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The Significance of Conscience

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The Significance of Conscience

KENT GREENAWALT*

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I. INTRODUCTION

Conscience, like most words that describe human experience and recommend human action, has changed its meanings over time and takes on subtly different meanings in different contexts.¹ Since the time of Thomas Aquinas, when *conscience* referred to moral judgments about action, and our founding era, when “freedom of conscience” dominantly referred to individual religious liberty, our understanding has evolved. In this paper, I concentrate on present usage. My aims are partially descriptive and mainly normative. My hope is that by clarifying various ways the notion of conscience is conceived, I can contribute to a thoughtful elaboration of normative issues concerning responses to assertions of conscience and to near relatives of such assertions. This essay is modest in two important senses. I neither try to develop a full

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1. See Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 225–33 (2009); Michael J. White, *The First Amendment’s Religion Clauses: “Freedom of Conscience” Versus Institutional Accommodation*, 47 SAN DIEGO L. REV. 1075, 1077 (2010).

theoretical account of the distinctions I suggest nor do I try to resolve the hard questions about when legal accommodations to conscience should be extended.

Among the questions I address are these: How do claims of conscience relate to the entire domain of moral judgments? Do claims of conscience reach beyond moral judgments? Are all claims of conscience religious? If not, what does it take to make a claim religious? Do religious claims of conscience often, or sometimes, warrant more respect or protection than nonreligious ones? Some of these questions are daunting, and I do not aspire to give them definitive answers, if indeed they are capable of such answers. But I hope to suggest nuances that will increase awareness of what is at stake.

Three kinds of distinctions are important throughout my treatment. In respect to the obvious one between religious and nonreligious claims, I oversimplify to a degree by mainly assuming that religious claims of conscience are moral ones with a religious base. Sometimes writers distinguish between moral claims of conscience and religious claims, but typical claims of conscience by religious believers are assertions about what is morally required. A religious Quaker conceives killing in war as morally wrong; religious persons who refuse to participate in abortions believe it would be morally wrong to do so. Some perceived religious obligations, such as daily prayer or wearing a yarmulke, are nonmoral, unless “moral” is understood *very* broadly. But in most of my discussion this qualification is not important.

One can refer broadly to accommodations of conscience, but in developing public policy, it is crucial to reflect on the grounds for accommodation and what specifically should be done to accommodate. Someone may believe that the vindication of certain claims is a basic human right, one that every government, or every modern government, has an obligation to respect.² A person may think that most governments would wisely and desirably treat other claims as rights but would not assert that nonrecognition of these violates a basic human right. A third category is claims that are best left to individual decisionmakers. The line between a right and a privilege granted by discretion is less than sharp. A right formulated in flexible terms that takes into account all competing interests may amount in practice to an exercise of discretion that courts will hesitate to overturn. A possible fourth category is claims that should be rejected in all instances.

2. See, e.g., Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993, 999, 1012 (2010).

The creation of rights by governments can take place at different levels; they appear in constitutions, statutes, executive regulations, and judicial pronouncements. The stronger the argument that something is a basic human right, the more compelling is the contention that it belongs in the written constitution, if there is one, and in transnational documents protecting such rights. Once a constitution is in place, its interpretation is a highly significant component of defining rights—a component that receives little attention in what follows.³ When legislative measures are involved, these may simply relieve rights bearers of what would otherwise be legal requirements, but they may go further and protect certain actions from being treated by private employers or other private entities as the basis for adverse consequences. Even when the law leaves them free to do what they wish, private businesses and nonstate entities, such as hospitals and universities, may create rights that operate internally. Whether accommodations take place by right or by individual discretion, a vital question involves their extent. Are the individuals relieved only of compelled performance or also from adverse consequences?

A third kind of distinction is between what we might regard as ideal if we put aside difficulties of categorization, fact-finding, and practical administration, and what we think makes sense in our actual social and legal environments. Realistic formulations of rights and discretionary judgments must take into account both the nontransparency of true convictions and effective administration. In what follows, I will occasionally mention, but without detailed analysis, the need of lawmakers and others to develop legal standards that are workable.

