscientious commitments.”<sup>201</sup> If the dilemma holds, then it doesn’t matter which view Leiter holds: his “insulation from evidence” feature fails to demarcate the religious conscience from its secular counterpart in either case.

The second horn of the dilemma exists insofar as Boucher and Laborde take both kinds of conscience to be, in principle, insulated from *empirical* evidence. To see why they think this, they have us consider two different moral imperatives adopted by a religious group and by a secular group – arguing that both are categorical and “arguably insulated from empirical evidence and standards of justification found in natural science.”<sup>202</sup> They initially consider examples of religious conscience beliefs, e.g., the Buddhist who doesn’t

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<sup>199</sup> François Boucher and Cécile Laborde (2016), 497

<sup>200</sup> Brian Leiter (2013), 47

<sup>201</sup> François Boucher and Cécile Laborde (2016), 497

<sup>202</sup> François Boucher and Cécile Laborde (2016), 502

eat meat because it “spreads fear among living creatures and goes against the virtue of compassion” and the Quaker whose pacifism is grounded in the claim that “all wars and outward fighting proceed from men’s lust.”<sup>203</sup> Then, they explain that the secular analogs to these religious conscience beliefs – namely, that “violence and the use of weapons to kill other human beings is always wrong” and “that life has intrinsic value” – also “ground an ethical commitment...while being just as impossible to prove with empirical evidence and the tools of modern science.”<sup>204</sup> Can we justifiably believe that both forms of conscience are, in principle, insulated from empirical evidence?

### **A. Empirical Evidence**

To answer this “in principle” question, we should return to the nature of conscience itself. Remember that Sorabji claimed that the conscience produces value beliefs about which past, present, or future actions or attitudes would be wrong or not wrong for us to adopt or not adopt by applying certain values to our particular context.<sup>205</sup> This means that the evidential or justificatory basis on which conscience beliefs stand are our *moral values*. We adopt values, and those values – at least in some way – explain why we hold the conscience beliefs we do, serve to justify the conscience beliefs that we hold, and act as the evidence that our conscience beliefs appeal to. Of course, these values can – and often do –

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<sup>203</sup> François Boucher and Cécile Laborde (2016), 502

<sup>204</sup> François Boucher and Cécile Laborde (2016), 502

<sup>205</sup> Richard Sorabji (2014), 215-16

run the risk of reflecting merely local conventions, customs, or superstitions, and therefore require constant reflection and awareness of other values as Sorabji notes.<sup>206</sup>

If this is true, then why does Leiter think that a greater, in practice insulation from empirical evidence is the distinguishing feature of the religious conscience? I suspect that a methodological mistake by Leiter is partly to blame here. In his analysis, Leiter broadly compares religious beliefs to conscience beliefs instead of comparing religious and nonreligious conscience beliefs in particular. More specifically, though it seems clear from his hypothetical scenario involving the Sikh and rural boy that Leiter had the *narrow version* of the specialness question in mind – comparing secular and religious conscience – his method for answering this question nevertheless operated as though he was trying to answer the *broad version* of the question – comparing religion and conscience more broadly. This insight is supported by the fact that Leiter’s method was to uncover the general “features of religious belief that...distinguish religious beliefs from other kinds of belief” in order to see whether those features warrant toleration.<sup>207</sup> So, when Leiter argues that ‘religious beliefs’ are insulated from empirical evidence, he seems to have a wider range of religious beliefs in mind, which include ontological and epistemological beliefs as well as conscience beliefs. In fact, when addressing this feature, Leiter relies exclusively on examples highlighting the insulation from empirical evidence that uniquely ontological or

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<sup>206</sup> Richard Sorabji (2014), 220. We should note too that the justificatory process involved with conscience beliefs is not altogether uncommon, for gauging the evidence for moral beliefs in ethics more broadly often involves examining the support they get from things like moral principles or values, moral theories, and considered moral judgments or intuitions.

<sup>207</sup> Brian Leiter (2013), 27

epistemological religious beliefs seem to enjoy – e.g., arguments for the existence of God, testimonial evidence supporting the belief in the resurrection of Jesus Christ, etc. Not once does he cite an example of a uniquely religious conscience belief that might be insulated from empirical evidence. Thus, it seems as though at least part of the reason that Leiter included this feature was in response to thinking about ontological and epistemological religious beliefs as opposed to religious conscience beliefs specifically.

### **B. Religious Ontological and Epistemological Beliefs**

We should pause for a moment in order to highlight the fact that the view that religious ontological and epistemological beliefs are insulated, in practice, from empirical evidence is highly contentious.<sup>208</sup> Unfortunately, Leiter just assumes this view and fails to offer any substantive arguments in favor of his particular claim – even in spite of known counterexamples to his position. Leiter writes:

There are, for example, “intellectualist” traditions in religious thought – William Paley’s “natural theology” or neo-Thomist arguments come to mind – according to which religious beliefs (for example, belief in a creator, or as in American recently, belief in “an intelligent designer”) are, in fact, supported by the kinds of evidence adduced in the sciences, once that evidence is rightly interpreted.<sup>209</sup>

First, we should note that when Leiter talks about “religious beliefs” here, he cites as an example the belief that God exists and the belief in an intelligent designer – both of which are examples of explicitly ontological claims. Second, we should also note that Leiter

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<sup>208</sup> Scholars have challenged Leiter on this point, e.g., Christopher Eberle (2014) and Michael Paulsen (2014).

<sup>209</sup> Brian Leiter (2013), 39



tries to be charitable here, noting that “[i]t is doubtful, though, whether these intellectualist traditions capture the character of popular religious belief, the typical epistemic attitudes of religious believers.”<sup>210</sup>

But even if we table the comparison to popular religious beliefs, Leiter argues that these “intellectualist traditions in religious thought might still be thought of as *insulated from evidence*.”<sup>211</sup> First, he notes that “it is dubious (to put the matter gently) that these positions are really serious about following the evidence where it leads, as opposed to manipulating it to fit preordained ends.”<sup>212</sup> As noted above, Leiter just seems to assume that this is the case without citing any evidence or advancing a substantive argument – even though there are counterexamples to this claim. As Michael McConnell highlights:

But religious belief has been attested to by millions of seemingly intelligent and rational people over long periods of time, who report that they have experienced, in some way, transcendent reality. There is even, as Leiter admits, a “large literature in Anglophone philosophy devoted to defending the rationality of religious belief.” Leiter chooses to disregard this testimonial evidence, along with its philosophical defense, without so much as “address[ing] . . . in any detail”—really, at all—the arguments that are offered. Why? The only reason he supplies is that the “dominant sentiment among other philosophers” is that belief in God is “unsupported by reasons

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<sup>210</sup> Brian Leiter (2013), 39

<sup>211</sup> Brian Leiter (2013), 40

<sup>212</sup> Brian Leiter (2013), 40

and evidence.” With all respect, there is no reason to think that members of modern philosophy faculties have any special insights about God.<sup>213</sup>

The irony here should not be lightly noted: Leiter’s claim that intellectualist traditions of religious thought are insulated from evidence is advanced without sufficient evidence and without regard for relevant evidence to the contrary.

Second, Leiter notes that “in the case of the sciences, beliefs based on evidence are also revisable in light of the evidence; but in the intellectualist traditions in religious thought just noted, it never turns out that the fundamental beliefs are revised in light of new evidence.”<sup>214</sup> Again, Leiter just seems to assume that this is the case without citing any evidence or advancing any substantive argument – even though there are counterexamples here as well. As Michael McConnell notes:

Developments in biology, physics, linguistics, archeology, and other disciplines have had profound impact on Biblical hermeneutics and theology in mainstream Protestantism and Roman Catholicism, and ‘practical reason’ has played a major role in natural law thinking since at least Thomas Aquinas. To be sure, some religious traditions are more insulated from scientific developments than others. The Navajo creation story, for example, is impervious to archeological and linguistic evidence that the tribe migrated to the Southwest from Canada only a few centuries before the arrival of Europeans, and fundamentalist Christian belief in the historicity of Noah’s flood and the literal six-day creation, depending on how these ideas are

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<sup>213</sup> Michael McConnell (2013), 789

<sup>214</sup> Brian Leiter (2013), 40

understood, is much the same. But to say that ‘insulation from evidence’ is a defining characteristic of ‘all’ (or even most) religions is simply false. Religion is constantly changing, and constantly interacting with the culture and other ways of understanding the world.<sup>215</sup>

Concerning these “intellectualist” religious traditions, Leiter simply concludes: “The whole exercise is one of post-hoc rationalization, as is no doubt obvious to those outside the sectarian tradition.”<sup>216</sup>

As I see it, the sword cuts both ways: what seems obvious to those inside the sectarian tradition is not obvious to those outside the sectarian tradition either. As McConnell notes, “no religious believer would recognize [Leiter’s] description.”<sup>217</sup> McConnell writes:

Religious believers do not think they are “insulating” themselves from all the relevant “evidence.” They think they are considering evidence of a different, nonmaterial sort, *in addition to* the evidence of science, history, and the senses. It would be more accurate, and less loaded, to amend this second part of Leiter’s definition to say that religion is *a system of belief in which significant aspects are not based on science or common sense observations about the material world.*<sup>218</sup>

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<sup>215</sup> Michael McConnell (2013), 787

<sup>216</sup> Brian Leiter (2013), 40

<sup>217</sup> Michael McConnell (2013), 786

<sup>218</sup> Michael McConnell (2013), 786-87

If religious believers are insulated from the “only epistemically relevant considerations,”<sup>219</sup> then it’s no surprise that Leiter reaches the conclusion that he does. McConnell continues:

In a footnote, Leiter acknowledges that “of course” there may be matters such as the “meaning of life” that “are insulated from evidence only in the sense that no scientific evidence would seem to bear on them.” But he immediately dismisses the importance of this observation on the ground that “[s]uch beliefs are not my concern here, mainly because they are not distinctive to religion.” What could he be thinking? His entire argument is built around the idea that religion is “a *culpable* form of unwarranted belief” precisely because of its “insulation from evidence.” If it turns out that religion’s “insulation from evidence” is attributable to the fact that “no scientific evidence bears” on many questions of a religious nature, then religious belief cannot be criticized on these grounds. There is no reason to apply the “ordinary epistemic standards” of science and material observation to questions on which they do not bear. If Leiter is confining his “concern” to beliefs on which “scientific evidence would seem to bear,” he is leaving out most of what is central to religion, including beliefs underlying almost all claims of religious conscience, which are the subject of his book.<sup>220</sup>

Overall, then, Leiter’s view just seems to be “a sectarian premise, predicated on a questionable view about evidence”<sup>221</sup> – but admittedly, so is the view that there are other

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<sup>219</sup> Brian Leiter (2013), 57

<sup>220</sup> Michael McConnell (2013), 788

<sup>221</sup> Michael McConnell (2013), 786

viable forms of evidence in addition to common sense and the sciences. Of course, Leiter is free to “confine himself to whatever categories of evidence may strike him as persuasive, but he cannot reasonably label as ‘culpable’ or ‘unwarranted’ the sincere conclusion of many persons, including thinkers of the first rank, that there are nonmaterial aspects of reality supporting religious belief.”<sup>222</sup>

So, the otherwise obvious, additional evidence to those inside the sectarian tradition might not be so obvious to those outside the sectarian tradition such that those on the outside might be the ones lacking – not those on the inside. But even if Leiter is right that religious ontological and epistemological beliefs are, in practice, more insulated from empirical evidence – and those on the inside of sectarian traditions are wrong – it might not matter much to the original specialness question. McConnell argues that, “even for those who agree with Leiter as a matter of personal conviction that there is no persuasive evidence supporting the truth of religious belief, but agree with Madison and Washington that the truth of religion is not a subject on which the government should take a stand, Leiter’s conclusions do not follow, because they rest on the view that the state should treat religious beliefs and arguments as lacking evidentiary warrant.”<sup>223</sup> In short, McConnell argues that the truthfulness of religious beliefs – here, specifically ontological or epistemological religious beliefs – is just not an issue that the government should take a

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<sup>222</sup> Michael McConnell (2013): “A color-blind person might think the idea of color is bunk, because the evidence of his own eyes fails to reveal it, but that does not entitle him to assume that those who see color are engaged in a culpable form of unwarranted belief.” (788)

<sup>223</sup> Michael McConnell (2013), 789

stand on. Instead, it is “better to proceed on the premise that people may reasonably disagree about the truth or falsehood of religious claims.”<sup>224</sup>

### C. Religious Conscience Beliefs

Nevertheless, does Leiter think that religious conscience beliefs are, in practice, insulated from empirical evidence in the way that their ontological and epistemological counterparts are alleged to be? When broadly comparing ‘religion’ and ‘morality,’ we get close to Leiter’s answer to this question:

Is moral belief necessarily insulated from reasons and evidence? [F]or cognitivist realists like Richard Boyd and Peter Railton...moral judgments are not insulated from reasons and evidence as they are understood in the sciences; indeed, just the opposite. So on this view, morality is not at all like religion; it answers to reasons and evidence – and answers successfully! Noncognitivist antirealists, by contrast, conceive of moral judgments not as expressing beliefs...but as expressing mental states that are not truth-apt, such as feelings. On this picture, then, moral judgments are by their nature insulated from reasons and evidence; just as feeling cheerful or sad is not answerable to reasons or evidence, so too with moral judgment. Religious judgments are still different, on this account, since some religious judgments *do express beliefs* and so, in principle, could be answerable to reasons and evidence, but are nonetheless taken to be insulated from them. So on either

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<sup>224</sup> Michael McConnell (2013), 789

of the two main contenders for a credible metaphysics and semantics of morality, morality is still different from religion.<sup>225</sup>

A few points about this paragraph are in order. First, Leiter actually presents a false-dichotomy here since it is possible – indeed, some say plausible – to hold non-naturalist versions of metaethical cognitivism.<sup>226</sup> This point is important when you consider that non-naturalist forms of cognitivism involve some degree of insulation from empirical evidences. Second, since Leiter’s discussion about moral or religious beliefs focuses on their insulation from *empirical* evidence, his views on their insulation from other forms of evidence – e.g., *conceptual* evidence – remain an open question. Third, this paragraph nicely illustrates Leiter’s initial ambiguity about whether he holds Believer or Belief insulation. When discussing metaethical cognitivism, Leiter seems to hold Belief Insulation: “So on this view, morality is not at all like religion [because] it answers to reasons and evidence.” Yet, when discussing metaethical noncognitivism, Leiter seems to hold Believer Insulation: “Religious judgments are still different, on this account, since some religious judgments *do express beliefs* and so, in principle, could be answerable to reasons and evidence, but are nonetheless taken to be insulated from them.” Lastly, this paragraph also illustrates the confusion that results from Leiter’s methodological mistake. Leiter understands the “central puzzle” of *Why Tolerate Religion?* to be “why the state should have to tolerate

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<sup>225</sup> Brian Leiter (2013), 50-51

<sup>226</sup> This objection was raised by Boucher and Laborde (2016) as well: “This argument is fallacious since it presents us with a false dichotomy and misrepresents both realism and non-cognitivism. First, Leiter relies on a false dichotomy. Several strands of moral realism view moral propositions as referring to non-natural moral facts such that the truth and falsity of moral judgements cannot be established by appealing to empirical evidence and scientific methods.” (503)

exemptions from generally applicable laws when they conflict with religious obligations but not with any other equally serious obligations of conscience."<sup>227</sup> But as we noted above, his method for answering this puzzle oddly focuses on 'religion' more broadly – not religious conscience specifically. In other words, Leiter mistakenly answers the *narrow version* of the specialness question through *broad version* methodology – thus disallowing him from straightforwardly addressing the narrow question.

Given Leiter's claims up to this point, it doesn't seem like he takes much of a stand on whether or not religious conscience beliefs are, in practice, insulated from empirical evidence even though he repeatedly claims that religious beliefs, in general, are. Again, it seems like his methodological mistake prevents making this distinction. Leiter must believe that religious conscience beliefs respond to the same kinds of evidences – and in roughly the same way – as other kinds of religious beliefs if he believes that religious conscience beliefs are, in practice, largely insulated from empirical evidence. Unfortunately, Leiter gives us no reason to believe that religious conscience beliefs respond to the same kind of evidence as their ontological or epistemological counterparts allegedly do. He only thinks that religious beliefs are, in general, insulated from empirical evidence in practice – which may or may not include religious conscience beliefs.

In fact, when contrasting 'morality' and 'religion,' Leiter actually seems to give us reasons to believe that the opposite is true: namely, that religious beliefs – understood as ontological or epistemological religious beliefs – and moral beliefs – which would include religious conscience beliefs – may differ with respect to evidence.

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<sup>227</sup> Brian Leiter (2013), 3



Consider this: if one is a metaethical cognitivist as Leiter describes it above – and believes that moral judgments are, in principle, truth-apt and responsive to empirical evidence as he assumes – then moral beliefs (which include conscience beliefs) would be distinct from religious ontological and epistemological beliefs when those religious beliefs are, in principle, insulated from empirical evidence. Interestingly, a straightforward reading of Leiter in the above paragraph seems to suggest that he holds this kind of Belief Insulation position: after all, moral beliefs are “not at all like religion” insofar as moral belief “answers to reasons and evidence as they are understood in the sciences” and religion does not.<sup>228</sup> Under this sort of scenario, the *conscience* part of the religious conscience would be in principle open to empirical evidence, but the *religious* part of the religious conscience would not. While we know that Leiter actually holds the Believer Insulation position,<sup>229</sup> it is not similarly clear whether he is a metaethical cognitivist as described above.<sup>230</sup> So, a straightforward reading indicates that Leiter takes moral and religious beliefs to differ with respect to evidence. But an adjusted reading makes it unclear whether or not Leiter thinks that religious conscience beliefs are insulated from empirical evidence the way that their ontological and epistemological counterparts are alleged to be.

Leiter argues that if one is a metaethical noncognitivist – and believes that moral judgments are, in principle, *not* truth-apt and responsive to empirical evidence – then

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<sup>228</sup> Brian Leiter (2013), 50-51

<sup>229</sup> Brian Leiter (2016), 548

<sup>230</sup> Brian Leiter (2013), 152. Leiter clearly express his views about non-naturalist versions of moral realism in a footnote: “Nonnaturalist versions of moral realism are, in my opinion, mere artifacts of academic philosophy, which, through specialization, encourages the dialectical ingenuity that results in every position in logical space finding a defender, no matter how bizarre.” (152)

moral beliefs (including conscience beliefs) are still distinct from religious beliefs. His defense here is to argue that, contrary to noncognitivist moral judgments, at least some religious beliefs are nevertheless, in principle, truth-apt and answerable to empirical reasons and evidence. Again, he seems to mean the ontological and epistemological kind, for these are the only kind of religious belief cited for example when discussing the insulation feature. Under his second scenario, the *conscience* part of the religious conscience would not be in principle open to empirical evidence, but the *religious* part of the religious conscience would. As was the case before, we know that Leiter holds the Believer Insulation position,<sup>231</sup> but we don't know whether he is a metaethical noncognitivist. So, under this scenario, it remains unclear whether Leiter thinks that religious conscience beliefs are insulated from empirical evidence in the way that their ontological and epistemological counterparts are alleged to be as well.

Even though Leiter repeatedly claims that religious beliefs are, in general, insulated from empirical evidence, he nevertheless fails to clearly show that religious conscience beliefs are, in practice similarly insulated from empirical evidence. It seems like we can only assume that they are if we also assume that Leiter is a metaethical cognitivist of some kind and that religious conscience beliefs are, in principle, truth-apt and answerable to empirical evidence. If Leiter were to adopt a form of metaethical cognitivism, then the specific moral judgments produced by either kind of conscience would amount to moral beliefs that are, in principle if not always in practice, truth-apt and responsive to such

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<sup>231</sup> Brian Leiter (2016), 548

evidence.<sup>232</sup> In such a case, Leiter would *still* need to show that religious conscience beliefs are somehow more insulated from empirical evidence than their nonreligious counterparts – and more insulated such that differential legal treatment would be justified. In the absence of an argument from Leiter showing that religious conscience beliefs are both in principle responsive to empirical evidence *and* in practice typically more insulated from this evidence in a legally differentiating way when compared to their nonreligious counterparts, we should suspend judgment on any conclusion he draws about their respective legal treatment.

Perhaps the greatest implication of my critique is that, by failing to show that the religious conscience is both in principle responsive to empirical evidence and in practice typically more insulated from this evidence than secular conscience in a way that justifies differential legal treatment, Leiter has failed to answer the “central puzzle” of *Why Tolerate Religion?* His conclusion that the state has no principled reason to grant exemptions from generally applicable laws to “religious obligations but not [to] any other equally serious obligations of conscience” rests on the assumption that religious conscience beliefs are

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<sup>232</sup> Brian Leiter (2016), 550. The idea here is that religious beliefs typically involve moral judgments, and as a result, Leiter’s approach to moral judgments as either cognitive or noncognitive would apply to religious moral judgments as well. Leiter surprisingly thinks that “[t]his is correct, but also irrelevant. For what is crucial is that all religions involve non-moral judgments about the way the world is that cannot be interpreted in non-cognitive terms: e.g., that Christ rose from the dead after his resurrection, that one or more supernatural beings exist, that everything that lives is the reincarnation of a prior living being, and so on. These claims are cognitive, and systematically false or, at best, unwarranted. They are also distinctive of religion but not of moralities.” (550) Perhaps Leiter sees this point as “irrelevant” only because he doesn’t fully appreciate the implications of his methodological mistake.

differentiated by their insulation from empirical evidence.<sup>233</sup> As Michael McConnell notes, “it is the ‘insulation from evidence’ that most clearly distinguishes religion in Leiter’s definition, and does almost all the work in his analysis”<sup>234</sup> – and if I’m right that Leiter has failed to distinguish the religious conscience through this feature, then his analysis is largely undermined and never gets off the ground.

