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**WHAT DOES RELIGION HAVE TO DO WITH
FREEDOM OF CONSCIENCE?**

STEVEN D. SMITH*

Although the framers of the First Amendment chose to protect “the free exercise of religion” and deleted language about “freedom of conscience,” a widely-held modern assumption maintains that constitutional protection should extend to conscience generally, not just to religious exercise. But is this extension defensible? This article considers three classic rationales for religious freedom—the “separate spheres” rationale, the “futility” rationale, and the “higher duties” rationale—and asks whether they justify protection of non-religious conscience. The article concludes that all of the classic rationales are vulnerable to serious objections. However, a somewhat different rationale, which might be called the “personhood” rationale, is more successful, and the personhood rationale warrants protection for both religious and non-religious conscience. In the final section, the article asks whether the personhood rationale is ultimately religious in character and concludes that even if it is, the scope of protection for conscience that it supports should not be confined to religious belief and exercise.

INTRODUCTION

Although “freedom of conscience” is nowhere expressly mentioned in the text of the Constitution, its absence from the document is probably a historical accident. Several of the drafts of what became the First Amendment *did* explicitly refer to “conscience,” but in the final version

* Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander and Andy Koppelman for their helpful comments on an earlier draft. I also benefited from comments at the symposium, and in particular from Martin Belsky’s thoughtful response.

those references were omitted in favor of the familiar phrase protecting "the free exercise thereof"—that is, of *religion*.¹ Michael McConnell speculates that the alteration might have been the result of a deliberate decision to protect only a subset of conscience—namely, the part connected to religious convictions.² This conjecture *might* be right. But nothing in the records of the Congressional discussions reflects any such decision. Rather, the discussions suggest that the framers viewed "free exercise of religion" and "freedom of conscience" as virtually interchangeable concepts.³ And well they might have—because for the preceding two-plus centuries, pleas for "freedom of conscience" had been a central theme in the campaign to promote greater freedom in matters of religion, and those pleas had routinely been made and understood in essentially religious terms.⁴

Today, by contrast, the identification of freedom of conscience with freedom of religious exercise seems much more problematic, if not thoroughly objectionable. A virtual consensus in the academic community and the courts holds that it would be unacceptable to give constitutional protection to religiously-formed conscience, but not to what we can call the "secularized conscience."⁵

Thus, in the 1940s, in decisions like *West Virginia State Board of Education v. Barnette*⁶ and *Cantwell v. Connecticut*,⁷ the Supreme Court obliquely paved the way for protecting the secular conscience by treating the Free Exercise and Free Speech Clauses as a sort of conscience-protecting hybrid. And in the 1960s and 70s, in both constitutional and statutory contexts, the Supreme Court expanded protection for conscience by construing "religion" broadly to include convictions that are deeply-held, but not "religious" in any conventional sense of the term.⁸ Justice Harlan suggested that unless the exemption in the draft laws for

1. U.S. CONST. amend. I. For a brief review of this history, see Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1481–84 (1990).

2. McConnell, *supra* note 1, at 1495.

3. McConnell himself acknowledges "the absence of any recorded speech or discussion of differences between the terms. The drafters alternated between the two formulations without apparent pattern . . ." *Id.* (footnotes omitted).

4. See generally ANDREW R. MURPHY, CONSCIENCE AND COMMUNITY: REVISITING TOLERATION AND RELIGIOUS DISSENT IN EARLY MODERN ENGLAND AND AMERICA (2001).

5. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1263–64 (1994); Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433 (1999).

6. 319 U.S. 624 (1943).

7. 310 U.S. 296 (1940).

8. See *Welsh v. United States*, 398 U.S. 333, 343–44 (1970); *United States v. Seeger*, 380 U.S. 163, 180–81 (1965); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

conscientious objectors were construed (in defiance of statutory text and legislative history) to include non-religious objectors, the exemption provision would have to be declared unconstitutional.⁹

Indeed, the constitutional pendulum may have swung to the other extreme. For about a decade-and-a-half now, the Supreme Court has ceased to treat the Free Exercise Clause as a provision for protecting conscience in any direct way; instead, the focus in modern free exercise doctrine is on *the form of the laws* that burden conscience. Under current doctrine, so long as such laws are viewed by the courts as being “generally applicable” and religiously “neutral,” no accommodation of religious exercise—and hence of conscience—is required.¹⁰ But judicial concern for conscience (or at least for something that passes under that name) has not disappeared altogether. Rather, it has migrated to textual locations like the Establishment Clause and the Due Process Clause, where freedom of conscience can appear in peculiar and secularized forms.

Thus, under the heading of the Establishment Clause, advocates like Justice Souter invoke freedom of conscience in school aid cases to argue that it is unconstitutional to burden the consciences of taxpayers who object to spending public money in ways that have a legitimate secular function but may also have the effect of subsidizing religious instruction.¹¹ And while the Court as a whole has not fully embraced this position, the Court *has* indicated that protecting the consciences of such taxpayers is at least a legitimate and important state interest—one that can serve to justify what might otherwise be anti-religious discrimination.¹² There is of course no hint of any similar concern for the conscience of *religious* taxpayers who object to the expenditure of their tax dollars to support what they regard as indoctrination *contrary to* (or subversive of) their religious convictions.¹³

9. See *Welsh*, 398 U.S. at 344 (Harlan, J., concurring).

10. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

11. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 711–16 (2002) (Souter, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting).

12. See *Locke v. Davey*, 540 U.S. 712, 722 (2004) (holding that the state interest in protecting the conscience of taxpayers could justify the exclusion of theology students from eligibility for a state-sponsored scholarship).

13. The existence of such religious opposition is apparent in cases like *Mozert v. Hawkins County*, 827 F.2d 1058 (6th Cir. 1987), and *Smith v. Board of School Commissioners*, 827 F.2d 684 (11th Cir. 1987), though current law gives the objectors no remedy in their role as taxpayers—or, for that matter, in their roles as parents or students or in any other role. Souter and others of similar mind like to cite James Madison’s “three pence” argument that it would violate conscience to force taxpayers to subsidize religious teaching by Christian clergy. See, e.g., *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting). But in fact Jefferson’s Virginia Statute for Religious Freedom, the passage of which Madison helped secure, framed the point more broadly, asserting that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . .” Thomas Jefferson, *Bill for Es-*

In the realm of "substantive due process," the celebrated or notorious joint opinion in *Planned Parenthood v. Casey* centrally featured an appeal to freedom of conscience in its defense of a right to abortion.¹⁴ Justice Stevens, in a concurring opinion, applauded the joint opinion for grounding the abortion right in the commitment to conscience.¹⁵ Stevens might well be pleased, because he himself had advocated the "conscience" rationale for abortion rights several years earlier in *Webster v. Reproductive Health Services*.¹⁶ And though not using the term "conscience," Stevens advanced a similar rationale in the much discussed case of *Cruzan v. Missouri Department of Health* as an argument in favor of what is sometimes called a "right to die."¹⁷

Indeed, it seems hardly an overstatement to say that Stevens is the Justice who in recent times has exhibited the greatest solicitude for conscience—*except*, that is, when conscience is directly tied to religious belief. It is worth pausing to appreciate this spectacle. When the concerns of conscience arise regarding matters or on grounds that are not conventionally religious, as with abortion or the right to die, Stevens seems prepared to strike down at least some restrictions across-the-board, for *all* cases, because they might intrude on judgments of conscience in *some* cases. But where the claim of conscience arises in a context in which the right has been thought to belong for centuries—that is, in religious belief—Stevens not only declines to strike down a restriction burdening conscience; he will not even *permit* government to accommodate the conscience of the religious dissenter.¹⁸

So current constitutional doctrine, though perhaps fragile and uncertain in its contours, if anything gives secular conscience *more* respect

tablishing Religious Freedom, reprinted in THE SUPREME COURT ON CHURCH AND STATE 25 (Robert S. Alley ed., 1988). Notice that the evil to be avoided is forced support of "opinions [one] disbelieves"—not only of *religious* opinions one disbelieves. Souter and others give no explanation for why the burden on conscience applies when a taxpayer objects (whether on grounds of conscience or not) to expenditures that may benefit religion but not when a taxpayer objects on religious or conscientious grounds to expenditures that run contrary to the taxpayer's beliefs. For a perceptive discussion of the difficulty, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 417–27 (2002). Feldman concludes that "[t]here is probably no principled answer that would satisfy someone who takes seriously the idea of protecting conscience." *Id.* at 426. See also STEVEN D. SMITH, GETTING OVER EQUALITY 73–75 (2001).

