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AN HISTORICAL PERSPECTIVE OF RELIGION’S VIEWS OF THE LAW OF CHURCH AND STATE

THE CRISIS IN THE SANCTITY OF CONSCIENCE IN AMERICAN JURISPRUDENCE

James M. Washington*

Conscience has been a major cultural bedrock of American jurisprudence, especially in the history and theory of the laws of church and state. But a rather quiet crisis of confidence in the meaning and usefulness of conscience has bedeviled American jurisprudence, in particular, and Western jurisprudence, in general, since the seventeenth century. This exploratory Essay¹ offers an abbreviated genealogy² of the crisis in the nature and meaning of conscience as it

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1. This Essay is an extensive revision of my address at the Conference on the Bicentennial of the Bill of Rights, which was sponsored by the Center for Church/State Studies at the DePaul University College of Law. I write as a professional church historian who is interested in legal scholarship rather than as a professional legal scholar. I am grateful for this opportunity to offer an installment on my long-range plan to produce a book on the history of conscience.

2. I use this term to align my project in this Essay with Michel Foucault in his books: THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1971); THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., Harper & Row 1972); and POWER/KNOWLEDGE (Colin Gordon trans., Pantheon 1980). Foucault argued that students of the humanities need to isolate discontinuities in order to accentuate the role of contingency in human history. He believed this procedure would disclose the nature and emergence of power relationships. One of the best introductions to Foucault's thought can be found in JOHN RAJCHMAN, MICHEL FOUCAULT: THE FREEDOM OF PHILOSOPHY (1985), especially page 118ff on the meaning and sources of the notion of “genealogy” in Foucault's Nietzschean presuppositions.
relates to a few aspects of the doctrine of church and state in Anglo-American legal and religious discussions.

The lack of agreement about the meaning and content of natural law formed the crux of the problem in relating religion and morality with jurisprudence in the constitutional debates involved in crafting the First Amendment to the Constitution. But the present moral and religious crisis that confronts the Western democratic traditions, which themselves are the legatees of popular revolutions that appealed to conscience, resides in reconciling the conflict in the often different values promoted by religion, government, and social custom amidst disturbing signs that there are major cultural drifts toward nihilism. The prevailing view was that the existence of God was the ultimate constraint upon these great engines of human society. This view was aptly expressed by René Descartes in a 1645 letter to Princess Elizabeth of Bohemia:

> God has so established the order of things and has joined men together in so close a society, that even if every man were to be concerned only with himself, and to show no charity towards others, he would still, in the normal course of events, be working on their behalf in everything that lay within his power, provided that he acted prudently, and, in particular, that he lived in a society where morals and customs had not fallen into corruption.⁸

An anxious certainty about God's effectiveness in human affairs is the unspoken subtext of this paradigmatic statement. It is also the subtext of Descartes's prodigious intellectual progeny who sought to rescue the faithful from the creeping pathologies of everyday atheism. They yoked a deep fear of social chaos to their efforts to provide an intellectual response to the tragic vision.⁴

This dual fear of social disruption coupled with a growing sense of God's impotence, if not death, provided the groundwork for what I call "the quest for a public theodicy." In the modern era, revolutions have often been attempts to fill the personal and public void created by the real or imagined funeral of God.⁵ At the initiation of

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4. Both Luther's famous Good Friday Hymn, God Himself Died, and his notion of the deus absconditus try to confront the numbing fear that perhaps God is more impotent than the faithful would ever dare to admit. See John Dillenberger, God Hidden and Revealed: The Interpretation of Luther's Deus Absconditus and Its Significance for Religious Thought (1953); Alan M. Olson, Hegel and the Spirit: Philosophy as Pneumatology 121 (1992).

5. See Jon P. Gunnemann, The Moral Meaning of Revolution 9-50 (1979); Michael Harrington, The Politics at God's Funeral: The Spiritual Crisis of Western Civiliza-
the Puritan, American, and French revolutions, the classic revolutionary traditions of the modern period, the revolutionaries often appealed to the authority of the three respective sovereignties of God, law, and the people. Consequently, each democratic tradition fought paradigmatic revolutions that had the assertion of these sovereignties as their foci. The quest for the sovereignty of God in human affairs was a major reason for the revolt of the Puritan element in the English Civil War. The attempt to insist on the priority of legal constraints on both the church and the state defined much of the ideology that shaped the aspirations of the American Revolution. The repudiation of the sovereignty of both the church and the state in the name of the sovereignty of the people inspired many during the French Revolution.

These three impulses are among the major components of the mythos of divine providence, state security, and social progress that has propelled and directed the public trajectories of major historical changes in the modern era. Reinhart Koselleck argues that these impulses constitute pathogenetic flaws in modern society that are in conflict over various utopian visions of society and the realities spawned by human events. His specific argument that the political alienation of the Enlightenment worldview encouraged new forms of state Absolutism depends upon his general hypothesis that history induces crises that in turn demand critiques of both status quo as tradition and authority. The Enlightenment critique of status quo unwittingly participated in a forced Hobbesian merger between conscience and judgment. According to Thomas Hobbes, "[A] man’s conscience, and his judgment is the same thing, and as the judgment, so also the conscience may be erroneous." Hobbes’s basic argument in the *Leviathan* is that it is the primeval right of the state to correct errors of private judgment in order to maintain civil order.

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6. I view the Russian Revolution as a postmodern phenomenon insofar as it sought to subvert modernity.
and peace.\textsuperscript{10} By asserting the right of state power to prevail over both the possible errors of reason and conscience, Hobbes, and other subsequent apologists of the Absolutist state, asserted the sovereignty of the state to be above that of both logic and revelation.

Hobbes was a major player in the long process of privatizing the notion of conscience. His reasoning is illustrative. He compared devotees of antinomianism to the citizens of "a commonwealth"\textsuperscript{11} and then asserted that the antinomian can only sin against the individual conscience because he has no other rule to follow but his own reason; yet it is not so with him that lives in a commonwealth; because the law is the public conscience, by which he hath already undertaken to be guided. Otherwise in such diversity, as there is of private consciences, which are but private opinions, the commonwealth must needs be distracted, and no man dare to obey the sovereign power, further than it shall seem good in his own eyes.\textsuperscript{12}

Hobbes was one of the first thinkers in the English-speaking world to construct legal thought without assuming the existence of God as a major premise. He believed there are three contenders for sovereignty that "set up a supremacy against the sovereignty; canons against laws; and a ghostly authority against the civil; working on men's minds, with words and distinctions, that of themselves signify nothing . . . ."\textsuperscript{13} In effect Hobbes's reaction against the English Civil War viewed Augustine's \textit{Civitas Dei} as an undisciplined invisible "kingdom of fairies" ruled by superstition and ghosts roaming in the alienated mind of religious enthusiasts who dwell on the outskirts of reason's precincts.\textsuperscript{14}

Monotheistic and humanistic republicans in the seventeenth and eighteenth centuries thought Hobbesianism was an overreaction. They feared the idea that a state could reserve unto itself what they felt could only belong to God and citizens. They pondered what would be the best alternative. Although the interests of theists and humanists often were in conflict, they often shared a common style of reasoning that was somewhat syllogistic in form: 1) the Creator is sovereign; 2) human creatures owe their Creator obedience through the maintenance of a good conscience which gives guidance to moral and religious decisions; and 3) in all areas of human affairs, con-

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 242.
\textsuperscript{14} Id.
science is sovereign.\textsuperscript{16}

For the sake of brevity, allow me to offer a profile of the role of religious and humanistic appeals to natural law theory as a way of juxtaposing those appeals over the appeals propounded by advocates of the doctrine of state Absolutism.

In his Livingston Centennial lectures at Tulane University Law School in 1936, Professor Roscoe Pound both identified and attacked opponents of natural law who he believed had nothing better to offer.\textsuperscript{16} He opined that "[a] psychological realism is abroad which regards reason as affording no more than a cover of illusion for processes judicial and administrative which are fundamentally and necessarily unrrational."\textsuperscript{17} Pound believed that this psychologizing needed to be subjected to the audit of historical criticism in order to prove that natural law is based on an appeal to reason, not an appeal to any nonrational faculty.\textsuperscript{18} Without using the word "conscience," he reminded his audience of the importance of natural law theory in the formation of American law. He then turned his attention to the various competing definitions of natural law prevalent at the end of the eighteenth century.

This natural law was variously conceived: sometimes as a vaguely outlined ideal order of society, sometimes as a body of moral ideals to which conduct

\textsuperscript{15.} Id. This is admittedly a highly sketchy summary of a complicated development. For a superb analytical genealogy of a \textit{habitus} that made this development possible, see LAWRENCE MANLEY. CONVENTION, 1500-1750 (1980). Manley offers a brilliant argument for the centrality of the idea and practice of \textit{convention} in Western thought between 1500 and 1750. Protestants had to resist and redefine the meaning of convention during this period. Manley's genealogy would have been greatly strengthened if he had considered the powerful \textit{mediating} role that the evolving institution of conscience played. He correctly states, for example, that "[t]he principal vehicle in England for the natural law apparatus of the Roman code was canon law, which equally aroused the antipapist zeal of religious reformers and the jealousy of common lawyers, who," as evident in the words of Sir Frederick Pollock, "associated it with 'attempts to encroach upon the king's authority for the benefit of foreigners' and the 'meddling and vexatious jurisdiction of the spiritual courts.'" \textit{Id.} at 99. He cites Richard Hooker's \textit{Of the Laws of Ecclesiastical Polity} as a landmark attempt to offer a theological via \textit{media} between divine, natural, and human law. \textit{Id.} at 90 (citing RICHARD HOOKER, \textit{OF THE LAWS OF ECCLESIASTICAL POLITY}, in THE FOLGER LIBRARY EDITION OF THE WORKS OF RICHARD HOOKER (W. Speed Hill ed., 1977)). Yet he overlooks Hooker's emphasis on the role of conscience as convention in his Anglican ecclesiology. Of course, Puritanism, far more than Anglicanism, sought to embody and advance the institution of conscience as the axis of both theology and jurisprudence. For insightful and helpful discussions of this phenomena, see LEON HOWARD, ESSAYS ON PURITANS AND PURITANISM 87-112 (James Barbour & Thomas Quirk eds., 1986), GEOFFREY F. NUTTALL, THE HOLY SPIRIT IN PURITAN FAITH AND EXPERIENCE (2d ed., University of Chicago Press 1992) (1947), and MICHAEL WALZER, THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS (1971).


17. \textit{Id.} at 27

18. \textit{Id.}
should be constrained to conform, sometimes as a body of ideal legal precepts by which the precepts of positive law are to be criticized and to which, so far as possible, they are to be made to conform. But whatever meaning was given to the ideal or body of ideals, the interpretation and application of existing rules were to be guided by it, and lawmaking, judicial reasoning, and doctrinal writing were to be governed by it. 19

Pound presumed that the history of American jurisprudence would attest that natural law and reason were synonymous since the reformation of the sixteenth century succeeded in divorcing jurisprudence from theology.

