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Religious Liberty and the Call of Conscience

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RELIGIOUS LIBERTY AND THE CALL OF CONSCIENCE

*W. Cole Durham, Jr.**

As Professor Washington rightly notes in his essay,[1] the idea of conscience is "a major cultural bedrock of American jurisprudence."[2] His essay excavates and elucidates the intellectual strata that underlie this bedrock, adding reflections on current social trends that might erode it. Starting with Descartes and Hobbes, he sketches an unfolding series of fundamental attitudes toward conscience that emerged over the course of the century and a half that separated the English Civil War from the American Revolution.[3] He then lays the significance of conscience as "a notional institution"[4] within American society. According to Washington, the idea was so widely accepted at the time of the founding that it seemed unnecessary to work out its deeper meaning.[5] Ironically, this neglect may have contributed to a gradual subordination of the claims of conscience to statist presumptions and ultimately to what Washington deplores as the "decline of the culture of conscience."[6]

What I find particularly interesting is Washington's characterization of conscience as "the one institution that [has] provided an opportunity to unify humanists and religionists."[7] For him, conscience is "a key member of the fundamental ideas and values which jurisprudence seeks to uphold."[8] It is a "venerable conceptual apparatus that [has] provided the fundamental moral basis for the liberties guaranteed in the Bill of Rights."[9] But this unifying category is suffering from a postmodernist "crisis engendered by cultural diversity,

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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. *Id.* at 11.
3. *Id.* at 11-22.
4. *Id.* at 23.
5. *Id.* at 23-24.
6. *Id.* at 31.
7. *Id.* at 22.
8. *Id.* at 23 n.50.
9. *Id.* at 31.

and by cultural perversity in the form of rampant nihilism, and undisciplined cynicism."[10] I take it that Washington's suggestion that we "expand the juridical role of conscience by redefining it as 'adherence to the sanctity of the body' "[11] is an effort to rehabilitate the core notion of conscience in areas where social consensus has not yet disintegrated.

I share Professor Washington's sense that conscience is a profound cultural category that needs to be protected, strengthened, and analyzed more deeply. In my comments, I want to probe the notion of conscience as a common moral denominator in a pluralistic society — as a category and an experience within modern political discourse capable of bridging subcultures and of being accessed as a common moral experience from a wide array of differing belief systems.

Without attempting to be exhaustive, I will examine a series of facets of the call of conscience that seem particularly vital and yet problematic: (1) the centrality of conscience as a moral bridge that helps integrate, or at least connect, different subcultures and as a source of moral development; (2) the elusiveness of conscience as a neutral category in law; (3) the sovereignty of conscience and its relation to the state; and (4) the attenuation of conscience as a distinctive liberty right. My approach is to draw on brief vignettes or reflections on conscience that are richly suggestive, but that cannot be fully worked out here. While what follows cannot hope to get at the full meaning of the "notional institution" of conscience, it can perhaps suggest directions in which further analysis needs to proceed.

I. Conscience as a Moral Bridge: Cultivating Its Integrating Role

Let me begin with a personal experience that has come to symbolize for me what I shall call the integrating or connecting role of conscience. During the spring of 1991, I participated in writing an amicus brief in the graduation prayer case of *Lee v. Weisman*.[12] In the spirit of full disclosure, I should indicate this brief was sympathetic to graduation prayer. It took the view that our constitutional tradition should be flexible enough to accommodate differing deci-

10. *Id.* at 59.
11. *Id.* at 24.
12. 112 S. Ct. 2649 (1992).

sions of local school boards in resolving the difficult issue of whether, in certain settings, graduation prayers should be allowed. What I want to describe here, however, is not the arguments of that brief, but an experience I had the day the brief was finalized and expressed off for printing and filing.

Once the dust settled and the express shipment was on its way, I went home to attend my son's high school graduation in the predominantly Mormon community of Provo, Utah. The week before, the federal district court in Utah had refused to enjoin graduation prayer in a neighboring school district, pending the outcome of *Weisman*. Based on this decision, the determination was made (I am not sure by whom) that prayers should be added to the program at my son's graduation. It was clear that this was a last minute arrangement, because the programs for the ceremony had been printed without indicating there would be an invocation or a benediction. These were simply announced orally. The student who was listed on the program as leading the Pledge of Allegiance, with its reference to "one nation under God," had been "promoted" to giving a full-fledged prayer, and someone else was substituted to lead the Pledge.