II. CLAIMS OF CONSCIENCE AND THE DOMAIN OF MORAL CHOICE

How do claims of conscience relate to the entire domain of what people think they are morally required to do or morally should do? In particular, do such claims encompass choices of lesser moral importance and significant choices that do not concern morality? In some uses, the word *conscience* does not carry an implication of great significance and need not implicate morality. Nonetheless, I believe rights of conscience

3. For a more in-depth discussion on this point, see 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006) (containing many of the Author's views about how constitutional free exercise rights have been and should be interpreted).

are ordinarily conceived, and should be conceived, as concerning judgments believed by those making them to be of considerable moral importance.

Some uses of *conscience* do not include magnitude. I might say, “I have a guilty conscience about that” to express a disquiet about something I have done that seems morally wrong, such as failing to wash the dishes when I am aware they will be done by an overworked spouse, even if the particular wrong is comparatively trivial. I might also say, “I am not sure what is the right thing to do, but my conscience tells me *A* is wrong” to indicate an intuitive feeling rather than a deliberative judgment. Again, *A* would not need to be a serious moral wrong. But when someone sincerely claims “an objection in conscience” to performing an act, that person does see performance as involving a substantial wrong. When preparing for a conference on rights of conscience to refuse to participate in forms of healthcare, I thought of a nurse who regarded much optional plastic surgery as a wasteful reflection of a self-centered, materialist culture. I assumed that she felt that a person who receives such surgery is morally at fault and that her own cooperation is morally less desirable than helping with needed medical services, but she does not think she would be committing a serious moral wrong by participating. She would have a moral objection to helping with such operations that would not amount to a claim of conscience to avoid participating.⁴

More recently, I have reflected on a long past example from my own life, one that illustrates not only concerns that fall short of conscience but also the desirable limits of rights of conscience and the broader range for discretionary judgments. Having done some of my early academic writing on electronic surveillance, in which I strongly supported the need for judicial approval even when one party to a conversation consents to the surveillance, I agreed to serve as one of three Deputy Solicitors General for a year. A case within my areas of responsibility involved government eavesdropping without court orders on organizations vehemently opposed to the Vietnam War. The government’s argument was that national security justified the electronic surveillance. I thought the government’s behavior was wrong, even outrageous. Although I did not think the office should have refused to help develop the brief if higher officials insisted that the case be taken to the Supreme Court, my own moral judgment about the practice led to a strong wish not to be involved. The understanding of

4. See Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. (forthcoming 2010). She might think her moral duties as a nurse to do what she is asked actually outweigh any negative moral aspect of her participation. One who has an objection of conscience ordinarily does not think general duties would make performing an act morally preferable.

Erwin Griswold, then Solicitor General, and the generous willingness of one of the other deputies to take over review of the draft brief allowed my wish to be ninety-five percent granted.⁵

Looking back on those events, my feelings fell short of a genuine claim of conscience, as I now understand that term. I did not believe all lawyers should have refused to help, and I did not feel that I would have done a serious moral wrong had I worked on the heart of the brief.⁶ I strongly reject the theory that because those working for the government necessarily undertake to do all tasks that fall within their ordinary responsibilities, government employees should never be extended rights of conscience. That is to say, I see no objection in principle to extending rights of conscience to some government workers, including government lawyers. Nevertheless, I do believe that anyone taking the position of Deputy Solicitor General, a fairly high appointive office, should have no right to refuse tasks assigned by the Solicitor General. Both for that reason and because of the nature of my objection to working on the brief, whether to grant my wish properly fell within his range of discretion. Within that range, it makes good sense to accede to wishes like mine if that can be done without serious inconvenience or an unfair burden on other workers. Indeed, if one is focusing on the uses of discretion by supervisors, it may often be wise to grant accommodations for all sorts of reasons, ones going well beyond moral objections to participation.

In what respect are claims of conscience narrower than all moral objections? Martha Nussbaum has suggested that conscience involves the search for the ultimate meaning of life.⁷ That may be one sense of conscience, but people can have strong convictions of conscience that bear only a remote relation to their conceptions of ultimate meaning, if they have such conceptions. A more helpful criterion for what counts as a claim of conscience is degree of seriousness: how great a wrong does someone believe that performing an act would involve, what would they

5. When time pressures produced a request for my assistance with a peripheral section of the brief, I agreed.

6. It is even questionable whether my wish itself was a question of morality. My underlying objection to the surveillance practice was moral, but my wish not to participate in the brief might be seen as a matter of self-identification. This is one example of how difficult it is to draw a precise line between moral and nonmoral objections to performing actions.

7. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 168–69 (2008).

be willing to suffer rather than perform the act, and what do they believe they should be willing to suffer? In respect to adverse consequences, both belief about what one should be willing to suffer and actual willingness to suffer seem relevant. A moral claim not to participate is of great significance if a person believes he *should* die or suffer huge professional and financial loss rather than participate, even if he lacks the moral strength to adhere to that conviction. But one wonders how honest or how deep are such convictions if a person is not actually willing to suffer *any* significant adverse consequences.

Unfortunately, in the real world assessing the magnitude of moral convictions is usually extremely difficult. Even if claimants are sincere, other persons are hard put to assess what they mean if they say, "This is a fundamental conviction of mine." And the claimants themselves may find it difficult to guess what adverse consequences they would undergo or think they should be willing to undergo if they know that acceptance of their claims will relieve them of those consequences. This particular concern is mitigated if a person making the claim has in fact lost a job for failing to perform and is seeking to establish that the firing was unjust. One might believe that insisting that consequences be linked to ultimate concerns would alleviate the potential difficulties, but that seems unlikely. "Ultimate concern" or the "ultimate meaning of life" are themselves rather amorphous concepts, and the required connection between a particular conviction and someone's ultimate concern would be bound to be highly imprecise.

The practical consequence of these difficulties is this: unless those making decisions engage in an intense examination of someone who claims an objection in conscience, they will not be able to distinguish genuine claims of conscience from lesser moral objections, and even a fairly intense examination, such as the sort draft boards undertook for conscientious objectors to military service, is hardly reliable. The best test of intense conviction is that someone would not assert it falsely because of natural, unavoidable, negative consequences of doing so. Jehovah's Witnesses would not refuse blood transfusions unless they strongly believed they were wrong. Nurses wishing to be admired by colleagues and favored by superiors would probably not lightly decline to participate in sterilizations even if their refusals were accorded legal protection against firing and other forms of negative treatment.

Whether claims of conscience *must* be moral raises a perplexing question. A person could feel strongly about pursuing a course of action because of (1) an overarching inclination, (2) an inclination without moral content but one that reflects a person's accepted identity, (3) a perceived

personal moral obligation that does not apply to others, or (4) a perceived general moral obligation. The fourth and first categories are simple. Commonly, convictions of conscience involve beliefs that the behavior in question would be wrong for everyone.⁸ The typical claim not to participate in abortions includes a conviction that performing abortions is a serious moral wrong. A person with this view may also believe that many women who have abortions, and doctors and nurses who perform them, are, wholly or partially, relieved of moral blame, but the reason would be their ignorance that what they are doing is deeply wrongful. By contrast, not every overarching inclination is a matter of conscience. A drug addict may accord his highest priority to getting drugs; a husband may be obsessed with revenging himself against a man who has stolen his wife's affections. Such obsessions, recognized as regrettable by the very people who are in their throes, do not underlie claims of conscience.

The second and third categories are more difficult. Andrew Koppelman has analyzed Harry Frankfurt's concept of volitional necessity.⁹ A person accedes to a constraining force and is unwilling to oppose that force. Frankfurt refers to Luther's, "Here I stand, I can do no other," as a paradigm. This example is less than ideal for my purpose because of its religious character, and the likelihood is that Luther probably conceived his position in terms that I would classify as moral. But imagine a man who becomes so deeply drawn to painting that he is ready to make great sacrifices in order to paint. He comes to identify himself first and foremost as an artist, and pursuing that career becomes so important to him that he is willing to accept considerable neglect of his family as a price that must be paid. He realizes he is not a great artist and does not suppose humanity will suffer if he stops painting, yet his powerful desire to paint is a part of himself that he has no desire to shed. Although it may be an extension of standard usage, he might say, "I know my wife and children deserve more care than I am providing, but my conscience tells me that I must paint."

Sometimes a person who identifies a strong inclination in herself that does not apply to other people may believe it does have moral content. Many "callings" to enter into particular vocations fall into this category.

8. ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 3 (2010) (emphasizing the relational dimension of conscience not only in the actions it recommends but in the manner of its formation).

9. See Koppelman, *supra* note 1, at 234–36.

A woman is called to be a teacher, a doctor, or a minister. She feels powerfully drawn to this work as a way of assisting or guiding others. She will see the responsibility to help others as a general moral duty, but the specific career itself is one to which she in particular is drawn. She may have no judgment about who else should follow that career path.

Can any line be drawn between strong individual inclinations that have this moral element and those that do not, and if so, should they be differently treated? The conceptual defense of the distinction is threatened by egoistic hedonism and philosophies that posit a moral obligation to fully develop one's capabilities. According to such philosophies, our artist might reason, "Admittedly, my pursuit of art is much less than ideal for my family but it serves my overarching moral responsibility to develop myself." This problem generates interesting complexities, which I will short circuit. If we are imagining *rights* of conscience to be free of negative consequences if someone declines to perform ordinary responsibilities, the kind of conscience should involve conceived duties that reach beyond oneself. A nurse should not have a right to decline to participate in an operation because she strongly fears it will undermine her aesthetic sensibilities. On the other hand, if ample coworkers are available, an official with discretion may reasonably choose to excuse those with nonmoral reasons to avoid participation.

Even if moral content that relates to other people should be an element of claims of conscience that are treated as rights, drawing the line in practice between individualized claims of this kind and those without relevant moral content will be hard. It is a thin line between wanting to do the interesting and financially rewarding work of a lawyer and wanting to help others through the law; both aspirants to vocations and their practitioners are often less than honest with themselves about their overriding motivations, not to mention what they reveal to others.¹⁰ Perhaps the best reassurance about this subject is that the kinds of claims usually proposed for recognition as legal rights of conscience are ones that are most typically made by people who do have objections with moral content.

10. During the discussion of the paper at the conference, a question was raised about those who commit themselves to others to pursue a course of action that, standing alone, is not a question of morality, such as maintaining a healthy diet. Would the commitment to others turn this into a moral responsibility? For purposes of rights of conscience, such voluntary commitments should not transform self-interested reasons into genuinely moral ones.

III. RELIGIOUS CONSCIENCE AND NONRELIGIOUS CONSCIENCE:
IS THERE A DIFFERENCE, AND SHOULD THEY BE
TREATED DIFFERENTLY?

As I indicated earlier, I regard most religious claims of conscience as moral claims that rest on a religious base. But it may help to begin the discussion of religious claims with a further clarification. Some perceived religious obligations do not involve behavior toward other people. A believer might say, “It is a matter of conscience for me never to deny the truth that Jesus is the Son of God.” Unless the believer saw this principle as concerning the benefits of witnessing for other people, the obligation would not be moral, in the sense of concerning responsibilities toward other people or nonhuman animals. Nor would Abraham’s sense that God wanted him to sacrifice Isaac. That involved an obligation to engage in behavior toward another person, but the behavior was not designed to benefit that person. Similarly, people may feel they are instructed by God to hurt or kill others, even when that is not regarded as a form of punishment. I do not count these perceived obligations as moral. Without undertaking to draw a precise delineation between moral and nonmoral and recognizing that any categorization of this sort is bound to involve troublesome borderline instances,¹¹ I use the term *moral* here to refer to perceptions that behavior toward others will help them or avoid hurting them, will carry out a deserved consequence for their immoral behavior, or will avoid helping them engage in immoral behavior. This is sufficient to cover the great majority of instances in which religious persons will have claims of conscience not to carry out ordinary responsibilities.

In two important cases interpreting the Selective Service Act, the Supreme Court essentially eroded any distinction between religious and nonreligious claims to conscientious objection. To qualify under the statute, an objector had to reject participation in “war in any form” based on “religious training and belief.”¹² An amendment to the law responding to circuit court decisions mandated that the belief be in “relation to a Supreme Being.”¹³ In *United States v. Seeger*, the Court dispensed with

11. See, e.g., *supra* note 10.

12. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889.

