

Roger Williams University Law Review

Volume 10

Issue 2 Symposium: *Religious Liberty In America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth*

Article 3

Spring 2005

The Tenuous Case for Conscience

Steve D. Smith

University of San Diego School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Smith, Steve D. (2005) "The Tenuous Case for Conscience," *Roger Williams University Law Review*: Vol. 10: Iss. 2, Article 3.
Available at: http://docs.rwu.edu/rwu_LR/vol10/iss2/3

This Symposium is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

The Tenuous Case for Conscience

Steven D. Smith*

If there is any single theme for which Roger Williams is most revered, it is surely "freedom of conscience."¹ That theme has also been, arguably, the foundation of modern liberalism,² and has infused our more specific constitutional commitments to freedom of religion and freedom of speech. In addition, the rhetoric of freedom of conscience has expanded of late beyond its traditional home in First Amendment jurisprudence. For example, *Planned Parenthood v. Casey* invoked the sanctity of conscience as a central rationale for a right to abortion.³

Its featured appearance in such an untraditional role might lead us to think that conscience wields wider influence today than ever before. Maybe it does. But some observers also perceive a progressive cheapening of conscience – even a sort of degradation.

* Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander, Chris Eberle, Vittorio Hosle, Michael Perry and George Wright for comments on an earlier draft. I also appreciate very much the thoughtful comments and criticisms at the conference by Kathleen Brady and Michael Perry, as well as by other conference participants; these of course have prompted further thoughts and misgivings. Rather than attempt a series of back-and-forth adjustments, responses and rejoinders, however, it seemed better to leave the paper basically in its pre-chastened state.

1. Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 438 (1998).

2. See Robert N. Bellah, *Is There a Common American Culture?*, 66 J. AM. ACAD. RELIGION 613, 617-20 (1998); cf. DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 85 (1986).

If we have any rights, we must have this right, the inalienable right to conscience. Rawls puts the point well: the central case, both historically and philosophically, to be made on behalf of human rights is the argument for conscience, and many other claims of rights may be regarded as generalizations or elaborations of this focal argument.

Id. (footnotes omitted).

3. See *Planned Parenthood v. Casey*, 505 U.S. 833, 851-52 (1992).

Marie Failinger remarks that freedom of conscience "began as an argument that government must ensure a free response by the individual called distinctively by the Divine within . . ." but by now "has come to mean very little beyond the notion of personal existential decision-making . . ."⁴

David Richards's deployment of conscience as grounding a whole range of liberal rights might serve as "Exhibit A" for Failinger's observation.⁵ Ronald Beiner suggests that Richards demeans the concept of conscience. For example, Beiner asserts that "[t]he spuriousness of this recurrent appeal to the sacredness of conscience is very clearly displayed in the discussion of pornography. How can this possibly be a matter of *conscience*? What is at issue here, surely, is the sacredness of consumer preferences."⁶ Beiner goes on to scoff that "[b]y [Richards's] contorted reasoning, the decision to snort cocaine constitutes an act of conscience."⁷

These criticisms suggest the need for a contemporary rethinking of conscience. When we reverently invoke "conscience," "freedom of conscience" or the "sanctity of conscience" – as Richards does, or as the Court did in *Casey* – do we have any idea what we are talking about? Or are we just exploiting a venerable theme for rhetorical purposes without any clear sense of what "conscience" is or why it matters? Do we have any reason to be confident, for example, that when Elliott Welsh declined on grounds of "conscience" to make himself available for the draft during the Vietnam War,⁸ or when Henry David Thoreau spent a comfortable conscientious night in a Concord jail rather than pay a tax he thought unjust,⁹ they meant the same thing by the word "conscience" that Thomas More did when he invoked "conscience" as his explanation for going to the scaffold rather than swear an oath

4. Marie A. Failinger, *Wondering After Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses*, in LAW & RELIGION 81, 93-94 (Rex J. Adhar ed., 2000).

5. See generally RICHARDS, *supra* note 2.

6. RONALD BEINER, PHILOSOPHY IN A TIME OF LOST SPIRIT: ESSAYS ON CONTEMPORARY THEORY 29 (1997).

7. *Id.* at 30.

8. See *Welsh v. United States*, 398 U.S. 333, 336-37 (1970).

9. For Thoreau's own account, see HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE, in WALDEN, OR LIFE IN THE WOODS & ON THE DUTY OF CIVIL DISOBEDIENCE 222, 222-40 (1960).

he thought iniquitous,¹⁰ or that Roger Williams meant when he accused the Massachusetts Bay Puritans of raping the consciences of Christians?¹¹ (I refrain from insulting the reader by asking whether the "conscience" invoked by More and Williams was the same entity or quality as that featured in Richards's defense of the conscientious consumer of pornography.)

More generally, what do we understand "conscience" to be, exactly? And why do we suppose that actions done from "conscience" have some special dignity, so that government ought to accommodate such actions, at least in some contexts, even though the same actions would not be permitted if done from other motives or on other grounds?

A full exploration of these questions would call for a learned and careful historical investigation, after the manner of Alasdair MacIntyre or Charles Taylor,¹² of how a commitment to the sanctity of conscience arose, and of how its meaning and rationales have changed over the centuries in response to such developments as the Protestant Reformation, the proliferation of pluralism and the ascendancy of liberalism and secularization. I have scant space and even less competence to undertake any such investigation, so I propose to address the questions in a more oblique and sketchy way.

More specifically, I wish to pose two questions. The first question will be addressed briefly: What is "conscience," and what do we have in mind when we say that someone acted from "conscience?" A second question will receive more extended discussion: Granted its importance to the individuals who assert it, still, why should "conscience" deserve special respect or accommodation from *society*, or from *the state*? By thinking about these questions, I hope to gain some perspective on what, if anything, has happened to the theme that Roger Williams both advocated and personified.

10. See generally Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580 (2003).

11. See generally Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289 (2005).

12. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

I. WHAT IS "CONSCIENCE?" A MINIMALIST DESCRIPTION

Let us begin with the first question. What *is* "conscience" anyway? Over the centuries much learning has arisen around this question much of it recorded in Latin phrases that have little meaning for most of us today.¹³ For present purposes though, it may be enough to say that when we describe an act as being done from "conscience" we usually mean at least to say that the person in question acted on the basis of a sincere conviction about what is morally required or forbidden. Although the commonality it picks out might be mostly verbal (in part because "moral" can mean very different things to different people), this description seems to fit the classic cases. Welsh, Thoreau, More and Williams all acted on the basis of convictions about what was morally required or forbidden, didn't they?

In short, the person who invokes "freedom of conscience" against society or the state is in effect saying to the rest of us: "Although you might think you are justified in commanding or forbidding some performance, you should nonetheless refrain from commanding or forbidding this of *me* because I am opposed on the basis of a sincere conviction about what is morally required or proscribed." *Morality*, whatever that is, seems crucial here: we would not typically use the term "conscience" for a case in which someone asserted other than "moral" reasons for opposing a law or for resisting compliance with it. A doctor who refuses to perform an abortion because she believes it is morally wrong is said to be acting on "conscience." Conversely, a doctor who declines to perform an abortion because he thinks the procedure is unsafe, detrimental to a woman's psychological health or not cost-justified might, in a given case, be wholly justified – but we would not describe him as acting from "conscience."

This minimalist description admittedly leaves many questions unanswered. Some of these questions I intend to steer clear of; others will need to be discussed as we consider the questions of

13. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION*, II 74-75 (2003) ("The prevailing Roman Catholic doctrine . . . distinguished between a faculty of apprehension, which was called *synderesis*, and a faculty of application, which was called *conscientia*."). George Wright tells me that his "spell-check program informs me that 'synderesis' is not in its dictionary, and delightfully suggests 'sundress' as an alternative." E-mail from George Wright to Steven D. Smith (July 9, 2004) (on file with author).

whether and why the state should respect conscience. For example, to say that conscience involves a conviction about what is morally required or forbidden does not say how that conviction comes to be held. In order to qualify as a judgment of "conscience," must the judgment reflect deliberate, careful moral *reasoning* (as two eminent St. Thomases – Aquinas and More – seem to have supposed¹⁴)? Or is the judgment of conscience instead not so much the product of reasoning as of an "inner light" or "voice within" that speaks beyond frail mortal reason, or perhaps of an introspective reading of what is "written on the heart"?¹⁵ Although these differences in what we might call the "epistemology of conscience" can be important, for present purposes I think we need not try to adjudicate among them.