With the experience of working on a graduation prayer brief so recently behind me, I found myself listening to the invocation with the heart of a litigator (simultaneously wondering whether that was an appropriate way to experience a prayer). The prayer was offered by a student I knew quite well because she was a neighbor I go to church with every Sunday. I worried about the many verbal traps she could fall into, and whether her words would end up being quoted back and analyzed in the course of litigation, like Rabbi Weisman's prayer in the Providence case. As I listened to her prayer, sentence by sentence, I concluded that she had probably been coached, or given a copy of the guidelines promulgated by the National Council of Christians and Jews.[13] In any event, it was clear that she had given considerable thought to being sensitive to other individuals from other religious communities. For example, she omitted the traditional closing words of a Mormon prayer: "in the name of Jesus Christ, Amen." At the end of her prayer, I breathed a sigh of relief. She had done an excellent job of avoiding interdenominational sensitivities, and at the same time had ex-

13. NATIONAL CONFERENCE OF CHRISTIANS AND JEWS, GUIDELINES FOR CIVIC OCCASIONS.

pressed feelings that were meaningful and fitting for the occasion.

The commencement exercises then continued without incident. There were a series of student commencement speeches in which young people at the threshold of adulthood reflected on the meaning of their high school experience and on the challenges and opportunities lying ahead. My son was one of the speakers, and so I had a deeper than average personal stake in what he and his friends were saying.

What I will always remember, however, is the prayer that came at the end of the ceremony. It started out in English, but the student offering it was a Chicano, and most of his prayer was in Spanish. When he first switched languages, I could not resist thinking this would be a very nice touch if the matter ever came to litigation; those challenging such a prayer would have to attack good faith efforts to include minority groups in the ceremony. But as the prayer went on and the force of what was happening sank in, most of us in that audience felt something much more profound. While few could literally understand what was being said, we understood that the young Chicano was engaging in an exercise of deep personal meaning at a particularly important moment in his life. We heard, or better, felt the call of his conscience, emanating from another culture in another language and another voice, and in that moment of encounter, something was translated into our own modes of responding to the experience of conscience, thereby opening a channel to the highest within each of us. The experience confirmed us at once in our unity and in our diversity, providing us with a glimpse of the way that even distinctive assertions of conscience can have an integrating influence that bridges cultural distance.

Reflecting on this experience has led me to rethink one recurrent refrain in the graduation prayer litigation leading up to *Lee v. Weisman.* One of the issues for litigants defending graduation prayer under the *Lemon* test[14] was to establish that the practice had a legitimate secular purpose. This was often done by arguing that the state had a legitimate purpose in fostering the "solemnity" of ceremonial occasions. At one level, there always seemed to be something disingenuous about this argument. First, it was not altogether clear what was so important about getting people to put on long faces and be "solemn," and second, prayer was surely not the only means

14. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

available to promote this objective.[15] After the experience at my son's graduation, however, I have concluded that such "solemnity" arguments may be more persuasive if one understands them as an assertion that the state has a legitimate interest in fostering contexts in which its citizens are exposed to the call of conscience.

Of course, it is not possible to define in advance the way conscience calls to different people, nor is it advisable for the state to dictate the forms such a call should take. But there ought to be room, within the traditions and institutions of our pluralistic public life, for people to be able to express that call as felt by them, whether in religious or political speech, particularly since such encounters have a particularly powerful tendency to speak across cultural boundaries and to promote mutual understanding and respect. It is vital that there be moments when we are called upon to tap that which is deepest and most meaningful in us, and when that happens, we respond across differences, and even if we do not understand perfectly, we understand what is most fundamental.