13. Selective Service Act of 1948, Pub. L. No. 80-759, § 6(j), 62 Stat. 604, 613.

the Supreme Being requirement, ruling that it was sufficient that Seeger's conscientious objection "occupies a place in [his] life . . . parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹⁴ In *Welsh v. United States*, the applicant had struck the word *religious* from his application, but a plurality said that the exemption covered those "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war."¹⁵ Justice Harlan represented the fifth vote in *Welsh's* favor; he wrote that the statute did distinguish between religious and nonreligious conscientious objections, that line was unconstitutional, Congress would have preferred to include the relatively small number of nonreligious objectors to invalidation of the entire provision, and the Court was therefore warranted in expanding the provision to reach *Welsh*.¹⁶

The *Welsh* case raises a number of related but discrete questions. In terms of analytical clarity and common understanding, are all claims of conscience religious? Should judges interpret statutes cast in terms of religion to cover claims of conscience that are not evidently religious, either because this is what the legislature apparently intended—obviously not the basis for *Welsh*—or based on a more complex theory of interpretation? In terms of justifications for protection, are there significant differences between religious and nonreligious claims of conscience? For practical purposes, should the claims always be treated equally or may it be appropriate to give special protection to religious claims? Should the favoring of religious claims always be accepted or always or sometimes be regarded as unconstitutional?

On the question of common understanding and analytical clarity, we may start with the proposition that some people are nonreligious or antireligious. They see no reality beyond ordinary human life and are not members of any organization, such as the Ethical Culture Society, that engages in practices like those of religious organizations. These people, like *Welsh*, may experience claims of conscience. It is odd, even perhaps insulting, to assert that they are religious in reaching such convictions. Their convictions are better seen as nonreligious.

Two conceivable ways to avoid this conclusion are unpersuasive. One way is to say that atheism and agnosticism are themselves religions. The first problem with this strategy is that it is mistaken in its premise;

14. *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

15. *Welsh v. United States*, 398 U.S. 333, 343–44 (1970) (plurality opinion).

16. *Id.* at 344–62 (Harlan, J., concurring).

atheism and agnosticism are not religions—though they are convictions about religion—and I believe people reach the contrary conclusion only because they believe it leads to desirable norms about constitutionally permissible classifications. But even if one grants the premise about what count as religions, it does not help in respect to virtually all issues of conscience. Atheism or agnosticism can themselves produce a claim of conscience not to be drafted into activities that are designedly religious, but they cannot help on whether it is wrong to participate in war or perform an abortion. The atheist and the agnostic do not believe religious premises are a reliably true guide to how we should treat our fellows, and atheism and agnosticism do not by themselves provide guidance on most moral issues. That guidance must come instead from reason, intuition, or culture.

A more plausible way to equate all claims of conscience with religion is the idea of ultimate concern or ultimate meaning. If, as Paul Tillich famously urged, people's ultimate concerns are their religion and claims of conscience relate to ultimate concerns, then they can all be seen as religious.¹⁷ One difficulty with this approach is that people may experience claims of conscience that do not connect in any close way with their ultimate concern or their sense of ultimate meaning. A second difficulty concerns the application of those concepts to ordinary human life. Many people get through life's challenges with sets of aspirations and values but without any sense of ultimate meaning or concern. They may value their family, their professional life, and aesthetic experience without a sense of what it all "means" and without any ordered priority. If an "ultimate concern" theory responds that the ultimate concern of such people encompasses all those things about which they genuinely care, that concept has become so watered down, it signifies very little.

The existence of nonreligious claims of conscience is not restricted to those who are not religious. Imagine Frank, a religious divorced father whose wife has remarried to a man who, Frank acknowledges, is a loving and able stepfather. Frank is offered an extremely attractive and

17. The Supreme Court relied on Tillich's work in *United States v. Seeger*. *Seeger*, 380 U.S. at 180. The significance of "ultimate concern" is carefully explained and defended in Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066–67, 1075–83 (1978), a piece written by John Sexton, now president of New York University, *John Sexton*, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=pubs&personID=20281> (last visited Oct. 18, 2010). I summarize my disagreement with this approach in GREENAWALT, *supra* note 3, at 132–34.

appealing job a thousand miles away. He refuses the job. When asked why, he says, “I could not in good conscience abandon my children. This is not a religious matter for me but what I feel as a father I owe my children.” Even though Frank believes his children will be able to flourish in his absence, it might be that with enough thought and discussion with coreligionists he would be able to connect his religious convictions to his sense of parental duty. But those connections do not directly inform his present thoughts and feelings. We need to recognize that in our society many sincerely religious people experience strong obligations that they do not perceive as flowing from their religious convictions and practice.