But, we cannot similarly pass over the "metaethical" presuppositions in any claim of conscience. When we say that a judgment of conscience is a conviction about what is "morally" required or forbidden, what sort of thing or quality does the term "morally" refer to? We cannot ignore this issue because without some sense of what "morality" is, or at least of what a person who invokes conscience means by it, we will be deceiving ourselves. We will be using words without understanding what they mean – playing with words but revealing nothing, as Socrates suggested.¹⁶ In addition, we cannot ignore the metaethical question because, as I hope to show, the case for respecting conscience may turn to a significant extent on what we think "morality" is.

With this minimalist conception of "conscience," we have enough to proceed to ask whether and why the state, or perhaps

14. On Aquinas, see JOHN FINNIS, *AQUINAS* 123 n.101 (1998). More's understanding of conscience as an exercise of reason is reflected in his report that, in refusing on grounds of conscience to swear the oath affirming Henry VIII's supremacy over the church, "I had not informed my conscience neither suddenly nor slightly, but by long leisure and diligent search for the matter." *THE LAST LETTERS OF THOMAS MORE* 60 (Alvaro de Silva ed., 2000) (letter from Thomas More to Margaret Roper (*circa* April 17, 1534)).

15. The metaphor, commonly used in descriptions of conscience, traces back to 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).

16. PLATO, *GORGAS* 58-59 (W.C. Helmbold trans., 1952).

"society,"¹⁷ should, at least as a *prima facie* matter, respect claims of conscience. Why should the state allow an individual to engage in actions that would normally be prohibited (or to refuse to perform actions that would normally be required) just because his opposition is based upon sincere moral convictions? On what assumptions, moral or metaethical, would it seem sensible for the state to give at least some degree of deference to claims of conscience?

It will be convenient to have before us a concrete situation presenting the issues. So let us suppose that you are a wise and benevolent king. You are exquisitely sensitive and responsive to the beliefs and values of the society over which you preside, and you see yourself not so much as the "ruler," but rather as the agent and representative of that society. For my part, I am one of your subjects. You have decided after consultation and careful thought that reasons of justice and policy require our kingdom to go to war with a neighboring realm. You have accordingly declared war and have issued a decree requiring all healthy adult males to serve in the army. I am a healthy adult male (or at least we can suppose so), but I also have a deeply-held conviction, arising perhaps from intense reflection, or perhaps from what I take to be an inspired "voice within," that war (or at least *this* war) is morally impermissible. I therefore conclude that I am morally forbidden to serve in the war.

I raise these scruples when your officials try to conscript me, and the case ultimately comes to your attention. You are persuaded that I am honestly representing what I sincerely believe. Do you have any reason to excuse me from service because of my objection based upon what we can stipulate is a sincere moral

17. We often picture the claimant in conscience as asserting a right to act contrary to the judgments of "the state" or the norms of "society," and that is the picture that I am working from in this essay. To be sure, this picture raises hard definitional and philosophical questions. How do we define "the state," or "society"? How can "the state" or "society" hold moral beliefs or judgments? What is the relationship between the judgments of "the state" and those of "society"? These are important questions, but they are not the subject of this essay. For present purposes, therefore, I will suppose that the state and society *can* have moral beliefs and make moral judgments, and I will not focus on the distinction between the beliefs and judgments of the state and those of society.

conviction?¹⁸

II. THE METAETHICAL QUESTION

In considering my case you will naturally want to understand my objection as clearly as possible, so you ask me to explain the substantive content of and basis for my judgments about the immorality of war. But you also ask a further question: What exactly do I mean when I say something is "morally" impermissible? I am evidently making reference to something called "morality," but what do I understand the nature of this something to be?

Is my conviction just a dressed up way of saying that I do not *like* war, or that I *disapprove* of it, or that contemplating war causes me to *feel* depressed or indignant, or something of that sort? If so, then my attitude is readily understandable. In fact, you patiently explain, a great many of your subjects share in this attitude of disapproval or indignation (as they do, you report sadly, about a good many of your decrees and enactments). Still, it seems impracticable to excuse everyone who has that attitude from serving in the war. And it seems unjust to make most men serve while

18. In presenting the question in this way, I am admittedly linking the question of *respect* for conscience to the somewhat independent question of whether the state should *exempt conduct* motivated by conscience. My purpose in this essay is not actually to enter into debates over, say, "free exercise exemptions" per se, or to take sides as between *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (holding that disqualification of a member of the Seventh-Day Adventist Church from unemployment compensation benefits solely because of her refusal to accept employment in which she would have to work on Saturdays contrary to her religious beliefs imposed an unconstitutional burden on her free exercise of religion), and *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause permits the state to prohibit sacramental peyote use and thus to deny employment benefits to persons discharged from their work for such use). Rather, I am using a claim of exemption merely as a context for considering the question of whether conscience is deserving of any special deference from the state. The exemption scenario is at least a common context, in our history, in which the question of "conscience" has presented itself – in draft objector cases, for example – and indeed it is difficult to think of other plausible controversies today in which the question can be isolated. One might argue, for instance, that respect for conscience should merely mean that coercion should not be employed (as it was with, say, Thomas More) to force people to *affirm beliefs* contrary to conscience. However, because other constitutional commitments such as freedom of speech already are thought to preclude forced affirmations of belief (whether contrary to conscience or not), it is difficult to address the special question of conscience in that setting.

letting off the few (like myself) who are astute enough to articulate their disapproval in terms of "conscience," or in terms of a "moral" objection. So is this all I mean by my invocation of "conscience?" Or do I mean to refer to something more substantial than my disapproving attitude?

You are asking me, in short, about the metaethical presuppositions behind my moral judgments. And there are, of course, many possible answers to this sort of question. For present purposes, though, let us simplify by describing four main kinds of responses that I might give to your metaethical question. One kind of response we can call "objectivist." This kind of answer would suggest that morality is something that is "real," something that is somehow "there;" it is given, or natural. The moral order exists independent of you and me – or at least independent of your and my opinions about it. Perhaps it inheres in the sort of "kosmos" or "ontotheological synthesis" that, according to Louis Dupre, was accepted in the West from the time of the Greeks through the Middle Ages and that persisted, in a sort of centuries-long retreat, well into the modern period.¹⁹ Perhaps objective morality is grounded in God's providential plan for the universe – what in the Thomist scheme was called the "eternal law."²⁰ Or objective morality might have its ground *in us* – in what would once have been called the "nature of man," or in our "metaphysical biology," or in some indwelling "telos;"²¹ although locating morality in us, this view of morality would still be objectivist because it would insist that our nature, or telos, is somehow natural and given, and hence independent of our (possibly mistaken) opinions about it.

A second, familiar kind of answer – although, as we will see, one that I as a claimant in conscience should be loathe to give –

19. LOUIS DUPRE, *PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE* 3, 18 (1993). Dupre explains that in classical thought, the universe was viewed as a "*kosmos*," or as an "ontotheological synthesis," in which nature itself was thought to have "theological and anthropic as well as physical meanings." *Id.*

20. See FINNIS, *supra* note 14, at 307-08. Eternal law, according to Aquinas, stems from the notion that the universe is "a vast community of beings . . . [a]nd the production and sustaining of the universe is the supreme act of practical reason." *Id.* at 307. Eternal law, thus, is the method God chooses to bring order and reason. *Id.*

21. For a discussion of this view, see, e.g., MACINTYRE, *supra* note 12, at 32-34, 52-53, 148-49.

we can call "conventionalist."²² This type of answer suggests that morality consists of the conventional rules and principles that a society accepts; these may have evolved, or may have been adopted through some sort of implicit social contract, to enable human beings to live together in a social order.²³ Charles Pigden describes the view as being that moral "judgements . . . hold true in virtue of human conventions and institutions, [and] shared social practices Morals boils down to a sophisticated sociology."²⁴

A third kind of response would be more "subjectivist." The term is used in various ways and to describe a range of ethical theories, and for present purposes I am going to use the term to cover ethical positions that in some important respects conflict with each other. What these positions do have in common, justifying the inclusive use of the term, is that they hold that morality is generated by individual *subjects* – by you and me and her and him.²⁵ In this broad sense, in other words, "subjectivism" says that morality is the product of imperatives, prescriptions or attitudes of approval or disapproval by individuals, whether arising from acts of will, deliberation, intuitions or emotions.²⁶ This means that if I say "cheating is morally wrong," I am saying something like "I condemn cheating," "I disapprove of cheating," or perhaps "do not cheat." What is morally obligatory for me does not come from some outside source or inner essential nature that imposes rules on me with or without my consent; it is the result of my own attitudes, prescriptions or self-legislation.²⁷

22. This position is also sometimes described as "relativist." Russ Shafer-Landau thus explains that "[e]thical relativism . . . allows for moral truth, but places its source within each culture, rather than in personal opinion; roughly, whatever society says, goes." RUSS SHAFER-LANDAU, *WHATEVER HAPPENED TO GOOD AND EVIL?* 8 (2004) (emphasis omitted). However, the term "conventionalism" seems a more illuminating and less potentially pejorative term for our purposes.