With its decision in *Lee v. Weisman,* the Supreme Court has effectively struck the death knell of graduation prayer,[16] and this facet of the traditional rite of passage into American adulthood will become a forgotten relic of times past. American civilization will no doubt survive without this small piece of traditional Americana. Graduation prayers are obviously not the only or even the most important contexts in which the call of conscience can be encountered. Private contexts within families or churches or among friends are probably far more important. But it is vital in a democracy that the call of conscience also be felt in public settings. And it is important in that setting that conscientious expression not be hobbled by being forced to speak in the broken accents of a foreign mode of expression. Just as the impact of the benediction at my son's graduation

15. I leave aside for the present the question of why it should be that secular purpose analysis, in a curious inversion of free exercise least restrictive alternative analysis, should be understood as requiring the least religious alternative. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981); Wisconsin v. Yoder, 406 U.S. 205, 219-26 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963).

16. Notwithstanding Justice Souter's footnote stressing factual distinctions in the *Weisman* situation, 112 S. Ct. 2649, 2678 n.8 (1992), and Justice Scalia's dissenting hints about how the Court's holding could be circumvented, *id.* at 2678-86, I assume with some reluctance that the institution of graduation prayer as it has existed in many school districts throughout America is dead. The *in terroram* threat that someone might win a suit challenging even a suitably modified and voluntary graduation prayer scheme and thereby be entitled not only to an injunction but also to legal fees is too great a risk for most fund-starved school districts to run.

had infinitely more force in Spanish than it would have had in English, so it is important that we allow conscience to choose its own voice. Conscience is a rare enough commodity in public life; we should not encumber it with artificial constraints.

The deeper question posed by the *Weisman* decision, as by Professor Washington's paper, is whether our resources for cultivating encounters with conscience are being diminished. Such encounters are vital to moral education and development and to the cultivation of conscience itself. They are crucial for the cultivation of what classical republicanism described as "public virtue" — the commitment to sacrifice personal interests to the public good. Modern societies, and for that matter, societies of any vintage, have an important interest in cultivating this facet of moral education.

Will *Weisman* be extended in ways that further restrict traditional expressions of conscience in public settings? Outside the school setting, will the ban on educational prayers be extended to local legislative bodies such as city councils, or will the traditional practices in that context be shielded by *Marsh v. Chambers?*[17] If such practices are permitted, is it better to regulate the content of prayers offered to minimize the risk of causing offense, or should those offering prayers be allowed to be faithful to their traditions, assuming some suitable rotation scheme is arranged? The latter seems preferable to me. What will be the likely fruits of *Weisman* within schools? Can we expect challenges to the singing of sacred choral music, or to the participation of school choral groups in Christmas season programs? More generally, what role, if any, should be given to public school teachers in cultivating basic moral traits such as honesty, industriousness, and moral courage? How should more difficult moral issues be approached? In a pluralistic world, where it is impossible to avoid alignment with some value orientation (even a non-stand is a stand), how can schools possibly accommodate all the value preferences pressed upon them? Which issues need to be dealt with in the schools, and which are better left to other fora?

Few of the foregoing have the ring of classic confrontations of conscience and the state. But where does the strength for the more classic confrontations come from? Conscience is a fragile resource in any society, and great care must be taken to nurture it. Along

17. 463 U.S. 783, 784 (1983) (upholding "the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State").

with our efforts to cultivate a robust marketplace of ideas, we need to leave ample room for the development of resources of conscience which help rank and assign weights and values to the ideas being exchanged.

II. The Elusiveness of Conscience as a Neutral Category

Precisely because it is so central and important, the idea of conscience suggests itself as an answer to several recurring puzzles. Perhaps the notion is sufficiently broad to cover the deepest moral instincts of both religious and secular citizens, suggesting that what should really be covered by religious liberty protections (to avoid favoritism) is freedom of conscience. Seen in this light, conscience appears as a possible notion in terms of which religion can be defined. Moreover, the notion of conscience as a moral sovereign within the individual may help to explain why religious liberty (or liberty of conscience) deserves heightened protection in comparison with other rights.

But no sooner does one start down these paths than one begins to worry that the idea of conscience may not be such a neutral idea after all. This "notional institution" may be more central for Protestants than for Catholics and Jews, and appears almost irrelevant to certain forms of Native American religions.[18] If this is true, conscience may be neither as universal nor as neutral as initial reflection might suggest.

Yet we should not be too quick to dismiss conscience as a central organizing category. It may well be that conscience is experienced differently and that different importance is attached to conscience by Protestants than by Catholics or Jews or Native Americans. But it does not follow that it is simply absent. The difficulty may lie more in the elusiveness of conscience — its affinity for concrete practical judgment as opposed to grand system, and its tendency to resist being bottled up in conventional moral categories. The fact that conscience may speak several languages does not mean that it does not speak.

