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INDIVIDUAL CONSCIENCE AND THE LAW

*Laura S. Underkuffler**

Professor Washington's essay explores two interrelated questions: first, what conscience is; and second, what its role should be in jurisprudence or in law.[1]

Conscience, as it is traditionally understood, has two characteristics. It is claimed to somehow be of God, therefore implicating a sovereignty above the state. It is also something invoked by the individual and, almost more importantly, defined by the individual, therefore reflecting subjective concepts chosen by the individual alone.

I think that we would all agree that these characteristics in fact identify very deep problems that run throughout the intersection of religion and law. To the extent that conscience is a totally subjective concept, its collision with civil government is inevitable. If conscience is of God, and therefore implicates a sovereignty above the state, and if it is something that is invoked by the individual and defined by the individual, then this leaves the individual's adherence to collective norms up to individual choice.[2] Moreover, the potential

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1. James M. Washington, *The Crisis in the Sanctity of Conscience in American Jurisprudence*, 42 DEPAUL L. REV. 11 (1992).

2. The United States Supreme Court, in its early cases, defined religion in traditional, theistic terms. *See* United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (defining religion as "a belief in a relation to God involving duties superior to those arising from any human relation"); Davis v. Beason, 133 U.S. 333, 342 (1890) (defining religion as "one's views of his relations with his Creator"). The Court then moved to a nontheistic definition. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."). At other times, the Court has defined religion as something that is explicitly left to the declaration of the individual adherent. *See* United States v. Ballard, 322 U.S. 76, 86-87 (1944) ("Men may believe what they cannot prove. . . . Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean they can be made suspect before the law.").

The problems inherent in combining individually defined religion with First Amendment guarantees were recognized by the Court in *Employment Division v. Smith*, 494 U.S. 872 (1990). Faced with the principle that " '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of these creeds,' " the Court held that constitutional protection of asserted religious belief must yield.

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scope of this individual choice is unlimited — an example of this being the claim of Christian fundamentalists that majority-use school textbooks reflect secular humanism, thereby violating the Establishment Clause and coercively interfering with the exercise of those individuals' religious beliefs.[3]

Professor Washington traces historical responses to this conflict, which have ranged from a simple assertion of the state's power over individual conscience[4] to the state's efforts to "privatize" conscience as something which may be a part of private, religious exercise but which has no role in the public sphere.[5] He also discusses what could be called the evisceration of the concept of individual conscience through state co-optation. He argues that references to the sanctity of individual conscience became so commonplace and were so unexamined that they lost all meaning.[6]

The problem of reconciling conscience with state authority could be attacked by challenging the fundamental characteristics of the concept of individual conscience itself. First, we could attack the notion that conscience is of God or implicates a sovereignty above

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Id. at 887 (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)). This "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* Accommodation of religious belief must be left to the "political process". *Id.* at 890.

3. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (rejecting complainant's contention that a prescribed set of reading textbooks in the public schools promoted evolution, secular humanism, futuristic supernaturalism, and pacifism, in violation of the Free Exercise Clause), *cert. denied*, 484 U.S. 1066 (1988). *See also* Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 975 (S.D. Ala.) (claiming that "a man-centered belief-system . . . [known] by the appellation 'secular humanism,' [was] promoted in the public schools to the detriment of their children's first amendment right of free exercise, all in violation of the establishment clause"), *rev'd*, 827 F.2d 684 (11th Cir. 1987); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (challenging two exhibitions containing references to evolution at the Smithsonian Museum of Natural History, on the ground that they supported the religion of secular humanism in violation of the Establishment and Free Exercise Clauses).