23. See, e.g., Will Kymlicka, *The Social Contract Tradition*, in *A COMPANION TO ETHICS* 186, 188-89 (Peter Singer ed., 1991) (discussing the social contract theory of morality).

24. Charles R. Pigden, *Naturalism*, in *A COMPANION TO ETHICS* 421, 429 (Peter Singer ed., 1991).

25. See James Rachels, *Subjectivism*, in *A COMPANION TO ETHICS*, *supra* note 24, at 432.

26. See *id.*

27. See *id.* at 432-35.

A final response to your metaethical question would be "nihilistic" in nature. Nihilists might say that "morality" is not real at all – that it is an illusion or sham, embraced by mistake or perhaps in an effort of the weak to enslave the strong.²⁸ This sort of answer is commonly associated with thinkers like Nietzsche, or the character Thrasyarchus in Plato's *Republic*.²⁹ As someone who wants to invoke a right to "freedom of conscience," however, I am not likely to give this answer because it could only serve to undermine my claim that my moral convictions are worthy of respect.

So there are various ways in which I might elaborate on the metaethical presuppositions behind my claim that I am enjoined by conscience from participating in your war. Will the particular response I give make my claim of conscience more or less persuasive to you, my sagacious sovereign?

A. Conscience Within a Framework of Moral Objectivism

Historically, it seems that proponents of conscience like Thomas More and Roger Williams would most likely have embraced objectivist metaethics. So let us start by supposing that I give this kind of account. Perhaps I report that it is my sincere and reflective judgment that God has established an "eternal law" for the operation of the universe, including human affairs. Or I might maintain that moral principles are grounded in a teleological human nature. I spell out my view in two propositions: (a) There is an objective moral order that obligates us (and the nature of a "moral" order, I explain, is that it obligates us to comply with it: that is what "morality" is and means);³⁰ and (b) in my judgment,

28. See Michael Smith, *Realism, in A COMPANION TO ETHICS*, *supra* note 24, 399.

29. See JOHN M. RIST, *REAL ETHICS: RECONSIDERING THE FOUNDATIONS OF MORALITY* 13-26 (2002). Rist contends that in fact there are only two coherent metaethical positions – metaphysical moral realism and nihilism – and that "all other possibilities [are] good-natured muddles to be collapsed by the clear-headed into Thrasyarcheanism." *Id.* at 44. Positions that purport to be neither objectivist nor nihilist are maintained only through "deception and self-deception (including outright lying)," *id.* at 37, which is one source of the "deceptions, equivocations, and outright lying and humbug in public debate," *id.* at 1-2.

30. My assertion elides one prominent debate in modern metaethics. See Connie S. Rosati, *Internalism and the Good for a Person*, 106 *ETHICS* 297 (1996) (discussing some important subtleties that contemporary philosophers

war (or at least *this* war) is incompatible with this moral order.

Do these assertions give you, my sovereign, any good reason to excuse me from serving in the war? Well, it seems that proposition (a) at least serves to distinguish my objection from those of many other people who would very much like to avoid military service but whose reasons do not arise from any belief in a moral order that obligates them not to fight. To put the point differently, without proposition (a) I would be just like all the other adult males who, for one reason or another – perhaps they would rather study, or work, or surf, or perhaps they want to support their children or aging parents – would prefer not to serve in the military. My objection may seem to have a force and dignity missing from their more self-serving preferences, or even their admirable personal commitments and projects.

Whether you think my claim has this additional dignity will likely depend, it seems, on whether you agree that there is an objective moral order. If you do, then you can agree that claims invoking that order have, at least potentially, a status different from that of claims *not* based upon morality. Conversely, if you do not believe in any objective moral order, then at least in one respect you might regard my claim as having *less* dignity than other kinds of claims, because my claim is rooted in what you regard as a sort of delusion.

So let us suppose that you, the sovereign, do accept the reality of an objective moral order of some kind. Even so, is this enough? I think we can concede that for *me*, the combination of propositions (a) and (b) provides a sufficient reason to decline military service; together they lead me to conclude that I am morally forbidden to participate. But do they provide a sufficient reason for *you* to excuse me from service? The problem is that even if you agree with (a), you will inevitably think I am mistaken about (b); you will disagree, in other words, with my judgment that war (or at least *this* war) is morally impermissible.³¹ If you did not disagree with me – if you came to accept proposition (b) – then you would not merely excuse me, but would likely desist from the war effort alto-

vigorously debate under the headings of “internalism” and “externalism”).

31. The analysis that follows parallels, and is informed by, Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35 (1998).

gether. But you *do* believe the war is both right and just. So in your eyes I will necessarily appear as a person who sincerely but mistakenly believes the war is wrong, and, hence, who sincerely but mistakenly believes he is morally forbidden to participate in war.³²

But of course, citizens sincerely disagree with the government's judgments all the time and on all sorts of matters, and it would seem extraordinary to suppose that citizens who sincerely disagree with the judgments animating a law should be excused from obeying it. So why should I have any special claim to being excused? How am I any different from the thousands upon thousands of other subjects who sincerely but (in your view) mistakenly disagree with your laws and policies, but are nonetheless expected to obey them?

Perhaps the fact that my mistake, unlike theirs, is a mistake about a *moral* obligation still gives my objection some greater force? But why? If I actually *were* morally forbidden to participate in war, that would be one thing. But if in fact there is no moral prohibition applicable to me, then why should it matter that I mistakenly believe there is such a prohibition?³³ Consider a comparison. Suppose I sincerely believe that I am *allergic* to war – that participation will produce devastating physical consequences in me. If my belief were true, you as a benevolent sovereign might have good reason to excuse me from serving. Medical specialists convince you, however, that no such allergy exists, and that my belief, however sincere, is rank superstition. Now it might happen that my belief, though erroneous, is nonetheless so powerful that it will prove psychologically debilitating, and you might decide to excuse me from serving on that ground. But if this is not the case, so that I can be forced to serve effectively, my mistaken belief in an allergy presumably will count for nothing with you. If anything my objection should be *less* weighty than those of persons who at

32. However, I might say not that war or this war is morally wrong *in general*, but rather that, due to some special duty or constraint applicable peculiarly to myself, they are wrong *for me*. (Perhaps I made a vow years ago not to participate in war.) It is possible that you could accept this more individual-focused kind of argument. Normally, though, pleas of conscience do not seem to take the form of saying that the believer is subject to tailor-made duties or prohibitions not applicable to others.

33. Cf. VITTORIO HOSLE, *MORALS AND POLITICS* 756 (Stephen Rendall trans., University of Notre Dame Press 2004).

least have a true belief that they would prefer to go to medical school, or surf. So, why is a mistaken conscience entitled to greater deference than is a mistaken belief in an allergy?

One familiar and basically utilitarian response suggests that because of my (presumptively mistaken) moral belief, I will suffer a higher than normal level of psychological distress if I am forced to act against my conscience.³⁴ This suggestion *might* be correct; but then again, it might not be. It is not obvious that people required to act against their moral convictions uniformly feel more psychic pain than do people who are forced to act contrary to other sorts of strongly held commitments, values or desires.³⁵ Moreover, even if this suggestion is true, it still makes my objection to service like those of other objectors who have merely personal or self-regarding reasons not to serve but who will likewise suffer distress if those reasons are rejected. In my view, to be sure, my objection is importantly different from theirs; it reflects an obligation independent of my own desires. But if you do not accept my moral judgments or the conclusion I draw from them, this claim becomes cognizable for you only as a plea to be spared psychological distress. Having rejected similar "distress" claims from others, it is not clear why you should accept such a claim from me. So, is there any further premise or claim that might be brought in to shore up my claim demanding deference to conscience?