#### **IV. Other Forms of Evidence**

To be sure, Boucher and Laborde similarly fail to offer an argument for their metaethical assumptions – namely, that both forms of conscience are, in principle, insulated from empirical evidence. Additionally, it’s not clear whether they think that the religious conscience is somehow differently insulated from nonreligious conscience with respect to other evidences. Independent of these scholars, however, can we justifiably believe that the religious conscience is somehow differently insulated with respect to other forms of evidence – and ultimately in a way that justifies special legal treatment? In what follows, I’ll argue that: (a) typically, both forms of conscience seem to be similarly insulated from a relevant kind of evidence – namely, moral argumentation; and (b) the secular conscience typically seems to be, at least in some sense, comparably more insulated from moral values. I think a reasonable case can be made for (a) and (b) via Jonathan Haidt’s work in moral psychology and that, even when (a) and (b) are plausible, treating religious conscience with special legal solicitude is not.

#### **A. Moral Argumentation**

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<sup>233</sup> Brian Leiter (2013), 3

<sup>234</sup> Michael McConnell (2013), 786

In *The Righteous Mind*, Haidt's first principle of moral psychology states that "[moral] intuitions come first [and] strategic reasoning second."<sup>235</sup> Haidt writes:

Moral intuitions arise automatically and almost instantaneously, long before moral reasoning has a chance to get started, and those first intuitions tend to drive our later reasoning. If you think that moral reasoning is something we do to figure out the truth, you'll be constantly frustrated by how foolish, biased, and illogical people become when they disagree with you. But if you think about moral reasoning as a skill we humans evolved to further our social agendas – to justify our own actions and to defend the teams we belong to – then things will make a lot more sense. Keep your eye on the intuitions, and don't take people's moral arguments at face value. They're mostly post hoc constructions made up on the fly, crafted to advance one or more strategic objectives.<sup>236</sup>

By intuitions, Haidt means the "dozens or hundreds of rapid, effortless moral judgments and decisions that we all make every day."<sup>237</sup> And by moral judgments, Haidt is referring to a rapid cognitive process distinguished from reasoning<sup>238</sup> that is "akin to the judgments animals make as they move through the world, feeling themselves drawn toward or away from various things."<sup>239</sup> While Haidt seems to initially indicate that our moral judgments

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<sup>235</sup> Jonathan Haidt (2013), XX

<sup>236</sup> Jonathan Haidt (2013), XX – XXI

<sup>237</sup> Jonathan Haidt (2013), 53

<sup>238</sup> Jonathan Haidt (2013), 53

<sup>239</sup> Jonathan Haidt (2013), 72

are, in principle, insulated from moral argumentation, he does concede that it's still "possible for people simply to reason their way to a moral conclusion that contradicts their initial intuitive judgment, although [he] believe this process is rare."<sup>240</sup> He thinks that friends can challenge us, giving us reasons and arguments that sometimes "trigger new intuitions, thereby making it possible for us to change our minds."<sup>241</sup> Thus, Haidt maintains that while our moral judgments seem to be, at least in principle, open to this sort of evidence, in practice he thinks they are largely insulated.<sup>242</sup>

This first principle of moral psychology is important for establishing (a) in that Haidt is presumably talking about *all* moral judgments – religious or otherwise. If (a) is true, then we may actually have good reason to treat religious and secular conscience beliefs equally before the law since they would be practically indistinguishable concerning their insulation from this sort of evidence. Both kinds of conscience beliefs are intuitive moral judgments produced by applying values to our actions or attitudes that are not *themselves* initially justified by some moral argument or line of reasoning. Both kinds of conscience adopt some moral values, apply these values to our particular actions or attitudes, and produce an intuitive moral judgment. And the intuitive moral judgments produced by both kinds of conscience are described as being in principle open to moral

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<sup>240</sup> Jonathan Haidt (2013), 80

<sup>241</sup> Jonathan Haidt (2013), 55. "It's not every day", Haidt says "that we change our mind about a moral issue without any prompting from anyone else." (56) We should note, however, that even though others may give us moral arguments that we might find persuasive, we ultimately seem to *answer to the intuition* that their moral arguments create in us.

<sup>242</sup> To better understand how this influence from others and our own reasoning might work in changing our minds about moral conclusions, see figure 2.4 depicting Haidt's *Social Intuitionist Model*. (55)

arguments even though, in practice, they are typically insulated from this evidence.<sup>243</sup> At this point, then, there are no grounds for affording religious conscience special legal solicitude if it nearly indistinguishable from secular conscience with regard to its insulation from moral argumentation.

## **B. Moral Values**

Concerning (b), does Haidt's research help us develop a plausible case that the secular conscience is typically more insulated from moral values – and perhaps in a way that justifies special legal solicitude for religious conscience? Here, we can turn to Haidt's second principle of moral psychology, which states that “there's more to morality than harm and fairness.”<sup>244</sup> By this principle, Haidt only means to make a descriptive claim about what sorts of “moral foundations”<sup>245</sup> and related values<sup>246</sup> that people from across different cultures draw from as an anthropological fact. He writes:

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<sup>243</sup> Haidt notes that one of the most common criticisms of his social intuitions model from philosophers is that conceptual evidence actually seems to change or at least influence our moral beliefs more frequently in practice than he seems to grant. Haidt (2013) writes: “These critics present no evidence, but, in fairness, I have no evidence either as to the actual frequency in daily life with which people reason their way to counterintuitive conclusions (link 5) or change their minds during private reflection about moral matters (link 6). Of course people change their minds on moral issues, but I suspect that in most cases the cause of change was a new intuitively compelling experience (link 1), such as seeing a sonogram of a fetus, or an intuitively compelling argument made by another person (link 3). I also suspect that philosophers are able to override their initial intuitions more easily than can ordinary folk, based on findings by Kuhn (1991).” (385)

<sup>244</sup> Jonathan Haidt (2013), XXI

<sup>245</sup> Haidt (2013) describes these moral foundations as “sets of modules that work together” to meet adaptive challenges. (147) He describes modules as “little switches in the brains of all animals” that are “switched on by patters that were important for survival in a particular ecological niche and when they detect that pattern,

The moral domain is unusually *narrow* in WEIRD [i.e. – western, educated, industrial, rich, and democratic] cultures, where it is largely limited to the ethic of autonomy (i.e., moral concerns about individuals harming, oppressing, or cheating other individuals). It is *broader* – including the ethics of community and divinity – in most other societies, and within religious and conservative moral matrices within WEIRD societies.<sup>247</sup>

So, Haidt's research indicates the following: that nonreligious and non-conservative individuals within a WEIRD culture typically draw from comparatively *fewer* moral foundations and related values than their religious and conservative WEIRD counterparts when explaining or justifying moral judgments. The more nonreligious and liberal WEIRD individuals, according to Haidt, typically draw from just *three* moral foundations and their related values – what he calls the Care/Harm foundation,<sup>248</sup> the Fairness/Cheating foundation,<sup>249</sup> and the Liberty/Oppression foundation.<sup>250</sup> Conversely, more religious and

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they send out a signal that (eventually) changes the animal's behavior in a way that is (usually) adaptive.” (144)

<sup>246</sup> Haidt (2013) explains that each moral foundation has characteristic emotions – e.g., compassion is a characteristic emotion of the Care/Harm foundation – and relevant virtues and values – e.g., obedience and deference are the virtues and values of the Authority/Subversion foundation. (146)

<sup>247</sup> Jonathan Haidt (2013), 129; emphasis added

<sup>248</sup> Jonathan Haidt (2013): this foundation “makes us sensitive to signs of suffering and need; it makes us despise cruelty and want to care for those who are suffering.” (178)

<sup>249</sup> Jonathan Haidt (2013): this foundation “makes us sensitive to indications that another person is likely to be a good (or bad) partner for collaboration and reciprocal altruism. It makes us want to shun or punish cheaters.” (178)



conservative WEIRD individuals tend to draw from *three additional* moral foundations – the Loyalty/Betrayal foundation<sup>251</sup>, the Authority/Subversion foundation<sup>252</sup>, and the Sanctity/Degradation foundation.<sup>253</sup> Hence, this is why Haidt suggests that there is, at least descriptively, “more to morality than harm and fairness:” after all, liberals typically appeal to only three moral foundations whereas conservatives tend to appeal to all six.<sup>254</sup>

For our present purposes, what’s important to highlight is that nonreligious WEIRD individuals seem to typically draw on three moral foundations and their related values whereas religious WEIRD individuals typically draw on all six moral foundations and their related values. Haidt’s second principle implies that there is a descriptive difference with our moral beliefs that trends along secular and religious lines: religious moral beliefs

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<sup>250</sup> Jonathan Haidt (2013): this foundation “makes people notice and resent any sign of attempted domination. It triggers an urge to band together and resist or overthrow bullies and tyrants.” (215)

<sup>251</sup> Jonathan Haidt (2013): this foundation “makes us sensitive to signs that another person is (or is not) a team player. It makes us trust and reward such people, and it makes us want to hurt, ostracize, or even kill those who betray us or our group.” (178-79)

<sup>252</sup> Jonathan Haidt (2013): this foundation “makes us sensitive to signs of rank or status, and to signs that other people are (or are not) behaving properly, given their position.” (179)

<sup>253</sup> Jonathan Haidt (2013): this foundation “makes it possible for people to invest objects with irrational and extreme values – both positive and negative – which are important for binding groups together.” (179)

<sup>254</sup> Jonathan Haidt (2013): “Liberals have a three-foundation morality, whereas conservatives use all six. Liberal moral matrices rest on the Care/harm, Liberty/oppression, and Fairness/cheating foundations although liberals are often willing to trade away fairness (as proportionality) when it conflicts with compassion or with their desire to fight oppression. Conservative morality rests on all six foundations, although conservatives are more willing than liberals to sacrifice Care and let some people get hurt in order to achieve their many other moral objectives.” (214)

typically draw from a larger evidential base (i.e., a larger set of moral values) when compared to their secular counterparts (i.e., a smaller set of moral values). If this is true, then (b) seems plausible: the religious conscience would typically apply a broader range of values and must therefore work with a greater range of evidence in order to produce beliefs about what would be wrong or not wrong for one to do or not do. Using Haidt's language, the religious and secular individual would obviously both possess moral beliefs (including conscience beliefs), but their intuitive moral judgments would be produced by a different set of moral foundations and related values getting "triggered" by and applied to particular events. Thus, the more religious person must typically process the intuitive moral judgments produced by six moral foundations and related values, while the more secular person must typically process the intuitive moral judgments produced by only three moral foundations and related values.<sup>255</sup>

If (b) is plausible, then there seem to be only two reasons why we might grant special legal treatment to the religious conscience: either because there is something special about the different moral value(s) that the religious conscience applies or else because there is something special about the religious conscience having to apply a greater number of values. Under the first scenario, there would have to be something special about the value(s) uniquely applied by the religious conscience – something that the value(s) applied by the secular conscience lack(s) – that would warrant preferential legal treatment.

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<sup>255</sup> This helps us, for example, understand why we see such a vast difference between the political left and right over the use of concepts such as 'sanctity' and 'purity'. Those on the right are driven by intuitions triggered by the sanctity foundation and those on the left lack these intuitions. For more on this, see Jonathan Haidt (2013), Chapter 8 "The Conservative Advantage," 180-216.

Under the second scenario, there would have to be something special about having to navigate and apply a greater number of values – something the secular conscience does not have to do – that would warrant preferential legal treatment.

We can plausibly dismiss the second reason as drawing a distinction without a moral difference. After all, navigating a greater number of moral values en route to formulating one's conscience belief just doesn't seem to amount to a principled reason for granting totally different legal protections to the religious conscience objector. Regarding the first reason, however, we can make a few points. First, we should note that Haidt's research concerns *trends* with respect to these moral foundations and values: the religious conscience seems to *typically* draw from a larger set of moral values or foundations, while the secular conscience seems to *typically* draw from a smaller set of moral values or foundations. This means that it is possible for both forms of conscience to not only *sometimes* draw from an atypical moral foundation and related value, but to *sometimes* draw from an atypical moral foundation and related value with an atypical weightiness as well.<sup>256</sup> So, it seems then, that granting special protections to religious conscience on the grounds that it *typically* draws from a certain set of arbitrarily designated, special values would inevitably lead to unwarranted exclusivity and underinclusivity. While it is true that laws draw somewhat arbitrary lines all the time that are over and underinclusive, drawing

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<sup>256</sup> For example, Haidt (2013) notes that Unitarian (religious, liberal) preachers made greater use of Care and Fairness words in their sermons, while Baptist (religious, conservative) preachers made greater use of Loyalty, Authority, and Sanctity words in their sermons. (188) This indicates that there are outlier religious consciences – e.g., Unitarian consciences – that typically and weightily draw on the first three moral foundations and related values.

a line between moral values in this way might be *especially* arbitrary – which leads to the next point.

Second, qualitatively comparing some moral values to other moral values – when possible – seems difficult to do. You might think that moral values are incommensurable, and so any sort of comparative question would be, in principle, impossible to navigate. You might also think that it is in principle possible to show that some moral values are better to adopt than others – and that some value beliefs are more justified than others. But, as noted, when this is possible, it is oftentimes difficult to do – especially when comparatively evaluating the values that underlie conscientious objections. This would amount to, for example, exempting a religious conscientious objector to conscription but not a similarly situated secular objector *solely on the basis* that the value underlying the religious conscience belief is somehow better or more worthy of entirely different legal protections.<sup>257</sup> Lastly, you might also worry whether courts are the appropriate arbiters of these comparative questions between underlying moral values. Not only are these questions difficult to navigate, but answering them might effectively cause the state to take a definitive stance on some conception(s) of the good life or to endorse some sectarian value(s) over some nonsectarian value(s). Disallowing courts to be the arbiters of questions comparing moral values may actually protect against the “totalization of

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<sup>257</sup> To use Boucher and Laborde’s (2016) example, this would amount to granting an exemption to the Quaker whose pacifism is grounded in one kind of value and claim - i.e., that “all wars and outward fighting proceed from men’s lust” – but not the secularist whose conscientious objection is grounded in a different sort of value and claim - i.e., that “violence and the use of weapons to kill other human beings is always wrong.” (502)

morality” on the part of the government<sup>258</sup> as well as encourage the sort of “skepticism and humility that we owe one another as compatriots in a pluralistic society.”<sup>259</sup>

## V. Private Evidence

Of course, there may still be other kinds of evidence not discussed above that are relevant to conscience beliefs – religious or otherwise. For example, John Corvino contends that McConnell overlooks the more pertinent *private evidence* that religious beliefs appeal to when responding to Leiter’s insulation from empirical evidence feature. Corvino notes that even if one grants McConnell’s “evidence of a different, nonmaterial sort,”<sup>260</sup> this sort of evidence is “often private in a way that renders it effectively useless for the purpose of resolving interpersonal disputes.”<sup>261</sup> In virtue of their evidence being private, the “law

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<sup>258</sup> Nathan Chapman (2013), 1494

<sup>259</sup> Amy Sepinwall (2015), 1929. I’m also sympathetic to the views of Nadia Sawicki (2012) on this point. Sawicki argues that true respect for any claims of conscience demands a consistent, coherent, and repeatable mechanism for legal accommodation, even if that test is open-ended and results in uncertainty at the margins. (1395) She thinks that the most promising legal mechanism for determining the permissibility of conscientious exemptions may be the kind of content-neutral balancing test often used in constitutional law – indeed, the kind that we see with RFRA. (1396) While she grants that a balancing approach may be subject to criticism (e.g., that it risks being used as a proxy for judgments based on majoritarian values), she thinks that the alternative to establishing a content-neutral guiding principle is to “abandon the promise of freedom of conscience and concede that American society considers exercises of personal conscience to be valuable only to the extent that they align with widely accepted moral principles.” (1396) This alternative, Sawicki argues “would undermine the foundational purpose of legal accommodation of conscientious belief, which is to protect individuals from oppressive majoritarian understanding of morality.” (1396)

<sup>260</sup> Michael McConnell (2013), 786-87

<sup>261</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 49

avoids inquiring into the plausibility of religious claims” and governments remain powerless to persuade religious believers otherwise – acknowledging that religious claims “are generally accepted ‘on faith.’”<sup>262</sup> Corvino concludes:

It is precisely by being ‘beyond human understanding’ that religious beliefs are ‘insulated from evidence’ in Leiter’s sense,<sup>263</sup> and precisely for that reason that Justice Scalia opined that, in a religiously diverse nation, any system requiring strict scrutiny for laws burdening religious beliefs is ‘courting anarchy.’<sup>264</sup>

### **A. Content Neutrality**

In response to Corvino, we should note a few things. First, Corvino’s private evidence feature may be understood as a friendly amendment to Leiter’s admittedly obscure insulation feature: perhaps a better way to understand Leiter’s insulation feature is not that religious beliefs are narrowly insulated from empirical evidence but that religious beliefs appeal to uniquely private evidence for justification instead. Though this may be closer to what we commonly mean when we suggest that religious beliefs are insulated from evidence, even Corvino’s updated feature – like Leiter’s – needs further clarification about the specific role and place that private evidence occupies in both religious and conscience beliefs in order to be helpful. At the very least, it seems clear that

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<sup>262</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 49

<sup>263</sup> I should note here that Corvino’s understanding of Leiter’s insulation feature is mistaken here. As discussed in this chapter, being insulated from evidence in Leiter’s sense means being insulated in practice from empirical evidence, not being insulated “beyond human understanding” – which is too sweeping.

<sup>264</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 50

religious ontological beliefs can often appeal to private evidence for justification instead of empirical evidence. But what's not entirely clear is whether religious conscience beliefs can similarly appeal to private evidence for justification instead of moral values. Regardless, even if religious conscience beliefs do not *directly* appeal to private evidence, they may nevertheless *indirectly* appeal to private evidence insofar as religious conscience beliefs – at least to some degree – are influenced by religious ontological beliefs that directly appeal to private evidence.<sup>265</sup>

Second, even when we grant that religious conscience beliefs uniquely rely on private evidence either directly or indirectly, should this make a legal difference overall? Though there may be evidential differences between religious and nonreligious conscience beliefs, perhaps there is no reason to think that their evidential position is ultimately a relevant consideration when determining the permissibility of granting legal exemptions. In other words, perhaps the whole discussion surrounding the respective insulation of

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<sup>265</sup> It's worth highlighting here that the opposite seems possible too: religious ontological beliefs can be indirectly influenced by – at least to some degree – moral values insofar as they are influenced by religious conscience beliefs that directly appeal to moral values. On the one hand, religious ontological beliefs (which appeal to empirical evidence and/or private evidence) can affect our religious conscience beliefs – e.g., believing that God exists can affect what actions I take to be right or wrong. But the opposite also seems true: religious conscience beliefs (which appeal to moral values) can affect our religious ontological beliefs – e.g., believing that certain actions are right or wrong can affect whether I believe that God exists. Thus, it is not only possible for ontological beliefs to affect our conscience beliefs, but it is also possible for conscience beliefs to affect our ontological beliefs – that is, to sort of “suppress the truth in unrighteousness.” (Romans 1:18 NASB) The main point here is simple: because the evidentiary or justificatory relationship between religious ontological beliefs and religious conscience beliefs is not straightforward, we cannot simply assume that religious conscience beliefs are always asymmetrically influenced by religious ontological beliefs.

religious and nonreligious conscience beliefs from evidence is a red herring because, when determining the permissibility of granting legal exemptions, the legal mechanism should be *content-neutral*.<sup>266</sup>

By adopting an approach that deemphasizes the particular content of a conscientious objection, courts may be able to set aside questions about evidence altogether and instead emphasize extrinsic features (e.g., the infringement of rights or harm caused to third-parties) over intrinsic features (e.g., whether the content is justified by private evidence) as relevant to determining whether granting a legal exemption is justified. Of course, other approaches consider the particular content of a conscientious objection as significant and, in some way, determinative of whether or not a legal exemption is justified. Approaches in this vein may consider the bad evidential basis of a conscience belief as a good reason to withhold accommodations and a good evidential basis as a good reason to grant accommodations. The larger question at hand in response to Corvino, then, is whether we ought to adopt a content-neutral or a content non-neutral approach to granting legal exemptions. In what follows, I offer a few cursory reasons why we might prefer content-neutral approaches without making a complete case – hopefully curtailing any lingering questions about comparative evidence.

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<sup>266</sup> Separate from the central question in this paragraph is the following: even when we grant the content non-neutralist that a religious conscience's direct or indirect appeal to private evidence constitutes a weighty and relevant factor in deciding whether or not to grant an exemption, just how weighty and relevant that reason is or should be remains unhelpfully unclear – especially when considered amongst competing reasons for granting or not granting an exemption. This related though different question will be covered at length at the end of the next chapter.



Nadia Sawicki is an example of a contemporary theorist who defends a content-neutral view. Broadly, she argues that true respect for any claim of conscience demands a consistent, coherent, and repeatable mechanism for legal accommodation, even if that test is open-ended and results in uncertainty at the margins.<sup>267</sup> More specifically, she thinks that the most promising legal mechanism for determining the permissibility of conscientious exemptions may be the kind of content-neutral balancing test often used in constitutional law – indeed, the kind that we see with RFRA.<sup>268</sup> While she grants that a balancing approach may be subject to criticism (e.g., that it risks being used as a proxy for judgments based on majoritarian values), she thinks that the alternative to establishing a content-neutral guiding principle is to “abandon the promise of freedom of conscience and concede that American society considers exercises of personal conscience to be valuable only to the extent that they align with widely accepted moral principles.”<sup>269</sup> This alternative, Sawicki argues “would undermine the foundational purpose of legal accommodation of conscientious belief, which is to protect individuals from oppressive majoritarian understanding of morality.”<sup>270</sup>

Amy Sepinwall reaches a similar conclusion about content-neutrality when addressing a separate though related question: when is a claim of moral complicity compelling enough to warrant an accommodation – especially when that accommodation would impose costs on third parties? Her answer is that conscientious objections should

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<sup>267</sup> Nadia Sawicki (2012), 1395

<sup>268</sup> Nadia Sawicki (2012), 1396

<sup>269</sup> Nadia Sawicki (2012), 1396

<sup>270</sup> Nadia Sawicki (2012), 1396

likewise be evaluated under a sort of content-neutral RFRA regime but that “a separate, additional set of considerations must be brought to bear – namely, considerations tracking the interests of third parties.”<sup>271</sup> Thus, she suggests adding to the content-neutral RFRA test an additional feature: roughly, third-party costs “exceeding some threshold amount should be found untenable – and exemptions should be denied when these excessive costs would otherwise result.”<sup>272</sup> Specifying exactly where this threshold might be on a cost spectrum is, Sepinwall thinks, “a matter for democratic deliberation.”<sup>273</sup>

Sepinwall adds this extrinsic feature to her test of exemption demarcation because of the reasons she sees for refraining from evaluating the intrinsic content of any given conscience belief. Because courts are limited when evaluating the more intrinsic features of a conscience belief, Sepinwall believes that courts should instead focus on more extrinsic features when determining whether a legal exemption is warranted.

