

February 2017

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Recommended Citation

Patrick McKinley Brennan (2017) "Conscience and the Common Good: An Alternative Perspective," *Journal of Catholic Legal Studies*: Vol. 49 : No. 2 , Article 8.

Available at: <http://scholarship.law.stjohns.edu/jcls/vol49/iss2/8>

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CONSCIENCE AND THE COMMON GOOD: AN ALTERNATIVE PERSPECTIVE

CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE. By Robert K. Vischer. Cambridge University Press. 2010.

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“Conscience” and the “common good.” Two very bright ideas but in need of definition and detail if they are to be found to be true ideas.

As readers of a journal such as this are no doubt aware, since 1931, the Catholic Church has understood that she is developing a body of social “doctrine”¹ handed down from the time of Pope Leo XIII—1878 to 1903. Writing in 1991, Pope John Paul II explained that

to teach and to spread her social doctrine pertains to the Church’s evangelizing mission and is an essential part of the Christian message, since this doctrine points out the direct consequences of that message in the life of society and situates

[†] Associate Dean for Academic Affairs, Professor of Law, and John F. Scarpa Chair in Catholic Legal Studies, Villanova University School of Law. An early draft of these comments was prepared for a panel, at the annual conference of the Center for Ethics and Culture at the University of Notre Dame, exploring Robert Vischer’s new book *Conscience and the Common Good: Reclaiming the Space Between Person and State*. In preparing this revised and expanded version of my comments, I have relied on the paper Vischer presented on the occasion and on the book itself. It was an honor to be invited to be a part of the panel, and I am grateful to many, above all Rob Vischer himself, for his patience, understanding, and keen questions. Thanks also to Michael Moreland, Rick Garnett, and Nora O’Callaghan for their contributions at the conference and thereafter. The nature and degree of my disagreements with Vischer’s arguments are an index of my respect for his place in a conversation in which I am something of the odd man out.

¹ PIUS XI, ENCYCLICAL LETTER *QUADRAGESIMO ANNO* ¶ 18–21 (1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

daily work and struggles for justice in the context of bearing witness to Christ the Savior.²

With her social doctrine, John Paul continued, the Church “proclaims God and his mystery of salvation in Christ to every human being, and for that very reason reveals man to himself.”³ Drawing on “contributions from all branches of knowledge, whatever their source,”⁴ the Church in her social doctrine speaks not just to Catholics but to all people about how society is to be rightly ordered in light of what things truly are and are called to be—that is, how society is to be ordered to the common good.

The questions I wish to raise here concern the compatibility, so to speak, between several of the principal positions taken by Robert Vischer in his provocative book *Conscience and the Common Good*, on the one hand, and several important theses of Catholic social doctrine, on the other. Whatever Vischer’s intent in taking the positions he does in the book, it is surely fair to ask of a serious study in social questions, such as Vischer’s, the extent to which it is one with which Catholics loyal to the Church’s social doctrine can agree. The inquiry may prove to be inconclusive or underdetermined or uninteresting; in the alternative, it may turn out to be probative. It is especially promising to ask about a study’s compatibility with Catholic doctrine, moreover, when, as here, its two poles, conscience and the common good, name concepts that occupy, at least nominally, key positions in Catholic social doctrine. We are not comparing apples and oranges, at least not necessarily. It may turn out that we are comparing Fujis and Granny Smiths, so to speak, and to discover the differences between the two kinds just might turn out to be of value. Why? Changing the metaphor, sometimes wolves come wearing sheep’s clothing. In trade in Vischer’s account are concepts that occupy high places in Catholic social doctrine, above all, conscience and the common good. Do Vischer’s conceptions differ substantively from the concepts of

² JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 5 (1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.

³ *Id.* ¶ 54.

⁴ PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 76 (2004).

the Catholic tradition? It would be good news to some if they did. I would hate to deliver bad news. Still, it bears mentioning that some fruit is not to be eaten.

So, my questions here conveniently cluster around the implications of the two poles of Vischer's study, but one preliminary issue concerns what exactly Vischer means, as a matter of metaphysics and epistemology, by "conscience," the first pole. I will proceed rather summarily on this preliminary point. "This book," Vischer writes, "does not aim to overturn the prevailing understanding of conscience as a person's judgment of right and wrong, but it does," he continues, "aim to bring into focus a dimension of conscience that is discernible from the term's earliest usage, which is 'to denote a knowledge which can be shared by several people.'"⁵ Vischer thematizes this as "the relational dimension of conscience,"⁶ which he elaborates as follows: "[C]onscience cannot be adequately explained as a freestanding individual construct. It might be expressed and defended by the individual, but its substance and real-world implications are relational by their very nature."⁷ This insistence on the inevitably relational dimensions of conscience is one of the signature contributions of Vischer's book, and I regard as truly salutary this reminder that conscience is not properly formed by an individual in splendid isolation.⁸ Though each of us must take final, non-delegable responsibility for our decisions about what to do and what not to do, our consciences are formed, willy-nilly, by the associations in which we engage. Needless to say, therefore, the better our associations, the better our consciences are likely to be.

