HJR

5

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: March 20, 1998 FURTHER REFERRALS:

Date of Committee Action: 3/31/98

The FINANCE Committee considered: HJR 5

HOUSE JOINT RESOLUTION NO. 5 CONSTIT AMNDMNT: FREEDOM OF CONSCIENCE

Proposing an amendment to the Constitution of the State of Alaska relating to freedom of conscience.

recommends it be replaced with the following committee substitute CSHJR 5 (FIN) [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal note(s) of ad Gov 1/30/98 [ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
	Therriault			X	
	MULDER	✓			
	martin	✓			
	Kohring	X			
	J. Davies				X
	Grussendorf				X
	Kelly			✓	
	FOSTER			X	

CO CHAIR'S SIGNATURE: _____
Therriault

No: 1

FISCAL NOTE

Bill Version: HJR 5

(H) Publish Date: 1/30/98

STATE OF ALASKA
1998 LEGISLATIVE SESSION

Revision Date (Note if correction)

Dept. Affected: Office of the Governor

Title: Const. Amend Freedom of Conscience

BRU: Elective Operations

Component: Elections

Sponsor: Representative Martin

Requester: House State Affairs Committee

Component Serial No.: #21

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual	3.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	3.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	3.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	3.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58, and the programming costs for counting votes cast on the measure. However, only four measures can be printed on a single ballot card. If this measure requires printing an additional ballot card, the costs will increase by $56.0.

Prepared by: Dana LaTour — Phone: 465-5347

Division: Division of Elections — Date: 1/16/98

Approved by C: Lt. Governor Fran Ulmer — Date: 1/16/98

Agency: Office of the Lieutenant Governor

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Juneau, Alaska 99801-2105

MEMORANDUM April 1, 1998

SUBJECT: Freedom of Conscience (CSHJR 5(FIN))

TO: Representative Gene Therriault, Co-Chair
Representative Mark Hanley, Co-Chair
House Finance Committee
Attn: Shar Smith

FROM: Tamara Brandt Cook
Director TBC

Enclosed is a Finance CS for HJR 5.

I am not sure what the legal effect of the amendment will be. Are you, for example, intending to allow hospital personnel to refuse to participate in tonsillectomy or hysterectomy procedures without being fired from their jobs if they, in good conscience, believe that too many tonsillectomies or hysterectomies are performed unnecessarily? Are you intending to allow parents to refuse to provide necessary surgery for their children without having the children taken from their custody if they, as a matter of conscience, oppose invasive procedures? Are you intending to allow a hospital or nursing home to operate differently from what might otherwise be required by licensing regulations if the hospital or nursing home, in good conscience, believes that the regulations are too onerous and will lead to too much expense for the patients?

Subsection (b) requires the legislature to implement the new freedom of conscience section. Bear in mind that under Art. XII, sec. 9 provisions of the constitution are self-executing, so even if the legislature does not act to implement this new constitutional provision the court may apply it. Or the court may decide that the legislature's implementation of the provision is unconstitutional. (Hickel v. Cowper, 874 P.2d 922 (Alaska 1994) invalidating a statute that implemented Art. IX, sec. 17(d))

TBC:jdr
98-221.jdr

Enclosure

3-31-98

adopted N/O #1

HOUSE AMENDMENT

TO: CSHJR 5 (Jud) By: Rep. Martin

On page 1, line 5

following the phrase, "Freedom of Conscience"

delete the remainder of Section 1 and replace with:

"(a) Nothing in this constitution requires

(1) an individual to participate in providing a health care service if the individual has a conscientious objection to the service;

(2) a public or private health care facility to participate in, or to accommodate the provision of, a health care service if a majority of the members of the governing body of the facility has a conscientious objection to the service.

(b) The legislature shall implement this section."

3-31-98

0-LS0199\E.1
Cook
3/30/98

withdrawn

AMENDMENT #2

OFFERED IN THE HOUSE BY REPRESENTATIVE THERRIAULT

TO: CSHJR 5(JUD)

Page 1, lines 4 - 10:

Delete all material and insert:

"* **Section 1.** Article I, sec. 22, Constitution of the State of Alaska, is amended to read:

Section 22. Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. **However, a person's right to privacy does not compel another person or an organization to perform an act that violates the freedom of conscience of the other person or of a majority of the members of the governing body of the organization.** The legislature shall implement this section."

REPRESENTATIVE
TERRY MARTIN
VICE-CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 258-8169
716 W. 4TH, SUITE 650
ANCHORAGE, AK 99504

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

HOME 333-6990
355 DONNA DRIVE, #11
ANCHORAGE, AK 99504

MEMORANDUM

To: **House Finance Committee Members**

From: **Representative Terry Martin** TM.

Date: **March 31, 1998**

Subject: **HJR 5 - Freedom of Conscience** and the 'myths' of the Valley Hospital Decision

---

This information is in response to certain testimony heard at the March 26 hearing:

1. The hospital is ordered to allow abortions:

> "It is therefore ordered, adjudged, and decreed that Valley Hospital, its Operating board, medical staff members, officers, agents, servants, and employees, any of their successors, and all persons acting in concert, participation, or cooperation with them, or at their direction, or under their control, are hereby permanently restrained and enjoined as follows:
>
> 1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;
>
> 2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;
>
> 3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure which is not based on accepted, established medical practices or requirements with respect to such procedures." (page 2 of Superior Court Final Judgment).

2. Personnel are required to participate in the procedure. Only the direct participants may refuse on the basis of conscience. No more protection, as we once had, for the nurses, orderlies, radiologists, lab technicians, and others involved:

> "Nothing in the permanent injunction granted as part of this Final Judgment shall require any member of the medical staff of Valley Hospital, to participate

directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so." (Final Judgment).

(Read this: "Nothing in this bill exempts those who must participate indirectly and who object by reason of conscience or belief". There is no definition of 'direct' participant - is it only the abortionist who separates the fetus from the wall of the womb? Other medical personnel must do the preparation, clean-up and comfort the would-be mother.)

Nurses, radiologists, lab technicians and other health care workers are particularly vulnerable to pressure because they occupy subordinate positions in the hospital/medical hierarchy.

3. There is not much chance on a religious basis exemption for other hospitals. The Supreme Court says that nothing in the decision

> "should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as 'compelling' could violate the Establishment Clause of the First Amendment to the United States Constitution." (Valley Hospital, Supreme Court decision page 19).

4. And there is no reliance on being a private hospital. There probably are no hospitals in Alaska which do not accept State or Federal money. And, further, as the decision reads:

> "We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the Superior Court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public'". (Page 17, Alaska Supreme Court decisio...

Alaskans do need the option of a Right of Conscience so that everyday people and community institutions are no longer compelled by another person's exercise of the right to privacy to act in a manner that violates their convictions of conscience.

REPRESENTATIVE
TERRY MARTIN
VICE- CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

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Sponsor Statement

HJR 5 - Proposing an amendment to the Constitution of the State of Alaska relating to the freedom of conscience

What do we mean when we say "freedom of conscience?" The United States is a nation founded on the freedom of religion; it is fundamental to the many institutions we have grown up with and take for granted. That is to say, our freedom of religion is not for any specific sect, but for all of religions, and recognizes the basic tenets of many religions as foundational to our society.

Yet, what is it to claim a freedom of religion if not to be able to act upon one's conscience when your religious beliefs collide with the secular world? The freedom to act in accordance with one's religious–or even non-religious, but moral–beliefs is a fundamental precept of freedom of religion.

In Alaska, we have been careful to articulate the rights of the individual, through both the Alaska and the US Constitutions. In 1972, we added to the state constitution the right to privacy. Perhaps the right to freedom of conscience has simply been taken for granted, as implied by the protection of the freedom of religion, or as codified in Alaska statutes

However, having the freedom of conscience in statute has not been sufficient, and a court challenge has sought to compel individual Alaskans to perform actions to which they personally objected as a matter of conscience. Specifically, providers of medical services, such as doctors and nurses, have been forced to perform or participate in certain medical procedures such as abortions, even though they are morally opposed to the killing of innocent human life. Today's new emphasis on assisted suicide could well become a public governmental policy, mandated by the courts or the legislature.

Any convoluted rationalization of a social policy that forces a person to participate in what he or she considers to be murder puts Alaska at the doorstep of Nazi Germany of the 1930s or of the several communist despotisms of the 30s, 40s and 50s, up to and including the 70s, 80s and 90s.

By adding this new protection to the Alaska Constitution, we can make it crystal clear that Alaskans enjoy complete freedom of conscience, just as most people imagine they now do.

Thomas Jefferson
on Freedom of Conscience

You may think you have it,
but in Alaska there are no guarantees.


THOMAS JEFFERSON.

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrranical." - 1777

"It is inconsistent with the spirit of our laws and Constitution to force tender *consciences*." - 1781

"But our rulers can have authority over such natural rights only as we have submitted to them. The *rights of conscience* we never submitted, we could not submit. We are answerable for them to God." - 1782

"The freedom of opinion and the reasonable maintenance of it is not a crime and ought not to occasion injury." - 1801

"We are bound, you, I, and every one, to make common cause, even with error itself, to maintain the common *right of freedom of conscience*." - 1803

"It behooves every man who values *liberty of conscience* for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become their own. It behooves him, too, in his own case, to give no example of concession, betraying the common right of independent opinion, by answering questions of faith, which the laws have left between God and himself." - 1803

"No provision in our Constitution ought to be dearer to man than that which protects the *rights of conscience* against the enterprises of the civil authority." - 1809

"This country which has given to the world the example of physical liberty owes it that of *moral emancipation* also." - 1821

*** The right to freedom of conscience is not guaranteed by the State of Alaska Constitution.**

- Distributed by Representative Terry Martin

MEMORANDUM

To: **Senate Members**
20th Legislature

From: **Representative Terry Martin**

Date: **February 17, 1998**

Subject: **HJR5 - Freedom of Conscience**

Although the State of Alaska's Constitution does not contain a 'conscience' clause, many States, both explicitly and implicitly, guarantee and protect the 'freedom of conscience' in their State Constitutions. Some examples are:

Indiana, in Section 3 of their Bill of Rights, states: "**No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience".**

Kentucky Bill of Rights. Section 5 includes "**No human authority shall, in any case whatever, control or interfere with the rights of conscience**".

Washington, in Article 1, Section 11 of their Constitution reads: "**Absolute freedom of conscience in all matters of religious sentiment, belief, and worship shall be guaranteed to every individual and no one shall be molested or disturbed in person or property on account of religion;**".

New Hampshire Bill of Rights. Section 4. Rights of conscience unalienable: "**Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.**"

Oregon Bill of Rights. Article I, Section 3 reads: "No law shall in any case whatever control the free exercise, and enjoyment of religious opinions or interfere with the rights of conscience".

Arkansas Constitution, in Article II, Section 3, states that "The State shall not control or interfere with the right of conscience..."

Delaware, Article I, Section 1: '...no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience...".

Georgia, Section I. Paragraph III. Freedom of Conscience: "...no human authority should, in any case, control or interfere with such right of conscience."

Kansas Section 7: "...nor shall any control of or interference with the rights of conscience be permitted..."

Ohio Article 1, Bill of Rights: "nor shall any interference with the rights of conscience be permitted."

Pennsylvania Constitution Article I, Section 3 "...no human authority can, in any case whatsoever, control or interfere with the rights of conscience".

The **Minnesota** Bill of Rights, Section 16. Freedom of Conscience reads: "...nor shall any control of or interference with the rights of conscience be permitted..."

Missouri Constitution, Article I, Section 5: "...that no human authority can control or interfere with the rights of conscience..."

Idaho, Article I, Section 7. Rights of conscience; education; necessity of religion and knowledge: " ...nor shall any interfere; e with the rights of conscience be permitted."

The State of **Tennessee** Declaration of Rights, Article I, Section 3, reads: "...that no human authority can, in any case whatever, control or interfere with the rights of conscience..."

Wisconsin, Declaration of Rights, Section 18: "... nor shall any control of, or interference with, the rights of conscience be permitted..."

The **Arizona** constitution reads: "The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State." Idaho, California, Connecticut, New York, North Dakota, Wyoming, and Illinois include similar cautions in their constitutions.

Please call for additional documentation; I am most willing to meet with you.

attachments

Arizona

Article 2 Section 12 - Liberty of conscience

Section 12. The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

Arkansas - Proposed New Constitution

ARTICLE II - DECLARATION OF RIGHTS

Section 3. Freedom of Religion.

All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No law shall be made respecting an establishment of religion or prohibiting the free exercise of religion; no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry. **The State shall not control or interfere with the right of conscience,** nor give any preference by law to any religious establishment, denomination, or mode of worship. Religion, morality, and knowledge being essential to good government, the General Assembly shall enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship. No religious test shall ever be required of any person as a qualification to vote or hold public office, nor shall any person be rendered incompetent to be a witness on account of religious belief, but nothing herein shall be construed to dispense with oaths or affirmations.

DELAWARE BILL OF RIGHTS

ARTICLE I. BILL OF RIGHTS

FREEDOM OF RELIGION

Sec. 1. Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends are hereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and **no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience,** in the free exercise or religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.

Georgia

Section I. Rights of Persons. Paragraph III. Freedom of conscience.

Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and **no human authority should, in any case, control or interfere with such right of conscience**.

Constitution of the State of Indiana

ARTICLE 1. Bill of Rights

Section 3. Freedom of religious opinions and rights of conscience

Section 3. **No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.**

STATE OF KANSAS

Kansas Bill of Rights

§ 7. Religious liberty. The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; **nor shall any control of or interference with the rights of conscience be permitted**, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any elections,

Kentucky Constitution

BILL OF RIGHTS
Kentucky Constitution, Section 5
Right of religious freedom.

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. **No human authority shall, in any case whatever, control or interfere with the rights of conscience.**

Minnesota

Sec. 16. FREEDOM OF CONSCIENCE; NO PREFERENCE TO BE GIVEN TO ANY RELIGIOUS ESTABLISHMENT OR MODE OF WORSHIP. The enumeration of rights

in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; **nor shall any control of or interference with the rights of conscience be permitted**, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Missouri Constitution

Article I, BILL OF RIGHTS, Section 5

Religious freedom--liberty of conscience and belief--limitations.
Section 5. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences: **that no human authority can control or interfere with the rights of conscience**; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

New Hampshire State Constitution

AMENDED AND IN FORCE DECEMBER 1990, PART FIRST- BILL OF RIGHTS
4. Rights of conscience unalienable.
Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS
CURRENT TO JULY 1, 1996
§ 7 Rights of **conscience**: education: necessity of **religion** and knowledge.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own **conscience**. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; **nor shall any interference with the rights of conscience be permitted**. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. **Religion**, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

ARTICLE I
Oregon BILL OF RIGHTS

Section 3. Freedom of religious opinion. **No law shall** in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience.

PENNSYLVANIA

Article 1. DECLARATION OF RIGHTS, Religious Freedom
Section 3.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own **consciences**; no man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent; **no human authority can, in any case whatever, control or interfere with the rights of conscience**, and no preference shall ever be given by law to any religious establishments or modes of worship.

TENNESSEE

ARTICLE I
DECLARATION OF RIGHTS

Sec. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own **conscience**; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; **that no human authority can, in any case whatever, control or interfere with the rights of conscience;** and that no preference shall ever be given, by law to any religious establishment or mode of worship.