His own genealogy of this phenomenon is suspect on this point, however, because of his inattentiveness to the career of the nature and meanings of conscience in natural law theory. First of all, the relationship between conscience and natural law needs historical clarification. They represent the impact of the two diverging streams of Augustinian and Thomistic thought. More empathically, they reflect the earlier divergence between Catholic and Protestant legalistic theology. Without this understanding, it is very difficult to account for the dominant role of Protestant theology, in particular, in American jurisprudence. 20

Some have argued correctly that trust is the primal psychic sinew of social bonds, and that contract and covenant theories assumed different kinds and degrees of trust during their prevalence in seventeenth- and eighteenth-century social and religious thought. Contract theory became hegemonic as the nations involved in the Religious Wars embraced the Peace of Westphalia in 1648. 21

19. Id. at 15-16.
20. See GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978). Wills argued that much of the ideology that shaped the Declaration of Independence has theological roots in Calvinist thought, especially among American Christians, such as the Reverend John Witherspoon, who subscribed to the views of Scottish Commonsense Philosophy. This was most certainly not an original idea. One of the clearest analyses of a chief connection had already been well-established by gifted American church historians like James Smylie. See James H. Smylie, Madison and Witherspoon: Theological Roots of American Political Thought, 22 PRINCETON U. L. LIBR. CHRON. 118 (1961).
21. The last phase of more than a hundred years of warfare between European Catholics and Protestants was called the "Thirty Years War" (1618-1648). The Peace of Westphalia, signed on October 27, 1648, was the name given to the accord reached between Western monarchs to cease fighting. Since the fourth century, cjus regio, ejus religio, the idea that the religion of the monarch should be the religion of the citizenry was accepted in most European countries until the sixteenth-century Protestant Reformation. Soon after the deaths of major leaders of the Reformation, such as Martin Luther (1483-1546) and John Calvin (1509-1564), hostilities ensued. Cjus regio, ejus religio was reconfirmed in the Peace of Augsburg (1555), as well as the Peace of Westphalia. In the meantime, intellectuals, such as Hugo Grotius (1583-1645) and John Locke (1632-1704), respectively advocated universal peace and religious toleration. See 3 KENNETH
failure of covenant theory as a societal practice gradually occurred as group conflict and anger assumed the irrelevance of God as a social reality. Puritan "Preparationist" theologians, especially those trained at Cambridge University, such as William Ames, Thomas Hooker, and John Cotton, found their arguments for the social reality of God had been subverted. This could be done rather easily once one perceived that the hubris of their arguments lay in their fragile "social construction of reality." They believed that conscience is the venue of God in the infrastructure of human personality. The Westminster Confession of Faith (1647) summarized their conviction: "God alone is lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his Word, or beside it, in matters of faith or worship." As I have already stated, by 1651, four years after the great Westminster Assembly had adjoined, Hobbes had undermined this assertion of the supremacy of conscience, and therefore, God.

The English Civil War, the excesses of religious zeal, and weariness prompted many to moderate their radical allegiance to religious

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22. Puritans were Calvinists who accented the absolute sovereignty of God. This doctrine left little formal room for believers to participate in the process of salvation. God either does or does not save a person from damnation. The rigidity of this doctrine encouraged some to formulate and embrace what was called "preparationist" theology. According to John Morgan:

This concept of preparation was based on the ability to come first to a recognition of the condition of one's own soul. Preserving the freedom of the Almighty to act as he saw fit in individual cases while also encouraging their (as yet unregenerate) parishioners to courses of preparation involved puritan ministers in paradoxical offerings.


23. This phrase refers to the following study: P E T E R L. B E R G E R & T H O M A S L U C K M A N N, T H E S O C I A L C O N S T R U C T I O N O F R E A L I T Y : A T R E A T I S E I N T H E S O C I O L O G Y O F K N O W L E D G E (1966), in which the authors succeed in dethroning the idea of social determinism without diminishing the power of social reality. They analyze how individuation is itself a social process that plays a primordial role in shaping social reality. Berger states this same principle in another influential study: "The individual is not molded as a passive, inert thing. Rather, he is formed in the course of a protracted conversation (a dialectic, in the literal sense of the world) in which he is a participant." P E T E R L. B E R G E R, T H E S A C R E D C A N O P Y : E L E M E N T S O F A S O C I O L O G I C A L T H E O R Y O F R E L I G I O N 18 (1967). I am suggesting that the Protestant (and modern) attempt to institutionalize conscience as a moral and psychological center of value independent of religious institutions was a concerted effort to wed belief in the reality of God with evolving material forces that elevated reason above revelation.


liberty. Both William Penn’s *A Persuasive to Moderation to Church Dissenters, in Prudence and Conscience*, written in 1686,26 and John Locke’s *Letter Concerning Toleration*, published in 1689,27 reflect this Anglo-American sentiment. These two documents also illustrate how fragile the compromise was between advocates of religious liberty and religious toleration. To illustrate where these two humanistic strata merge and diverge, it is necessary to quote two rather lengthy statements from these documents.

In the following quotation, William Penn offers an important differentiation between the act of defining conscience, and the liberty and duty that he believes conscience has to act upon its principles.

That there is such a thing as conscience, and the liberty of it, in reference to faith and worship towards God, must not be denied, even by those that are most scandalized at the ill use some seem to have made of such pretences. But to settle the terms: by conscience, I understand, the apprehension and persuasion a man has of his duty to God: by liberty of conscience, I mean, a free and open profession and exercise of that duty; especially in worship: but I always premise this conscience to keep within the bounds of morality, and that it be neither frantic or mischievous, but a good subject, a good child, a good servant, in all affairs of life; as exact to yield to Caesar the things that are Caesar’s, as jealous of withholding from God the thing that is God’s. In brief, he that acknowledges the civil government under which he lives, and that maintains no principle hurtful to his neighbour in his civil property.28

Penn sought to rescue conscience from being restricted solely to the diverse arenas of religious worship. Conscience was that and more. It was the duty a monotheist owes to the Creator because the relation between creature and Creator was sacred. He also subtly invoked the Biblical paradigm of covenant in order to argue that the creature’s obligation to the Creator is both direct and indirect. Obedience to duly constituted civil authority and communal values is the indirect way of adhering to conscience. Penn’s sense of a progressive divine illumination led him to conclude that all relationships bear the imprimatur of divinity, and that especially included the citizen’s relation to civil authority. “[F]or duty to such relations hath a divine stamp; and divine right runs through more things of the world, and acts of our lives, than we are aware of; and sacrilege

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28. 2 PENN, supra note 26, at 507.
may be committed against more than the church.”

This paradigmatic Quaker defense of progressive revelation had a humanist corollary which had one of its best expressions in the writings of Pierre Bayle. Bayle, writing under the pseudonym Sieur Jean Fox de Bruggs, articulated a view of conscience shared by many humanists. Bayle argued:

It is so evident that our conscience is a light by which we know that this or that is good or bad, that nobody, apparently, doubts at all that this is the definition of conscience. It is just as evident that every creature which judges an action to be good or bad assumes that there is a law or rule concerning rightness or wrongness of actions . . .

Rather than repudiate the notion, conscience became the linchpin of a doctrine of institutionalism. But the need to temper religious excesses among religious radicals increasingly lent support to Quakers like Penn who urged the Society of Friends to embrace a communal interpretation of divine illumination. There was a pervasive fear of the dangers of religious anarchy. The notion of anarchy was equated with the idea of radical individualism, and eventually even with the eighteenth-century idea of autonomy which Immanuel Kant argued in his famous essay, *What Is Enlightenment?*, constituted the epicenter of Enlightenment culture.

Penn's convictions were not simply a matter of metaphysics. He embodied these convictions in his "Holy Experiment" which became the Commonwealth of Pennsylvania. John Locke, the author of the

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30. Pierre Bayle (1647-1706), an important precursor of the eighteenth-century Enlightenment, was one of the most prominent proponents of radical religious toleration. He was exceptional in his advocacy in so far as his concept of religious toleration included Unitarians, Jews, and Moslems. See Franklin L. Baumer, *Modern European Thought: Continuity and Change in Ideas*, 1600-1950, at 96-116 (1977).

31. This quotation from Bayle's pseudonymous work titled, *Traduit de l'Anglois Sieur Jean Fox de Bruggs par M.J.F.* (1686), was translated from the French in Raymond Klibansky, *Preface* to *Locke, supra* note 27, at xii. Klibansky skillfully and correctly identifies Bayle as the author of this pseudonymous publication.

32. See Immanuel Kant, *What is Enlightenment?*, in *Foundations of the Metaphysics of Morals* and "What is Enlightenment?" 85 (Lewis White Beck trans., Bobbs-Merrill Co. 1959). Kant wrote this essay in 1784. He declared, "Enlightenment is man's release from his self-incurred tutelage. Tutelage is man's inability to make use of his understanding without direction from another." *Id.*

fundamental laws of the colony of North Carolina,\textsuperscript{34} also tried to make conscience an important cornerstone of his philosophy of law.\textsuperscript{35} While Locke's understanding of conscience was deeply shaped by the Puritanism of his own parents, his influence upon the humanistic proponents of natural law was considerable.

John Locke was less concerned with yoking his views, which were an anticipation of the English Act of Toleration (1689),\textsuperscript{36} than with theological convictions even though he was careful to assume them. In his \textit{Letter on Toleration}, Locke made an enduring distinction between "private judgment" and public responsibility in matters concerning primary moral and religious convictions.\textsuperscript{37} Proponents of religion have a duty to propagate their faith. But he argues, "However great, therefore, may be your profession of goodwill and your efforts for the salvation of men's souls, a man cannot be forced to be saved. In the end he must be left to himself and his own conscience."\textsuperscript{38} This argument addressed the enormous problem of religious anarchy. But the issue of potential state infringements upon religious liberty remained. Locke pursued this challenge in a Socratic manner:

\begin{quote}
But you will say: What if the magistrate's decree should order something which seems unlawful to the conscience of a private person? I answer: If the commonwealth is governed in good faith, and the counsels of the magistrate are really directed to the common good of the citizens, this will seldom happen. But if it should chance to happen, I say that such a private person should abstain from the action which his conscience pronounces to be unlawful, but undergo the punishment which it is not unlawful for him to bear. For the private judgment of any person concerning a law enacted in political matters, and for the public good, does not take away the obligation of that law, nor does it deserve toleration. But if the law concerns things which lie
\end{quote}

\begin{itemize}
\item \textsuperscript{34} See Richard I. Aaron, \textit{John Locke} 16 (3d ed. 1970).
\item \textsuperscript{35} Id. at 74-82.
\item \textsuperscript{36} Y.B. 1 W. & M., ch. 18 (1689). Although the English Toleration Act of 1689 extended religious liberty to Protestant dissenters from the Church of England, it did not grant religious liberty to Unitarians and Roman Catholics. The Act's legal title was actually "An act for exempting their Majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws." But it is commonly known as the English Act of Toleration. According to its preamble, its objective was twofold. It granted "some ease to scrupulous consciences, in the exercise of religion," and sought "to unite their Majesties' Protestant subjects in interest and affection." The preamble and full text of this Act can be found in Philip Schaff, \textit{The Progress of Religious Freedom as Shown in the History of Toleration Acts} 119-25 (New York, Charles Scribner's Sons 1889).
\item \textsuperscript{37} Locke, \textit{supra} note 27, at 127, 129, 131. See both the preface and introduction to this critical edition of Locke's famous published missive where the historical context and intellectual implications of his advocacy of toleration are explored in detail.
\item \textsuperscript{38} Id. at 101.
\end{itemize}
outside the magistrate's province, as for example that the people, or any part of it, should be compelled to embrace a strange religion and adopt new rites, those who disagree are not obliged by that law, because political society was instituted only to preserve for each private man his possession of the things of this life, and for no other purpose. The care of his soul and of spiritual matters, which does not belong to the state and could not be subjected to it, is reserved and retained for each individual.39

With this distinction, Locke moved the center of discussion away from Hobbes's notion of the state as the arbiter of bellum omnium contra omnes.40 Locke expanded the humanist interpretation of the place of conscience in natural law theory. While he accepted the privatization of conscience, his anthropology saw conscience as the sanctuary of tradition. As the sacred house of tradition, conscience became a promoter of civil peace and continuity. Conscience became the seat of moral authority as defined by tradition. As long as cultural memory and homogeneity remained unscathed by time and circumstance, conscience could be a sure moral guide for both the individual and the state.

