

Introduction

Americans justifiably cherish the liberty of conscience as a foundational limitation on state power. Few today would challenge the assessment offered in 1919 by future Supreme Court Chief Justice Harlan Fiske Stone that the liberty of conscience is so vital that “it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.”¹ Stone was affirming, in the wake of World War I, the ongoing need to recognize and respect conscientious objector status. The nation’s commitment to conscience has helped provide legal protection for individuals faced with direct state encroachment on their core moral convictions, not only in the draft context, but also, for example, for students facing state-required participation in the pledge of allegiance. “If there is any fixed star in our constitutional constellation,” Justice Jackson wrote for the court in *Barnette*, the landmark case striking down a state’s pledge requirement, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”² At stake was nothing less than the court’s duty to preserve “freedom of conscience to the full.”³

When the state moves against the individual, either foreclosing dissent or coercing assent to the majority’s ideals, it makes sense to view liberty of conscience as a legal protection that arises at the point of conflict between an individual’s deeply held moral or religious beliefs and state power.⁴ In many of today’s public-square battles implicating conscience, the individual-versus-state paradigm is inapposite.

¹ Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919) (quoted in *Seeger v. United States*, 380 U.S. 163, 170 (1965)).

² *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

³ *Id.* at 646 (Murphy, J., concurring).

⁴ See, e.g., *Girouard v. United States*, 328 U.S. 61, 68 (1946) (“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.”)

Increasingly, the individual claiming conscience is opposed not by state power, but by the similarly conscience-driven claims of nonstate entities. Few of us would dispute the notion that liberty of conscience is an essential feature of the political order, but that broad consensus has proved to be of little help in resolving an expanding range of disputes involving conscience.

LAW'S CONSCIENCE CONUNDRUM

Consider the case of Elane Photography. Nearly ninety years after future Chief Justice Stone cautioned against using state power to force a person to participate in military combat against the dictates of his conscience, another widely publicized legal skirmish over conscience erupted from a simple email exchange. Vanessa Willock contacted Elane Photography, a husband-and-wife photo agency in Albuquerque, New Mexico, through its web site to inquire about photographing her same-sex commitment ceremony. Co-owner Elaine Huguenin emailed back: "We do not photograph same-sex weddings. But thanks for checking out our site." Willock filed a complaint with the state human rights commission, alleging a violation of the state's public accommodations law, which covers sexual orientation. At the hearing, Willock testified that the email "was a shock" and caused her "anger and fear." Jonathan Huguenin explained at the hearing that they made sure that "everything that we photographed, everything we used our artistic ability for" was in line with their Christian values.⁵ The commission rejected the photographers' constitutional claims, found that they unlawfully discriminated on the basis of sexual orientation, and ordered them to pay attorney's fees of nearly \$7,000 to Willock.⁶

Unlike the military draft or pledge of allegiance cases, both sides in the Elane Photography case can wrap themselves in the mantle of conscience. Willock acted on her belief in the moral legitimacy of same-sex relationships by seeking to solemnize her commitment with the same celebratory trappings that have long been part of traditional marriage ceremonies. The Huguenins acted on their belief in the immorality of same-sex relationships by refusing to participate in the celebration of such a relationship. Whereas Willock's critics argue that liberty of conscience should not be interpreted as empowering individuals to force others to assist their morally contested projects, the Huguenins' critics argue that liberty of conscience should not be interpreted as a license for marketplace providers to discriminate against members of historically marginalized groups.

Barnette's warning that the sanctity of conscience forbids the state from compelling allegiance to the flag may offer lessons for today's expanding range of disputes over conscience, but those lessons are far from obvious. A casual observer of America's

⁵ Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR Morning Edition (Jun. 16, 2008).

⁶ Andrew Webb, *State: It's Discrimination: Photographer Refused to Shoot Gay Ceremony*, Albuquerque J., Apr. 11, 2008, at A1.

cultural and legal landscapes may wonder whether the right of conscience is morphing from a bulwark against government encroachment into a more generally applicable right to individual autonomy. A central claim of this book is that this trend is avoidable and should be avoided. We need to expand our understanding of conscience, not only to support and secure the common good, but also to facilitate the continuing vitality of conscience itself. Our failure to break conscience out of its individualist framework affects our understanding of the interplay between the individual and the state in a variety of intermediate institutions such as voluntary associations, social service providers, corporations, and even the family.

