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QUESTIONS AND ANSWERS TO PANEL 1

QUESTION: In the attempt, as Cole Durham suggests, of looking from the religious side in defining the respective territories of church and state, when we do it through history and the passage of time as possibly Madison was trying to suggest, I would like to ask something that is more contemporary and therefore more difficult and comes out of an experience I recently confronted in Iowa. I am sure many of you have read that there have been some racist activities going on in Iowa. I was asked to give a talk about the Iowa tradition. Iowa was actively involved during the Fugitive Slave Act period in the Underground Railroad. We talked about the scope of conscience that was shown during that period in opposition to concerns about “property rights” which the Court upheld in the *Dred Scott* decision.¹ We discussed that people in Iowa and elsewhere in spite of the decision were upset with the practice of slavery — not just were not willing to participate in it, but were upset with the practice as violating humanity, violating their consciences, and many ways in the way you have defined conscience, and that their consciences were so opposed that they were willing to take steps in violation of the positive law of that time and oppose it to the point of criminality. After making this statement, there was an individual in the back of the room who stood up and asked me to compare either positively or to show the distinctions that might be made between that process as was involved in the Fugitive Slave Act and the activities of Operation Rescue in today’s world, because many of them claim very similar traditions and commitments to that earlier tradition.

JAMES WASHINGTON: I think that there is a connection between the two. I think that is a good analogy, although one has to be careful about making historical analogies. If I heard you correctly, what disturbs me a great deal about those kinds of events is the refusal to recognize that the social bond at the beginning, as you have said, was one that excluded so many. The law often works to support status quo. As a consequence — I think Professor Un-

1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

derkuffler is correct — religious and moral institutions and the notion of conscience — provide some hope. But there is one thing that is not so much surprising as rather disappointing. One of the things I have noticed about past dissenters is that they were willing to pay the price. The feeling that one must have the protection of law before one does what one thinks is right often impedes some from working for change. I do not know exactly how to characterize it. But this is more of a strong sentiment, kind of a hunch on my part, than an accusation. I just think that an overall decline in religious belief and moral belief is upon us. I am not sure what implications that has for law. But this has profound implications for religious and moral individuals. The message that went out in 1968, which was delivered quite clearly by some very powerful forces in this country, is that if you do take stands that are in opposition to status quo, it may cost you your life. One thinks of the assassinations of Martin Luther King, Jr. and Robert Kennedy. In fact, commitment to the point of death seems to be something that certainly never has been a popular thing. But you do not see it too often these days.

MARK FACKLER: This question really asks us what constitutes responsible civil disobedience. And we have come to realize that those who opposed slavery were exercising it; but we have not come to realize it, or there is no consensus, with respect to the pro-life or pro-abortion movement. We do not know who the heroes of that movement are going to be. Maybe a hundred years from now we will, but we do not yet. But it does seem to me that one of the hallmarks of responsible civil disobedience is talk, not merely action. This is not to say that pro-lifers have not attempted to express their argument in compelling words as well as with sit-ins and demonstrations, but it is to say that I do not think yet that the pro-life movement has seriously talked about the privacy question that Justice Blackmun's decision raised. And that seems to me to be the crux; at least, that gets much closer to the problem of conscience with respect to the abortion controversy. And I need, myself, to be more informed about how a right to life and a right to privacy interact. I would like more talk and somewhat less confrontation so that I can get clearer myself in terms of public policy with respect to who the heroes of the current controversy ought to be. I think also Justice Scalia was trying to get at something of the question here in *Em-*

*ployment Division v. Smith*² when he suggested that we cannot have every conscience a law unto itself;³ that would be a problem in democratic order. And so, as we all know, he reiterated the right of the State of Oregon to make its own exceptions; and having made none, in this case the law would stand.