In summary, the theocentric, humanist, and absolutist bases for the centrality of conscience differed in the degree to which they believed human nature was corrupt or corruptible. The long shadow of Calvinism's grim view of human ability constantly provoked its challengers who were inspired by their discovery that human events can be both capricious and promising. These theological and philosophical anthropologists were far removed from the scientific and psychological works of their successors from the late eighteenth century onward. But their efforts to fuse theology and philosophy in the service of jurisprudence created an important but insecure institution within the interdisciplinary arenas of legal thought.41

Nonetheless, despite its schizoid history, the appeal to conscience as the basis for religious liberty and toleration had become a fragile but distinctive American political tradition by the late eighteenth century. In 1791, most political and ecclesiastical leaders in the Anglo-American world assumed that "the rights of conscience" were natural and inalienable. But this did not forestall nearly 150 years

39. Id. at 127, 129.
40. Koselleck, supra note 8, at 53-61.
of theological and philosophical debates about the meaning of this phrase. Between the outbreak of the English Civil War in 1642 and the ratification of the American Bill of Rights in 1791, the attempt to interface Calvinist and humanist republicanism succeeded. But this did not happen without much anguish.

Without taking the evolving power of the nation state seriously enough, many belletrist and religious subjectivists abandoned the brutalities of “marketplace culture.” But neither the engines of capital nor propriety could regain enough moral verve to challenge the state’s willingness to desecrate the human body through the abrogation of human rights (especially in the form of slavery) and through the carnage of warfare. By the end of the eighteenth century, conscience, the one institution that provided an opportunity to unify humanists and religionists had become so sacred that few bothered to discuss what they meant by it. This lack of discussion unwittingly subjected conscience to interpretations that excluded its advocates’ claims for its sacredness from judicial ameliorations when it found itself in conflict with the interests of the state. The subordination of the sacredness of conscience tempted students of jurisprudence to mix theological and psychological speculation without always being aware of the difference. Moreover, it subjugated the sacred claims of conscience to the judicial review of the state. This meant that those who appealed to the sacred authority of conscience in efforts to make the state subject to transcendent values beyond national self-interest, placed the moral and religious constraints of conscience upon the state at risk.

In the remainder of this Essay, I would like to telescope this problem with another hypothesis. I believe radical forms of historical contingencies created the precondition for what I call “juridical cults of assurance.” The Founders of the American Republic had

42. For a helpful summary and analysis of this enduring intellectual debate during this period, see Kenneth E. Kirk, Conscience and Its Problems: An Introduction to Casuistry 123-290 (1927).

43. The history of Baptist opposition to established churches is one of the best illustrations of this point. For an account of this opposition, see both volumes of William G. McLoughlin, New England Dissent. 1630-1833: The Baptists and the Separation of Church and State (1971).


45. Keeping in mind Koselleck’s view of Absolutism as the pathogenesis of modern society,
to contend with the enormous anxieties of historic societal changes unleashed by revolutionary ferment. These cults that had their analogue in the older religious revolutionary traditions appealed to three historic manifestations of the authority of sovereignty: covenant, contract, and constitution. As attested by many excellent recent studies, the monotheistic and humanistic republicans who crafted the Constitution of the United States, as well as the state constitutions, used the moral and religious discourse of these forms of sovereignty in order to garner public support for their handywork. One American historian has referred to this veneration of constitutionalism as the "cult of the constitution." Religious views of the law of church and state have relied heavily on asserting the natural and transcendent rights of conscience by establishing "conscience as a notional institution."
Commentaries on the Constitution of the United States, Justice Joseph Story offered a juridical description of this strange institution as a precondition of law: "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion." This belief assumed that there are religious and moral constraints upon the state's claims to sovereignty. As a fundamental principle of American legal thought, this notion of "the rights of conscience" made the predication of an amazing spectra of religious and humanistic beliefs and practices possible.

Justice Story's remarks, however, contain a subtext that assumes conscience is a bridge between "natural" and "revealed" religion. Story assumed knowledge of the histories, theologies, and anthropologies of religious liberty and religious toleration that are foreign to many. I cannot review all these factors in this paper. But I do wish to offer a genealogical assessment of some of the religious bases for the meanings of conscience in American jurisprudence. I begin with the assertion that the notion of conscience has suffered greatly at the hands of irreversible historical and cultural changes. Therefore, I am suggesting that we need to expand the juridical role of conscience by redefining it as "adherence to the sanctity of the body."

The importance of the sanctity of the body itself has been excluded from religious arguments: 1) for religious liberty; 2) against the fugitive slave law tradition; and 3) for both religious and selective conscientious objection to military service. These three jurisprudential traditions show how appeals to the natural rights of conscience without reference to some identifiable notion of the sanctity of the body, a primal natural right, continues to extend an unwarranted patent to an institution in dire need of renovation.


52. 2 Id. § 990, at 701.
53. I see Native American beliefs in the sacredness of the land as a significant, but concurrent religious argument for the law of church and state whose history needs to be reconstructed. For example, the Otoe land dispute and other American Indian claims that appealed to different notions of religious liberty would be an effective and important way to expand the definition of conscience to include the sanctity of the land. Parenthetically, it could also be a way of critiquing
My historical diagnosis of the crisis in the institution of conscience might seem premature and unwarranted. In one sense it is. Much further historical reconstruction and analysis of this notional institution need be done. Paul Lehmann's call for more attention to this area of neglect still remains largely unheeded. He said:

A full-length study of what has happened to conscience in the Western cultural tradition is overdue. A carefully documented and sufficiently comprehensive account of what might be called "the shape of conscience," i.e., an interpretive framework other than that offered by moral theology in which the ethical nature and behavioral effectiveness of the conscience might once again be clearly and persuasively understood, is not at hand.54

This inattentiveness to the obvious, yet neglected, story of the impact of the notional institution of conscience on Western jurisprudence has eclipsed the past role of the ontology of conscience in the epistemological, cultural, and anthropological dimensions of the church and state debate.

In fact, most of the historiological debate about the role of conscience in Anglo-American jurisprudence as it relates to the problems attending the discussion concerning relations between church and state have largely failed to relate to the broader theological and philosophical debates of the seventeenth and eighteenth centuries. Fortunately, some students of jurisprudence are beginning to redress the seeming immunization of this noble discipline against the Western crisis in the foundations of epistemology.55


assumptions of foundationalism as a cognitive presupposition and intellectual habitus have had upon Western jurisprudence remain regnant, the pressing postmodern need to develop a jurisprudence that is multicultural, nonracist, and nonsexist will continue to go unmet. Although several astute students of jurisprudence and the humanities have embraced and engaged this eventful development in the history of the Western psyche, much work remains to be done.

Any capital improvements on the venerable house of conscience, however, requires an examination of the deterioration of its infrastructure along the lines of its inherent epistemological, cultural, and anthropological faults. Raising consciousness about the corrosion of the epistemological basis for the institution of conscience does not preclude the need to describe the equally disabling effect of cultural diffusion and despair. Paul Tillich often referred to this modern development as heteronomy. This is a useful descriptive term for pinpointing the influence of the decline in the authority of religion in the public sphere, especially in its monotheistic guise. A careful analysis of how these faults developed in each of these historic debates mentioned above would offer more specific insights into the nature of the crisis in the religious authority of conscience.

An abbreviated profile of these lines in the structure of conscience, however, at least provides a preliminary index. Because it is so diffuse, the cultural fault line of conscience with its jagged edges cuts crudely into the preserves of clarity. Devotees of cultural discernment and historical representation find this sort of work difficult and often frustrating. Despite these technical prohibitions, I have found that this intricate pastiche is perhaps most discernible in the ideological debates about the proper role of religion in fostering social values. But the distinction that I am making between cultural and anthropological dimensions of conscience is largely a twentieth-century development.

The cultural fault line in the institution of conscience is the macrocosmic expression of the microcosmic crisis in the definition of hu-

56. See 1 PAUL TILLICH, SYSTEMATIC THEOLOGY: REASON AND REVELATION BEING AND GOD 83-86 (1951) (discussing the conflict within actual reason and the quest for revelation — autonomy against heteronomy); see also JAMES LUTHER ADAMS, PAUL TILLICH'S PHILOSOPHY OF CULTURE, SCIENCE, AND RELIGION 15-64 (1965) (providing an engaging and reliable analysis of Tillich's overall project, and the place of "heteronomy" in Tillich's basic concepts).

57. But, alas! time limitations insist that this be pursued on another occasion. Instead of pursuing that trajectory, continuing a descriptive outline of the cultural and anthropological fault lines within the notional institution of conscience constitutes the remainder of my agenda in this paper.
CRISIS IN SANCTITY OF CONSCIENCE

Manity. This is where ideology and theology diverge. In its best moments, theology pursues and defends an eschatological ontology that is invested in answering the question: "Given the reality of God's presence within the created order, who is my neighbor?" Ideologists pursue a different question: "Given the possibility of perfectibility of the human race, what humans are more likely to be perfected?"

These questions were merged in late eighteenth-century North America even though Joseph Haroutunian is correct in his astute observation that "in a way, the deepest tragedy of the modern religious mind is the separation of ethics from theology." He believed that this fissure occurred during the eighteenth century:

> The separation of ethics from theology established by eighteenth century rationalism has sunk into our consciousness so deeply that we have become well-nigh incapable of understanding the Biblical point of view, according to which man is at all times and for all things responsible to God.

The Bill of Rights does more than adjudicate interests. It defines social values amidst gargantuan evidence that religion could no longer do it without adjusting to the subordination of the sovereignty of God at the expense of the supposed elevation of the sovereignty of the people. The people of God and the new republic of peoplehood tried to join forces to constrain the power of the state.

We should be careful not to underestimate how much the Founders of the American constitutional tradition valued what the classical modernists taught them about how to relate societal structure to human ability. The key is to see that relationality is what dialogue and dialectics have in common. Later such different figures as Mother Ann Lee (the great shaman of the Shakers), Karl Marx, Sven Kierkegaard, Friedrich Schleiermacher, and Frederick Douglass perceived within their own spheres of influence that redemptive "development" seldom happens unless power is disclosed, reviewed, and redefined.


59. Haroutunian, supra note 58, at 31.

Both popular, political, and religious Romanticism profited and shaped the idea of the perfectibility of humanity. This horizon would not have been as visible, or necessary, had it not encountered republicanism's discovery that historical change need not be total change in order to dislodge both the myth of absolute human corruption and absolute human greed. Neither utopia nor the commonwealth of complete self-interest could supersede human ingenuity and historical surprise. The legatees of constitutionalism discovered, along with John Locke, the importance of seeing "imagination as a means of grace."  

By the end of the nineteenth century, it was evident that the juridical use of conscience had been diminished by the decline of its authority. It was no longer considered by some to be a transcendent reality brokered by the human will. It had been reduced to a state of individual consciousness. The following quotation from Herman Melville's *Billy Budd* illustrates this point. Melville has his narrator characterize the conscience of Budd's tormentor, Mr. Claggert:

But how with Claggert's conscience? For though consciences are unlike as foreheads, every intelligence, not excluding the scriptural devils who "believe and tremble," has one. But Claggert's conscience being but the lawyer to his will, made ogres of trifles, probably arguing that the motive imputed to Billy in spilling the soup just when he did, together with the epithets alleged, these, if nothing more, made a strong case against him; nay, justified animosity into a sort of retributive righteousness.