B. A *Mischievous Truism*

One candidate for such a premise should be examined even though it may prove unhelpful in the end because it is a tempting thought, and one that I suspect has done considerable work – and perhaps mischief – over the years. Consider the following claim: "A person should always do what he or she believes to be right." Is this claim persuasive? If so, is it helpful in shoring up the case for conscience?

The claim seems to be correct in a truistic sense; indeed, it is simply the application of a tautological truth under the conditions

34. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 52-53 (1996) (describing and criticizing the response).

35. Cf. *id.* at 53 ("A religious pacifist fears for his salvation when he is drafted, but the average marine also suffers at the thought of leaving his family and going into combat.").

of human finitude. The tautological truth is that a person should do what is morally right; the very concept of something being "morally right" seemingly entails that it should be done. But *for us*, as choosing and fallible agents, the practical meaning of this truth can only be that we should do what *we believe* to be right. Occasionally, of course, we may do the right thing by mistake. Thus, it is not impossible for someone to do what she *thinks* is wrong, but what is actually the (objectively) right thing to do – and, even more obviously, vice versa. Even so, the exhortation "do not do what *you believe* is right, but what actually *is* right" appears to be a pragmatic nullity. Thus, I might say, in short form, "you should do what *is* right," in the same way that I might say, "you should write the correct answer on the test," or "you should bet on the horse that will win." However, because you can only act on the basis of your finite and fallible understanding, in practice these admonitions necessarily reduce into admonitions that you should do what *you believe* is right, should write down what *you believe* to be the correct answer, and should bet on the horse *you believe* will win.

Suppose, then, that we accept the claim that "a person should always do what he or she believes to be right" as a sort of practical truism.³⁶ Does this truism add anything to the case for conscience?

36. A possible (and I suspect common) confusion should be guarded against here. The truism that you should do what you believe to be right says nothing at all about how you should go about forming that belief; hence, it says nothing about whether you should give weight (or *how much* weight to give) to the counsel of others – your friends, your parents, your teachers, or the church. Through strategic selective intonation ("I am morally obligated to do what *I* believe to be right"), you might misconstrue the truism into a maxim forbidding reliance on such sources. You might thus infer that your obligation to do what *you* believe to be right entails "thinking for yourself," and hence "mak[ing] use of [your] own understanding without the guidance of another." See Immanuel Kant, *An Answer to the Question: What Is Enlightenment?*, reprinted in *WHAT IS ENLIGHTENMENT?* 58 (James Schmidt ed., 1996). And you might proceed to infer that "[t]here is no place for others to tell [you] what morality requires, nor has anyone the authority to do so – not [your] neighbors, not the magistrates and their laws, not even those who speak in the name of God," see J.B. Schneewind, *Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO KANT* 309, 310 (Paul Guyer ed., 1992), and that there is no excuse for "submitting to groundless authorities," including "state, church, majority, tradition, or dictator." See Onora O'Neill, *Vindicating Reason*, in *THE CAMBRIDGE COMPANION TO KANT*, *supra*, at 280, 299, 305. These exhilarating and apparently liberating propositions might be sound – or they might not be

In one sense it may, but in the more important sense I think it does not. If conscience refers to a person's belief about what is morally required or forbidden, then the truism supports the conclusion that an individual should always act in accordance with conscience. But the truism does not imply that an individual's judgment or action of conscience is thereby entitled to deference *from anyone else*, including society or the state.

Suppose an institution such as the church or the state believes itself to be, if not infallible, at least a somewhat more reliable judge of truth than individuals are. In that case, it is perfectly consistent for the institution to tell individuals that "You should always do what you believe to be right," and also that "You should always do what we tell you to do." These admonitions are wholly compatible. Or, even if the institution does not consider itself to be an especially reliable judge of truth, still there is no inconsistency in telling individuals: "*Your* duty is always to do what you think is right, using *your* best judgment, even when you disagree with us.³⁷ *Our* duty is to correct and punish you when you do what, using *our* best judgment, we believe to be wrong."³⁸

To be sure, it may seem paradoxical for an institution to instruct individuals to do what they believe to be right but then punish them when they follow that instruction because their judgment diverges from the institution's.³⁹ But the paradox is illusory. The fact is that no matter how profoundly and pervasively fallible they may be, both individuals and institutions can only do

– but you will be misusing your vaunted reason if you suppose that they follow from the truism that you are morally obligated to do what you believe to be right.

37. This instruction is coherent within an objectivist moral framework. In a conventionalist framework, the instruction might not be coherent; the claim, for instance, that "morality consists of social conventions" is at least in tension with the claim that "a person is morally obligated to do what he believes to be right even if his belief is at odds with social conventions."

38. It seems that the medieval church understood "conscience" basically in this way. See BRIAN TIERNEY, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 36-37 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

39. The formulation is important here. The institution might punish individuals in some cases in which they follow the instruction to do what they believe is right. But it would not punish them *for* following the instruction, or *because* they followed the instruction; it would punish them for doing what is wrong (in the institution's judgment).

their best to act in accordance with what they believe to be right, and each should be able to acknowledge that the others are subject to the same limiting truism. Thus, a teacher can with perfect consistency tell students: "You should write down on the exam the answers you believe to be correct. Of course, if I believe your answers to be incorrect at the time I grade the exams, I will mark them wrong." What else *would* the teacher do? Give points for what he believes to be wrong answers because the students sincerely believed them to be correct?

In short, whether we are individuals, teachers, parents, church or state, what more can any of us do than to make our best judgments about what is right and then act in accordance with those judgments? And this means that we – each of us – should act according to his, her or its conscience. Even so, the truism about doing what we believe to be right does not provide *others*, including society or the state, with any reason to respect or defer to what they believe to be errors of judgment.

C. Moral Authenticity?

So it turns out that even if the truism discussed above gives *me* a reason for following my conscience, it does not strengthen my argument that *you*, the sovereign, should defer to a moral judgment you believe to be wrong. Is there some other value or premise I might enlist that can support my case for conscience?

Perhaps I could bolster my case by invoking some value such as "authenticity." I might assert, in other words, that even if you, the sovereign, believe I am wrong in my moral judgments, you should nevertheless appreciate that by requiring me to act against them, you would be forcing me to be in some sense false to myself, or "inauthentic." My mistaken belief (mistaken in your judgment) confronts you with a choice of evils, and forcing me to be false to myself might be a worse evil than letting me do the (objectively) wrong thing.

Should this assertion be enough to persuade you to grant the exemption I request? The case remains fragile. Why wouldn't you simply acknowledge my point about being false to myself,⁴⁰ but

40. Or you might *not* acknowledge the point. "We often find ourselves faced with conflicting duties, or conflicting consequences," you might observe. "So how does punishing you if you break the law compel you to be 'false to

then say: So what? What's so wonderful about authenticity? "As it happens, what we need now are soldiers for a just and necessary war: it doesn't much matter whether these soldiers believe they are being 'true' to themselves or 'false' to themselves."⁴¹ And you will wonder how I am being any more "false" to myself by acting under compulsion against a *moral belief* – one that you, the sovereign, believe to be mistaken – than these other objectors are by acting under compulsion contrary to their *sincere desires*?

Still, the plea based on authenticity might be sufficient if we allow some further assumptions. Beyond being objective, perhaps the particular moral order that you and I both believe in regards something like "authenticity" – that is, living in accordance with one's sincere beliefs, true or false, whatever they are – as a moral good of the highest order.⁴² In that case, my sincere claim of conscience might give you a sufficient reason to defer to my (pre-

yourself any more than conflicting duties or considerations backed by consequences ever force anyone to be false to himself? In every such case, a person weighs the consequences, makes the choice that his priorities indicate, and in that way reveals what sort of person he truly is."

41. You might decide to excuse conscientious objectors like myself on purely prudential grounds, of course, if you conclude that men with this sort of objection will make bad soldiers. See *Welsh v. United States*, 398 U.S. 333, 369 (1970) (White, J., dissenting). In *Welsh*, Justice White observed that exemption of religious objectors from a draft

may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do.