In this regard, an incident from Mark Twain's *Huckleberry Finn*[19] is worth rereading. The passage is relevant to Professor

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18. *See* W. Cole Durham, Jr., *The Aboriginal and Comparative: A United States Perspective*, 34 Am. J. Comp. L. 1 (Supp. 1986).

19. Mark Twain, The Adventures of Huckleberry Finn (1885), *reprinted in* The Unabridged Mark Twain 748 (Lawrence Teacher ed., 1976).

Washington's discussion of conscience in the context of opposition to fugitive slave laws,[20] but I believe it captures something more general. The passage occurs at the point where Jim has been betrayed for forty dollars by the "king" and the "duke" and he has now been captured.[21] Huck is in a real quandary about what he should do. He is fully conscious of what conventional conscience demands in his society. Being an abolitionist in his hometown was not particularly popular. Indeed, a little later in the narrative, Huck is actually shocked when conventional Tom Sawyer appears and agrees, at least initially, to help him free Jim.[22] In this quandary, Huck tries to pray to figure out what to do:

> I was trying to make my mouth *say* I would do the right thing and the clean thing, and go and write to [Miss Watson] and tell where [Jim] was; but deep down in me I knowed it was a lie — and [God] knowed it. You can't pray a lie — I found that out.
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> So I was full of trouble, full as I could be; and didn't know what to do.[23]

In agony of conscience, Huck finally decides he needs to do what society or state tells him is the right thing to do:

> At last I had an idea; and I says, I'll go and write the letter — and *then* see if I can pray. Why, it was astonishing, the way I felt as light as a feather, right straight off, and my troubles all gone. So I got a piece of paper and a pencil, all glad and excited, and set down and wrote: Miss Watson, your runaway [slave] Jim is down here two mile below Pikesville and Mr. Phelps has got him and he will give him up for the reward if you send. Huck Finn.[24]

At first this seems to work: "I felt good and all washed clean of sin for the first time I had ever felt so in my life, and I knowed I could pray now."[25] But Huck has never been someone to jump into things precipitously — especially do-gooder things — and so he meditates a bit further. And now another process sets in. Huck does not quite know what to make of it, and thinks it makes him perverse because it goes against conventional morality, but in fact, it is genuine conscience:

> But I didn't do it straight off, but laid the paper down and set there thinking . . . . And got to thinking over our trip down the river; and I see Jim before

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20. Washington, *supra* note 1, at 40-41.
21. TWAIN, *supra* note 19, at 898.
22. *Id.* at 908.
23. *Id.* at 899.
24. *Id.*
25. *Id.*

> me, all the time, in the day, and in the nighttime, sometimes moonlight, sometimes storms, and we a floating along, talking, and singing, and laughing. But somehow I couldn't seem to strike no places to harden me against him, but only the other kind. I'd see him standing my watch on top of his'n, stead of calling me, so I could go on sleeping; and see him how glad he was when I come back out of the fog; and when I come to him again in the swamp, up there where the feud was; and such-like times; and would always call me honey, and pet me, and do everything he could think of for me, and how good he always was; and at last I struck the time I saved him by telling the men we had small-pox aboard, and he was so grateful, and said I was the best friend old Jim ever had in the world, and the *only* one he's got now; and then I happened to look around, and see that paper.
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> It was a close place. I took it up, and held it in my hand. I was a trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied the minute, sort of holding my breath, and then says to myself:
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> "All right then, I'll *go* to hell" and tore it up.
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> It was awful thoughts, and awful words, but they was said. And I let them stay said; and never thought no more about reforming. I shoved the whole thing out of my head; and said I would take up wickedness again, which was in my line, being brung up to it, and the other warn't. And for a starter, I would go to work and steal Jim out of slavery again; and if I could think up anything worse, I would do that, too; because as long as I was in, and in for good, I might as well go the whole hog.[26]

This passage has enduring appeal precisely because it captures what is uncapturable about conscience — its ability to break through encrusted moral conventions and expectations. Of course, this is also what makes conscience dangerous. From the perspective of law, conscience is a political renegade as well as a loyal citizen. And yet, despite this very real risk, and subject inevitably to some outer limits, part of what pluralism and democracy ultimately mean is that judgments of conscience should be trusted and respected. At a minimum, when we get into our own "close places," we want to let the words of our own consciences "stay said."