This insight, into the "relationality" of conscience, leads to Vischer's principal project in the book—that is, to defend the place of associations and groups, anticipating that they will be actors in a "moral marketplace."⁹ No invisible hand is mentioned, but the market, with groups, and not just individuals, firmly a part of it, is what is to be trusted, trusted as the means by which groups develop their own identities and that of their

⁵ ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD* 3 (2010).

⁶ *Id.*

⁷ *Id.* at 4.

⁸ How one could possibly come to hold the view Vischer asks us to reject, is a story for another day.

⁹ *Id.* at 5.

members. If this trust is not limitless, what then is to be the limit of this freedom of group action? For example, no one seriously denies some things groups sometimes do—such as torturing babies—cannot and should not be tolerated. In one especially intriguing passage in which he relies on the arguments of Harold Laski among many others, Vischer cautions against “restricting the authority of associations to embody their own distinct—even deviant—moral identities.”¹⁰ What are we to make of this from the perspective of Catholic social doctrine?

Catholic social doctrine does not disagree about the importance of associations and groups—terms I use interchangeably for present purposes. In fact, quite the opposite is the case. The Church has been at the forefront of modern defenses of social pluralism—that is, the pluralism of social forms—and Vischer’s own account, specifically of “subsidiarity,” acknowledges the Church’s teaching that the individual is who he or she is in virtue, in part, of his or her associations: “Subsidiarity pushes back against the temptation to view the individual as a decontextualized rational agent by reminding us that the human person is, above all, relational—not just as an empirical description, but as a normative claim.”¹¹

Catholic social doctrine does, however, situate the problem—and therefore the solution—somewhat differently, and it does so in light of an association whose uniqueness Vischer ignores, elides or, perhaps, the reader can only guess, denies. In Catholic social doctrine, the question of the formation of conscience is intimately and preeminently linked with the work of the Church, an association *sui generis*. Not all “relationality” is created equal; in Catholic social doctrine, “subsidiarity” is not, at least not principally, about “closest proximity” or a “preference for the local.”¹² The Church is the associational place par excellence where conscience is to be formed, and this not because it is or is not local or proximate but because of divine right. To bring this point into bold relief, some ground clearing is first required.

¹⁰ *Id.* at 115.

¹¹ *Id.* at 105.

¹² *Id.* at 106.

One of the most celebrated doctrinal declarations of the Second Vatican Council concerned liberty of conscience. In its Declaration on Religious Freedom, *Dignitatis Humanae*, the Council declared:

In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious.¹³

This declaration in particular led the notorious anti-Catholic bigot Paul Blanshard to announce: “The final statement on religious liberty was an important achievement. It will make the struggle for religious liberty throughout the world easier. From now on every libertarian can cite an official Catholic pronouncement endorsing the principle of liberty.”¹⁴

Perhaps, but Blanshard missed the other declaration of liberty, on which *Dignitatis Humanae* was strikingly unequivocal: “The freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”¹⁵ *Dignitatis Humanae* continued in this vein: “In human society and in the face of government the Church claims freedom for herself in her character as a spiritual authority, established by Christ the Lord”¹⁶ *Unlike every other group or association*, the Church is a foundation, an association founded directly by Christ and possessed of the unique rights with which He endowed it. Those rights are summed up in the principle of the *Libertas ecclesiae*, as it is called, the fundamental principle governing the relations between the Church and all other groups and individuals. This principle guarantees the freedom of operation, so to speak, of the internal life of the Church, which includes teaching through schools, works of charity through hospitals and such, celebration of the sacraments, preaching of the Word to the faithful, and the hierarchy’s governance of the Church herself.

¹³ POPE PAUL VI, DECLARATION ON RELIGIOUS FREEDOM *DIGNITATIS HUMANAЕ* ¶ 3 (1965) [hereinafter *DIGNITATIS HUMANAЕ*], available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

¹⁴ PAUL BLANSHARD, PAUL BLANSHARD ON VATICAN II 89 (1966).

¹⁵ *DIGNITATIS HUMANAЕ*, *supra* note 13, ¶ 13.