Beyond supporting the presence of nonreligious claims of conscience, this example also suggests how hard it may be to draw a line between nonreligious and religious claims when people are somewhat religious and the connection of conscience to religious convictions is weak or remote. The occasional difficulty of drawing the distinction in practice is one reason to treat religious and nonreligious claims equally.

If analytically we can distinguish between nonreligious moral claims and religiously based moral claims, does it make sense to do so? A different question is whether religious claims of conscience that are other than moral should receive greater protection than nonreligious, nonmoral claims.

I shall pass over quickly the interpretation of existing statutes cast in terms of religious belief or association. Barring an unusual legislative history that points to a very broad sense of “religion” or serious constitutional doubts about excluding nonreligious claims, such laws should be construed as limited to religion, although in arguable cases the boundaries of religion should be conceived generously.¹⁸ Unless the statute itself imposes a restriction, a claim of conscience based on an obligation to God—or some other religious source—that does not amount to a moral duty should be treated like religiously based moral claims.

Sound statutory interpretation does not tell us how legal rights to conscience should be formulated or what the constitutional boundaries of permissible categorizations should be. At the country’s founding, the right to conscience that was emphasized was the religious liberty to choose one’s religion and practice free of governmental interference. It is debated whether that basic liberty was conceived as covering any right

18. For a discussion of my views on how the legal boundaries of religion should be conceived, see GREENAWALT, *supra* note 3, at 124–56.

to be exempt from neutral laws of general application that happened to interfere with religious practice. And, in the absence of evidence with which I am familiar, I assume that the concept of conscience itself was broader than the freedom of conscience that played a prominent role in controversies over state involvement with religion. That is, I assume that if someone had said, "Participation in the institution of slavery would violate my conscience," that would not have seemed a strange use of the concept even though it did not touch the speaker's religious liberty as that was conceived in public debate. If all this is right, the founding era's concepts are little help in deciding just when claims of conscience should be safeguarded, except perhaps in providing some support for the value of respecting conscience and in suggesting that insofar as the Free Exercise Clause protected conscience, it concerned religious conscience. Even if my premises about two centuries ago are mistaken, our thinking about this subject has developed sufficiently so that judgments about when to accommodate must rest primarily on our modern evaluations.

The notion that similar claims of conscience about the demands of morality—say, not to participate in wars, executions, sterilizations, or sales of morning-after pills—should be treated similarly, whether their basis is religious or not, is straightforward. Whatever may have been true in ages past, in which it may have been thought that all such serious claims of conscience were religious, this is not true today. One would need positive reasons if one were to defend differential treatment.

We may pass over any conceivable argument that in reality nonreligious claims should actually be favored, perhaps because they reflect independent thought. Given our traditions and our population's attachment to religion, the favoring of nonreligious claims is not practically thinkable. The serious questions are whether favoring religious claims of conscience is wise and constitutionally appropriate.

That depends. For certain kinds of claims, it is hard to imagine a nonreligious analogue. A nonreligious person is unlikely to be opposed to all blood transfusions, to think he has an obligation to wear something on his head at all times, or to believe he must withdraw his children from school after the eighth grade. If a right to conscience is to be created in respect to kinds of claims for which nonreligious claims of conscience are difficult to conceive, restricting the right to religious claims may be unnecessary, but it would not be unjust.

More interesting questions are posed when the claims of conscience to refrain from behavior are ones we can comfortably imagine as being

religious or nonreligious. Someone who is opposed to assisted suicide may rely on religious or nonreligious grounds; on either basis she might conclude that withdrawing life support amounts to assisted suicide and is an action in which she should not participate. One possible basis to favor religious claims is a tradition of some accommodation to religious conscience. For me, the argument from tradition is less powerful for legislative choice than for constitutional permissibility, and I do not regard it as decisive even in the latter context. Another possible ground to favor religious claims is that more is at stake for the typical believer; God may punish wrongdoers when this life is over. A basic problem with this assumption is that so much depends on the particular religion's assumptions. The nonbeliever may reasonably respond that behaving morally in this life matters more for her than for someone who is convinced that a loving God forgives all confessed sins.