The Texas Constitution

Article 1 - BILL OF RIGHTS, Section 6 - FREEDOM OF WORSHIP

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. **No human authority ought, in any case whatever, to control or interfere with the rights of conscience** in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Wisconsin,

DECLARATION OF RIGHTS

Sec. 18. The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; **nor shall any control of, or interference with, the rights of conscience be permitted**, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Washington

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 11 RELIGIOUS FREEDOM. **Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion;** but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER,
That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.
[AMENDMENT 88, 1993 House Joint Resolution No. 4200, p 3062. Approved November
2, 1993.]

have published most of these presentations, adding footnotes and the necessary editing of the oral presentations. Some of the participants, however, have responded to the issues raised at the Conference and requested that we include their expanded comments in this issue. We have noted those papers where appropriate. Similarly, the Conference participants were encouraged to engage panelists in discussion following the presentations. Accordingly, we have attempted to incorporate some of the conversations that followed the initial presentations in an informal manner to capture the full flavor of the dialogues started by our main panelists. Moreover, questions and discussions would often build upon discussions from previous panels.

The plurality of opinions follow. We trust you will find them a helpful companion in seeking understanding of the First Amendment. Not unsurprisingly, debates focused as much on differences of opinion within religious understandings and legal doctrines as between law and religion. Nevertheless, the participants also posed new questions for all scholars of church and state in our society. We do not presume that all beliefs or disciplines could have been covered in this two-day conference. Indeed, this should start rather than conclude this dialogue. But the necessity to continue this discussion between disciplines is recognized in Robin Lovin's concluding comment that our society will continue to struggle with the appropriate relationship between government and religion "unless we can come up with a legal conception of human freedom and its social context that is adequate to contemporary religious and philosophical understandings of persons and their communities."[57]

57. Lovin, *supra* note 52, at 316.

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 Essay[1] offers an abbreviated genealogy[2] of the crisis in the nature and meaning of conscience as it

* Professor of Modern and American Church History, Union Theological Seminary (NY). B.A., University of Tennessee; M.T.S., Harvard Divinity School; M. Phil., Yale University; Ph.D., Yale University. Professor Washington is the author of FRUSTRATED FELLOWSHIP THE BLACK BAPTIST QUEST FOR SOCIAL POWER (1986), and has edited two anthologies: A TESTAMENT OF HOPE THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (1986), as well as I HAVE A DREAM SPEECHES AND WRITINGS THAT CHANGED THE WORLD (1992). He is presently conducting research and writing for a book on the religious history of the civil rights movement, which is sponsored by a major three-year grant from the Lilly Endowment.

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.[3]

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

3. LUCIEN GOLDMANN, THE HIDDEN GOD A STUDY OF TRAGIC VISION IN THE *PENSÉES* OF PASCAL AND THE TRAGEDIES OF RACINE 28 (Philip Thody trans., Routledge & Kegan Paul Ltd. 1964).

4. Both Luther's famous Good Friday Hymn, *God imself 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 PNUEMATOLOGY 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 CIVILIZATION (1983).

the Puritan, American, and French revolutions, the classic revolutionary traditions of the modern period,[6] the revolutionaries often appealed to the authority of the three respective sovereignties of God, law, and the people.[7]

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.[8] His specific argument that the political alienation of the Enlightenment world view 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."[9] 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

6. I view the Russian Revolution as a postmodern phenomenon insofar as it sought to subvert modernity.

7. For an excellent study of the development of the praxis of sovereignty, see EDMUND S. MORGAN, INVENTING THE PEOPLE THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

8. *See* REINHART KOSELLECK, CRITIQUE AND CRISIS ENLIGHTENMENT AND THE PATHOGENESIS OF MODERN SOCIETY (1988).

9. THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 239 (Michael Oakeshott ed., Crowell-Collier Publishing Co. 1962) (1651).

and peace.[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"[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.[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 . . . ."[13] In effect Hobbes's reaction against the English Civil War viewed Augustine's *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.[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, conscience is sovereign.[15]

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 242.
14. *Id.*

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.[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 unrational."[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.[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

15. *Id.* This is admittedly a highly sketchy summary of a complicated development. For a superb analytical genealogy of a *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 *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 *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.'" *Id.* at 99. He cites Richard Hooker's *Of the Laws of Ecclesiastical Polity* as a landmark attempt to offer a theological *via media* between divine, natural, and human law. *Id.* at 90 (citing RICHARD HOOKER, 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).

16. *See* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).
17. *Id.* at 27.
18. *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 reformations 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] The

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 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, *cujus 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. *Cujus regio, ejus religio* was reconfirmed in the Peace of Augsburg (1955), 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 SCOTT LATOURETTE, A HISTORY OF THE EXPANSION OF CHRISTIANITY THE THOUSAND YEARS OF UNCERTAINTY 884-98 (Harper & Row 1975) (1953).

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.[22] This could be done rather easily once one perceived that the hubris of their arguments lay in their fragile "social construction of reality."[23] 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."[24] As I have already stated, by 1651, four years after the great Westminster Assembly had adjoined,[25] 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

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.

JOHN MORGAN, GODLY LEARNING PURITAN ATTITUDES TOWARDS REASON, LEARNING, AND EDUCATION, 1560-1640, at 28-29 (1986). *See also* PERRY MILLER, THE NEW ENGLAND MIND THE SEVENTEENTH CENTURY (1939).

23. This phrase refers to the following study: PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (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*." PETER L. BERGER, THE SACRED CANOPY ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 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.

24. THE CONSTITUTION OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA. PART I. BOOK OF CONFESSIONS § 6.101 (2d ed. 1970).

25. *See* ROBERT S. PAUL, THE ASSEMBLY OF THE LORD POLITICS AND RELIGION IN THE WESTMINSTER ASSEMBLY AND THE "GRAND DEBATE" (1985).

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

26. 2 WILLIAM PENN, *A Persuasive to Moderation to Dissenters, in Prudence and Conscience, in* THE SELECT WORKS OF WILLIAM PENN 504 (4th ed., London, William Phillips 1825).

27. The best critical edition and translation of this famous essay can be found in JOHN LOCKE, EPISTOLA DE TOLERANTIA. A LETTER ON TOLERATION (Raymond Klibansky ed. & J.W. Gough trans., Latin text ed., Oxford Univ. Press 1968).

28. 2 PENN, *supra* note 26, at 507.

may be committed against more than the church."[29] This paradigmatic Quaker defense of progressive revelation had a humanist corollary which had one of its best expressions in the writings of Pierre Bayle.[30] 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 . . . ."[31]

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.[32]

Penn's convictions were not simply a matter of metaphysics. He embodied these convictions in his "Holy Experiment" which became the Commonwealth of Pennsylvania.[33] John Locke, the author of the

29. 2 *Id.* at 508. For a fine discussion of the nuanced development of social consciousness among the Society of Friends, see RICHARD T. VANN, THE SOCIAL DEVELOPMENT OF ENGLISH QUAKERISM, 1655-1755 (1969).

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.*

33. *See* MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 65-68 (1992).

fundamental laws of the colony of North Carolina,[34] also tried to make conscience an important cornerstone of his philosophy of law.[36] 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),[36] than with theological convictions even though he was careful to assume them. In his *Letter on Toleration*, Locke made an enduring distinction between "private judgment" and public responsibility in matters concerning primary moral and religious convictions.[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."[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:

> 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

34. *See* RICHARD I. AARON, JOHN LOCKE 16 (3d ed. 1970).

35. *Id.* at 74-82.

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, THE PROGRESS OF RELIGIOUS FREEDOM AS SHOWN IN THE HISTORY OF TOLERATION ACTS 119-25 (New York, Charles Scribner's Sons 1889).

37. LOCKE, *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.

38. *Id.* at 101.

> 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.

41. The following monographs offer excellent inroads into this complex historiography: RICHARD L. GREAVES, THEOLOGY AND REVOLUTION IN THE SCOTTISH REFORMATION: STUDIES IN THE THOUGHT OF JOHN KNOX (1980); CHRISTOPHER HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION (1965); PERRY MILLER, ERRAND INTO THE WILDERNESS (1956); JOHN T. MCNEILL, THE HISTORY AND CHARACTER OF CALVINISM (1954).

of theological and philosophical debates about the meaning of this phrase.[42] 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.[43]

Without taking the evolving power of the nation state seriously enough, many belletrist and religious subjectivists abandoned the brutalities of "marketplace culture."[44] 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."[45] 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).

44. *See* JEAN-CHRISTOPHE AGNEW. WORLDS APART THE MARKET AND THE THEATER IN ANGLO-AMERICAN THOUGHT. 1550-1750, at 188 (1986); *see also* J G A POCOCK. THE MACHIAVELLIAN MOMENT FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 462-552 (1975).

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.[46] 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,[47] 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.[48] One American historian has referred to this veneration of constitutionalism as the "cult of the constitution."[49]

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."[50] In his 1833

KOSELLECK, *supra* note 8, I find *Webster's Ninth Collegiate Dictionary* medicinal definition of "cult" helpful in advancing my argument here. It defines cult as "a system for the cure of disease based on dogma set forth by its promulgator." WEBSTER'S NINTH COLLEGIATE DICTIONARY 314 (9th ed. 1990).

46. ELIE HALÉVY. THE BIRTH OF METHODISM IN ENGLAND (Bernard Semmel ed. & trans., University of Chicago Press 1971). Several scholars have pursued Elie Halévy's intriguing thesis that Britain was spared such anxieties because of the supposedly "psychologically repressive" effects of the Evangelical revivals. Semmel's excellent introduction offers a valuable assessment of recent contributors to, and critics of, Halévy's thesis. *See* ELIE HALÉVY, METHODISM AND REVOLUTION *in* HALÉVY, *supra*, at I. Edward P. Thompson advanced the most influential contribution and expansion of this thesis. *See* E P THOMPSON. THE MAKING OF THE ENGLISH WORKING CLASS (1st Vintage ed. 1966) (1963). See especially the chapter titled, "The Transforming Power of the Cross." *Id.* at 350. But Semmel himself authored the most effective and knowledgeable rejoinder to the misleading idea that Methodism was psychologically repressive. *See* BERNARD SEMMEL. THE METHODIST REVOLUTION (1973).

47. The most influential analysis of this subject in the last twenty years is by Garry Wills. *See* WILLS, *supra* note 20. However, Alan Heimert overemphasized the role of Calvinists in the Revolution, and subsequent constitutional debates, during a period when Calvinism was in a profound state of transformation. See ALAN HEIMERT. RELIGION AND THE AMERICAN MIND FROM THE GREAT AWAKENING TO THE REVOLUTION (1966) for a finely woven analysis of the role of religion in the political culture of the early Republic during a time when scholars were too inattentive to this subject. The following studies have also made major contributions to our understanding of the role of religionists and humanists in the early republic: FRED J HOOD. REFORMED AMERICA. THE MIDDLE AND SOUTHERN STATES. 1783-1837 (1980); HENRY F MAY. THE ENLIGHTENMENT IN AMERICA (1976); MARK A NOLL. PRINCETON AND THE REPUBLIC. 1768-1822 THE SEARCH FOR A CHRISTIAN ENLIGHTENMENT IN THE ERA OF SAMUEL STANHOPE SMITH (1989); JACK R POLE. THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (1978).

48. There are many fine studies of the rhetoric of the American Revolution that allude to the interface of religious language and revolutionary discourse. Perhaps the most engaging one is SACVAN BERCOVITCH. THE AMERICAN JEREMIAD 132-75 (1978). *See also* MORGAN, *supra* note 7.

49. MICHAEL KAMMEN. A MACHINE THAT WOULD GO OF ITSELF THE CONSTITUTION IN AMERICAN CULTURE 22 (1987).

50. This term is my way of locating "conscience" as a key member of the fundamental ideas and values which jurisprudence seeks to uphold. "Conscience" has been both a symbol and a mode

Commentaries on the Constitution of the United States,[51] 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."[52] 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.[53]

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of discourse that signifies this jurisprudential culture. I agree with Anthony Giddens that such signifiers and signification constitute institutions: "Symbolic orders and associated modes of discourse are a major institutional locus of ideology." ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY OUTLINE OF THE THEORY OF STRUCTURATION 32-33 (1984).

51. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Academic Press 1987) (1833).

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 the inordinate sway that the praxis and philosophy of ownership has in American jurisprudence. Time and space prevent me from discussing this here. *See* BERLIN BASIL CHAPMAN, THE OTOES AND MISSOURIAS A STUDY OF INDIAN REMOVAL AND THE LEGAL AFTERMATH 223-89 (1965); VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 217-46 (1983); EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT, at 403-28 (1991). Several excellent studies on Native American religious freedom can be found in the HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM (Christopher Vecsey ed., 1991) [hereinafter HANDBOOK]. *See, e.g.*, Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, *in* HANDBOOK, *supra*, at 27. For a fine examination of the idea of land as an embodiment of the sacred, see BELDEN C. LANE, LANDSCAPES OF THE SACRED GEOGRAPHY AND NARRATIVE IN AMERICAN SPIRITUALITY (1988).

54. PAUL L. LEHMANN, ETHICS IN A CHRISTIAN CONTEXT 327 n.2 (1963).

55. Although the literature on this subject is vast, several recent studies provide helpful inroads into, and exits out of, this problematic intellectual junction. *See* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY (1989); HANS-GEORG GADAMER, TRUTH AND METHOD (Eng. ed., Crossroad 1982) (1965); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); POST MODERN LAW ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN (Anthony Carty ed., 1990).

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] As long as there is unconsciousness and indifference about the impact that the

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*.[56] 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.[57]

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 humanity. 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."[58] 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.[59]

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, revitalized, and redefined.[60]

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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.

58. Joseph Haroutunian, *The Gospel and Our Situation*, 2 RADICAL RELIGION 31 (Spring, 1937). *See also* JOSEPH HAROUTUNIAN, PIETY VERSUS MORALISM: THE PASSING OF NEW ENGLAND THEOLOGY (Harper & Row 1970) (1932); MAY, *supra* note 47.

59. Haroutunian, *supra* note 58, at 31.

60. For a discussion of the cultural and sociological uses of *developmentalism*, see MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY (1982) and ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY: ASPECTS OF THE WESTERN THEORY OF DEVELOPMENT (1969). The concept gained wide acceptance among German Protestants at the beginning of the nineteenth century who identified with Romanticism. *See* JOHN EDWARD TOEWS, HE-

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."[61]

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*[62] 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.[63]

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.[64]

Melville portrays the agony of the conscience as a bondage of the will burdened with the vicissitudes of contingency.[65] The domain of 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]."[66] 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*.[67] 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.[68]

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

gelianism THE PATH TOWARD DIALECTICAL HUMANISM, 1805-1841, at 30-67 (1980).

61. *See* ERNEST LEE TUVESON, THE IMAGINATION AS A MEANS OF GRACE LOCKE AND THE AESTHETICS OF ROMANTICISM (1960).

62. HERMAN MELVILLE, BILLY BUDD, *reprinted in* THE AMERICAN TRADITION IN LITERATURE 990 (Sculley Bradley et al. eds., 3d ed. 1967).

63. *Id.* at 1020.

64. Melville uses several terms that form the coterie of images and concepts that inform my view here. They include "sin" and "civilization." *See* T. WALTER HERBERT, JR., MARQUESAN ENCOUNTERS MELVILLE AND THE MEANING OF CIVILIZATION (1980); R.W.B. LEWIS, THE AMERICAN ADAM: INNOCENCE, TRAGEDY, AND TRADITION IN THE NINETEENTH CENTURY (1955).

65. *See* LEWIS, *supra* note 64, at 127-55.

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).

68. *See* HORACE BUSHNELL, CHRISTIAN NURTURE (1960).

> 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.[69]

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 unwarranted 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] Professor 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 Claggert'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.

73. *See* ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA, 1880-1920 (1991).