III. THE SOVEREIGNTY OF CONSCIENCE

The question of the extent to which conscience should be respected and of the reasons for affording such respect leads into some of the deepest questions of political theory. To what extent should the claims of individual conscience, and of communities of conscience, be granted deference over claims of the state? Do we respect claims of conscience as part of a more general respect for personal autonomy and self-determination of individual life plans?

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26. *Id.* at 899-900.

If so, why should life plans forged by conscience be afforded any greater protection than life plans molded by other factors? Does conscience differ in some fundamental way from other desires, and does this difference justify granting claims of conscience higher status than the claims of the desires?

As Michael Sandel has noted, there is a tendency in the contemporary setting to confuse freedom of conscience with freedom of choice.[27] In contemporary liberal theory, the individual is viewed as being "free and independent, unencumbered by aims and attachments it does not choose for itself."[28] The unencumbered self chooses religion as it chooses everything else, and freedom of religion is to be respected as part of a more general respect for personal autonomy and freedom of choice.

This picture is inconsistent in fundamental ways with the experience of conscience. To use Sandel's words:

> [F]reedom of conscience and freedom of choice are not the same; where conscience dictates, choice decides. Where freedom of conscience is at stake, the relevant right is to exercise a duty, not make a choice. . . . Religious liberty addressed the problem of encumbered selves, claimed by duties they cannot renounce, even in the face of civil obligations that may conflict.[29]

The call of conscience may guide choice, but it does not emanate from choice.

This certainly appears to be the way that Madison understood conscience. In the first paragraph of his *Memorial and Remonstrance Against Religious Assessments*,[30] he and his co-petitioners objected to Patrick Henry's "Bill establishing a provision for Teachers of the Christian Religion" because:

> We hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may *dictate*. This right is in its nature an unalienable right. It is unalienable;

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27. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74 (James Davison Hunter & Os Guinness eds., 1990).

28. *Id.* at 75.

29. *Id.* at 88.

30. 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). *Memorial and Remonstrance* is also reprinted as an appendix to Everson v. Board of Education, 330 U.S. 1, 63 (1947).

> because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. *This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.* Before any man 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. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.[31]

This brief passage, with its social contractarian picture of the relation of individual conscience to the state, provides one of the most profound analyses of freedom of conscience that I know. Here I can only highlight a few features of this account.

Like Jefferson[32] and Locke[33] before him, Madison advocated a jurisdictional division between religion and government, but he even more clearly than they believed that dividing lines should be based on the demands of religion and not merely on the secular concerns of the state. These demands of religion are clearly not perceived in terms of what Sandel describes as freedom of choice. Men and women must be free to exercise religion as "conviction and conscience . . . dictate."[34] They enter into the social contract not as beings lacking other moral obligations. (Indeed, the decision to enter into the social contract itself may reflect preexisting moral obligations, rather than mere expediency or practical judgment about promoting self-preservation, as Hobbes would have it.)

The important point is that religious obligations are "precedent both in order of time and degree of obligation, to the claims of Civil Society."[35] Claims of conscience are not like other obligations ("a

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31. Madison, *supra* note 30, at 7 (emphasis added).

32. *See* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (1854).

33. *See* John Locke, *A Letter Concerning Toleration, reprinted in* 33 GREAT BOOKS OF THE WESTERN WORLD 1 (Mortimer J. Adler et al. eds., 2d ed. 1990) (articulating Locke's thoughts on religious toleration).