In fact, Sepinwall argues that moral beliefs in general – which include conscience beliefs – should enjoy total deference by courts. A position of total deference to objectors’ moral beliefs appropriately maintains the “skepticism and humility that we owe one another as compatriots in a pluralistic society.”<sup>274</sup> And given the reality of moral and religious pluralism, “we are often without a capacity for certitude ... in moral and religious

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<sup>271</sup> Amy Sepinwall (2015), 1974

<sup>272</sup> Amy Sepinwall (2015), 1974

<sup>273</sup> Sepinwall (2015) writes: “There is no a priori, context-independent answer to the question of how much of a burden it is fair to impose on third parties for the sake of respecting religious observance.” (1975)

<sup>274</sup> Amy Sepinwall (2015), 1927

matters ... that would allow us to discern truth and falsity” – it seems like an attitude of “moral deference on the part of the state” is appropriate.<sup>275</sup>

But what about particular moral beliefs that are highly objectionable like racism or – to cite Sepinwall’s example – homophobia?<sup>276</sup> Should certain limits on moral deference and content-neutrality be appropriated so as to ensure that courts, as State actors, are not compelled to treat highly objectionable moral beliefs like racism as on par with other moral beliefs? To this question, Sepinwall offers three responses. First, she argues that “according to a claim that denigrates another group is not the same as endorsing that claim.”<sup>277</sup> Though a court should treat the moral belief with deference and neutrality, Sepinwall thinks that courts have a responsibility to clearly articulate that such a moral view “flies in the face of our most fundamental constitutional values...[thereby serving]

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<sup>275</sup> Amy Sepinwall (2015), 1927

<sup>276</sup> Interestingly, though Sepinwall (2015) grants much deferential latitude for religious claims of complicity, she nevertheless thinks that “we should expect that claims seeking religious exemptions from antidiscrimination laws would typically fail” because the third parties whose interests are relevant in these cases are those who are “immediately denied service or employment by the religious objector.” (1978) Moreover, she thinks that “all members of the group facing discrimination can claim an expressive injury from the discrimination” and that “other historically oppressed groups can claim that an exemption threatens them with an injury, too.” (1978) A state that grants an exemption to the religious objector in this case runs the risk of failing to “take seriously the great evil of discrimination” and undermining “the sense of security and respect that a decent state should confer on all its citizens.” (1978)

<sup>277</sup> Amy Sepinwall (2015), 1928

religious freedom but also [speaking] in favor of the notion of equal respect that underpins our constitutional regime.”<sup>278</sup>

Second, deferring to and remaining neutral toward a moral claim doesn’t necessarily commit a court to issuing an exemption: the objector’s assertion must still be weighed against a governmental interest. Hence, the entitlements that citizens enjoy would be *defeasible*. It may turn out, for example, that in some instances, “the government will invoke its compelling interest in the eradication of, say, racism, and it will wield that interest to defeat the bid for an exemption.”<sup>279</sup> We should note, too, that the moral belief must also be weighed by the court against the interests of third parties – at least according to Sepinwall’s revised test. She writes:

Third parties will presumably be able to marshal arguments that acceding to the believer’s hateful claim inflicts a grave injury on them—one so grave that the court should find it dispositive. But even if third parties choose not to become too vexed about the believer’s claim, the state must, again in its capacity as a defender of our constitutional regime, add to its arguments about the compelling interests underpinning the challenged legal requirement a statement decrying the challenge because it deviates from our most cherished constitutional values.<sup>280</sup>

In sum, Sepinwall argues that courts should afford a great deal of deference and neutrality when facing a conscientious objection. After all, “pluralism demands respect for

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<sup>278</sup> Amy Sepinwall (2015), 1928

<sup>279</sup> Amy Sepinwall (2015), 1928

<sup>280</sup> Amy Sepinwall (2015), 1929

religious differences, but that respect goes both ways: it entails that we must be open to many claims of conscience, but we must also ensure that these claims do not unduly or disproportionately interfere with the interests of discrete third parties.”<sup>281</sup> However, the deferential conclusion sketched here does not necessarily entail that an objector is always entitled to an exemption. Even though the courts “should in general treat as true the religious adherent’s claim..., they must still consider whether acceding to a request for an accommodation would impose undue burdens on third parties.”<sup>282</sup>

Finally, Nathan Chapman offers several reasons why we ought to grant broad, content-neutral, defeasible entitlements for conscience beliefs. He argues that granting such entitlements for conscience may help to protect against tyranny insofar as “protecting conscience undermines the totalization of morality by the government.”<sup>283</sup> By promoting a robust liberty of conscience, several anti-tyrannical consequences are encouraged – such as fueling advancements in otherwise stagnant democratic deliberation and aiding the elimination of at least some disputes over moral differences that “might otherwise monopolize the public sphere of a pluralistic society” – which may then leave “objectors and their opponents more resources ... to debate (and to collaborate on) other important matters.”<sup>284</sup> Such debate and collaboration may also generate social trust between groups that might otherwise be suspicious of each other.”<sup>285</sup> Securing broad, content-neutral,

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<sup>281</sup> Amy Sepinwall (2015), 1972

<sup>282</sup> Amy Sepinwall (2015), 1910

<sup>283</sup> Nathan Chapman (2013), 1494

<sup>284</sup> Nathan Chapman (2013), 1499

<sup>285</sup> Nathan Chapman (2013), 1499

defeasible protections for conscience also “limits the government’s pretensions to absolute moral authority,” permits “nonconformist moral thought that aims to undermine moral tyranny,” and allows the kind of justifiable civil disobedience that has “an important place in political history and theory” – the kind that can be “particularly effective at jarring a morally apathetic society into taking notice and making important changes.”<sup>286</sup> Lastly, such protections for conscience may also keep minority thoughts and practices alive against the conclusions promoted by the majority, allow for “majority decisions to be provisional,” allow the “persuasiveness of minority speech to be aided by the persuasiveness of minority action,” and allow for those who disagree with prevailing norms to prolong internal and national dialogues over contested moral issues.<sup>287</sup>

## **VI. Conclusion**

In this chapter, I provided support for my central claim – namely, that because religious conscience beliefs are sufficiently similar to other conscience beliefs, there is no good reason to treat them differently before the law. In particular, I narrowed in on two of Brian Leiter’s main features of the religious conscience: categoricity and insulation from evidence respectively. After showing that Leiter’s categoricity feature is shared by both kinds of conscience, I turned my attention to Leiter’s arguments that religious beliefs are insulated from evidence, and as a result, are not worthy of special legal treatment. I argued that Leiter failed to show that religious conscience beliefs are both in principle responsive to empirical evidence and in practice typically more insulated from this evidence than secular conscience beliefs. If I am right about this, then Leiter failed to sufficiently

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<sup>286</sup> Nathan Chapman (2013), 1499

<sup>287</sup> Nathan Chapman (2013), 1500

distinguish the religious conscience from the secular conscience and failed to answer the “central puzzle” of his book *Why Tolerate Religion?* I then looked at whether or not it is plausible to understand the religious conscience as insulated from other forms of evidence. Following the research of social-psychologist Jonathan Haidt, I argued that, typically, both forms of conscience seem to be similarly insulated from a relevant kind of evidence – namely, moral argumentation. I also showed that, while it seems as though the religious conscience usually draws from a larger set of moral values when compared to the secular conscience, this should make no legal difference overall. Lastly, I considered whether religious conscience beliefs uniquely appeal either directly or indirectly to private evidence. In response, I concluded the chapter by offering a few cursory arguments why we might prefer content-neutral approaches without making a complete case – hopefully curtailing any lingering questions about comparative evidence.

## CHAPTER 4: FURTHER FEATURES

*Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity - to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.*

*- Michael McConnell, "The Problem of Singling out Religion," p. 42*

### **I. Introduction**

As in the last chapter, I continue to provide support for my central claim by analyzing several possibly demarcating features of religious conscience beliefs taken to be legally relevant by theorists in the field. Overall, I contend that there are no features held by either kind of conscience that give us good grounds to adopt an Inegalitarian Response to the original specialness question. Instead, I argue that a comparative analysis between the two kinds of conscience actually gives us good reason to adopt an Egalitarian Response to the specialness question since they are sufficiently similar in nature.

In this chapter in particular, I narrow in on three further, possibly delineating features of the religious conscience that theorists take to be legally relevant. First, I investigate whether religious conscience beliefs are more central to our identity – and



relatedly, whether they are more central to our moral integrity. Ultimately, I argue that both religious and nonreligious conscience beliefs are sufficiently central to our identity and moral integrity such that there is no obvious reason to grant preferential legal treatment to one over the other. Second, I investigate whether religious conscience beliefs are more primordial, unchosen, or non-voluntary. I contend that granting legal exemptions on the grounds that the belief or practice in question is primordial or non-voluntary is problematic for at least three reasons. First, I argue that non-voluntariness should not be classified as a necessary condition for obtaining a legal exemption. Second, I argue that non-voluntariness should not be understood as a sufficient condition for obtaining a legal exemption either. And third, I argue that, even if we grant non-voluntariness as a sufficient condition, it should not be understood as the only sufficient condition for obtaining a legal exemption.

As I end chapter four, I investigate whether religious conscience beliefs are uniquely linked to unjustified intolerance and prejudice so that differential treatment before the law is warranted. I argue that, because both religious and nonreligious conscience beliefs have similar propensities for unjustified prejudice and intolerance, their differential treatment before the law is plausibly unwarranted. First, I argue that unjustified prejudice and intolerance are similarly correlated to religious and nonreligious conscience beliefs insofar as the driving force behind the prejudice and intolerance is, at least in principle, shared by both kinds of conscience. Second, I argue that we should be skeptical that religious conscience beliefs enjoy a uniquely strong in-practice-link to unjustified prejudice and intolerance. If these claims are right, then it seems like we should accept an anti-intolerance approach over an exclusively anti-religious approach. And if the anti-

intolerance approach is adopted, then we have no reason to treat religious conscientious objectors with special, negative treatment. Nevertheless, I conclude by highlighting a further problem for both the anti-religious approach and the anti-intolerance approach: just how relevant or how weighty should content-based reasons be in the exemption calculus if we discover unjustifiably intolerant content in a person's conscience belief, practice, or ideology?

## II. Central to Identity

The first feature we will investigate as possibly demarcating religious conscience is the *central to identity* feature. That is, perhaps the religious conscience is disproportionately central to the identity of its possessor when compared to the centrality of the secular conscience to its possessor – and as such, the former is thought to be more deserving of legal protections. As Alberto Giubilini notes, the conscience in general “delimits a sphere of personal morality that is an essential part of our sense of personal identity, understood as our sense of who we are and of what characterizes qualitatively our individuality (for instance, our character, our psychological traits, our past experience, etc).”<sup>288</sup> Perhaps the religious conscience is *more* central to our identity such that it is more constitutive of, more important to, or plays a greater role in shaping the identity of its possessor. Do we have reason to believe that this is the case? And if it is the case, should this count as a good reason to legally privilege the religious conscience?

One reason that people might initially think that religious conscience beliefs are more central to our identity is that religious beliefs in general seem to be more central to our identity than other kinds of beliefs. As such, it seems plausible to legally single out

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<sup>288</sup> Alberto Giubilini (2016)

religious beliefs: after all, they seem to serve as a proxy for, or else provide “evidence for deep and important commitments” – roughly, the sorts of things that are central to our identity.<sup>289</sup> This way of thinking is flawed for at least two reasons. First, even if we take the above claim at face value, religious beliefs are nevertheless “both over and underinclusive as a proxy for deep and important commitments” anyway.<sup>290</sup> As John Corvino notes, “not every religious claim is deep and important, and not every deep and important claim is religious.”<sup>291</sup> In other words, not every belief central to one’s identity is religious and not every religious belief is central one’s identity. Second, and more importantly, reasoning in this way commits the same sort of methodological error that Leiter committed; things get conceptually muddy and complicated when we try to compare and contrast religious beliefs *in general* – which include conscience beliefs – with conscience beliefs *in general* – of which some are religious – for legal privileging purposes. The objects of comparison central to the *narrow version* of the specialness question are religious and secular conscience beliefs – not religious and conscience beliefs more generally.

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<sup>289</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 56

<sup>290</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 57. Corvino adds: “One might object here that the law is a rough instrument, and that *any* proxy is going to be either over- or underinclusive to some extent. After all, the whole point of considering *proxies* is that direct evidence is either impossible or unfeasible. The state can’t examine people’s consciences directly, so it relies on a rough external measure instead to determine their level of commitment. I respond that even as a rough external measure, ‘religion’ as a category [still] falls short.” (58) Corvino cites *Seeger* (1965) and *Welsh* (1970) as examples of beliefs that were not religious yet deep, important, and central to one’s identity and were legally accommodated.

<sup>291</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 57

To work through this feature in a clearer way that avoids Leiter's methodological mistake, we should again look back at the nature of conscience – i.e., the faculty that applies our values in order to produce beliefs about what actions or attitudes are wrong or not wrong for us to adopt or not adopt in our past, present, or future situations. Interestingly, Richard Sorabji thinks that the conscience in general, religious or otherwise, is not necessarily central to our identity – and that being central to one's identity is just a contingent and correlated feature of conscience, not constitutive of it. According to Sorabji, then, being central to one's identity is neither a necessary or sufficient condition of conscience: conscience beliefs, religious or otherwise, need not be central to one's identity, and those beliefs that happen to be central to one's identity need not be conscience beliefs.

To illustrate his position that conscience beliefs in general are not necessarily central to one's identity, Sorabji has us consider the example of the Money Lover:

His success in making money made him feel not merely good at moneymaking, but also like a good person (a "jolly good fellow"). Moneymaking allowed him to structure his identity, and if "good person" is a moral category, his *moral* identity. His belief in the need to make money might be intensely felt, and it would facilitate his rational capacity for directing his life. What is needed to make his belief and practice one of *conscience* is some reference to what it would be morally wrong for him to do or not to do. In the example imagined, the belief and practice of moneymaking would not need protection as a matter of conscience, since it is an agreed form of life in no danger from opposing viewpoints. But if for any reason it needed to be

presented as a matter of conscience, that could easily be achieved by citing duties to family and shareholder, or, more admirably, by deliberately taking on duties to society.<sup>292</sup>

In this example, it's clear that beliefs that are central to one's identity are not necessarily conscience beliefs – e.g., they could be beliefs that you're good at money-making, and that money-making makes you feel good. So, beliefs that are central to one's identity are not sufficient for being conscience beliefs – much less *religious* conscience beliefs. But is Sorabji right that conscience beliefs, religious or otherwise, are not necessarily central to one's identity? Is it possible that our conscience beliefs are not central to our identity?

### **A. Moral Identity**

I don't think Sorabji effectively makes the case that conscience beliefs are not central to our identity. In the above paragraph, Sorabji uses the Money Lover to seemingly illustrate that someone can have a *moral* identity without reference to *conscience* beliefs about what “would be morally wrong for him to do or not to do.” Contrary to Sorabji, however, it seems as though conscience beliefs at least partly constitute our moral identity – for it seems difficult to articulate one's complete moral identity without ever referencing what they believe to be morally wrong to do or not do. While it is possible to highlight at least *some* aspects of our moral identity that are not necessarily conscience beliefs, it just seems impossible to discuss the totality of our moral identity without any reference to our conscience beliefs. If conscience beliefs are necessarily central to our moral identity, then it seems as though conscience beliefs might be necessarily central to our overall identity as well. After all, it seems plausible to think that our overall identity is at least partly

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<sup>292</sup> Richard Sorabji (2014), 206

constituted by our moral identity. Even Sorabji seems to indicate as much: moneymaking allowed the Money Lover “to structure his identity” – which included “his *moral* identity.”

If I am right about this – namely, that conscience beliefs, religious or otherwise, are necessarily central to our overall identity insofar as conscience beliefs are a necessary aspect of our moral identity, and that our moral identity a necessary aspect of our overall identity – then is there reason to legally privilege the religious conscience over the nonreligious conscience? The answer seems to be “no” at first glance if both forms of conscience are similarly central to our moral identity if not our overall identity. It seems as if we should just treat both forms of conscience similarly before the law if they are at least similarly central to our moral or overall identity. As Gemma Cornelissen notes, “the identity approach locates a plausible basis for the concern behind religious exemptions, but it fails on its own to explain why religious beliefs should be considered more central to individuals’ identities than other personal attributes, including non-religious beliefs.”<sup>293</sup> But, importantly, what if these forms of conscience are dissimilarly central to our identity such that the religious conscience is somehow more central to our moral or overall identity?

Even if religious conscience beliefs are somehow more central to an individual’s moral or overall identity, I still don’t think that it is a sufficient reason for preferential treatment before the law. While it’s true that “the identity approach seems, at least at first glance, to come close to what people are concerned with when they claim a religious exemption,”<sup>294</sup> it doesn’t seem as though identity concerns are the only relevant grounds

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<sup>293</sup> Gemma Cornelissen (2012), 105

<sup>294</sup> Gemma Cornelissen (2012), 93

for an exemption worth considering. As such, it seems possible that the nonreligious conscience – as well as the religious conscience, really – could be justifiably granted the same legal exemption, but on non-identity grounds. In fact, Sorabji accepts this conclusion, believing that conscience’s “connection with being in the *wrong* accounts for the *force* of, and respect for, conscience of others, for no one wants to be in the wrong.”<sup>295</sup> As such, he doesn’t think that we would need to look for something additional in order to ground protections for conscience – such as its “being central to people’s identity.”<sup>296</sup> In this sort of scenario, religious conscience might be more central to one’s identity – moral or otherwise – but it might not matter much with respect to comparative treatment before the law: there might be adequate, non-identity grounds for legal exemptions that are similarly shared by either form of conscience. As noted by Sorabji, the relevant feature for grounding an exemption might just be that the belief in question is conscientious in nature, not necessarily that it is central – or more central – to one’s identity.

While that may be true, it’s also worth noting here that even if the religious conscience were understood to be more central to one’s identity – moral or otherwise – there might be simpler reasons to treat both forms of conscience equally. If we suppose that being central to one’s identity is a relevant consideration for determining the permissibility of an exemption and that secular conscience is nevertheless central to one’s

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<sup>295</sup> Richard Sorabji (2014), 217. For Sorabji, an appeal to conscience has force because “when it concerns the present or future, it represents a person’s belief about what it would be *wrong* for them to do in an expected situation calling for decision. A person’s sense of what it would be *wrong* for them to do has a special weight, and causes a degree of inhibition against overriding it.” (205)

<sup>296</sup> Richard Sorabji (2014), 217

identity even though it's not as central as the religious conscience, then it seems plausible to think that the secular conscience would remain sufficiently central to one's identity so as to warrant the exemption. We can see this point illustrated in the *Seeger* and *Welsh* cases, for example. We can, for the sake of argument, just suppose religious conscience beliefs against conscription were more central to the identity of the objectors than the secular conscience beliefs against conscription in these cases. But even if they were more central, it still seems as though the secular conscience beliefs against conscription were sufficiently central to their identity so as to warrant the same exemption. After all, the secular conscience beliefs in these cases qualified for the exemption because they seemed to sufficiently occupy "in the life of [their] possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."<sup>297</sup> As Charles Taylor and Jocelyn Maclure argue, "it is not religious convictions in themselves that must enjoy a special status but, rather, all core beliefs that allow individuals to structure their moral identity."<sup>298</sup>

## **B. Moral Integrity**

Just as some have inquired about the centrality of religious conscience beliefs to the moral identity of their possessor, others have relatedly inquired about the centrality of religious conscience beliefs to the moral integrity of their possessor. This might sound like doubletalk, but it's important to point out that moral identity, conscience, and moral integrity are different but related concepts. Alberto Giubilini writes:

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<sup>297</sup> Michael W. McConnell, John H. Garvey, and Thomas C. Berg (2011), 771

<sup>298</sup> Charles Taylor and Jocelyn Maclure (2011), 89. "What defines a core conviction is the role it plays in a person's moral life. That sort of belief and commitment aids the individual in resolving conflicts of values, in sketching out a life plan, and in attributing meaning to his actions, in short, in leading a 'good' life." (91)



The concept of personal identity in the sense in which the notion is used here – i.e., what defines me as this particular person in a qualitative sense – is intimately related to the notions of conscience and of moral integrity, and more specifically to the “identity view of integrity.” According to this view, for people to have integrity means to remain faithful to “identity-conferring commitments,” i.e., “commitments that people identify with most deeply, as constituting what they consider their life is fundamentally about.”<sup>299</sup>

So, on the one hand, one’s moral identity can be constituted by something like Taylor and Maclure’s “core beliefs,” or what Giubilini refers to as “identity-conferring commitments” – and which, I should add, plausibly include our conscience beliefs, religious or otherwise. On the other hand, one’s moral integrity is constituted by the degree to which we “remain faithful” to these “core beliefs” or “identity-conferring commitments” – which, again, plausibly include our conscience beliefs. When someone fails to “remain faithful” to their “core beliefs” or “identity-conferring commitments,” they are, to some degree, lacking moral integrity. When we fail to integrate our moral values and beliefs with our actions or attitudes – and when we possess knowledge of this defect – we are said to have a *guilty* conscience. We might say that it is hard to “live with myself”<sup>300</sup> insofar as part of us “knows of the defect but is keeping it a secret” and “the other shares the secret.”<sup>301</sup> As Sorabji notes,

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<sup>299</sup> Alberto Giubilini (2016)

<sup>300</sup> James F. Childress (1979), 315-35

<sup>301</sup> Richard Sorabji (2014), 12

“for those who feel the force of conscience *strongly*, the expression ‘I could not live with myself’ displays the connection of a clear conscience with integrity.”<sup>302</sup>

The relevant question at hand concerns what sort of relationship religious and nonreligious conscience beliefs have to our moral integrity respectively. After all, requests for exemptions are commonly made on the grounds of respecting moral integrity – especially in healthcare contexts.<sup>303</sup> When we suppose that both kinds of conscience belief are similarly central to our moral integrity, there remains no obvious reason to legally privilege religious conscience beliefs over secular conscience beliefs. And even when we suppose that the religious conscience is – if possible – somehow more central to our moral integrity, there nevertheless seems to be no obvious reason to legally privilege the religious conscience over the secular. Even in this latter scenario, it is plausible to think that, when the religious conscience is – if possible – somehow more central to one’s moral integrity, the secular conscience may be nonetheless sufficiently central to one’s moral integrity so as to warrant similar accommodations. Perhaps *Seeger* and *Welsh* are good examples of cases where nonreligious conscience beliefs were understood to be sufficiently central to one’s moral integrity so as to warrant granting them the same legal accommodations enjoyed by religious conscience beliefs that were admittedly central to one’s moral integrity. Overall then, the same sort of argument made when discussing the relationship between religious conscience and moral identity can be plausibly made when discussing the relationship between religious conscience and moral integrity as well.