JAMES WASHINGTON: One of the things I was trying to say was that I do not think that there is such a thing as responsible civil disobedience for someone who takes conscience seriously. I mean, that is a view from the standpoint of status quo. How can I be a responsible disobedient person to a law which I find morally offensive? It reminds me of the insistence on the part of the dominant white community that those who were suffering under Jim Crowism should dissent nonviolently while they were the victims of violence, unrepentant state and local communal violence. What I was trying to suggest is that there seems to be a real irony in the question itself because there is this prevalent idea that you do not have to pay a price for being against something. And I think that is, to me, endemic to the very notion of conscience. If you really believe that God is involved in your moral and religious stance and that God would have you do X, Y, Z for your principles, to raise the legal question strikes me as contradictory, though many people do it.

COLE DURHAM: One of the problems — and I think the reason why I think the responsibility issue is a very important one — is that a person's religious views may take very seriously the constitutional principles or the principles of the regime where he or she lives. In my own tradition, one of our Articles of Faith states: "We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law."⁴ In the Mormon tradition, this belief survived some very painful periods. We faced an order in Missouri to exterminate all Mormons. Property was expropriated, and church members were driven out of the state. Similar persecution and deprivation of property occurred in Utah in the 1880s at the hands of the federal government. But there was a deep sense that the way to seek redress was, at least initially, to go

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

3. *Id.* at 885.

4. Article of Faith 12, *The Articles of Faith of The Church of Jesus Christ of Latter-day Saints*, reprinted in 5 *ENCYCLOPEDIA OF MORMONISM* 486 (Daniel H. Ludlow ed., 1992).

through legal channels. This was also the reason that the *Reynolds*⁵ case was appealed: the objective was to test the constitutionality of antipolygamy legislation by invoking available legal procedures. It seems to me that it is not necessarily a betrayal of religious principles to respect such legal channels, particularly if among that it is good to have societies with laws and that governments in general, even though imperfect, are ordained by God. This makes the problem of how responsible one should be and how that responsibility should be structured considerably more complex.

JAMES WASHINGTON: As I listen to the rap music of urban African-American folk culture, they are saying that the law serves status quo. They are also asking — and this is the deeper point: “What do you do when the law is evil?” Whether in the history of African-Americans in the South or of Jews in Nazi Germany, the oppressed have experienced the legal system as a source of the masking and nurture of abusive governmental and social power.

EMILY FOWLER HARTIGAN [University of Nebraska]: It seems to me that the last three comments tap something which to me is reminiscent most of all of the *Crito*⁶ where Socrates is talking about his profound fidelity to law; it is in fact the perversion of the law which he cannot be faithful to. And such fidelity is something which requires — because of the nature, I think, of what the law, as one of God’s gifts to us is — that the price will be that high; and that in some ways anything that is cheaper suggests that the act comes out of a sense of “my sovereignty versus the state’s sovereignty,” which is not my understanding of what the American law of the land is. Is not the American law of the land that the sovereignty resides in the people? That the unenumerated rights stay with the people? Isn’t the whole point that the sovereignty has not been given fully to the state?

DOUGLAS STURM: One time I coined the phrase — which may not have been novel with me — the “dilemma of the constitutionalist.” The dilemma of the constitutionalist is this. On the one hand, in keeping with the idea of the sovereignty of the people, we must, of course, let the people make their own basic decisions about the shape of their common life. The people, not the state, are sovereign.

5. *Reynolds v. United States*, 98 U.S. 145 (1878).

6. PLATO, *Crito* in THE COLLECTED DIALOGUES OF PLATO 27 (Edith Hamilton & Huntington Cairns eds. 1961).

On the other hand, the people may be wrong. And when they are wrong, they stand in need of correction. But who is there to correct them when they are wrong?

What is needed is a procedure whereby the people can engage in some process of continuous self-correction. What would that mean? How is that possible? Following James Washington, I would, once again, affirm that in a sense we are obsessed by conscience; we are driven to follow our conscience. But, I would insist, our conscience should be informed by "reason," even as reason must heed the call of conscience and considerations of reason must be brought into dialectical relationship.

