

# Against Freedom of Conscience

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	000
II.	THE RIGHT AGAINST CONSCIENCE .....	000
III.	FAIR DISTRIBUTION OF THE BURDENS OF COMPLIANCE WITH LEGAL REQUIREMENTS .....	000
IV.	ACCOMMODATION BY EXEMPTION AND ACCOMMODATION BY ACCEPTANCE OF POSITIVE DUTY TO AID .....	000
V.	THE SUPPOSED WRONG OF INDUCING PEOPLE TO ACT AGAINST THEIR CONSCIENTIOUS JUDGMENT .....	000
VI.	FUTILITY? .....	000
VII.	PRACTICALITY .....	000

## I. INTRODUCTION

Is there a moral right to freedom of conscience? Should a legal right to freedom of conscience be established in each country on Earth? This essay argues for negative answers to both questions.<sup>1</sup>

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1. It should not be assumed these questions are nested—that the legal right should be established if there is such a moral right, or only if there is such a moral right, or if and only if there is such a moral right. In my view, the questions are separate and independent because we should favor establishing some legal rights that do not correspond to any matching moral rights, and we should recognize some moral rights yet refrain from establishing them as legal rights. Although pondering what moral rights there are is an inquiry distinct from pondering what legal rights there should be, in the present case these inquiries arrive at similar conclusions: in my view, there is no moral right to freedom of conscience, and we should not establish any such legal right.

The term *freedom of conscience* might refer to freedom of thought and the freedom of expression that sustains freedom of thought. In this sense we might affirm the right of each person to form individual opinions about the right and the good, about what we owe one another by way of due consideration of others, and about what is worthy of pursuit in life, on the basis of free discussion of these matters. In the present discussion, these freedoms, important as they might be, are not under consideration. Let us assume freedom of thought and expression are secured. The status of freedom of conscience in the sense that is our concern in this discussion is still wide open.

The right to freedom of conscience at issue here is what Michael Perry has called the “right to moral freedom.”<sup>2</sup> He characterizes this as the right “to live one’s life in harmony with one’s moral convictions and commitments,” and he interprets “moral” convictions and commitments broadly as ones that

are the yield of one’s conscientious effort to discern what sort of person one should be—and what sort of life, therefore, one should live—especially in relation to other persons; in particular, *moral* convictions and commitments are the yield of one’s conscientious effort to discern what choices are, for oneself if not for everyone, and all things considered, right rather than wrong, just rather than unjust, good rather than bad, or the like.<sup>3</sup>

More needs to be said to pinpoint what is at issue here. Taken one way, one can always live one’s life fully in harmony with one’s moral convictions and commitments—no matter what circumstances one faces and no matter what one’s convictions are.<sup>4</sup> Of the acts available for choice at a time, one can always choose the one that best fulfills one’s moral convictions, the act that, in the circumstances, is what conscience tells one that one ought to do.<sup>5</sup> Given the choice of renouncing one’s

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2. Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. [REDACTED] (2010).

3. *Id.*

4. This claim is literally correct only for moral judgments about what one ought to do that accept an “ought implies can” constraint. If conscience tells a person she must complete a pilgrimage to Mecca in her lifetime, come what may, then she can fulfill the demand of conscience only if she has the resources and opportunity to do the required act.

5. The claim here is that one can always act in conformity with one’s conscience, so one always has the opportunity to do that. Someone might deny this claim on the ground that one might be unable to do what one has the opportunity to do. My response is that if it is thought that one has the opportunity to do what is morally right but one is unable to act in this way, then the “ought implies can” principle is always triggered, and the supposedly morally required act that one is unable to do must be regarded as outside the set of acts eligible for choice and hence, not all things considered, the act that is really morally required.

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

faith or being burned at the stake, if one's conscience says one ought not renounce one's faith, one can refrain from renouncing. One's subsequent life will be short, but it will be a life lived in full harmony with one's moral convictions. Call this a "life of integrity." If one always necessarily has the opportunity to lead such a life, it makes no sense to hold that one has a right to live such a life, a right with corresponding duties on the part of other people to safeguard the opportunity. The right to moral freedom has to be a right to something more than the opportunity for a life of integrity.

In broad outline the "something more" is easy to discern. If one's conscience says one ought to farm the land and if one has a right to moral freedom, then one has a right to freedom to farm the land. There may be many conditions that must be fulfilled for it to be the case that one has this freedom, but as advocates interpret it, the right to moral freedom specifically protects one against certain forms of interference.<sup>6</sup> The right is construed as negative, not positive. I do not lack freedom to farm the land just because I lack farming ability or the resources to purchase a farm or the resources to move to an agricultural region where farming jobs are available, but I do lack the freedom if, for example, vigilantes threaten credibly that if I farm the land, then they will attack my family, or no one will hire me for farm work or sell me farmland because of my religion or ethnicity or race, or the state prohibits me, along with everyone else, from working the available land suitable for farming in order to preserve the environment for future generations, and so on. In this essay I shall focus on the right to moral freedom regarded in its aspect of protection from state action that restricts one's freedom to live according to one's moral convictions.

A law or official action by a state official that restricts one's liberty to live in harmony with one's conscience would be a burden on the free exercise of conscience. Such a burden would not count as a violation of the right to freedom of conscience if the law or public policy or official action in question is "necessary to serve a legitimate government interest."<sup>7</sup> So interpreted, the right to freedom of conscience is not absolute and exceptionless. It is one right to be balanced against others.

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6. In Part IV of this essay, I suggest that this is not the best construction of the right in question. *See infra* text accompanying notes 19–20.

7. Perry, *supra* note 2, at [REDACTED].

We are to put a heavy thumb on the scale, not an infinitely large weight, in favor of freedom of conscience.

The idea of a right to freedom of conscience so interpreted might sound admirable and high-minded, but to my mind, it merits firm rejection. The right to freedom of conscience is unacceptable both at the level of abstract moral principle and at the level of practical policy—the level of moral thinking at which we try to discern what laws, social norms, public morality, and constitutional guidelines there should be.