A more promising basis of distinction concerns the underlying grounds of claims. The religious believer will usually be relying on a claim about what is morally right that applies generally and depends in part on religion's premises. A Roman Catholic who assumes that natural law reasoning establishes the unacceptability of abortion is bolstered in that conviction by the teaching of the church. Although governments must implicitly reject various claims about religious truth in policies they adopt—fighting wars rejects the premise that God instructs us to be pacifists—nonetheless the government is not highly competent to evaluate assertions of religious truth and should steer clear of them when it can.

Nonreligious claims of conscience are more likely either to reflect individualized reactions that avoid general claims about truth or to rest on claims whose evaluation by the government is more acceptable. If the claimant relies on secular reason to conclude that in all circumstances withdrawing life support is killing, the government may respond that this view is unreasonable given a dominant opinion to the contrary within the medical community and among others who have thought carefully about the issue.

I do not want to suggest that the contrast I have drawn puts all religious claims on one side and all nonreligious ones on the other. Some religious claims may explicitly involve a sense of what is right that does not reach beyond the individual: for example, "Prayer has led me to know this would be wrong for me, whatever may be right for others." And some general claims based on religious premises may be shown to be mistaken by nonreligious reason. Roman Catholics and many other Christians believe that wars just in their origin that are

fought according to moral principles, such as not intentionally killing innocent civilians, are morally acceptable. Suppose such a believer concludes that he cannot fight in a war because the United States is aiming only to expand its control of oil reserves and is wantonly killing innocent civilians. Both of these factual premises could be wrong and known to be so by relevant government officials and well-informed outsiders. Nonetheless, despite these counterexamples, the general desirability of the government's avoiding claims of religious truth is one basis for accession to religious claims of conscience.

About my suggestion that the government's competence may be greater and its exercise of judgment more appropriate, in respect to nonreligious moral claims than religious ones, Adam Kolber responded in commentary on my paper that the better line may be between empirical claims, as to which the government's competence is substantial, and claims of value, as to which its competence is much weaker.¹⁹ I agree that the government's competence may be greatest for ordinary empirical questions.²⁰ But I also think that in respect to nonreligious claims about value, secular reason has a significant role, and dominant opinion may be important, and that therefore public officials are typically in a stronger position to assert such claims than they are with respect to religious claims of value.

A final reason to prefer religious claims may be that it is simpler to judge their sincerity because such claimants usually, though far from always, have been attached to religious organizations that share a particular view. This particular reason carries no weight when the claim of conscience is one that would be extremely unlikely to be made insincerely. Nurses are unlikely to refuse to participate in sterilizations, for example, unless they have a sincere objection because there is no independent advantage to be gained by nonparticipation.²¹

The general lessons to be drawn from this analysis are debatable. I conclude that for most subjects as to which both religious and nonreligious claims of conscience about moral requirements are likely to arise, any right of conscience should include the nonreligious claims.

19. Adam J. Kolber, *Alternative Burdens on Freedom of Conscience*, 47 SAN DIEGO L. REV. 919, 920–26 (2010).

20. I add the word *ordinary* to put aside such questions as whether Jesus performed miracles and whether his body was resurrected after his death.

21. Of course, the existence of a sincere objection might or might not amount to a sense that participation would amount to a serious moral wrong.

That is both because the claims are similar enough to warrant comparable treatment and because there is some reason to accommodate deeply held convictions even when they are demonstrably mistaken. Nevertheless, the special reasons to accommodate religious conscience should be a crucial part of the discussion whether any right or privilege should be granted.