Melville labored until his death in 1891 with the implications of a committed conscience. He sought to portray the tragic and ambiguous consequences of the reign of conscience when this notional institution is given the freedom to exhaust itself in the relentless pursuit of principles.

Melville portrays the agony of the conscience as a bondage of the will burdened with the vicissitudes of contingency. The domain of

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63. Id. at 1020.
65. See Lewis, supra note 64, at 127-55.
conscience finds itself besieged by the surds of time, space, and mystery. In an attempt to explain Claggert’s motivation for persecuting Billy Budd, Melville offers two important insights into the social status of conscience during the centennial year of the ratification of the Bill of Rights. The courtroom replaces the confessional in the architecture of the human psyche’s moral infrastructure. Subsequently, the lawyer, rather than the priest, becomes the advocate for righteousness. The consequence of these changes is the unwitting expansion of the role of conscience as an agency of unholy alliances.

According to Melville, “every intelligence, not excluding the scriptural devils who ‘believe and tremble,’ has one [a conscience].” This statement recognizes the complete universalization of the institution of conscience by making it a byproduct of intelligence. In the context of Billy Budd, intelligence is equivalent to culture. Should Billy Budd be held accountable for not knowing the protocols of life aboard ship? Missionaries raised similar questions about the “heathen.” Rather than make conscience, sub specie aeternitatis, a mystical governor, it had become synonymous with rationality. A link between this shift and the rationale for education can be seen in Matthew Arnold’s Culture and Anarchy. But on the North American side of the Atlantic, Horace Bushnell had already anticipated the erosion of the authority of the religious understanding of conscience by making the well-being of conscience dependent upon nurture (or education) rather than revelation.

Others were less willing, however, to dethrone the religious definition and authority of conscience. Just three years before Melville’s death, Philip Schaff, the distinguished Professor of Church History at Union Theological Seminary, offered one of the most forthright descriptions and defenses of the religious understanding of conscience and its relation to religious liberty:

Religious liberty is a natural, fundamental, and inalienable right of every man. It is founded in the sacredness of conscience, which is the voice of God

66. See Melville, supra note 62, at 1020.
67. See Matthew Arnold, Culture & Anarchy: An Essay in Political and Social Criticism and Friendship’s Garland Being the Conversations, Letters, and Opinions of the Late Arminius, Baron Von Thunderten-Tronckh 49 (1883) (“We are not in danger from Fenianism, fierce and turbulent as it may show itself; for against this our conscience is free enough to let us act resolutely and put forth our overwhelming strength the moment there is any real need for it.”). For a brilliant analysis of Arnold’s Culture & Anarchy, and some interesting allusions to the impact of John Stuart Mill on both Arnold and the great American jurist, Oliver Wendell Holmes, see Lionel Trilling, Matthew Arnold 252-91 (1939).
in man and above the reach and control of human authority. There is a law
above all human law. It is written not on parchment and tables of stone, but
on the heart of man by the finger of God.66

But Schaff certainly recognized the antinomian implications of this
position even though he held to the conviction that God “alone is the
author and lord of conscience, and no power on earth has a right to
interpose itself between them.”70 Unlike others, however, Schaff was
an adamant foe of religious toleration.71 He felt it was an unwarr-
ranted and unprincipled stopgap between religious persecution and
religious liberty. Because religious liberty is founded on conscience,
he argued that sacredness of conscience precluded compromise. He
dismissed the fear of antinomianism implicit in his view. He argued
that “[l]iberty will be abused to the end of time. But no amount of
abuse can abolish the right use. The same sun which spreads light
and life promotes decay and death.”72 But in his latest book,73 Pro-
fessor Robert T. Handy demonstrates that a kind of political and
social decay of the basis for the separation of church and state was
steadily distending even as death engulfed Schaff in 1893.74

Melville shows how ethical complications can be engendered by
the moral myth of conscience. He endows Claggert with the self-
serving compromises that the brokered conscience makes when it
serves the warped interests of a polymorphously perverse will. 
Granted, the image of Claggert as a latent homosexual would not
pass many contemporary tests for either fairness or sensitivity. Nor
would the portrayal of Billy Budd as the innocent victim of Clag-
gert’s inward torture survive the cynicism of late twentieth-century
American culture. Yet Melville’s psychodrama arrests all appeals to
conscience with a nagging question: If conscience has become the
servant of a clinically narcissistic will, is not justice, as well as truth,
impossible to attain under such a regime?

The same problem has its societal analogue in the genealogy of
the law of church and state. The work of reconstructing much of

69. SCHAFF, supra note 36, at 2.
70. Id.
71. Id.
72. Id. at 3.
this genealogy has been done by scholars such as Anson Phelps Stokes, Elwyn Smith, Robert T. Handy, and Glenn T. Miller. Their prior labor therefore makes my task much easier. These esteemed friends of religious liberty pursued their admirable task, however, from a rightly apologetic viewpoint. Religious liberty is indeed one of those precious political inheritances that requires "eternal vigilance" lest we lose it. But even during the centennial year of the Bill of Rights, some shared Melville's concerns about the moral and epistemological crisis within the notional institution of conscience. Many saw that the denial of the rights of conscience was a gargantuan problem. But few could admit that there was a problem in the very meaning of this venerable conceptual apparatus that had provided the fundamental moral basis for the liberties guaranteed in the Bill of Rights.

The decline of the culture of conscience is both a great tragedy and a costly boon. Although the "terrors of history" have checked, if not checkmated, military henotheism, assaults against the sanctity of the body, one of the embarrassing legacies of modern henotheism, continue to increase with more sophisticated, if not greater, efficiency.

But the ascendancy of heteronomy cannot be fully explained by referring to the development of the modern nation-state. The decline in the moral, intellectual, and liturgical authority of institutional religion reflects an ancient fissure in Christian social teachings between Pauline anthropology and the development of Constantini-


78. There has been a tendency to interpret the Apostle Paul's notion of "conscience" as an individualistic construct. Bishop Krister Stendahl, the former dean of Harvard Divinity, critiqued this interpretation in his 1961 address before the American Psychological Association. See Krister Stendahl, The Apostle Paul and the Introspective Conscience of the West, in Paul Among Jews and Gentiles 78 (1976).
anism by the fifth century. After nearly five centuries of martyrdom, Christians reached an unsettling compromise with their host, the Roman Empire. Both the clarity and anxiety endemic to Constantinianism, sealed in the Council of Nicaea in 325, was best expressed by Augustine of Hippo in Book XIX of his *City of God*. Augustine believed that Christian soteriology offers the believer the opportunity to reside eventually in a "heavenly city." But in the meantime, as creatures of time, they are consigned to the vileness and vicissitudes of the earthly polis:

This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace.

Augustine saw this bifocal nature of Christian discipleship as a necessary compromise, not as an abdication of Christian identity. But for nearly a thousand years from the death of Augustine in 430, the regnant impulse within Western Christendom was to identify Christian interests with those of the state. Questioning and challenging the religious basis for such alliances with the earthly *polis* became one of the hallmarks of the sixteenth-century Reformation. Different conceptions of "Christian society" vied for supremacy as Christian nations embraced the praxis of coercion as a form of evangelism. Religious toleration, and most certainly religious liberty, did not begin to become a legitimate part of the public sphere until the late seventeenth century.

As theologians, especially Protestant ones, continued to debate and define the meaning of Christian discipleship because of the internal pressures following the Reformation, many of them also sought to include an understanding of the Christian's relation to civil society. This endeavor consumed the energies of both religious and secular intellectuals. Some, such as Rousseau, divorced them-

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79. *Id*. at 397.
80. *Id*. at 397.
selves from the issues of religious discipleship, and began to address the crisis in the meaning of citizenship in a bourgeois society exclusive of the problem of discipleship. They broadened the discussion to ask, "What are those human rights which no state, whether or not sanctified by religious authority, can abridge?" The carnage of warfare, as well as the abuses of religious authority, broadened the moral consciousness of many. Karl Löwith succinctly frames this central modern problem:

Thus the human problem of "our days" is the fact that the modern bourgeois is neither a citizen in the sense of the ancient polis, nor a whole man. He is two things in one person; on the one hand, he belongs to himself, and on the other, to the order civil.

Although the process of desacralization in the Western hemisphere began much earlier than the 1780s, the political exclusion of African people from the ranks of American peoplehood during the Founders' debates about the United States Constitution illustrates how the intense focus of Europeans on their own freedom could support the denial of freedom to their radical other, the Africans. The right to practice racism, and have it sanctified by religion, revealed how glaring the anthropological fault line in the institution of conscience could be.

The invocation of conscience to support racism (and sexism) could not have been possible without the abysmal history of the desacralization of the body. The tradition of minimizing the sanctity of both the body and life itself is too often reserved for heated present debates concerning abortion. Moreover, it is erroneously associated exclusively with the rise of liberal culture. Both advocates and opponents of abortion rights too often divorce that discussion from the larger question of the degree to which the human body, and life itself, is sacred.

Nonetheless, the primary cultural fault line of conscience reveals an institution that exists at the mercy of the idolatry of individuality, that great engine of modernity called "individualism." The anthropological fault line of conscience, on the other hand, becomes visible in the form of the fetishism of white tribalism. Two sets of juridical events illustrate this point: the emergence of the fugitive slave law tradition, and the twentieth-century judicial insistence

that conscience must be subordinated to nationalistic and racial homogeneity. After examining the problem of fugitive slave laws, I will discuss the latter point in a brief review of *United States v. Macintosh.*

The appeal to the doctrine of the “sovereignty of the people” in the Preamble of the Constitution of the United States of America assumed the veracity of the *anthropology of the universality of human equality* pronounced in the American Declaration of Independence. But the Founders could not bypass the problem that African slavery posed for defining American citizenship. The tacit legitimation of slavery led to the creation of a *herrenvolk* democracy that could not find the national will to abolish slavery without civil war. Appeals to the “rights of conscience” were invoked by both proslavery and antislavery advocates.

The Framers of the Constitution knew from their experience in colonial self-government that doctrines of social relations greatly impact the way governments structure public policy. Indeed, they believed that a government that is without constraints can unduly abridge “certain inalienable rights.” They discovered early in the constitutional debates, however, that the notion of “natural rights” is not easily defined, especially in a society that is racially, religiously, and culturally diverse. This is the core of what Gunnar Myrdal later called the “American dilemma.” Few described this dilemma of American republicanism as clearly and passionately as St. George Tucker:

> Whilst we were offering up vows at the Shrine of liberty, and sacrificing hecatombs upon her altars; whilst we score irreconcilable hostility to her enemies, and hurled defiance in their faces; whilst we adjured the God of Hosts to witness our resolution to live free, or die, and imprecated curses on their heads who refused to unite with us in establishing the empire of freedom; we were imposing upon our fellow men; who differ in complexion from us, a *slavery,* ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained. Such are the inconsistencies of human nature; . . . such that partial system of morality which confines rights and injuries, to particular complexions; such the effect that self-love which justifies, or condemns, not according to principle, but to agent.

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85. 283 U.S. 605 (1931). See *infra* notes 149-81 and accompanying text for a discussion of *Macintosh.*
86. U.S. CONST. pmbl.
Tucker went beyond characterizing the institution of slavery as the shadow of American democracy. He believed that it is the embodiment of what I call *tribal narcissism*. Those who opposed the institutionalization of this tribalism knew that they had a long fight ahead of them when the first fugitive slave law was written into the new Constitution.