34. Madison, *supra* note 30, at 7.

35. *Id.*

right towards men") that can be compromised by mutual consent in the process of accepting the social contract. They are more immediate and fundamental and by their very nature take priority over the claims of civil society. Conscience is something innate and natural. Someone entering civil society may do so only "with a reservation of his duty to the general authority."[36]

Madison's picture portrays religious liberty as a matter of interacting sovereigns — the Creator as the ultimate source of conscientious obligation, the individual as the vessel of conscience, and civil society as an artificial construct whose very existence is conditioned and bounded by preexisting obligations set up by the other two sources of sovereignty. Significantly, liberty of conscience is in no sense derivative from the state. Exemptions for conscientious conduct are not bestowed as a matter of grace by the state, nor are they the functional equivalent of aid, subsidization, or preferred treatment. They are simply reserved spheres of free conduct built into the original structure of the social compact.[37] The state should strive for arrangements that maximize equal protection for the conscience of everyone, but this imperative does not imply that all spheres of conscience must be kept equally small, or that there is a violation of the equality of some not in need of an exemption when an exemption for others respects the contours of conscience.[38] What needs to be evenhanded in state action in this area is equal restraint from encroaching on the reserved sphere of conscience. The state's fundamental obligation is to avoid taking steps that will hamper the call of conscience. Thus, it should protect freedom of expression, proselyting, persuasion without coercion, and a wide range of other contexts in which the call of conscience can be articulated, lived,

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36. *Id.*

37. It should be understood here that in talking of entry into the social contract, I am not presupposing a literal historical event. The social contract device is merely a schema for thinking about the nature of obligations. At the same time, the idea of the social contract is not totally without historical analogues. An interesting historical example is provided by the Mormon Church, which first attempted to leave the United States and establish its own community in the Great Basin, but ultimately decided to apply for statehood. Note that a community of conscience may have different incentives and reservations with respect to entering civil society than an individual. Among other things, an individual may need civil society for the sake of having membership in a community; that problem has already been solved when it is a community that is seeking admission to a larger society.

38. This is the fundamental flaw I see in the writings of William Marshall and others who support the outcome in the *Smith* decision and object to religiously based exemptions on equalitarian grounds. *See, e.g.*, William P. Marshall, *The Case Against The Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989).

and felt by others. Actions which prematurely cut off the possibility of one group's hearing the call of conscience as expressed by another are illegitimate. One individual or group may ultimately reject another's views, but it is important that such calls to what is deepest within us should be heard.

This outlook has significant practical implications for the way that one thinks about the problem of defining the outer limits of religious liberty. I believe the Madisonian position, if fully worked out,[39] supports an approach in which the state is required to be highly deferential to the way that conscience itself defines those limits. That is, in contrast to the Hobbesian assumption that the state is the ultimate arbiter of matters of conscience,[40] or Penn's assumption that conscientious conduct should stay within "the bounds of morality,"[41] or the Lockean view that conscience should give way before validly enacted law,[42] the deferentialist position that I propose holds that subject to certain narrow exceptions, the state is obligated to defer to the dictates of individual or community conscience and not to interfere with or proscribe the conduct thus required. The exceptions to the deference requirement, like the requirement itself, flow from the social contractarian model. While Madison believes that the claims of conscience are "precedent both in order of time and degree of obligation, to the claims of Civil Society,"[43] he does not say that conscience is prior to nature or human society per se. The demands of conscience arise within and presuppose the natural social situation that preexists civil society. Conscience presupposes conditions that make ongoing human existence possible. Accordingly, it is reasonable to think that the "reservation" for the rights of conscience implicitly written into the social contract would not necessarily bar state action aimed, for example, at protecting public health or safety, so long as every effort is made to minimize the impact on conscientious conduct of any state action thus required.

In some areas, state intervention may be appropriate because it

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39. That is to say, I am not necessarily claiming that Madison himself held the full deferentialist position I describe. But I believe his conception of the relationship of conscience and civil society supports the deferentialist approach.

40. *See* Washington, *supra* note 1, at 14.

41. *Id.* at 18 (citing 2 THE SECRET WORKS OF WILLIAM PENN 507 (4th ed., London, William Phillips 1825)).

42. *Id.* at 20-21 (citing JOHN LOCKE, EPISTOLA DE TOLERANTIA: A LETTER ON TOLERATION (Raymond Klibansky ed., J.W. Gough trans., Latin text ed., Oxford Univ. Press 1968).

