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Douglas Sturm

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REPENTANCE, CONSTITUTIONALISM, AND SACRALITY

*Douglas Sturm**

Let me begin by expressing deep thanks to James Washington for his provocative essay.¹ He has adopted an original tack on the topic of this panel, namely, "An Historical Perspective of Religion's Views of the Law of Church and State." His focus on the meaning of conscience and the manner in which freedom of conscience constitutes a central political and religious question in the modern age is refreshing. As intended, his remarks are suggestive and bristle with multiple possibilities and problems. I am particularly drawn to his constructive suggestion that within our contemporary cultural milieu, conscience be reinterpreted for constitutional purposes as "adherence to the sanctity of the body."² He further suggests that as a consequence of that reinterpretation, the First Amendment be construed as providing protection of the bodily integrity of all citizens, indeed all persons, if not all kinds and conditions of life, as a "primal natural right."³ As he is surely aware, that consequence may be construed, as a Karl Llewellyn would remind us, either narrowly or broadly.⁴ Given Washington's reference to the Native American belief in the sacredness of the land and how that belief bears on the practice and theory of ownership,⁵ I suspect he would want that reinterpretation construed most broadly.

I have organized my remarks on the topic of "An Historical Perspective of Religion's Views of Law of Church and State" around three themes: repentance, constitutionalism, and sacrality. While these remarks are not in direct and explicit response to Washington's statement, they do bear on his concerns. In substance, the

* Professor of Religion and Political Science, Bucknell University. This Essay is a revised version of comments presented on December 6 and 7, 1991, at the Conference on the Bicentennial of the Bill of Rights sponsored by the Center for Church/State Studies, DePaul University College of Law.

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

2. *Id.* at 24.

3. *Id.*

4. See KARL LLEWELLYN, *JURISPRUDENCE* (1962); KARL LLEWELLYN, *BRAMBLE BUSH* (1960).

5. Washington, *supra* note 1, at 24 n.53.

three themes overlap, but I distinguish them for ease of organization and presentation.

REPENTANCE

At this conference, we are commemorating the day on which the final ratification of the American Bill of Rights was announced, December 15, 1791. But, lest we romanticize that moment and its significance, I remind you that the Bill of Rights was born of political compromise. It was the result of a rough and tumble political struggle to establish a new constitution and became, upon ratification, an integral part of that constitution.

That constitution, and more inclusively, this nation, were founded in conquest. To be blunt, the Constitution, with its preamble about justice, the general welfare, and the blessing of liberty, was a pack of lies. When we reflect on the origins of this nation, we must, if we are honest, give full acknowledgement to this fact and we should, if we are at all sensitive to its implications, be driven to repentance. On a personal level, I confess that since my college days — when the dark side of American history became evident to me — I have never been a comfortable citizen of this country. However, in many respects, I love it dearly — including many aspects and aspirations of its constitutional statement. It is so easy to neglect the sheer viciousness of our corporate history. We forget, to our detriment, that this nation was born in violence, both direct and indirect — through the massacre of thousands upon thousands of Native Americans, through the exploitation and erosion of the earth, through the enslavement of thousands upon thousands of Africans, and through the deliberate suppression of one-half of the population of people who settled on the land (i.e., women).

As we are told, during this time of presumed celebration, that the Bill of Rights is a prototypical charter of liberty, we must remember that the liberty promised therein was at best a half-truth, that many of the people who lived on this land were deliberately, even forcibly, excluded from the privileges and immunities declared in that document. This remains true, sad to say, even today. If I understand correctly, James Washington — given his references and allusions — would agree with me. He proposes, through his tendentious, but tantalizing, extension of the religion clauses, to embrace conscience understood as “adherence to the sanctity of the body,” the rectifica-

tion of this wrong.⁶ In short, what he proposes would entail a development from deep repentance to radical reformation. Let us, he suggests, at long last take with eminent seriousness the religion clauses as signifying respect for the sanctity of all life in its material and corporate embodiment. He would, out of a religious sensibility, press the judicial community to repudiate the hypocrisies of our national and constitutional past and to take the First Amendment religion clauses with utmost seriousness to their furthest implications.