74. *See* PHILIP SCHAFF: HISTORIAN AND AMBASSADOR OF THE UNIVERSAL CHURCH, SELECTED WRITINGS (Klaus Penzel ed., 1991); GEORGE H. SHRIVER, PHILIP SCHAFF: CHRISTIAN SCHOLAR AND ECUMENICAL PROPHET 84-107 (1987).

this genealogy has been done by scholars such as Anson Phelps Stokes, Elwyn Smith, Robert T. Handy, and Glenn T. Miller.[75] 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"[76] 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[77] between Pauline anthropology[78] and the development of Constantini-

75. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); GLENN T. MILLER, RELIGIOUS LIBERTY IN AMERICA: HISTORY AND PROSPECTS (1976); ELWYN A. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA (1966); ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (1950); Robert T. Handy, *The American Tradition of Religious Freedom: An Historical Analysis*, 13 J. PUB. L. 247 (1964). See especially Elwyn A. Smith's essay, *Religion and Conscience in Constitutional Law*, *in* CHURCH-STATE RELATIONS IN ECUMENICAL PERSPECTIVE 243 (Elwyn A. Smith ed., 1966).

76. *See* MIRCEA ELIADE, THE MYTH OF THE ETERNAL RETURN, OR, COSMOS AND HISTORY 139, 141-62 (Willard R. Trask trans., Princeton Univ. Press 1971) (1954).

77. *See* ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES (Olive Wyon trans., Harper & Row 1960) (1931).

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.[79] 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*.[80] Augustine believed that Christian soteriology offers the believer the opportunity to reside eventually in a "heavenly city."[81] 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.[82]

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 themselves 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.[83]

Although the process of desacralization in the Western hemisphere began much earlier than the 1780s,[84] 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

79. Between the years 413 and 426, Augustine of Hippo crafted the classic Christian differentiation between the privileges of the state and the aspirations of the Christian in his *Civitas Dei*. *See* SAINT AURELIUS AUGUSTIN, THE CITY OF GOD (Marcus Dods trans.), *reprinted in* 2 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 1 (Philip Schaff ed., Wm. B. Eerdmans Publishing Co. 1956)

80. *Id.* at 397.

81. *Id.*

82. *Id.* at 412-13. For an excellent analysis of this treatise and its social context, see R.A. MARKUS, SAECULUM: HISTORY AND SOCIETY IN THE THEOLOGY OF ST. AUGUSTINE (1970).

83. KARL LÖWITH, FROM HEGEL TO NIETZSCHE: THE REVOLUTION IN NINETEENTH CENTURY THOUGHT 232 (David E. Green trans., 3d ed., Anchor Books 1967) (1941).

84. *See* DAVID E. STANNARD, COLUMBUS AND THE CONQUEST OF THE NEW WORLD (1992).

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*.[85]

The appeal to the doctrine of the "sovereignty of the people" in the Preamble of the Constitution of the United States of America[86] 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."[87] 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.[88]

85. 283 U.S. 605 (1931). See *infra* notes 149-81 and accompanying text for a discussion of *Macintosh*.

86. US CONST pmbl.

87. *See* GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA THE NEGRO PROBLEM AND MODERN DEMOCRACY (Harper & Row 1966) (1944).

88. 1 THE FOUNDERS' CONSTITUTION 562 (Philip B. Kirkland & Ralph Lerner eds., 1987).

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."[89] 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.[90] 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.[91]

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).

90. *See* DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 207-47 (1979).

91. US 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.[92] Between 1770 and 1808,[93] those denominations vigorously opposed slavery. But by 1808, "evangelical opposition to domestic slavery had largely subsided."[94]

Despite inconsistent and sporadic Christian opposition, many citizens believed that the fugitive slave provision of the Constitution offended conscience.[95] 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:

92. *See* JAMES D. ESSIG, THE BONDS OF WICKEDNESS AMERICAN EVANGELICALS AGAINST SLAVERY, 1770-1808 (1982).

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).

> Passive non-resistance is one thing; active non-resistance another. We mean to *apply* our principles. We mean to be bold for God. Action! — Action! — thus shall we overcome the violent. . . . We need no body of men to tell us when, and where, and how we may speak, but each one is bound to speak as his own reason and conscience dictate.[96]

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 . . . ."[97]

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.[98] 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."[99] 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."[100]

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

96. LEWIS PERRY, RADICAL ABOLITIONISM ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT 247 (1973).

97. ROBERT M. COVER, JUSTICE ACCUSED ANTISLAVERY AND THE JUDICIAL PROCESS 172 (1975).

98. *See* PERRY, *supra* note 96, at 247; *see also* D H MEYER, THE INSTRUCTED CONSCIENCE THE SHAPING OF THE AMERICAN NATIONAL ETHIC (1972).

99. R H RIVERS, ELEMENTS OF MORAL PHILOSOPHY 196 (Nashville, 1860).

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."[101] 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.[102] 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*.[103] 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[104] despite the egalitarian rhetoric of its liberal ideology.[105] The existence of a people who were viewed as outcasts[106] 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

101. Henry M. Smith, *What is Conscience?*, 18 S. PRESBYTERIAN REV. 430-31 (1867).

102. *See* DAVID T. BAILEY, SHADOW ON THE CHURCH: SOUTHWESTERN EVANGELICAL RELIGION AND THE ISSUE OF SLAVERY, 1783-1860 (1985); C.C. GOEN, BROKEN CHURCHES, BROKEN NATION: DENOMINATIONAL SCHISMS AND THE COMING OF THE AMERICAN CIVIL WAR (1985); JOHN R. MCKIVIGAN, THE WAR AGAINST PROSLAVERY RELIGION: ABOLITIONISM AND THE NORTHERN CHURCHES, 1830-1865 (1984).

103. 60 U.S. (19 How.) 393 (1857).

104. *See* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 (1971).

105. *See* LOUIS HARTZ, THE LIBERAL TRADITION: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955).

106. *See* JOHN S. HALLER, JR., OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971); JAMES A. RAWLEY, RACE AND POLITICS: "BLEEDING KANSAS" AND THE COMING OF THE CIVIL WAR (1969).

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

107. This term is used by Professor Horwitz in his illuminating discussion of JEROME FRANK, LAW AND THE MODERN MIND (1930). *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 178 (1992).

108. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857).

109. *Id.*

110. *Id.* at 407.

111. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

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).

113. For a thorough historical analysis of the problem of naturalization, see JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978).

114. *Dred Scott*, 60 U.S. (19 How.) at 533.

Jersey, and North Carolina under the period of the Articles of Confederation (1781-1787), which granted citizenship to all free native-born inhabitants.[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."[116] He strived for a *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.[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:

> 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; 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.[118]

115. *Id.* at 572-76.

116. COVER, *supra* note 97, at 248.

117. *Id.*

118. 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).

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."[119] 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."[120] 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.[121] After the Civil War, several amendments[122] 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[123] — numbed its moral sensi-

119. DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 292 (Don E. Fehrenbacher ed., 1976).

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.[124] 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.[125] 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."[126]

Monsignor Jeremiah Newman reminds us that "legal positivism"[127] dominated Anglo-American jurisprudence by the 1860s.[128] 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.[129]

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.[130]

MARTY, RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA (1970); SIDNEY E. MEAD, THE NATION WITH THE SOUL OF A CHURCH (1975); LEONARD I. SWEET, BLACK IMAGES OF AMERICA, 1784-1870, at 69-124 (1976); ERNEST TUVESON, THE REDEEMER NATION: THE IDEA OF AMERICA'S MILLENIAL ROLE (1968).

124. Several recent studies accent the manner and degree of racist violence against African-Americans. They include RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES (1988); SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 (1982); HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY (1988); JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1984).

125. *See* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); HORWITZ, *supra* note 107, at 65-107; GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963). For an excellent biography which illustrates this trend, see RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE (1990).

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).

127. JEREMIAH NEWMAN, CONSCIENCE VERSUS LAW: REFLECTIONS ON THE EVOLUTION OF NATURAL LAW 104-19 (1971).

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.

129. NEWMAN, *supra* note 127, at 104.

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 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).

In fact, the close reading of the most thorough historian[131] of the law of church and state provided very few instances where appeals to conscience between 1879[132] and 1931[133] 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[134] had many guises. Its development in public affairs,[135] the social sciences (especially psychology and sociology),[136] theology,[137] and philosophy,[138] probably did as much to undermine the authority of conscience as did the tenuous

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131. *See* 2 STOKES, *supra* note 75, at 255-758; 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).

133. *See* United States v. Macintosh, 283 U.S. 605 (1931).

134. In speaking of twentieth-century philosophical positivism, William Barrett characterizes the positivist's attitude toward perennial, if not ancient, problems:

> The great philosophic 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).

137. The best study of the gargantuan impact of positivism on the development of theology in the Anglo-American Victorian world is CHARLES D. CASHDOLLAR, THE TRANSFORMATION OF THEOLOGY, 1830-1890: POSITIVISM AND PROTESTANT THOUGHT IN BRITAIN AND AMERICA (1989). How positivism interacted with other forms of theological modernism is discussed with disciplined verve and sensitivity in WILLIAM R. HUTCHISON, THE MODERNIST IMPULSE IN AMERICAN PROTESTANTISM (1976). *See also* BRUCE KUKLICK, CHURCHMEN AND PHILOSOPHERS: FROM JONATHAN EDWARDS TO JOHN DEWEY (1985).

138. *See* RICHMOND LAURIN HAWKINS, POSITIVISM IN THE UNITED STATES, 1853-1861 (1938); KUKLICK, *supra* note 137, at 230-61; ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991).

cultural wedding between Christianity and American culture.[139] 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*.[140] 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.[141]

This was an unapologetic, pragmatic[142] 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.[143] 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."[144] But this "urgency" required more than the "decline of Darwinism,"[145] as Professor

139. Robert T. Handy offers an incisive historical analysis of the intricate series of cultural, ecclesiastical, and political processes that created this largely Protestant hegemony in ROBERT T HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (2d ed. 1984). H. Richard Niebuhr produced classic studies of the mergence of religion and culture in American society that still remain highly influential. *See* H. RICHARD NIEBUHR, CHRIST AND CULTURE (1951); H. RICHARD NIEBUHR, THE KINGDOM OF GOD IN AMERICA (1937); H. RICHARD NIEBUHR, THE SOCIAL SOURCES OF DENOMINATIONALISM (1929) [hereinafter NIEBUHR, THE SOCIAL SOURCES OF DENOMINATION].

140. OLIVER WENDELL HOLMES, THE COMMON LAW (Mark De Wolfe Howe ed., Little, Brown & Co. 1963) (1881).

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.

HORWITZ, *supra* note 107, at 194-95.

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 underscoring 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).

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[146] that reflected the appearance of this phase of what I call "the eclipse of Protestant hegemony"[147] signalled the critical shift in legal and social scientific anthropology from an early Victorian emphasis on the sacredness of character[148] to a psychoanalytical redefinition of conscience.

Toward the end of his distinguished tenure on the bench of the Supreme Court,[149] Justice Holmes, often called "the Great Dissenter," participated in opposing the majority's decision in *United States v. Macintosh*.[150] 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.[151] Macintosh, a professor of theology and an ex-

146. *See* Girouard v. United States, 328 U.S. 61 (1946); United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).

147. For a brilliant analysis of the importance of conscience to the theological jurisprudence of Calvinistic Protestantism, see DAVID LITTLE, RELIGION, ORDER, AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND 33-80 (1969).

148. See STANLEY COBEN, REBELLION AGAINST VICTORIANISM: THE IMPETUS FOR CULTURAL CHANGE IN 1920s AMERICA 3-35 (1991), where Coben discusses the decline of the influence of the Victorian notion of character in American culture. Despite his enriching insights, he overlooks this development as another important instance of his argument, and as a sign of the increasing influence of psychoanalytical language in the United States. *See* NATHAN G. HALE, JR., FREUD AND THE AMERICANS: THE BEGINNINGS OF PSYCHOANALYSIS IN THE UNITED STATES, 1876-1917 (1971); JOHN R. SEELEY, THE AMERICANIZATION OF THE UNCONSCIOUS (1967). Freudianism's influence was especially keenly felt among "mainline" American religionists. *See* ANN ELIZABETH ROSENBERG, FREUDIAN THEORY AND AMERICAN RELIGIOUS JOURNALS, 1900-1965 (1980); ALLISON STOKES, MINISTRY AFTER FREUD (1985).

149. Justice Holmes retired from the bench in 1932.

150. 283 U.S. 605 (1931).

151. PRESTON WARREN, OUT OF THE WILDERNESS: DOUGLAS CLYDE MACINTOSH'S JOURNEYS THROUGH THE GROUNDS AND CLAIMS OF MODERN THOUGHT 1-2 (1989).

ceedingly scrupulous person, refused to answer Question #22 on the naturalization form in the affirmative.[152] The form stated, "If necessary, are you willing to take up arms in defense of this country?"[153] 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.[154]

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*[155] 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."[156] 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."[157] 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

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).
155. *See* 3 STOKES, *supra* note 75, at 271 (discussing the relevance of *justa bella* to this case). For a discussion of the contribution of Christians to the development of *justa bella* theory and practice offered by an eminent church historian and Quaker, see ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION (1960). *See also* JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR A MORAL AND HISTORICAL INQUIRY (1981).
156. *Macintosh*, 283 U.S. at 618.
157. WARREN, *supra* note 151, at 4.

court's denial.[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.[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 *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.[160]

Justice Sutherland appealed to the Court's denial of citizenship in an earlier case, *United States v. Schwimmer*,[161] as a precedent for the majority's denial of the same to Macintosh.[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.[163]

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

158. Macintosh v. United States, 42 F.2d 845 (2d Cir. 1930).
159. United States v. Macintosh, 283 U.S. 605 (1931).
160. *Id.* at 625 (citation omitted).
161. 279 U.S. 644 (1928).
162. *Macintosh*, 283 U.S. at 620-21.
163. *Schwimmer*, 279 U.S. at 654-55 (Holmes, C.J., dissenting). Holmes stated:
> 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.

Id.
164. *Macintosh*, 283 U.S. at 635 (Hughes, C.J., dissenting).
165. *See* Davis v. Beason, 133 U.S. 333 (1890).

majority's opinion offered a definition of religion[166] that he believed was applicable in the *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.[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."[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."[169] Chief Justice Hughes believed that the majority's opinion in the *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."[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 obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens.[171]

166. *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 *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.'" *Id.* (quoting *Davis*, 133 U.S. at 342).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

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.*

175. "Social amnesia is society's repression of remembrance — society's own past. It is a psychic commodity of the commodity society." RUSSELL JACOBY, SOCIAL AMNESIA A CRITIQUE OF CONFORMIST PSYCHOLOGY FROM ADLER TO LAING 5 (1975).

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.[178] 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.[179] 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."[180] 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.[181]

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."[182] 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 separate 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?[183]

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).

179. *See* PAUL G KAUPER, RELIGION AND THE CONSTITUTION 27-28 (1964); MILTON R KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE A CONSTITUTIONAL INQUIRY 35-37, 88-89 (1968); Smith, *supra* note 75, at 250-52; SMITH, *supra* note 75, at 269-74.

180. *See* Smith, *supra* note 75, at 251.

181. *See* KIRK, *supra* note 42; T V SMITH, BEYOND CONSCIENCE (1934).

182. NEWMAN SMITH, OLD FAITHS IN NEW LIGHT 69 (New York, Charles Scribner's Sons, 1879). *See* ROBERTS, *supra* note 145, at 174-208.

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."[184] 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.[185]

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."[186] However, Dewey had two major opponents[187] 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-

183. JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 166 (1908).

184. JOHN DEWEY, HUMAN NATURE AND CONDUCT AN INTRODUCTION TO SOCIAL PSYCHOLOGY 187 (Henry Holt & Co. 1957) (1922).

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, 1890-1930 (1958); 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

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.

190. *See* Walter Marshall Horton, Theism and the Modern Mood (1930).