14. *Planned Parenthood v. Casey*, 505 U.S. 833, 851–52 (1992) (Joint Opinion).

15. *Id.* at 916, 919 (Stevens, J., concurring and dissenting).

16. 492 U.S. 490, 572 (1989) (Stevens, J., concurring and dissenting).

17. 497 U.S. 261, 350 (1990) (Stevens, J., dissenting).

18. See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., joining in the concurring opinion of Scalia, J.). For an argument that Justice Stevens' various positions can only be explained by hostility to religion, see Robert F. Nagel, *Justice Stevens' Religion Problem*, 134 FIRST THINGS, June/July 2003, at 9.

than it affords religious conscience. And yet there are still prominent scholars like John Garvey and Michael McConnell who question that development,¹⁹ and other scholars who favor it but wonder whether any convincing justification for the extension can be given. In this vein, Noah Feldman explains:

[T]he modern understanding of liberty of conscience seems to be that every person is entitled not to be coerced into performing actions or subscribing to beliefs that violate his most deeply held principles. This definition differs fundamentally from that of the eighteenth century in that it is secular. To the eighteenth-century mind, liberty of conscience meant that the individual must not be coerced into performing religious actions or subscribing to religious beliefs that he believed were sinful in the eyes of God and that could therefore endanger his salvation. Indeed, it was, following Locke, literally “absurd, to speak of allowing Atheists Liberty of Conscience,” because conscience necessarily related to one’s salvation, in which atheists presumably disbelieved altogether. Because this view seems implausible today, liberty of conscience may require some justification other than the religious justification that underlay the eighteenth-century version of the theory.²⁰

Feldman goes on to observe that:

[if we] broaden conscience to include secular matters of deep belief . . . the Lockean distinction between the sphere of the church and that of the state evaporates. Suddenly there is no clear rationale for allowing government to take any action of any kind where it violates conscience; or alternatively, all attempts to protect conscience look unjustifiable.²¹

So, *can* any plausible justification be given for affording respect and some form of legal protection to secular conscience?²² In this article, I

19. See *infra* notes 45, 100.

20. Feldman, *supra* note 13, at 424–25 (quoting MOSES DICKINSON, A SERMON PREACHED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT 35 (1755)).

21. *Id.* at 426.

22. I will not worry here about exactly what form, if any, such protection might take. In our history, it has occasionally been suggested that conscience (at least when it is religious in character) should be categorically exempt from state regulation. See, e.g., JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY 75, 89 (1998). But reflection quickly shows that position to be untenable—the example of a religion demanding human sacrifice seems a sufficient counterexample, see *Reynolds v. United States*, 98 U.S. 145, 166 (1878)—and so the possible protection has typically been understood to consist of some sort of rebuttable presumption of non-interference with conscience, qualified by something like a “compelling state interest” limitation. For our purposes, we can use that familiar “presumptive accommodation” position

want to examine some of the leading rationales for freedom of conscience with this question in mind. From this examination, I think two conclusions emerge, though both are highly tentative. First, it is far from clear whether any sufficiently persuasive rationale exists for giving special legal accommodation to conscience at all, whether secular *or* religious.²³ But, second (and contrary to what I initially expected to conclude), insofar as such a rationale *is* available, it would most plausibly encompass secular as well as religious conscience.²⁴

In Part I, I will consider three classic arguments for freedom of conscience—we can call them the “separate spheres,” “futility,” and “higher duty” rationales—to see whether they provide persuasive justifications for protecting freedom of conscience and, if so, whether the justifications apply to secular as well as religious conscience. Part II considers a different argument that emerges from the deficiencies of the classic rationales: we can call this the “personhood” rationale. I suggest that this rationale, though highly contestable, is nonetheless more successful than the other three, and its logic would seem to apply to both secular and religious conscience. Part III briefly considers a possible objection which suggests that the “personhood” rationale depends upon religious assumptions after all. I conclude that this objection is probably misconceived, and that even if it is correct, it shows only that the *reasons* for respecting conscience are religious, not that the *scope of protection* is limited to religious conscience. Hence, the “personhood” rationale for respecting conscience both religious and secular remains in place, albeit precariously.

I. THE CLASSIC RATIONALES

Over the centuries, some well rehearsed rationales for respecting conscience have emerged. These rationales are by now so venerable that they may come to seem almost self-evident—propositions that it would

to pose the question of whether we can articulate any rationale for giving special legal protection to conscience.

23. For development of this point from a different angle, see Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

24. It remains true, of course, that the First Amendment explicitly applies to the “free exercise [of religion],” *not* to the free exercise of conscience. So a certain kind of originalism might still support protection only for religious conscience. However, if I am right that the best rationale for protecting conscience is not limited to religion, then under modern judicial practice that has generated decisions like *Roe v. Wade*, 410 U.S. 113 (1973), and *Lawrence v. Texas*, 539 U.S. 558 (2003), finding a textual basis for the extension of conscience should be child’s play. Most obviously, a court could say that protecting only religious conscience would be arbitrary and thereby offensive to constitutional provisions such as the Due Process and Equal Protection Clauses.

be both implausible and impious to question. If we are indelicate enough to inspect them, however, both the rationales themselves and their application to secular conscience seem vulnerable.

A. *The "Separate Spheres" Rationale*

We can begin our examination with the Lockean argument noted above by Noah Feldman. Locke, Feldman explains, "developed the argument for liberty of conscience by refining the idea of separate spheres of authority for religious and worldly affairs . . ." The state exists "solely for the civil interests of life, liberty, and property and therefore has no jurisdiction over matters falling outside these interests."²⁵ Religion, and hence religious conscience, fall outside that proper sphere of government—a conclusion reinforced in Locke's view by the fact that nothing in Christian scripture (as opposed to Hebrew scripture, or what Christians describe as the "Old Testament") confers on the state any jurisdiction over religion.²⁶ Feldman argues that this "separate spheres" rationale has exerted a powerful influence over the American law governing conscience and religious freedom.

So, does the "separate spheres" argument provide any rationale for accommodating non-religious conscience? The rationale seemingly *would* protect religious believers and non-believers alike from being coerced by the state into affirming religious beliefs or performing religious duties; that is because, once again, the state ostensibly has no jurisdiction over religion, and hence no authority either to interfere with it or to impose it.²⁷ But insofar as a non-believer might have an objection of conscience to some regulation of a matter that *does* fall within the state's jurisdiction—a requirement of military service, perhaps, or a "no beards" regulation for police officers²⁸—the "separate spheres" rationale provides no basis for accommodation. And indeed, Locke expressly asserted (as Feldman notes) that it would be "absurd, to speak of allowing Atheists Liberty of Conscience."²⁹

But this analysis seems incomplete and perhaps a bit tangled. It may be true that the "separate spheres" rationale provides no help to secular objectors who seek exemption from legal requirements regarding matters that fall within the state's proper sphere. But then the rationale

25. Feldman, *supra* note 13, at 368.

26. *Id.*

27. Cf. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 54 (1996).

28. Cf. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d. Cir. 1999).

29. Feldman, *supra* note 13, at 425.

provides no help to religious objectors within that domain either. If conducting war or imposing grooming regulations are functions that the state is authorized to perform, then the "separate spheres" rationale itself simply does not provide any reason for excusing *anyone*—including people who are conscientiously opposed, whether on religious or secular grounds. And the more general conclusion that follows from these observations is that the "separate spheres" rationale is problematic for our purposes, *not* because it would protect religious but not secular conscience, but rather because, upon closer inspection, it is not really an argument for protecting *conscience* at all.