Pierce Butler and General Charles Pinckney moved on August 28, 1787, during the Federal Convention "to require fugitive slaves and servants to be delivered up like criminals." The concept of the "fugitive slave" was actually introduced into American law during the summer of 1787, first in the Northwest Ordinance, then at the Federal Convention. From the standpoint of jurisprudence, it gave sanction to the right to consider slaves as property. Therefore, slavery in one could not be undermined by conditions or abolitionist enactments in any other. If the estate of which the owner was a citizen recognized a slave master's right to own slaves, there would be no place in the new United States where the slave could escape. In effect, the federal government promised to guarantee that the slave master's enslaved property would be sacrosanct.

Article IV, section 2 of the Constitution of the United States reads as follows:

> No person held to service or labor in the state, under the laws thereof, escaping into another, shall, in consequence of any law or Regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

This constitutional provision was a direct challenge to the institution of conscience. The right of conscience to object to slavery was not as well established in the land of the Puritans as was the right to religious freedom based upon the privileges extended to the institution of conscience. But the two were not unrelated.

The legacy of European religious warfare, as well as the Puritan Revolution, had not been forgotten. America had become the sanctuary for the victims of religious intolerance. Religious pluralism was a fact of life that insured the political necessity to legitimize

89. 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 443 (1911).
91. U.S. Const. art. IV, § 2.
religious liberty in the Bill of Rights. Congregationalists, Schwenkfelders, Amish, Mennonites, Baptists, Methodists, Roman Catholics, Presbyterians, Episcopalians, Moravians, Jews, etc., populated the new Republic. Those denominations that had not been established colonial churches pressed the "rights of conscience" more than those who had. Many of them were the beneficiaries of those Evangelical revivals known as the "Great Awakening" and the "Second Great Awakening." These revivals caused schisms within religious denominations, and the creation of new ones. They also nurtured the desire for earthly personal and social perfection. They believed that God, speaking to and through their conscience, disapproved all forms of oppression. Their dissatisfaction with the status quo in both church and state contributed greatly to energizing the agents of social and religious change. James D. Essig reminds his readers that the institution of slavery had its first broad religious opposition, beyond a small faction of the Quakers, as well as other Christians, among these early Evangelicals. Between 1770 and 1808, those denominations vigorously opposed slavery. But by 1808, "evangelical opposition to domestic slavery had largely subsided." 

Despite inconsistent and sporadic Christian opposition, many citizens believed that the fugitive slave provision of the Constitution offended conscience. By 1830, this antislavery impulse quickened under the leadership of radical abolitionists such as William Lloyd Garrison, Frederick Douglass, Lewis Tappan, and Maria W. Chapman. The formation of the American Anti-Slavery Society represented the determination of many to abolish the slave regime even if resistance meant breaking the law. They believed that God's law is higher than human law. Maria W. Chapman, an undaunted abolitionist, articulated this view with uncompromising verve in 1839 as she spoke before the New England Non-Resistance Society:

93. In 1808, Congress mandated the end of American involvement in the slave trade. Id. at xiii.
94. Id.
95. In fact, gradual abolition of slavery in several Northern states, as well as the formation of the American Colonization Society in 1817, signalled great national discomfort about the institution of slavery among both religionists and humanists. See David Brion Davis, Slavery and Human Progress (1984); David Brion Davis, The Problem of Slavery in the Age of Revolution, 1770-1823 (1975); David Brion Davis, The Problem of Slavery in Western Culture (1966); Arthur Zilversmit, The First Emancipation: The Abolition of Slavery in the North (1967).
Antislavery attorneys, such as Salmon Chase and John Jolliffe, used the language of jurisprudence to argue the same point. Two years before Chapman uttered her latter remarks, Chase argued against the fugitive slave law provision of the Constitution, as it was backed by the congressional Fugitive Slave Act of 1793, in the famous Ohio Mathilda case: “There is such a thing as natural rights, derived not from any constitution or civil code, but from the constitution of human nature and the code of heaven . . . .”

Such views were met with determined opposition both from those who were for the gradual abolition of slavery and from proslavery advocates. Many feared that appeals to what was often called “the moral government of God” would lead to civic anarchy and religious antinomianism. They sought to dethrone conscience as that aspect of human judgment that pertains solely to matters of individual human conduct. R.H. Rivers, a professor of moral philosophy at Wesleyan College in Florence, Alabama, argued that the individual conscience renders it “not a distinct action from judgement much less a distinct faculty; and by no means carrying with it more proof of accuracy and correctness than is our own judgement about any other matter.” He spoke for many ethicists and jurists when he declared earlier in his argument that “no one should place conscience above God, or above law.”

The ambiguous place of conscience in these opposing views of the relationship between human nature and citizenship underscore the depth of intellectual morass surrounding conscience as a mediating institution between religion, law, and ethics. In 1867, the Reverend Dr. Henry M. Smith, against the logic of his own review of recent

100. Id. at 20. For a fuller discussion of the proslavery position, see William Sumner Jenkins, Pro-Slavery Thought in the Old South (1935) and H. Shelton Smith, In His Image, But . . . : Racism in Southern Religion, 1780-1910 (1972).
studies of conscience, pleaded: "Conscience, now gagged and shackled, will survive these indignities and restraints. It is indestructible; and when probation terminates, the finished life moves in review before its unbandaged gaze." But what happened between the 1790s and 1867 that would lead this Presbyterian divine to offer a defense of conscience?

The problem of slavery and racism in this period refused to retreat from the consciousness of the nation. By 1845, nearly every major religious denomination split over whether or not Christians should hold slaves. With the exception of the Civil War itself, perhaps no series of events exposed the ambiguity of conscience as a legal and moral construct as did the Supreme Court's decision in *Dred Scott v. Sandford*. This case, commonly referred to as the *Dred Scott* decision, focused on three of the important issues left unresolved by the drafters of the Constitution. That is: 1) the issue of states' rights; 2) the nature of citizenship; and 3) the limits and nature of property rights.

The possible expansion of the institution of slavery into the western territories exacerbated these issues. The problem of possibly expanding the political power of slavocracy unmasked how captive American jurisprudence was to biological and social determinism despite the egalitarian rhetoric of its liberal ideology. The existence of a people who were viewed as outcasts raised serious questions about the nature of citizenship. The gravity of this crisis became painfully evident in the suit of Dred Scott, a free black whose "right" to move freely between slave, as well as free, states and territories, was severely tested by the Fugitive Slave Law of 1850. The Supreme Court's decision in this case confirmed the pervasive suspicion that many jurists were obsessed with a tenacious commitment

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103. 60 U.S. (19 How.) 393 (1857).
to a retrogressive "legal anthropology"¹⁰⁷ that assumed African-American inferiority. In 1857, the Supreme Court articulated a widely accepted legal anthropology that was based on a racist understanding of the nature of American citizenship. The Court decided in *Dred Scott* that the denial of citizenship to persons of African descent was justified because the Framers of the Constitution did not view Africans as "constituent members of sovereignty."¹⁰⁸ Speaking for the majority, Chief Justice Roger Brooke Taney stated as a matter of fact that "[w]e think they [Africans] are not, and that they are not included, and were not intended to be included . . ."¹⁰⁹ in the social compact. Later, Taney was even more pointed in articulating the Court’s historical and anthropological assumptions: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . .; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."¹¹⁰

Taney’s opinion reflected the pervasive view in American jurisprudence that African people could not be citizens either by birth,¹¹¹ religious conversion,¹¹² or naturalization.¹¹³ Taney assumed the legitimacy of the notion of chattel slavery, as well as reasserted the innate biological and social inferiority of African-Americans. Justices John McLean and Benjamin Curtis dissented. According to Justice McLean, the majority of the Court was wrong in its refusal to recognize the natal rights of an American just because of African ancestry. For him, this was "more a matter of taste than of law."¹¹⁴ Justice Curtis’s argument appealed to the older precedent of the state laws of New Hampshire, Massachusetts, New York, New

¹⁰⁹. Id.
¹¹⁰. Id. at 407.
¹¹². From the late seventeenth century, an Anglo-American consensus emerged in several colonial legislatures, including Maryland, New York, Virginia, North and South Carolina, in the form of "laws reassuring masters that conversion of their slaves did not necessitate manumission." See Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812*, at 92-94 (1977).
Jersey, and North Carolina under the period of the Articles of Confederation (1781-1787), which granted citizenship to all free native-born inhabitants.\textsuperscript{115}

This reduced the disagreement within the Court to a matter of historical interpretation. Justice McLean’s pointed reference to the role of bigotry sanctioned by custom in this decision rescued the dissenters from juridical obfuscation. But it also disclosed how judicial moral blindness helped to place American legal anthropology in a moribund state. Even McLean was unwilling to allow custom in the form of legal precedence to be overthrown by the ambiguous moral shadow of conscience. On November 10, 1850, he had already confided in a letter to the Reverend Jona Wald about the Fugitive Slave Law that “formerly the enforcement of the ‘higher law’ [conscience] caused more wars and bloodshed in the world, than all other causes united. . . . Conscience is not always a sure guide.”\textsuperscript{116}

He strived for a \textit{via media} between his own desire for judicial certainty; the pressures of a historic and prophetic moment in American history, and the demands of judicial restraint. He eschewed both social “taste” and “conscience,” and embraced historical precedent as the only sure protection against anarchy.\textsuperscript{117}

It seems to be an oxymoron to suggest that governments themselves can be the agents of anarchy. Governments are supposed to make and enforce laws that insure societal tranquility. The enactment of the Fugitive Slave Law of 1850, however, challenged this assumption. Many felt that the Fugitive Slave Law disregarded the prior moral authority of conscience. The Reverend Samuel T. Spear preached a sermon in 1850 declaring that the government, when it passes legislation such as the Fugitive Slave Law, uses its legislative authority to supplant the moral government of God:

\begin{quote}
Forget not that morality and God are older and more infallible than the Constitution, and that a compromise with wrong for the sake of union does not convert it into right. Those who choose to give up their moral sense to the decisions of the Constitution, let them do so; \textit{I will} not. I acknowledge no such citizenship under any government man ever made, as destroys the present obligation invariable and irrepealable of the Supreme Rule.\textsuperscript{118}
\end{quote}

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 572-76.
\item \textsuperscript{116} \textit{Cover}, supra note 97, at 248.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textsc{Samuel T. Spear, The Law-Abiding Conscience, and the Higher Law Conscience, with Remarks on the Fugitive Slave Question: A Sermon, Preached in the South Presbyterian Church, Brooklyn, [NY], Dec. 12, 1850} (New York, Lambert & Lane, Stationers & Printers 1850).
\end{itemize}
The Reverend Mr. Spear proposed a schizoid definition of conscience. He identified the nature of its twoness as being torn between a conscience that is committed to obedience to the laws of the nation-state, as well as obedient to God's Higher Law which we know through the conscience. Besides appealing to enlightened obedience to both laws, he was unable to resolve the dilemma of being committed to two different sovereigns, God and the nation-state. This insistence on obedience to the Court's decision could not forestall examples of disobedience in the form of John Brown's Raid on Harper's Ferry in 1859, as well as other lesser known events. According to Professors Potter and Fehrenbacher, "The Dred Scott decision was a failure because the justices followed a narrow legalism which led them into the untenable position of pitting the Constitution against basic American values, although the Constitution in fact derives its strength from its embodiment of American values." The doctrine of America as a country of free people could not be sustained by reason alone, nor by appeals to conscience, nor even by civil warfare. In fact, James H. Kettner correctly concludes that "[n]ot logic, but force, finally answered these questions." It was military force, and not morality, that temporarily ameliorated conscience's anthropological fissure.