191. Reinhold Niebuhr, Moral Man and Immoral Society A Study in Ethics and Politics (Charles Scribner's Sons 1960) (1932).

192. Ralph Henry Gabriel & Robert H Walker, The Course of American Democratic Thought 443-67 (3d ed. 1986).

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 racialist, 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 evident in his very helpful, but uncritical, biography, see Ralph H Jones, Charles Albert Tindley Prince of Preachers 82 (1982). The cultural alienation between blacks and whites is revealed most notably in their music. For an excellent recent study of the African-American gospel music tradition, see Michael W Harris, The Rise of Gospel Blues The Music of Thomas Andrew Dorsey in the Urban Church (1992).

nature and an ebullient belief in progress.[194] Some religious leaders like Reinhold Niebuhr[195] 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.[196]

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

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.

195. For a fine biography of Niebuhr, see Richard Wightman Fox, Reinhold Niebuhr A Biography (1985). The social and political activities of Protestant religious leaders are examined in two excellent and enduring studies: Donald B Meyer, The Protestant Search for Political Realism 1919-1941 (2d ed. 1988); Robert Moats Miller, American Protestantism and Social Issues, 1919-1939 (1958).

196. Niebuhr, *supra* note 191, at 36-37.

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.[197]

Many, including Niebuhr, began to fear[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 *cri de coeur* for conscience, published the year after Hitler's Nazis cunningly absorbed the Weimar Republic after burning the Reichstag,[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."[200] Through several stinging disclosures and critiques of the Hobbesian impulse in the majoritarian ideology of Rousseau, Smith cites *United States v. Macintosh*[201] as a crucial example of the creeping transformation of American Jeffersonian democracy into a new Leviathan.

Unlike Rousseau, the Supreme Court in *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."[202] Smith was appalled and startled at the Supreme Court's assumption that the reality, *not* sanctity, of the "inner voice" could be substituted for the convenience of "external order."[203] 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."[204] 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."[205] He understood his dilemma, however, once conscience is severed from ethics. He asked, "But with conscience thus dissevered 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?"[206] 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."[207] But neither

197. It is strange that Niebuhr does not discuss the obvious impact of Freudianism on his thought. In fact, he seems to be more interested in tracing the Christian roots in Augustinian thought of what are obvious Freudian perspectives. Niebuhr did, however, later distance himself from Freud in his Gifford Lectures where he argued that "Freudianism pretends to explain all the complexities of man's spirit in biological terms but fails to explain how biological impulses should have become transmuted into such highly complex spiritual phenomena." REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN, A CHRISTIAN INTERPRATION HUMAN NATURE (VOL I) 43 (Charles Scribner's Sons 1964) (1941).

198. *See* PAUL HUTCHINSON, THE ORDEAL OF WESTERN RELIGION 115-16 (1933); H RICHARD NIEBUHR, RADICAL MONOTHEISM AND WESTERN CULTURE (1943); NIEBUHR, *supra* note 191, at 187-88.

199. The Nazis burned the Reichstag on February 27. By June 29, 1933, Minister Bernhard Rust declared at a mass meeting of German Christians: "If anyone can lay claim to God's help, then it is Hitler, for without God's benevolent fatherly hand, without his blessing, the nation would not be where it stands today. It is an unbelievable miracle that God has bestowed upon our people." ERNST CHRISTIAN HELMREICH, THE GERMAN CHURCHES UNDER HITLER BACKGROUND, STRUGGLE, AND EPILOGUE 138 (1979).

200. SMITH, *supra* note 181, at 144-145.

201. 283 U.S. 605 (1931).

202. SMITH, *supra* note 181, at 166.

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.[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."[209]

The nineteenth-century glorification of individualism[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[211] who, in turn, were seen as the enemies of modern Americanism. Thurman Arnold spoke for many when he rejected the impact of intellectual individualism on American jurisprudence: "Ideals of law arise from the hearts of people, not from refinements of intellectuals."[212] 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.[213]

In *Girouard v. United States*,[214] 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.[215] 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

208. NIEBUHR, *supra* note 191, at 276-77.

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).

210. *See* YEHOSHUA ARIELI, INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY (1964).

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).

212. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 225 (1935). For a recent analysis of the triumph and inherited difficulties of modern liberal culture, see ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE (1991).

213. GEORGE SANTAYANA, *The Genteel Tradition at Bay*, *in* THE GENTEEL TRADITION: NINE ESSAYS BY GEORGE SANTAYANA 153, 193 (Douglas L. Wilson ed., 1967).

214. 328 U.S. 61 (1946).

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).

Black's Law Dictionary.[216] 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

216. BLACK'S LAW DICTIONARY (6th ed. 1990).
217. *Id.* at 303.
218. *Id.*
219. *Id.* at 854.
220. *Id.* at 855.
221. MARTHA MINOW, MAKING ALL THE DIFFERENCE INCLUSION EXCLUSION, AND AMERICAN LAW 8 (1990).
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.

223 US CONST pmbl.

224. *See* J W GOUGH, THE SOCIAL CONTRACT A CRITICAL STUDY OF ITS DEVELOPMENT (2d ed 1957); SHELDON S WOLIN, POLITICS AND VISION CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 338 (1960)

REPENTANCE, CONSTITUTIONALISM, AND SACRALITY

*Douglas Sturm**

Let me begin by expressing deep thanks to James Washington for his provocative essay.[1] He has adopted an original tack on the topic of this panel, namely, "An Historical Perspective of Religion's Views of the Law of Church and State." His focus on the meaning of conscience and the manner in which freedom of conscience constitutes a central political and religious question in the modern age is refreshing. As intended, his remarks are suggestive and bristle with multiple possibilities and problems. I am particularly drawn to his constructive suggestion that within our contemporary cultural milieu, conscience be reinterpreted for constitutional purposes as "adherence to the sanctity of the body."[2] He further suggests that as a consequence of that reinterpretation, the First Amendment be construed as providing protection of the bodily integrity of all citizens, indeed all persons, if not all kinds and conditions of life, as a "primal natural right."[3] As he is surely aware, that consequence may be construed, as a Karl Llewellyn would remind us, either narrowly or broadly.[4] Given Washington's reference to the Native American belief in the sacredness of the land and how that belief bears on the practice and theory of ownership,[5] I suspect he would want that reinterpretation construed most broadly.

I have organized my remarks on the topic of "An Historical Perspective of Religion's Views of Law of Church and State" around three themes: repentance, constitutionalism, and sacrality. While these remarks are not in direct and explicit response to Washington's statement, they do bear on his concerns. In substance, the

* Professor of Religion and Political Science, Bucknell University. This Essay is a revised version of comments presented on December 6 and 7, 1991, at the Conference on the Bicentennial of the Bill of Rights sponsored by the Center for Church/State Studies, DePaul University College of Law.

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

2. *Id.* at 24.

3. *Id.*

4. *See* KARL LLEWELLYN, JURISPRUDENCE (1962); KARL LLEWELLYN, BRAMBLE BUSH (1960)

5. Washington, *supra* note 1, at 24 n.53.

Lessons from History: Euthanasia in Nazi Germany

by PJ King

Note: This can be prevented by passage of HJR 5 and implementing legislation— "an Act relating to rights of conscience protection for persons who directly or indirectly provide or perform health care services" —Terry Martin

Present day death proponents of the "right-to-die" movement disavow any analogy between what they are selling and what happened in Nazi Germany in the 1930's. And, if one does not examine the facts too closely, there appears to be none. After all, Hitler was bent on exterminating the Jews, even though he destroyed a few thousand others before he found his focus. His was a dictatorship, not a democratic nation. His agenda was political, not moral. He fed on hate, not compassion. And one could add to the list.

However, if we look back to German society of the twenties and thirties, we find a civilized culture not so unlike our own. As a nation, Germany took pride in its art, its culture, and its science. People engaged in business, went shopping, enjoyed their families, followed the news. Genocide did not seem a likely development. But the seeds had already sprouted, though few foresaw into what kind of twisting vines they would soon grow.

In 1920 was published a book titled *The Permission to Destroy Life Unworthy of Life,* by Alfred Hoche, M.D., a professor of psychiatry at the University of Freiburg, and Karl Binding, a professor of law from the University of Leipzig. They argued in their book that patients who ask for "death assistance" should, under very carefully controlled conditions, be able to obtain it from a physician. The conditions were spelled out, and included the submission of the request to a panel of three experts, the right of the patient to withdraw his request at any time, and the legal protection of the physicians who would help him terminate his life. Binding and Hoche explained how death assistance was congruent with the highest medical ethics and was essentially a compassionate solution to a painful problem.

Death assistance, according to the authors, was not to be limited to those who were able or even willing to ask for it. They would have such mercy extended as well to "empty shells of human beings" such as those with brain damage, some psychiatric conditions, and mental retardation, if by scientific criteria the "impossibility of improvement of a mentally dead person" could be proven. The benefits to society would be great, they said, as money previously devoted to the care of "meaningless life" would be channeled to those who most needed it, the socially and physically fit. Germans needed only to learn to evaluate the relative value of life in different individuals.

An opinion poll conducted in 1920 revealed that 73% of the parents and guardians of severely disabled children surveyed would approve of allowing physicians to end the lives of disabled children such as their own. Newspapers, journal articles, and movies joined in shaping the opinion of the German public. The Ministry of Justice described the proposal as one that would make it "possible for physicians to end the tortures of incurable patients, upon request, in the interests of true humanity" (reported in the *N.Y. Times,* 10/8/33, p. 1, col. 2). And the savings would redound to the German people if money was no longer thrown away on the disabled, the incurable, and "those on the threshold of old age."

A 1936 novel written by Helmut Unger, M.D., further assisted the German people in accepting the unthinkable. Dr. Unger told the story of a physician whose wife was disabled by multiple sclerosis. She asks him to help her

Distributed by Rep. Martin

die, and he complies. At his trial he pleads with the jurors to understand his honorable motive: "Would you, if you were a cripple, want to vegetate forever?" The jury acquit him in the novel. The book was subsequently made into a movie which, according to research by the SS Security Service, was "favorably received and discussed," even though some Germans were concerned about possible abuses.

With the public now assenting, the question turned from "whether" to "by whom" and "under what circumstances."

The first known case of the application of this now-acceptable proposal concerned "Baby Knauer." The child's father requested of Adolph Hitler himself that his son be allowed death because he was blind, retarded, and missing an arm and a leg. Surely, in his condition, he would be better off dead. Hitler turned the case over to his personal physician, Karl Brandt, and in 1938 the request was granted.

Over the next few months, a committee set out to establish practical means by which such "mercy deaths" could be granted to other children who had no prospect for meaningful life. The hospital at Eglfing-Haar, under the direction of Hermann Pfannmuller, M.D., slowly starved many of the disabled children in its care until they died of "natural causes." Other institutions followed suit, some depriving its small patients of heat rather than food. Medical personnel who were uncomfortable with what they were asked to do were told this was not killing: they were simply withholding treatment and "letting nature take its course."

Over time Pfannmuller set up *Hungerhauser* (starvation houses) for the elderly. By the end of 1941, euthanasia was simply "normal hospital routine."

In the meantime, no law had been passed permitting euthanasia. Rather, at the end of 1939, Hitler signed this letter:

> "Reichleader Bouhler and Dr. Med. Brandt are responsibly commissioned to extend the authority of physicians to be designated by name so that a mercy death may be granted to patients who, according to human judgment, are incurably ill according to the most critical evaluation of the state of their disease."

Interestingly, physicians were not ordered to participate, but merely permitted to if they so wished. It was to be a private matter between the doctor and his patient (or the family if the patient was unable to speak for himself).

Brandt, testifying at his trial in Nuremburg after the war, insisted:

> "The underlying motive was the desire to help individuals who could not help themselves and were thus prolonging their lives in torment. ... To quote Hippocrates today is to proclaim that invalids and persons in great pain should never be given poison. But any modern doctor who makes so rhetorical a declaration without qualification is either a liar or a hypocrite. ... I never intended anything more than or believed I was doing anything but abbreviating the tortured existence of such unhappy creatures."

Brandt's only regret was that the dead patients' relatives may have been caused pain. Yet he justified even that: "I am convinced that today they have overcome their distress and personally believe that the dead members of their families were given a happy release from their sufferings." (A. Mitcherlich & F. Mielke, *The Death Doctors,* pp. 264-265.)

Decide for yourselves whether parallels can be drawn between Germany in the thirties and forties and the world scene in the nineties.

Life Devoid of Value

By Joseph Collison

June 1997

In 1985 when Dr. Josep Mengele, the monster of Auchswitz, was thought to be still alive and hiding in South America, a hearing was held in Jerusalem to obtain evidence against him. The Boston Sunday Globe described the dramatic testimony: for three days, twins and dwarfs told a hushed audience how Mengele injected them with medicine, mutilated them, and in one piece of testimony brought the audience to tears, tried to starve a newborn baby to death to see how long babies could survive without food. The child's mother testified that she killed her own child after six days to spare the baby any more agony.

Our minds recoil from knowledge of such horror, but we must never ignore it. Above all we must never forget Dr. Mengele.

History books tell us that the Holocaust began in 1939, but that was only its official beginning. It dates from 1920 with the publication of a small book, THE RELEASE OF DISTRUCTION OF LIFE DEVOID OF VALUE, written by a physician and a lawyer, Drs. Binding and Hoche. When the Nazis came to power in 1933, they discovered that Binding and Hoche's "Culture of Death" was already in operation. Their book had been the rational for a program of forced sterilization, forced abortion, and the killing of the mentally and physically handicapped, the elderly and social misfits.

Those who did the killing were not soldiers or politicians. They were doctors, psychiatrists, lawyers and judges who searched and found thousand of lives "devoid of value." They were willingly "creating a race of thoroughbreds" and made no effort to keep it a secret.

Eventually, over three hundred thousand lives were "terminated" in hospitals and orphanages. Half were children. Later, the Nazis used these methods to "terminate" others whose lives were "devoid of value" - Jews, Poles, Gypsies. By 1945, seven million human lives were sacrificed.

In 1985, Dr. Mengele was indeed alive, still practicing his "profession" as an abortionist in Argentina. By then he may have known how long a baby can survive, because two years before the Jerusalem hearing, a court in Bloomington, Indiana, had ordered the local hospital not to perform a simple operation to allow a Downs Syndrome baby to eat. It took Baby Boy Doe ten days to die the dreadful death of dehydration and starvation.

In 1973, the same year our Supreme Court told the world that they didn't know whether or not an unborn baby is a person with "meaningful life," the NEW ENGLAND JOURNAL OF MEDICINE revealed that fourteen per cent of infant deaths at Yale-New Haven Medical Center were related to the withholding of treatment (treatment often being food and water).

This fact was later confirmed when Senator Regina Smith, Chairman of the Connecticut Senate Health Committee, held hearings on proposals to conform State law to the Federal Child Abuse Treatment Act. During the hearings Doctors from Yale-New Haven testified to the widespread practice of allowing handicapped infants to die. They estimated that 45 babies had been killed "in the recent past".

Three years after Senator Smith's hearings, the CBS program 60 MINUTES, in a segment on spina bifida babies at Oklahoma Children's Hospital, reported that handicapped babies were allowed to live or condemned to die according to a "scientific formula" used in American hospitals nationwide.

The "scientific formula", published in 1983 in the journal PEDIATRICS is QL=NEx(H+S). "The quality of life equals the child's natural endowments plus the status of his home (read money) and society (read social position)." Ah! The wonders of science!