At this point I would like to quote from William Penn. I have before me a copy of his classic statement, *The Great Case of Liberty of Conscience*.⁷ He wrote this document while in jail in defiance of a law which, in his judgment, contravened the Quakers' right to freedom of conscience. You recall that he and William Mead were jailed in 1670 for violating the Conventicle Act — a case that, in turn, led to the famous great *Bushell's Case*,⁸ upholding the integrity of the jury system. After Penn's father paid the imposed fine and Penn was released, he immediately defied the law again and was, once more, jailed in 1671. At that time he wrote his defense of "Liberty of Conscience." Among his arguments, Penn insists that genuine faith and rational judgment are correlative. So he writes: "[I]n order to believe, we must first will; to will, we must judge; to judge anything, we must first understand The understanding can never be convinced, nor properly submit, but by such arguments as are rational, persuasive, and suitable to its nature" Faith and, I would submit, conscience must be informed by rational discourse. According to Quaker doctrine, all of us possess the inner light. We are therefore obliged *both* to speak *and* to listen to each other. Reason entails intercommunication. Through that process of speaking *and* listening, our conscience may be refined, even transformed. Or, in other terms, public discourse is a means of subjecting our conscience as it has been formed in times past to correction and enlightenment. Through public discourse, as a manifestation of dialogic reason, we may arrive at new insights and be led in new

7. WILLIAM PENN, *The Great Case of Liberty of Conscience*, in 1 COLLECTION OF WORKS OF WILLIAM PENN 443 (Joseph Besse ed., 1726).

8. 124 Eng. Rep. 10,006 (1670).

9. PENN, *supra* note 7, at 451-52 (with modernized punctuation and spelling).

directions.

So in the spirit of constitutionalism, to let the people settle upon the basic policies that shall govern their common life does not mean merely to let individuals or groups register their pre-given convictions and interests in some kind of battle royal to secure a majority. It means, more profoundly, to draw the people into a rigorous process of discourse, of self-criticism and self-correction, until they can arrive, through a dialogic give-and-take, at some consensus — although, to be sure, that consensus is susceptible to re-examination and transformation at any point. That is why the public forum is so essential to politics. This, I submit, is the sense of Mark Fackler's insistence that all the people, from their diverse religious perspectives should be brought together in a common forum to engage in discussion with each other.

And this is why James Washington suggests that, given the current turmoil over abortion, what is most lacking and most needed is for all factions to talk with each other. At the moment, groups opposing each other on this prickly and divisive issue are not talking with each other; they are screaming at each other. As groups clash with each other, they gloss over the excruciating dilemmas that abortion entails. At moments, I become weary of both pro-choice and pro-life constituencies. In one sense, I must admit, they are all "conscientious." That is, they are sincere in their respective appeals to conscience. But in another sense, they are not "conscientious." That is, for a fully and adequately informed conscience, they need to talk over the full range of questions entailed in the issue of abortion, from the condition and status of women in modern society to the character and moral significance of fetal life, but including as well the broader economic and political meaning of the principle of respect for life and the kinds of occasions and situations in which death, even if tragic, is nonetheless warranted.

Within this context we may distinguish the kind of civil disobedience characteristic of Martin Luther King's civil rights movement and the kind of civil disobedience which was part of an extensive political discourse. Repeatedly he stressed that civil disobedience was but a stage in a negotiating process. If the powers-that-be refused to engage in rational discourse about the rights of the African-American community, then actions of civil disobedience were deemed appropriate as a means of speaking through action to provoke a response and to move the political process along. Moreover,

as such, civil disobedience was an expression of a profoundly religious understanding of our essential connectedness. Operation Rescue, on the other hand, as I understand it, employs civil disobedience as an oppositional tactic. It is less concerned to draw us together in a common forum of mutual respect with the end in mind of a "beloved community" than to conquer all their opponents on this single issue. Its concern is not so much discourse and consensus as it is opposition and subjection.