## II. THE RIGHT AGAINST CONSCIENCE

The simplest way to see the flaws in the idea of a right to freedom of conscience is to notice that in a well-functioning, tolerably just democratic society, there is a moral right on the part of those who cooperate together to establish and sustain the rule of law by generally obeying the laws, even those offensive to conscience, that those who benefit from their submission should do the same. In short, there is a moral right *against* freedom of conscience.

The basis of this right against conscience is that people tend to have substantially different and opposed convictions about the right and the good. These disagreements are perhaps especially pronounced, or at least especially well-articulated, in a diverse, modern society with wide freedom of speech and action. Despite these disagreements, there are great benefits to coordinating behavior by general compliance with a set of laws that is enforced uniformly on all members of society by the state. Given an ongoing society with a particular array of sets of moral beliefs held by the various members, there are many legal codes that might be enforced such that the results of general conformity to the code would be superior from each person's moral standpoint than no enforcement of any code. Some of these possible codes would still be morally unsavory. We could instead imagine a set of legal codes, enforcement of any of which would be better than no agreement from every reasonable person's moral standpoint. *Reasonable* here means "reasonable enough"; it is a vague standard that prevents a legal code from being admissible because it is opposed by some person's uncontroversially unacceptable moral beliefs.<sup>8</sup>

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8. See JOHN RAWLS, *POLITICAL LIBERALISM* 48–50 (1993) (discussing the notion of reasonable disagreement on the content of public morality among citizens in modern democracies).

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

Now suppose one of these admissible codes is in place.<sup>9</sup> Some portion of the code, let us say, is offensive to the conscience of each person in the society who lives under the jurisdiction of the code. Understanding the situation just described, including especially the point that everyone finds general compliance with this code better from her own standpoint rather than general noncompliance, the other members of society comply with the laws in order to gain the benefits of a good rule of law for all. Given the facts as described, one has a moral duty, in fairness to the cooperating others, to comply with laws, even a law that is obnoxious to one's own conscience, up to a point. This is an implication of the Hart-Rawls principle of fairness in the setting of moral disagreement combined with benefits for all that arise from everybody's subordinating her private judgment to the general will provided others are doing the same.<sup>10</sup>

The principle of fair play arising from the Hart-Rawls principle of fairness generates duties simply in virtue of the cooperating behavior of others, directed toward producing benefits for all including oneself, and thus triggering a reciprocal duty to do likewise. The process by which the laws arise does not per se matter so far as the principle of fair play is concerned. The duty is amplified if the set of laws around which cooperation pivots is selected by a reasonably fair democratic process.

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9. At this point I am assuming that cooperation to sustain any admissible legal code can trigger a duty owed by beneficiaries of the cooperation to the cooperators to cooperate in turn. Eventually I challenge this assumption. Some legal codes are substantially unfair in their distribution of the benefits and burdens that flow from establishing and sustaining compliance with the code in a society. Cooperation to secure compliance with an unfair code does not trigger a duty of reciprocity on the part of the beneficiaries of this cooperation. Correcting this assumption does not unsettle the argument I am making in this section.

10. The Hart-Rawls principle of fairness holds that:

[W]hen a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission.

ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 90 (1974). There is a large literature on this topic. See, e.g., A. JOHN SIMMONS, *Fair Play and Political Obligation: Twenty Years Later*, in *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 27, 27–42 (2001); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 101–42 (1979). For a defense of the principle of fairness, see generally Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 *ETHICS* 616 (1982); Richard J. Arneson, *Doubting and Defending the Principle of Fairness* (Sept. 29, 2010) (unpublished essay) (on file with author).

Other citizens have sacrificed in becoming well-informed voters who have voted conscientiously for the general good as they see it. That is, let us suppose a fair process in which one has an equal, democratic say. The fact that fellow citizens have cooperated together to produce the laws as well as to sustain them by their obedience once they are enacted generates a fair-play obligation to participate in the democratic process and a further obligation to comply with laws that have this morally desirable pedigree, even when the laws are obnoxious to one's conscience.

This further obligation to subordinate one's private, conscientious judgment and comply with laws, even those that one conscientiously opposes, has an epistemic component. After all, what the majority of one's fellow citizens supports might be right even though one's present opinion is that the majority's will has embraced what is wrong. But even setting this possibility to the side, in a society in which democratic citizens generally subordinate their private judgment, up to a point, and defer in their conduct to legal requirements established by a fair majority rule process, one has a moral duty as a democratic citizen to do the same.<sup>11</sup>

The fact that the individual citizen has a moral duty to comply with the duly enacted laws even against her conscience is compatible with the possibility that one's fellow citizens also have a duty to induce the government not to require compliance against conscience but to subordinate legal requirements to individual conscience. The situation could be comparable to one in which, as host, you are obligated to offer the last piece of cake to the guest, but as the discerning guest I am morally obligated to notice your ravenous hunger and decline the offer. However, I shall argue that this is not actually the case. The next section of this essay addresses the issue.

There is an ambiguity here in the notion of being conscientiously opposed to a legal requirement. One might be conscientiously opposed to a legal requirement—believes that it is wrong and that it ought not to be imposed on anyone—but also believe that, all things considered, given it is a legal requirement, one morally ought to comply with it. In this case, in a sense, one's conscience opposes compliance and in another sense supports compliance. Another possibility is that one is conscientiously opposed to a legal requirement—believes that it is wrong and ought not to be imposed on anyone—and also believes that, all things considered, even though it is a legal requirement, one in

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11. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 117–58 (2008) (discussing the moral authority of democratic decisionmaking).

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

conscience ought not to obey. The right to freedom of conscience might be construed in a broad way, covering both possibilities, or in a narrow way, covering just the second.

The right against freedom of conscience and the duty to subordinate one's private judgment to established legal requirements in a tolerably just political order hold only up to a point. If state officials order one to kill an innocent, nonthreatening person for no good reason, in accordance with existing laws, one surely ought not to do so, even if this is a tolerably just political order and the odd command an aberration. The same goes for many other legal requirements that might confront the individual with a stark choice between obeying the law and following one's conscience. In this case, because the majority of citizens has no right to authorize this command, it obviously has no moral right that you obey the command and no right to compel you to obey it. In other cases, in which individual conscience has gone awry, the fact that the individual, from an epistemic, standpoint will reasonably think she has no duty to comply with a legal requirement is fully compatible with state officials' acting rightly in forcing compliance. If there are good and sufficient reasons to establish a legal requirement, there is a strong presumption in favor of enforcing the legal requirement evenhandedly against all citizens, including those with some disposition against compliance.