CONSCIENCE'S RELATIONAL DIMENSION

This book does not aim to overturn the prevailing understanding of conscience as a person's judgment of right and wrong, but it does aim to bring into focus a dimension of conscience that is discernible from the term's earliest usage, which is "to denote a knowledge which can be shared by several people."⁷ The concept of conscience as shared knowledge has been lost amid the individualist clamor of American "rights talk."⁸ There is a clear need to recapture the relational dimension of conscience – the notion that the dictates of conscience are defined, articulated, and lived out in relationship with others. Our consciences are shaped externally; our moral convictions have sources, and our sense of self comes into relief through interaction with others. By conveying my perception of reality's normative implications, my conscience makes truth claims that possess authority over conduct – both my own and the conduct of those who share, or come to share, my perception. Conscience, by its very nature, connects a person to something bigger than herself, not only because we form our moral convictions through interaction with the world around us, but also because we invest those convictions with real-world authority in ways that are accessible, if not agreeable, to others. This is the relational dimension of conscience.

Conscience is not just belief, passively held by the individual. It is belief applied to conduct, an act. To a significant extent, the acting, not the intellectual choosing, makes up personhood and justifies the state's respect for conscience. As far back as the writings of St. Paul, conscience was portrayed as a source of authority – not just over the substance of interior habits of mind, but over a believer's conduct.⁹ Indeed, early Christian usages were telling: Although a person's faculty of apprehension was called "synderesis," only the faculty of *application* – action derived from apprehension – received the label "conscientia."¹⁰

⁷ Philippe Delhay, *The Christian Conscience*, 24 (1968).

⁸ See generally Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1993).

⁹ See, e.g., 1 Corinthians 10 (instructing Christians to forego certain foods if it would offend the consciences of fellow believers).

¹⁰ Harold J. Berman, *Law and Revolution*, II 74–5 (2004).

As such, conscience cannot be adequately explained as a freestanding individual construct. It might be expressed and defended by the individual, but its substance and real-world implications are relational by their very nature. Cultivating and maintaining the conditions necessary for these relationships to thrive should be a priority for our society if we are serious about freedom of conscience. History is replete with individuals who have tenaciously clung to their claims of conscience from the depths of solitary confinement, of course, but their steadfastness belies the fact that their claims have been relegated, in effect, to a state of suspended animation. Conscience, by its very nature, directs our gaze outward, to sources of formation, to communities of discernment, and to venues for expression. When the state closes down avenues by which persons live out their core beliefs – and admittedly, some avenues must be closed if peaceful coexistence is to be possible – there is a cost to the continued vitality of conscience.

It is not just a vague allegiance to moral pluralism that should underlie our legal system's reluctance to restrict the independence of the myriad associations that make up the vast space between person and state; it is a commitment to freedom of conscience, properly understood. A more robust conception of conscience will also help clarify how our own deeply held moral convictions can foster the sort of thick interpersonal commitments that are one mark of a healthy society.

THE MORAL MARKETPLACE

So what lessons does conscience's relational dimension hold for the Elane Photography case? The problem is that the state, in this and other cases, has chosen sides, effectively giving the individual customer's conscience a trump over the provider's conscience through the imposition of broad nondiscrimination laws. Increasingly, such laws appear aimed not simply at ensuring access to an essential good or service, but at enshrining nondiscrimination as a blanket requirement for providers' participation in the marketplace. Little attention is paid to whether a dissenting provider's discriminatory practice actually threatens access in a significant way.

The problem is compounded by the fact that, too often, the response of those concerned with the erosion of providers' liberty is to champion the recognition of a blanket right of conscience on their behalf. They ask the law to immunize an individual provider's conscience-driven marketplace conduct from state penalty and from employer reprisal. If a photographer (or pharmacist or taxi driver or cashier) has the legal right to make her own decisions about the morally contested goods and services she will provide, it becomes more difficult for institutions to create and maintain their own distinct moral identities. A morally homogeneous landscape of institutional providers makes it more difficult for individuals to gather in venues for the mutual formation, articulation, and living out of shared moral commitments. This problem is more pressing, as we will see, when the state hinders the cultivation of distinct moral identities among religious groups, charities, and other voluntary associations, but venues for conscience are also important in the commercial sphere. Individualized

conceptions of conscience – whether espoused by the consumer or the provider – do not hold much promise for resolving the new wave of conscience battles because they overlook the relationships that are key to conscience’s long-term flourishing.

This book asks us to step back from the rights-centered rhetoric of current debates and contextualize the public relevance of conscience. In particular, the book outlines the contours of a marketplace in which moral convictions are allowed to operate and compete without invoking the trump of state power. A more deliberate articulation and broader recognition of this “moral marketplace” can enrich our discourse on a range of issues, as the legal system’s current response to the competing claims of conscience has afforded little space in which contrasting moral visions might be allowed to flourish in any meaningful way.