CONSTITUTIONALISM

Charles Howard McIlwain, throughout his extensive studies of Western political thought, suggests that the minimal meaning of constitutionalism is "limited government."⁷ The tradition of constitutionalism emerged from the idea that governments, by virtue of their proper purposes as well as their temptations, must be circumscribed. They must be bounded. We must therefore define with some care the arenas of our life into which governments must not be permitted to intrude even as we define what role governments properly fulfill in our common life. As an historian, McIlwain was keenly aware that over the course of centuries, the precise character of the limits to governmental action was a source of constant debate and was susceptible to alteration and change.

Without neglecting the hypocrisy of the Bill of Rights' promises at the time it was ratified and throughout subsequent centuries, we may nonetheless conceive of it at its best (together with its historical counterpart, the French Declaration of the Rights of Citizen and Man [sic]) as a milestone in the history of constitutionalism. These proclaimed rights constitute a set of liberties, immunities, and privileges that citizens possess and that may not be — except for compelling reasons, ultimately grounded in those rights themselves — modified or denied by governmental powers. They constitute a boundary for governmental action.

It is significant — even if only, in a sense, an accident of history — that the first of the rights stated in the Bill of Rights as ratified has to do with religion. The placement is fitting, given the significance of religion in our human history. Yet therein lies an extraordinarily difficult conceptual problem with both theoretical and practi-

6. *Id.* at 26.

7. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1947).

cal import: What is the meaning of religion? How are we to construe what sorts of understandings and practices are embraced by the notion of religion? That has long been a puzzle in religious studies and has been a puzzle in judicial decisions as well.

As Washington has noted, for some time in the West and in this nation, we assumed that belief in some sort of supreme being — a God — resides at the heart of religion.⁸ In conscientious objector cases, for instance, those seeking an exemption from the armed services on grounds of conscience were required to respond to the question: "Do you believe in a supreme being?"⁹ A negative answer was sufficient to deny the application.¹⁰ However, the Supreme Court's approach to such cases took a radical turn in the cases of *Welsh v. United States*¹¹ and *United States v. Seeger*.¹² When confronted with conscientious objectors to participation in the armed services who, by their own declaration, were not theists, the Supreme Court, drawing upon language from Paul Tillich, adopted a "functional equivalency" test.¹³ Belief in God as such was not deemed essential to religion, at least for purposes of this line of cases.

Moreover, in the academic study of religion, we encounter a wide range of diverse definitions of religion, many of which are intentionally not limited to theism. Paul Tillich stresses the notion of ultimacy;¹⁴ John Hick, the notion of transcendence;¹⁵ Mircea Eliade, the notion of sacrality;¹⁶ and Franklin Gamwell, the notion of comprehensive purpose.¹⁷ All these notions are presented as efforts to embrace a vast plurality of philosophies, visions, and practices that we would want to call, in some vital sense, "religious" whether or not they are, in a strict sense, theistic — such as Confucianism, Buddhism, Islam, Judaism, or Christianity.

8. Washington, *supra* note 1, at 45-49.

9. See Douglas Sturm, *Constitutionalism and Conscientiousness: The Dignity of Objection to Military Service*, 1 J.L. & RELIGION 265, 268-69 (1983).

10. *Id.*

11. 398 U.S. 333 (1970).

12. 380 U.S. 163 (1965).

13. *Welsh*, 398 U.S. at 339-40; *Seeger*, 380 U.S. at 180.

14. PAUL TILlich, *DYNAMICS OF FAITH* (1958).

15. JOHN HICK, *AN INTERPRETATION OF RELIGION: HUMAN RESPONSES TO THE TRANSCENDENT* (1989).

16. MIRCEA ELIADE, *THE SACRED AND PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., Harcourt 1957).

17. FRANKLIN I. GAMWELL, *BEYOND PREFERENCE* 69-89 (1984). See also FRANKLIN I. GAMWELL, *THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD* 168 (1990).