This presumption can be overridden. Laws are blunt instruments of social control, and in the nature of the case, even an ideal law that is properly designed can end up constraining individuals sometimes when the morally right choice for the individual is to violate the law's requirements.<sup>12</sup> Trying to write a theoretically perfect law that in every application issued directives to those subject to its authority that exactly matched what all things considered they morally ought to do would be a misguided venture. The effort would result in a law that was either too complicated to function as a good law at all or too vague in its provisions to guide conduct effectively even in the standard situations that warrant having any legal requirement in this domain. The conflict between the requirements even of ideal law as they fall on individuals in some circumstances and the requirements of morality as they determine what the individual really ought to do in those circumstances is just a

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12. On this theme, see generally LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001).

fact of life, not to be deplored or teased into paradox. However, given the conflict, an ideal administration of law should perhaps have some flexibility built into it. It might be the case that state officials should have discretion to decline to enforce the clear requirements of law as they apply to some individuals in extreme circumstances—in which violating the law is objectively the right thing to do. Sometimes police ought to look the other way and decline to arrest, and if an arrest is made, sometimes public prosecutors ought to decline to prosecute, and if a prosecution goes forward, sometimes judges should twist and manipulate the law to avoid a conviction, and if a trial goes forward to the jury with the evidence clearly favoring a guilty verdict, sometimes juries should decline to convict. However, the question whether state officials should sometimes relax the enforcement of a law in circumstances in which disobedience to law would be objectively morally right is obviously different from the question whether an individual's belief that "noncompliance with a law is what morality demands" is by itself sufficient to generate an argument that the individual should be exempted from the legal requirement to comply.

### III. FAIR DISTRIBUTION OF THE BURDENS OF COMPLIANCE WITH LEGAL REQUIREMENTS

The claim that there is a right against conscience as described here is consistent with the idea that there is a right to freedom of conscience as advocated by Perry. The argument for the right against conscience is an application of the Hart-Rawls principle of fairness. Cooperators who acquire rights against others who benefit from their cooperation according to this principle do so only provided that the cooperative scheme in play is fair in its distribution of the benefits and burdens of cooperation. For all that has been said, perhaps a necessary condition for meeting this fairness test here is that the legal order respects a prior right of conscience. Recall that the Perry right of conscience requires that one be left free to act on one's conscientious judgment concerning what one morally ought to do or what would be morally desirable to do unless state restriction is "necessary to secure a legitimate government interest."<sup>13</sup>

Although the claim that a right of conscience must be fulfilled before the right against conscience can arise is logically possible, it is highly implausible. In brief, the argument supporting this claim of implausibility

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13. Perry, *supra* note 2, at     .



[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

is that what triggers a sound moral claim that the law is unfairly burdensome and that one should be relieved from its requirements is that the disadvantage one suffers from the imposition of the law is disproportionate to the advantage to society that the imposition of the law achieves. There are many types of advantages and disadvantages that may figure in the determination of disproportionality. That compliance with law would prevent one from complying with one's conscientious judgment about what one ought to do is not necessarily a disadvantage at all, and certainly not a disadvantage that trumps all others. Affirming a right to freedom of conscience in effect gives a special privilege to one particular type of claim among others that might be made to buttress a claim that a particular law is unfairly burdensome in its application to oneself and the law should either be revised to remove this burden, or that by administrative decree one should be exempted from the requirement to comply with the law on the books. Accordingly this special privilege to claims of conscience would be unfair—a form of wrongful discrimination.

In many situations, when the state enacts a law that regulates or restricts a type of activity, compliance is more onerous for some people than others. A law that prohibits driving motorboats after dark is more burdensome on people who want to engage in that activity than on people who have no such desire. Still, it might serve the public interest to have such a law. We can further pick out a class of people who are unfortunately burdened by the law. Suppose the law aims at preventing boating accidents. Some people are especially safe drivers of motorboats after dark, so restricting them does not do much to advance the law's purpose, and some people have especially strong interests in driving motorboats after dark, and some people fit both descriptions to a degree. For some of these especially burdened people, if it were administratively feasible to craft the law so as not to target them or if it were administratively feasible to exempt them from the requirement of compliance, it would be morally desirable, all things considered, to do so. Call these people the "unfortunately burdened." Here it is intended that the idea of "administrative unfeasibility" is stretched to include the situation in which several groups of people have a case for accommodation such that it would be morally desirable to accommodate some of these people but morally undesirable to accommodate all—the fulfillment of the state's legitimate purposes would drop excessively if all were accommodated—and in addition, there is no morally

nonarbitrary basis for discriminating among the unfortunately burdened to accommodate some but not others. Moreover, if it is administratively feasible to limit the law's reach in some way so that these people or some subset of them are left free to drive motorboats after dark and this limitation is morally desirable, then the people who should be left free in this way are *unduly burdened* by the law.

Other things being equal, it is morally desirable to accommodate those who are unfortunately burdened by legal requirements by eliminating the burden. This might be done by substituting an alternate law that does not restrict the liberty of some unfortunately burdened people or equivalently by leaving the law as it stands but exempting some class of unfortunately burdened people from the legal requirement to comply. Accommodations of this sort might conceivably be costless for those who still must comply with the law—given that the law is going to apply to me and restrict my liberty, no further costs are imposed on me by exempting some others from the requirement to comply—but often accommodations will impose costs on other citizens. In the example of nighttime motorboating, allowing some to drive motorboats at night will presumably impose some safety cost on those who want to row boats or swim in the water after dark. If the accommodation is justified, the distribution of benefits and burdens that it brings is fair to all who might be affected.