To put the point differently, the separate spheres rationale, by keeping government out of the domain of "religion," would seem to immunize against governmental regulation a range of human practices and concerns that may or may not be manifestations of "conscience" (because surely not everything that churches or religious believers say and do is a manifestation of "conscience"³⁰). And conversely, the rationale would subject to government regulation a whole range of other concerns—those that affect "civil interests"—even when regulations have a harmful or inhibiting impact on some citizens' commitments of "conscience." Though conscience might sometimes benefit from the jurisdictional limitations, the "separate spheres" rationale is simply not about *conscience*, whether secular or religious.

The examples mentioned above—about war and grooming regulations—could be multiplied, of course, and they suggest a deeper problem with the "separate spheres" rationale: the rationale misdescribes the world, and in particular the character of religion. In its nature and for many believers, "religion" is emphatically *not* a "separate sphere"—not some discrete set of beliefs or concerns or activities disconnected from worldly concerns—but rather something that frames and pervades the believers' ways of understanding and living. Insofar as it rests upon a supposed dichotomy between "the religious" and something like "the temporal," therefore, the "separate spheres" rationale rests on a basic category mistake.³¹ Even if it was not apparent earlier in our history, that mistake ought to be evident by now both in the voluminous debate over "religion in the public square" (in which many commentators have pointed out how religion is inextricably connected with other human beliefs and con-

30. See Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1390-91 (1981).

31. For further discussion, see Steven D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487 (2001).

cerns³²) and in the free speech cases recognizing that “religious” speech is often not a separate category of speech addressing discretely “religious” matters, but rather a way of speaking about many of the same things that nonreligious speech addresses—family and character and politics and life generally.³³

But we need not dwell on this difficulty here. It is enough for our purposes to observe that even if the “separate spheres” rationale has its appeal and its uses, it does not serve to explain why there is anything distinctive about “conscience,” whether religious or secular, that deserves special respect or legal protection from the state.

B. The “Futility” Rationale

Another rationale both prominently featured by Locke and urged by many other advocates and theorists looks more promising, in part because it might explain why secular conscience is as deserving of respect and protection as religious conscience is. The argument asserts that government should not attempt to coerce conscience because coercion in this domain is futile: it cannot achieve its objective. That is because *belief*, according to this rationale, simply cannot be coerced. Government might want me to believe *X*, and it might force me to *say* I believe *X*; but if *X* does not seem true to me, then inwardly I will still not be a believer and the government’s objective will not be realized.

In this vein, Locke argued that “such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force.”³⁴ And James Madison asserted that “[t]he Religion . . . of every man must be left to the conviction and conscience of every man,” among other reasons because “the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.”³⁵

In matters of belief, in short, coercion is pointless. The rationale has been a common one in arguments for freedom of conscience.

32. See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 30–46 (1988).

33. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

34. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689), reprinted in *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION*, at 173 (Charles L. Sherman ed., Irvington Publishers 1979).

35. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *THE SUPREME COURT ON CHURCH AND STATE*, *supra* note 13, at 18.

The futility rationale may seem promising for our purposes because it does not seem limited to religion. The relevant futility, that is, pertains to *belief*—not to *religious* belief specifically. Government has as little power to force me contrary to my inclinations to believe—actually, sincerely *believe*—the theory of evolution or Humanist Manifesto III as it has to compel me to believe the Apostles' Creed. Hence, if the main reason for respecting freedom of conscience is given by the futility rationale, then it would seem that secular as well as religious conscience ought to be covered.

So, does the futility rationale give us what we are looking for? We might begin by noticing that the basic rationale is not as powerful as in recent times scholars have sometimes supposed it to be.³⁶ In fact, coercion *can* be efficacious even in the realm of belief—in at least three ways.

First, forced exposure to teachings can induce a captive audience to confront, consider, and perhaps thereby come to accept beliefs that the audience otherwise might not have encountered, or might not have seen presented in a favorable way. Generations of parents who have compelled their children to attend Sunday School have understood this dynamic—as have public schools that require students to receive instruction in, for example, the evils of substance abuse, and employers and courts that require recalcitrant employees to attend various forms of sensitivity training.

Second, well-known psychological dynamics might cause some coerced subjects to internalize a creed they are compelled to confess as a way of reducing “cognitive dissonance.” Suppose I am forced to *say X* even though (initially) I *believe* not-*X*. I am likely to experience dissonance. One way to reduce this dissonance would be to persuade myself that *X* is true after all.

In a related vein, religionists have often maintained that the principal reason why some people reject the truth is not so much honest incredulity as pride, selfishness, and unwillingness to conform their actions to the demands of the truth.³⁷ By changing habits and life patterns, coercion might overcome this resistance. Thus, Steven Resnicoff explains that:

36. The difficulties with the rationale are discussed at greater length in STEVEN D. SMITH, *GETTING OVER EQUALITY* 146–62 (2001).

37. See *John* 3:19–20 (King James): “And this is the condemnation, that light is come into the world, and men loved darkness rather than light, because their deeds were evil. For every one that doeth evil hateth the light, neither cometh to the light, lest his deeds should be reproved.”

[i]n a society governed by Jewish law, rabbinic leaders would use coercion—including physical force if necessary—to induce an individual to perform a commandment requiring a specific action . . . Jewish law believes that a person is metaphysically affected by his deeds. Fulfillment of a commandment, even if not done for the right reason, leads a person to performing more commandments and, *ultimately, to doing so for the right reason* . . . Thus, such coercion leads to the coerced individual's ultimate perfection.³⁸

Third, and of greater historical significance, suppression of heretical belief has typically been calculated not so much to induce genuine belief in the heretics themselves (though religious authorities have no doubt hoped for that result) as to prevent heretics from infecting others who if spared the exposure will continue to hold a sincere, untroubled belief rather than being led astray. These heretical beliefs have been compared to a contagious disease, or to counterfeit currency, which the state ought to control and suppress. And there is no reason to suppose that coercion cannot achieve that end, at least under some conditions. Thus, Jeremy Waldron explains that:

[c]ensors, inquisitors and persecutors have usually known exactly what they were doing, and have had a fair and calculating idea of what they could hope to achieve. If our only charge against their enterprise [is that it was] hopeless and instrumentally irrational from the start, then we perhaps betray only our ignorance of their methods and objectives, and the irrelevance of our liberalism to their concerns.³⁹

Let us set aside these objections, though, and suppose that the futility rationale is persuasive. After all, at least in some circumstances the rationale *does* seem plausible. In a highly pluralistic society that enjoys a large measure of freedom of speech, for example, there is good reason to doubt the efficacy of efforts on the part of the state to suppress what it regards as false beliefs through direct coercion. In these circumstances, does the futility rationale provide a persuasive argument for protecting conscience both religious and secular?

The deeper problem lies, I think, in the rationale's dubious identification of "conscience" and "belief." In reality, the two are neither identical nor coextensive. You and I believe many, many things—we believe

38. Steven H. Resnicoff, *Professional Ethics and Autonomy: A Theological Critique*, in LAW AND RELIGION 329, 334 (Richard O'Dair & Andrew Lewis eds., 2001) (emphasis added and footnotes omitted).

39. Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, in JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 120 (John Horton & Susan Mendus eds., 1991).

that the earth is more nearly round than flat, and that the Red Sox finally won the World Series, and that two plus two equals four—and we would probably place relatively few of our beliefs under the heading of “conscience.” Conversely (and more crucially), if we are proponents of “freedom of conscience,” we are likely seeking to protect much more than our freedom to *believe*. Typically, the partisans of conscience have been concerned about the ability to worship, proselytize, and practice their beliefs. Think of the classic cases: the Vietnam era draft objectors, or Henry David Thoreau, or Roger Williams, or Thomas More. In each of these cases, the relevant civil authorities were perfectly willing to let these dissenters *believe* as they felt inclined, so long as they were willing to conform their *conduct*—or at least their *public expression*—to some civil requirement. And in each case, the claimants in conscience were seeking respect for some course of conduct or expression that went beyond mere belief.

Indeed, this is the typical pattern. We remember Puritan Massachusetts, for example, as a classic case of a lack of respect for freedom of conscience. But, in fact, the Massachusetts authorities were generally quite willing to let people *believe* as they wished so long as they did not act upon and publicly promote their heretical or subversive opinions.⁴⁰

In short, the futility rationale fails to meet our purposes for the same reason the “separate spheres” rationale fails: even if it is persuasive, it is not finally an argument about conscience *per se*, or for the sort of freedom that proponents of freedom of conscience have sought to secure.

C. The “Higher Duty” Rationale

We come closer to the historical concerns of proponents of freedom of conscience with another familiar argument, which we can call the “higher duty” rationale. “Conscience,” according to this rationale, is a sort of divine instruction “written on the heart,”⁴¹ or a divine “voice” speaking within the soul of the individual: it is a faculty by which the believer discerns the ordinances of God. But if the promptings of conscience are understood to be the communication of a divine imperative, then it surely follows that the believer herself ought to obey that impera-

40. See TIMOTHY HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 61 (1998).

41. The metaphor comes from St. Paul’s Epistle to the Romans: “For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law *written in their hearts*, their conscience also bearing witness . . .” *Romans* 2:14–15 (emphasis added).

tive over any other command, including the command of human law.⁴² And it seems to follow as well that government ought to avoid interfering with or purporting to countermand the divine imperative. What government, after all, would want to place itself in opposition to the will of the Almighty?

Thus, James Madison argued that “[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.”⁴³ In slightly different versions, Michael McConnell and John Garvey have developed modern versions of this “higher duty” rationale for conscience.⁴⁴

The “higher duty” rationale comes closer than those we have already considered to capturing what “conscience” has historically been understood to encompass. The rationale understands, that is, that “conscience” involves more than mere belief: it entails acting—*living*—in accordance with central convictions. Thus, we do not describe as “conscientious,” or as a “person of conscience,” the individual who merely holds or affirms particular beliefs, but rather the person who actually lives in accordance with her deepest convictions.

But if the “higher duty” rationale is concerned with “conscience,” does it provide a justification for giving legal accommodation to the purely secular conscience? It seems not—at least not on first inspection. We can stipulate that a secular objector like Elliott Welsh,⁴⁵ for example, has reflected deeply and has reached a sincere, heart-felt, intellectually sophisticated belief that war is morally wrong. Consequently, Welsh sincerely disagrees with the government about the propriety of waging war in Vietnam. So what? Citizens sincerely disagree with the government’s judgments all the time and on all manner of issues. Normally, these citizens are not excused from complying with generally applicable laws. So why should the “conscientious” objector be excused?

As the “higher law” rationale suggests, the religious objector can respond to that challenge with the distinctive claim that in obeying the human law she would be violating a higher duty to God, and that by forcing

42. Cf. *Acts* 5:29 (“Then Peter and the other apostles answered and said, We ought to obey God rather than men.”) (italics omitted).

43. Madison, *supra* note 35, at 18–19.

44. See Garvey, *supra* note 28, at 52–53; McConnell, *supra* note 2, at 1496–99; Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 15–24. Alan Brownstein argues that the rationale is more persuasive if formulated in terms of “love” rather than “duty.” Alan E. Brownstein, *Justifying Free Exercise Rights*, 1 U. ST. THOMAS L.J. 504, 517–23 (2003). Brownstein’s re-rendering is subtle and attractive, I think, but I do not believe it avoids the particular difficulties to be noted here.

45. See *Welsh v. United States*, 398 U.S. 333 (1970).

her to comply, the government itself would be placing itself in opposition to the divine will. This is essentially what Madison's famous rationale for religious freedom said. The believer may or (depending on the content of her faith) may not reinforce that claim by asserting that violation of this higher duty will result in "extratemporal consequences"—eternal damnation, perhaps⁴⁶—but even if she does not, we might be reluctant to force citizens to violate higher duties. Conversely, however earnest he may be, the secular objector like Welsh cannot make quite the same claim. He might frame his moral concerns in terms of "duties," to be sure, but by definition these are not duties emanating from any higher power or source. So they do not seem to have the same status that the religious believer's higher duties purport to have.

On first inspection, therefore, it seems that the "higher duty" rationale does two things: it provides a justification for respecting religious conscience and it also explains why the secular conscience is for these purposes *not* similarly situated to the religious conscience and thus not entitled to the same deference. And indeed, this is the conclusion that Garvey and McConnell appear to draw from the rationale.⁴⁷

So then, has our inquiry come to an end—albeit one that will disappoint the judges and scholars who have supposed that secular conscience is equally worthy of respect and legal protection? Perhaps, but a nagging doubt remains. That is because upon closer examination, the "higher duty" rationale appears to be inapplicable to precisely those situations in which freedom of conscience might actually have any practical force.

To see why, we begin by breaking down the "higher duty" rationale into two contentions. First, conscience is a faculty or operation by which individuals discern divinely-imposed duties. Second, government should not coerce individuals to violate divine commands, thereby placing itself in opposition to the divine will. These contentions are religious in nature, obviously, and this quality will make them objectionable to some;⁴⁸ but proponents of the rationale have typically been candid about this point.⁴⁹ And on religious assumptions, the contentions seem at least plausible taken separately. But they provide assistance to the conscien-

46. *Reynolds v. United States*, 98 U.S. 145, 161 (1878).

47. See Garvey, *supra* note 27, at 53–54; McConnell, *supra* note 1, at 1497–99.

48. See, e.g., Brownstein, *supra* note 44, at 519:

It is not clear to me that [the "higher duty"] justification, however powerful it may be to religious believers, has persuasive force for nonbelievers. The problem is not only that they reject the premise of divine sovereignty. It is that they see the reliance on higher authority as a source of religious oppression, rather than a foundation for freedom.

49. See, e.g., Garvey, *supra* note 27, at 51, 54–55.

tious objector only when taken together. And in any case of conflict between a law adopted by government and a conscientious dissenter, the union of the two contentions becomes problematic.

The problem arises because even in the religious perspective that informs these contentions, conscience is not viewed as infallible: it is subject to error, or to misinterpretation. Conscience *can* be a way of discerning the divine will but, conversely, individuals acting on their interpretations of conscience can also be mistaken. And in cases of mistake, an individual would not *in fact* be subject to any divinely-ordained duty; she would merely *believe* (erroneously) that she was under such a duty. In such cases, a government that coerced individual compliance would not actually be compelling the individual to violate any actual duty, nor would it be placing itself in opposition to divine will.

But of course, in any case in which an individual's judgment conflicts with what the human law requires, the government will presumably believe that the individual *is* mistaken; otherwise, the government would not merely accommodate the objector, but would repeal the deity-offending law.⁵⁰ In such cases, the government may most plausibly respond to the objector's claim of conscience in this way: "It is true that we should not force you to violate a divine duty; nor should we place ourselves in opposition to the divine will. And it is also true that conscience *can be* a way of discerning divine duties. But conscience can also be mistaken and in this instance, unfortunately, we believe yours is."

