Masthead Logo

DePaul Law Review

Volume 42
Issue 1 *Fall 1992: Symposium - Confronting the Wall of Separation: A New Dialogue Between Law and Religion on the Meaning of the First Amendment*

Article 6

Christian Voices in the Public Square

Mark Fackler

CHRISTIAN VOICES IN THE PUBLIC SQUARE

*Mark Fackler**

Professor Washington both applauds and frets over the place of conscience in our public life, especially in positive law. Speaking as one of the heirs of the evangelical tradition which he notes in his essay, I share both his worries and his joys. The "notional institution of conscience," as he puts it,[1] has been at the least a safeguard against the encroachment of state power into the private sphere, and at best an argument to empower individuals against collective hegemony of all sorts. Apart from conscience, would we have our William Lloyd Garrisons and Dietrich Bonhoeffers and Elijah Parish Lovejoys? So conscience — at least morally enlightened conscience — has served us well. At points it has even effected social change, legal change, and a more benevolent common life.

However, the notional institution of conscience is a two-edged sword. It cuts through conservative hegemonies on the one hand; it violates the law to our credit, as Holmes came to admire it in his free speech decisions. On the other hand, it isolates us from the community, makes moral hermits of us, and in a twisted kind of logic, it justifies our isolating speech and ideas which may have much to contribute in the public square.

One of the issues which must shape this conference, but to which Professor Washington did not refer, is the *Employment Division v. Smith*[2] decision by Justice Scalia, a decision that to my mind vitiates the institution of conscience as clearly as if a surgeon's knife had cut a hole in First Amendment history. Where is conscience, if the state, already the obvious power center, can legally override religious conscience merely by the all-too-easy demonstration that a prohibition is facially neutral to religious practice? I am convinced that it was precisely for the protection against such state power that the First Amendment was crafted. Scalia's opinion ignores that role

---

* Associate Professor of Communication, Wheaton College, Wheaton, Illinois.

1. James M. Washington, *The Crisis in the Sanctity of Conscience in American Jurisprudence*, 42 DEPAUL L. REV. 11, 23 (1992).

2. 494 U.S. 872 (1990).

of conscience and thus does serious damage to the legal standing of dissenters, who in theory at least have often been our closest shot at the Jeremiah of old.

It is odd to me that the evangelicals whom Professor Washington credits for institutionalizing conscience have in the last several decades all but abandoned the public square, as Neuhaus called it.[3] Perhaps that prior abandonment made Scalia's opinion appear more benign than it would be under conditions of a more heated public presence. Yet there are hopeful signs amid the wreckage of *Smith*. First, there is the Religious Freedom Restoration Act.[4] An alliance supporting this Act includes groups whose names are synonymous with contentiousness and mutual name-calling; yet the Court's opinion constitutes such a departure from established First Amendment doctrine that it drives these natural antagonists together. Second is the Equal Access Act,[5] upheld in *Westside Community Schools v. Mergens*[6] last year, but still opposed even by groups which historically have fought to protect free expression from state control. The Equal Access Act promotes, I believe, the kind of strong democracy that Benjamin Barber described so eloquently,[7] the principled pluralism advanced by the Association for Public Justice,[8] the republican tradition called for by Robert Bellah.[9]

The rigorous privatization of religious expression represented in *Lee v. Weisman*[10] and in *Pennsylvania v. Chambers*,[11] the Pennsylvania Supreme Court's recent directive against quoting from the Bible, which is after all the world's most popular piece of literature, represents to evangelicals a kind of discriminatory disenfranchisement, a "no solicitors" sign over the public square. Thoughtful evangelicals want genuine, principled, responsible, democratic, full-orbed, nonexclusive, consensual, and multichromatic debate, rich

---

3. *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1986).

4. H.R. 5377, 101st Cong., 2d Sess. (1990).

5. 20 U.S.C. §§ 4071-4074 (1988).

6. 496 U.S. 226 (1990).

7. *See* BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

8. *See* POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY (James W. Skillen & Rockne M. McCarthy eds., 1991) (stating the principles of pluralism advanced by the Association).

9. *See* ROBERT NEELLY BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

10. 112 S. Ct. 2649 (1992).

11. 599 A.2d 630 (Pa. 1991), *cert. denied*, 112 S. Ct. 2290 (1992).

with nuance. To borrow from Paulo Friere, evangelicals want a "reconscientization" concerning the genuine role of faith in public life.

Let me signal a couple of theoretical advances supported by evangelicals and predicated on, or at least harmonious with, the Judeo-Christian view of persons in the community. All of these advances, I believe, are helpful in sorting out the law of First Amendment constitutional rights, which concerns us here today.

First is the *Lausanne Covenant of 1979*,[12] which formally recovers evangelicals' concern for public justice. Second, the *Williamsburg Charter of 1988*,[13] which argues for a positive social good, the inviolability of human dignity, the universal duty to respect the right of free conscience, and the responsibility of people of either all faiths or none to participate in democratic debate. Third, is Charles Taylor's important study *Sources of the Self*,[14] which tops my current list of thoughtful rejoinders to the ideas of Stanley Fish and other deconstructionalists who claim that the best for which we can hope in our effort to make sense of anything are the articulations of separate traditions, arbitrarily interpreting texts for their own purposes. Here, Taylor and others, Leslie Newbigin among them, step in to argue that understanding requires commitment, that arbitrariness is overcome through public dialogue. Fourth, are the thoughtful essays of Os Guinness,[15] James Davison Hunter,[16] Charles Taylor,[17] and Peter Berger[18] in their recent Brookings Institute book *Articles of Faith, Articles of Peace*. It is an argument for positive civic freedom and principled pluralism. And finally, there is the brilliant analysis of evangelical public philosophy in Nick Wolterstorff's *Until Justice and Peace Embrace*[19] and the many artful writings of

---

12. *See* JOHN R.W. STOTT, THE LAUSANNE COVENANT: AN EXPOSITION AND COMMENTARY (1975).

13. THE WILLIAMSBURG CHARTER (1988), *reprinted in* 8 J.L. & RELIGION 5 (1990).

14. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

15. Os Guinness, *Introduction* to ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 1 (James Davison Hunter & Os Guinness eds., 1990).

16. James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism, in* ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 15, at 54.

17. Charles Taylor, *Religion in a Free Society, in* ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 15, at 93.

18. Peter L. Berger, *Afterword* to ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 15, at 114.

19. NICHOLAS WOLTERSTORFF, UNTIL JUSTICE AND PEACE EMBRACE (1983).

Father Neuhaus.[20]

To me, the linkage between loss of conscience and theological skepticism which Professor Washington alludes to at the end of his paper is chimera.[21] Neither theology, as a mode of inquiry, nor popular religious belief and practice, nor strongly-valued consciences are in danger today. However, we do see a marginalization of conscience by the courts and by popular culture that should give us all more than enough grist for the conversation Professor Washington has opened for us. I look forward to learning from it.

20. *See, e.g.*, NEUHAUS, *supra* note 3.

21. Washington, *supra* note 1.