The fundamental argument against the claim that there is a right to moral freedom—to live in harmony with one's conscientious judgments about how one ought to live—that ought to be legally enforced is that it wrongfully privileges one particular group of people who might claim to be unfortunately burdened by legal requirements. Affirming a right to moral freedom elevates the claim to accommodation of the conscientious above the claims of others who might have more compelling claims to accommodation. Of course, affirming a right to moral freedom is compatible with also affirming special rights for other special categories of accommodation claims, such as those with disabilities. However, assigning special privilege to the conscientious at least gives them greater entitlement to accommodation than those with bread and butter burdens—those who simply find their important interests are especially set back if they are not freed from the duty to comply with the law as currently drafted. That is unfair because there is no reason to suppose that the conscientiously burdened generally have greater claims to be accommodated. Entrenching a right to moral freedom or freedom of conscience is also unfair to the diffuse interests of citizens who will be asked to shoulder extra burdens if accommodation to some is granted.

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

The interests of all affected, those who will suffer if not accommodated and those who will suffer if accommodation is granted, should be weighed evenhandedly and given equal consideration in the determination of the morally appropriate response to an accommodation claim. The bare fact that “the law offends my conscience” does not generate a special reason to put a thumb on the scale in favor of freeing me from the duty of obedience.

Reverting to the example of the nighttime motorboating prohibition, suppose there are people who believe that driving motorboats at night is morally required. Their conscience tells them this is something they must do. It is always possible that people who are gripped by such judgments perceive moral reasons that in fact show that either all people or some people in special circumstances morally ought to drive motorboats at night. If that is so, then of course there are good reasons to change the law. The good reasons have nothing to do with the fact that people subjectively believe that they morally ought to drive motorboats at night. The good reasons would be whatever reasons there really are that show nighttime motorboating to be morally special. These are reasons anyone and everyone should recognize.

To get back to the question at issue, we should recognize that the mere fact that I am of the opinion that I morally ought to drive motorboats at night does not have any force in showing that I am unfortunately burdened, much less that I am unfortunately burdened to a greater degree than others who lack such an opinion. My subjective opinion by itself just cuts no ice here. Suppose there are especially skilled drivers of motorboats who make a living by nighttime fishing and who need to be able to move quickly across the bodies of water on which they fish. They have no moral beliefs that say they morally ought to be driving motorboats at night. This is just a necessary means to carrying out their livelihood. I submit that in the example as described, it should be obvious that if anyone is to be accommodated, then it is the nonconscientious people who engage in nighttime fishing who should be accommodated, not the conscientious objectors who have a moral vision that tells them they morally ought to drive motorboats at night.

If you like, you can say that everyone who has a case for being considered unfortunately burdened by a legal requirement has a right that her complaint should be considered on its merits along with others in any procedure that is used to determine who, if anyone, is really unfortunately burdened, and if so, whether there should be some legal

accommodation for some of the unfortunately burdened, and if so, which complaints should be accommodated. It would be a form of wrongful discrimination to dismiss someone's complaint from consideration on spurious grounds, such as that she is of a disfavored race or religion or gender. I say it would be a form of wrongful discrimination to disfavor people's complaints on the ground that they are not based on a claim of conscientious judgment about how one ought to live. The claimed right to moral freedom in effect stipulates that, in situations of this sort, all those who are burdened by a legal requirement because it makes it more difficult for them to do what they judge they morally ought to do have a special claim to accommodation. Acceptance of that claim tilts the playing field unfairly. At worst, a consideration that in itself has no moral weight at all is being treated as though it had decisive moral weight. At the very least, a consideration that is just one type of reason among others, one among many minnows swimming together, is being treated as though it were specially morally privileged.

Discussing the normative basis for giving special legal protection to individuals when the free exercise of their religious way of life is burdened by state action, Christopher L. Eisgruber and Lawrence G. Sager arrive at a position that somewhat resembles the view I am taking about the normative basis for giving special legal protection to individuals when state action impedes their acting in conformity with their conscientious beliefs. They deny that special priority should be given to accommodating religious interests on the basis that religious interests have exceptional value. They propose the alternative that our concern in this domain should be to protect individuals from unfair discrimination. In this spirit they affirm the "principle of equal regard," which requires that "*government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.*"<sup>14</sup> They are interpreting the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution, but their idea generalizes. Just as adherents of minority religions may suffer discrimination and mistreatment, those whose conscientious beliefs are in a minority may be prone to similar discrimination and mistreatment. So, consider a version of their principle of equal regard that applies to deeply held conscientious judgments held by adherents of minority moral beliefs.

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14. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1283 (1994).

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

Their principle of equal regard gives no special priority or privilege to claims for accommodation based on burdening of conscience, so in this sense, it is fully consistent with my suggestion that all who claim that they are unfortunately burdened by legal requirements have a right to consideration of their case for accommodation on its merits.

There is a difference between the Eisgruber-Sager principle of equal regard and my proposed right to equal consideration. Their principle specifies that, in ranking claims for accommodation, the relevant metric is depth of concern. Depth of concern might be interpreted as subjective intensity of concern. Or perhaps a deep concern is one that is both intensely felt and carefully considered by the person who has the concern. Either way, this way of ranking claims for accommodation is unsatisfactory. Imagine that after careful consideration I form an extremely intense feeling or conviction that I ought to spend my life counting the blades of courthouse lawns. I claim that I am burdened by “stay off the grass” rules at courthouses. Compare my claim for accommodation to that of a person who has no conscientious convictions or deeply felt concerns of relevance, but happens to be allergic to concrete, so will suffer great physical pain or comparable affliction if he is not allowed to walk on the grass instead of being required to stay on the cement pathways when conducting business in the vicinity of courthouses. To my mind the grass counter’s claim is outranked by that of the person prone to allergy—there is no contest.

The strength of a claim to be accommodated depends rather on a calculation of advantages and disadvantages. What burdens will fall on other people if one is allowed not to comply with the law whose impingement on oneself is challenging? What is the aggregate disadvantage of this burden, and how would it be distributed across persons? To what extent would these burdens be lessened if people engaged in reasonable coping behavior that they ought to undertake? What burdens will fall on one if one is required to comply with the law in question? To what extent would these burdens be lessened if one engaged in reasonable coping behavior that one ought to undertake? A morally sensitive cost-benefit calculation is needed, but I do not here try to stipulate the just distribution principles that should frame this analysis.