The state would prudently support the liberty of conscience by allowing Vanessa Willock and the Huguenins to live out their convictions in the marketplace. Assuming that other wedding photographers are willing and able to shoot a same-sex commitment ceremony, the state should leave the Huguenins to answer to the consumer, not the state, and allow consumers to utilize market power to contest (or embrace) the moral norms of their choosing. Rather than making all photography agencies morally fungible (i.e., freely interchangeable) via state edict, the market allows the flourishing of plural moral norms in the provision of these services. Individual consciences can thrive through overlapping webs of morality-driven associations and allegiances, even while diametrically opposed consciences similarly thrive. At the same time, if the Huguenins cannot find market support for their agency’s moral claims, they would not have the right to force other agencies to hire them and accommodate their claims of conscience. They should have the freedom to create an economically viable agency with a distinct moral identity; they should not have the authority to hinder the cultivation of another agency’s conflicting, nondiscriminatory moral identity. For the conscience-driven consumer and the conscience-driven provider, the state should not be the primary audience for their moral claims. In the moral marketplace, the zero-sum contest over the reins of state power is replaced by a reinvigorated civil society, allowing the commercial sphere to reflect our moral pluralism.

This is not to suggest that the prospects for civil society are inexorably linked with market economics, but only that where the marketplace provision of certain goods and services is subject to a society-wide battle over moral norms, allowing the contest to proceed may be more conducive to a healthy and engaged public life than the current inclination to enshrine legally one set of moral norms and negate the others. State power is not marginalized in the moral marketplace, but it is constrained, as it is devoted to ensuring a well-functioning market, not to eviscerating the market through the top-down imposition of particular moral norms. This sounds like (and is) a fairly straightforward proposal, but there are few traces of it in the cacophony of voices trumpeting provider (or consumer) rights.

Wedding photographers, obviously, are the very small tip of a very large iceberg. Participants in an exploding array of debates over the provision of goods and services

in our society tend to invoke conscience as a freestanding, absolute value without acknowledging – much less articulating – the real-world relationships and associational ties that empower individuals to live out the dictates of conscience. The vibrancy and vitality of these relationships are best facilitated by a state that limits itself to supporting a functioning market (i.e., ensuring access), rather than serving as the marketplace’s moral gatekeeper.

As noted, the merits of a flourishing moral marketplace flow from a deeper understanding of conscience than the individualist portrayal that (understandably) dominates American law. Conscience is, as this book will detail, inherently relational: Its claims are formed, articulated, and lived out along paths that transcend the individual. The vibrancy of conscience thus depends on more than the law’s protection of individual autonomy; it also depends on the vitality of the associations, such as Elane Photography, against which the right of conscience is currently being invoked. Put simply, if our society is to facilitate an authentic and robust liberty of conscience, it cannot reflexively favor individual autonomy against group authority; it must also work to cultivate the spaces in which individuals come together to live out the shared dictates of conscience.

CONSCIENCE’S NEW BATTLE LINES

To get some sense of the lurking “iceberg” and why the traditional, individual-versus-state conception of conscience is such an unhelpful template for resolving today’s conscience battles, try to formulate a coherent and consistent set of solutions to the following roster of recent skirmishes over conscience. First consider the widely publicized “pharmacist wars,” in which individuals on both sides claim a right to compel others to honor the dictates of their consciences. Pharmacists in many states have claimed a right of conscience to refuse to dispense any pharmaceutical to which they object morally (typically contraceptives or antidepressants) without fear of government, or even employer, reprisal. At the same time, pharmacy customers have argued – in litigation and before legislatures – that their own rights of conscience entitle them to receive any legal pharmaceutical at any licensed pharmacy with “no hassle, no delay, no lecture.” Many states have enshrined one side or the other’s claim into their laws. Whose claims should win? Is your answer shaped more by liberty of conscience or by your moral analysis of the pharmaceuticals at issue?

Next consider the recent headline-grabbing battles over conscience that have been sparked by scientific advancements, expanding religious pluralism, rapidly shifting cultural norms, or some combination thereof. Should a physician’s right of conscience empower him to refuse to provide reproductive assistance to a patient because she is not married? Does a Muslim taxi driver’s right of conscience warrant an accommodation allowing him to avoid transporting passengers carrying alcohol? Should a Muslim cashier be entitled to call over a coworker whenever a customer needs to have pork products scanned and bagged? Should a bus driver be entitled

to avoid operating a bus with an advertisement for a gay-friendly magazine? In justifying your answers, note that all of these disputes arose out of marketplace transactions for goods and services. Are these claimants defending their consciences against illegitimate coercion or using conscience as an affirmative weapon by which to force the rewriting of their job descriptions? The state executioner would be hard-pressed to keep his job if he were to invoke conscience as a basis for refusing to participate in the death penalty, but such obvious cases are rare.