Thus, criticizing John Garvey's rendition of the "higher duty" argument, Larry Alexander explains that the rationale will justify religious freedom only for people who embrace what the theorist or the state regards as *true* religion.⁵¹ Alexander gives the example of Christian Scientists who believe God forbids people to get medical help, and thus forbids them to get such help for a gravely sick child. The parents may be perfectly sincere. But a governor or legislator—or for that matter *anyone*—who is familiar with this view, but who would nonetheless require parents to obtain such medical assistance will *ipso facto* have concluded that these parents, however sincere, are simply *wrong*. Hence, the divine

50. It is possible, I suppose, that a government might acknowledge that its law is contrary to God's will and defiantly decide to maintain the law anyway. But this scenario, in which government openly places itself in opposition to God's will, hardly improves the prospects of the religious objector.

51. Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35 (1998). See also Brownstein, *supra* note 44, at 509 ("Belief in a higher law that preempts inconsistent government edicts only supports religious liberty for those who correctly understand what G-d requires of us.").

duty rationale will not justify protection for the Christian Scientists.⁵² More generally, Alexander points out, "[r]eligious believers do not view compliance with *imagined* duties as a good. Rather, they view compliance with *actual* duties as a good."⁵³ And cases of conflict between law and conscience will *ipso facto* be cases in which the state (as well as both the secular and religious citizens who support the state's decision) will think that objectors are asserting imagined, not actual, duties.

A proponent of the "higher duty" rationale might try to salvage it by arguing that even if the conscientious objector is mistaken in thinking she is subject to a divine duty that conflicts with human law, her belief will nonetheless mean that compulsion to follow the law will generate serious psychological suffering on her part. But this is a wholly different kind of argument for respecting conscience and one that does not convincingly justify special protection. It is not obvious that religious believers suffer greater psychic distress in doing what they believe to be wrong than secular objectors do or than people do whose deeply-felt desires or commitments are defeated by compliance with the law. Nor is it clear that government ought to excuse people from complying with generally applicable laws just because they will suffer psychic distress in complying.

A proponent of the "higher duty" rationale might also remind government of its fallibility: the government may believe that its law is consistent with divine will and hence that the objector's contrary opinion is mistaken—but then, the government might be wrong. Yet this observation is of little help, because if the government is wrong, it will be wrong (and hence in violation of divine will) whether or not it exempts particular believers from compliance. Fallible though it may be, the best that government (like the rest of us) can do is to make its best judgment in the matter, and the truism that its judgment might be mistaken supplies no reason for government not to follow that judgment.⁵⁴

In sum, unlike the "separate spheres" and "futility" arguments, the "higher duty" argument at least is about what we have typically understood "conscience" to be. But the argument provides no persuasive reason for government to defer to individual conscience in situations in which government is convinced that the individual's conscience is mistaken—and hence that the individual is not in reality subject to any higher duty.

52. Alexander, *supra* note 51, at 40–41.

53. *Id.* at 40.

54. See Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 686–90 (1987).

II. THE "PERSONHOOD" RATIONALE

So, where does this conclusion leave us? We started out in search of an argument for extending freedom of conscience beyond its historic contours in religion to encompass secular conscience as well. But our examination of the classic rationales for conscience has had the opposite effect of undermining the case for conscience altogether. This is a disappointing conclusion. And it would seem precipitous to reject so quickly a constitutional commitment with such a long and illustrious pedigree. What might we have overlooked?

A. *Two Test Cases*

We can start with two concrete situations—one quite fantastic and the other more real and familiar—that may yield some useable intuitions.

First, the fantastic case. Suppose that scientists develop a tiny chip that is the size of a grain of sand and can be quietly, painlessly and surreptitiously implanted in people's brains. So long as they remain operative and in the brain, these chips will cause their recipients to reject certain patently false and pernicious ideas that many people currently hold—aggressively racist ideas, perhaps, or beliefs in other manifestly delusional notions—and to sincerely embrace truer opinions in these matters.⁵⁵ Should we approve the implantation of the chips? And if not, why not?

No doubt there are plenty of reasons for resisting this program, including slippery slope dangers and concerns about abuse of power. But suppose these dangers could somehow be avoided: we might still have the sense that insofar as people come to hold opinions as the result of an implanted chip, then even though those beliefs would be both true and sincere, it is not really *persons* who are holding these true opinions. Or, perhaps more accurately, it is not really *as persons* that they are holding the opinions. We could after all program computers to recite back true opinions when prompted, but we would not thereby realize the human good that inheres in having persons who embrace those truths. True opinions held as the product of implanted chips raise a similar doubt.

This is a far-fetched scenario, maybe, so consider a more mundane example. Parents often confront a related sort of dilemma in raising children: they want a child to make a wise and sound decision, and they

55. The assumption is that the chips work by exerting continuing influence over their recipients' beliefs; they do not merely extinguish false beliefs and then dissolve or cease their operation.

also want the child to exercise his own judgment, and these two desiderata conflict. If the child exercises his own judgment, he will in the given instance do what (in the parents' judgment) is the wrong thing. So the parents face a conflict: should they compel their child to do the right thing, thereby disrespecting and perhaps undermining his ability to exercise and implement good judgment on his own, or should they let him make his own decision, understanding that in a particular case he will probably make the wrong choice?

There is no uniform solution to this kind of conflict: the answer may depend on the age and maturity of the child, the consequences of a particular bad choice, and other relevant considerations. But at least sometimes caring parents will decide to allow a child to exercise his own judgment, concluding that it is better to let him freely do what *he thinks* is right than to coerce him to do what *is* right. Only through such experiences, they may reason, will a child mature into a person capable of exercising sound judgment. Conversely, a child who is never permitted to make his own judgments will remain a perpetual child—not quite a full person.

The point is not merely that the excessively controlled child will grow into adulthood unprepared, and at that point will then proceed to make serious mistakes. That concern may be a weighty one. But even if the parents (or others) could continue to exercise complete authority over the child throughout his life, causing him to believe and do the right things, we may have the sense that this sort of individual would never actually become a full person, so that the goods associated with persons would not be realized.

In the religious realm, it is possible and far from uncommon to depict humans as "children of God" and to conceive of a similarly-minded deity who wants people to do what is right—to follow divine instructions, perhaps—but who also prefers that people develop and act on their best judgment about what is true and good, even though they may often be mistaken. It might be that coercion to act—even to act correctly—subverts or corrupts subjects' capacity for perceiving and acting in accordance with the truth, and thereby prevents them from maturing into the full persons the deity wants them to be. Indeed, coercion might injure individuals' capacities to genuinely believe in and honor deity in the fullest sense.⁵⁶

56. A declaration by God in Milton's *Paradise Lost* makes the point very nicely:

Freely they stood who stood, and fell who fell.
Not free, what proof could they have given sincere
Of true allegiance, constant faith or love?
Where only what they needs must do, appeared,

Roger Williams seems to have had some such notion in mind when he graphically described persecution for religious opinion not merely as futile, but as a kind of "soul rape."⁵⁷ The metaphor suggests that coercion in matters of religion not only does no good (as the "futility" rationale holds), but in fact somehow damages the soul of the person who is coerced.

For reasons similar to those in the parent-child situation, in short, it might be that in this context it is more important that people do what they sincerely *think is right* than that they do what actually *is right*. Only by developing and exercising the capacity for judgment do individuals realize the fullness of personhood. And the good of true believing can only be realized *in persons*.