One principle that may play a role in shaping what counts as a just distribution is that we ought to give extra weight to a claim for accommodation to the degree that, if the claimants will suffer

disadvantage if not exempted from the requirements of the law under challenge, being in position to suffer disadvantage in this way is an affliction that was beyond their power to control rather than the result of choices and behaviors for which they are reasonably held responsible. For example, if the law against jaywalking bears harshly on a person because he suffers a disability that impedes his mobility and makes it difficult for him to cross the street during the permitted time in which the “Walk” sign is flashing, this is a ground for accommodation—say by adding extra seconds to the “Walk” interval or by permitting him to assert a right of way against oncoming traffic by brandishing a cane or using a wheelchair in the circumstances just described.

In response, one might claim that we should assimilate claims of religious duty and claims of conscience to physical handicaps on the ground that the person who believes to be under a religious or moral duty will experience having no choice in the matter. He cannot choose at will to cease believing a judgment about what he ought to do that is forced on him by his conscientious perception and reasoning. Belief is not something we voluntarily bring about; it is something that happens to us. So one might urge.

But this assimilation of practical judgments about what one ought to do to unchosen handicaps is incorrect. Although I cannot choose at will to believe against the dictates of conscience, the process by which my conscientious beliefs form is one to which norms apply, which I may fulfill or flout to varying degree. I may carelessly neglect to consider evidence about facts that are material to my conscientious verdicts or neglect to consider relevant counterarguments or to listen to what those opposed to views to which I am inclined have to say on behalf of their views. Belief is supposed to be responsive to evidence and argument, and I normally bear responsibility for bringing it about that I am responsive in the appropriate ways to the best of my ability.

There is a further wrinkle here of some importance. Suppose I am unfortunately burdened by some law, for some reason, along with other groups of persons, who are unfortunately burdened by this law for different types of reasons. Suppose further that the legal regime is altered, so that some of those unfortunately burdened by the law are exempted from the duty of compliance with it, but I am not. Am I being unfairly treated? Let us stipulate that in a fair moral cost-benefit analysis, the burden I suffer under the law and the costs to other people if the law is changed to lift this burden are morally comparable to the burdens and costs associated with the people for whom accommodation

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

is made.<sup>15</sup> Am I then being treated unfairly by the shift in legal regime that accommodates some of the unfortunately burdened but not me?

This question should be understood to be answerable only by holistic inquiry that does not consider just the law under review but the entire system of legal requirements and exemptions. For it may well be the case that what might look like unfair treatment if one focuses on the benefits and burdens brought about by one law in isolation might appear benign if one broadens one's view and considers the legal code as a whole. Maybe you are being given special treatment in one set of legal provisions, but this just offsets the special treatment that I was given by some previous set of legal provisions addressing some quite different matters. Whether some of those unfortunately burdened by a particular law that is altered to accommodate some of the burdened are unfairly treated if they are excluded from the class of those accommodated in the revised regime depends on the particulars of the case and also the entire background of legal requirements with its aggregate distribution of benefits and burdens.

Of course, the \$64,000 question—adjusting for inflation, perhaps we should say, “the \$64,000,000,000 question”—is what standard is the right one to employ in deciding questions about whether or not the overall burden of legal requirements bearing on citizens is fair or unfair.<sup>16</sup> This essay is not the proper occasion for discussing this question, which in effect asks us to determine what is the morally correct set of normative political principles. I shall just venture the remark that the desideratum that people should live their lives in conformity with their own moral convictions has no special status here. From the first-person perspective, of course, the claim that I ought to do what is morally right is in practice, at the point of choice of action, not going to be distinguishable from the claim that I ought to do what my best conscientious judgment tells me is morally right.<sup>17</sup> But from the third-

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15. Maybe the relevant idea of comparability is that the ratio of gain to one if the burden is lifted to costs imposed on others if the burden is lifted is the same for both parties whose claims are being compared.

16. *The \$64,000 Question* was a television game show broadcast by CBS from June 1955 to June 1958. *The \$64,000 Question*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_\\$64,000\\_Question](http://en.wikipedia.org/wiki/The_$64,000_Question) (last updated Nov. 8, 2010, 3:05 AM).

17. The claim in the text is not exactly right. When choosing what to do, I cannot in practice distinguish the act that I believe to be morally required from the act that is actually morally required, if any, in my circumstances. However, I can, even at the moment of choosing, entertain the idea that my current belief in this matter might in fact

person perspective, these claims are sharply distinguishable. Suppose we start with the idea that, in deciding whom and when to accommodate, our guiding principle should be to bring it about that each person has a fair share of opportunity to lead a life that there is good and sufficient reason to find valuable. Straightaway it emerges that there is no special reason to give special priority to claims of conscience as such.

Suppose the law as it currently stands in some jurisdiction prohibits the use of psychedelic drugs, such as mescaline, peyote, and LSD, except for medical purposes controlled by a physician's prescription. Three classes of people have a credible claim that they are specially burdened by this law. Some adhere to a religion whose weekend morning rituals call for the ingestion of psychedelic drugs to secure spiritual states of mind. Some other persons are committed to political activity to save the environment and are wont to gather in small groups on weekend mornings to ingest psychedelic drugs to facilitate feelings of solidarity and community and a renewed will to work hard for environmental causes. A third group of people is committed to surfing for its beauty and excellence and holds that gathering on weekend mornings to ingest psychedelic drugs prior to engaging in surfing transforms a merely enjoyable and fine activity into a sublime and moving experience. If our political morality gives special legal status to the claim for accommodation made by people whose free exercise of religion is burdened by legal requirements, then the first group is favored for accommodation over the latter two. If our political morality gives special legal status to allowing people to live in accordance with their conscientious judgments about how they ought to live, then depending on the interpretation of this norm, the first two groups will be favored for accommodation over the third. My position is that both forms of legal privilege—the religious liberty privilege and the conscientious liberty privilege—involve wrongful discrimination. They wrongfully favor some types of claims over others equally meritorious.

Besides any individual's right to consideration of her claim for accommodation on its merits, there is a more minimal right that also comes into play: a right that one's claim for accommodation not be dismissed with hostile intent or treated perversely as though it were a reason against accommodation. The duty to refrain from persecuting someone because she adheres to a religion that the majority of voters

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be incorrect, and this thought might have, and perhaps should have, a practical implication. For example, perhaps it would be reasonable for me to undertake further moral reflection or further efforts to discover empirical facts that bear on my proper choice of action.