However, defined more specifically, it seems to me that all these efforts to construe the meaning of religion affirm something along the following lines, namely, that there is a dimension of reality after which the human spirit reaches as integral to its own enhancement which transcends the ordinary and the everyday. In that dimension, the spirit bloweth as it listeth. In a certain sense, even if we wanted to use coercive means in that dimension, the attempt would be futile precisely *because* the spirit bloweth as it listeth. The human spirit will break through all artificially induced boundaries because of its obsession with the search for ultimate meanings, for transcendent realities, for comprehensive purposes. More importantly, governments, given their proper functions, have no business even *trying* to define, to direct, to dictate what people think and feel, envision, and enact in that dimension because, in the final analysis, governments are meant to serve the human spirit, not vice versa.

What I have affirmed as the impetus and character of religious dimension of human life corresponds, I believe, with James Washington's approach to a redefinition of conscience, even including the modifications suggested by Cole Durham.¹⁸ Conscience, as I would phrase it in this context, is the human yearning for and apprehension of that which is, to the self, the dimension of ultimacy, transcendence, comprehensive purpose. It is the apprehension of that which will not let one go, of that which leads one hither and yon, of that with which one is obsessed, of that which constitutes one's most fundamental identity, of that whose character permeates in some measure all one does and all one is. Conscience is the point at which, as a matter of both judgment and fulfillment, there is a conjunction between one's individual reality and that deeper or, if you will, higher reality whose presence is the Alpha and Omega, the beginning and the end, of our being.

In the religious dimension so understood, coercion is, in a sense, contradictory. In theistic terms, coercion in religious matters deprives God of God's sovereignty. In nontheistic terms, coercion in religious matters deprives the human spirit of its liberation and fulfillment. Governments not only ought to withhold their coercive powers from encroaching upon that dimension; they ought to manifest a decent respect for that dimension. That is the genius of the religion clauses from a religious perspective and is a way of getting

18. W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71 (1992).

at James Washington's primary constructive thesis.

Washington, if I understand the import of his statement, focuses on freedom of conscience as the centerpoint of church-state issues in this country. He proposes as a redefinition of conscience "adherence to the sanctity of the body."¹⁹ I take his reference to "body" to assert that the burden and import of conscience are not exhausted in belief alone. Freedom of conscience extends beyond freedom of belief. Contrary to Thomas Jefferson's beliefs,²⁰ conscience, by virtue of its character, pertains as well to social practice and institutionalized forms of interaction. Therefore, a respect for bodily integrity — and hence for associational autonomy and cultural diversity — is part and parcel, though not the sum total, of a respect for freedom of conscience. That, I assume, is part of the implication of Washington's haunting query, posed at the conclusion of his statement, "Who constrains nation-states that turn national interests into a fetish even to the point of destroying human life and cultural diversity?"²¹ As the institution of slavery demonstrates so starkly, to degrade the body is to degrade the spirit, to constrain free interaction is to shackle the conscience, to stifle diversity in forms of life is to smother the principle of life itself.

SACRALITY

As a bridge to this theme, let me assert that in my understanding, constitutionalism properly construed does not put a premium on orderliness. Rather it institutionalizes tension. Constitutionalism, by virtue of its respect for liberty, especially liberty in that deeper, more ultimate dimension of reality about which I have spoken, entails an acknowledgement that life in the human community is never peaceful and quiet. It cannot be and should not be expected to be so. It is always in conflict and turmoil.

Constitutionalism means that in our common life, we must so or-

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

20. See ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 112 (1990) (quoting Thomas Jefferson, Reply to the Danbury Baptist Association (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON 113-14 (H. Washington ed., 1853)). Significantly, Chief Justice Morrison Waite, in the first of the Mormon cases, construed Jefferson's doctrine of separation of church and state, as stated in his response to the Danbury Baptists, as supporting a radical distinction between belief and action in interpreting the Free Exercise Clause: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

21. Washington, *supra* note 1, at 60.

ganize ourselves to sustain that conflict and turmoil — but to do so in such a way that we stretch ourselves, not narrow ourselves; that we broaden the possibilities for life, not constrict them; that we celebrate plurality, not drive toward conformity and uniformity. At the same time, constitutionalism, in a seeming paradox, means that there are boundary lines of a sort. They, however, are only boundary lines resisting parochialism and provincialism. That is, we must resist movements that tend to constrict and constrain the human spirit (e.g., the destructive tactics of the Ku Klux Klan), not movements whose purposes are to open up new possibilities of thought and action (e.g., the ritual practices of the Native American Church).