B. Conscience and Personhood

The argument thus far is merely suggestive and based on intuitions. It may be worth trying to elaborate the rationale step-by-step in a more propositional form. What follows is one such elaboration, offered in summary fashion.⁵⁸

1. The Priority of *Persons* Over *Interests*

A great deal of contemporary normative thought conceives of practical decisionmaking in terms of registering and balancing human interests with the aim of maximizing the fulfillment or satisfaction of such interests. This instrumentalist perspective is common in law, and is reflected in jurisprudential positions and constitutional doctrines that depict law as a matter of interest balancing.⁵⁹ But "interests" are of course

Not what they would, what praise could they receive?
 What pleasure I from such obedience paid,
 When will and reason (reason also is choice)
 Useless and vain, of freedom both despoiled,
 Made passive both, had served necessity,
 Not me.

JOHN MILTON, *PARADISE LOST*, book III, ca line 102 (Alastair Fowler ed., 2nd ed. 1998) (I thank Andy Koppelman for the reference.) Cf. *John* 4:23: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him."

57. Hall, *supra* note 40, at 86.

58. For a much more detailed discussion of some of these propositions, see Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233. For a persuasive articulation of a similar rationale, see Brownstein, *supra* note 44, at 516–17.

59. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE

not free-floating entities or self-subsistent substances: they are *properties* – properties of *persons*. Before we can satisfy interests, we must have persons capable of possessing such interests and of experiencing the satisfaction of such interests. Thus, it makes no sense, normatively and probably even conceptually, to attempt to fulfill *interests* at the cost of sacrificing *persons*.

This may seem an obvious point, and at some level it is (though a fuller treatment would have to address important and obvious complications).⁶⁰ But the very fact that it is so often the subject of moralizing⁶¹ suggests that it is one of those obvious points that human beings are prone to neglect or forget. So the point bears reiterating: persons have priority over interests.

2. "Personhood" as an Either/Or and as a Matter of Degree

Sometimes we treat "persons" as an either/or category. Dogs or chimpanzees, we may say, are *not* persons. Babies *are*, even though they cannot do some of the things characteristic of adult persons that dogs or chimpanzees can do. Sometimes we argue about what to include in the category of "persons"—are corporations "persons"? what about fetuses?—but we may still look for and expect a "yes or no" answer.

In other contexts we talk about "personhood" as a matter of degree—as something that can be more or less fully realized in a given individual. "John isn't half the man his father was," we say, or (perhaps after some physical or intellectual moral degeneration) "John isn't the man he used to be."

Our normative judgments are often conveyed in terms that treat "personhood," or perhaps "humanity," as evaluative terms of degree. Thus, the sociologist Christian Smith observes with respect to people who are commonly described as "psychopaths" or "sociopaths"—people who "lack consciences"—that "[w]e know that something has gone very deeply wrong with their humanity, that even though they are genetically human, they have become in a sense somehow something *less than human*."⁶² Martha Nussbaum employs a similar usage—though in a very

L.J. 943 (1987); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

60. For example, it plainly is possible to satisfy some people's interests by sacrificing other persons. A great deal of normative reflection, concerned with matters ranging from war to auto accidents, addresses that sort of trade-off.

61. See, e.g., *Matthew* 16:26: "For what is a man profited, if he shall gain the whole world, and lose his own soul?"

62. CHRISTIAN SMITH, MORAL, BELIEVING ANIMALS: HUMAN PERSONHOOD AND CULTURE 14 (2003).

different context—in arguing that in political regimes that do not facilitate the development of valued human capacities, the subjects of those regimes live lives that are not “fully human,” or “really human,” or “truly human.”⁶³ Presumably Nussbaum does not mean that persons who live under such regimes are not human beings, or not persons. Her language suggests, rather, that human personhood is a quality that is less fully realized under such conditions.

When used as a term of degree, “personhood” becomes a slippery concept and the distinction between “persons” and “interests” becomes more elusive. This evaluative usage of “persons” or of the “human” is nonetheless a valuable one; it serves, for example, to express different normative dimensions of actions or choices that might be lost if we tried to convey them solely in the flat terminology of “interests.” Suppose, for example, that you are fresh out of college and are trying to decide between two careers. One (a position in a high-pressure business firm, perhaps) involves the single-minded pursuit of wealth and the material advantages that accompany it. The other (some sort of artistic or charitable career, perhaps), though much less lucrative, would offer greater scope to develop and use your aesthetic, moral, or social capacities. We might say that the first choice promises to leave you a wealthier but a lesser person, while the second course, though providing a lower level of interest satisfaction, will help you to become a more full and complete person.

To be sure, we might try to convey a similar judgment by asserting that you have “interests” of various sorts—“interests” in aesthetic satisfaction, perhaps, or self-realization, or moral development—and that the second career would promote a greater overall fulfillment of your interests. But this reductionist and flattening locution seems less natural, or less perspicuous. It obliterates the qualitative distinction that we sense and that we try to convey when we say, for example, that a particular saintly person—Mother Teresa, perhaps—neglected her own interests, or was poor in material ways, but was nonetheless a magnificent person.

When we use “personhood” as a qualitative term of distinction, the priority of the person over interests is not quite so self-evident or demonstrable, because an individual who sacrifices a degree of “personhood” in exchange for greater achievement of interests—Ebenezer Scrooge, perhaps—will still be a “person” in the minimalist, either/or sense, and thus will still be available to enjoy the fulfillment of interests. Nonetheless, it is at least a common judgment that the more complete realization of per-

63. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 72–74 (2000).

sonhood is to be desired and admired over the more complete satisfaction of mere "interests."⁶⁴

3. The Integration of Belief and Action in Personhood

The third claim is that having and acting on core beliefs is central to what makes us "persons." The individual who lacks conviction and merely pursues interests opportunistically, and even the individual who is naturally good-natured or caring but who does not act on the basis of any actual beliefs, seem in this respect less fully "persons" than is the individual who sincerely embraces a set of beliefs and lives in accordance with those beliefs.

It might seem that this is a complex claim that should be broken down into simpler ones. Perhaps the formulation would go like this: a) *believing* is central to personhood; and b) *acting on beliefs* is central to personhood. Elsewhere I have argued for the position in similar terms; indeed, I have tried to analyze the claim in much smaller units than these.⁶⁵ Such analysis has its advantages, of course, but also its risks. Specifically, the analyzed formulation that distinguishes beliefs from actions risks promoting a dichotomy—between believing and acting—that distorts the character of lived human experience, thereby possibly muting the case for conscience.

Conceptually, of course, we *can* distinguish between "believing" and "acting." And experientially we can and do make the same separation: we say, for example, that sinners and hypocrites fail to act on their beliefs. But even as we say this, we may also openly wonder about the person who claims to believe something, but acts in ways inconsistent with that belief. Does she *really* believe what she says (and perhaps at some level *thinks*) she believes? If she *really* believed, why would she act as she does? At the very least, we sense that this sort of inert or unenacted belief is not the same sort of thing as the living belief that *is* acted on: the poverty of our terms conflates phenomena that resemble each other in some respects, but that are also fundamentally different in other important respects.

And in any case, it is the sort of *living, active, embodied belief*, not the merely passive intellectual assent, that seems central to making an

64. Whether that common judgment is justified, and if so on what basis, are tough questions. An objector might argue that the intuitions I am working from here are grounded in assumptions about persons and the cosmos—teleological assumptions, perhaps—that do not fit well with a modern or secular or naturalistic worldview. I find this objection troubling but do not know how to pursue it here.

65. See Smith, *supra* note 58.

individual a person, and to making her the particular person that she is. Just as a person is neither just a “mind” nor just a “body,” nor even a mind hooked up to a body, but rather a composite unity of mind and body, so it is *believing incorporated into and informing our acting* – our *living* – that makes us the persons we are.⁶⁶

This is a contestable view, to be sure, and though I have argued for it at length elsewhere, I doubt that it is ultimately something that can be demonstrated. But the picture of personhood sketched here is consistent with the observation that we often admire someone who lives in a “principled” or conscientious way in accordance with deeply-held beliefs, even when we disagree with those beliefs. And, conversely, we do *not* admire the unprincipled or inconsistent or hypocritical person who acts contrary to his professed beliefs, even if we would approve of his actions in themselves. Thus, non-Catholics may regard core Catholic beliefs as not merely false but quite fantastic and yet still admire the reflective, conscientious Catholic. Further, Republicans can disagree with but still profoundly respect Democrats who exhibit integrity and the courage of their convictions—and *vice versa*.