[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

dislike or because she affirms conscientious beliefs that are unpopular in her community is a peremptory duty, and detecting its violation can be done by examining a single law or public policy and does not require holistic appraisal of the ensemble of laws as does the right to consideration.<sup>18</sup>

#### IV. ACCOMMODATION BY EXEMPTION AND ACCOMMODATION BY ACCEPTANCE OF POSITIVE DUTY TO AID

The discussion to this point construes the right to freedom of conscience or moral freedom as a right to negative liberty—a right to be free from interference, especially coercive legal interference, with one’s living in harmony with one’s conscientious judgments about how one ought to live. I have argued against the existence of such a moral right. However, this approach to the issue of accommodation misframes the issue. The point of accommodating others when legal arrangements are especially burdensome to them is not merely to protect negative liberty. We should be considering accommodation claims with a view to bring about a fair distribution of positive freedom in the sense of real freedom. One enjoys real freedom to do or gets *X* just in case one has an available course of action such that if one chooses and carries out that course of action, one does *X* or gets *X*.<sup>19</sup>

In light of this aim, sometimes accommodating others involves accepting restrictions on our own liberty rather than exempting those we seek to accommodate from compliance with laws and policies that restrict their freedom. In other cases, adequate accommodation involves acceptance of positive duty to aid.

There might be grounds for accepting restriction or another duty to aid, even if the goal were limited to ensuring that all had a fair share of negative liberty to pursue their aims and projects. For example, imagine that we were considering laws that would prohibit private individuals from carrying guns or other dangerous weapons in public places. Some Quakers and other religious pacifists, who refuse to employ violence or

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18. For a plausible example of a state action that violated the minimal right against discrimination as described in the text, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), which deals with a prohibition of ritual animal sacrifice that specially targeted Santeria religious practices.

19. On rights to capability as rights to positive freedom, see generally Amartya Sen, *Rights and Agency*, 11 *PHIL. & PUB. AFF.* 14, 15–19 (1982).

the threat of violence as a way to resolve conflicts of interest among persons, may well be specially burdened by nonpassage of a law forbidding carrying weapons in public. These people are barred by their conscience from opting to decide to carry weapons, even if the costs of not doing so become increasingly great as more and more people become gun toters and being unarmed in public becomes increasingly risky. For the sake of the argument, assume that circumstances are such that, setting aside the issue of due consideration for religious pacifists, the case for prohibition of carrying weapons in public is outweighed by the considerations that oppose such a ban. Perhaps many people have innocent reasons for carrying guns; they need to carry guns in public in order to hunt game or pursue some other legitimate project. Quite aside from incentives to carry guns that arise from the arms-race worry that if sufficient others are armed, one had better be armed as well, there are legitimate liberty interests in gun toting that just barely outweigh counterconsiderations. However, throwing onto the scales the interests of the religious pacifists, who have interests in traveling freely in public without excessive risk of being bullied or shot by gun-wielding fellow citizens, the balance of moral reasons now swings the other way. In this case we would be morally required to accommodate the interests of Quakers and other religious pacifists whose interests in living a life with normal freedoms and opportunities in harmony with their cherished values would be unduly burdened by nonpassage of the ban on carrying weapons in public. In short, laws can be unfortunately or unduly burdensome on some people in virtue of the failure of the laws to restrict other people's liberty as they ought.

This point has a bearing on a claim made by Michael Perry in support of his proposal that the right to freedom of conscience or moral freedom should be made a legal right in every country. He urges that when it acts beyond the sphere of protection of certain fundamental, uncontroversial interests, the government is likely to be wrong in its choices of law and policy, and hence there is a general presumption in favor of letting people act according to their conscience, when important protections of people's fundamental interests are not in jeopardy.<sup>20</sup> However, the government may be wrong, not only in establishing a law that ought not to be established but also by failing to establish a law that ought to be established. The likelihood of error does not by itself make a case for government inaction. The government, however error prone, might wrongly restrict people's liberty to do what they like in some domain but

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20. Perry, *supra* note 2, at [REDACTED].

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

might equally wrongly fail to restrict people's liberty to do what they like in that domain. A moral duty to accommodate conscience might just as well require the rest of us to accept restrictions of our liberty to benefit the conscientious as to require us to exempt the conscientious from legal restrictions on their liberty. The same goes if there were no such moral duty, rather a broader duty to consider on their merits and fairly all complaints by anyone to be specially burdened by current arrangements.

#### V. THE SUPPOSED WRONG OF INDUCING PEOPLE TO ACT AGAINST THEIR CONSCIENTIOUS JUDGMENT

A careful reader might object to the line of thought elaborated in this essay on the ground that it doggedly insists on forcing a round peg into a square hole. The essay treats claims of conscience as claims of personal interest, but these are fundamentally different. A person who claims it is morally wrong to kill human beings in the course of waging war is not claiming that killing others disadvantages him and that he should be relieved of this disadvantage. His demand on the state is not a claim of personal advantage at all.

There is something to this complaint, but the truth in it casts doubt on the claim that there is a moral right to freedom of conscience. Such a moral right necessarily imposes moral duties on the part of other agents to allow the individual to act in line with her conscientious judgment of what she morally ought to do, up to a point. I do not see the case for upholding any such duties. There may be pragmatic reasons in some cases not to force people to act against their conscience. As Kent Greenawalt observes, "[F]utilely demanding that people do what they regard as morally abhorrent is not the most productive use of rules and is bound to cause resentment among those whose conscience is burdened."<sup>21</sup> When trying to force people to act against their conscience is counterproductive, we probably should not do it, but this is fully compatible with holding that when trying to force people to act against their conscience is not futile, making the effort may be morally permissible and even morally required. Moreover, causing resentment is a consideration, not necessarily a trumping consideration. So the

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21. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 199 (1988).

question becomes, when there are moral gains from seeking to induce people to act against their conscience by attaching penalties or other disincentives to the doing of the conscientious act, is there some general principled bar to doing this that the right to freedom of conscience exposes?