Id. In this case, you would not be "respecting" the conscience of such an objector so much as treating it as a sort of disability, like poor eyesight or a trick knee. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1267 (1994) (citation omitted) ("[R]eligious obligations in some respects resemble physical disabilities. Both religious obligation and physical disability may make it hard for individuals to comply with otherwise neutral laws."). Conversely, you might conclude that despite our scruples, people like me *can* still be compelled to give useful service, perhaps in non-combatant roles.

42. See generally Steven D. Smith, *Believing Persons, Personal Beliefs: The Neglected Center of the First Amendment*, 2002 U. Ill. L. Rev. 1233 (2002). I argue for what I think is a substantively similar rationale in Steven D. Smith, *What Does Religion Have to Do With Freedom of Conscience?*, 76 U. COLO. L. REV. (publication forthcoming October 2005).

sumptively mistaken) beliefs.

So, are there plausible moral positions that in fact assign this sort of preeminent value to authenticity? We can notice two candidates that have been historically significant. A familiar religious view understands (at least some) moral principles or duties to be derived from God, and to serve the function of making us, as human beings, acceptable to God. But if God accepts only sincere, voluntary beliefs and performances, then something we could call authenticity becomes central to morality. In different versions, Roger Williams, John Locke and many others have given this sort of religious rationale for respecting freedom of conscience, at least in the domain of religion.⁴³ There is no point in forcing people into religious professions and performances against their consciences because the point of religion is to bring us to God; and as Williams put it, "forc't Worship stincks in Gods Nostrills."⁴⁴

A different sort of moral position that places high value on authenticity is described by Charles Taylor as the "romantic" view.⁴⁵ Taylor approvingly outlines a "powerful moral ideal that . . . accords crucial moral importance to a kind of contact with [one]self, with [one's] own inner nature . . .,"⁴⁶ and also holds that "each of us has an original way of being human. Each person has his or her own 'measure' . . ."⁴⁷ In this view, authenticity "takes on independent and crucial moral significance. It comes to be something we have to attain to be true and full human beings."⁴⁸ We can imagine that Thoreau, marching to his own drummer, may have acted on some such moral supposition. Ralph Waldo Emerson, expressed the basic idea with characteristic eloquence: "Nothing is at last sacred but the integrity of your own mind No law can be sacred to me but that of my nature."⁴⁹

The religious and romantic positions may converge. Thus, the philosopher John Hare argues that, based upon Christian as-

43. See Eberle, *supra* note 11, at 299.

44. *Id.* (quoting Letter from Roger Williams to Major John Mason & Governor Thomas Prentice (June 22, 1670), in 2 COMPLETE WRITINGS OF ROGER WILLIAMS 617 (1963)).

45. See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 25-29 (1991).

46. *Id.* at 29.

47. *Id.* at 28.

48. *Id.* at 26.

49. Ralph Waldo Emerson, *Self-Reliance*, in SELECTED WRITINGS OF RALPH WALDO EMERSON 257, 260 (William H. Gilman ed., 1965).

sumptions, "we each have, as persons, an individual essence, which is unique to us."⁵⁰ By assigning high importance to authenticity, these or similar moral positions might give you, the beneficent sovereign, reason to respect judgments of conscience even when you do not agree with those judgments. "More important (at least within limits) that my subjects be true to their moral beliefs and thus true to themselves," you might tell yourself, "than that they do what is objectively right."

D. The Conventionalist Conscience?

It seems, then, that on certain assumptions – namely, those of a moral objectivism that assigns high value to authenticity – at least a tenuous case might be made for deferring to what authorities will view as dubious, misguided, or eccentric conscience. But what if the objector, the government or both do *not* affirm an objectivist metaethics? *Now* how does the case for conscience stand?

Suppose our view is that there is a moral order but that it is not objective – not grounded in God's eternal law, man's essential nature, or anything of that sort – but rather is purely conventional. *Now* is the claim of conscience supportable?

We should note in the first place that it is hard to imagine the conscientious objector who would be willing to affirm such conventionalism. Quite the contrary: Thomas More and Roger Williams and Henry David Thoreau and Elliott Welsh were all asserting a duty of conscience to act *contrary to* prevailing conventions in accordance with what they understood to be higher ethical criteria – criteria that transcended mere conventions. Indeed, the picture of the conscientious citizen adamantly insisting on her right to conform to social conventions seems almost ludicrous.

Still, we cannot simply proceed to the next metaethical position, but instead must consider two ways in which the claim of conscience might arise within a conventionalist framework. First, we can imagine that, implausible though this may seem, *I*, the objector, *do* claim to be both (a) conventionalist in my understanding of morality and (b) morally opposed to the war. Second, we can imagine the more likely situation in which *I*, the conscientious objector, reject metaethical conventionalism in favor of some more

50. JOHN HARE, WHY BOTHER BEING GOOD? THE PLACE OF GOD IN THE MORAL LIFE 22 (2002).

objectivist view, but *you*, the sovereign, acting as the agent or representative of "society," regard morality as merely conventional in nature.

Consider the first case. Suppose that both I, the objector, and you, the sovereign, understand morality to be purely conventional in nature. We can thus agree there is a moral order that obligates me. But it seems I will be in serious trouble when it comes to my more specific claim that war, or *this* war, is morally wrong. After all, you have concluded – in accordance now with conventional moral principles or commitments – that the war is right and just. So you will believe that my contrary conclusion is mistaken, and that I am accordingly in error in thinking that I am morally forbidden to participate in the war. Particularly if we frame the question as whether "society" should respect a right to conscience, my claim that I am morally required to act contrary to the judgment of society comes to look, according to conventionalist assumptions, not merely mistaken, but deeply confused. It is as if someone were to assert that "etiquette is merely what everyone thinks is proper – no more, no less," but also that "even if everyone thought it was proper to put one's elbows on the table, that would still be bad etiquette." And it seems unlikely that what you perceive as a mistaken and confused opinion will elicit your respect or deference.

E. Conscience and "Deep Conventionalism?"

But perhaps what appears to you to be incoherence in my position could be cured by appealing to a view sometimes described as "deep conventionalism."⁵¹ Ronald Dworkin advocated this view in a comment on Lord Patrick Devlin's famous argument for the legal enforcement of morality.⁵² Dworkin appeared to agree with

51. I take the term "deep conventionalism" from Michael Moore, who interprets both Dworkin and Rawls as deep conventionalists. See MICHAEL S. MOORE, *EDUCATING ONESELF IN PUBLIC* 250-51 (2000).

52. See RONALD DWORKIN, *Liberty and Moralism*, in *TAKING RIGHTS SERIOUSLY* 240, 248 (1978). In his essay on Devlin, Dworkin used different terminology. He distinguished between "anthropological" and "discriminating" senses of morality, with morality "in . . . an anthropological sense[] meaning to refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals," and with morality "in a discriminatory sense" meaning when one "contrast[s] the positions they describe with prejudices, rationalizations, matters of personal aversion or taste, arbitrary

Devlin that the law should sometimes enforce morality, and he even seemed to share Devlin's apparent acceptance of the conventional nature of morality.⁵³ However, he disagreed sharply with Devlin's view that the content of a society's conventional morality is necessarily what the members of the society consciously think it is.⁵⁴

Thus, Dworkin argued that a judgment or position, in order to count as a "moral position," must satisfy a set of regulatory criteria.⁵⁵ The judgment must be grounded in "reasons," not in "prejudice" or "a personal emotional reaction."⁵⁶ If the judgment is based upon a proposition of fact, that proposition must be consistent with the evidence.⁵⁷ The opinion must not be a manifestation of mere unreflective "parroting" of the teachings of tradition, or of a religious or other authority.⁵⁸ The judgment also must be consistent with other judgments endorsed by the person or the society; this requirement entails that the judgment must reflect some implicit "general [moral] principle or theory" that is potentially susceptible to consistent elaboration, though not everyone who holds the opinion need be capable of articulating that theory.⁵⁹ Only if a judgment can satisfy these regulatory criteria can it qualify as part of a "moral position."⁶⁰ So the application of these regulatory criteria might culminate in the conclusion that the actual "moral position" of a particular society is something quite different than what the members of that society consciously think it is.⁶¹

In a similar vein, it is imaginable that even though I, the claimant in conscience, assert a moral judgment quite different than yours and society's, my claim could nonetheless be translated into the terms of "deep conventionalism." "It is true," I might say, "that if we did a Gallup Poll we would probably find that most members of this society say they believe this war is just and right. That is the opinion that most people *think* they hold. But upon re-

stands, and the like." *Id.* at 248.