Public opinion before and after the Civil War seemed only to heighten the ambiguous, if not the schizoid, development of the institution of conscience. After the Civil War, several amendments to the Constitution embodied a political compromise that enabled Africans to be citizens of the United States. A de facto denizenship still awaited the liberated slaves, however. The end of political Reconstruction in 1877 reflected despair and indifference about the validity of including people of African descent in the body politic. A national conscience, at ease in its political Zion — busily continuing to build a righteous empire — numbed its moral sensi-

120. KETTNER, supra note 113, at 351.
121. For an excellent historical analysis of public opinion before and during the Civil War regarding the nature of African-American citizenship, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).
122. The Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments were the three historic post-Civil War constitutional amendments that were ratified in order to insure the citizenship rights of African-Americans.
123. The theme of the United States as a nation with a religious mission is a major one in American religious historiography. Among the many studies of this theme, see MARTIN E.
bilities against the terrorism that stalked the African-American community for more than a century after the Civil War. Meanwhile, most of the judiciary remained largely committed to a racist jurisprudence that turned most of its energies between the Civil War and the 1930s to consolidating the massive capitalist effort to protect business interests. This historical phenomenon was aided by a positivist jurisprudence that was soft on securing human rights, but adamant about solidifying the rights of corporations as if they were "persons."

Monsignor Jeremiah Newman reminds us that "legal positivism" dominated Anglo-American jurisprudence by the 1860s. According to Newman:

Positivism in law might be described as the view that legality rests on some basis other than natural law. It is most generally expressed under the form of what is called statist positivism, namely, that law stems from the naked command of the legislator as embodying the will of the State.

From this standpoint, the Civil War was the most pronounced embodiment of statist positivism in nineteenth-century America. The state used the power to wage war to secure its prerogative to define the meaning and responsibilities of citizenship. But this happened without much assistance from the institution of conscience.


126. See Santa Clara County v. Southern Pac. RR., 118 U.S. 394, 396 (1886) (declaring that a corporation is a person for the purposes of the Fourteenth Amendment).


128. Id. at 105. Newman correctly cites John Austin, Lectures in Jurisprudence (1861) as an illustration of the dominance of legal positivism in this period.


130. One exception to this generalization was the recognition of the tradition of the "conscientious objector" to warfare. In fact a delegation from the Society of Friends spoke approvingly of
In fact, the close reading of the most thorough historian of the law of church and state provided very few instances where appeals to conscience between 1879 and 1931 survived the state's often unwitting subversion of appeals to conscience. It is important to keep in mind that this development was not malevolent. Indeed, it was often quite unconscious. Positivism had many guises. Its development in public affairs, the social sciences (especially psychology and sociology), theology, and philosophy, probably did as much to undermine the authority of conscience as did the tenuous...

the way the administration of President Abraham Lincoln respected their pacifism in a report to their fellow Quakers: "They were grateful not only for the relief afforded Friends, but especially for [Lincoln's] and the Government's recognition of the rights of conscience, and the respect they had manifested for religious scruples." But the nineteenth-century conscientious objector usually had to pay the equivalent in money or service for refusing to fight. See Edward Needles Wright, Conscientious Objectors in the Civil War 128 (1931).

131. See 2 Stokes, supra note 75, at 255-75; 3 id. at 3-365.

132. For the first of a series of Mormon cases concerning polygamy, see Reynolds v. United States, 98 U.S. 145 (1879). A very helpful historical study of this phenomenon can be found in Richard S. Van Wagoner, Mormon Polygamy: A History 105-81 (1986).


134. In speaking of twentieth-century philosophical positivism, William Barrett characterizes the positivist's attitude toward perennial, if not ancient, problems: The great philosophical problems of the past were to be declared pseudoproblems, and the great figures of the past were portrayed as men fighting with empty shadows. The resulting scheme that issued from positivism had at least the virtue of overwhelming simplicity. All problems were either questions of fact or questions of logic. William Barrett, The Illusion of Technique: A Search for Meaning in a Technological Civilization 7 (1978). Research assumed the status of a secular messianic hope. See Martin Heidegger, The Age of the World Picture, in The Question Concerning Technology and Other Essays 115 (William Lovitt trans., Harper & Row 1977). Heidegger declares that "the modern research experiment, however, is not only an observation more precise in degree and scope, but is a methodology . . . ." Id. at 122.

135. See Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America (1977), especially the chapter entitled "The Province of Law." Id. at 343.

136. The best study of the development of the social sciences in the United States is Dorothy Ross, The Origins of American Social Science (1991). Although Professor Ross often alludes to importance of "race" in this process, she is less sanguine about the role of racism in spawning American social scene where other scholars tend to be more emphatic. See Haller, Jr., supra note 106; John H. Stanfield, Philanthropy and Jim Crow in American Social Science (1985); George W. Stocking, Jr., Victorian Anthropology (1987).


cultural wedding between Christianity and American culture. But its most practical (and perhaps effective) influence was upon jurisprudence. The great jurist, Oliver Wendell Holmes, Jr., challenged his colleagues to embrace legal positivism in his famous treatise *The Common Law.* According to Holmes, who was then coeditor of *The American Law Review*:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

This was an unapologetic, pragmatic appreciation for how experience, especially in its historical guise, shapes modern jurisprudence. It was a fresh and influential insistence that jurists embrace practicality rather than sanctity as the best guide to justice. Morton J. Horwitz argues that the twentieth-century triumph of “legal positivism” that Justice Holmes embodied represented “a new urgency to distinguish sharply between law and morals.” But this “urgency” required more than the “decline of Darwinism,” as Professor

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141. Id. at 5.

142. Pragmatism was in its origins and sentiments directly related to positivism. Professor Horwitz deftly summarizes this point in showing how “consequentialism” became the key factor in legal pragmatism:

> The appearance of pragmatism in America philosophy around the turn of the century represents a challenge to the prevailing process-oriented conception of justice that had dominated late nineteenth-century American thought. This turn to consequentialism in social thought is an important expression of the gradual disintegration of the belief in neutral processes, especially a neutral market economy, as the legitimate distributor of just rewards.

143. In 1882, the year after Holmes published *The Common Law,* he became a professor of law at Harvard. President Theodore Roosevelt appointed him to the Supreme Court in 1902 where he served for nearly thirty years. The important “Place of Justice Holmes” in American jurisprudence is discussed most recently by Horwitz. *Id.* at 109-43.

144. Id. at 140.

145. Id. I am not disagreeing with Professor Horwitz’s generalization here. But I am under-
Horwitz asserts, to acquire juridical powers. The sacred bastion of the institution of conscience had to be subverted. A crucial set of Supreme Court decisions that reflected the appearance of this phase of what I call "the eclipse of Protestant hegemony" signalled the critical shift in legal and social scientific anthropology from an early Victorian emphasis on the sacredness of character to a psychoanalytical redefinition of conscience.

Toward the end of his distinguished tenure on the bench of the Supreme Court, Justice Holmes, often called "the Great Dissenter," participated in opposing the majority's decision in United States v. Macintosh. This decision is usually cited for its contribution to the ongoing struggle to maintain legal respect for conscientious objection to warfare. But it also signified the decline of the sanctity of conscience in American jurisprudence.

Although Professor Douglas Clyde Macintosh, a Canadian, had served on the faculty of Yale Divinity School since 1909, several anomalous circumstances prevented him from applying for citizenship until 1925. Macintosh, a professor of theology and an ex-sorcing its incompleteness. The decline of Darwinism certainly led to the development of legal pragmatism. But this is largely a nineteenth-century development. Explaining what happened between its definite decline by 1900 and the resurgence of the various forms of Realism in the 1930s is a task beyond the scope of both Professor Horwitz's excellent study and this Essay. See Jon H. Roberts, Darwinism and the Divine in America: Protestant Intellectuals and Organic Evolution, 1859-1900 (1988). Nevertheless, Professor Degler complicates glib generalizations about social Darwinism's history by reminding the students of that history that decline does not necessarily mean defeat. See Carl N. Degler, In Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought (1991).


149. Justice Holmes retired from the bench in 1932.
150. 283 U.S. 605 (1931).
ceedingly scrupulous person, refused to answer Question #22 on the naturalization form in the affirmative. The form stated, “If necessary, are you willing to take up arms in defense of this country?”

The immigration officer denied Macintosh’s application. Macintosh took the matter before the United States District Court of Connecticut where he argued:

"[J]ust as the native-born citizen is a citizen without having had to promise beforehand that he will support any and every war which any future Government of the country may engage in during his lifetime, so, it seemed to me, the naturalized citizen . . . who has not been required to make any immoral promise to do what might possibly seem wrong to him when the time came."

Macintosh himself did not directly appeal to conscience as a defense for his decision not to invest the state with the privileges of moral sovereignty. But he appealed to the doctrine of just war rather than the sanctuary of American pacifism, the institution of conscience. He also went beyond an appeal to justa bella. He claimed access to “the will of God.” In fact, he pitted his access to the will of God against the government’s implied privileged access: “Interpreting the will of God, however, as what is right and for the highest well-being of all humanity, I felt that I ought not to put my allegiance to any country, not even my own, above allegiance to the will of God, thus interpreted.”

In short, Macintosh wanted to reserve the right to question the morality of government decisions that could possibly offend the “highest well-being of all humanity” which he believed formed the core of what he calls “the will of God.” Despite his argument, the district court denied Macintosh citizenship. John W. Davis, Macintosh’s attorney, immediately appealed the professor’s case to the appellate court, which reversed the district court.

152. Macintosh, 283 U.S. at 617.
153. Id.
154. Warren, supra note 151, at 4. One of his Yale colleagues later characterized Macintosh as a person who “believed that there is a truth and that he had it, and that this truth is of paramount importance.” Roland H. Bainton, Yale and the Ministry: A History of Education for the Christian Ministry at Yale from the Founding in 1701, at 227 (1957).
156. Macintosh, 283 U.S. at 618.
court's denial.\textsuperscript{158}

The government of the United States appealed to the Supreme Court where a five to four majority of Justices were not convinced by Macintosh's reasoning.\textsuperscript{159} The Court handed down its decision in 1931. Justice George Sutherland wrote the majority opinion that denied Macintosh citizenship. The following comment in his opinion speaks most directly to the concerns of this Essay:

When [Macintosh] speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make \textit{his own interpretation} of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.\textsuperscript{160}

Justice Sutherland appealed to the Court's denial of citizenship in an earlier case, \textit{United States v. Schwimmer},\textsuperscript{161} as a precedent for the majority's denial of the same to Macintosh.\textsuperscript{162} But he apparently forgot the dissent of Justices Holmes and Brandeis where Holmes, speaking for the minority, cast the case as more a "freedom of thought" case than a religious liberty case.\textsuperscript{163}