As Cole Durham hinted in his preceding comments,²² we confront the question of who properly draws the line. In a recent issue of *The Journal of Law and Religion*, a set of articles derived from a Georgetown symposium on church and state addressed that question.²³ Stephen Pepper and William Marshall, in their articles, took a traditional route of asserting that the state, with its concern for public order, has the authority and duty to draw the line.²⁴ But given the meaning of sacrality, I would take the side of John Howard Yoder who, in his response, rejected that assertion.²⁵ According to Yoder's interpretation, Pepper and Marshall were proposing that government, given its purposes, has the authority to define a special space for religion and should confine religion to that space.²⁶ Yoder, in reaction, reversed the equation. Affirming the supremacy of sacrality, Yoder stated, in effect, that sacrality has the authority to define a special space for government, not the other way around! From a religious perspective, government is subordinate to the higher reaches of the human spirit and must accommodate those higher reaches. Religious liberty and its corollary, religious tolerance, are not a privilege granted by political authority; they constitute a right grounded in the religious dimension. Sacrality is supreme.

22. Durham, *supra* note 18.

23. See *Georgetown Symposium on Church and State and Society and Law Colloquium*, 7 J.L. & RELIGION 257 (1989).

24. Stephen Pepper, *A Brief for the Free Exercise Clause*, 7 J.L. & RELIGION 323, 354-55 (1989); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989-90), reprinted in 7 J.L. & RELIGION 363, 401-03 (1989).

25. John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIGION 415, 415-16 (1989).

26. *Id.* at 418.

This proposition, as Cole Durham reminds us, was affirmed during the beginnings of this nation, not only by radical Protestants, but also by enlightenment rationalists.²⁷ On this point, I would underline a long standing conviction of mine, a conviction well-founded in historical evidence, even though yet contested by historians and theologians. According to a dominant tradition of interpretation, Protestants and rationalists have been presented as, respectively, religionists (to whom sacrality is supreme) and secularists (for whom public order takes priority over religious concerns). That interpretation, however, is contradicted by the historical record. As one telling example, I would cite James Madison's *Memorial and Remonstrance*²⁸ in which he asserts:

This duty [which we owe our Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society. Before any man [sic] can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.²⁹

That is James Madison. This is not to say that all enlightenment rationalists would support such a sentiment, but James Madison did. Benjamin Franklin did, as well as others (e.g., Patrick Henry and Thomas Paine). My point is that not only radical Protestants, but also enlightenment Deists, understood the supremacy of sacrality. From the standpoint of that premise, government's authority is secondary and subordinate.

I would conclude with a quotation from George Fox, the founder of the Quakers. I am, I admit, fond of the Quaker tradition in many ways. Regarding religious liberty, George Fox once wrote:

And let him [or her] be Jew or Papist or Turk or heathen or Protestant or what sort so ever or such as worship sun or moon or stocks or stone, let them have liberty where everyone may bring forth his [or her] strength and his [or her] mind and judgment.³⁰

That is a striking statement for its time. William Penn, who com-

27. Durham, *supra* note 18, at 79-85.

28. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 5 (Marvin Meyers ed., rev. ed. 1981).

29. *Id.* at 7.

30. MELVIN B. ENDY, JR., *WILLIAM PENN AND EARLY QUAKERISM* 315 (1973).

posed constitutions for Eastern New Jersey and, later, for Pennsylvania, came *fairly* close to Fox's expansive sentiment in his provision for religious liberty, albeit, in my judgment, not close enough. Fox's sentiment, I would argue, is grounded in an understanding of what it means to be human. To be human in the Quaker tradition is to be possessed of an inner light. As Washington would remind us, that is an understanding of conscience. The inner light corresponds to the divine light. In that correspondence, we have entered upon the realm of the sacred. At that point, if we would respect the innermost depths of our humanity, we must let people do their own searching — whether they worship stones or sun, whether they be Turk or Papist or heathen or Protestant. That is their reason for the religion clauses in the Bill of Rights. From this standpoint, the religion clauses are protective of that sacred space beyond the jurisdiction of government within which and through which we may continue our search for ultimate meaning.