Claims of similar breadth have also been made in the employment context. In one constellation of recent cases, religious employees as diverse as "fundamentalist" Christians, Agudath Israel, the Roman Catholic Church, and the Salvation Army, resisted enforcement of state and municipal civil rights laws prohibiting discrimination in employment on the basis of religion, sex, marital status, or affectional preferences, on the ground that acquiescence would be contrary to the free exercise of the employer's religious beliefs. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 766 F.2d 932 (6th Cir. 1985), *rev'd and remanded on other grounds*, 477 U.S. 619 (1986); *In re* State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *dismissed for lack of juris.*, 478 U.S. 1015 (1986); Under 21, Catholic Home Bureau for Dependant Children v. City of New York, 482 N.E.2d 1 (N.Y. 1985).

4. Washington, *supra* note 1, at 13-14.

5. *Id.* at 20-21.

6. *Id.* at 22.

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the state. The threat to the state that individual conscience presents would be eliminated, under this approach, by its reduction from something that reflects transcendent reality to a mere statement of individual consciousness. Conscience would simply be a "byproduct of intelligence," not something of sacred origin.[7] It would simply be another human characteristic or value, with no particular standing above other human characteristics or values.[8]

The second way to approach the problem would be to attack the notion that conscience is something that is defined by the individual. Instead, we could substitute some kind of "objective" concept, based upon principles or norms that all individuals in the society are assumed to share. Conscience, as "objectively" defined, could then be used as an operative legal principle to constrain state action. This is the solution chosen by Professor Washington in his conclusion that conscience should be redefined as "adherence to the sanctity of the body."[9] Only after such redefinition, he argues, will conscience be able to play a meaningful role in such areas as the preservation of religious liberty, the preservation of individual bodily integrity, and freedom from compulsory military service.[10]

From the point of view of the interaction of religion with law, would anything be lost if we took Professor Washington's approach? Would there be any loss if we substituted a collectively defined or collectively determined notion of conscience for one that is individually defined? There might be potential loss to religion, depending upon how that is defined, and I think that many of the other speakers have discussed this. The question I would like to ask is this: Would there be any loss to law? Would there be any loss to the collective, which is concerned about the development and enforcement of collective judgments?

I would like to suggest that the answer lies in how we see conscience standing in relationship to law. I think it could be seen in one of two ways. Conscience could be seen as something *interposed between* the individual and the state — an example of this, of course, being conscientious objection, one of the foci of Professor Washington's remarks. Conscience could also be viewed, however,

7. *Id.* at 29.

8. It could be argued that this is what the Supreme Court has done in leaving accommodation of religious practice and belief to the "political process," in *Employment Division v. Smith*. 494 U.S. 872 (1990). *See supra* note 2 (discussing *Smith*).

9. Washington, *supra* note 1, at 24.

10. *Id.*

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as something to be *protected from* the state — an example here being law guaranteeing freedom of religion to protect freedom of conscience.

When conscience is seen as something interposed between the individual and the state, the elimination of the notion that conscience is defined by the individual, and the substitution of some sort of collective judgment, may not create any particular loss to law or the process of law. The fact that the collective has, for instance, determined what recognized "conscientious objection" to collective judgments shall be, may result in the loss in the diversity of individual beliefs, but will not result in any particular loss to law or to the process of law. If, however, conscience is seen as something to be protected from the state, then the result is different. The destruction of the individually defined conscience, understood this way, may well result in a loss to law.

How, you might ask, could this be? I think the answer inheres in the fact that the notion of conscience, in law, involves more than religious belief, generically stated. In fact, it has several characteristics that are of utmost importance. First, it refers to principles that transcend politics and collective decisionmaking; it is, as mentioned above, "of God." To that extent, it is similar to any religious belief; but this is only the beginning point. Second, it implicates the use of reason. One cannot have recourse to conscience without some use of reason. It may be a flawed use in the eyes of others, but there must be some use nonetheless. Third, as generally understood in this culture, at least, conscience involves an element of compulsion. A particular religious practice in a particular religious scheme might be optional under some circumstances, but the meaning of conscience is different. Conscience is, in its essence, inalterable and compelling. And finally, because of its inalterable, compelling nature, I think that conscience is one of the rare instances in the law where there is a recognition of individual responsibility. Again, this may be flawed in the eyes of others — one person's concept of the responsibility imposed by conscience may be different from another's — but it is nonetheless a very rare instance in the law where individual responsibility to define principles and to adhere to them is recognized.