Another category of cases involves direct challenges to an organization's moral identity, particularly its religious identity, by individual employees or customers who believe that their own liberty of conscience is threatened by organizational policies. Is it safe to presume that conscience is a relevant concern on the individual's side of the ledger, but not the organization's? Take two recent lawsuits: one filed by employees against the Salvation Army for making religion part of the hiring and retention criteria; and the other by customers against a leading dating web site run by Christians for failing to expand their services to include gays and lesbians. Is the cause of conscience represented by the organizations pursuing distinctive moral identities or by the individuals whose own exercise of conscience may be burdened by the organizational identity?

Some of these challenges to an organization's moral identity are brought by the state itself, purportedly on the individual's behalf. In such cases, the state seeks to compel groups to honor the conscience claims implicit in the morally laden priorities of their employees, prospective members or prospective clients, even when those priorities conflict with the organization's identity. Several years ago, for example, James Dale was excluded from the Boy Scouts based on his openly gay identity, and the state of New Jersey responded by enforcing antidiscrimination law to require his inclusion.¹¹ Even more recently, state universities have revoked recognition of Christian student groups that exclude non-Christians; state legislatures in California and New York have forced Catholic Charities to cover the cost of contraceptives for employees; and the Massachusetts legislature has required Catholic Charities to place children with same-sex couples as a condition of maintaining its license to perform adoption services, leading to the group's decision to terminate the services. Who should prevail in these cases, and how does our commitment to conscience help us decide who should prevail? Does liberty of conscience favor the dissenting association against the oppressive state or the dissenting individual against the oppressive association?

What if the "oppressive association" in question is a family? A California appellate court recently ruled that parents cannot home-school their children unless the parent is a state-certified teacher.¹² Thirty-five years ago, the Supreme Court was faced with

¹¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

¹² Mitchell Landsberg, *Ruling Hits Home Schooling*, L.A. Times, Mar. 6, 2008, at 1. The ruling was subsequently reversed on rehearing. See *Jonathan L. v. Superior Court of Los Angeles County*, 165 Cal. App. 4th 1074 (Cal. Ct. App. 2008).

a standoff between the state of Wisconsin and Amish parents who refused to submit to the state's requirement that children attend high school.¹³ Both cases present the same question about conscience: To what extent should we, as a society, defer to the consciences of parents when it comes to child rearing? Especially in the years before we recognize an individual as the bearer of a fully formed conscience, who should speak on behalf of the child and her not-yet-formed conscience? Are there limits to parental authority, especially when society perceives that parental prerogative may compromise the child's development? If our protection of conscience aims only to defend the moral autonomy of the individual, where do families fit?

This exercise gets even trickier if we try to discern the extent to which our answers are influenced by the fact that many of these episodes pit our society's deepening commitment to inclusiveness and equality against groups that prioritize other moral claims. In today's climate, these claims are often based on traditional religious views of sexuality or gender. The broader interests at stake, however, do not fall into any single "culture war" category or easily align along the usual conservative-liberal battle lines. To the extent that these cases share a conception of conscience as a sort of trump card to be invoked on behalf of the individual's stated objectives against whatever institution happens to block the path, are you comfortable resolving these cases based on whether you agree with what a particular association is trying to do?

A ROAD MAP

This book seeks to explore conscience's relational dimension and to begin tracing its implications for public policy. Headline-grabbing litigation battles are encompassed within those implications, but they are not the whole story. Reclaiming the relational dimension will bring a depth and nuance to conscience currently lacking from our public discourse, with significant implications for our understanding of prudently ordered relationships among the state, the individual, and the associations standing between them. Recognizing these dynamics of conscience need not denigrate the individual's primacy, but rather aims to honor that primacy by facilitating the relationships that make the individual's conscience possible. In the simplest terms, conscience is the person's interior judge of right and wrong. Its interiority, however, can never be mistaken for self-containment because conscience's formation and operation link the person to the world outside herself.

Although conscience's relational dimension requires some discussion of philosophy, sociology, political theory, and even theology, this is primarily a book about law. Chapter 1 provides a brief overview of the law's treatment of conscience and explains why, despite key points of progress in the legal protection of individual conscience over the course of the twentieth century, the law's support of conscience is unduly narrow. In particular, the law's support tends to be limited to particular instances

¹³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

of conflict between the individual and the state. Those instances are – and should remain – central to the sanctity of conscience in our legal system. But the cause of conscience would be further bolstered to the extent that the law’s cognizance of conscience expands beyond points of conflict to encompass paths of formation and expression, beyond the individual-versus-state paradigm to encompass nonstate associations, and beyond purely individualist justifications for liberty of conscience to include justifications grounded in the common good.