For simplicity, let us confine our attention to cases in which conscience issues in verdicts that a course of action forbidden by the community is morally required or that a course of action required by the community is morally prohibited. In consulting her conscience, a person seeks to use her faculties of practical and moral imagination as best she can to figure out what is morally right and wrong. In carrying out this exercise and then deciding to act according to its verdict, her aim is not to do whatever she happens at the moment to believe is morally right and required. Her aim is to conform her conduct to what is really morally right and required. To return to the example of conscientious objection to participation in war, the person who refuses to fight in a war on grounds of conscience believes that she owes it to other people—specifically the people who would be harmed by her participation in war—that she not participate and not bring about harm to them, or impose on them a risk of harm, in this way. Her deep underlying aim is to conform her conduct to the genuine moral requirements that bear on her conduct, not per se to conform her conduct to her opinion about these matters. Loyalty to her own conscientious verdicts enters as a means: she must believe that doing what, all things considered, she believes to be morally right is the best means available to her to achieve her underlying aim of doing what is really morally right. So she refuses to fight.

Suppose you have arrived at a different verdict: the war is just, and the conscientious objector owes it to the people who will suffer injustice if the just side fails to win the war that she participate with force to block this injustice from occurring. If you are in a position to induce the conscientious objector to fight, you have moral relations not only to her but also to those affected by her refusal to fight. Even if her nonparticipation can be offset by enhanced participation by others, these others will then incur extra costs, including perhaps extra risks of being killed or maimed, and the result might then be a significantly unfair distribution of the burdens of waging a morally required just war.<sup>22</sup> You

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22. There is also the possibility that attaching penalties to this act of conscientious objection, even if ineffective in altering the choice of this objector, may tend to deter others from similar shirking.

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

might be right or wrong in the judgment you have reached to the effect that the war effort is just and refusing to serve is morally wrong. Just suppose that in this case you are right.<sup>23</sup> You calculate correctly that you can achieve morally desirable results by threatening to impose a penalty on the conscientious objector unless she relents and joins the war effort. The question then becomes, is there a moral right to freedom of conscience that in this situation imposes a duty on you—unless the stakes are very high—to allow the person to act according to her conscience without suffering the contemplated penalty?

Notice that there is an element of personal advantage wrapped up in the demand that we defer to conscience. The threatened penalty directed at the person about to act according to her conscience might do wrong by bringing it about that the person acts against her conscience or by failing to deter and then bringing it about that the person's condition assessed in self-interested terms is deliberately made worse by imposition of penalty. The person is fined, or sent to prison, or summarily executed. In all of these cases, she suffers personal disadvantage, and the claim of freedom of conscience is that she should not be subject to this disadvantage. Having already considered this claim in Parts II and III of this essay and found it wanting, I am now considering the claim that there is a general duty to allow people to act in conformity with their conscientious judgments—independently of whether or not those judgments are true or likely to be true.

If the threat succeeds in deterring the person from declining to participate in the war, is she forced to act against her will? In an obvious sense, yes: her considered will, absent the threatened penalty, is not to fight. But insofar as her underlying aim is that her conduct should conform to what morality really requires, in the stipulated circumstances of this example, the threat if successful would be forcing her to do what in a deep sense she wills to do—to do the right thing. The point holds generally: whenever a person is not merely in love with her own opinion or rigidly wedded to a dogma, but is exercising her practical reason with a view to discerning what is really right and doing what is really right,

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23. If you are incorrect, you do wrong to support the war effort and are wrong to induce others to support it and participate in it. However, the possibility of being wrong does not tend to show that there is a right to moral freedom or freedom of conscience that should inhibit one from preventing a person from acting against her conscientious judgment, independently of whether or not the judgment is right or wrong.

then if she is wrong in fact, inducing her to act against her conscientious judgment is inducing her to fulfill her deepest aim in her conscientious project. Notice also that this point does not depend on the size of the moral stakes. The point holds just as much in small matters as in momentous ones. Suppose I am trying to discern the right division of a lollipop between two children, I make a mistake, and you induce me to act against my conscientious judgment and divide the candy in a way I think is wrong but that actually is right. Again, my deep will to do what is right has not been contravened. So long as your act of inducement does not violate a proportionality requirement but is rather appropriate to what is at stake, the fact that someone is of the mistaken sincere opinion that she ought not to do *X* is not in itself a reason not to induce her to do *X*. Hence, there is no moral right to freedom of conscience.

If instead the person does not have the deep aim of conforming her conduct to correct moral principles, but rather ultimately wants to do whatever he thinks is right to do at the moment of choice, or aims ultimately to fulfill the actual conscientious opinion he holds now— independently of whether or not his opinion now is correct—or the like, then inducing the person to alter his course of action toward what is really right and away from what appears to him to be right cannot be represented as helping the person to achieve what he fundamentally is trying to achieve. However, in these cases the person’s “conscientious” aim is somewhat self-indulgent. The person is attaching unwarranted attachment to his own opinion—correct or incorrect, reasonable or unreasonable—about what he morally ought to do. Having this type of self-indulgent aim does not generate a duty on the part of others to allow the person to act on the aim.<sup>24</sup>

There is an epistemic dimension of the problem of the claimed right of freedom of conscience to which I cannot do justice in this essay, but that nonetheless merits mention. Suppose you have decided that what is morally right is that I do *X*, and I have come to the opposed judgment that I ought not to do *X*. Is it not morally arrogant for you to dismiss my judgment and do what you can, within limits of reason, to bring it about that I act as you think best in the circumstances? The answer is that, if time permits, you should examine the reasoning that leads me to my judgment and assess it. If it turns out that I have uncovered reasons your

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24. There is an intermediate possibility. One’s underlying aim may be both (1) to act in conformity with whatever one’s conscientious belief is at the moment of acting and (2) to bring it about that one’s conscientious belief conforms to what is objectively right. The question then arises, when aim (2) is not fulfilled, does one still affirm aim (1)? If so, then the animadversions in the text against self-indulgence still apply.