An ACLU spokesman explained that doctors decided "..to let the children die because of their subjective belief that the child .. may be better off dead than physically or mentally handicapped." (Nat'l RTL News 5/16/95)

In the past decade a number of proposals have been made to declare infants "legally non-persons" up to a specified period of time - six days, two weeks, six weeks, even a year. While such laws will probably have to wait their turn on the slippery slope until the elderly can be euthanized, we will continue to hear calls for laws to allow parents and doctors time to spot "defects" and legally destroy "defective" children.

In 1989, a group of 167 American pro-abortion scientists and doctors uttered the following absurdity to the U.S. Supreme Court in the WEBSTER case: "There is no scientific consensus that a human life begins at conception, at a given stage of fetal development, or at birth." Reread the last phrase.

We must never forget Dr. Mengele. In a recent survey, three out of four doctors, said they would not keep a handicapped baby alive. Recently, the topic on an afternoon talk show was whether we have the right to allow a handicapped child to live!

Handicapped persons offer us the special gift of their kind and gentle love. I know no family of a Downs Syndrome child who does not cherish that love, as my family cherishes the love of little Michael, our autistic grandson.

When I was chairman of the Killingly Town Council, the vice-chairman was a very dear friend of mine, Miss Gertrude Stone. She had been born with spina-bifida and needed crutches and braces to walk. She was a warm and generous person. Shortly before she died, she was honored as "Person Of The Year" by the Danielson Lions Club and received recognition from the Northeast Department of Health and the area Four H Clubs for her service to the people of Northeast Connecticut. If she were born today, she would probably be killed. Her parents were poor farmers.

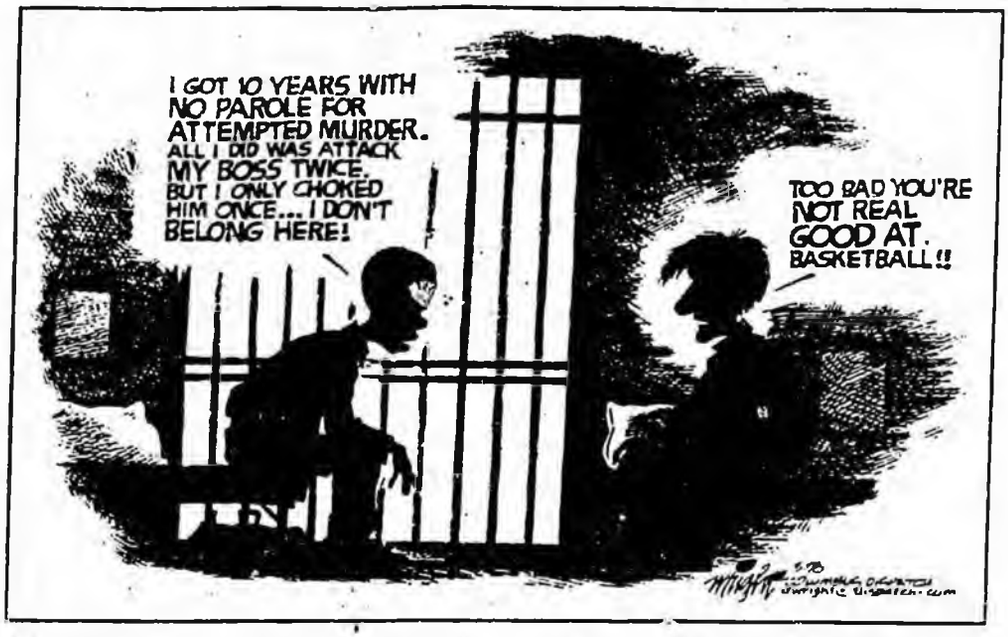
Return to the Euthanasia Home Page.

Remember—
"Those who cannot remember
the past are condemned to repeat it."
— George Santayana

oice of **The Times** Wed, March 18, 1998

Physician-assisted suicide deadly for health care

By LAURA REMSON MITCHELL



If physician-assisted suicide ever is legalized, your access to high-quality health care is likely to be significantly reduced, even though taking your own life may be the furthest thing from you mind.

And if you happen to have a disability or serious chronic illness, you will be particularly at risk. That's not just because of abuses, although I believe there would be many.

It's not just because of fears and stereotypes about disability that are so deeply rooted in our society, although such prejudice increases the danger.

The basic problem is that legalized physician-assisted suicide would inevitably become the ultimate financial escape hatch in a health care system that increasingly is dominated by cost considerations, even at the risk of patient well-being.

Consider this: In the last few years, federal authorities have approved three new drugs that, for the first time in history, have an impact not just on the symptoms but on the actual disease process in multiple sclerosis, a disease that has driven a significant number of people into the arms of Jack Kevorkian. Unfortunately, these drugs are expensive — about $10,000 to $12,000 a year per patient.

Now think about the bean counters at BigBucks HMO. Under current law, if the HMO refuses to cover one of these drugs for an MS patient who needs it, and if the disease gets worse, the plan is on the hook to provide care that may turn out to be even more expensive than the treatment that was rejected. If the HMO refuses to provide care at that point and the patient's condition continues to decline, members and friends are likely to start calling government regulators, elected officials and lawyers. Bad press about cases like this also could mean the loss of multimillion-dollar employer contracts for the HMO. So, all things considered, BigBucks HMO has good reasons to think twice about denying coverage.

But in a world where physician-assisted suicide is legal, the HMO would have other options. It could simply drop expensive treatments and services from the plan's benefit package, provide minimal care and, when the patient finds that life no longer is tolerable, offer "compassionate" assistance in dying.

Family and political outrage are unlikely to be much of a problem once the idea of physician-assisted suicide becomes routine. Suicide would end the patient's "suffering" (and the stress that suffering puts on the family) and the patient would be dead. Would anyone then even think to challenge the pattern of decisions that pushed the patient to the point of asking for help in dying?

Recent reports suggest that with managed care dominating more and more of the industry, health plans are less able to avoid high-risk patients than in the past. That's probably one reason why more plans are finding their profit margins shrinking or disappearing. I believe many also are now paying the price for failing to meet the earlier needs of the high-risk patients they couldn't avoid.

Yet the first response of the health care industry (and many business purchasers of health benefits) to reforms like those recommended by the President's Advisory Commission of Consumer Protection and Quality in the Health Care Industry and the California Managed Health Care Improvement Task Force has been to reject such proposals as "too expensive."

Legalizing physician-assisted suicide would allow health plans, insurance companies and public programs like Medicare and Medicaid to appear "compassionate" while they cut back or eliminate coverage for the health and support services that can make for a good quality of life even in the face of significant disability and illness. For that reason, legalization is likely to reduce access to the very things that might give a seriously ill or disabled person a desire to continue living.

But the ramifications of legalization go even further. If health plans begin cutting back on coverage of expensive new treatments for serious diseases like MS, Alzheimer's and AIDS, it would significantly weaken or even destroy the market for such treatments. And without a market large enough to at least recover their costs, the pharmaceutical companies and other investors who turn scientific research into usable health care products aren't very likely to spend the money necessary to develop those treatments.

As a result, we may never see cures for many serious, currently incurable conditions, or improvements in the quality of life for people with severe disabilities and chronic health problems — even though such developments may be well within our reach.

As a public policy analyst, I've watched HMO problems that I anticipated five or six years ago become pronounced enough to create a consumer backlash and demands for change — even though most people ignored what I was saying years ago or dismissed it as "catastrophizing."

Unfortunately, the effects of legalized physician-assisted suicide on the health care system would be subtle and insidious. By the time they are recognized (if ever), it may be too late to change course. That's why we should avoid the mistake of moving down that road in the first place.

Laura Remson Mitchell is a Los Angeles-based public policy analyst, consultant and writer specializing in economic, health care and disability issues. She has lived with multiple sclerosis for many years.

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PP Clergyman says:
"Sometimes abortion is the redemptive thing to do."

You read that correctly. Not only does Planned Parenthood claim that killing babies in the womb is a woman's right, now it is trying to convince the world that there is some kind of religious reward for women who kill their babies!

The above quote was uttered by the Reverend Gene Mace, a minister with the United Methodist Church, who is chaplain at the Methodist Medical Center in Peoria, Illinois. Rev. Mace is also a member of the Clergy Advisory Board of Planned Parenthood Association of the Greater Peoria Area. His comments were reported in the January 17 edition of the Peoria *Journal Star*. Rev. Mace further explained that abortion is "redemptive" because it gives women a chance to live a fuller life. "They don't have to be branded," he said.

This thrust to make abortion into some kind of religious ceremony was not limited to a lone minister in Peoria, Illinois. In fact, the Planned Parenthood Federation of America coordinated "A Week in Faith for Choice" in January. All across the United States, at PP sponsored events, clergy people stood up and proclaimed that God had no problem with women killing their children. Rev. Mace's comments were made at a Planned Parenthood sponsored Interfaith Community Breakfast held in Peoria on Thursday, January 15.

This is not the first time Planned Parenthood has tried to use religion to justify its extreme positions on the wanton taking of human life. In fact, it was one of the chief strategies used by its founder, Margaret Sanger, in the 1920's and 1930's.

In her 1922 book, *The Pivot of Civilization*, Sanger specifically used a minister, Ralph Inge, to further her birth control and eugenics causes. In Chapter IX of that book, Sanger first identifies Inge as "The Very Reverend Dean of St. Paul's Cathedral, London," and then writes:

> Dean Inge believes Birth Control is an essential part of Eugenics, and an essential part of Christian morality. On this point he asserts: "We do wish to remind our orthodox and conservative friends that the Sermon on the Mount contains some admirably clear and unmistakable eugenic precepts. 'Do men gather grapes of thorns or figs of thistles? A corrupt tree cannot bring forth good fruit, neither can a good tree bring forth evil fruit. Every tree which bringeth not forth good fruit is hewn down, and cast into the fire.' We wish to apply these words not only to the actions of individuals, which spring from their characters, but to the character of individuals, which spring from their inherited qualities. This extension of the scope of the maxim seems to me quite legitimate. Men do not gather grapes of thorns. As our proverb says, you cannot make a silk purse out of a sow's ear. If we believe this, and do not act upon it by trying to move public opinion towards

giving social reform, education and religion a better material to work upon, we are sinning against the light, and not doing our best to bring in the Kingdom of God upon earth."

Incredible! Planned Parenthood began by trying to convince people of Sanger's time that using birth control to weed out the unfit and provide "a better material (meaning more intelligent and more fit people) to work upon," was an important thing to do for God. Now, Planned Parenthood is using the same religious tactic to convince people of the 90's that killing babies is "a redemptive thing to do."

We must not stand by and let Planned Parenthood get away with this!

With your help, STOPP is launching an effort to unmask this outrageous position which would be considered a heresy buy just about every major church denomination. A mother is not redeemed by killing her child. STOPP is willing to stand-up and say so!

We are planning a campaign to educate the public and clergy all over the country on this latest thrust by Planned Parenthood. We will be issuing press releases and preparing a booklet which will be mailed to pastors exposing this lie.

We will begin by doing a thorough search of all statements made by Planned Parenthood people during its "A Week in Faith for Choice." Then we will publicize those statements and show how Planned Parenthood is trying to set the stage for killing babies in even greater numbers in the future.

We will also inform the public, and the pastors, of the religion that Planned Parenthood is actually pushing. The religion written down in the Humanist Manifestos of 1933 and 1973. Those of you who have seen our nine-part video series on Planned Parenthood know that the first talk is devoted exclusively to these documents and PP's connection to it. We are going to launch a major effort to get that video aired on every cable-access channel and in every church across the nation.

As usual, to do all this, we need your help. We believe that this outrageous effort by Planned Parenthood, to convince mothers that God wants them to kill their babies, needs to be opposed. But, we need your financial gifts to help us launch our counter-offensive. The mailing costs alone will run into thousands of dollars. Please send whatever you can so we can effectively counter Planned Parenthood's latest campaign.

And, please pray for the people at Planned Parenthood. Satan is ever present in the world and must be particularly active in PP. To so openly mock God, they must be blind to His goodness and His graces. Planned Parenthood people need your prayers — right now!

Please also pray for us — that we will be guided by God to the most effective ways to counter this PP thrust.

With Prayers for Life,

Jim Sedlak
President

P.S. Your gift in the enclosed envelope will allow us to expose PP's latest attack on God and His babies. Please be as generous as you can. Thank you for whatever you can send.

Gifts to STOPP International are not deductible for income tax purposes

MAILED BY: E. BETTY HALL - JUNEAU, AK 99802-2933

I am attaching, for the record, legal written exhibits from the Valley Hospital case wherein Valley Hospital personnel describe the feelings and morale of persons 'indirectly' taking part in practices that they consider deeply against their conscience.

for Rep. Tolsy Markin

3/24/98

VALLEY

January 22, 1993

MEMO

TO: Jim Walsh, Executive Director

FROM: Peggy Robinson, R.N., Surgical Services Manager pr

SUBJECT: Elective Abortions

As you know we have met in the past to discuss some of the problems we have experienced for years in the surgery department performing elective abortions. Prior to the board stopping elective abortions, every nurse in the operating room had signed a statement they would not participate in elective abortions. Some specify they would not prepare the patient for surgery nor participate in the actual procedure. There are different thoughts concerning levels of participation. Preparing the patient for the procedure (pre-op assessment, I.V. therapy etc.) is indeed viewed as essential to performing the actual intraoperative procedure. Cleaning the operating room and instrumentation, disposing of blood products and transporting the fetal parts to the lab were also seen as participation. Therefore levels of participation remain a freedom of choice for each staff person.

Staffing remained an ongoing concern. Without a trained operating room nurse to assist in the procedure, an obstetric nurse volunteered and was specifically trained for this one procedure. When this obstetric nurse was ill or on vacation this procedure could not be performed. Qualification was also a concern. In order to perform an elective abortion I had to staff the obstetric nurse and have two operating room nurses standing by in case of an emergency. For example, if the surgeon perforated the uterus and an immediate hysterectomy had to be performed in order to save the life of the mother. This increased staffing for potential emergency coverage was less than cost effective.

Morale of the staff continued to be impacted. People refused to help the obstetric nurse as she set up the room, performed the procedure, and cleaned up after the case. If several abortions were scheduled in one day, this nurse had to perform all the work without assistance. This caused conflicting feelings as the operating nurses wanted to help their co-worker, however wanted to stand firm in their decisions and convictions regarding their participation. Personnel problems remained, some I had observed and some problems staff shared with me. One of our sterile

0088

063

EXHIBIT: K
Page 15 of 16

515 E. DAHLIA ST., P.O. BOX 1687, PALMER, AK 99645 (907) 745-4813 FAX (907) 745-4850 DUNS#010203629

processing technicians came to me distressed because after abortion instruments had been cleaned in the decontamination sink, a fetal part (foot) had been found in the drain.

Ongoing considerations to the problems of staffing, qualifications of nurses performing the procedure, disruption in morale and cost effectiveness of providing the service should be evaluated before any attempt is made to reinstate elective abortions.

Thank you for your time and consideration.

EXHIBIT: K
Page 16 of 16.

VALLEY HOSPITAL

October 24, 1991

RECEIVED
OCT 2 . 1991
Valley Hospital

Mr. James Walsh
Valley Hospital
P.O. Box 1687
Palmer, AK 99645

Dear Mr. Walsh:

By now, you are aware that I will be leaving the practice at Valley Hospital with Drs. . It is with a great deal of sadness that leaving has become necessary. I wanted to take this opportunity to explain to you my situation and the major factor in my decision to leave.