This conclusion raises a separate important question to which I shall devote fleeting attention. How should the law regard nonmoral claims made on religious or nonreligious grounds? Two examples that have arisen in American prison cases are claims by inmates that they should be given special diets or be permitted to wear beards of a certain length. It is fairly easy to see that a typical religious claim of this kind could be a claim of conscience. In the most straightforward case, the believer thinks he is obligated to God to act in accord with God's dictates, with perhaps a secondary obligation to the community of fellow believers. The believer does not perceive his attachment to the religion as itself a simple voluntary act.²² The nonreligious person with a similar wish is not likely to have a comparable sense of an obligation to an entity outside himself. One may hesitate, at least in most instances, to see his claim to engage in the behavior as one of conscience. In any event, whatever the theoretical conceptualization, I think the sense of obligation to an entity beyond oneself that is so important for most religious believers is a powerful enough reason to warrant giving legal protection to some religious claims of conscience that do not involve moral conclusions, while protection is denied for nonreligious, nonmoral claims. No reason comparable to the believer's sense of obligation to a higher authority applies when a nonbeliever's sense of what the nonbeliever should do is outside the realm of morality.²³

In one significant domain, I would limit a right of conscience to religious claimants. When a right is claimed by institutions rather than individuals, religious organizations have a strong sense of commitment, and a degree of independence from the state, that warrants respect. When nonreligious organizations are created for particular purposes, such as medical care, there is much less reason to permit them to decline services that are generally required.

The range of what should be constitutionally permissible is itself a complex topic. Present doctrine requires virtually no accommodation to

22. Cf. *supra* note 10.

23. I am not considering completely independent grounds to be relieved from ordinary requirements, such as medical conditions and disabilities. It may well be appropriate to adopt legal standards providing protections of these bases for special treatment.

religion but broadly permits accommodation. If too much is demanded of private employers, required accommodation turns into forbidden establishment. The Supreme Court has never specifically held that a permitted accommodation to religion that a legislature has granted *must* be matched by an equal accommodation to nonreligious conviction, but the draft cases came close to this. The Court's reading of Congress's language in *Seeger* and *Welsh* is so strained that the results may suggest what Justice Harlan explicitly concluded in the latter case: that in that context an exemption restricted to religious conscience is impermissible.

In my opinion, when a legislature favors religious claimants, a court should consider whether nonreligious claims of conscience about morally appropriate action are closely similar. If they are, and if there are not strong independent reasons to prefer religious claimants, a court should rule that the Equal Protection Clause and the Establishment Clause require equal treatment.

IV. CODA

What I have written here is mainly a preliminary to the crucial questions about government recognition of claims of conscience. In what arenas of social life should such claims be protected and how far should they be protected? What connection to a controversial procedure should be sufficient? For example, should admissions personnel be permitted to refuse to do paperwork for patients who will receive abortions? Should protections extend to forbid responses by private employers as well as to guard against government restrictions? Should protections be limited to behavior about which the citizenry is seriously divided, such as abortion, or extend to outlooks that are highly idiosyncratic? How far should a right or privilege of conscience extend when it runs up against the desirable provision of services for those who seek them or impedes the efficient operations of companies providing services and their fair treatment of other workers? How should the government respond when those who seek a commodity or service and those who want to avoid participating in providing it have competing claims of conscience?²⁴ Should rights be crafted by specific legislative or administrative measures, say regarding participation by doctors and nurses in abortions and sterilizations, or druggists in the sale of specified drugs, or should a

24. Such conflicts are a major theme in VISCHER, *supra* note 8.

formulation be in general terms, with disputed applications to be resolved by courts, as under the Religious Freedom Restoration Act,²⁵ the Religious Land Use and Institutionalized Persons Act,²⁶ and Title VII of the 1964 Civil Rights Act, as amended?²⁷ Designing desirable protections for conscience depends on the addressing of all of these inquiries. Our exploration of the relevant meanings of conscience and the divide between religious and nonreligious conscience forms only a small part of the total effort that is needed.

I should also be explicit that my focus on rights of conscience, the subject of the conference for which this paper was written, is not intended as an implicit assertion that conscience should dominate conceptions of religion or supplant an institutional approach under the religion clauses. I have implicitly proposed that responding to individual claims of conscience is one significant feature of protecting free exercise of religion, but I resist the idea that one must choose at some very general level between individual and institutional approaches. Both are relevant. Only in the context of some particular issues need one decide which should take priority.

25. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2006).

26. 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

27. 42 U.S.C. § 2000e(j) (2006).