Chief Justice Charles Evans Hughes, who wrote for the minority, rightly dismissed \textit{Schwimmer} as not being very pertinent to \textit{Macintosh} because it "stands upon the special facts of that case."\textsuperscript{164} But he argued that one of the famous Mormon polygamy cases of the nineteenth century\textsuperscript{165} was a more pertinent precedent because the

\begin{thebibliography}{9}
\bibitem{158} Macintosh v. United States, 42 F.2d 845 (2d Cir. 1930).
\bibitem{159} United States v. Macintosh, 283 U.S. 605 (1931).
\bibitem{160} \textit{Id}. at 625 (citation omitted).
\bibitem{161} 279 U.S. 644 (1928).
\bibitem{162} Macintosh, 283 U.S. at 620-21.
\bibitem{163} Schwimmer, 279 U.S. at 654-55 (Holmes, C.J., dissenting). Holmes stated:
\begin{quote}
Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.
\end{quote}
\textit{Id}\textsuperscript{.}
\bibitem{164} Macintosh, 283 U.S. at 635 (Hughes, C.J., dissenting).
\bibitem{165} See Davis v. Beason, 133 U.S. 333 (1890).
\end{thebibliography}
majority’s opinion offered a definition of religion\textsuperscript{166} that he believed was applicable in the \textit{Macintosh} case. Hughes argued that this definition of religion is similar to Macintosh’s definition because both definitions embrace the notion of “the will of God” as being central to most understandings of religion.\textsuperscript{167} According to Hughes, “One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God.”\textsuperscript{168} Indeed, Hughes argued that Professor Macintosh, “when pressed,” believed that the religionist has a paramount duty to obey the will of God. For Macintosh, this is “what is axiomatic in religious doctrine.”\textsuperscript{169} Chief Justice Hughes believed that the majority’s opinion in the \textit{Macintosh} case posed a threat to the institution of conscience. He declared, “And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty.”\textsuperscript{170}

Hughes believed that the majority’s emphasis on duty to country placed country above duty to God. Although Hughes did not say this directly, he implied that there was a danger here of making the state itself a religion. In fact, he introduced his focus on the doctrine of the will of God with the assertion that the decision to place loyalty to God above loyalty to the state did not necessarily mean that conflict between the two would ensue. But he reminded the majority that legal respect for the sanctity of conscience had been a noble and longstanding tradition in American jurisprudence. His entire statement needs to be repeated for the sake of emphasis:

Much has been said [in Justice Sutherland’s opinion] of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one’s belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obli-

\textsuperscript{166} \textit{Macintosh}, 283 U.S. at 634 (Hughes, C.J., dissenting). Chief Justice Hughes quoted the following definition of religion given by Justice Stephen J. Field, who wrote for the majority in \textit{Davis v. Beason}: “The term “religion” has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” \textit{Id.} (quoting \textit{Davis}, 133 U.S. at 342).

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}
gation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. 171

Justice Sutherland, however, had already accused Professor Macintosh of not being “attached to the principles of the Constitution.” 172 In a direct repudiation of Macintosh’s “carefully prepared” brief, Sutherland argued that Macintosh asserts the existence of a constitutional right that is nonexistent. 173 With obvious irritation, Sutherland blasted Macintosh’s reasoning with these words:

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, expressed or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. 174

The really surprising aspect of this skillful argument is its display of “social amnesia” 175 and legal indifference to the sanctity of conscience. Justice Sutherland either did not know, or had forgotten, that the constitutional debates were very much concerned with the problem of insuring legal respect for the sanctity of conscience. 176 Chief Justice Hughes concluded his objection with a pointed reminder to the majority that Macintosh’s assertion of the constitutionality of his right to have religious scruples was “not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience.” 177

171. Id.
172. Id. at 616.
173. Id. at 623. Sutherland quotes the following remark from Macintosh’s brief:

“To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future war, would mean that such an alien would come into our citizenry on an unequal footing with the native born, and that he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if has conscientious religious scruples against doing so.”

Id.
174. Id.
176. For a general survey of the impact of the struggle for religious freedom during the 1780s and 1790s, see 1 Stokes, supra note 75, at 366-646, and Smith, supra note 75, at 2-90.
177. Macintosh, 283 U.S. at 635 (Hughes, C.J., dissenting).
In 1931, the Supreme Court, and indeed the entire nation, was undergoing profound changes. New alliances were forming across traditional boundaries in order to address pressing concerns. This was particularly true in the intellectual arena. Shifts in the foci of both theology and jurisprudence were far more evident in the Macintosh case than most of its observers have noted. Elwyn A. Smith, a quite astute student of the career of the relation between religion and conscience, correctly observed that the Macintosh majority "identified" Macintosh's "conscience as secular." But inattention to changes in both jurisprudence and theology led him to characterize the crisis incorrectly as a crisis in the privacy of conscience rather than as a crisis in the social, political, ethical, and religious meanings of conscience. For most of its public career, the institution of conscience had an honorable role in shaping an American public ethics. But by the 1920s and 1930s, conscience was so confused with its cousin concepts, consciousness and conscientiousness, that several students of casuistry sought to address the crisis in its meaning.

One notable nineteenth-century American theologian had declared in the 1870s that "man's conscience and its education through centuries of history are the work of God, or nothing is." The prevalent belief that conscience was a byproduct of a progressive revelation that is revealed in history could not withstand the growing influence of critical historical consciousness. Not even the learned philosopher Josiah Royce, with his tireless commitment to idealism, could withstand this development. He reflected the frustration of many in a series of questions that also haunted many. According to Royce:

Our differences regarding our conscience begin when questions arise of the following sort: Is our conscience inborn? Is it acquired by training? Are its dictates the same in all men? Is it God-given? Is it infallible? Is it a sepa-

178. See Horwitz, supra note 107, at 169-212, for a discussion of changes in jurisprudence. For astute discussions of major theological transitions during this period, see the following: William Dean, American Religious Empiricism (1986); Hutchison, supra note 137, at 288-310; Randolph Crump Miller, The American Spirit in Theology (1974).
180. See Smith, supra note 75, at 251.
181. See Kirk, supra note 42; T.V. Smith, Beyond Conscience (1934).
rate power of the mind? Or is it simply a name for a collection of habits of moral judgment which we have acquired through social training, through reasoning, and through personal experience of the consequences of conduct?  

John Dewey led the pragmatists in saying "yes" to Royce's last question. In a classic manifesto on the nature of moral knowledge, Dewey advanced the position that conscience is a byproduct of socialization, not, as some contended, "an original faculty of illumination." In Dewey's words:

In language and imagination we rehearse the responses of others just as we dramatically enact other consequences. We foreknow how others will act, and the foreknowledge is the beginning of judgement passed on action. We know with them; there is conscience. An assembly is formed within our breast which discusses and appraises proposed and performed acts.

Dewey argued that conscience is a form of moral and social knowledge acquired through education and experience. It is not a subsidiary of either moral intuitionism or consciousness. Dewey was the enemy of any equivocal epistemology that preached the erroneous belief that knowledge is discontinuous with "the workings of natural impulses in connection with environment." However, Dewey had two major opponents who stated their case in the 1930s against his effort to socialize conscience.

In order to appreciate the critiques levelled by Reinhold Niebuhr and T.V. Smith, the public status of conscience in the 1920s needs to be mentioned. Dewey's strategic redefinition of the social foundations of conscience was a crucial buoy in the midst of a tidal wave of secular psychologizing, if not attempted dissipation, of conscience. The effort to overthrow Victorian fidelity to the questionable therapeutic value of "guilt," among devotees of popular Freudianism, led many to associate conscience with having the chief agency for fo-

185. Id. at 315.
186. Id. at 187. The resurgence of this self-conscious Aristotelian view of the relation between personality and nature was quite widespread among the intelligentsia in both Europe and the United States. See H. Stuart Hughes, Consciousness and Society: The Reorientation of European Social Thought, 1800-1930 (1938); James T. Kloppenberg, Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920 (1986); Henry F. May, The End of American Innocence: A Study of the First Years of Our Own Time, 1912-1917 (1959).
187. There were of course many others. But the critiques of Green and Niebuhr are more pertinent to my point.
menting guilt within the human psyche. One well-known religious psychologist complained bitterly about this state of affairs. He said, "The average psychology pays little, if any, attention to conscience. An examination of 20 secular psychologies, selected from a shelf almost at random, revealed the fact that out of 10,070 pages not one page was devoted to conscience." \(^{188}\) Vergilius Ferm, a noted Lutheran philosopher of religion, joined in this complaint, and added, "There have been abuses of the appeals to conscience in the past, just as there are abuses of all of God's choicest gifts. But when even the church begins to systematically ignore conscience, conscience is a force of sufficient activity and vitality to break the old wineskins." \(^{189}\) Many felt that the jaded house of conscience — some felt hopelessly in bondage to the problems of theism — had crashed on the precarious shores of modernity. \(^{190}\)

Reinhold Niebuhr's *Moral Man and Immoral Society* \(^{191}\) could not have been published at a more propitious time. It was a crisp and prophetic, but nuanced, defense of the possibility of individual moral integrity in the midst of incalculable public cynicism and defeatism. In fact, Ralph Henry Gabriel defined this era as "individualism at Bay." \(^{192}\) In the midst of one of the deepest economic depressions in American history, the heroism of the moral individual was under seige. Resentment toward the wealthy who flaunted their status during the 1920s grew in proportion to the depth of the misery. But many of the churches who belonged to the Federal Council of Churches had benefitted from, and aligned themselves with, wealth, \(^{193}\) and based this behavior on a liberal doctrine of human

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188. O.M. Norlie, An Elementary Christian Psychology 143 (1924). This is also quoted in Vergilius Ferm, What is Lutheranism?: A Symposium in Interpretation 263 (1930).
189. Ferm, supra note 188, at 264.
193. For a very accessible recent introduction to this chummy ethos that nurtured and sustained most of the Protestant denominations who belonged to the Federal Council of Churches since it was founded in 1908, see 2 Martin E. Marty, Modern American Religion: The Noise of Conflict, 1919-1941, at 33-58 (1991). Most of the major African-American denominations belonged to the Federal Council of Churches. While a few of their larger urban ministers and congregations benefitted from the largess of the wealthy, usually racist, if not racist, patronizing accompanied such relationships. The patronage that John Wanamaker of Philadelphia extended to the Reverend Charles Albert Tindley, the famous gospel music patriarch and pastor of the East Calvary Methodist Episcopal Church, would be an example of this peculiar gratuity. Although the nature and depth of the "friendship" between Tindley and Wanamaker is not fully
nature and an ebullient belief in progress. Some religious leaders like Reinhold Niebuhr grew increasingly embarrassed about the too often uncritical acceptance of the alliance between religion and undisciplined capitalism.

Niebuhr's *Moral Man and Immoral Society* is not often read as a defense of conscience. But it was. Niebuhr and his cohorts believed that it was absolutely necessary to distance themselves from the seemingly glib optimism that liberal culture had toward human nature, progress, and secular culture. If a prophetic critique of status quo was to have a viable intellectual foundation, it would be of crucial importance to rebuild its foundations which rested partly upon the ancien régime of conscience. After asserting correctly that natural sociologists, such as Herbert Spencer and Edward Westermarck, had reduced conscience to "fear of the group," Niebuhr fired this salvo at the forces of nihilism and cynicism by dismissing the notion that conscience is a social phenomenon. "Obviously," Niebuhr reasoned, "defiance" of one's community "points to a force of conscience, more individual than social." In fact, for Niebuhr:

The individual character of conscience does not preclude the determination of most moral judgments by the opinions of the group. Most individuals lack the intellectual penetration to form independent judgments and therefore accept the moral opinions of their society. Even when they do form their own judgments there is no certainty that their sense of obligation toward moral values, defined by their own mind, will be powerful enough to overcome the fear of social disapproval. The social character of most moral judgments and the pressure of society upon an individual are both facts to be reckoned with; but neither explains the peculiar phenomenon of the moral life, usually called conscience.