43. Madison, *supra* note 30, at 7.

deals with matters that require no reservation to protect conscientious practices. Inherent in the idea of entering into the social contract is sacrificing or exchanging some liberties for the greater measure of freedom, security, and justice that can be experienced in civil society. Most churches, for example, have no conscientious reason to object to regulations that regulate the number of parking spaces that must be provided when a new church building is constructed, and there are obviously numerous similar "matters indifferent." What is vital in using this mode of justification for state intrusion is that the state action appear natural and that it not be experienced as an encroachment on conscience *from the perspective of the individual or group whose conscience is possibly being burdened.* Contrary to the decision in *Employment Division v. Smith,*[44] the issue is *not* whether state legislators or bureaucrats think that a law or action is neutral. The state only has jurisdiction to regulate conduct not reserved from state intervention in connection with entry into civil society, and in the absence of some indication of fraud or lack of sincerity,[45] there is no reason to think the state is in a better position to assess whether conscience is being infringed than the person or community whose conscience is burdened.

Reasoning such as the foregoing accounts for a large proportion of justifiable exceptions to religious liberty claims. There is inevitably a residue of particularly difficult issues where such analysis breaks down, whether because of radical irresolvable conflict of opinion that must be resolved one way or another, or where state interests appear so overwhelming that individual claims of conscience must give way. Even these cases may be analyzable as a necessary concession that parties to the social contract might be expected to give in order to address in advance how the possibility of such impasses of conscience should be handled.

The point in all of this is that the state is required to take conscience seriously. Contrary to some traditional worries,[46] doing so

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44. 494 U.S. 872 (1990).

45. Note that conscientious individuals or groups might consent to state determination of the sincerity issue for a number of reasons, not the least of which is that persons of conscience have the same interest in avoiding freeriders (those who abuse the cloak of religion) that the state has. Moreover, conscience itself does not dictate feigned assertion of conscience, so there is no reason for conscience to worry about such a requirement (except that state bureaucrats may make mistakes or abuse the authorization to assess sincerity).

46. *See, e.g.,* Washington, *supra* note 1, at 19 ("There was a pervasive fear of the dangers of religious anarchy.").

does not entail anarchic results. A reasonable set of constraints can be squared with a highly deferential, conscience-oriented approach to delineating the outer limits of religious liberty.

IV. The Attenuation of Conscience

One of the major hazards in our century is that the notion of conscience is gradually becoming so broad and vague that it is being emptied of any meaningful content. This process began innocently enough in the conscientious objector cases. There, the notion of conscience was defined as "[a] sincere and meaningful [belief which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[47] Extending the notion of conscience in this direction is obviously reasonable, because conscience does not always wear religious garb. The difficulty comes when conscience is extended to cover any deeply felt psychological state experienced at moments of decision.[48]

Conscience is more than merely feeling a conflict of desires. It has to do not only with our sense of moral obligation, but with what makes our sense of moral obligation sacred, deserving awe and respect. Moreover, as Madison understood, conscience is an imperious sovereign: its demands are experienced as imperatives, as "dictates."[49] It is not a matter of freedom of choice — of choosing a "rational plan of life"[50] — or of personal autonomy in the sense of arbitrary choice. Conscience may be experienced or interpreted differently by different individuals or communities, but it is not arbitrary. It is something we answer to more immediately than we answer to government or to matters of personal interest. Conscience is not a mere interest; it outweighs interests. It is what makes utilitarian theories seem hollow.

In the latest wave of abortion cases, one recurrent claim has been that laws aimed at regulating the abortion choice to any degree violate the free exercise rights of at least some women, and possibly, depending on the structure of the jurisdiction's complicity rules,

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47. United States v. Seeger, 380 U.S. 163, 166 (1965).

48. George P. Fletcher, Loyalty: An Essay on the Morality of Relationships (forthcoming 1992) (arguing that it is a mistake to think that the psychological intensity of religious beliefs requires us to accord these beliefs special protection).

49. Madison, *supra* note 30, at 7.

50. John Rawls, A Theory of Justice 407-16 (1971) (defining the notion of a rational life plan).

those of clergy or other religious counselors who feel called to counsel them. The argument runs essentially as follows: (1) abortion is a deeply personal choice; (2) deeply personal choices are choices of conscience (or should be guided by conscience); (3) all choices of conscience are covered by the Free Exercise Clause; (4) abortion regulation thus burdens a free exercise right; and (5) abortion regulation is therefore an unconstitutional infringement of the free exercise of religion.[51]

This line of argument raises a number of questions. I shall leave to one side the clergy/counselor claims and the question of whether the state might have a compelling state interest (or even a conscience-based obligation) with respect to protecting unborn life similar to that used to justify intervention to give blood transfusions or other medical care to children whose parents object to such treatment on conscientious grounds. What I am concerned with here is an inappropriate expansion of the notion of conscientious conduct.