53. *See id.* at 249.

54. *See id.* at 254.

55. *See id.* at 249.

56. *See id.* at 249-50.

57. *See id.* at 250.

58. *See id.*

59. *See id.* at 249.

60. *See id.*

61. *See id.* at 254.

flection, we can see that the pro-war opinion is based not upon reason, but rather upon prejudice, emotion, false information, or a parroting of the pronouncements of influential authorities. Conversely, if we screen out those impermissible influences and consider the issue in light of other moral judgments and values more reflectively held in the society, we will see that the society's conventional morality *really* points to the immorality of the war, even though not many members of the society *realize* this. It is that deeper and more reflective, though still conventional, moral view that informs my conscientious refusal to participate in the war."

Might the case for conscience be successfully made on "deep conventionalist" grounds? In the first place, even if claimants in conscience *could* frame their position in this way without falling into incoherence, it still seems unlikely that many such claimants would in fact be drawn to this somewhat insipid argument. "Although morality is nothing more than conventions, I think *I* understand this society's moral conventions better than society itself does, or at least better than most of its members do." This is a position hardly calculated to inspire declarations of: "Here I stand! I can do no other!"

Yet even if I, the objector, were inclined to make this appeal to deep conventionalism, my appeal would prompt us to ask another question: Where exactly did Dworkin's regulatory criteria for conventional morality – for screening out a society's "moral position" judgments based upon prejudice, emotion, inaccurate information or parroting – come from? How did these criteria for rationality gain their authority to judge and reform the content of conventional morality? One possibility is that reason and its corollary condemnations of prejudice, emotion and parroting just *are* valid regulatory criteria independent of any particular conventional morality. They are, in some sense, just "givens;" they are objective and transcultural criteria that all judgments simply must satisfy to be certified as "moral." This picture is familiar enough; indeed in the Enlightenment tradition it is almost platitudinous that opinions, conventions and traditions must be tried and judged before the bar of "reason."⁶² But if we understand the constraints

62. See VITTORIO HOSLE, *OBJECTIVE IDEALISM, ETHICS, AND POLITICS* 41 (1998) (describing the aspiration to "bring the Enlightenment into its truth: no external validity claims are accepted; every authority has to justify itself before reason.").

of reason on morality in this way, we have departed from a conventionalist understanding of the nature of morality in favor of a more "objectivist" view. We have said that "reason" and its corollaries are objectively obligatory whether the conventions of our society say so or not. Thus, as a metaethical conventionalist, you the sovereign are bound to reject this account.

Conversely, we might argue that Dworkin's regulatory criteria gain their force not from any outside or objective source, but rather from our conventions themselves. It might just happen, in other words, that in rummaging through the conventions of our particular culture or society we find commitments to act on reason, to avoid prejudice, emotion and parroting, to act only on an at least implicit coherent general theory, and so forth. In his comment on Devlin, Ronald Dworkin explicitly adopted this tactic. It is because we have conventional commitments to reason, Dworkin insisted, that reasoned judgments are more accurate statements of society's conventional morality than even pervasively held but less reasoned opinions are.⁶³

This account of morality, however, still leaves me, the claimant in conscience, with a serious difficulty in making my case. Our problem assumes, initially, that my view that war is immoral is contrary to what most members of society (including you, the sovereign) believe about morality. After all, that is why I am appearing in the role of conscientious *dissenter*. Dworkin's account suggests, though, that I might remind you (and society in general, which we suppose you to represent) that you also believe that in making moral evaluations you should act only on reason, should screen out prejudices and emotions, and so forth.⁶⁴ I might also try to convince you that if you reflect on the issues of war and peace in this more reasoned way you will join me in concluding that war is immoral. Suppose I make this argument. It is conceivable that I might convince you. In that case, my view will have become yours (and society's) and I need no longer play the part of conscientious dissenter.

Now suppose, as seems more likely, that I do *not* convince you. Perhaps you (and thus society) disagree from the beginning with my assertion that people are committed to acting on reason,

63. See DWORKIN, *supra* note 52, at 254-55.

64. See *id.*

avoiding emotion and the like. Or, more plausibly, suppose you acknowledge these regulatory criteria but disagree that reasoning in this way leads to my conclusion that war is immoral. *Now* is it coherent to continue to maintain that my judgment about the immorality of war is still meaningful, and at least conceivably correct, on conventionalist assumptions?

If the society rejects my (or Dworkin's) regulatory criteria, then it seems my argument is doomed from the start; the argument depends upon ostensibly conventionalist commitments that do not exist. But even if you accept those regulatory criteria as being among your conventional commitments while rejecting my view that they lead to my conclusion, it seems that my case is no longer cognizable as coherent within the conventionalist framework. This is because if "reason" and its supposed corollaries have their force *only as a matter of convention*, then they also have *only the meaning and only as much force as the conventions give them*, and they must operate in the way the conventions prescribe.⁶⁵ Indeed, the bare fact that you (and society in general) disagree with my specific conclusion seems sufficient to demonstrate that I am not using reason and its corollaries in the conventional way.

In short, in being idiosyncratic I cannot plausibly claim to be – or be viewed as being – more truly conventional than the conventions themselves. Thus, if I try to press my objection on purely conventionalist grounds, I should come across as not merely mistaken but profoundly confused, and there seems to be no particularly plausible reason to suppose that profoundly confused people deserve special deference under the law.

F. *The Objectivist Objector in the Conventionalist Culture*

I might, however, still claim to be unconventional but *right*. And of course this is exactly what the conscientious dissenter typically does claim. This claim can make sense *on objectivist assumptions*.

To be sure, if you, the sovereign, reject those objectivist as-

65. In this respect, it might fairly be argued that Dworkin's is the "shallow" version of conventional morality; it fails to appreciate conventional morality's subtle capacity to embrace multiple, competing commitments and considerations, holding them in active tension without allowing one or a few of them to expand to their logical conclusions and thereby to crowd out other logically incompatible commitments and considerations.

sumptions in favor of conventionalism, then this claim will for you simply be further evidence that I am misguided and wrong – doubly wrong, in fact, because I am wrong not only in my specific judgment that the war is morally wrong, but also, more generally, in my understanding of what morality is. But of course the sovereign or the society will by hypothesis *always* think the conscientious objector is mistaken; if they did not, then they would accept the objector's views and the objector would no longer have anything to object to. Despite this fundamental disagreement, we saw that the sovereign who believes in objective morality and who also believes in the special importance of "authenticity" as a moral value or virtue might have reason to excuse even the mistaken objector from compliance with a law. Is the same possibility available with respect to the sovereign who thinks morality is purely conventional in nature?

Contrary to my first reaction, I have been persuaded⁶⁶ that, at least in theory, this possibility is a real one. That is, if we overlook its serious internal difficulties and suppose that conventionalism is a plausible and coherent metaethical position,⁶⁷ then we should also admit the theoretical possibility of a conventionalist society whose conventions place high value on individual authenticity – not because such authenticity is an objective moral value (because in this society's view there is no "objective" morality), and not because individuals themselves prescribe authenticity or judge it to be valuable (because individuals do not get to determine the content of morality), but rather because it just so happens that the conventions of this particular culture value individual authenticity. In other words, there is no morality independent of conven-

66. Mainly by Chris Eberle.

67. A conventionalist metaethics position arguably falls into difficulties because in their actual primary use moral terms and judgments are not easily reduced to statements about the conventions of a society. Conventional moral judgments, in other words, seem to be judgments about something other than conventions. If the "wrong" in the statement "cheating is wrong" is rendered as "believed in this culture or society to be wrong," then what does "wrong" in the latter phrase mean? An infinite regress threatens: "In this society most people believe that in this society most people believe that in this society most people believe . . ." And in any case, that sort of rendition is almost surely *not* what people in this society are saying when they say, for example, that "cheating is wrong." For present purposes, though, we need to overlook such embarrassments and assume that metaethical conventionalism is a plausible and coherent position.

tional social norms, but those norms happen to prize individual authenticity. The case would be like that of the despotic but eccentric CEO who says: "Around here, my will is law, there is no authority except me, and what I say goes; but I just happen to like spunky employees who resist and talk back to me." Or like the bumper stickers that command us to "Question Authority." Such a position seems deeply unstable, but that does not mean it is unimaginable. In fact, something like this view may have flourished in, for example, some sectors of 1960's America.⁶⁸

As the sovereign of this conventionalist society, you might thus conclude that even though I am mistaken both in my specific moral judgments and my overall understanding of morality, the social commitment to authenticity means that I should be permitted to act in accordance with my doubly mistaken but sincere beliefs. Thus, moral conventionalism, if it is possible at all, seemingly *could* support respect for claims of conscience. Before moving on, however, we should note some difficulties inherent in this position.