Conversely, we typically do not feel much respect for the opportunistic, self-serving individual who does not seem to have any real beliefs at all. Even the talented, successful, witty or pleasant individual (pick your favorite Seinfeld character) who pursues various interests, but appears to lack any real convictions that guide and animate his life seems to us to have less stature or substance—to be somehow less of a person, we might say—compared to the person of conviction.

Or at any rate, it is intuitions like these that underlie the conception of personhood suggested here. Such intuitions resonate with (and arguably reflect) a view of human beings—or a philosophical anthropology, if you like—as having their distinctive virtue and glory in an active orientation to truth, fallible though that orientation is and misguided as the re-

66. Using George Orwell's *1984* as a text for reflection, Alan Brownstein develops what I think is a similar point. Commenting on the harm inflicted on the protagonist Winston Smith by a government that forced him to deny what he believed, Brownstein observes that “[w]hat is key is that the belief exists and that it is a core premise of Winston's life.” Brownstein, *supra* note 44, at 517. He continues:

Asking a religious person to deny the existence of G-d, or to act as if G-d does not exist; asking a nonreligious person to affirm the existence of G-d, or to act like G-d does exist, is like Big Brother insisting that two plus two equals five. All the religious person or nonreligious person can do in response to government pressure to deny his core beliefs is to affirm what he knows to be true and to cry out, as Winston did, “What else can I say?”

Id.

sults can sometimes be.⁶⁷ This view competes with other views—of humans as primarily autonomous “choosers,” or of humans as merely one among many species produced by a process of blind evolution who happen to be equipped with particular capacities and needs and interests (including an interest in survival).

Thus, arguing for a “moral, believing model of personhood,” Christian Smith argues that “[o]ur *believings* are what create the conditions and shape of our very perceptions, identity, agency, orientation, purpose—in short, our selves, our lives, and our worlds as we know them.”⁶⁸ Smith contrasts this “model of personhood” emphasizing “homo credens” with other more purely naturalistic anthropologies implicit or sometimes explicit in much contemporary thought: “behaviorism, neo-classical economics, rational choice theory, exchange theory, artificial intelligence theory, public choice theory, sociobiology, and so on.”⁶⁹

Similarly, the anthropology offered by the rationale discussed here should not be confused with a view that sees persons as centrally constituted by their autonomy. A person, in the view presented here, is not merely or primarily a *chooser*. To be sure, the capacity to choose is part of what it means to be a human being. And the objective and effect of the personhood rationale is to justify respect and protection for certain kinds of choices—namely, those that manifest or embody central beliefs. But not all choices fall into that category. Choices can conflict with beliefs and many or most choices (black socks or brown socks today? the hamburger or the burrito?) have little to do with our central beliefs. The central contention of the personhood rationale is that you and I are and become full and distinctive persons as our core beliefs become embodied in our acting—or, more accurately, in our living—and that it is that integration and not the mere fact of choosing for which the rationale urges respect.

67. See David F. Swenson, *The Dignity of Life*, in *THE MEANING OF LIFE*, 21–22 (E. D. Klemke ed., 2d ed. 2000) (“A view of life is . . . a personal expression of what a man essentially is in his own inmost self . . .”). Richard Weaver quotes Thomas Carlyle to similar effect:

But the thing a man does practically believe (and this is often enough *without* asserting it even to himself, much less to others); the thing a man does practically lay to heart, and know for certain, concerning his vital relations to this mysterious Universe, and his duty and destiny there, that is in all cases the primary thing for him, and creatively determines all the rest.

RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* 18 (1948). See also *id.* at 3 (asserting that “world view is the most important thing about a man”).

68. Smith, *supra* note 62, at 57.

69. *Id.* at 58.

4. The Case for Conscience

If this conception of personhood is attractive, it serves to provide a rationale not for general “autonomy,” or for any undifferentiated “liberty,” but rather for respecting conscience. “Conscience” after all is a term that we use to refer to the integration of believing and acting that, according to the argument just sketched, is central to human personhood. Violations of conscience detract from that personhood. So governments that want to respect the personhood of their citizens and subjects would presumably be loathe to attempt to coerce such violations, thereby undermining the personhood of those citizens or subjects.

It hardly follows, to be sure, that conscience becomes some sort of absolute value that government must never contravene. As noted, sacrificing one individual’s personhood may serve to promote other peoples’ interests: these are tradeoffs that we sometimes knowingly make (just as we sometimes knowingly trade off actual human lives for economic efficiency, as law-and-economics scholars point out). The preceding argument cannot dictate how such tradeoffs should be made.

What the argument does show, if it is successful, is that impositions on conscience involve more than the usual cost-benefit assessments. If government decides to build a road in one location rather than another, or if government imposes restrictions on pollution that help some people and burden others, there will be the usual tradeoffs of *interests*: some people will benefit while others will benefit less, or will suffer injuries to their interests. But if government forces some people to act contrary to their consciences, it inflicts a different sort of injury, detracting from the very *personhood* of those individuals (or at least forcing them to choose between suffering that injury and defying the law). That is a consequence that government will sometimes choose; but it is a different sort of consequence than those entailed in the more usual sorts of cost-benefit calculations.

The personhood rationale can be seen as drawing upon but refining the three classic rationales discussed above. Though it does not rely upon any claim about “separate spheres,” by emphasizing the difference between *interests* and *persons* the personhood rationale does describe distinct levels or dimensions of value, and it suggests that government ought to be especially reluctant to impose injuries on the level of personhood. Unlike the “futility” argument, the personhood rationale does not assert that government *cannot* use coercion to influence or change belief, nor does it limit its concern to the realm of belief. But the rationale suggests that when government coerces people to act contrary to their core beliefs, it inflicts a particularly grave and in a sense self-defeating kind

of injury (even if the coercion is successful in the sense that the subjects of such coercion eventually come to embrace the beliefs favored by the government).⁷⁰ That is because insofar as personhood is undermined, the good of personal or human believing is subverted. And the rationale suggests that if people are forced to violate what they believe to be "higher duties," they will suffer not merely psychic distress (which would be an injury to their *interests* in mental tranquility or happiness), but rather an injury to their very *personhood*. In these ways, the personhood rationale arguably remedies the deficiencies in the classic arguments for freedom of conscience.

C. *The Secular Conscience*

Suppose the foregoing argument is persuasive in justifying at least some level of special respect for or deference to conscience. Would that respect or deference extend only to religious conscience?

Under the higher duty rationale, as we have seen, it seems possible to justify deference to religious but not secular conscience: that is because the secular claimant does not make the same kind of assertion involving a claim of obligation to a higher power that the religious claimant typically makes. In the personhood rationale, by contrast, the focus is not on actual higher duties, but rather on the personhood of the individual herself. What is important in the case of the religious believer, in this view, is that he *sincerely believes* that God commands him to do or not to do something; that is why the state can respect and presumptively defer to his beliefs even when it regards those beliefs as mistaken (as it will, as noted above, in the cases of conflict in which freedom of conscience makes a practical difference). But the same can be said of the person who, though not a religious believer, has a sincere conviction that some conduct commanded by the state is morally wrong, or that some conduct prohibited by the state is morally required.