What is the benefit to law from all of this? I agree with many of the articulate spokesmen of the American founding era, whose works I have been studying in connection with this question, who believed that the notion of individually defined conscience is one of

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our few hopes and few protections against the possibility of governmental tyranny. It is important not only for the substantive principles that it yields, but also for the process that it represents. It is one of the few indictments against the use of law or the existence of collective judgments as a justification for the failure to make individual moral inquiry. Isaac Backus wrote, "The free exercises of private judgment, and the unalienable rights of conscience, are of too high a rank and dignity to be submitted to the decrees of councils . . . ."[11] Thomas Jefferson wrote, "We should . . . moralise for ourselves, follow the oracle of conscience . . . ."[12] John Adams referred to the "Liberty of conscience" as "the right of free inquiry and private judgment."[13] He wrote:

> Morals are attributes of spirits *only* when those spirits are *free* as well as intelligent agents, and have consciences or a moral sense, a faculty of discrimination not only between right and wrong, but between good and evil. . . . This freedom of choice and action, united with conscience, necessarily implies a responsibility to a lawgiver and to a law . . . .[14]

Conscience, or "moral respectability," was therefore "necessary to [the people's] own safety, and to orderly government . . . ."[15] Only conscience, rooted in transcendent moral or religious values and imposing a sense of responsibility upon freely reasoning persons, provided the restraint on human conduct necessary for the survival of government by the people.

There is no doubt that leaving conscience (or the ability to defy collective norms) to individual determination carries risks. There is no guarantee, as the Founders recognized, that individuals will not suffer from imperfections in "moral sense,"[16] or, indeed, that all will agree as to what the relevant transcendent or moral principles should be.[17] This difficulty, however, inheres as much in moral

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11. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 529 (1950) (quoting Isaac Backus, Plea to the Constitutional Convention of 1787).

12. Letter of Thomas Jefferson to John Adams (Aug. 22, 1813), *in* 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 367, 368 (Lester J. Cappon ed., 1959).

13. Letter from John Adams to Thomas Jefferson (Jan. 23, 1825), *in* 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 12, 607, 608.

14. Letter of John Adams to John Taylor (1814), *in* "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 105, 105 (Norman Cousins ed., 1958).

15. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 12, at 387, 390.

16. *See, e.g.*, Letter of Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in* "IN GOD WE TRUST", *supra* note 14, at 127.

17. *See* Letter of Thomas Jefferson to Miles King (Sept. 26, 1814), *in* "IN GOD WE TRUST",

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norms collectively chosen, as in those defined by individuals; the prevalence with which particular beliefs are held does not indicate their degree of congruence with abstract moral truth (if, indeed such exists, and we, as human beings, are able to perceive it). Individually defined conscience has, in fact, often provided the only contemporary voice against what we now universally agree to have been atrocities in human history.

Individually defined conscience may lead to claimed individual actions as above the law, which we as a society do not wish to recognize or which are repugnant to our own individual beliefs. But as frail and as flawed as it is, individually defined conscience is still a rare instance in the law where individual responsibility to determine moral norms is recognized. It is probably unique in that respect. I therefore believe that as tempting as the clarity of a collective definition might be, the sacrifice of individually defined conscience, and the substitution of some collectively or externally determined norm, would lead to a greater loss to law and to the processes of law.

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supra note 14, at 144 (discussing the existence of cross-cultural, transcendent moral norms); Letter of Thomas Jefferson to James Fishback (Sept. 27, 1809), *in* "IN GOD WE TRUST", *supra* note 14, at 138 (same); Letter of Thomas Jefferson to Thomas Leiper (Jan. 21, 1809), *in* "IN GOD WE TRUST", *supra* note 14, at 138 (same).

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