First, within a conventionalist framework the claimant in conscience needs to be lucky. He or she needs to hope that the particular society just happens to place high value on individual authenticity, because if it does not there is nothing much to be said – or at least no outside moral value or standard to invoke – to convince it that it *should* regard authenticity as an important moral value. If morality is determined by conventions then there is nothing independent of the conventions that could serve to evaluate or correct them.

Second, there is a serious internal tension with the image of a thoroughly conventionalist culture that places high value on individual authenticity – a tension that makes such a culture not necessarily impossible, but at least improbable and unstable. Conventionalism and authenticity describe moral orientations and commitments that are, if not antithetical, at least deeply suspicious of each other. For conventionalism, social practices and beliefs are the locus and essence of morality, and our duty is to

68. My own view, however, is that for reasons suggested in the previous footnote, a *self-consciously and coherently conventionalist* culture (with or without a commitment to authenticity) probably has not existed and could not exist.

conform to them.⁶⁹ Authenticity preaches the opposite, holding that our moral sources are within (or at least *speak* within) each of us as individuals, and that we must resist outside efforts to induce conformity.⁷⁰ Charles Taylor explains that the ideal of authenticity is wary of “the pressures towards outward conformity;”⁷¹ it insists instead that “[t]here is a certain way of being human that is *my way*. I am called upon to live my life in this way, and not in imitation of anyone else’s.”⁷² Consequently, it is hard to imagine an enduring and mutually respectful relation between authenticity and moral conventionalism; each seems bound to resist and defy rather than respect or defer to the other.

G. *The Subjectivist Conscience*

If conventionalism and authenticity are natural adversaries, subjectivism, by contrast, would seem to be authenticity’s intimate ally. Indeed, the terms “subjectivism” and “authenticity” seem to name, if not the *same* commitment, at least commitments that nicely complement each other. Subjectivism says that what is moral arises from something within *me* – my will or my attitudes, approving and disapproving, prescribing and forbidding.⁷³ Authenticity says that I should live in a way that is true to my inner self.⁷⁴

At first look, therefore, it may appear that metaethical subjectivism provides the ideal foundation for conscience. But the appearance is misleading. On closer inspection, moral subjectivism subverts or even negates the case for conscience.

Suppose that I, the would-be claimant in conscience, affirm subjectivism as a metaethical position. Upon first reflection (and also, I believe, upon third reflection, or even tenth reflection) this position makes it difficult for me to give a satisfying account of what I even mean when I say that some particular conviction is a “moral” conviction, or to distinguish my “moral” judgments or attitudes from other kinds of judgments or attitudes of approval or disapproval, liking or disliking. In an objectivist framework I

69. See Pigden, *supra* note 24, at 429.

70. See TAYLOR, *supra* note 45, at 29.

71. *Id.*

72. *Id.* at 28-29.

73. See *id.*

74. See, e.g., *id.* at 29.

could say, for example that my view that cheating is wrong was a "moral" conviction because it expressed my judgment about a standard independent of my own attitudes about cheating. In this way, a statement like "cheating is wrong" is importantly different than a statement like, for instance, "brussel sprouts are disgusting," or "country western music is annoying," because as commonly understood those statements do not purport to be anything other than reports of my personal attitudes or tastes. But if I now embrace a metaethics which holds that my moral judgments are likewise merely expressions of my personal attitudes or acts of will and *not* judgments about the application of truths or principles independent of such attitudes or acts of will, then it is no longer clear how my moral judgments are different in kind or different in any way that makes "morality" significant or distinctively more valuable than other attitudes, tastes, desires or acts of will.

For similar reasons, even if you, the sovereign, embrace subjectivism and place high value on authenticity⁷⁵ it is not clear how you would distinguish between my "moral" and my "nonmoral" subjective attitudes, preferences or commitments. And even if you do manage to draw this distinction, it is not clear why you should give greater deference to my "moral" judgments – or, for that matter, why you should treat them as more central to my "authenticity" – than my other desires, preferences and attitudes. To be sure, if we want to we still *can* find ways to distinguish those subjective states or acts of mind to which we attach the adjective "moral" from other states or acts of mind for which we do not typically use that adjective. Modern moral theorists have proposed many ways of sorting our attitudes or judgments into the categories of "moral" and "nonmoral." However, even if we do this it remains unclear why, on subjectivist metaethical assumptions, "moral" attitudes or acts of will should enjoy any greater dignity or receive greater deference than other attitudes or acts of will – namely, other tastes, likes, preferences, commitments and so forth.

Thus, following the teachings of various modern philosophers, we might say that although "moral" judgments or prescriptions –

75. Within a consistently subjectivist framework, it is not clear why you should place high value on *my* authenticity, but you *could* adopt this valuation.

such as “war is wrong” or “do not cheat” – and desires, likes or tastes – like “I do not want to go to war,” or “cheating disgusts me” – are all in a sense subjective, rather than being the application of some independent and objective standard, “moral” judgments or prescriptions are nonetheless distinguishable because they can be measured against some criterion, such as rational consistency or, perhaps, “universality.” To count as “moral,” perhaps my judgment needs to be something that I can consistently will to be a universal law, or that I prescribe for everyone and not just for myself.⁷⁶

Let us concede, at least for purposes of argument, that a detached observer – an anthropologist, perhaps, or a linguist – would after careful study determine that some such criteria do in fact serve to distinguish the judgments, attitudes, or prescriptions that in our culture are classified as “moral” from other subjective states. How does the observation that the subjective attitudes or judgments that we call “moral” accept a standard of rationality or universality somehow elevate those “moral” attitudes or judgments above other subjective states of mind or acts of will? How does this difference give “moral” judgments greater dignity or greater entitlement to respect or deference from the state or from society? In short, as acting agents and not detached anthropologists or linguists, why should we attach importance to a distinction between those subjective states capable of being classified as rationally consistent or inconsistent and those that are not? Supposing that we *can* make and apply this distinction, why *should*

76. The most famous version of this idea is surely Kant's first formulation of the categorical imperative: “I ought never to act except in such a way *that I can also will that my maxim should become a universal law.*” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 70 (H. J. Paton trans., Harper & Row 1964) (1785). However, a similar idea also appears in very differently-minded thinkers. See, e.g., JEAN-PAUL SARTRE: *BASIC WRITINGS* 30-31 (Stephen Priest ed., 2001). Jean-Paul Sartre claimed that

[w]hen a man commits himself to anything, fully realising that he is not only choosing what he will be, but is thereby at the same time a legislator deciding for the whole of mankind – in such a moment a man cannot escape from a sense of complete and profound responsibility. . . . Everything happens to every man as though the whole human race had its eyes fixed upon what he is doing and regulated his conduct accordingly.

Id.

we?⁷⁷

Within an objectivist framework there is an obvious answer to these questions. "Moral" beliefs are supposed to be about an objective moral order and they can accordingly be true or false, and rationality is one of our standard devices for assessing whether particular moral judgments are in fact true or false. Take away the belief in an objective moral order, however, and rationality loses this function. To continue to examine our individual attitudes of approval or disapproval for rational consistency now comes to seem quite pointless. It hardly seems enough to say: "Well, obviously, it's always good to be 'rational,' or to act in accordance with 'reason,' isn't it?"⁷⁸ *Why* is it good? More specifically, why is it good to subject ourselves to "reason" in an area in which "reason" is no longer thought to be a method or faculty for discerning objective truth?