Shortly after arriving here six weeks ago, I became aware that second trimester abortions were being done at Valley Hospital. This saddened me greatly. I decided that I would not be able to remain a part of a Hospital staff where normal fetuses were being destroyed for birth control. These abortions are in conflict with my moral feelings about life and my understanding of my responsibilities as a physician to preserve life. This, therefore, creates instability in my job position and prevented me from doing anything permanent about settling here in Palmer. We certainly cannot buy a home or rent a home and get settled in and then turn around and have to leave because of the continued abortion policy at the Hospital. We suspended our efforts to buy or rent a house here. We also took our house off the market. For the last six weeks, we have lived in a basement apartment waiting and hoping the abortion issue would be resolved so we can move forward in getting settled. Unfortunately, my wife and I, particularly , reached a point where we could no longer handle this "limbo" condition. With winter and the holiday season approaching, we need to be settled, and that is what we must do.

Being new on the staff, I did not feel it appropriate to make a lot of noise or cause a lot of trouble, but rather to quietly resign my position at the Hospital. This I did two weeks ago, and will finish my work here at the end of this week.

041

EXHIBIT: A
Page 3 of 5

1478

515 E. DAHLIA ST., P O BOX 1687, PALMER, AK 99645 (907) 745-4813 FAX (907) 745-4850 DUNS#010203625

VALLEY HOSPITAL

January 21, 1993

To James G. Walsh, Executive Director

In the past, under the previous abortion policy at Valley Hospital, I had some sensitive staffing issues to work out in the Transcription Department. Those issues involved two transcriptionists who were adamantly opposed to abortion to the extent they could not transcribe the operative reports dictated by physicians who performed abortions.

Gretchen Mau ART
Manager, Health Records

002

0087

EXHIBIT: K
Page 14 of 16.

515 E. DAHLIA ST., P.O. BOX 1687, PALMER, AK 99645 (907) 745-4813 FAX (907) 745-4850 DUNS#010203628

October 6, 1991

Board of Directors
Valley Hospital
Palmer, Alaska 99645

Ladies and Gentlemen:

I wrote you in April, 1989 to strongly protest allowing second and third trimester abortions in our hospital (copy enclosed). To my knowledge, no abortions have been performed until now. Regrettably this past week several abortions were permitted in our operating room.

Please remember that these abortions are hideous, involving the dismemberment of a living human body and crushing of the skull! For 2500 years doctors such as myself have taken the Hippocratic oath, forswearing abortion.

I have worked hard, along with many others, to improve the quality and reputation of our hospital. will undoubtedly play a major role in future advances. I would like very much to paticipate in our growth using my knowledge, skills, and experience.

However, if our hospital continues to allow these terrible procedures, I feel our reputation will deteriorate rapidly. Many of the patients we have worked so hard to attract will travel to Anchorage again. Personally, I will feel compelled to find a practice setting which is not involved with such atrocities.

Providence and Humana currently do not permit abortions. It is past time for Valley Hospital to adopt the same policy. So far as I'm concerned, no other course is acceptable. I await your earliest decision.

Sincerely,

011

Date
Exhibit: A
Page 4 of 5

MEMO

TO:

FROM: , M.D., Chief of OB

DATE: May 11, 1981

SUBJECT: PATIENTS FOR PREGNANCY TERMINATION

I would like to ask that when we are caring for patients who are having a pregnancy termination that they not be placed in the vicinity of the obstetric wing and nursery wing. I recognize that there are instances in which we have absolutely no other room to place patients, but I would much prefer that they be placed in the hall either by the emergency room or even in the hall on the med surg wing if this is necessary.

It is my professional judgement that although these patients have been counselled to a considerable extent, there is no need for us to add insult to injury by placing these patients where newborn babies are crying and where happy families are receiving their newborns.

If there are problems with this request, please let me know.

013

Defs' Exhibit: A
Page 5 of 5

1480

To: NAME

From: NAME

April 12, 1989

I will not participate in any elective abortions in any trimester. I will not prepare the patient for surgery or circulate for the case if such a procedure occurs in our department. Thank-you for allowing me to follow my conscience.

SIGNATURE
Blocked for Privacy

RN.

4/12/84

To: NAME

From: NAME

I will not participate in any abortions.

SIGNATURE
Blocked for Privacy

051

0076

3 of 16

May 25 1989

I will not participate in ABC's

SIGNATURE
Blocked for Privacy

053

0078

K
5 of 16

22 January 93

To whom it may concern,

I, NAME do not wish to participate in elective abortions

SIGNATURE
Blacked for Privacy

0i.0

0085

EXHIBIT: X
Page 12 of 16

I. NAME refuse to assist with elective abortions unless the physician determines the pregnancy seriously endangers the life of the mother.

Signature
Blocked for Privacy

035

0080

K
7 of 16

Form 623 BROOKS Des Moines, Iowa 50306

Date	Notes Should Be Signed by Physician
5-7-92	
	TO Peggy Robinson, RN
	I don't wish to assist, recruit or in anyway, have direct patient contact w/ an individual having an abortion regardless of circumstances.
	Thankyou -
	RN
	SIGNATURE Blocked for Privacy

053

Name—Last | First | Middle | Hospital No. 0083

Location in Hospital | Clinic or Service | Attending Physician

EXHIBIT 7
Page 10 of 16

PRINTED IN U.S.A.

PROGRESS NOTES

VALLEY HOSPITAL

January 21, 1993

MEMO

TO: Jim Walsh

FROM: Kathleen Walker Williams Kathleen Walker Williams

SUBJECT: Marketing Survey Abortion Remarks

The following verbatim remarks regarding abortion at Valley Hospital were recorded in the 1992 Marketing Survey:

Pg. 710-3.17	Death Valley I don't support them - give second-trimester abortions.
Pg. 710-3.18	Death Valley
Pg. 710-3.19	They perform abortions, I'm against abortions.
	They do abortions, that is why I won't go there.
Pg. 710-3.20	Performs abortions.

001

0086

comrel.779

Page 13 of 16

515 E. DAHLIA ST., P O BOX 1687, PALMER, AK 99645 907) 745-4813 FAX (907) 745-4850 DUNS#010203625

NAME EN

4-6-89

I will not participate in any legal abortions at Valley Hospital. It conflicts with my personal feelings.

SIGNATURE RN

[Blocked for Privacy]

0070

0075

EXHIBIT: K

Page 2 of 16

To: M. Shaw, R.N., OR Nurse Manager
From: NAME , R.N.
Dated: 4-13-89

I have been asked to comment on whether or not I will participate with abortions at Valley Hospital. I have put much thought & deliberation into this and see some situations where I would feel comfortable enough to partake in first trimester abortions. But because most abortions performed at Valley Hospital are second trimester pregnancies, I feel at this time I have to decline further participation.

052

00

K
4 of 16

6-1-5j

To whom it may concern:

This letter is regarding my feelings on participation in abortions.

At the present time I do not wish to participate in abortions done at Valley Hospital.

Sincerely,

Signature
Blocked for Privacy

6-16

7-6-92

I choose not to participate in abortions.

SIGNATURE

Redacted for Privacy

059

0084

11 of 16

10-19-90

To Peggy Robinson - Nurse Manager-OR.

I do not wish to participate in any abortion procedures. Thank you for your consideration.

SIGNATURE
Blocked for Privacy

RN. OR

0081

X
8.16.

5-15-91

To Valley Hospital,

I will not take part in an abortion at this hospital.

SIGNATURE
Blocked for Privacy

057

0082

Exhibit: K
p. 9 of 16

MAT-SU COALITION FOR CHOICE & DR. SUSAN LEMAGIE

v.

Abort.xls

VALLEY HOSPITAL ASSOCIATION, INC. & JAMES G. WALSH

US District Court for the District of Alaska No. A92-692CI

SCHEDULE OF ABORTION PROCEDURES

October 3, 1991 - November 3, 1992

Description	Physician #1	#2	#3*	#4	#5	Dr. Lemagie	Hospital Total
1. SOURCE OF PATIENTS:							
Local (Palmer, Wasilla, Houston, Willow, Sutton, Talkeetna)	9	7	3	8	5	8	40
Outside local area (Anchorage 4, Soldotna/Kenai 3, Yakatat 1, Fairbanks 1, Nenana 2, Ketchikan 1, Whittier 1)				1		12	13
Total D&C/D&E Pregnancy Related Pre Delivery in Hospital	9	7	3	9	5	20	53
2. MISSED AB (FETAL DEMISE AND ANOMOLIES)							
Local	9	7	2	8	5	3	34
Outside local area				1			1
Total That Current Policy Would Still Allow	9	7	2	9	5	3	35
3. "ELECTIVE" ABORTIONS (Includes 2, 1 patient HIV positive and 1 fetus Cystic Fibrosis, that may or may not now be allowed)							
Local			1			5	6
Outside local area						12	12
Total That Current Policy Would Apparently NOT Allow	0	0	1	0	0	17	18

* Physician #3 is an associate of Dr. Lemagie.

I HEREBY CERTIFY THAT THE FOREGOING SCHEDULE IS AN ACCURATE SUMMARY OF FACTS OBTAINED BY ME FROM THE OFFICIAL RECORDS OF VALLEY HOSPITAL.

Faith Handley

TITLE on call Quality Risk manager

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 17th DAY OF NOVEMBER, 1992

Kathleen Dunn

NOTARY PUBLIC IN AND FOR ALASKA

MY COMMISSION EXPIRES: 11/10/95

DEFENDANTS' EXHIBIT B

011

1081

3-31-98

cc:Mail for: Ted Deats

Subject: HJR5 in House Finance
Forwarded: Representative Terry Martin 3/24/98 10:15 AM
To: Ted Deats

Subject: HJR5 in House Finance
From: ahippler@mtaonline.net (Arthur E Hippler) at CC2MHS1
Date: 3/23/98 5:59 PM

Alaska Right to Life strongly urges the members of the House Finance Committee to pass out with a "do pass" recommendation, Rep Terry Martin's Freedom of Conscience Bill

While the concern of our organization is very direct, (we do not wish people to be forced to perform or assist at abortions if they have a moral objection to it). This is not an unrealistic fear. We have the assurances of the Court itself by strong implication in the Valley Hospital case that, given the opportunity, they will gladly impose this judicial tyranny over us.

But this activism can bite both ways. Indeed the very reason why I founded the Alaska Civil Liberties Union and became a member of the National Board of Directors of the American Civil Liberties Union, (lo these many decades ago), was to respond to what we saw at the time as a judiciary stepping on the rights of liberals. I am still a strong believer in civil liberties (though I have some doubt that the organization I founded and no longer belong to still is.)

At the utter core of civil liberties is the respect for conscience. If conscience can be compelled, then any other assumed liberty is a joke and meaningless. If you can only act on the beliefs of others, and not upon your own; if you can be compelled to act against your conscience then you are no longer living in a society with even a pretense of freedom.

There really shouldn't even be a need for such a Constitutional Amendment. Freedom of conscience is such a basic matter that it's actually shocking that we have to fear an encroachment on it. But who doubts, even for a moment, that the judiciary as it is now constituted won't simply impose it's own extremely liberal anti-religious and pro-death ideas regardless of what the elected officials of the state do, unless there is a patent Constitional provison limiting their arbitrary power in this matter.

We are aware that many if not most of the members of the House are not only aware of this problem but are, in another bill, attempting to do rectify this difficulty by providing elected representatives with a direct say in the appointment of judges.

However this long range and more permanent solution is achieved, the problem of existing judges remains. And this is not a problem which applies only to those who presently dislike the ideological makeup of the courts. The kinds of precedent being set at this point can bite anyone in any direction.

The Courts must be mandated by Constitutional chains, not to infringe upon the conscience of the citizen.

We strongly urge you once again. Pass HJR5. Protect Freedom of Conscience.

Arthur E Hipper PhD
Executive Director
Alaska Right to Life

Alaskans for Life, Inc.

. . . Our First Inalienable Right

P.O. Box 32186
Juneau, AK 99803-2186

To: House Finance Committee, Alaska Legislature

From: Sidney D. Heidersdorf, President

Date: March 25, 1998

Re: HJR 5 (JUD); Freedom of Conscience

We support HJR 5 (JUD) the Freedom of Conscience Resolution. This is fundamental to protection of Alaskan's rights.

There has been a great deal of effort made to confuse the issue with claims of chaos resulting from such an amendment. Claims are made that this would open the gates to all kinds of unlawful acts based on conscience. We believe this is false for two reasons:

1. A Freedom of Conscience amendment to the Alaska Constitution does not break new ground or enter unknown territory. It is too late to claim that a freedom of conscience clause in our constitution will cause chaos. There has been long experience with conscience clauses in other state constitutions and chaos has not resulted.

2. The proposed amendment does not give license for any kind of behavior. The last half of the amendment makes that clear. The purpose of the freedom of conscience clause is to protect individuals from the tyranny of government requiring individuals to act in a manner they consider to be a violation of their conscience. The Nuremberg trials condemned individuals who followed orders. A freedom of conscience clause in a setting of legitimate constitutional government would protect those individuals who refused to follow orders.

Our immediate concerns are in regard to abortion and physician assisted suicide/euthanasia. We are concerned that a future activist court or political entity could require an individual's participation in these attacks upon life as the basis for the granting of a license; to practice medicine, for example. This amendment would pre-empt such a thing from happening. It takes little imagination to think of other issues that could require a freedom of conscience clause in the Alaska Constitution.

Alaskans should be able to decide the issue with the opportunity to vote on the proposed Freedom of Conscience Amendment. Please give favorable consideration to HJR 5 (JUD). Thank you.

REPRESENTATIVE
TERRY MARTIN
VICE- CHAIRMAN
BUDGET & AUDIT COMMITTEE
MEMBER
HOUSE FINANCE COMMITTEE

Alaska State Legislature

MAY 15 - JAN 15 [illegible]
716 W. 4TH. SUITE 600
ANCHORAGE, AK 99501

JAN 15 - MAY 15 465-3783
STATE CAPITOL
JUNEAU, AK 99801-1182

HOME 333-6990
355 DONNA DRIVE, #11
ANCHORAGE, AK 99504

BE SURE TO READ - JUSTICE SANDRA DAY O'CONNOR ON FREEDOM OF CONSCIENCE

To: Rep. Joe Green, Chair
House Judiciary Committee

From: Rep. Terry Martin TM

Re: HJR 5

Date: February 2, 1998

In light of a discussion in House State Affairs Committee of the pro's and con's of freedom of religion and conscience, I offer the following observations from Supreme Court Justice Sandra Day O'Connor:

"The principle of religious 'free exercise' and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. To the contrary, these principles were first articulated in this country in the colonies of Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina in the mid-1600s. These colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups--although often limited to Christians--beyond their own. Thus, they encountered early on the conflicts that may arise in a society made up of a plurality of faiths.

"The term *free exercise* appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the 'free exercise' of their religion. Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion: "No person . . . professing to believe in Jesus Christ shall from henceforth be any ways troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor in any way [be] compelled to the belief or exercise of any other religion against his or her consent, so as they be not unfaithful to the Lord Proprietary, or molest or conspire against the civil government.'

Rhode Island's Charter of 1663 used the analogous term--'liberty of conscience.' It protected residents from being 'in any ways molested, punished, disquieted, or called into question, for any differences in opinion, in matters of religions and do not actually disturb the civil peace of our said colony.' The charter further provided that residents may 'freely, and fully have and enjoy his and their own judgments, and conscience in matters of religious concernments . . . ; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness; nor to the civil injury, or outward disturbance of others.'

"The principles expounded in these early charters reemerged more than a century later in state constitutions that were adopted in the flurry of constitution drafting that followed the American Revolution. By 1789 every state but Connecticut had incorporated some version of a free exercise clause into its constitution. These state provisions, which were typically longer and more detailed than the federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the states that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests.

"For example, the New York Constitution of 1777 provided: 'The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this state, to all mankind: provided that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.'

"Similarly, the New Hampshire Constitution of 1784 declared: 'Every individual has a natural and ualienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.'

'The Maryland Declaration of Rights in 1776 read: "No person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under color of religion, any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights' (Maryland Constitution, Declaration of Rights, Art. XXXIII).