Niebuhr believed that the deontologist's urge to "cultivate" a sense of duty would also be an insufficient explanation of the wellsprings

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194. The classic study of this phenomenon was published in 1929 by Reinhold Niebuhr's brother, a professor of theological ethics at Yale Divinity School. See Niebuhr, *The Social Sources of Denominationalism*, supra note 139.


of conscience, nor do the other rational sources of conscience, such as the many forms of human virtue. Niebuhr then brilliantly describes how captive they are to the infinite regressions of individual and collective egoism.\textsuperscript{197}

Many, including Niebuhr, began to fear\textsuperscript{198} the emergence of a henotheistic state that identified the will of the government with the will of God. Such theological ideologies were evident in Japan, Germany, and Italy where fascism began to raise its infamous head. T.V. Smith's \textit{cri de coeur} for conscience, published the year after Hitler's Nazis cunningly absorbed the Weimar Republic after burning the Reichstag,\textsuperscript{199} certainly was also deeply troubled by what some erroneously viewed as quotidian assaults on democracy at home and abroad. According to Smith, "Nationalism is a-brewing its heady wine of secular sacredness with so enlarged a version of conscience that they infer the presence or absence of citizenly intention by the inner conformity to this outer order."\textsuperscript{200} Through several stinging disclosures and critiques of the Hobbesian impulse in the majoritarian ideology of Rousseau, Smith cites \textit{United States v. Macintosh}\textsuperscript{201} as a crucial example of the creeping transformation of American Jeffersonian democracy into a new Leviathan.

Unlike Rousseau, the Supreme Court in \textit{Macintosh} identified the will of the state with God's will. According to Smith, "The Supreme Court judges to be of supreme importance in crucial cases the priority of public to private conscience."\textsuperscript{202} Smith was appalled and star-
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ted at the Supreme Court’s assumption that the reality, not sanctity, of the “inner voice” could be substituted for the convenience of “external order.” He agreed with Chief Justice Charles Hughes’s claim that “the supremacy of conscience within its proper field” is a cardinal principle of constitutionalism dating back to both John Locke and Thomas Jefferson. Smith had been arguing vigorously throughout this text that conscience’s nature, contra Dewey and others, is inherently private. At this point, however, he shifts gears without stripping his logic of its acumen. He said, “In its proper privacy it [conscience] is supreme, nor does it lose its nature when it becomes public.” Even when conscience agrees with public sentiment, it does not lose its private nature. But if conscience goes against “public declarations,” it makes little sense to invalidate it because its nature is private. Smith insisted that the way to overcome this effort to invalidate conscience because of its “nature” is to redescribe its nature, not redefine it.

For him, the difficulty confronting conscience in the new Leviathan was more a problem of aesthetics than ethics. But we must keep in mind that Smith understood both to be aspects of axiology. Smith believed that value theory itself is subservient to consciousness. Thus, it is better, and more accurate, to see conscience as a dimension of consciousness. He argued that “at least inside consciousness, it is better to attend to the voice of conscience, regardless of what its voice prescribes, since it is the catalyzer of the self.” He understood his dilemma, however, once conscience is severed from ethics. He asked, “But with conscience thus disassembled from conduct and hospitably housed in the ivory tower of the utterly subjective, what are we to do with the not infrequent claim of conscience to be the basis of social order?” By using an intellectual strategy, reminiscent of Reinhold Niebuhr, who he describes as a “Christian-communistic” servant of “half-hearted deprecations of ‘immoral’ elements in democratic societies,” Smith advised his readers to spurn defeatism and accept “the aesthetic attitude which I have recommended, and a strategic technique thereto, psychoanalysis, the brain child of an essentially Oriental mind.”

203. Id. at 250.
204. Id. at 251.
205. Id.
206. Id.
207. Id. at 357.
Smith's libertarian advice nor Niebuhr's Augustinian realism could stem the desacralizing tide of modernity against the institution of conscience.

In the historical context just described, small wonder that many, despite the excellent respectively religious and secular apologetics of Niebuhr and Smith, came to believe that conscience is a genteel luxury that a socially conscious society could ill afford. Niebuhr himself was pessimistic about the possibility of materialists either seeing or resisting the tragedy of the demise of the sanctity of conscience. He lamented:

We live in an age in which personal moral idealism is easily accused of hypocrisy and frequently deserves it. It is an age in which honesty is possible only when it skirts the edges of cynicism. All this is rather tragic. For what the individual conscience feels when it lifts itself above the world of nature and the system of collective relationships in which the human spirit remains under the power of nature, is not a luxury but a necessity of the soul. Yet there is a beauty in our tragedy. We are, at least, rid of some of our illusions. We can no longer buy the highest satisfactions of the individual life at the expense of social injustice.\textsuperscript{208}

Niebuhr fervently believed that the work of justice is powered by disruptions of "the illusions" of a perfect society. These illusions certainly endanger societal tranquility. But such "madness of the soul," tempered by reason, is necessary. "One can only hope," Niebuhr concluded, "that reason will not destroy it before its work is done."\textsuperscript{209}

The nineteenth-century glorification of individualism\textsuperscript{210} now had to broker itself before the altar of society. Justices and intellectuals like both Holmes and Hughes were often seen as the intellectual, and sometimes genetic, legatees of Boston Brahmins\textsuperscript{211} who, in turn, were seen as the enemies of modern Americanism. Thurman Arnold spoke for many when he rejected the impact of intellectual individu-

\textsuperscript{208} Niebuhr, supra note 191, at 276-77.

\textsuperscript{209} Id. at 277. For a brilliant and, as usual, engaging analysis of what he calls "prophetic pragmatism," see Cornel West, The American Evasion of Philosophy: A Genealogy of Pragmatism (1989).

\textsuperscript{210} See Yehoshua Arieli, Individualism and Nationalism in American Ideology (1964).

\textsuperscript{211} In fact, according to Schneider, Holmes "[p]ersonally . . . continued to cultivate the genteel life of a gentleman and felt a disdain for the hard labors to which his own theories were condemning future judges." Herbert W. Schneider, A History of American Philosophy 563 n.11 (1946). For a fine analysis of the extensive influence of this genteel tradition, see Peter Dobkin Hall, The Organization of American Culture, 1700-1900: Private Institutions, Elites, and the Origins of American Nationality (1984).
alism on American jurisprudence: "Ideals of law arise from the hearts of people, not from refinements of intellectuals." Despite their rationalist suspicions about the God of the Puritans, the old-line liberals, such as Holmes and Hughes, were nervous about forsaking the spiritual directions of those old weathervanes atop the New England meetinghouses. But George Santayana, surely not a friend of the New England conscience, expressed the new-line liberal consensus in this redefinition of conscience:

Conscience is an index to integrity of character, and under varying circumstances may retain an iron rigidity, like the staff and arrow of a weathervane; but if directed by sentiment only, and not by a solid science of human nature, conscience will always be pointing in a different direction.

In *Girouard v. United States*, Justice William O. Douglas, writing for the majority of the Supreme Court, repudiated the *Macintosh* decision without seeing that the idea of the sacredness of conscience had been substituted for a view of conscience as an honorable sanctuary. Freedom of thought had become the protector of the now subordinate, but still grand, old institution of conscience. Given the history of the institution of conscience, the difference is subtle, but profound.

**CONCLUSION**

The acceptance of the legal desacralization of conscience is evident in the ambiguous professional definitions of both conscience and jurisprudence that are ensconced in the centennial edition of

215. Douglas said:
The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Id. at 68. Some commentators on this opinion misunderstood its view of conscience. For example, Sidney F. Wheeler states that in *Girouard*, "Conscience and God were treated as synonyms." Sidney F. Wheeler, Constitutional Law — Black Muslimism Is a Religion Within the Meaning of the First Amendment, 24 GA. B.J. 519, 520 (1962) (citation omitted).
The authors of the latest edition define conscience as "the moral sense" whereby we judge "the moral qualities of actions, or of discriminating between right and wrong."\(^{217}\) They also define conscience as "the moral rule which requires probity, justice, and honest dealing between man and man . . . ."\(^{218}\) How can conscience be both simultaneously an innate, individual moral sense, as this definition implies, and a commonly recognized "moral rule?" Granted, certainly moral governance of the self and society are deeply yoked. The strength and effectiveness of the bond between them, however, depends on the nature, kind, and degree of communal norms.

In law, one would logically expect jurisprudence to be concerned with the epistemological and axiological presuppositions that make the bond between individual and social probity just. But, according to *Black's Law Dictionary*, this is not the primary function of jurisprudence. It defines jurisprudence as "the philosophy of law, or the science which treats of the principles of positive law and legal relations."\(^{219}\) In fact, the authors dismiss the idea that jurisprudence should be concerned with either moral sense or moral duty: "It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation."\(^{220}\) This allegiance to intellectual bifurcation is frustrating for both its proponents and opponents. Martha Minow correctly pinpoints the difficulty that such "descriptions of legal reasoning" encounter when they treat the categories of law as given receptacles, ready to contain whatever new problem may arise. Missing from these descriptions is the possibility that our very process of sorting may stretch some categories, contract others, or even require us to invent a new box for what we cannot yet classify.\(^{221}\)

Professor Minow calls these phenomena "dilemmas of difference."\(^{222}\)

Various terms like "difference" and "otherness" are used to describe and define the complex set of phenomena and issues that

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217. *Id.* at 303.
218. *Id.*
219. *Id.* at 854.
220. *Id.* at 855.
222. *Id.* at 19-97.
sympathizers of "critical legal studies," like Professor Minow, seek to explore. The expansion of the vocation and consciousness of jurisprudence to include ethics (and other disciplines) is an attempt to respond to the realities of cultural, racial, and sexual diversity.

I do not see myself as a detractor of religious liberty. But I do believe that its foundations in jurisprudence, ethics, and theology must address the postmodern awareness of the epistemological problem of representation, and the cultural, as well as moral, crisis engendered by cultural diversity, and by cultural perversity in the form of rampant nihilism and undisciplined cynicism.

Often without pinpointing the locus of this latter difficulty, American religionists have characterized this situation as the problem of the invasion of the secular into the preserves of religion. Stating the problem in this fashion encourages lamentation rather than analysis. We need to go beyond the point of serving notice that legal respect for the sacred has declined. We need to identify when and where the law makes little or no provision for the sacred. I am also suggesting that we need to reassess why and whether conscience offers a sufficient moral basis for the Bill of Rights, and especially for religious liberty.

There have been many areas of conflict between church and state over the issue of what is sacred and what is not. They include issues related to the sacredness of both the conscience and the body. The state has managed rather successfully to avoid interference in matters of doctrine and polity except in situations and disputes that involve religious conceptions and practices about the human body, space (especially property), management of religious business affairs, and matters concerning moral and religious principles.

Often the issues related to the assertion of the prerogatives of religious and moral principles are placed under the rubric of "conscience." Much of the discussion related to religious liberty has sought to define issues as they relate to the presumption of the prerogatives of conscience rather than to the need to define what is meant by conscience. Each of these in some way impinges upon the state's reserved right and obligation, to use the words of the Preamble of the United States Constitution, to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessing of Liberty to ourselves and
our Posterity..."223 This sounds like a perfectly reasonable formulation. But it is really a self-authenticating assertion of the sovereignty of the state in the name of advancing the sovereignty of the people. Once again a government appealed to the myth of a social compact in order to advance its own interests.224 We are left with a question that haunts the twentieth century: Who constrains nation-states that turn national interests into a fetish even to the point of destroying human life and cultural diversity?

Although I have constructivist concerns which I failed to resist the temptation to raise throughout this Essay, I have sought to problematize the role of conscience in American jurisprudence. The disclosure of surds and discontinuities in an inadequate profile of conscience's career in modern, and especially American, jurisprudence has been my primary objective in this exploratory Essay. Conscience is as subject to the caldrons and anxieties of contingency as other modern claimants for certainty.