### **III. Primordialism and Non-Voluntariness**

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<sup>302</sup> Richard Sorabji (2014), 205

<sup>303</sup> Alberto Giubilini (2014); Patrick Lenta (2016); Morten Magelssen (2011)

The next feature under investigation concerns primordialism and non-voluntariness. More specifically, I will investigate whether religious conscience beliefs are somehow less freely chosen or constructed such that they deserve special legal treatment over and above their more freely chosen, secular counterparts. Sonu Bedi, for example, contends that the primordial and non-voluntary nature of a given belief should be a relevant consideration when determining the permissibility of granting a legal exemption. He argues that “granting religious groups exemptions from facially neutral laws stands on the horns of an often neglected but core dilemma” involving the role of choice:<sup>304</sup>

On the one hand, contemporary theory has come to see religious affiliations and practices as contingent, open-ended and freely constructed. On the other hand, in order to justify different or special treatment for such groups we must view these affiliations as unchosen, static and not freely constructed. I argue that we cannot have it both ways...We must be able to identify the difference between religion and mere preference, and this difference must be enough to justify the religious exemption. I argue that doing so requires viewing the religious practice as anything but voluntary. That is, in establishing the all-important exemption, we must see the religious practice as effectively unchosen, rigid and inhospitable to contestation. Consequently, securing an exemption entails rejecting the open-ended, freely constructed and contingent characterization of religious affiliations. Put simply, the more

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<sup>304</sup> Sonu Bedi (2007), 235

the religious group is seen as just like any other voluntary association or preference, the more difficult it becomes to justify an exemption.<sup>305</sup>

So, Bedi argues that religious beliefs in general – and by association, religious conscience beliefs in particular – can only enjoy special treatment in the form of legal exemptions if they are understood to be “effectively unchosen, rigid and inhospitable to contestation.” Conversely, any sort of “voluntary association or preference” would stand comparatively less justified for special treatment in the form of legal exemptions. Thus, the justification for special legal treatment and the lack of free-choice are, according to Bedi, inversely proportional: as our role in choosing beliefs decreases, our justification for deserving special treatment in the form of a legal exemption increases – and vice versa.

#### **A. The (Religious) Belief Continuum**

Bedi’s above argument rests on a few, key claims worth highlighting and analyzing. The first is that religious beliefs “can be characterized along a continuum.”<sup>306</sup> On one end, the religious belief “is entirely unchosen” – “something one cannot help but do.”<sup>307</sup> Here, religion is understood to be “*a priori* and given: there is no choice in being Sikh or Christian” because religious beliefs “are rigid, static and compelled.”<sup>308</sup> Religion more generally is “primordial.”<sup>309</sup> Bedi continues:

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<sup>305</sup> Sonu Bedi (2007), 235

<sup>306</sup> Sonu Bedi (2007), 235

<sup>307</sup> Sonu Bedi (2007), 235-36

<sup>308</sup> Sonu Bedi (2007), 236

<sup>309</sup> Sonu Bedi (2007), 236

It is primordial because unlike a simple preference or membership in the voluntary association—the Rotary Club or the local charity group, religious affiliations are importantly prior and essential. We are born into them. They shape and inform our identity rather than vice versa...On the primordial end of the continuum, religious practices are rigid and unchangeable instead of mutable and fluid. After all, if we cannot choose such practices—that is, they are simply given—we as individuals cannot alter, change or even revise them.<sup>310</sup>

On this far end of the spectrum, our religious beliefs – which would include religious conscience beliefs – are *entirely unchosen*.

On the other far end of the spectrum, religious belief “is characterized as entirely voluntary.”<sup>311</sup> Here, religious beliefs are *entirely chosen*:

The other end contends that all religious affiliations and practices are chosen making the very notion of a coherent community a fiction. After all, as an empirical matter individuals do convert, leave particular faiths, and even pick and choose which religious tenets to follow. Here we are seen as choosing *everything*, leaving *nothing* up to mere circumstance. Religious practices are mere preferences alterable as we see fit. Far from being constrained by such affiliations, we create, change, affirm, fix and amend them. They do not determine our behavior, rather we determine them.<sup>312</sup>

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<sup>310</sup> Sonu Bedi (2007), 236

<sup>311</sup> Sonu Bedi (2007), 236

<sup>312</sup> Sonu Bedi (2007), 236; italics added

Bedi “highly doubt[s] that religion occupies one extreme or the other” and, instead, occupies a position somewhere in the middle – which seems plausible enough. In the middle, religious beliefs – which, again, would include religious conscience beliefs – would include elements that are both chosen and unchosen.

Gemma Cornelissen similarly investigates the “nature of believing” when evaluating the original specialness question, concluding alongside Bedi that religious beliefs likely lie somewhere in the middle.<sup>313</sup> Cornelissen agrees with the “standard picture” in philosophy that belief acquisition broadly speaking is roughly analogous to catching a cold.<sup>314</sup> In some sense, she agrees that “one cannot *decide* what one believes” since “beliefs aim at truth” – but that this should be taken with two large caveats.<sup>315</sup> First, it’s clear that “we can control many aspects of our surrounding circumstances which tend to give rise to and sustain certain beliefs and not others.”<sup>316</sup> “We can,” Cornelissen writes, “choose to attend church services in attempt to promote in ourselves a belief in that church’s teaching” for example.<sup>317</sup> Similarly, we can choose to place ourselves in a particular context that tends to give rise to and sustain a cold as well. While we don’t choose to have a cold in a strong sense, we do choose to set ourselves up in a particular way in order to catch that cold. Second, it seems like we can also “control the extent to which we exercise or apply our

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<sup>313</sup> Gemma Cornelissen (2012), 100-101

<sup>314</sup> Gemma Cornelissen (2012), 100; citing John Heal (2010), 47

<sup>315</sup> Gemma Cornelissen (2012), 100; citing Bernard Williams (1973), 148

<sup>316</sup> Gemma Cornelissen (2012), 100

<sup>317</sup> Gemma Cornelissen (2012), 100

beliefs in reasoning and behavior.”<sup>318</sup> Cornelissen illustrates this point with an interesting *Seeger* and *Welsh*-like example: “An individual might have little control over believing that war is wrong but, in theory, she could very well choose not to apply her belief if conscripted.” Accordingly, Cornelissen argues that beliefs seem to “require endorsement: they become relevant only when the believer not only ‘holds’ them to be true, but actively chooses to ‘take’ them as true in her reasoning.”<sup>319</sup> So, like Bedi, Cornelissen also takes religious beliefs – which include religious conscience beliefs – to lie somewhere in the middle of the belief continuum described above.

We should also notice that Bedi and Cornelissen’s position is compatible with Haidt’s views – namely, that conscience beliefs in general seem to be typically insulated from moral argumentation in similar ways. For Haidt, the process of forming moral beliefs begins by non-volitionally and primordially adopting moral values (which run the risk of reflecting merely local conventions, customs, or superstitions), then non-volitionally applying these values to our particular actions or attitudes, and then non-volitionally producing an intuitive moral judgment. The only seemingly chosen or non-primordial aspect of this process is a “post-hoc rationalization” step involving appeals to moral arguments in order to justify our beliefs.<sup>320</sup> Interestingly, Haidt believes that the non-volitional and primordial intuitive moral judgments of conscience are still, at least in principle, open to change and amendment (e.g., through moral argumentation or intuitive

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<sup>318</sup> Gemma Cornelissen (2012), 100

<sup>319</sup> Gemma Cornelissen (2012), 101

<sup>320</sup> Jonathan Haidt (2013), XX – XXI

moral judgments produced in us) even though, in practice, they are typically unchanging and insulated from relevant evidence.

The process Haidt describes seems to fit well with Cornelissen’s “standard picture” of belief acquisition: there are non-volitional and primordial aspects to our beliefs that are, in principle, open to change – but this change typically happens in an indirect sort of way, e.g., by controlling our belief-forming influences and controlling the extent to which we exercise or apply our beliefs in reasoning and behavior. Cornelissen’s second caveat – that we can control the extent to which we exercise or apply our beliefs in reasoning and behavior – might help to explain Haidt’s finding that our moral beliefs are, in practice, typically insulated from relevant and contrary evidence. Though friends might challenge us and give us reasons and arguments that sometimes “trigger new intuitions, thereby making it possible for us to change our minds,” we could nevertheless fail to endorse the intuition or belief, failing to actively choose to “take” them as true in our reasoning even when we might non-volitionally “hold” them to be true.

### **B. Non-Voluntariness and Legal Exemptions**

Bedi continues that “much contemporary theory rejects the primordial view and explicitly moves towards the paradigm of choice and contestability.”<sup>321</sup> As noted above, he thinks that by moving “in the direction of anti-primordialism...we undercut the ability to grant an exemption, to treat religion as special or different from a mere preference or voluntary association.”<sup>322</sup> Justifiably granting an exemption gets so undermined because – according to Bedi’s second, key claim – “the only way to effectively justify [an] exemption is

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<sup>321</sup> Sonu Bedi (2007), 237

<sup>322</sup> Sonu Bedi (2007), 237



to treat the affiliation or practice as non-voluntary, as anything but contestable or fluid.”<sup>323</sup>

Is it true that the only justifiable grounds for granting a legal exemption that the belief in question be non-voluntary? Why think that non-voluntary, primordial beliefs are the only sorts of beliefs worthy of legal exemptions?

I find Bedi’s second, key claim to be problematic for at least three reasons. First, it seems as though non-voluntariness should not be classified as a *necessary* condition for obtaining a legal exemption – a view that Bedi clearly posits insofar as he thinks that justifying a religious exemption requires that the religious belief be non-voluntary. To see why I think non-voluntariness fails as a necessary condition, let’s look again at the *Seeger* case. The reason that a legal accommodation was afforded to the conscientious objector had nothing to do with whether or not his belief was freely chosen. What was centrally in question was whether the objector’s belief, freely chosen or not, occupied “in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.” So, the pacifist who freely chooses not to serve in the war after carefully considering the nonreligious arguments for pacifism would still qualify for a legal exemption in *Seeger* because of their belief’s functional equivalence to traditional religious beliefs – not because of its non-voluntariness. The legal conclusion in *Seeger* seems like the acceptable moral conclusion as well, for we seem morally justified in granting a legal exemption to the pacifist who voluntarily acquired their beliefs, thus demonstrating the non-necessity of non-voluntariness.

Second, it seems that non-voluntariness should not be understood as a *sufficient* condition for obtaining a legal exemption either. Remember that Bedi claims that the only

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<sup>323</sup> Sonu Bedi (2007), 235-36

way to justify an exemption is that the belief in question be non-voluntary. This implies that Bedi understands non-voluntariness as, at the very least, sufficient for warranting a legal exemption. To see why non-voluntariness remains insufficient for warranting a legal exemption, however, just consider the real or imagined unjust discriminator whose beliefs are unchosen and primordial and who requests a legal exemption from some law in order to unjustly discriminate to an unacceptable level. The unjust discriminator would satisfy Bedi's necessary and sufficient condition of possessing a non-voluntary belief – yet, intuitively, it seems like we are not morally justified in granting the unjust discriminator a legal exemption. Other interests (e.g., third-party harms) may be sufficient for blocking a legal exemption in such a case. Thus, this counterexample shows that non-voluntariness is insufficient to justify granting the requested legal exemption.

Third, it seems that, even if we grant non-voluntariness as a sufficient condition, it should nevertheless not be understood as the *only sufficient* condition for obtaining a legal exemption. Interestingly, Bedi not only takes non-voluntariness as merely sufficient for warranting a legal exemption; he actually takes non-voluntariness as the *only sufficient* ground for warranting a legal exemption. Contrary to Bedi's position, there seem to be other sufficient grounds for justifying legal exemptions – grounds that are likely more important and overriding, in fact. Again, we can look to *Seeger* to illustrate this point. What really seems to be doing the justificatory work in cases like *Seeger* is that the belief is perceived to be an obligation to its possessor – voluntarily chosen or not. That is, what seems central in these cases is that the belief in question places heavy demands on an individual's action that “must be satisfied no matter what an individual's antecedent

desires and no matter what incentives or disincentives the world offers up.”<sup>324</sup> Accordingly, it seems as though what more centrally and sufficiently justifies granting legal exemptions are considerations related to obligation such as one’s moral identity, moral integrity, and the like – or some combination of these and related features. After all, requiring someone to act against their perceived obligations, freely chosen or not, would in some sense cause them to undermine their moral identity or moral integrity such that they may not be able to “live with themselves.”<sup>325</sup> Bedi rhetorically asks if something “is a choice that some have decided to take, why should it receive an exemption?”<sup>326</sup> We can respond: for a multitude of other sufficient and possibly more important non-volitional reasons including protecting one’s moral identity, moral integrity, and the like.

#### **IV. Unjustified Intolerance and Prejudice**

The last feature that I will look at in this chapter is whether or not religious conscience beliefs enjoy a unique link to unjustified intolerance and prejudice such that *negative* differential treatment before the law is justified. To illustrate what I have in mind with this feature, consider John Corvino’s discussion about the intrinsic value of religion. He notes “that religion – like health, education, family, and so on – is a fundamental good worth promoting” insofar as it “engages the distinctively human capacity for grappling with basic questions about meaning and existence,” “binds people together, often for charitable purposes that promote the general welfare,” “provides a way to mark major life events, and

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<sup>324</sup> Brian Leiter (2013), 34

<sup>325</sup> James Childress (1979), 321

<sup>326</sup> Sonu Bedi (2007), 239

it offers solace in times of grief and despair.”<sup>327</sup> Though he agrees that religion doubtlessly “does all of these things, and does them well,” Corvino also thinks that religion doubtlessly “does great evil” as well.<sup>328</sup>

If that’s true, then perhaps we’ve identified a reason to treat religious conscience unequally before the law: religious conscience beliefs might have a comparatively greater propensity for conflict insofar as they enjoy a unique link to unjustified intolerance and prejudice. In response to this idea, I will argue that religious and nonreligious claims of conscience arguably have similar propensities for conflict such that unequal treatment before the law would be unjustified.

#### **A. Nehushtan’s Anti-Religious Approach**

As noted, some writers have worried that we may have the legal picture backwards: given the features of religious belief, we may actually have good reasons to afford special, *negative* legal treatment toward religious beliefs. For example, Yossi Nehushtan contends that, contrary to their typical codification, religious conscience beliefs are undeserving of a special legal status because they possess a strong tie to unjustified intolerance. This means that Nehushtan defends the view that we should accept an anti-religious approach to granting conscientious exemptions.<sup>329</sup> His argument for this conclusion is as follows:

- (1) Unjustified intolerance should not be tolerated;
- (2) Empirical evidence links religion and intolerance, that is, people’s responses to measures of religion and intolerance are closely related;

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<sup>327</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 62-3

<sup>328</sup> John Corvino, Ryan T. Anderson, and Sherif Girgis (2017), 63

<sup>329</sup> Yossi Nehushtan (2011a), 146

- (3) Theoretical evidence links (some) religions and intolerance;
- (4) The religiosity of conscience gives the state a reason to refuse to grant conscientious exemptions.<sup>330</sup>

Overall, Nehushtan and Leiter seem to agree, then, that religious beliefs “are *far more likely* to cause harms and infringe on liberty” and, as such, believe that there might be “special reasons *not* to tolerate religion.”<sup>331</sup>

Should we accept Nehushtan’s argument and adopt an anti-religious approach? For now, I will assume his first premise (since he defends it at length elsewhere<sup>332</sup>) and instead focus on the remaining premises. I should note, however, that nothing about Nehushtan’s first premise gives us any reason to treat religious conscience differently than its nonreligious counterpart – that is, with either special positive or special negative solicitude. Upon accepting (1), Nehushtan’s conclusion is just that “conscientious objections *that rely on intolerant values* should not be tolerated, including, when necessary, a refusal to grant conscientious exemptions.”<sup>333</sup> What he fails to highlight is the fact that either kind of conscience, religious or otherwise, can rely on unjustifiably intolerant values. Given the nature of conscience, we know that conscience, religious or otherwise, is the applier of our values – values that commonly risk being intolerant because of their tendency to be derived from local custom or superstition. As far as the argument is concerned at this point, it doesn’t seem as though Nehushtan necessarily holds an anti-religious position *per se*.

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<sup>330</sup> For a fuller defense of this argument, see Yossi Nehushtan (2016).

<sup>331</sup> Brian Leiter (2013), 59

<sup>332</sup> Yossi Nehushtan (2007); Yossi Nehushtan (2011b)

<sup>333</sup> Yossi Nehushtan (2011a), 159; emphasis added

Instead, it seems as though he's arguing for an *anti-intolerance* position where any conscientious objection that might "rely on [unjustifiably] intolerant values," religious or otherwise, should not be tolerated – up to the point of withholding the legal exemption.

Furthermore, we should note that Nehushtan's argument, at least as written, is formally invalid. More specifically, Nehushtan qualifies the kind of intolerance he has in mind with premise (1) – namely, *unjustified* intolerance. But in premises (2) and (3), Nehushtan drops the qualifier and merely describes the empirical and theoretical links that religion has to mere *intolerance*. So, in order for his argument to be valid – and for Nehushtan to conclude that the religiosity of conscience gives the state a reason to refuse to grant conscientious exemptions – Nehushtan must add the *unjustified* qualifier to premises (2) and (3). In what follows, I will simply assume this friendly amendment to Nehushtan and interact with the valid version of his argument.

Yet, even after we offer a friendly amendment to Nehushtan's argument in order to make it valid, is it nevertheless sound? That is, are premises (2) and (3) true? Nehushtan claims that both empirical and theoretical evidence links some religions – specifically Christianity, Islam, and Judaism – and intolerance. Concerning (2), Nehushtan explains that "scholars do not dispute the *strong and unique* empirical links between religious orientation and prejudice or intolerance."<sup>334</sup> Two conclusions about this empirical link are highlighted. First, "religion and intolerance are indeed closely related" in that, "as a broad generalization, the more religious an individual is, the more prejudiced that person is."<sup>335</sup> Second, "the first conclusion should be qualified and treated with caution" – the most

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<sup>334</sup> Yossi Nehushtan (2011a), 159; emphasis added

<sup>335</sup> Yossi Nehushtan (2011a), 159

important such qualification being “the need to differentiate between various types of religious orientation.”<sup>336</sup> The importance of differentiating between various types is understood when we consider that “different religious orientations can entail various degree of intolerance towards different target-groups.”<sup>337</sup>

To illustrate the different prejudices and intolerances displayed among particular religious orientations, consider the results of the following study:

The target of prejudice is important when considering prejudice-religious orientations relationships. The intrinsic [religious orientation, where religion is an end in itself, was] consistently *negatively* related to the self-reported racial/ethnic intolerance, but it was *positively* related to intolerance of gay men and lesbians and possibly to authoritarianism and intolerance of communists and religious outgroups though there are few relevant studies. The extrinsic [religious orientation, where religion is merely a means to self-serving ends,] was sometimes positively related to racial/ethnic and gay/lesbians intolerance. [The quest religious orientation, where religion is perceived as a quest or a way of finding the truth rather than as the truth itself,] showed a weak tendency to be associated with tolerance for racial groups; a much stronger effect appeared for gay/lesbian as targets. Finally, [religious fundamentalism] was consistently related to increased prejudice against gay/lesbian persons, women, Communists and religious outgroups,

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<sup>336</sup> Yossi Nehushtan (2011a), 159

<sup>337</sup> Yossi Nehushtan (2011a), 160

as well as authoritarianism, but its relationship with racial/ethnic intolerance is less clear cut.<sup>338</sup>

So, it seems as though the main takeaway from this research is that different religious orientations not only differ with regard to the *kind* of prejudice and intolerance (i.e., negatively or positively related), but also with regard to the *object* of prejudice and intolerance as well (e.g., races/ethnicities, gays/lesbians, women, authoritarians, communists, religious outgroups, etc.). Even though different religious orientations are differently prejudiced against and intolerant of different people groups, Nehushtan concludes (2): there is a strong and unique empirical link between religious orientation in general and prejudice or intolerance.

Though these studies are admittedly vulnerable to criticism<sup>339</sup> and fail to give us a full picture of things,<sup>340</sup> Nehushtan nevertheless contends that “the results in these studies

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<sup>338</sup> Bruce Hunsberger and Lynne Jackson (2005), 812. This study is also cited in Nehushtan (2011a), 160.