"The New York Constitution [stated that] rights of conscience should not be 'construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] state.'

"Like the federal Free Exercise Clause, the Virginia religious liberty clause was simply silent on the subject, providing only that all men are equally entitled to the free exercise of religion, according to the dictates of conscience.'

"George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers: 'In my opinion, the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.'"

- U.S. Supreme Court Justice Sandra Day O'Connor, adapted from her dissent in Boerne vs. Flores

http://www.alaska.net/~akctlib/sp4906.txt

THE SUPREME COURT OF THE STATE OF ALASKA

VALLEY HOSPITAL ASSOCIATION, INC., and JAMES G. WALSH, Valley Hospital Executive Director,	)	Supreme Court No. S-7417
	)	Superior Court No. 3PA-92-01207 CI
Appellants,	)	
v.	)	O P I N I O N
MAT-SU COALITION FOR CHOICE, DR. SUSAN LEMAGIE, and JANE DOES I-X,	)	[No. 4906 - November 21, 1997]
Appellees.	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Dana Fabe, Judge.

Appearances: Brian J. Brundin, Brundin, Inc., Anchorage, and James Bopp, Jr., Bopp, Coleson & Bostrom, Terre Haute, Indiana, for Appellants. Stephan H. Williams, Cooperating Attorney for the Alaska Civil Liberties Union, Anchorage, and Janet L. Crepps and Kathryn Kolbert, Center for Reproductive Law & Policy, New York, New York, for Appellees. Susan Wright Mason, Atkinson, Conway & Gagnon, Anchorage, for Amicus Curiae Alaska State Hospital and Nursing Home Association. Paul Benjamin Linton, Americans United for Life, Chicago, Illinois, and Kenneth P. Jacobus, Kenneth P. Jacobus, P.C., Anchorage, for Amici Curiae Members of the Alaska Legislature. Jeffrey M. Feldman and Susan Orlansky, Young, Sanders & Feldman, Anchorage, for Amici Curiae American College of Obstetricians and Gynecologists and American Medical Women's Association, Inc.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Fabe, Justice, not participating.]

COMPTON, Chief Justice.

I. INTRODUCTION

Valley Hospital Association (VHA) seeks to reverse the superior court's summary judgment declaring unenforceable and permanently enjoining enforcement of its policy limiting abortion. We affirm the superior court. We hold that (1) Article I, section 22 of the Alaska Constitution encompasses reproductive rights, including abortion; (2) VHA is a quasi-public institution subject to the Alaska Constitution; (3) VHA's abortion policy is an unconstitutional restriction on the right to abortion; ~~(4) AS 18.16.010(b)~~ is unconstitutional to the extent it applies to quasi-public institutions; and (5) the superior court's award of attorney's fees was not an abuse of discretion.

II. FACTS AND PROCEEDINGS

VHA is a nonprofit corporation organized under Alaska law. It owns and operates a thirty-six-bed hospital in Palmer. The hospital is licensed by the State of Alaska (State); it is the only hospital in the Matanuska-Susitna (Mat-Su) Valley. The hospital facility currently in use was rebuilt and expanded in the early 1960s, using $10.7 million in State funds and five acres of land donated by the City of Palmer. VHA is not affiliated with or operated by any religious organization. The corporation "is organized to serve public interests."

http://www.alaska.net/~akctlib/sp4906.txt

VHA's Board of Directors is divided into two boards, the Association Board and the Operating Board. The Association Board raises money and acquires property for the hospital and elects the Operating Board. The Operating Board has all the other powers and functions of the Board of Directors, including establishing hospital policy.

VHA is a membership organization. Any adult may become a VHA member upon paying a five dollar application fee. Members who are residents of the Mat-Su Borough, denominated "general members," annually elect the Association Board.

Abortion has been permitted in Alaska since 1970, when the state legislature passed the current abortion law. [Fn. 1] VHA permitted lawful abortion procedures at its facility from 1970 until 1992. [Fn. 2] In 1992 abortion opponents organized a campaign to enlarge the membership of VHA. In April 1992 a larger-than-usual membership elected the Association Board, which then elected the Operating Board. In September 1992 the Operating Board enacted a new policy on abortion. The policy prohibits abortions at the hospital unless (1) there is documentation by one or more physicians that the fetus has a condition that is incompatible with life; (2) the mother's life is threatened; or (3) the pregnancy is a result of rape or incest. All VHA Operating Board members supported this new policy.

The Mat-Su Coalition for Choice, Dr. Susan Lemagie, and ten unnamed women (Coalition) filed suit against VHA and its executive director, seeking declaratory and injunctive relief. The Coalition then filed a motion for a preliminary injunction against VHA's abortion policy. The superior court granted the motion. [Fn. 3] Its order temporarily enjoined enforcement of VHA's new abortion policy and restored the status quo existing before the policy was enacted. The court then granted the Coalition's motion for summary judgment [Fn. 4] and permanently enjoined VHA

1. from enforcing any policy, rule, regulation, practice, or custom prohibiting the performance of any lawful abortion procedure at Valley Hospital;

2. from refusing to permit the facilities of Valley Hospital to be used for the performance of any lawful abortion procedure by qualified medical personnel;

3. and from imposing any restriction on the performance or scheduling of any lawful abortion procedure at Valley Hospital which is not based on accepted, established medical practices or requirements with respect to such procedures.

The superior court noted that nothing in the permanent injunction required anyone affiliated with the hospital "to participate directly in the performance of any abortion procedure if that person, for reasons of conscience or belief, objects to doing so."

The superior court granted full reasonable attorney's fees in the amount of $110,000 to the Coalition in a separate order. VHA appeals the injunction, the summary judgment, and the award of attorney's fees to the Coalition.

III. DISCUSSION

A. Standard of Review

We apply our independent judgment in reviewing the questions of law presented in this appeal, adopting rules of law which are most persuasive in light of precedent, reason, and policy. Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979). We review the award of attorney's fees for abuse of discretion. Bromley v. Mitchell, 902 P.2d 797, 804 (Alaska 1995). An abuse of discretion is established only where the court's determination is manifestly unreasonable. Id.

B. The Alaska Constitution Protects Reproductive Autonomy, Including the Right to Abortion, More Broadly Than Does the United States Constitution.

1. The United States Constitution

http://www.alaska.net/~akctlib/sp4906.txt

The Supreme Court's articulation of the United States Constitution's protection of reproductive rights establishes the minimum protection provided to women in Alaska. [Fn. 5] This protection includes the right to an abortion. Under Roe v. Wade, 410 U.S. 113, 155 (1973), this right could be limited only where required by a compelling state interest. Id. States could regulate abortions performed before a fetus became viable only when such regulation was necessary to ensure the life and health of the mother. Id. at 163.

The compelling state interest test no longer accurately reflects federal constitutional law. Arguably, the prevailing federal view is that a state may regulate abortions so long as their regulation does not impose "an undue burden on a woman's ability" to decide to have an abortion. Planned Parenthood v. Casey, 505 U.S. 833, 875 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The O'Connor plurality substituted the undue burden test for the compelling state interest test in recognition of the view that there "is a substantial state interest in potential life throughout pregnancy." Id. at 876. The following paragraphs from the joint opinion in Casey suggest the current state of federal constitutional law concerning reproductive rights:

(a) To protect the central right recognized by Roe v. Wade while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of Roe v. Wade. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm Roe's holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. at 164-65. 505 U.S. at 878-79.

2. The Alaska Constitution

We sometimes have taken a broad view of our role in defining state constitutional rights:

[W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970)

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(extending the constitutional right to a jury trial). [Fn. 6] Thus, our articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. Id. at 401 ("[This court is] at liberty to make constitutional progress in Alaska by our own interpretations, as long as we measure up to the national standards which are required by the United States Supreme Court."). [Fn. 7]

Article I, section 22 of the Alaska Constitution provides:

The right of the people to privacy is recognized and shall not be infringed.

This express privacy provision was adopted by the people in 1972. It provides more protection of individual privacy rights than the United States Constitution. Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (balancing the individual right to personal autonomy and free speech with the need for an informed electorate); Ravin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J. concurring) ("Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.").

A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty." Baker, 471 P.2d at 401-02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language. "[D]ecisions whether to accomplish or prevent conception are among the most private and sensitive." Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 479 n.42 (Alaska 1977) (holding that a physician who specialized in contraception and abortion could not be required to disclose the names of his patients); see also Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1080 (Alaska 1981) (holding that abortion clinic protests cause patients to "suffer emotional distress as a result of appellants' invasion of their privacy during a particularly sensitive period"); Ravin, 537 P.2d at 502 (holding that decisions about contraception involve "significantly personal areas").

We stated in Breese v. Smith, 501 P.2d 159, 169 (Alaska 1972), that "few things [are] more personal than one's body." [Fn. 8] In Breese, a school policy regulating hair length was at issue; the regulation was held unconstitutional because the State failed to show a compelling interest that justified the policy. Id. at 170-72. Surely "few things are more personal" than a woman's control of her body, including the choice of whether and when to have children.

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when and how one's body is to become the vehicle for another human being's creation; second, when and how--this time there is no question of "whether"--one's body is to terminate its organic life.

Laurence H. Tribe, American Constitutional Law 1337-38 (2d ed. 1988). We agree that "[t]he decision whether or not to have a child is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman." In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (citing Roe, 410 U.S. at 153).

For the above reasons, we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These rights may be legally constrained only when the constraints are justified by a compelling state

interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion. The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in Roe v. Wade. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in Casey.

VHA argues that there can be no state constitutional protection for reproductive rights under article I, section 22, because the section was intended to encompass protection from unwarranted surveillance and data collection by the State and private businesses. It cannot extend beyond this "informational" privacy. [Fn. 9] To support this argument, VHA cites newspaper articles and other bills introduced contemporaneously with the adoption of article I, section 22.

The only informative legislative history consists of the privacy amendment as originally proposed. [Fn. 10] The earliest form of the proposed amendment stated:

> Section 22. Right of Privacy. The right of the people to privacy in their opinions, persons, families, reputations and property is recognized and shall not be violated. Neither warrants nor writs of investigation in abrogation of privacy shall issue, except upon probable cause and upon a showing of a legitimate and pressing need, supported by oath or affirmation, particularly describing the information or data sought and the person whose privacy may be affected, and particularly setting forth the reasons for the search or investigation. The legislature shall provide for the prosecution and punishment of public officials and private parties who act in violation of this section, and shall provide civil remedies to redress and prevent such violations. The legislature shall provide for the protection and security of information available to the State to the extent necessary to protect the rights of the individual recognized in this section and shall further provide for the protection and security of information gathered under this section by the State.

1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess. While the initial draft of the amendment attempted to specify privacy interests to be protected, the final constitutional amendment simply protected the right of the people to privacy. The plain language of article I, section 22 is a broad protection of privacy rights. The legislative history is insufficient to limit the general language of the privacy amendment.

C. VHA's Abortion Policy Is Subject to the Provisions of the Alaska Constitution.

We previously have determined that a hospital may be a "quasi-public" institution. Storrs v. Lutheran Hosps. and Homes Soc'y of Am., Inc., 609 P.2d 24 (Alaska 1980). In Storrs, we held that a quasi-public hospital "cannot violate due process . . . in denying staff privileges." [Fn. 11] Id. at 28. The hospital was quasi-public because: (1) it was the only hospital serving the community; (2) the construction of the hospital was funded in significant part by State and federal grants; and (3) over twenty-five percent of the funds received for hospital services came from governmental sources. Id. Storrs established that a quasi-public medical facility is bound to protect constitutional rights affected by the administration of the hospital. [Fn. 12]

The elements that led us to conclude that the hospital in Storrs was quasi-public show that the hospital in this case is quasi-public; thus, the conduct of VHA qualifies as "state action," meaning that it "may be fairly treated as [the action] of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), quoted in United States Jaycees v. Richardet, 666 P.2d 1008, 1013 (Alaska 1983).

In order to determine whether the hospital operated by VHA is a quasi-public institution, we look to a number of factors, just as we did in Storrs. First, VHA has a special relationship with the State through the State's Certificate of Need program.

Under this program, the State must review and approve expenditures of one million dollars or more for construction or alteration of a health care facility. AS 18.07.031. The Department of Health and Social Services determines whether to grant a Certificate of Need based on health care demand and resources. AS 18.07.041. [Fn. 13] This program creates in VHA a type of health care monopoly. Indeed, VHA is the only hospital serving the Mat-Su Valley, just as the hospital in Storrs was the only hospital serving the Fairbanks area. The public need for medical facilities makes this sort of regulation essential. However, such monopoly privileges may not be used by VHA to limit access to lawful medical procedures for moral or religious reasons.

Second, VHA has received construction funds, land, and operating funds from the State, local, and federal governments, [Fn. 14] including more than ten million dollars for construction from the State and a grant of five acres of public land from the City of Palmer. [Fn. 15] Money from the city and borough came from pass-through grants from the State legislature. [Fn. 16] VHA is required to operate as a "public facility" under State laws governing the pass-through grants from the State to the city and borough. AS 37.05.315(a) and (c). Finally, a significant portion of the operating funds VHA receives for hospital services comes from governmental sources. We also consider the fact that the hospital is a community hospital whose board is elected by a public membership. As the superior court noted, the public governance structure "strongly favors a finding that the hospital is 'quasi-public.'"

VHA argues that the Storrs quasi-public criteria are limited to determining whether a hospital must afford due process in staffing determinations and should not be extended to require hospitals to protect other constitutional rights. VHA relies on language in Kiester, which discusses limitations on judicial review to avoid intruding upon a hospital's recognized expertise in evaluating medical qualifications. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 (Alaska 1992). However, no medical qualification or decision is at issue here. Neither the issue whether the hospital is quasi-public, nor the issue whether the abortion policy is invalid on constitutional grounds, involves intruding on a medical decision that is within the hospital's expertise. Likewise, VHA has acknowledged that its abortion policy is not a medical policy, but one founded on "sincere moral conscience." The scope and application of the Alaska Constitution to this kind of policy presents a question of law that is within this court's expertise.

Considering all factors similar to those found persuasive in Storrs, we conclude that the hospital operated by VHA is a quasi-public hospital. Its policy concerning abortion must comply with the Alaska Constitution.

D. VHA Has Not Demonstrated a Compelling State Interest Justifying Its Abortion Policy.

Since VHA is a quasi-public institution, its policies are subject to the limitations which the Alaska Constitution imposes on legislation and government regulations. Under Alaska's Constitution, there is a protected right to an abortion, and VHA's policy interferes with that right. Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest. Further, assuming the existence of such an interest, there also must be no less restrictive means by which the interest might be advanced. [Fn. 17] In re A.B., 791 P.2d 615, 621 (Alaska 1990) and Vogler v. Miller, 651 P.2d 1, 5 (Alaska 1981). VHA has not demonstrated a compelling state interest justifying its policy. It has not advanced any medical, safety, or other public-welfare interest to justify precluding elective abortions. VHA has stated unequivocally that its policy is a matter of conscience, and not a medical, safety, or economic issue. As VHA cannot raise a free exercise claim, [Fn. 18] this does not amount to a compelling state interest.

E. Alaska Statute 18.16.010(b) Is Unconstitutional to the

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Extent It Applies to Quasi-Public Institutions.

VHA argues that even if the Alaska Constitution encompasses the right to an abortion, and even if the hospital is a quasi-public institution, the legislature already has addressed the issue in AS 18.16.010(b), [Fn. 19] and has determined that a "hospital may decline to offer abortions for reasons of moral conscience." VHA argues that "[c]onsistent with its previous approach to the highly-sensitive question of abortion, this Court should defer to the considered judgment of the legislature." However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action. The issue before us includes the question whether AS 18.16.010(b) is a permissible limitation on a constitutional right.