The next part of the book lays out three key aspects of conscience’s relational dimension. Chapter 2 explores the place of conscience within our conception of the person, tracing the ancient roots of conscience up to Charles Taylor’s groundbreaking philosophical work on identity. Because conscience’s sources lie outside ourselves, conscience’s claims tend to be accessible and intersubjective in a way that claims of preference are not. Our moral convictions provide a framework that allows us to live lives of coherence and integrity; their accessibility and intersubjectivity mean that we tend to construct those frameworks through relationships. Linking the relational dimension of conscience with the nature of the person, I argue, first, that conscience embodies our social nature; second, that conscience is not so much an expression of our identity as an essential means of forming our identity; and third, that conscience is best understood not as a force that binds our will in particular circumstances, but more broadly as a set of truth claims that is perpetually in dialogue with our will.

Chapter 3 focuses more specifically on the inherently self-transcendent quality of conscience’s claims. These claims connect the person with the world outside herself because moral judgments are grounded in reality, actual or perceived. The chapter summarizes the tension between objectivist and subjectivist accounts of morality, concluding that even subjectivist accounts make room for conscience’s outward orientation. This outward orientation – captured in part by the intersubjective nature of moral language – underscores the importance of communities in which a person’s moral identity can be articulated and stabilized and explains how a vibrant community life within a society facilitates the formation of individual conscience, even among those who are not themselves members of a meaningful moral community.

Chapter 4 outlines the connection between conscience and the common good, drawing on a variety of thoughtful perspectives on a just social order, ranging from the nineteenth-century Calvinist theory of sphere sovereignty to the current “cultural cognition” project spearheaded by scholars at Yale Law School. All of the perspectives are bound, to varying degrees, by a shared commitment to decentralized moral authority in society. The chapter concludes that a society committed to the common good presupposes a “bottom up” conversation on contested moral issues, which requires, in turn, ample space for individuals and associations to live out moral identities in tension with – even in open defiance of – the majority’s norms.

The book’s second half begins to trace the implications of conscience’s relational dimension across a range of social settings in which the law and moral claims interact.

Chapter 5 focuses on voluntary associations, emphasizing the importance of the mediating role played by groups to which individuals willingly commit themselves. By providing members with a sense of identity and purpose, a means of expression, and a venue for shared meaning, voluntary associations connect the individual with social power without subjecting her to the collectivizing inclinations of the state. As such, voluntary associations are central to the cause of conscience. This centrality requires a meaningful, but not unlimited, degree of independence from state interference. Determining the prudent degree of independence is no easy task, of course, particularly at a time when many associations are eager to align themselves more closely with the government, or at least to get their share of the government's money. Focusing on the mediating role, and its capacity to support conscience's flourishing, helps clarify the interests at stake.

Chapter 6 examines the role of conscience in the provision of health care, using as an entry point the recent controversy over morality in the pharmacy. On one side, conscience is invoked to justify legislation that would enable individual pharmacists to refuse to fill prescriptions on moral grounds without suffering any negative repercussions, whether in the form of government penalty, employment discrimination, or third-party liability. On the other side, conscience is invoked to justify legislation that would enable individual consumers to compel pharmacists to fill any legally obtained prescription without delay or inconvenience. The chapter proposes a third way, asking the state to allow both sides to live out their convictions in the marketplace, maintaining a forum in which pharmacies craft their own particular conscience policies in response to the demands of their employees and customers.

Chapter 7 uses the pharmacy example to open a broader inquiry into whether corporations in general should be considered venues for the communal expression and implementation of conscience, looking specifically at the capacity of corporations such as Wal-Mart to carve out moral identities that diverge from the norms embraced by the broader society. My inquiry also includes the internal environment of the corporation, exploring the tension between a corporate community's constituent-driven moral identity and the exercise of conscience by dissenting community members, particularly employees. When it comes to facilitating the living out of conscience, I conclude that the relevance of the local church and Wal-Mart are different in degree, not in kind.

Education is the focus of chapter 8. Recent federal court rulings have solidified the authority of school officials to decide what students are taught about contested moral issues and curtailed parents' right to shield students from teachings to which they object. Parental authority over their children's education, courts have reasoned, extends only to the choice of schools. Because many parents do not have a viable choice of schools, however, the state's power over students' moral formation poses a significant threat to conscience. When there is a functioning market of school choice, institutional authority is consistent with – and can actually support – the relational dimension of conscience.