<sup>339</sup> Yossi Nehushtan (2011a): “...most of these studies were conducted in the United States (and a few in Canada), mainly amongst Christians. This fact is unfortunate, as we might expect that the kinds and degree of intolerant tendencies among religious people would be culturally and geographically specific. The studies outside of North America that examined religious prejudice and intolerance among non-Christians are too few and often suffer from methodological flaws. This regrettable fact may raise doubts about whether North American studies should be used to draw conclusions about religion as such.” (160)

<sup>340</sup> Yossi Nehushtan (2011a): “...there is also good reason to believe that a considerable proportion of the studies conducted to date actually fail to describe how intolerant and prejudiced religious people really are. It is very likely that religious people are even more intolerant and prejudiced than many studies describe. Most of the studies have used ‘pencil and paper’ instruments that examine self-reported prejudice rather than using behavioral instruments to measure prejudice. In other words, most studies examined the relationship between religious orientation and overt forms of prejudice.” (161)



over time” provide us cursory reasons for accepting (3): “the relevant resemblance between Christianity, Judaism and Islam, and the fact that the description of religious fundamentalism is potentially applicable to at least these three religions, all provide [theoretical] grounds to believe in the applicability of the above findings to Judaism...Islam, [Christianity] and perhaps to other similar religions as well.”<sup>341</sup>

### **B. The Anti-Intolerance Approach**

Now that we’ve seen Nehushtan’s argument laid out, we can return to the original question of this section: should we adopt an anti-religious approach? At the very least, I don’t think that Nehushtan has offered a complete argument for accepting an anti-religious approach. But more strongly, I think there are better reasons to accept an anti-intolerance approach instead when we accept Nehushtan’s first premise. To see why, first consider that, in order to justify adopting the anti-religious approach over the anti-intolerance approach, Nehushtan would need to show that religious beliefs have a *uniquely* strong tie to *unjustified* prejudice and intolerance that other beliefs fail to possess. More specifically, Nehushtan would need to show that religious conscience beliefs have a uniquely strong tie to unjustified prejudice and intolerance that nonreligious conscience beliefs fail to possess – and that this tie is sufficiently unique such that differential legal treatment is warranted. Unfortunately, Nehushtan only shows that religious beliefs are, in general, strongly tied to prejudice and intolerance – not that they have a uniquely strong tie to unjustified prejudice and intolerance in a way that justifies their special, negative treatment before the law. To

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<sup>341</sup> Yossi Yossi Nehushtan (2011a), 160-61. For more on the possible links between religion and intolerance overall, see Yossi Nehushtan (2011c).

fully make this case, Nehushtan would need to consider the tie to unjustified prejudice and intolerance that nonreligious conscience beliefs have also.

Additionally, this central claim that religious conscience beliefs possess a uniquely strong tie to unjustified prejudice and intolerance just seems false. At the outset, it seems like we can safely claim that various conscience beliefs in general possess at least some kind of prejudice or intolerance – regardless of the strength. Any sort of value belief with a particular content has the potential to be prejudiced against something or intolerant of something. This claim seems especially plausible when we grant, alongside Nehushtan, that both the kind and objects of prejudice and intolerance can vary. More crucially, however, the justification of the prejudice and intolerance is what seems to be important here: religious conscience beliefs allegedly have a uniquely strong tie to unjustified prejudice and intolerance that nonreligious conscience beliefs lack. Contrary to Nehushtan, I will now argue that religious conscience beliefs fail to possess a uniquely strong in principle or in practice tie to unjustified prejudice and intolerance.

First, it seems as though unjustified prejudice and intolerance are similarly correlated to religious and nonreligious conscience beliefs insofar as the driving force behind the prejudice and intolerance is, at least in principle, shared by both kinds of conscience. To see why this is the case, consider the example of suicide bombers offered by Jonathan Haidt:

To take one example, religion does not seem to be the *cause* of suicide bombing. According to Robert Pape, who has created a database of every suicide terrorist attack in the last hundred years, suicide bombing is a nationalist response to military occupation by a culturally alien democratic

power. It's a response to boots and tanks on the ground – never to bombs dropped from the air. It's a response to contamination of the sacred homeland. (Imagine a fist punched into a beehive, and left in for a long time.) Most military occupations don't lead to suicide bombings. There has to be an ideology in place that can rally young men to martyr themselves for a greater cause. The ideology can be secular (as was the case with the Marxist-Leninist Tamil Tigers of Sri Lanka) or it can be religious (as was the case with the Shiite Muslims who first demonstrated that suicide bombing works, driving the United States out of Lebanon in 1983). Anything that binds people together into a moral matrix that glorifies the in-group *while at the same time demonizing another group* can lead to moralistic killing, and many religions are well suited for that task. Religion is therefore often an *accessory* to atrocity, rather than the driving force of the atrocity.<sup>342</sup>

According to Haidt, unjustified prejudices and intolerances – like those manifested in suicide bombings – are not the unique products of religion per se, but instead seem to be the products of ideologies that “bind people together into a moral matrix that glorifies the in-group *while at the same time demonizing another group*.” While these ideologies can be either secular or religious, what serves as the primary “driving force of the atrocity” is being deeply embedded within the above sort of moral matrix that glorifies the in-group and demonizes the out-group. Thus, the underlying feature that seems to drive unjustified prejudice and intolerance is not, at least in principle, unique to religious conscience beliefs.

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<sup>342</sup> Jonathan Haidt (2013), 312

Second, it seems like we should doubt that unjustifiably prejudiced and intolerant ideologies are, in practice, uniquely religious – which seems to be the idea that really does the distinguishing work for Nehushtan. To see why we should doubt religion’s unique in-practice-link to unjustified prejudice and intolerance, just consider some of the following claims made by the BBC’s war audit in 2004.<sup>343</sup> For example, one of the main findings of the study was:

...that the overwhelming majority of wars and the overwhelming majority of the victims of such wars cannot be classified primarily according to religious causes or religious beliefs. There have been horrific examples though where particular communities have been targeted because of their religious faith, and these atrocities have been perpetrated by the three most vicious and blood-thirsty regimes ever to hold power: Stalin’s Russia, Mao’s China and Hitler’s Germany.<sup>344</sup>

Moreover:

The discussion of god-invoking, militantly religious states in connection with a propensity for war raises the question of whether atheistic or secular states, such as China, are less prone to war or large scale violence. The information...on death tolls from major wars is a fairly strong indication that atheism is not by itself any indicator in this direction. Atheist governments in the USSR, China and Russia were in fact the biggest perpetrators of mass violence that the world has ever seen, with both governments individually

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<sup>343</sup> Greg Austin, Todd Kranock, and Thom Oommen (2004)

<sup>344</sup> Greg Austin, Todd Kranock, and Thom Oommen (2004), 17

responsible for many more deaths than the Nazi regime of Adolf Hitler. The presence of the millenarian ideology of Communism (like Nazism) gave the rulers the justification for mass murder, in much the same way that religion had been used by other rulers before them the world over to justify war. The common thread here linking the disposition to war of religious and atheistic states is absolutism: the more absolutist the state, the more likely it is to go to war. Thus we can conclude that a genuinely secular (atheistic) state may be less inclined to go to war than a state in which religion is very prominent, only as long as the secular state is one which is not pursuing a millenarian or totalitarian ideology (such as Communism or Nazism) and as long as the state is one in which pluralism and tolerance of diversity are the norm.<sup>345</sup>

The main point here is simple: it seems like we can be reasonably skeptical that religion boasts of a unique in-practice-link to unjustified prejudice and intolerance. Given the above claims, perhaps a good case can be made that nonreligious ideologies and beliefs – which include nonreligious conscience beliefs – are, in practice, similarly unjustifiably prejudiced and intolerant. At the very least, the modest claim is sufficient: we should doubt that religious ideologies and beliefs possess a uniquely strong in practice tie to unjustified prejudice and intolerance – especially in a way that warrants altogether different treatment before the law.

If these claims are right, then we have good reason to instead accept an anti-intolerance approach over Nehushtan's exclusively anti-religious approach when we are under the assumption of his first premise. If the anti-intolerance approach is adopted, then

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<sup>345</sup> Greg Austin, Todd Kranock, and Thom Oommen (2004), 35-36

we have no reason to treat religious conscientious objectors with special, negative treatment. The only kind of conscience belief that might receive special, negative treatment before the law would be conscience beliefs based on unjustifiably intolerant values – regardless of their religiosity.

### **C. A Remaining Problem for Content Non-Neutral Approaches**

In this last section, I raise a lingering concern that applies to all content non-neutral approaches. The concern is that, even when we grant the content non-neutralist that the unjustifiably intolerant content of one’s conscience constitutes a weighty and relevant factor in deciding whether or not to grant an exemption, just how weighty and relevant that reason is or should be remains unhelpfully unclear – especially when considered amongst competing reasons for granting or not granting an exemption.

For example, Nehushtan admits that the unjustifiably prejudiced and intolerant content of a conscience as a reason “is not necessarily compelling,” yet ought to be understood as a “relevant, presumably weighty justification that should be included within the balance of reasons.”<sup>346</sup> If this is true, then how strong – or for that matter, how helpful – is the content non-neutral conclusion of either approach described above? The content-based reason for withholding an exemption may be relevant and weighty, but *how* relevant and *how* weighty? Other reasons included within the balance of reasons could very well be like legitimate governmental interests in a liberal society: not necessarily equally weighty or equally important.<sup>347</sup> So, if the reason isn’t necessarily compelling and is categorized as

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<sup>346</sup> Yossi Nehushtan (2011a), 161

<sup>347</sup> Yossi Nehushtan (2011a): “One can agree with Greenawalt but add that the protection of religious freedom and the promotion of equal opportunity, although both legitimate governmental objectives in a liberal society,

just one reason among many within the balance of reasons, then it can end up being marginally relevant and weighty. In the end, then, how helpful and how much does the anti-religious or anti-intolerance approach really accomplish if content-based reasons are marginally relevant and weighty within the balance of reasons?

Nehushtan's reply to the concern about the weight of the content-based reason will vary according to whether one adopts what he calls "the narrow thesis" or "the broad thesis." Concerning the narrow thesis, he writes:

According to what I shall call 'the narrow thesis', if claims for religious-conscientious exemptions are *based directly on intolerant values, beliefs and conscience, or on values that utterly undermine the rationales for tolerance*, the state has a strong, normally prevailing reason not to grant the exemption. This view does not accord any weight to the fact that the conscientious objection is based on religious beliefs. It also does not take a stand against religion as such. Nevertheless, even within the narrow thesis, it is important to acknowledge the existence of the links between certain religions and intolerance. These links should lead authorities to apply a cautious, perhaps suspicious attitude towards religious requests for conscientious exemptions, even though the decision would have to be made mainly on a case-by-case basis, that is, according to the content of the values that ground each and every conscientious objection, be it religious or not.<sup>348</sup>

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are not necessarily equally weighty or equally important. No principle prevents a liberal-democratic state from setting a hierarchy of values or rights or giving a priori priority to certain rights over others." (148-49)

<sup>348</sup> Yossi Nehushtan (2011a), 165; emphasis added

From this paragraph, we can note a few things. First, the content-based reason is considered “normally prevailing” when the conscience belief in question is “based directly on intolerant values” – or based directly “on values that utterly undermine the rationales for tolerance.” Unfortunately, there is no further discussion about the kinds of reasons that might count against this otherwise “normally prevailing,” content-based reason. Given the above description, it seems clear that adopting “the narrow thesis” implies the anti-intolerance approach over the anti-religious approach. Under the narrow thesis, what matters is whether the conscience belief in question is based on unjustified intolerant values – regardless of its religiosity – such that each request for an exemption must be made “on a case-by-case basis.” Moreover, Nehushtan thinks that, given the strong link between religious beliefs, prejudice, and intolerance, authorities should “apply a cautious, perhaps suspicious attitude towards religious requests for conscientious exemptions.” That is, he argues that, under the narrow thesis, we should treat all conscientious objectors the same before the law in the sense that they must all be ran through the same legal mechanism to determine the permissibility of granting an exemption. But when a religious objector comes along, authorities should be comparatively more suspicious. If I am right that we should be skeptical that religious conscience beliefs possess a uniquely strong tie to unjustified prejudice and intolerance, then his conclusion here would be unreasonably discriminatory against religious believers.

The second part of Nehushtan’s answer to the question about the weight of the content-based reason concerns what he calls “the broad thesis.” Though Nehushtan does



not “argue which of these two theses is preferable,” he admittedly tends “to favor the broad rather than the narrow thesis.”<sup>349</sup> Concerning to the broad thesis, Nehustan writes:

According to what I shall call ‘the broad thesis’, the state has a good reason, although not necessarily a prevailing one, not to grant religious conscientious exemptions, even in cases where the claims to be granted exemptions are not based directly on intolerant values, beliefs or conscience. The state may have such a reason because of the special links between certain religions and intolerance. The stronger the link regarding a certain religion, the stronger is the reason not to grant religious conscientious exemptions to its adherents. The broad thesis assumes that the tolerant-liberal state has a right both to strengthen its liberal, secular nature and to discourage its citizens from choosing a religious way of life. The broad thesis suggests that granting conscientious exemptions to religious objectors who act upon a conscience that is not intolerant may still support, even if indirectly institutions or practices of that religion that are intolerant.<sup>350</sup>

We should note a few things about adopting the broad thesis as well. First, the old problem about how relevant and weighty the content-based reason is within the balance of reasons returns – showing again that Nehustan’s claims about this content-based reason aren’t that helpful. In fact, this particular problem may be worse under the broad thesis insofar as the reason can be considered relevant “even in cases where the claims to be granted exemptions are not based directly on intolerant values.” Unfortunately, the

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<sup>349</sup> Yossi Nehushtan (2011a), 166

<sup>350</sup> Yossi Nehushtan (2011a), 165-66

relevance and weight of the content-based reason is already ambiguous. But under the broad thesis, whether or not the particular conscience belief actually violates content-based concerns would be uniquely and additionally ambiguous. After all, the content-based reason would now be considered relevant even in cases where the claim in question is based even indirectly on intolerant values – whatever that might look like. Lastly, if I am right that we should doubt that religious conscience beliefs possess a uniquely strong tie to prejudice and intolerance, then the state would seemingly have reason not to grant any sort of conscientious exemption in cases where the claims in question are based even indirectly on intolerant values. Such a conclusion, taken at face value, seems overreaching.

Sadly, Nehushtan never quite answers whether the content-based reason “should be a uniquely strong reason” and even admits that this “is a question yet to be resolved.”<sup>351</sup> While he thinks that there is nevertheless “a strong case” for regarding the content-based reason as “a relevant reason,” the “question yet to be answered” remains: should the content-based reason merely be “a relevant factor to be considered” or should it be “a relatively weighty reason?”<sup>352</sup> This is a problem for both anti-religious and anti-intolerance approaches. Nehushtan notes that both the narrow and broad theses “entail an evaluative, normative judgment which identifies either the intolerant content of a person’s religious conscience, the intolerant nature of a certain religion, or the intolerant practice of that religion.”<sup>353</sup> And if I am right that we ought to adopt an anti-intolerance approach over an anti-religious approach under the assumption of Nehushtan’s first premise, then either

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<sup>351</sup> Yossi Nehushtan (2011a), 166

<sup>352</sup> Yossi Nehushtan (2011a), 166

<sup>353</sup> Yossi Nehushtan (2011a), 166

thesis would instead entail an evaluative, normative judgment which identifies either the intolerant content of a person's conscience, the intolerant nature of a certain ideology, or the intolerant practice of that ideology. Yet, the problem about the relevance and weightiness of content-based reasons would show up here too: just how relevant or how weighty should content-based reasons be if we discover unjustifiably intolerant content in a person's conscience belief, practice, or ideology?

## **V. Conclusion**

In this chapter, I provided further support for my central claim – namely, that because religious conscience beliefs are sufficiently similar to other conscience beliefs, there is no good reason to treat them differently before the law. In particular, I narrowed in on three further, possibly delineating features of the religious conscience that theorists take to be legally relevant. First, I investigated whether religious conscience beliefs are more central to our identity – and relatedly, whether they are more central to our moral integrity. Ultimately, I argued that both religious and nonreligious conscience beliefs are sufficiently central to our identity and moral integrity such that there is no obvious reason to grant preferential legal treatment to one over the other. Second, I investigated whether religious conscience beliefs are more primordial, unchosen, or non-voluntary. I claimed that granting legal exemptions on the grounds that the belief or practice in question is primordial or non-voluntary is problematic for at least three reasons. First, I argued that non-voluntariness should not be classified as a necessary condition for obtaining a legal exemption. Second, I argued that non-voluntariness should not be understood as a sufficient condition for obtaining a legal exemption either. And third, I argued that, even if

we grant non-voluntariness as a sufficient condition, it should not be understood as the only sufficient condition for obtaining a legal exemption.

As I ended the chapter, I investigated whether religious conscience beliefs are uniquely linked to unjustified intolerance and prejudice such that differential treatment before the law is warranted. I argued that both religious and nonreligious conscience beliefs plausibly have similar propensities for unjustified prejudice and intolerance such that unequal treatment before the law is, in fact, unwarranted. First, I argued that unjustified prejudice and intolerance are similarly correlated to religious and nonreligious conscience beliefs insofar as the driving force behind the prejudice and intolerance is, at least in principle, shared by both kinds of conscience. Second, I argued that we should doubt that religious conscience beliefs enjoy a uniquely strong in-practice-link to unjustified prejudice and intolerance. If these claims are right, then I argued that we should accept the anti-intolerance approach over an exclusively anti-religious approach under the assumption of Nehushtan's first premise. And when the anti-intolerance approach is adopted, we have no reason to treat religious conscientious objectors with special, negative treatment. Nevertheless, I concluded by highlighting a further problem for both the anti-religious approach and the anti-intolerance approach: just how relevant or how weighty should content-based reasons be in the exemption calculus if we discover unjustifiably intolerant content in a person's conscience belief, practice, or ideology?

## CHAPTER 5: OBJECTIONS TO THE EGALITARIAN RESPONSE

*A strategy of mandatory religious exemptions...puts religionists and secularists at war with one another, with the former claiming a right to be free from laws that the latter must obey. By contrast, a strategy for protecting religion under broader umbrellas of rights and immunities makes religionists and secularists into partners in developing a workable theory of the limited state.*

*– Ira Lupu & Robert Tuttle, *Secular Government, Religious People*, p. 180*

### I. Introduction

Having argued for the Egalitarian Response, in the last chapter I address several lurking objections to this position. In the first section, I address the multifaceted critique of the Egalitarian Response advanced by Kathleen Brady. In particular, I address her claims that: religious conscience beliefs should enjoy special legal treatment because they enjoy a distinct relationship with the divine; that accepting the Egalitarian Response results in weaker protections for both religious and secular conscience beliefs; and that accepting the Egalitarian Response limits liberty more broadly and religious liberty in particular. In the second section, I address the Feasibility Objection which worries that the implications of accepting this response may be pragmatically or legally unworkable – possibly leading to something like legal anarchy. There, I discuss responses to this objection raised by Douglas Laycock and Nadia Sawicki. In the final section, I offer two responses to the Underinclusiveness Objection as raised by Simon May – which just claims that there is no principled moral reason to grant legal accommodations to conscience beliefs that are not equally good reason to grant legal accommodations to non-moral projects.

### II. Kathleen Brady's Objections

In her book *The Distinctiveness of Religion in American Law*, Kathleen Brady advances a multifaceted critique of the Egalitarian Response to the original specialness question. In this section, I will detail her most salient objections and respond to them in turn.

### **A. Religion's Distinctive Relationship with the Divine**

Contrary to the Egalitarian Response, Brady contends that “religious beliefs and practices are distinctive” and that “the distinctive character of religious belief and practice has implications for the relationship between religion and government.”<sup>354</sup> Concerning the basis of their distinctiveness, she writes:

Unlike secular commitments, [religious beliefs and practices] involve the relationship of persons with the divine. Humans have the ability to reflect on their existence and the larger world of which they are a part, and as they do so, they confront the ground or source of all that is as a question and concern. We are all oriented to the divine. For the religious person, however, this orientation has become a relationship. The divine is not just a question or concern. The divine is present to them as something good and trustworthy, and the religious person seeks union or communion with the divine as humanity's highest end. Salvation or liberation or fulfillment inheres in this connection, and through union or communion with the divine, humanity's deepest existential threats are overcome. Death is overcome as human finitude is taken up into the infinite. So are the threats of meaninglessness and guilt. In the divine, the religious believer understands himself and the

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<sup>354</sup> Kathleen A. Brady (2015), 300

world as they really are and should be. Life takes on meaning and is given purpose. The believer shares in what is eternal, absolute, and perfect. For the believer, all of life is lived in light of this relationship, and it reaches deep into the many facets of human thought and experience.<sup>355</sup>

According to Brady, what distinguishes religious beliefs and practices from their secular counterparts is roughly the following: religious beliefs and practices involve seeking union or communion with the divine – which is humanity’s highest end and the ground or source of all that is. Beyond this, the divine is also described as being good, trustworthy, eternal, absolute, perfect, able to bring salvation, liberation, or fulfilment when united with, and able to overcome humanity’s deepest existential threats like meaninglessness, purposelessness, and guilt. Moreover, when united with the divine, the religious believer “understands himself and the world as they really are and should be” and their whole life is “lived in light of this relationship.”

Moreover, Brady argues that religious and secular convictions are further differentiated insofar as they could never be “functional equivalents or fully analogous even when the latter take the form of moral commitments that are deeply held, central to personal identity, or meaning-giving.”<sup>356</sup> In other words, Brady would not agree that religious and nonreligious conscience beliefs can be functional equivalents in the way that they were in *Seeger* and *Welsh* for example. We should note, however, that being functional equivalents and being fully analogous are different. As was decided in *Seeger* and *Welsh*, it seems like religious and nonreligious conscience beliefs can be functional equivalents while

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<sup>355</sup> Kathleen A. Brady (2015), 300

<sup>356</sup> Kathleen A. Brady (2015), 302

only being sufficiently analogous to one another. The different modes of conscience could, for example, be differently insulated from certain kinds of evidence – rendering them not fully analogous – yet sufficiently similar such that they would qualify as functional equivalents before the law. What’s important for our present purposes is not necessarily whether or not religious and nonreligious conscience beliefs can be equally analogous but whether they are sufficiently functionally equivalent for purposes of determining their comparative legal treatment. As emphasized above, Brady’s central reason for believing in their functional inequality is that “religious beliefs and practices, unlike secular ones, are always inseparable from the believer’s encounter with the divine.”<sup>357</sup>

So, the connectedness – the union or communion – that religious beliefs have with the divine seems to be the central feature that Brady takes as distinguishing religious conscience from secular conscience before the law. After all, religion in general is “different” insofar as the object of religious belief is, in some sense, the divine – “the source and ground of all that is.”<sup>358</sup> While it’s true that “religious belief involves moral conviction and commitment” in the same way that secular belief does, Brady thinks that religious belief involves “more than that” – indeed, it involves the very “source of obligation.”<sup>359</sup> So, Brady’s first reason for not adopting the Egalitarian Response is that religious conscience beliefs uniquely possess the distinctive feature of union with the divine that justifies affording them special legal treatment.