In this context, nurturing an ongoing commitment to rationality seems much like continuing to perform some regular ritual to a deity we have ceased to believe in, based upon the premise that even though the original grounds for performing the ritual no longer apply, we should still acknowledge that "piety" is a virtue. At one time, asked why we were performing the ritual, we would have said: "To placate the gods." Now we explain: "Well, we understand by now that the gods do not exist, but that doesn't excuse us from obligations of 'piety,' does it?" How powerful is that explanation? In a similar way, maintaining a commitment to rationality even when rationality no longer serves its erstwhile function of

77. We *can* after all distinguish among our various subjective states in all sorts of ways. We can distinguish between relatively transitory wants and enduring ones, between intense feelings and relatively less powerful ones, and between desires for immediate gratification and desires for more long-term fulfillment. Any of these distinctions may seem significant for some purposes but not for others. We can also draw further distinctions – between attitudes named in one-syllable words (e.g., "faith," "hope" or "love") and attitudes named in multi-syllable words (e.g., "diffidence" or "obstreperousness"), or between wishes formed on Monday through Wednesday and wishes formed on Thursday through Sunday – that seem irrelevant to any conceivable purpose. The fact that we can make a distinction does not make it important. Similarly, the fact that a distinction is important for some purposes does not make it important for other purposes.

78. Cf. SIMON BLACKBURN, *BEING GOOD: AN INTRODUCTION TO ETHICS* 109 (2001) ("Philosophers, of course, are professionally wedded to reasoning, so it is natural for them to hope that we can find Reasons.").

disclosing objective truth comes to seem, well, almost *irrational*.

The proponent of "reason" might respond that rational consistency in our evaluations is still valuable as a matter of good intellectual housekeeping. Although "reason" in moral matters does not guide us to objective truth, as we had fondly supposed, at least it keeps our evaluative inventories orderly.⁷⁹ But it seems obvious that evaluative inventories are in this respect like professors' offices: the need or desire for orderliness fluctuates from person to person. We do not necessarily admire the person who is driven by a passion for tidiness; at some point we find the person pitiable, as we pity the obsessive hand-washer or the Adrian Monk detective who cannot abide the thought that all the umbrellas on the rack are not pointing the same way. Thus if morality, and hence conscience, are reduced to evaluative orderliness, the case for special deference from society or the state seems exceedingly frail.

Conversely, suppose I announce that even though there is no objective morality – so that demanding rational consistency of moral views cannot be viewed as a means of apprehending objective moral truth – nonetheless *I* remain committed to being rational in my moral evaluations and I accordingly find it important to distinguish my subjective states that are susceptible of being or not being rationally consistent with those subjective states that lack this quality.⁸⁰ I label the first sort of subjective states "moral"

79. In an essay on Kant entitled *Vindicating Reason*, Onora O'Neill advocates essentially this view. See O'Neill, *supra* note 36, at 280-89. In O'Neill's interpretation, Kant shows and acknowledges the failure of a "classical" conception of reason based on a supposed "correspondence of reason to reality." *Id.* at 282. Reason remains obligatory, however, but now for a different purpose: "[R]eason is only a *precept* or prescription to seek unity" in our understanding. *Id.* at 284. So it seems that reason is not the means of apprehending objective truth, but rather a matter of intellectual orderliness.

80. On purely subjectivist assumptions, though, it is not so clear that "moral" judgments are more or less capable of being consistent or inconsistent than some other subjective states are. It at least seems inconsistent, for instance, for someone to say she has a taste for "sweet and sour" pork. Aren't sweet and sour opposites? Or suppose someone says that she likes loud, fast music, but also quiet, slow music. Is there a contradiction there? The question is complicated, but it seems that we regard even opposite descriptive terms as in contradiction to each other only when they are offered as *descriptions* – even as *simultaneous* descriptions – of the same object. Insofar as mental states of disapproval are not understood as descriptions of any objective moral reality, therefore, it is not clear how they can be in rational contradiction to each other.

to set them apart, and I describe actions dictated by those moral states as being based upon "conscience." Within a subjectivist framework, there is perhaps nothing to stop me from adopting this vocabulary, and this scheme of values; if rational consistency is important to me, then that is what matters, and who has standing to say that I am wrong (wrong *for me*, that is)?

But now we come back to the hard question: Is there any reason for *you*, the sovereign, to give special respect to this scheme I have adopted? It is hard to see how there can be. Why should the desires and decisions of the person who nurtures a purely subjective commitment to rational evaluative consistency be any more worthy of admiration or deference than other desires and decisions that are not so constrained? A subjective preference for rational evaluative consistency can claim no more dignity than a subjective preference for anything else – for whimsy,⁸¹ perhaps, or unconstrained evaluative spontaneity.

H. Nihilism and the Annihilation of Conscience

We need not linger over the fourth response to the metaethical question – nihilism – both because few people openly embrace that view⁸² and because the nihilistic response would quite plainly nullify the case for respecting conscience. Most obviously I, as a conscientious objector, can hardly affirm nihilism as a metaethical position. I cannot say, "I decline to serve in the war because I believe war is morally wrong," and also, "by the way, 'morality' is illusory – a sham." Or rather, I *can* say this but in doing so I cut the ground out from under any claim that my judgments of conscience have some special dignity warranting respect.

Suppose, though, that I am *not* a moral nihilist but that you the sovereign *are*. The prospects for conscience still look bleak. You might acknowledge that my belief in the immorality of war is *sincere*, just as the atheist can acknowledge the sincerity of the believer's profession of faith; but you will be bound to regard my sincere belief as *false*, and in a particularly egregious sense. Now I

81. Emerson stated that "I would write on the lintels of the door-post, *Whim*," Emerson, *supra* note 49, at 261, and, more famously, that "[a] foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do." *Id.* at 263.

82. *But see* RIST, *supra* note 29, at 45.

am not like the person who is merely mistaken about a matter of fact (such as the law student who thinks John Marshall was the first Chief Justice), or even like the person with a bizarre evaluative judgment (such as the critic who thinks Ogden Nash was a greater poet than Milton); now I believe in a whole order or dimension of reality that in fact does not exist (in your view). Regarding me as deluded, you are not likely to conclude that my delusional judgments are especially worthy of respect and deference.⁸³

But the case is worse yet. Though they thought I was mistaken, the sovereigns who believed in a moral order of some sort could at least regard my plea – “you *ought to* respect my conscience” – as meaningful. By contrast, for you, the nihilist sovereign, the “ought” makes the plea itself nonsensical unless, perhaps, it is taken in some purely instrumentalist sense that my claim of conscience fails to elucidate and that you are unlikely to find convincing. Hence, within a nihilistic framework the case for conscience cannot even get off the ground.

III. CONCLUSION: THE DECLENSION OF CONSCIENCE

“A person should always follow his or her conscience.” That proposition comes to being tautologically true. But why should *society*, or *the state*, respect and possibly defer to what it believes to be an erroneous judgment of conscience (which is precisely the situation in which “freedom of conscience” has practical significance)?

Our discussion suggests that freedom of conscience can thrive only in rarified environments. Except in a peculiar and deeply unstable kind of conventionalist culture, the case for conscience seems to depend on metaethical objectivism – on a commitment to the idea that morality is in some sense natural, given, or objectively true. But that is not enough; even within an objectivist framework, some moral positions do, and some do not, justify giving respect to erroneous judgments of conscience. More specifically, it seems that freedom of conscience depends on a moral

83. As Kathleen Brady points out, though, you might still have pragmatic grounds for deferring to my (severely deluded, in your view) “conscience.” Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger than You Might Think*, 10 ROGER WILLIAMS U. L. REV. 359, 362-65 (2005).

position that assigns preeminent value to something like "authenticity," even over conduct that conforms to objective moral truth.

The modern discourse of conscience thus presents a puzzle. Generalizing, we might say that over the centuries since Thomas More and Roger Williams solemnly invoked conscience, the then prevailing metaethical objectivism has come to be highly contested, at least in the more reflective sectors of our society, and at least in some neighborhoods has been to a significant extent displaced by varieties of conventionalism, subjectivism, and (occasionally) nihilism.⁸⁴ At the same time, though, the theme of freedom of conscience has arguably become more widespread and commonplace – perhaps even platitudinous – in our public rhetoric. Thus, as the assumptions under which the case for freedom of conscience is strongest have become embattled, the opinion favoring that freedom has, if anything, become less and less controversial.

What to make of this situation? One natural inference is that the modern invocation of freedom of conscience is partly parasitic on older ways of thinking that many of those who invoke conscience today might find problematic. Another speculation is that if we look closely at the modern invocations of conscience we will find uncertainty, confusion, and perhaps even a kind of degradation. Which of course brings us back to the observations with which this essay began.

84. Cf. RIST, *supra* note 29, at 1 (observing that metaethical discussion "is at present carried on largely within academic departments of philosophy, where it is widely believed that not only transcendental realism . . . but even much weaker forms of moral objectivism have already been emasculated if not killed off outright.").