[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

initial thinking had overlooked, you should incorporate my reasons into your own practical reasoning efforts. Respect for my conscientious judgment should involve being disposed to make a good faith assessment of my reasoning to that judgment. But in the nature of the case, this assessment might turn out negative or positive. The more you determine that my reasoning is confused, careless, or mistaken, or that I have failed to apply myself with sufficient seriousness to the task of moral reasoning, or that although I did the best I could, my practical reasoning abilities are subpar, the less you should in the end be swayed by the fact that you and I have arrived at opposed judgments. The more my reasoning process looks to be sensible, the more doubt you should have in the certainty of your own judgment. But what is at issue here is an aspect of moral respect owed to others that requires us to take seriously their practical reasoning efforts, and this is a distinct matter from the claimed right to freedom of conscience. Assuming we should accept a fallibilist perspective on our own reasoning and belief formation, we should acknowledge that even if we disagree with the conscientious verdict of another person and correctly notice that verdict is based on feeble reasoning and evident lack of wisdom, it still remains the case that she might be right and we might be wrong. But again, acceptance of fallibilism does not ground a right to freedom of conscience.

#### VI. FUTILITY?

An advocate of the moral right to freedom of conscience might adduce the consideration that attempts by the state to induce people to act against their conscientious judgments, if successful, will have the effect of generally dampening people's disposition to act conscientiously. This would be unfortunate, urges the advocate. This appeal to consequences might form part of a case for assigning people a legal right to freedom of conscience.

I make no attempt to assess the force of this speculative conjecture. I merely set another speculative conjecture against it. This speculation, if correct, would weigh against the case for establishing a legal right to freedom of conscience. Consider laws forbidding racial and ethnic discrimination in such endeavors as hiring workers, admitting students for places in colleges and universities, and offering services to the public for sale. The law coercively regulates certain forms of behavior, but the

aspirations of those who support such laws go beyond the regulation of conduct. The aim is to change the hearts and minds of men and women and to bring it about that in time people will not only conform their conduct to the requirements of antidiscrimination law but will also do so willingly and cease to have racially charged motivations that lead them to want to do what the laws forbid. To support the speculative hope that such changes might in time unfold, we might point to the expected operation of a cognitive dissonance mechanism.<sup>25</sup> Suppose initially I have conscientious moral beliefs that oppose dealing with, for example, African-Americans on a footing of equality. My conscientious beliefs impel me to varieties of conduct the law forbids. If I generally submit to the law and follow its dictates in action, one psychological effect might be that because (1) I regard myself as a nice, decent, rational person and (2) I am not mistreating African-Americans but treating them as equals; therefore, (3) it probably is the case that these people do not deserve mistreatment and in fact deserve to be treated as equals. In short, inducing people to act against their conscientious beliefs may over time alter their conscientious beliefs.

The cognitive dissonance mechanism is morally blind. To the extent that it is effective, it can wean people away from their current beliefs and toward the beliefs that chime in with the behaviors that people are being induced to follow against their will, whether the latter beliefs are good, bad, or ugly. The mechanism is just as useful for bringing it about that people are led to embrace bad moral beliefs as good ones. I am highlighting the later possibility.

## VII. PRACTICALITY

Even if we were to concede—against the arguments adduced in this essay—that there is a moral right to freedom of conscience, it might seem that there is an obvious knockdown argument against establishing this moral right as an enforceable legal right. Any legal entrenchment of a broad right to freedom of conscience would be bound to have disastrous incentive effects—so it might be thought. Suppose that every law that a society enacts contains a proviso to the effect that the requirements of this law do not apply to anyone who is conscientiously opposed to obedience to them. Such a proviso would invite anyone who finds conformity to the law not to his liking to declare himself a conscientious objector. The same problem arises in a weakened form if

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25. *See generally* ELLIOT ARONSON, *THE SOCIAL ANIMAL* 190–200 (Worth Publishers 9th ed. 2004) (1972).



[VOL. 47: 1, 2010]

*Against Freedom of Conscience*  
SAN DIEGO LAW REVIEW

there is a standing legal procedure that allows anyone to claim that he should be exempted from the requirement of obedience to any provision of law to which he is conscientiously opposed, the procedure being set to accede to any such sincere request unless the state has a significant interest in declining to exempt the individual from this particular burden.

Any state policy that provides significant benefits to anyone whose conscientious beliefs oppose obedience to a given law inevitably tempts citizens to feign conscientious objector status or to convince themselves that they in fact have the conscientious beliefs that would entitle them to the benefits. So no such policy can be part of a stable, administrable, just system of law. So runs the argument from practicality.

I do not endorse the argument from practicality. It ignores the possibility that legal arrangements may be established that do not give people perverse incentives to feign or adopt conscientious objector beliefs. Consider conscientious objection to participation in war. If there are alternative forms of national service that will satisfy the varieties of conscientious objection to military service and that are roughly equally useful for advancing significantly morally worthy causes and that are just as dangerous or overall disadvantageous as military service, then the government can avoid coercing anyone to fight in wars against her conscience by setting up alternative forms of national service and giving all those subject to conscription into military service the option of participating in some alternative form of national service. In this way, no one who is merely seeking relief from danger or inconvenience will be given any incentive to feign or change beliefs just to avoid the inconvenience.

The example generalizes. In principle, one can craft laws, including exemption provisos, that allow citizens to avoid acting against their consciences without making it more advantageous to be such a conscientious objector than to be a citizen who complies with the law. So one might respond to the argument from practicality by affirming that there should be a legal right to freedom of conscience that is limited to situations in which the enforcement of the right is feasible in the sense that the enforcement mechanism does not provide any citizens perverse incentives.

A more robust response to the argument from practicality is also available. If there is a moral right to freedom of conscience—recall that in this section we are conceding *arguendo* that there is such a moral right—then *ex hypothesi* establishing legal arrangements that accord this

moral right to citizens is a morally worthy aim, and we should be willing to incur some costs to achieve it. These costs may involve some losses of efficiency in pursuing other social goals. Even in circumstances in which one cannot in practice respect the right to freedom of conscience without generating some incidental benefits for those who are enabled to live in harmony with their conscientious beliefs and hence without generating some perverse incentives, up to a point, swallowing these costs may be an acceptable price to pay in exchange for achieving the fulfillment of people's rights to freedom of conscience.

My argument in this essay denies that there is a moral right to freedom of conscience. I do not deny that, if there were such a right, there would be a strong case for making it a legal right as well. Generally speaking, the law should be set to protect people's significant moral rights. But if there is no moral right to freedom of conscience or moral freedom, anyone who urges that a legal right to this freedom should be established would need to advance some special considerations. I do not see any such considerations on the horizon.