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<sup>357</sup> Kathleen A. Brady (2015), 302

<sup>358</sup> Kathleen A. Brady (2015), 306

<sup>359</sup> Kathleen A. Brady (2015), 306



In response to Brady's first objection, we can ask a few questions. First, while it seems plausible to understand union with the divine as a sufficient condition for 'religion,' is it necessary? Second, if it is necessary for a belief system to invoke some concept of the 'divine' in order to be counted as a 'religion,' is Brady's concept of the 'divine' adequate for legal purposes? We'll consider each of these questions in turn.

First, while Brady's "union with the divine" may be a sufficient condition for 'religion,' is it necessary? To answer, let's consider Confucianism – an Eastern system of belief that many intuitively count as a 'religion.' If it is a religion, and if Brady is right that religions distinctively seek union or communion with the divine, then we should expect Confucianism to distinctively seek union or communion with the divine. Interestingly, religion scholar Stephen Prothero argues that Confucianism actually distinguishes itself from other world religions by its explicit "lack of interest in the divine."<sup>360</sup> He writes:

[Confucianism's] adherents speak of an impersonal force called Heaven that watches over human life and legitimates the authority of rulers, and they have been known to revere the quasi-divine sage emperors of golden ages past. But they pay about as much attention to the creator God as your average atheist, and even less to formal theology. The Analects, which refer no fewer than eighteen times to an impersonal Heaven, do not once use personal terms for God popular in pre-Confucian China. Before Confucius, Chinese thinkers were more likely to speak of Heaven than Earth. After Confucius it was the other way around. To this day, Confucians are preoccupied with humans rather than gods, and with life before death rather

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<sup>360</sup> Stephen Prothero (2011), 105

than life after it. Their concerns are ethical rather than eschatological, practical rather than metaphysical.<sup>361</sup>

Given the explicit lack of interest in a personal creator God, formal theology,<sup>362</sup> life after death, eschatology, and metaphysics, it's easy to see why, at least at face value, Confucianism is described as "lacking interest in the divine." If it's true that Confucianism lacks a strong relationship or union with the divine as understood by Brady, then we either have a counterexample to Brady's distinguishing feature of religion or else Confucianism isn't really a religion after all.

Prothero tries to answer this dilemma by giving us reason to believe that a necessary feature of all religions is the application of some concept of the 'divine' within its broader system and, subsequently, that Confucianism might be a religion after all:

This [lack of interest in the 'divine'] might make the Confucian project sound secular, but it makes more sense to see it as a thisworldly religion – an attempt to find the sacred hidden in plain sight in the profane or, as the contemporary Confucian thinker Tu Weiming puts it, "to regard the everyday human world as profoundly spiritual." If religion is about the sacred as opposed to the profane, the spirit as opposed to matter, the Creator as opposed to the created, Confucianism plainly does not qualify. But perhaps

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<sup>361</sup> Stephen Prothero (2011), 105-106

<sup>362</sup> Prothero (2011): "Of all the religious dimensions, Confucians care the least about theology. Confucians traditionally speak of God about as comfortably as do French politicians, and the notion of a transcendent Creator calling the shots from on high is as foreign to Confucianism as Confucianism is to most Western readers. Confucians do affirm, however, that our human nature comes from Heaven, that the good life is a life lived in accordance with this nature, and that a good state carries out the Mandate of Heaven." (108)

what we are to learn from this tradition is not that Confucianism is not a religion but that not all religious people parse the sacred and the secular the way Christians do.<sup>363</sup>

Thus, Prothero seems to think that Confucianism just rejects an “otherworldly” interpretation of the ‘divine’ and embraces a “thisworldly” interpretation of the ‘divine’ instead. What this tells us is that Confucianism still embraces some concept of the ‘divine’ – just not a particularly theistic or otherworldly version of it “the way Christians do.”<sup>364</sup> Perhaps the example of Confucianism can serve as good evidence that implementing some notion of the ‘divine’ is necessary for all religions even though they may differ on what the ‘divine’ really amounts to. Put another way, perhaps a necessary condition for all religions is that they contain this basic sacred-secular divide where what is sacred is understood as ‘divine’ even though where the sacred-secular dividing line falls may differ from religion to religion. In Christianity for example, the sacred-secular divide seems to fall between the Augustinian eternal “City of God” and the temporal “City of Man,” but from the Confucian perspective, the sacred and secular are “forever trespassing upon and interpenetrating

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<sup>363</sup> Stephen Prothero (2011), 107

<sup>364</sup> Prothero (2011): “Unlike Christianity, which drives a wedge between the sacred and the secular – the eternal ‘City of God’ and the temporal ‘City of Man’ – Confucianism glories in creatively confusing the two. There *is* a transcendent dimension in Confucianism. Confucians just locate it in the world rather than above or beyond it. The closest Confucians get to Western notions of a transcendent and ‘wholly other’ God is the notion of Heaven (tian), which, while impersonal, nonetheless seems to have a will. But transcendence is always to be found here and now in human history and in human bodies themselves. What we refer to as the sacred and the secular are from the Confucian perspective forever trespassing upon and interpenetrating each other – ‘immanent transcendence.’” (108)

each other.”<sup>365</sup> Both systems of belief can therefore be plausibly understood as ‘religions’ since they similarly rely upon a sacred-secular divide even though they differ on where the ‘divine’ line is drawn.

Up to this point, we have noted that it is plausible to think that when a belief system posits the existence of the ‘divine’ – i.e., some sacred-secular divide – it can be counted as a ‘religion.’ But this divinity feature also seems necessary for demarcating a religion: after all, it is difficult to conceive of a religion that fails to posit anything as divine and fails to draw any sort of sacred-secular divide. Even Confucianism – a belief system that some take to be just “a philosophy, ethic, or way or life” and not “a religion at all”<sup>366</sup> – may posit some basic concept of the ‘divine’ and sacred-secular divide. So it seems that Brady was right to think that one of the demarcating features of religion, at least in some sense, involved reference to the divine or sacred-secular divide. However, even when we think that it is necessary for a belief system to posit some concept of the ‘divine’ in order to be counted as a ‘religion,’ we must ask the further question: is Brady’s particular concept of the ‘divine’ adequate for legal purposes?

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<sup>365</sup> Stephen Prothero (2011), 108. “For all these reasons, Confucianism can be regarded as religious humanism. Confucians share with secular humanists a single-minded focus on this world of rag and bone. They, too, are far more interested in how to live than in plumbing the depths of Ultimate Reality. But whereas secular humanists insist on emptying the world of the sacred, Confucians insist on infusing the world with sacred import – on seeing Heaven in humanity, on investing human beings with incalculable value, on hallowing the everyday. In Confucianism, the secular is sacred. Or, as Tu Weiming puts it, “The Way of Heaven is immanent in human affairs.” (108)

<sup>366</sup> Stephen Prothero (2011), 105

To best answer this, we must remember that Brady takes the demarcating of religious beliefs to be that they involve a “relationship of persons with the divine.” And again, that the ‘divine’ according to Brady involves the following sorts of features:

- It is the ground or source of all that is as a question and concern and is eternal, absolute, and perfect.
- All humans are oriented to the divine, but persons who have a “relationship” with it – i.e., “union or communion with it” – are considered ‘religious.’ For the believer, all of life is lived in light of this relationship to the divine, and it reaches deep into the many facets of human thought and experience.
- For those with a relationship with the divine, it is not just a question or concern, but present to them as something good and trustworthy.
- Union or communion with the divine is humanity’s highest end, and salvation and liberation inheres this union.
- Additionally, humanity’s deepest existential threats of meaninglessness and guilt are overcome with meaning and purpose through union or communion with the divine.
- Through union or communion with the divine, the religious believer understands himself and the world as they really are and should be.

Given the above, I doubt that Brady’s concept of the ‘divine’ is adequate for legal purposes because Brady seemingly understands the ‘divine’ as narrowly theistic – and even vaguely Christian. Perhaps most importantly, not every religion takes the divine to be as personal, relatable, or communal as Brady does. Additionally, Brady’s account of the divine

sounds overly theistic in that it seemingly relies on the “notion of a transcendent Creator calling the shots from on high” insofar as the divine is described as eternal, absolute, perfect, and the source and ground of all that is. Unfortunately, this notion of a transcendent Creator is something that is as foreign to the Eastern religion of Confucianism “as Confucianism is to most Western readers.”<sup>367</sup> Interestingly, Prothero notes that “the closest Confucians get to Western notions of a transcendent and ‘wholly other’ God is the notion of Heaven (tian), which, while impersonal, nonetheless seems to have a will.”<sup>368</sup>

If it’s true that Brady takes ‘divine’ to roughly mean theistic God, then her concept of ‘divine’ will be clearly underinclusive for purposes of the law. This underinclusive notion of ‘divine’ would, for example, likely not recognize Confucianism as a religion since its concept of the ‘divine’ is non-theistic. If Brady understood ‘divine’ to mean something that included theism as well as other ways of parsing out the sacred-secular divide (e.g., pantheism), then her subsequent definition of ‘religion’ would likely better represent what religion actually is and would be more appropriate for legal purposes. While Brady is probably right that ‘religion’ necessarily invokes some notion of the ‘divine,’ she is nevertheless wrong if she understands the ‘divine’ as basically theistic – or even vaguely Christian.

Furthermore, if Brady’s concept of the ‘divine’ is, in fact, narrowly theistic, then Brady’s argument for the distinctiveness of the religious conscience would be predicated upon a metaethical assumption that, if false, would largely undermine her position. In other words, if Brady’s moral ontology is predicated upon the truthfulness of theism insofar as she understands the divine to be the “source of obligation” – indeed, the very “ground or

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<sup>367</sup> Stephen Prothero (2011), 108

<sup>368</sup> Stephen Prothero (2011), 108

source of all that is as a question and concern” – then her argument for the distinctiveness of religious conscience will fall apart if these assumptions turn out to be wrong. If it turns out that theism is false – or that her particular metaethical assumption about the divine’s relationship to moral ontology is false – then her whole account would be largely, if not entirely, undermined.

Moreover, even if we suppose that her metaethical assumptions are true, then it’s still not clear that nonreligious conscientious objectors should be treated differently before the law. Even if we grant that a nonreligious conscientious objection is predicated on a faulty metaethical view, specifically a faulty moral ontology, this does not seem to imply that we should treat their conscientious objection altogether differently before the law. The nonreligious conscientious objection would, if Brady’s assumptions are granted, still be drawing on the divine in at least some, indirect way because they are citing a moral obligation as the grounds for their requested exemption. The only difference between the nonreligious conscientious objector and the religious conscientious objector would be that the latter knows and acknowledges the true source of obligation whereas the former would fail to know and acknowledge the true source of obligation.

At best, withholding legal privileges in the form of exemptions from conscientious objectors drawing from the incorrect metaethics would be intolerant, failing to uphold the “skepticism and humility that we owe one another as compatriots in a pluralistic society.”<sup>369</sup> After all, tolerance requires, as Brian Leiter argues, not merely being indifferent toward some group, but actively putting up with the perceivably wrong, mistaken, or

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<sup>369</sup> Amy Sepinwall (2015), 1927

undesirable beliefs and actions of that group.<sup>370</sup> Thus, a tolerant attitude toward conscientious objectors would seemingly allow them the opportunity to be wrong by permitting a legal exemption in some cases. Otherwise, we may run the risk of a kind of “totalization of morality” on the part of the government.<sup>371</sup> Not only so, but we should also remember that every conscientious objection – drawing from the true metaethics or not – requires a degree of tolerance insofar as every conscientious objection is requesting an exemption from a law that is otherwise taken to be correct or justified. As Yossi Nehustan notes, the “very fact that a conscientious exemption is granted from a legal rule presupposes that the state does not share the conscientious objector’s values or his way of balancing them.”<sup>372</sup> In fact, the state “thinks that it would be unbearable and indeed intolerable if everyone shared the objector’s kind of conscience and reasoning; otherwise, the exemption would be the general rule rather than an exemption from it.”<sup>373</sup> So, tolerance is required to grant any legal exemption to any kind of conscientious objector – even in cases when the law is wrong and the conscientious objector is right.

## **B. Weaker Protections for Religious Belief**

Brady also contends that perhaps the “biggest danger with equalizing the treatment of religious and nonreligious conscience” involves collapsing the distinction between religious and nonreligious belief.<sup>374</sup> She argues that by undermining the distinctiveness of

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<sup>370</sup> Brian Leiter (2013), 8

<sup>371</sup> Nathan Chapman (2013), 38

<sup>372</sup> Yossi Nehustan (2011a), 155-56

<sup>373</sup> Yossi Nehustan (2011a), 156

<sup>374</sup> Kathleen A. Brady (2015), 310



religious beliefs and collapsing their distinction from nonreligious beliefs, we end up forfeiting “the most compelling reasons for protecting *both* religious and secular convictions.”<sup>375</sup> To see why she thinks that adopting the Egalitarian Response will lead to weaker protections for religious beliefs in particular, consider the following:

...as we collapse the distinction between religious and nonreligious belief, religion begins to disappear. We no longer see it for what it is, and it is replaced by the analogous category, whether it is deep-seated convictions about right and wrong, fundamental choices about the meaning and direction of one’s life, central components of personal identity, or something else. For some, religion collapses even further and becomes, just like secular commitments seem, merely an interest, an exercise in autonomy, a preference, or a feeling. When religious conviction becomes just an interest, a preference, or a choice, it often receives very little protection beyond protection against discrimination based on the content of the choice. As Brian Leiter concludes, no claims of conscience should receive exemptions from burdens on others. Even when religion is somewhat more than that, it is not what it really is. It is not about a relationship with the divine. It is not about the effort of persons to connect with the ground and source of all that is and, indeed, to share in the eternal. Religion becomes morality, but religion is more than that. It is about the source of morality and everything else. It is

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<sup>375</sup> Kathleen A. Brady (2015), 310; emphasis added

not just about right and wrong, meaning and identity. It is about what grounds and informs all of these.<sup>376</sup>

So, Brady's second reason for not adopting the Egalitarian Response seems to be the following: accepting the Egalitarian Response would inevitably lead to weaker protections for religious beliefs – including religious conscience beliefs. How does she reach this conclusion? She begins by arguing that, by accepting the Egalitarian Response, we end up collapsing the distinction between religious and nonreligious belief. And when we collapse the distinction between them, 'religion' so understood will disappear and be replaced by an analogous category. And when 'religion' so understood begins to disappear and be replaced by an analogous category, the legal protections for religious beliefs are undermined because the analogous category, it is argued, would fail to possess features sufficient for the strong sort of legal protections once enjoyed by religion.

In response to Brady here, we can say a few things. First, I think Brady is right to think that religious beliefs are not simply deep-seated convictions about right and wrong, fundamental choices about the meaning and direction of one's life, of the central components of personal identity. Of course, religious beliefs involve ontological and epistemological beliefs about what's real and knowable as well, and so involve further dimensions than those listed above. Second, we should not think that secular moral beliefs and commitments, which include secular conscience beliefs, are simply exercises in autonomy, preferences, or mere choices. Both religious and secular conscience beliefs can, in principle, be non-voluntarily formed and upheld as well as voluntarily formed and upheld. Not only so, but both religious and secular conscience beliefs are, in practice,

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<sup>376</sup> Kathleen A. Brady (2015), 310-11

similarly formed and upheld as well – involving mixed elements of voluntariness and non-voluntariness. We should, therefore, be careful not to see one kind of conscience belief as largely different in nature from the other.

Third, Brady worries that, if religious convictions were to become just an interest, a preference, or a choice, it may often receive “very little protection beyond protection against discrimination based on the content of the choice.” Elsewhere, I have argued that the role that choices plays in conscience beliefs – i.e., whether they were voluntarily formed and upheld or not – should not affect the permissibility of granting a legal exemption. More specifically, I argued that non-voluntariness should not be classified as a necessary or sufficient condition for granting a legal exemption. So, not only do I doubt that secular convictions are more of a mere interest, preference, or choice when compared to religious convictions, I also doubt that they should be treated with very little legal protection for being voluntarily formed and upheld.

Fourth, it seems like we can similarly afford special legal treatment to secular conscience beliefs in a way that would not involve replacing the category of ‘religion’ with another category. We could, for example, jointly afford strong legal protections for the Freedom of Religion and the Freedom of Conscience. As Kevin Vallier states, we could “*upgrade* respect for nonreligious comprehensive and moral belief to the level presently extended to religious belief” in order to grant freedom of conscience the same legal status now enjoyed by religious freedom.<sup>377</sup> Though these two freedoms overlap conceptually, they are not the same and do not pick out the same concept overall – so one, conjoining legal category would likely be underinclusive. Disentangling the Freedom of Religion and

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<sup>377</sup> Kevin Vallier (2016), 25

the Freedom of Conscience actually helps us to see that we can have good reasons to afford special legal treatment to both religious and conscience beliefs and that we can have good reasons to adopt the Egalitarian Response at the same time. While the Egalitarian Response tells us that religious and nonreligious conscience beliefs should be treated equally before the law, this is separate from how it is that we think religious and conscience beliefs should both be treated more generally. Determining how they both ought to be treated is a separate question from determining whether we think they should be treated equally. So, contrary to Brady, I think it is possible to believe that religious conscience beliefs in particular should not receive comparatively special legal treatment over and above their nonreligious counterparts while at the same time believe that religious beliefs more broadly, like conscience beliefs, should be granted a basically special legal status.

Lastly, I want to point out that, even if some analogous category did replace religion in the way that Brady fears, the features of that analogous category would likely be sufficient to warrant a basically legal status for that category anyway. Following Brady, this new, analogous legal category would probably contain deep-seated convictions about right and wrong, fundamental choices about the meaning and direction of one's life, and the central components of personal identity. Or, to put it differently, this category would probably include basic "core or meaning-giving beliefs and commitments."<sup>378</sup> But consider

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<sup>378</sup> Jocelyn Maclure and Charles Taylor (2011): "By the terms 'core or meaning-giving beliefs and commitments' we understand the reasons, evaluations, or grounds stemming from the conception of the world or of the good adopted by individuals that allow them to understand the world around them and to give a meaning and direction to their lives. It is in choosing values, hierarchizing or reconciling them, and clarifying the projects based on them that human beings manage to structure their existence, to exercise their

this: if a legal category constituted by deep-seated convictions about right and wrong, fundamental choices about the meaning and direction of one's life, and the central components of personal identity – i.e., core or meaning-giving beliefs and commitments – isn't worthy of a basically special legal status, then what sort of category is? As such, I think that if some analogous category did replace religion in the way that Brady fears – though I don't think that it should for conceptual reasons – the features of that analogous category would likely be sufficient to warrant a basically legal status for that category anyway.

### C. Weaker Protections for Secular Conscience

While it is clear that Brady affirms the distinctiveness of religious conscience beliefs, she nevertheless thinks that this position does not necessarily imply “that we should not care about secular convictions.”<sup>379</sup> Interestingly, she argues that “the more we appreciate the distinctiveness of religion, the more we will appreciate the worth of secular conscience.”<sup>380</sup> Relatedly, she argues that “the stronger foundation for protecting secular convictions is not equity norms, but rather the unique attributes of religion.”<sup>381</sup> She writes:

...understanding religion's uniqueness allows us to see strong reasons for protecting secular conscience that are not available to those who view religious and secular conscience as functional equivalents. Contemporary

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judgment, and to conduct their life – in short, to constitute a *moral* identity for themselves. Core beliefs and commitments, which we will also call ‘convictions of conscience’, include both deeply held religious and secular beliefs and are distinguished from the legitimate but less fundamental ‘preferences’ we display as individuals.” (13)

<sup>379</sup> Kathleen A. Brady (2015), 303

<sup>380</sup> Kathleen A. Brady (2015), 303

<sup>381</sup> Kathleen A. Brady (2015), 303

demands for equal treatment reflect a failure to understand the differences between religious and nonreligious convictions, but they also reflect the intuition that secular moral commitments are also worthy of respect and protection. This intuition is correct, but we can see this most clearly when we retain an appreciation for the uniqueness of religious claims. Collapsing the distinction between religious and secular conscience obscures the full worth of secular commitments and with it some of our most compelling reasons for protecting them.<sup>382</sup>

Brady's idea here seems to be as follows: as appreciation for the distinctiveness of religion increases, appreciation for the worth of secular conscience also increases. That is, Brady argues that the distinctiveness of religion and the worth of secular conscience are directly proportional. Not only so, but she thinks that we possess "strong reasons" – indeed what she labels as the "most compelling reasons" – for protecting secular conscience that are unavailable to us unless we affirm the distinctiveness of religious conscience. She worries that, if we end up collapsing the strong distinction between religious and secular conscience, then we'll end up obscuring the "full worth" of secular conscience beliefs and forfeiting the "most compelling reasons for protecting them."