VHA has a "sincere moral belief" that elective abortion is wrong. [Fn. 20] However, constitutional rights "cannot be allowed to yield simply because of disagreement with them." Brown v. Board of Education, 349 U.S. 294, 300 (1955).

The Alaska Attorney General has concluded that AS 18.16.010(b) is invalid, unless construed to be applicable only to sectarian facilities. 1978 Formal Op. Att'y Gen. No. 8 (February 10, 1978). The New Jersey Supreme Court struck down an almost identical statute:

> To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for elective abortions would clearly constitute state action . . . [f]or the state to frustrate [the constitutional right to a first trimester abortion] by its action would be violative of the constitutional guarantee.

Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

VHA argues that because the statute states that abortions may be performed only in certain situations, but that individuals and institutions may always refuse to participate in or provide them, "the legislature has determined that the ability to protect one's conscience outweighs the ability to procure an abortion." VHA has no constitutional right at issue; it has at most a statutory right. The legislature, however, may not balance statutory rights against constitutional ones, like the right to an abortion. Therefore, AS 18.16.010(b) is unconstitutional to the extent that it applies to VHA.

F. The Superior Court's Award of Attorney's Fees Was Not an Abuse of Discretion.

The superior court awarded full reasonable attorney's fees to the Coalition. The court based its decision on the factors articulated in Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). The superior court concluded that VHA was not a public interest litigant immune from having to pay an award of attorney's fees. [Fn. 21]

We review a trial court's determination of a litigant's public interest status under the abuse of discretion standard. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162, 171 (Alaska 1991). "Such an abuse is regarded as present only where the trial court's decision appears to be manifestly unreasonable or motivated by an inappropriate purpose." Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 222 (Alaska 1982).

VHA asserts two arguments for challenging the fee award: (1) VHA is a public interest litigant; [Fn. 22] and (2) VHA relied in good faith on a statute which authorized its policy.

A prevailing public interest plaintiff is normally entitled to full reasonable attorney's fees. Hunsicker v. Thompson, 717 P.2d 358, 359 (Alaska 1986). We have determined that "where both parties are individual, public interest litigants, neither should be made to bear the fees of the other, each should simply pay their own." McCormick v. Smith, 799 P.2d 287, 289 n.5 (Alaska 1990). However, VHA is not a public interest litigant. We are not persuaded by VHA's assertion that its defense of its abortion policy is in the public interest simply because it raises

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constitutional issues.

We have decided one case where we determined that attorney's fees should not be awarded against a losing private party in public interest litigation, because an award might have the effect of deterring citizens from litigating issues of public concern. Whitson v. Anchorage, 632 P.2d 232, 233 (Alaska 1981). In Whitson, the defendant was an individual who had placed an initiative on the next municipal election ballot, and the plaintiff was the City of Anchorage, which had obtained a judgment finding the initiative illegal and ordering it removed from the ballot. We found it significant that Whitson would have been a traditional private party plaintiff seeking relief against the governmental entity had the city not "beat[en] him to the courthouse steps," making him the nominal defendant. Id. at 234. Had the city refused to place his initiative on the ballot, rather than doing so and then suing him to get it removed, Whitson would likely have sued the city and been the traditional private party plaintiff seeking relief against the governmental entity. Id. at 233-34. In this case VHA is not an individual raising a public interest defense against a governmental entity. Rather, VHA is a quasi-public institution whose policy has infringed a constitutional right.

VHA also cannot assert its good faith reliance on AS 18.16.010(b). As discussed above, that statute cannot constitutionally be applied to a quasi-public hospital. SeePart III.D. Because VHA it cannot escape liability for attorney's fees by arguing that it relied in good faith on AS 18.16.010(b).

The superior court did not abuse its discretion in awarding fees to the Coalition.

IV. CONCLUSION

The superior court's summary judgment and injunction are AFFIRMED. The superior court's award of attorney's fees was not an abuse of discretion and is AFFIRMED.

FOOTNOTES

Footnote 1:

AS 18.16.010 provides:

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

. . . .

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

Footnote 2:

In July 1991 Humana Hospital in Anchorage stopped allowing elective abortions. VHA concedes that except pursuant to the superior court injunction, there is no hospital or other facility available in the Anchorage/Mat-Su area at which a woman can have a second trimester elective abortion.

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Footnote 3:

In its order granting the Coalition a preliminary injunction, the superior court determined that the Coalition had shown a clear probability of success in establishing the following propositions: (1) Valley Hospital is a quasi-public hospital; (2) the Alaska Constitution provides greater protection for individual rights than the United States Constitution; (3) the right to choose an abortion is a fundamental right guaranteed by article I, section 22 of the Alaska Constitution; (4) there is no compelling state interest in Valley Hospital's ban on abortions; and (5) AS 18.16.010(b) does not immunize Valley Hospital from violating Alaskans' constitutional right to reproductive choice, including abortions.

Footnote 4:

The superior court's order granting summary judgment was

based on the reasons articulated in the Court's earlier decision granting a preliminary injunction, the protections of the right to privacy contained in Article I, 22 of the Alaska Constitution, and the fact that Valley Hospital is a non-sectarian, non-profit, quasi-public hospital.

(Citation omitted.)

Footnote 5:

See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Roe v. Wade, 410 U.S. 113 (1973).

Footnote 6:

VHA interprets this language as a two-prong test which must be met before we may find a constitutional right. We did not interpret this language from Baker as VHA now urges us to do when we decided either Breese v. Smith, 501 P.2d 159 (Alaska 1972) (holding that governmental control of personal appearance is antithetical to the concept of personal liberty), or Ravin v. State, 537 P.2d 494 (Alaska 1975) (holding that privacy in the home is a fundamental right), although we found a right to exist under the Alaska Constitution in each of those cases.

Footnote 7:

Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy guarantee); American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46 (Cal. App. 1989) (upholding an injunction preventing implementation of restrictions on abortion rights of minors, requiring a compelling state interest before invasion of minors' privacy rights); In re T.W., 551 So. 2d 1186 (Fla. 1989) (reaffirming the right to choose to terminate a pregnancy as a fundamental state constitutional right and striking down legislation restricting abortion rights); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991) (applying a strict scrutiny standard for fundamental rights and determining that state failure to fund medically necessary abortions violated state constitution); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (extending state

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constitutional right to privacy beyond federal right in a custody dispute over divorced couple's frozen embryos).

Footnote 8:

Breese was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Breese relied exclusively on the inherent rights provision found in article I, section 1 of the Alaska Constitution. The Coalition argues that article I, section 1 of the Alaska Constitution protects abortion as a fundamental right. Because we hold this right is grounded in the privacy provision of the constitution, we do not address whether the right could be based solely on article I, section 1. While Breese's discussion of personal autonomy remains instructive, we choose to analyze reproductive rights under the privacy provision of our constitution, as other states have done. See, e.g., In re T.W., 551 So. 2d at 1193.

The relationship between a woman and her doctor is threatened by VHA's abortion policy, and thus privacy rights are implicated in addition to the notions of personal autonomy that were at issue in Breese. The information exchange between a woman and her doctor about the woman's health and her reproductive choices is intensely private. The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to the approval of a hospital's board of directors, according to their own values.

Other privacy interests are also implicated. If a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel. The fact that a woman has visited a certain doctor can be intensely private, when the doctor is one who specializes in abortion services.

Footnote 9:

The Alaska State Hospital and Nursing Home Association, argues only that the "legislative" history of the amendment prevents this court from applying the privacy provision of the constitution to private parties. We have already established that proposition. See Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989).

Footnote 10:

The Alaska State Hospital and Nursing Home Association argues that a summary of a House Judiciary Committee meeting during which the proposed amendment was modified is evidence that the privacy clause was intended to apply only to informational privacy. The meeting summary is largely a debate over grammar and style and provides no information which alters our interpretation of article I, section 22. See H. Jud. Comm. minutes at 318-19, 7th Leg., 1st Sess. (May 30, 1972).

Footnote 11:

One state court has rejected this application of procedural due process to private hospitals. See Hottentot v. Mid-Maine Med. Ctr., 549 A.2d 365, 368 (Me. 1988). At least eight other states have concluded that private hospitals must follow procedural due process for physician staffing decisions. Id. at 368 n.4.

Footnote 12:

VHA argues that constitutional due process was never at issue in Storrs because the hospital stipulated that Dr. Storrs was entitled to due process. We have stated, however, that Storrs was a constitutional due process case. Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1223 n.2 (Alaska 1992); see also Amerada Hess Pipeline Corp. v. Alaska Pub. Util. Comm'n, 711 P.2d 1170, 1180 (Alaska 1986) (relying on Storrs to find the right to an impartial decision maker basic to a guarantee of due process). Furthermore, the Storrs court would not have needed to address whether Dr. Storrs received due process were he not entitled to it. The determination that due process applied was material to the holding.

Footnote 13:

AS 18.07.041 provides:

> The office shall grant a sponsor a certificate of need or modify a certificate of need if the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirement for health services required to maintain the good health of citizens of this state.

Footnote 14:

VHA's assets totaled $31.7 million as of December 31, 1993. Between 1985 and 1993, VHA provided $37.5 million in unreimbursed care. In 1991, 14.71% and 5.98% of VHA's gross receipts were from Medicare and Medicaid respectively. VHA's April 1993 Certificate of Need application to the State showed that Medicare and Medicaid receipts total approximately $3.75 million to $5.1 million for the 1990, 1991, and 1992 fiscal years. This is approximately 25% of VHA's patient revenues for those three years.

Footnote 15:

The Alaska State Hospital and Nursing Home Association argues that money received under the federal Hill-Burton Act cannot be used as a basis for requiring hospitals to perform abortions. 42 U.S.C. 300a-7(b). The record does not show that any Hill-Burton money was used when the facilities were rebuilt in the early 1980s.

Footnote 16:

The statute allowing pass-through grants requires the municipality to agree that the facilities and services provided by the grant will be available for the use of the general public, and that the municipality will operate and maintain the facility for the practical life of the facility. AS 37.05.315(a) and (c). This is an additional indication that VHA is a quasi-public institution. See 1986 Informal Op. Att'y Gen. 1 (Apr. 8, 1982) (stating that municipality accepting funds for construction of a public facility must ensure the operation and maintenance of the facility, even if the facility will be owned and operated by a private non-profit organization); see also 1991 Informal Op. Att'y Gen. 19 (Sept. 22, 1986) (indicating that the State may have a cause of action against a city that allows a facility funded by pass-through grants to be converted to private use).

Footnote 17:

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We have used both the compelling state interest/least restrictive means test and the legitimate state interest/close and substantial relationship test in the privacy context. See Jones v. Jennings, 788 P.2d 732, 737-38 (Alaska 1990); State v. Erickson, 574 P.2d 1 (Alaska 1978); Ravin, 537 P.2d at 504. However, "[w]here the right to privacy is manifested in terms of interests . . . squarely within personal autonomy," as here, we use the compelling state interest test. Erickson, 574 P.2d at 22, n.144.

Footnote 18:

See infra note 20. Nothing said in this opinion should be taken to suggest that a quasi-public hospital could have a policy based on the religious tenets of its sponsors which could be a compelling state interest. Recognizing such a policy as "compelling" could violate the Establishment Clause of the First Amendment to the United States Constitution. As this point is not raised, we do not rule on it.

Footnote 19:

AS 18.16.010(b) provides:

> Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

Footnote 20:

VHA bases its argument in part on Frank v. State, 604 P.2d 1068 (Alaska 1979), a free exercise of religion case based on the First Amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. See Frank, 604 P.2d at 1070 (killing of cow moose for funeral potlatch protected as free exercise of religion). VHA is not affiliated with any religion and cannot raise a free exercise claim.

Footnote 21:

A party qualifies as a public interest litigant if (1) the case effectuates a strong public policy, (2) numerous people will benefit from the litigation, (3) only a private party could be expected to bring the action, and (4) the party would not have sufficient economic incentive to bring the lawsuit even if the action involved only narrow issues lacking general importance. Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420, 423 (Alaska 1995).

Footnote 22:

The Coalition argues that VHA did not challenge the superior court's determination that VHA is not a public interest litigant in its points on appeal and is barred from doing so now. Alaska Appellate Rule 204(e) provides that this court will consider only points included in the statement of points on appeal. See alsoKalenka v. Taylor, 89 where appellants failed to properly appeal a fee award and offered no mitigating circumstances to explain the failure, they cannot raise the issue). However, whether VHA is a public interest litigant is a legal issue that can be considered on the record before the court. See, e.g., Oceanview Homeowners Ass'n v. Quadrant Const., 680 P.2d 793, 797 (Alaska 1984). Additionally, although VHA's public interest status is not mentioned in the points on appeal, the issue of fees is raised. See Putnam v.

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State, 629 P.2d 35, 39 n.2 (Alaska 1980). There is no prejudice to the Coalition in considering the issue on appeal.

House Finance Committee

DATE: 3/26/98

PLACE Cap 519

SUBJECT OF MEETING:

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(6) E BETTY HALL	BLACK AMERICANS FOR LIFE	P.O. BOX 22933	99802	6-4058		Y	N	FREEDOM OF CONSCIENCE HJR 5
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

House Finance Committee

DATE: 3/26/98

PLACE: Cap 519

SUBJECT OF MEETING:

	NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(5)	SID HEIDERSDORF	ALASKANS FOR LIFE, Inc.	Box 020658, JUNEAU	99802	789-9858	—	(Y)	N	HJR-5
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	

House Finance Committee

DATE: 3/26/98

PLACE: Cap 5P

SUBJECT OF MEETING:

HB 81
SB 157
HJR 5
HB 252
HB 144
SB 221

	NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
(3)	Sarah Felix	Dept of Law	State of Alaska	99811		465-3600	(Y)	N	HJR 5
	~~Jim Bolton~~	"				"	(Y)	N	~~HB81~~
(4)	Juanita Hensley	ADMIN	DMV			465 5648	Y	N	Questions SB 157
	~~Personnel Commissioner~~	~~Dept Transp~~				274	(Y)	N	HB 81
(7)	Loraine Dees	ASHNHA	AK State Hospital Nursing Assn			586 1790	(Y)	N	HJR 5
(9)	Anne Carpenet	Law				465-3428	Y	N	Answer HB 252 Questions
							Y	N	
							Y	N	
							Y	N	
							Y	N	
							Y	N	

Page ___ of ___

R. Ryan's STAFF person

House Finance Committee

DATE: March 31, 98

PLACE: Cap 519

SUBJECT OF MEETING:
HB 462 7 HJR 5
HB 356

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Sarah Felix	Dept of Law	P.O. Box 110300 Juneau, AK	99811	465-3600		(Y)	N	HJR 5
Nanci Dahes	PFD	10th Floor SOB	99811		2323	Y	(N)	HB 462
Brad Piece	OMB	MS 0020			4677	(Y)	N	HB 462
Jeel Deatts	Mailing Office					Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

03/26/98 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
14:23:46 PARTICIPANT LIST (TESTIFIERS ONLY) BY:JNU
TCN:80556 SCHEDULED FOR:03/26/98 13:30 TO 16:00 FOR:ALL
PUBLIC HEARING HOUSE FINANCE

LOCATION:ANCHORAGE

(3)	HJR 5		JANET	OATES	PROV HOSP (Director - marketing)	TESTIFY
(4)	HJR 5		JENNIFER	RUDINGER	AKCLU	TESTIFY

LOCATION:DELTA JCT.

	HJR 5	MRS.	DEBRA	JOSLIN		TESTIFY

LOCATION:MATSU

(1)	HJR 5	DR	GERALD	PHILLIPS		TESTIFY
(2)	HJR 5	DR	WILLIAM	RESINGER	Radiologist Valley Hospital	TESTIFY