The difficulty is that this argument confuses freedom of choice and freedom of conscience. Of course, there are some traditions within which conscience specifies that abortion is morally obligatory under some limited conditions. For example, orthodox Judaism requires that an abortion be performed where this is necessary to save the life of the mother. Some other religious traditions recognize similar conscientious obligations. Generally, such "dictates of conscience" are covered by appropriate statutory exemptions, but if they were not, they appear to be proper "freedom of conscience" claims. Such claims may not prevail for some other reason (e.g., because conscience is subject to certain moral constraints even in the state of nature that are appropriately translated into "compelling state interests"), but they at least cross the threshold of reflecting genuine conscientious conduct.

The problem is that in a much larger number of cases, the line of argument described above is invoked in contexts where abortion is merely permitted by a plaintiff's religious beliefs, as opposed to being required or at least motivated by the dictates of conscience.[52] Innumerable actions are permitted by conscience that are neither required nor motivated by the conscience as such. This is simply the

51. I was involved in opposing such claims in the course of defending Utah's abortion statute against constitutional attack in Jane L. v. Bangerter, No. 91-C-345 G (D. Utah filed 1991).

52. My position in this paragraph tracks that taken in the Memorandum in Support of Defendants' Motion to Dismiss, Jane L. v. Bangerter, No. 91-C-345 G (D. Utah filed 1991).

domain of general liberty, as opposed to conscientious conduct in the traditional sense. But conduct of this nature does not give rise to free exercise protection.[53] A religion may permit someone to pursue any number of careers, choose different friends, structure one's lifestyle, select a marriage partner, and so forth. That such choices may be important and deeply personal, and even that a person may consult religious advisers or pray about them, does not by itself transmute them into matters of free exercise of religion.[54]

A seductive dynamic is at play here. On the one hand, it seems attractive to broaden the scope of religious liberty protections by expanding the range of what counts as conscientious conduct. At first blush, this appears to achieve a broadening of liberty. Indeed, equalitarian pressures press for such broadening. What really happens, however, is that the notion of conscience is gradually attenuated. It comes to be seen as functionally equivalent to other forms of liberty which it is permissible for the state to regulate so long as the state has some rational basis for the regulation. Particularly in the setting of the complex social welfare state, there are innumerable points at which conscience does not nest comfortably in the bureaucratic castle. Attenuation of conscience ultimately leads to erosion of its protection.

CONCLUSION

The foregoing comments are at best suggestive of some of the issues that need to be explored to develop a richer account of the role of conscience in contemporary legal systems. The idea of conscience has a lengthy history as a "notional institution" that cannot begin to be exhausted in these brief remarks. It is a concept fraught with

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53. Thus, in *Harris v. McRae*, the Court held that a woman does not have standing even to assert a free exercise claim against abortion legislation unless "she sought an abortion under *compulsion* of religious belief." 448 U.S. 293, 320 (1980) (emphasis added).

54. *See* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). Note that the undue extension of the notion of conscience described here involves a blurring of the distinction between conduct that conscience leaves open to personal choice and conduct that is required or at least motivated by conscience. There is a related but different question that arises concerning whether a community of conscience requires certain conduct of all believers. For example, in most religious traditions, not everyone is expected to become part of the clergy. From the perspective of the religious tradition, this is a permissive and not a mandatory requirement. But the individual who decides to accept this calling is clearly compelled or motivated by conscience to do so. Such conduct clearly fits within the category of protected conscientious conduct. The conduct in the particular case is required or motivated by conscience, even though the tradition does not require such conduct of all its adherents.

ambiguity and elusiveness, but this is in part what makes it available as a category and as an experience capable of facilitating interaction and mutual respect in a pluralistic society. A gentle yet adamantine light, it is perhaps the deepest of the natural resources of human society, and has a special claim to be protected, conserved, and constantly renewed.