So what exactly are these strong and most compelling reasons for protecting the full worth of secular conscience beliefs that we seem to lose when we deny the distinctiveness of religion? To understand Brady on this point, consider the following:

Indeed, when religion disappears, the full worth of secular conscience does too, and secular commitments are no longer understood as what they can

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<sup>382</sup> Kathleen A. Brady (2015), 303

also be. Secular moral commitments and religious convictions are not equivalents. They are not fully analogous. However, secular conscience and religious conscience are related. Religious conscience engages the divine directly. For the nonbeliever, the divine is rarely completely absent, but it is unseen and unacknowledged. It is presumed but not recognized. It is implied, but not knowingly. This divine referent gives secular moral commitment a special dignity as well. They are not mere interests or preferences or exercises of autonomy. They are judgments about right and wrong and human flourishing, and they are also more than that. In secular conscience, the divine is intimated, and what is sought by the believer is embraced indirectly.<sup>383</sup>

And here:

The relationship between religious and secular conscience can be seen most easily when secular commitments take the form of judgments about right and wrong, what is required or forbidden, that make demands on individuals that the individual experiences as transcending self-interest and personal preference...For the nonbeliever who experiences these demands, the judgment that a particular course of action is right or wrong, and right or wrong in such a way that they have no choice but to follow, implies some foundation for right and wrong. It implies that there is some order to the world and human relationship that we must respect and follow. It also presumes the fact that humans are moral agents who have been made with

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<sup>383</sup> Kathleen A. Brady (2015), 311

the capacity to understand the concepts of right and wrong and to desire what is good, to seek it, and to embrace it when it is found. The exercise of human moral agency refers, if only implicitly, to the divine. It implies a moral order and a ground to this order, and it implies a ground that invites – indeed requires that we act not as automatons or by instinct, but as persons who are responsible for our actions. We must make moral choices, and when we do, we do not create right and wrong. We discern it, and what we discern we must follow. We have been created for moral freedom, but it is a freedom that discovers and responds rather than makes and creates.<sup>384</sup>

In sum, Brady contends that the secular moral conscience, though not engaging the divine directly, possesses a special dignity – i.e., is afforded full worth and strong and compelling reasons for legal protection – insofar as its judgements about right and wrong and human flourishing unknowingly refer back to and intimate the divine.<sup>385</sup> She is, at the very least, clear about holding this position: “the divine is implicit even in secular moral reasoning as the ground of this reasoning and of human freedom itself, and this implicit reference to the divine gives secular conscience a weight and significance that requires

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<sup>384</sup> Kathleen A. Brady (2015), 311-12

<sup>385</sup> Kathleen A. Brady (2015): “The equal treatment paradigm is so attractive in the exemptions context because of the intuition that secular moral convictions are also worthy of respect and protection, and this intuition is correct. Secular moral conscience participates in the ultimacy of religious conviction, but not in the same way and not directly. When we appreciate religion’s distinctiveness, we see this ultimacy more clearly. By contrast, when we collapse religious and secular convictions, this ultimately disappears, and when it does, both forms of conscience become more vulnerable to state incursion.” (315)



respect from the state.”<sup>386</sup> This position seems misguided for a few reasons. First, as was noted above, Brady’s position makes strong metaethical assumptions involving theism that, if false, would largely if not totally undermine her position. We should note, too, that she seems to go even further with these assumptions insofar as she takes things like human moral agency and the broader moral order to refer, if only implicitly, to the divine as well.<sup>387</sup>

Second, I think there are ways of affording a sufficient amount of worth or dignity to secular conscience beliefs other than having them unknowingly reference and intimate the divine. I actually think that Brady makes such an argument. For example, Brady seems to imply that the value of secular conscience beliefs is at least partly derived from their being obligatory in nature – i.e., not a mere interest or preference or exercise of autonomy. Secular conscience beliefs can likewise be beliefs about what is required or forbidden, and can make demands on individuals that they experiences as transcending self-interest and personal preference such that they are compelled to follow them. If this is true, then my contention is that these beliefs can derive a sufficient amount of worth or dignity from being obligatory in nature without unnecessarily or superfluously invoking a divine-referring moral ontology. In fact, the obligatoriness feature may be accessible to conscience beliefs through some other, non-theistic moral ontology. If this is right, then Brady still

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<sup>386</sup> Kathleen A. Brady (2015), 313

<sup>387</sup> Kathleen A. Brady (2015): “These [secular conscience] convictions make such strong demands on the individual because they refer to an order of value beyond ourselves that we do not create but have been made to comprehend and to follow... We should respect and protect moral commitments regarding what is right and good because moral reasoning about these matters has a divine referent and horizon that grounds not only what is sought but also the requirement that we seek it freely and the importance of the search.” (313)

needs to explain: (a) why having a divine referent makes a conscience belief attain its full worth and dignity; (b) why the obligatoriness of a conscience belief fails to afford that belief with at least a sufficient amount of worth or dignity in the context of a legal exemption; and (c) why referencing the proper metaethics justifies affording special legal treatment to some conscience belief – and vice versa.

#### **D. The Objection from Religious Liberty**

The last objection from Brady contends that accepting the Egalitarian Response will limit liberty more broadly and religious liberty in particular. Brady contends that “equal treatment” of religious and secular conscience “has often meant” only modest protections for conscience overall, for many people who embrace the Egalitarian Response “have rejected a right to exemption altogether.”<sup>388</sup> This is true of Brian Leiter, for example, who embraces both the Egalitarian Response and a version of the No Exemptions Approach.<sup>389</sup> In short, Brady’s argument is that, by accepting the Egalitarian Response and extending possible accommodations to secular conscience, liberty overall, and religious liberty by extension, will likely be thwarted in order to protect against the possible overuse and abuse of exemptions. The relationship between religious liberty and egalitarianism for conscience, then, is believed to be inversely proportional: as egalitarianism for conscience increases, religious liberty decreases. Brady writes:

Indeed, as I have shown, when we collapse the distinction between religious and secular conscience, equality usually comes at the expense of liberty. It does so because a robust right of exemptions like the one I defend in this

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<sup>388</sup> Kathleen A. Brady (2015), 303

<sup>389</sup> Brian Leiter (2103), 100 – 108

book cannot feasibly be extended to all secular moral commitments or even just those that are strongly held or deeply important to individuals. Equality between religious and secular conscience would mean trading a strong right of religious exemption for weaker protection overall.<sup>390</sup>

In response to Brady, we can simply argue that the inversely proportional relationship that she is worried about need not and might not exist even if we accept the Egalitarian Response. That is, it seems possible to accept the Egalitarian Response while at the same time accepting a robust right to legal exemptions for both kinds of conscience. An increase in equality need not imply a decrease in liberty. While the trend in the literature is to accept the Egalitarian Response in conjunction with the sort of Leiter No Exemptions Approach, we can nevertheless hold a logically possible, legally workable, and perhaps morally required alternate view: the Egalitarian Response in conjunction with a sort of Robust Exemptions Approach. This alternate view would simultaneously grant equality to nonreligious conscientious objectors while continuing to uphold and protect religious and conscience liberties through robust legal exemptions. It's important to note, however, that we would still have to answer the more central worry underlying this objection: what we can call the worry about feasibility. The Feasibility Objection is what we will turn to next in order to explain how the views I have expressed above are legally workable if adopted.

### **III. The Feasibility Objection**

Even if the Egalitarian Response is principally justified, a relevant question remains: are the implications of this paradigm pragmatically or legally unworkable? That is, would this paradigm lead to too many exemptions or worse – something like legal anarchy? As

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<sup>390</sup> Kathleen A. Brady (2015), 323

Brady notes “already scholars worry about the chaotic potential of a right to exemption for religious conscience,” so she questions whether “expanding the right to cover nonreligious conscience would exacerbate this problem.”<sup>391</sup> Similarly, Frederick Gedicks worries that “[s]uch an expansion of the reach of exemptions...threatens to make them unworkable by leaving too few people subject to the law.”<sup>392</sup> Extending the reach of exemptions may “seriously undermine the observance, and thus the effectiveness, of law.”<sup>393</sup> There may not be many accommodations for secular conscience now, but if equal protections are codified into law, we can probably expect use and abuse of exemptions to increase. And in order to protect against this, many have, as Brady notes, rejected a right to exemption altogether.

#### **A. Laycock’s Response**

Douglas Laycock holds a unique position within this debate insofar as he accepts the Egalitarian Response yet denies that there is a feasibility problem. On the one hand, Laycock straightforwardly claims that “[w]e should protect the moral commitments of religious believers, and we should also protect the moral commitments of nonbelievers when those commitments are held with religious intensity.”<sup>394</sup> On the other hand, he seems

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<sup>391</sup> Kathleen A. Brady (2015), 303

<sup>392</sup> Frederick Gedicks (2005), 1252

<sup>393</sup> Frederick Gedicks (2006), 483

<sup>394</sup> Douglas Laycock (2009), 170. Laycock (1996) writes: “Most controversial, but essential to the pursuit of religious neutrality, the law should protect nontheists’ deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers. *United States v. Seegers* and *Welsh v. United States* were rightly decided; they implement policies at the core of religious liberty. The law cannot protect the pursuit of all personal commitments or obligations, or all disagreements with the policy or prudence of political decisions...What the law can do is

to think that, even when we afford robust and equal protections to religious and secular conscientious objectors alike, there simply “would not be many” conflicts involving viable claims of secular conscience – thus ameliorating the worry about feasibility.<sup>395</sup> So, Laycock responds to the Feasibility Objection by rhetorically asking: what’s the problem?

How could Laycock think that feasibility concerns are a non-problem? At base, Laycock argues that the Feasibility Objection falls flat because he thinks that nonbelievers typically don’t hold many intense moral commitments – that is, obligations delivered from conscience “that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply”<sup>396</sup> – that are actually at odds with the dominant morality reflected in governmental policy anyway. He elaborates:

Nonbelievers have many moral commitments, and they hold some of those commitments with religious intensity. But they do not hold many intense moral commitments that are at odds with the dominant morality reflected in government policy. Nonbelievers tend to have a modern sensibility. They do not draw their morality from ancient books written in a radically different culture that lived with radically different technology and had a radically different understanding of the world; they do not obey an omnipotent, omniscient God whose commands may be beyond human understanding. On the whole, nonbelievers take their morality from the same modern milieu

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protect those moral obligations of nontheists that are functionally equivalent to the protected moral obligations of theists.” (331)

<sup>395</sup> Douglas Laycock (2009), 172

<sup>396</sup> Douglas Laycock (1996), 336

that drives democratic decision making and government regulation. It is no accident that military service is the only prominent example where serious claims of nontheistic conscientious objection have been litigated.<sup>397</sup>

Though nonbelievers hold many moral commitments, and some of which with religious intensity, Laycock claims that nonbelievers nonetheless fail to hold many moral commitments that are odds with the “dominant morality reflected in government policy.” This “modern sensibility” of nonbelievers is reflected in the fact that their morality is largely derived from the same backdrop of moral beliefs and values that drive democratic decision making and government regulation – not ancient books or an omnipotent, omniscient God. In other words, he thinks that the consciences of most nonbelievers seemingly draw upon and apply the values of the dominant morality more often and to a greater degree than religious consciences. Religious consciences, on the other hand, mostly draw upon and apply the values of the morality found in ancient, religious texts. Since the consciences of the nonreligious fail to deviate much from the dominant morality, Laycock remarks that it’s no surprise, then, that the “only prominent example where serious claims of nontheistic conscientious objection have been litigated” involve military conscription. “No doubt cases would arise that do not involve military service,” writes Laycock, “but there would not be many.”<sup>398</sup>

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<sup>397</sup> Douglas Laycock (2009), 170-71

<sup>398</sup> Douglas Laycock (2009), 172. Laycock (2009) writes: “We can easily imagine other examples, but few realistic examples would squarely present the issue. Environmental activists, and animal-rights activists, may have profound moral objections to certain government policies, but they are rarely asked to actively participate in carrying out those policies. Unless an animal rights activist goes to veterinary school, or works

Laycock's central claims here are, of course, empirical. Unfortunately, Laycock offers no evidence in support of these claims. Are we nevertheless justified in believing these claims? Not only so, but if Laycock's empirical claims are warranted, then should this ameliorate the worries undergirding the Feasibility Objection overall?

In support of Laycock's empirical claims, we can somewhat surprisingly turn to Brian Leiter. Leiter similarly argues that requests for legal accommodations by nonbelievers are just simply uncommon, and that "litigated cases overwhelmingly involve claims of religious conscience."<sup>399</sup> In fact, Leiter goes as far as to say that, "while it is arguable in a few cases that atheists or agnostics brought challenges to neutral, generally applicable laws for burdening their 'religious practice,' it appears as if there is *no clear instance* of an atheist or agnostic challenging 'valid and neutral laws of general applicability.'"<sup>400</sup> In other words, Leiter claims that there are no clear cases in US

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in an animal research lab, he is unlikely to be asked to violate his conscience. And if he seeks conscientious objector protection for illegal acts of protest-- vandalism, destruction of labs, theft of lab animals, assaults on researchers-- he will lose on compelling interest grounds, just as a religious objector would. No conscientious objector, religious or secular, gets to impose his views on others or attack the persons or property of those who disagree with him." (171-72)

<sup>399</sup> Brian Leiter (2013), 6

<sup>400</sup> Brian Leiter (2013), 140, fn. 6; emphasis added. Leiter adds: "Overwhelmingly, if not universally, Establishment or Free Exercise Clause challenges to statutes or government actions by atheists or agnostics involve claims of underlying religious motives rather than claims of general motives that nonetheless unconstitutionally burden atheism or agnosticism." (140, fn. 6)

jurisprudence<sup>401</sup> where an atheist or agnostic has challenged valid and neutral laws of general applicability. Such a conclusion should not be lightly noted. Perhaps Leiter’s finding is due to the fact that nonreligious claims of conscience have few, explicit legal protections, and so we should expect that this number is low. But this is a bad explanation, for the nonreligious need not have legal protections already in place in order to challenge valid and neutral laws of general applicability – e.g., *Welsh* and arguably *Seeger*. In fact, it seems as though the absence of explicit legal protections would motivate more challenges from atheists and agnostics.<sup>402</sup> The worry undergirding the Feasibility Objection about an increased number of claimants seems similarly misguided: if the nonreligious are not challenging valid and neutral laws of general applicability now, why think that this number will increase to an unfeasible level once protections are codified?

Nevertheless, justifying the counterfactual claim that the use and abuse of legal exemptions might increase to unfeasible levels if expanded to protect nonreligious conscientious objectors is really hard to do – and especially hard when the current litigated cases “overwhelmingly involve claims of religious conscience” and there is “no clear

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<sup>401</sup> Brian Leiter (2013): “My research assistant...reviewed hundreds of U.S. cases brought by atheists and agnostics, and none involved challenges to ‘valid and neutral laws of general applicability...’” (138)

<sup>402</sup> On this point, Chris Lund (2017) writes: “One could wonder if the real reason that secular conscience claims have not flooded the courts is that secular conscience is unprotected. After all, no one brings suit when there is no chance of winning. There is something to this argument, but it faces some problems. For one thing, Americans are regarded as being famously litigious, bringing suit even without much chance of success. But more importantly, again, are *Seeger* and *Welsh*—for forty years, we have had Supreme Court precedents making claims of secular conscience cognizable under the Religion Clauses. And although few such claims have been made, when they have been brought before courts, they have sometimes met with success.” (510)



instance of an atheist or agnostic challenging ‘valid and neutral laws of general applicability.’” Perhaps this will change if we adopt the Egalitarian Response, but perhaps not for the reasons that Laycock cites. After all, if nonreligious objections to valid and neutral laws of general applicability are overwhelmingly absent now, what makes us think they will increase to the point of unfeasibility in the future? Moreover, withholding equal liberty and legal protections to nonreligious conscientious objectors because of an unjustified counterfactual claim seems like bad policy in general. The existing positive reasons for extending equal liberty and legal protections to secular conscientious objectors simply seem stronger than the weaker, negative, counterfactual reasons we have for withholding equal liberty and legal protections.

We started this section by highlighting the fact that scholars already “worry about the chaotic potential of a right to exemption for religious conscience” and wonder whether “expanding the right to cover nonreligious conscience would exacerbate this problem.”<sup>403</sup> As a result of these worries, many have rejected a right to exemption altogether. However, I agree with Laycock that this line of thinking “leads to the worst of all possible worlds – the equality of universal suppression.”<sup>404</sup> Unfortunately, the trend in the scholarship is to see equality and liberty as inversely proportional: as equality increases, liberty decreases. This trend is exemplified in Leiter, for example, who simultaneously adopts the Egalitarian Response in addition to a No Exemptions Approach. I think we can – and should – do better than that and offer equality without drastic costs to liberty. We can, I think, offer equal legal protections for all forms of conscience without concerns of unworkability or legal anarchy.

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<sup>403</sup> Kathleen A. Brady (2015), 303

<sup>404</sup> Douglas Laycock (2009), 173

## B. Sawicki's Response

Nadia Sawicki offers an altogether different sort of response to concerns of feasibility, arguing that we may have strong pragmatic reasons not to withhold accommodations to religious and nonreligious conscience beliefs. More specifically, she worries that the pragmatic implications of failing to adopt the Egalitarian Response and adequately protect conscience beliefs may be unworkable. Sawicki notes that “we begin to understand the pragmatic argument for legal accommodation of conscience” when we “accept that an individual may be driven to act in accordance with her strong conscientious beliefs regardless of the consequences.”<sup>405</sup> As such, the basis of her argument for accommodating conscience beliefs maintains “that a civil society is unlikely to function effectively if it chooses to punish conscientious objectors.” She writes:

Punishment in a civil society can serve many purposes, among them retribution, deterrence, and reform. However, punishing a person for acting in accordance with her conscience rarely serves these purposes effectively. First, because it is impossible to coerce belief against someone's wishes, punishment of conduct motivated by conscientious belief is unlikely to result in reform or rehabilitation. On a similar note, the threat of punishment is unlikely to deter those acting on the basis of conscientious conviction. That being said, some conscientious objectors (those who are more susceptible to the threat of punishment, perhaps because their moral commitments are not as firm) may be swayed by the threat of legal penalty, and may choose to comply with the law despite their conscience's voice to

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<sup>405</sup> Nadia Sawicki (2012), 1404

the contrary. What is the likely result for these persons, we might ask? “Deterrence of those who lack the will to act on their convictions exacts a terrible price. Their feeling that they have yielded to compulsion and violated their most deeply held beliefs and principles may involve profound resentment and loss of self-respect.” Finally, when it comes to retribution, many believe that the retributive purposes of punishment are poorly served by punishing individuals who act on the basis of moral compulsion rather than self-interest or impulsiveness.<sup>406</sup>

Overall, Sawicki’s pragmatic argument for accommodating conscience beliefs recognizes the punishment concerns raised above and responds accordingly. Of course, the original Feasibility Objection still lurks insofar as “granting conscience-based exemptions from legal obligations as a matter of course may wreak havoc on the state’s ability to maintain order.”<sup>407</sup> But her point is that “the same can be said of a state that rejects claims of conscience altogether.”<sup>408</sup> Because a society cannot adopt laws that perfectly align with all of its citizens’ beliefs, Sawicki contends that a “society must order itself in such a way as to mediate between the interests of social order and the interests of citizens who might feel disenfranchised by laws that violate their conscientious beliefs.”<sup>409</sup> And perhaps the only pragmatic and workable way to accomplish this, according to Sawicki, is to offer adequate legal accommodations for religious and nonreligious conscience beliefs.

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<sup>406</sup> Nadia Sawicki (2012), 1404-05

<sup>407</sup> Nadia Sawicki (2012), 1405

<sup>408</sup> Nadia Sawicki (2012), 1405

<sup>409</sup> Nadia Sawicki (2012), 1405-06

#### **IV. The Underinclusiveness Objection**

The third and last objection raised against the Egalitarian Response can be understood as the Problem of Underinclusivity. In short, this objection maintains that the Egalitarian Response may not be egalitarian enough: perhaps other sorts of beliefs, desires, motivations, concerns, projects, etc. should also enjoy an equal legal status with religious and nonreligious conscience beliefs. Perhaps the most salient proponent of this objection is Simon May. In his article “Exemptions for Conscience,” he argues that there “is nothing special about moral conscience that would justify granting an exemption...that is not shared by a variety of non-moral desires, motivations, concerns, or projects.”<sup>410</sup> In other words, he believes there is “no principled moral reason for a defeasible entitlement to moral conscience-based exemptions that is not an equally good reason for a defeasible entitlement to non-moral project-based exemptions.”<sup>411</sup> The heart of this objection is that the Egalitarian Response, in order to be truly egalitarian, must also extend legal exemptions to non-moral projects in addition to religious and secular conscientious objections. Hence, the Egalitarian Response may not be egalitarian enough.

##### **A. The Moral Conscience Principle and the Unfairness Objection**

As noted above, May is responding to the view that volitional conflicts involving conscience beliefs – religious or otherwise – warrant special legal accommodations because these individuals uniquely believe that “it would be wrong for her to do as the regulation requires and therefore wishes not to comply.”<sup>412</sup> Thus, a conflict of conscience would

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<sup>410</sup> Simon May (2017), 191

<sup>411</sup> Simon May (2017), 191

<sup>412</sup> Simon May (2017), 192

therefore be a subset of volitional conflicts more broadly insofar as the conscientious objector would not merely wish not to perform the required action; they also believe that it would be wrong to perform the required action. If we accept that the conflict between “the demands of a law and the demands of a person’s sincere moral conscience constitute a special type of volitional conflict” – indeed, one that’s importantly distinct from merely frustrating one’s will in other ways – then we would accept what May calls the “Moral Conscience principle.”<sup>413</sup> This principle just claims that “a conflict between the demands of a law and the demands of an individual’s sincere moral conscience, whether religious or secular in content, provides [them] with a defeasible moral entitlement to an exemption.”<sup>414</sup>

In response to the Moral Conscience principle, May levies the Unfairness Objection. To understand and illustrate the objection, he has us consider three hypothetical young friends who do not wish to serve in the military:

Angelica believes that it would be morally wrong for her to enlist because that would be inconsistent with her religion’s strict pacifist views. She would prefer to spend the two years preparing for the missionary work that her community requires of its young adults. Unlike Angelica, Biko has no religious beliefs. His opposition to military service is based in his belief that the war is unjust. He sympathizes with the political ideals espoused by the rebels and strongly identifies with the now-defunct radical organization from which the separatist movement emerged and with which his family is closely

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<sup>413</sup> Simon May (2017), 194

<sup>414</sup> Simon May (2017), 191

associated. He believes that it would be morally wrong for him to enlist as this would imply a lack of solidarity with the revolutionaries of the past and a craven betrayal of his family's radical tradition. In contrast to his friends, Chester does not believe that it would be morally wrong to enlist. Instead, he wishes not to serve in the military because it would interfere with his development as a chess grandmaster. Already one of the best chess players in the country, Chester cannot afford to lose two years of play at his age if he is to stay competitive with other leading players around the world and have any chance of becoming world champion.<sup>415</sup>

May adds that, since none of them fulfill the requirements for any category of non-volitional exemption, "the law requires that they either enlist or face three years of confinement in a minimum-security detention camp."<sup>416</sup> As you might expect, all three "prefer to spend three years in detention to two years in the military, since they would then be able to dedicate themselves to their respective studies— Angelica and Chester would even be allowed out on furlough for important missionary activities and chess tournaments."<sup>417</sup> Desiring to remain free rather than be jailed, all three friends end up petitioning for exemptions.