So the personhood rationale converges with the classical claim in asserting that we should be reluctant to undermine the personhood of someone whose distinctive identity is bound up with beliefs about her relationship to God. But the same conclusion would seem to follow if the individual's distinctive identity is bound up with core beliefs and commitments that are *not* religious in nature. The point, in sum, is to avoid undermining personhood by injuring the belief-action integration that

70. Cf. VITTORIO HOSLE, *MORALS AND POLITICS* 637–38 (Stephen Rendall trans., 2004) ("Even if it were possible to inject a moral idea into another person—by hypnosis, for example—one would destroy what constitutes the presupposition of morality: that the decision to be moral arises from the sources of an individual's own personality.").

helps to constitute the person. And that objective does not appear to depend on the nature of the beliefs that inform a particular person's identity.

As noted, the presumption of respect for conscience will not be unqualified. Earlier we noted that although parents will sometimes defer to a child's judgment, even though they are sure it is wrong, this is not *always* the proper resolution of such conflicts. The proper response, rather, will depend on a variety of factors, including the child's maturity and the potential harm attending a wrong choice. In the same way, though we can respect a person who acts in accordance with his central convictions even when we disagree with those convictions, our respect and our eagerness to accommodate will vary depending on how plausible or silly and how benign or harmful those convictions are. The personhood rationale does not suggest either that all instances of conscience are equally admirable or that conscience must always be accommodated. Rather, the rationale suggests only that there is a plausible *prima facie* reason to respect conscience, and that this reason is not limited in its application to religiously-formed conscience.

III. IS THE PERSONHOOD RATIONALE IMPLICITLY RELIGIOUS AFTER ALL?

But perhaps this conclusion is too hasty; perhaps the personhood rationale is based on hidden (or not so hidden) religious assumptions after all. The rationale rests on a conception of personhood that is contestable and, more specifically, that diverges in some respects from other conceptions that prevail in some sectors of the modern world and university. It might be that the conception of personhood suggested here presupposes a religious view of the world.

As noted, the conception of personhood discussed above sees the distinctive value and character of *persons* as resting in an orientation toward *truth*. This conception will naturally seem more attractive on some views of the world than on others. On a view of the world as containing the kind of truth—or Truth⁷¹—that commands our attention and allegiance, it may seem plausible and attractive to see the distinctive human quality as an orientation to truth. Religious understandings often hold something like that view. So it should not be surprising that some of the most emphatic and eloquent affirmations of the importance of truth are

71. Richard Rorty explains that "[u]ncapitalized, 'truth' and 'goodness' name properties of sentences, or of actions and situations. Capitalized, they are the proper names of objects—goals or standards which can be loved with all one's heart and soul and mind" RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xiv (1982).

embedded in overtly religious texts.⁷² Nor should it be surprising that one of the most eloquent and thoughtful expositions of conscience in recent times occurs in a papal encyclical aptly entitled "The Splendor of Truth."⁷³

Suppose, conversely, that we adopt a naturalistic view of the world as without any inherent purpose or meaning or moral order. The world, to quote John Searle, "consists entirely of entities that we find it convenient, though not entirely accurate, to describe as particles," some of which have become organized into systems that have "evolve[d] through natural selection" into "certain higher-level nervous systems, such as human brains"⁷⁴ In this view, it is not so clear that "truth" deserves the reverent treatment suggested in the preceding discussion, or that an "orientation to truth" should be placed at the center of our conceptions of personhood. Truth rather becomes something we construct to serve our ends, including survival,⁷⁵ and believing mostly serves the instrumental function of, as Richard Rorty puts it, "help[ing] us get what we want."⁷⁶ But there is nothing especially distinctive or dignifying about that function. And indeed, the person who struggles to maintain and live according to core beliefs, even at the expense of her interests (and even, in extreme cases of martyrdom, at the cost of her life), will seem worthy not so much of respect as of pity, or perhaps derision. She will seem to us to be deeply deluded, like the person who lives his life by studying the horoscope each morning. We may need to accommodate those who suffer under such delusions, but it is not apparent why we would want to create a special legal category offering them special protection under the law.

The objection, in short, suggests that the conception of personhood offered here at least implicitly resonates with a religious view of the world. This objection raises complicated questions which I have neither

72. See, e.g., *John* 8:32 ("And ye shall know the truth, and the truth shall make you free."). See also THOMAS AQUINAS, *SUMMA CONTRA GENTILES* I, ch. I, at 60 (Anton C. Pegis trans., 1955) (declaring that "[t]he ultimate end of the universe must . . . be the good of an intellect. This good is truth. Truth must consequently be the ultimate end of the whole universe, and the consideration of the wise man aims principally at truth.").

73. VERITATIS SPLENDOR ("The Splendor of Truth"), Introduction. The encyclical begins with the assertion that "[t]he splendour of truth shines forth in the works of the Creator and, in a special way, in man, created in the image and likeness of God . . . Truth enlightens man's intelligence and shapes his freedom, leading him to know and love the Lord."

74. JOHN SEARLE, *THE SOCIAL CONSTRUCTION OF REALITY* 6 (1995).

75. Cf. EDWARD O. WILSON, *ON HUMAN NATURE* 3 (1978) ("Traditional religious beliefs have been eroded, not so much by humiliating disproofs of their mythologies as by the growing awareness that beliefs are really enabling mechanisms for survival.").

76. RORTY, *CONSEQUENCES OF PRAGMATISM* xliii (1982).

the space nor the competence to address. But for present purposes, two responsive observations may be sufficient.

First, it seems to me correct that the conception of personhood I have sketched should be attractive mainly or perhaps only on the assumption that there is some sort of valuable truth in the cosmos—some sort of moral order, perhaps, that people can form (correct or incorrect) beliefs *about*. It may also be that *ultimately*—the qualifier is crucial—the most familiar versions of this sort of worldview as a historical matter, and the most plausible versions of this view as a theoretical matter, will have a religious character. But the crucial point is that this is a deeply contested issue. Surely there have been proponents of the preeminent value of truth—Socrates, Aristotle, J. S. Mill come quickly to mind—whose commitments to truth have been genuine, even passionate, but not formulated in conventionally religious terms. And there are numerous people (including thinkers of the highest order) who contend that religious assumptions are not necessary or even helpful in accounting for what is sometimes called “moral reality.”⁷⁷ Whether or not those who hold this position are ultimately correct, there is no reason to doubt that they are thoughtful and sincere: and at least for present purposes, this is the dispositive fact. As long as it is possible to believe in the preeminent value of truth, or in a moral order, without subscribing to a religious account of that order, it seems that one can accept the account of personhood sketched above—and hence the personhood rationale for respecting conscience—without embracing religious beliefs.

Second, even if the conception of personhood sketched here seems most plausible and attractive within a generally religious worldview, the most that would follow is that the rationale for conscience is a religious rationale. But that observation would not alter the normative conclusion—namely, that respect for conscience should not be limited to religiously shaped or informed consciences. In short, even if the *rationale* for freedom of conscience is religious, it does not follow that the *scope of protection* afforded by that rationale is limited to religion. The secular conscience might be the beneficiary of respect that would be hard to justify on secular premises. There is nothing internally contradictory (or, for that matter, unusual) in such a situation: it is arguable that most of our central constitutional commitments (including our commitments to equality, human rights, and rule of law) are in a similar condition.⁷⁸

77. See, e.g., Michael S. Moore, *Good without God*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 221 (Robert P. George ed. 1996).

78. See generally Steven D. Smith, *Recovering (from) Enlightenment?*, 41 U. SAN. L. REV. 1263 (2004).

IV. CONCLUSION

The preceding discussion suggests that the rationales for giving special respect and legal protection to freedom of conscience are not as solid as we might wish. But an at least plausible rationale can be given. And that rationale, grounded in a contestable but nonetheless intuitively attractive account of what it is to be a full person, is neither inherently religious nor limited in its application to religiously-formed conscience.