Overall, the Unfairness Objection raised against the Moral Conscience principle just argues that there is "no principled moral difference between the claims of Angelica and

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<sup>415</sup> Simon May (2017), 196-97

<sup>416</sup> Simon May (2017), 197

<sup>417</sup> Simon May (2017), 197

Biko, on the one hand, and Chester on the other.”<sup>418</sup> In order to maintain the Moral Conscience principle against the Unfairness Objection, May argues that we must “explain what it is that makes a person’s conscientious commitments different from her various non-moral projects”<sup>419</sup> – and we should add: that differentiates conscientious commitments in way that warrants special legal treatment.

Is there some other noteworthy feature that might differentiate a person’s conscientious commitments from their non-moral projects in a way that warrants special legal treatment? May has us consider four potentially distinguishing features. First, he considers that a person’s moral conscience may uniquely warrant accommodation in that “it imposes categorical demands.”<sup>420</sup> In response, May argues that Chester’s ambition to become world champion also “imposes categorical demands on his life, demands that he experiences as volitional necessities on a par with his moral beliefs.”<sup>421</sup> Second, May considers whether a person’s moral conscience uniquely warrants accommodations insofar as it “engages her capacity to reflect on the ultimate meaning of life.”<sup>422</sup> May contends that Chester’s love for chess can similarly engage his capacity to reflect on the ultimate meaning of life. After all, “chess is not just a game for Chester,” for he understands it as a “most vivid

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<sup>418</sup> Simon May (2017), 197

<sup>419</sup> Simon May (2017), 197

<sup>420</sup> Simon May (2017), 197

<sup>421</sup> Simon May (2017), 197

<sup>422</sup> Simon May (2017), 197

manifestation of the awesome beauty of the mathematical universe” and a “profound philosophical lesson in the significance of free will and the spark of genius.”<sup>423</sup>

Third, May wonders whether one’s “intense desire to act morally” might differentiate the conscientious objector from the non-moral plan objector.<sup>424</sup> May claims that Chester’s desire to play chess at the highest levels is arguably “as intensely felt as the desires of his friends – indeed, they are far more likely to waiver in their opposition to conscription than he is in his.”<sup>425</sup> Lastly, May has us consider whether a person’s moral conscience warrants special legal accommodations insofar as “moral commitments are central to her identity.”<sup>426</sup> He quickly dispenses of this possibly distinguishing feature by pointing out that “Chester’s ambition to be world champion is no less central to his self-conception” than his friend’s moral principles are to theirs.<sup>427</sup> Thus, as May points out, “each of the four responses to the Unfairness Objection fails for the same reason: each identifies a feature of conscientious convictions that has some plausible moral significance but that is shared by some non-moral projects.”<sup>428</sup>

If the Unfairness Objection holds, then why not just accept that Angelica, Biko, and Chester are all entitled to a defeasible legal exemption? May is leery about accepting this conclusion because he does not “believe the position is likely to prove tenable.”<sup>429</sup> In other

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<sup>423</sup> Simon May (2017), 197

<sup>424</sup> Simon May (2017), 197

<sup>425</sup> Simon May (2017), 197

<sup>426</sup> Simon May (2017), 197

<sup>427</sup> Simon May (2017), 198

<sup>428</sup> Simon May (2017), 198

<sup>429</sup> Simon May (2017), 198



words, May seems to be worried that accepting the Unfairness Objection – and consequently rejecting the Moral Conscience principle – may lead to greater feasibility concerns than what was faced when simply accepting the Egalitarian Response. After all, “no coherent defence of volitional exemptions can tolerate just any desire not to comply with a law.”<sup>430</sup>

### **B. The Moral Integrity Response**

In trying to further stave off the Unfairness Objection, May considers a fifth and final response – what he calls the Moral Integrity Response:

(1) An individual has a significant interest in preserving her moral integrity.<sup>431</sup> Thus:

(2) An individual has a defeasible entitlement that the state not require her to compromise her moral integrity.

(3) An individual’s legal obligation to act contrary to her moral conscience requires her to compromise her moral integrity. Thus:

(4) An individual has a defeasible entitlement that the state not legally obligate her to act contrary to her moral conscience.<sup>432</sup>

In general, the Moral Integrity Response “promises to explain why conscientious objection is special by identifying a distinctively moral interest of individuals” – namely,

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<sup>430</sup> Simon May (2017), 198

<sup>431</sup> Simon May (2017) adds that the concept of moral integrity in question “concerns a person’s fulfilment of her perceived moral duties, rather than her actual moral duties.” (199)

<sup>432</sup> Simon May (2017), 198

protecting their moral integrity.<sup>433</sup> Unfortunately, May contends that this last line of defense also fails. First, he argues that “the threat to moral integrity is not exclusive to cases of conscientious objection” – which means that moral integrity cannot therefore be the reason that conscientious objections are special.<sup>434</sup> If we accept the Moral Conscience principle, and furthermore think that the justification for granting special legal accommodations to conscience beliefs is protecting moral integrity, then it turns out we might have to protect more than conscience beliefs. After all, non-moral projects may sometimes involve moral integrity as well – e.g., May’s case involving Chesleigh below. Second, May contends that, “when a person’s moral integrity is imperiled by the frustration of her non-moral projects, it has no weight as a reason for granting a volitional exemption” under the Moral Conscience principle because it fails to be imperiled as a result of a conscientious objection as such.<sup>435</sup> So, we may unjustifiably exclude cases of imperiled moral integrity when we accept the Moral Conscience principle because these cases of imperiled moral integrity do not seemingly involve conscientious objections *per se*. As a result of these charges, May thinks that the Moral Integrity Response fails to explain why conscientious objections to the law require special treatment.

To illustrate these claims, May has us consider the case of a fourth friend named Chesleigh:

Like Chester, she is one of the country’s best chess players and wishes to compete at an international level. She also has no distinctly moral objection

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<sup>433</sup> Simon May (2017), 203

<sup>434</sup> Simon May (2017), 203

<sup>435</sup> Simon May (2017), 203

to the antiseccessionist war, but regards conscription as a severe impediment to her development as a grandmaster. Like Chester, she would prefer to spend three years in detention honing her skills. Chesleigh differs from Chester in that she has an additional motivation behind her chess ambitions. Whereas Chester is driven solely by his reverence for the aesthetic beauty of the game, Chesleigh also has an instrumental motive. She wants to play in international tournaments, not only for the sake of winning in itself, but also so that she can win as much prize money as possible. But Chesleigh does not want to win this money for purely selfish reasons. Instead, she feels obligated to earn enough money to repay her elderly grandparents for the many financial sacrifices they incurred supporting her chess career from an early age. When it became clear that she was especially talented, they spent the bulk of their retirement savings on her development. Because Chesleigh has the potential to compete at an elite level, she believes that her moral integrity demands that she help her grandparents enjoy the retirement they deserve before it is too late. If there were some other way to repay her debt—perhaps if she won the lottery—she would be less opposed to military service. Nevertheless, she would still opt for the detention camp for just the same reasons that Chester would.<sup>436</sup>

The case of Chesleigh nicely illustrates the dilemma for the Moral Conscience principle described above: either this principle “includes Chesleigh within the scope of those entitled to an exemption (because her moral integrity is threatened) or it does not

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<sup>436</sup> Simon May (2017), 201-202

(because she has no conscientious objection to military service as such).<sup>437</sup> By adopting the first horn of the dilemma, the Moral Conscience principle is threatened with implausibility – for once “an individual’s success or failure in realizing her non-moral projects is assigned to her individual sphere of responsibility, it does not seem to matter very much whether this success or failure has further consequences for her interest in leading a virtuous life.”<sup>438</sup> Not only so, but adopting the first horn would give Chester strong grounds to complain of unfairness. After all, Chesleigh’s case “is only a slight variation of his—the sole difference is a threat to her moral integrity that makes no practical difference to her refusal to serve in the military.”<sup>439</sup> Additionally, we might also worry that adopting this first horn may lead to even further feasibility problems: granting defeasible legal entitlements to non-moral projects that imperil moral integrity could lead to too many exemptions overall.

Adopting the second horn is problematic as well. As May notes, the “threat to moral integrity created by a law is no longer a distinctive feature of conscientious objection since it can also arise in cases where the law frustrates an individual’s non-moral projects.”<sup>440</sup> So, this means that, by trying to uphold the initial thrust of the Moral Conscience principle, we may end up undermining the Moral Integrity Response. That is, in denying accommodations to non-moral projects on the grounds that they are insufficiently conscientious in nature, we end up denying relevant threats to moral integrity. In terms of

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<sup>437</sup> Simon May (2017), 202

<sup>438</sup> Simon May (2017), 202

<sup>439</sup> Simon May (2017), 202

<sup>440</sup> Simon May (2017), 202

moral integrity, Chesleigh's case is not that different from Angelica's or Biko's. In fact, there seems to be "no reason why she cannot regard her moral obligation to repay her grandparents as no less stringent than they take their respective obligations to be."<sup>441</sup> Thus, if moral integrity is doing the justificatory work in granting defeasible entitlements to legal accommodations, then why treat Chesleigh differently from Angelica and Biko? May writes:

The implications of the second horn for the moral integrity response may seem relatively insignificant if cases such as Chesleigh were very rare. The Moral Conscience principle might be adequately supported by a consideration that, in actual practice, arises only in cases of conscientious objection. But I do not think this observation bears out. Most people lead complicated lives in which their moral values and non-moral projects overlap and interconnect in intricate ways. It is often impossible to disentangle these commitments and show that only a person's non-moral interests are threatened by a legal obligation. In these cases, when the state makes it harder for people to live as they would prefer, it thereby makes it harder for them to live up to their moral ideals.<sup>442</sup>

### **C. Twofold Response to May**

In response to May, I argue two things. First, I argue that May is too hasty in his analysis of the four potentially distinguishing features of conscience. As a result, I think that May fails to see that volitional necessities and the categorical demands of conscience are not the same, that conscience is not the capacity that "reflect[s] on the ultimate meaning of

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<sup>441</sup> Simon May (2017), 202

<sup>442</sup> Simon May (2017), 202

life,” and that moral commitments are dissimilarly central to one’s moral identity when compared to non-moral projects. Second, I argue that May’s dilemma for the Moral Conscience principle can be unraveled when we introduce Sorabji’s definition of conscience beliefs. As a result of May’s dilemma failing, I contend that the Moral Integrity Response can be vindicated.

As noted above, I think May is too hasty in his analysis of the four potentially distinguishing features of conscience – and this causes him to overlook important differences between conscience and non-moral projects. First, May considers whether a person’s moral conscience is unique in that “it imposes categorical demands,” only to conclude that Chester’s ambitions similarly impose categorical demands on his life – “demands that he experiences as volitional necessities on a par with his moral beliefs.”<sup>443</sup> Unfortunately, May fails to realize that volitional necessities and the categorical demands of conscience are distinct.

As noted in a previous chapter, the first major difference between volitional necessities and the categorical demands of conscience is that desire and duty are largely separable within the latter but not so separable within the former. Since conscience beliefs are perceived obligations, we can understand them as categorical demands that someone believes they must perform. However, conscience beliefs differ from volitional necessities in that the demands of the former must be satisfied even if the individual does not desire or “care” about performing the demand at all. Whereas conscience places categorical requirements on individuals independent of their desires, volitional necessities are just desires all the way down.

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<sup>443</sup> Simon May (2017), 197

Moreover, because volitional necessities “can arise from anything at all that a person cares about,” it is possible for the object of the volitional necessity to be amoral or value-neutral.<sup>444</sup> Another relevant difference thus arises: whereas the categorical demands of conscience cannot be value neutral, the demands of volitional necessities “need not have any connection to...value.”<sup>445</sup> This second difference between the categorical demands of conscience and the volitional necessities of non-moral projects is important for the current discussion of moral integrity: if a volitional necessity is thwarted by law, it does not necessarily involve an imperilment to moral integrity because it is possible that no moral values were involved. But when a categorical demand of conscience is thwarted by law, it necessarily involves an imperilment to moral integrity because moral values must always be involved. Insofar as the categorical demands of conscience require that individuals do things that they otherwise might not want to do and necessarily involve imperilments to moral integrity, they are different from the volitional necessities of non-moral projects and perhaps deserve differential treatment before the law as a result.

Moving forward, I also think that May is wrong to think – alongside Martha Nussbaum<sup>446</sup> – that conscience is the capacity that “reflect[s] on the ultimate meaning of life.” As noted in an earlier chapter, this view of conscience is misguided for several reasons. First, this view is, historically speaking, overinclusive: it attributes to conscience not only beliefs about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for us to adopt or not adopt in a particular situation, but also

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<sup>444</sup> Andrew Koppelman (2009), 216

<sup>445</sup> Andrew Koppelman (2009), 216

<sup>446</sup> Martha Nussbaum (2008), 19-20

beliefs about what is or is not broadly meaningful to an individual. Second, this view seems to reverse the role of conscience as the applier (and not supplier) of our values: conscience now seems to be the capacity that primarily supplies our values – or something like our answers to these questions of ultimate meaning. Additionally, this view of conscience seems much friendlier than conscience’s historical roles as the creator of categorical demands, judge, accuser, acquitter, and so on. Lastly, the historical notion of conscience produces more than just “emotions of longing” connected to a search for ultimate meaning, and includes emotions like guilt, remorse, pride, joy, and relief. Thus, I think May mistakenly attributes this feature to conscience in his analysis of potentially distinguishing features of conscience.

Lastly, I think May fails to see that moral commitments are dissimilarly central to one’s moral identity when compared to non-moral projects. It is plausible that “Chester’s ambition to be world champion is no less central to his self-conception” or identity than his friend’s moral principles are to theirs.<sup>447</sup> But I take his friend’s moral principles to be nevertheless more central to their moral identity than Chester’s ambitions to be a world champion chess-player. Angelica and Biko’s conscience beliefs at least partly constitute their moral identity – for it seems difficult to articulate someone’s moral identity without ever referencing what they believe to be morally wrong to do or not do. Chester’s non-moral project, however, probably doesn’t have much to do, if anything, with his moral identity – especially when we consider that the object of his volitional necessities seems to be value-neutral. This distinction is likely important only insofar as considerations of one’s moral identity – which includes considerations of one’s moral integrity – may carry more

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<sup>447</sup> Simon May (2017), 198



weight than considerations of one's overall identity in legal accommodations cases. In other words, this distinction will make a difference only insofar as the law is disproportionately concerned with imperiling a citizen's moral identity than a citizen's value-neutral identity.

Second, I think May's dilemma for the Moral Conscience principle is ultimately unsuccessful. In particular, I think this dilemma can be unraveled when we introduce Sorabji's definition of conscience beliefs. Remember that Sorabji contends that conscience beliefs are beliefs "about what actions or attitudes had been in the past, or would be in the future, wrong or not wrong for him to adopt or not adopt in a particular situation."<sup>448</sup> So, if this is true, then Chesleigh's belief that she must "earn enough money to repay her elderly grandparents for the many financial sacrifices they incurred supporting her chess career from an early age" is plausibly a conscience belief. That is, Chesleigh's belief that she must earn enough money to repay her grandparents is a belief about what actions she must perform in the future – and would be wrong of her to not perform. Thus, while it's true that Chesleigh "has no distinctly moral objection to the antiseccessionist war" per se, she nevertheless holds a conscience belief that indirectly grounds her conscientious objection.

How might this point unravel May's dilemma? Remember that May's dilemma is for supporters of the Moral Conscience principle: this principle either includes Chesleigh within the scope of those entitled to an exemption because her moral integrity is threatened or it does not because she has no conscientious objection to military service as such. My response is that Moral Conscience principle would, in fact, include Chesleigh within the scope of those entitled to an exemption because she possesses a conscientious objection – just not to military service as such. Of course, merely advancing a conscientious

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<sup>448</sup> Richard Sorabji (2014), 215

objection and advancing a conscientious objection worthy of accommodations is different. Though Chesleigh may possess a conscience belief and advance a conscientious objection – and would thus be, at the very least, granted the defeasible entitlement to legal accommodations under the Moral Conscience principle – her bid for accommodations may nevertheless fail. In fact, her conscience claim may fail to warrant a legal accommodation because it is, as May points out, “not a conscientious objection to military service as such.”

The broader point here is that, in cases where someone’s moral integrity is threatened, there is likely some conscience belief that is being imperiled. Most basically, this is because imperilments to moral integrity usually involve asking individuals to do or not do what they otherwise believe would be wrong or not wrong for them in a given situation. Unfortunately, May argues in the other direction, claiming that threats to moral integrity are not exclusive to cases of conscientious objection. But if the example of his claim is Chesleigh’s case, then he has not given us good reason to believe his claim: after all, we’ve shown that Chesleigh’s threat to moral integrity involved a conscience belief – just not one against military service as such. Interestingly, we should also note that Chester’s case seemingly involves no threat to moral integrity because his case involves no conscience beliefs concerning what is morally required or forbidden – only beliefs about what is morally permissible. Overall then, this means that May’s second objection to the Moral Integrity Response also fails: when a person’s moral integrity is imperiled by the frustration of her non-moral projects, it is likely because some nearby conscience belief is similarly imperiled. If this is true, then that individual would, like Chesleigh, be granted a defeasible entitlement to legal accommodations under the Moral Conscience principle. Yet,

as noted above, merely possessing a defeasible entitlement does not guarantee legal accommodations; a bid for accommodations may still fail for a number of good reasons.

If May's dilemma against the Moral Conscience principle is unsuccessful, and moral integrity can be redeemed as the reason that conscientious objections are special, then the Moral Integrity Response is vindicated and the Unfairness Objection seemingly answered. I should also note that May's Moral Integrity Response, if sound, helps to inform a response to *how* a state should determine whether to grant exemptions when permitted in general. In particular, the Moral Integrity Response would ground defeasible entitlements that the state not legally obligate individuals to act contrary to her moral conscience – religious or otherwise. Such a conclusion provides cursory support for the claim that the state has good reasons to grant a defeasible *positive* special legal status to all conscience beliefs. When we this claim with the Egalitarian Response, we get the following conclusion: the state therefore has good reasons to grant a defeasible *positive* special legal status to all conscience beliefs – religious or otherwise.

## **V. Conclusion**

In this final chapter, I addressed several objections to the Egalitarian Response. In the first section, I addressed the multifaceted critique as advanced by Kathleen Brady. In particular, I addressed her claims that: religious conscience beliefs should enjoy special legal treatment on the grounds that they enjoy a distinct relationship with the divine; that accepting the Egalitarian Response will result for weaker protections for both religious and secular conscience beliefs; and that limit liberty more broadly and religious liberty in particular. In the second section, I addressed the Feasibility Objection and discussed

responses raised by Douglas Laycock and Nadia Sawicki. In the final section, I offered two responses to the Underinclusiveness Objection as raised by Simon May.

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**ABSTRACT****THE “SPECIALNESS” OF RELIGIOUS CONSCIENCE: AN EGALITARIAN RESPONSE**

by

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Religion is often singled out for special legal treatment in Western societies. This is certainly true in the United States where religion enjoys a special place in the First Amendment to the Constitution via the Free Exercise and Establishment Clauses. Through Free Exercise guarantees, for example, the Supreme Court held in *Wisconsin v. Yoder* that Amish children were entitled to an exemption from compulsory school attendance laws after the eighth grade, emphasizing that this was a uniquely religious exemption that did not apply to everyone. Moreover, those conscientiously objecting to contemporary vaccination laws may find themselves with varying protections depending on which US state they live in. For example, if both an Atheist and a Christian conscientiously object to the mandatory vaccine laws in New York, a legal exemption may be granted to the Christian but not the Atheist under New York’s current legal framework.

These cases and many like it raise an important question: *what, if anything, is “special” about religious conscience beliefs that justifies their special legal treatment?* In this dissertation, I argue that, because religious and nonreligious conscience beliefs are sufficiently similar in nature, there is no reason to treat them differently before the law. In

this way, I offer an *Egalitarian Response* to the question about religion's legal specialness. In the first chapter, I highlight a few historical discussions concerning religion's specialness. In the second chapter, I develop and defend a broad account of 'conscience' against competing notions in order to navigate questions concerning the comparative features of religious and nonreligious conscience more effectively. In the third and fourth chapters, I analyze several possibly demarcating features of religious conscience beliefs taken to be legally relevant by theorists in the field. At the end of these chapters I conclude that, when compared to the nonreligious conscience, the religious conscience fails to possess sufficiently differentiating features so that comparative special legal treatment is warranted. In the fifth and final chapter, I field lurking objections to the *Egalitarian Response*.

**AUTOBIOGRAPHICAL STATEMENT**

My academic career has consisted of earning a BA, MA, and PhD in Philosophy from Wayne State University. Currently, I am a Lecturer in Philosophy at the University of Michigan–Dearborn with research areas in ethics, law and religion, and bioethics.

When I'm not engaged in teaching or research, I enjoy a variety of non-academic hobbies and interests as well. As an academic, I love to read of course, but I also play the electric bass, frequent the gym, enjoy tearing up a good foosball table, receive regular inspiration from the Star Wars franchise in my aspirations to become a Jedi Master, and regularly play through quality video games with my wife. In addition to all these activities, I also spend a lot of time volunteering at my local church where I work closely with college students. Lastly, as a Michigan native, I should confess my near neurotic fandom for the athletic programs at the University of Michigan—especially football and basketball.