¹⁶ *Id.*

The liberty of the Church is not exhausted, however, by these internal aspects for which she claims immunity from all outside influence. No, there is this further claim as well, here in the words of the Second Vatican Council, also in *Dignitatis Humanae*: “The Church also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith.”¹⁷ Those precepts include, naturally, the natural moral law. According to the Second Vatican Council in its Constitution on the Church in the Modern World, *Gaudium et Spes*: “Laymen should also know that it is generally the function of their well-formed Christian conscience to see that the divine law is inscribed in the life of the earthly city.”¹⁸ The Dogmatic Constitution on the Church, *Lumen Gentium*, teaches similarly: The layman is closely involved in “temporal affairs” of every sort—it is therefore his “special task” to illuminate and organize these affairs in such a way that they may always start out, develop, and persist “according to Christ to the praise of the Creator and the Redeemer.”¹⁹

In carrying out this work in the world, moreover, the laity are to be guided by the teachings of the Church. This is the domain of Catholic social doctrine, and its claim is impressive, as John Courtney Murray elaborates:

It is our faith that the sacred things of God—not merely the sacred things of the suprapolitical order (the Word, the sacraments, the Christian law) but also the sacredness inherent in human life—have been committed to the protection of a *potestas sacra* resident in the Church. . . . This sacred power is itself freedom’s strong defense. Founded on the rights of God, it is the last bulwark of the rights of man. Hence the Church asserts her freedom in the use of this sacred power—her

¹⁷ *Id.*

¹⁸ PAUL VI, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *GAUDIUM ET SPES* ¶ 43 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

¹⁹ PAUL VI, DOGMATIC CONSTITUTION ON THE CHURCH *LUMEN GENTIUM* ¶ 31 (1964), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html.

freedom, in the case, to enter the political order, there to set the protecting armature of her power about those things which must be kept sacred, if man is to be free.²⁰

This the Church does, in large measure, by the lay faithful's impressing upon the social order the truth about man and about the Church, each as the Church teaches—which is not to suggest that the Church's teaching is exhaustive or all of it possessed of the same level of authority. The Church asserts its freedom above all by informing the consciences of its members and sending them forth into civil society with a moral mandate and, of course, the counsel of prudence.

To sum up my first point, Vischer contends that “[c]onscience, by its very nature, directs our gaze outward, to sources of formation, to communities of discernment, and to venues for expression.”²¹ Vischer also anticipates—and commends—“a marketplace in which moral convictions are allowed to operate and compete without invoking the trump of state power.”²² While Vischer's wish to rule out “the trump of state power” is repeatedly and variously stated throughout the book,²³ his wish to rule out the “trump” of the Church remains unstated. The Church's social doctrine does not teach that the Church should trump by force, only that the Church has by divine right a unique place in forming the consciences of the faithful and by that route impressing the natural moral law on the social order, a “trump” of a different sort, if one wishes to speak in terms of tricks. In the eyes of Catholic social doctrine, “deviant”²⁴ associations—if by deviant we mean associations whose aims and/or practices violate the moral law—do not have *rights* against legitimate “centralized authority,”²⁵ though it may of course sometimes be prudent for that ruling authority to let them alone.

One way by which the faithful can succeed in shaping the social order along the lines sketched by Catholic social doctrine is, to be sure, through the formation, maintenance, and reformation of the associations and groups Vischer commends.

²⁰ John Courtney Murray, *Paul Blanshard and the New Nativism*, 5 THE MONTH 224–25 (Apr. 1951).

²¹ VISCHER, *supra* note 5, at 4.

²² *Id.* at 5.

²³ *Id.* at 114.

²⁴ *Id.* at 114–15.

²⁵ *Id.* at 106.

There is a risk, though, that in a commendable zeal to reclaim the space between person and state, the state—or what I shall prefer to call the civil or governing authority—will be denied its proper role in civil society. Intriguingly, “state” does not so much as appear in the book’s index. “Person” suffers a similar fate, though perhaps ameliorated by the entry for “personal integrity.” As we have already begun to see, however, Vischer does have a theory of what the state ought—and ought not—to do. Most of his focus is directed against variations on the Hobbesian theme that all governing authority is held at the top, unless and until it is dolloped out. This is a worthy target, to be sure, and I would not wish to misrepresent Vischer as holding the view that the central governing does not sometimes have a decisive role to play. “For example,” Vischer writes, “in today’s market economies, subsidiarity clearly contemplates effective labor unions and a vigorous antitrust enforcement regime, both of which require legislative action and oversight by a central government authority.”²⁶ I suspect, however, that there is more to be said on behalf of the civil ruling authority than Vischer has been willing to allow. I can only offer a few indicators here, as I turn to the second pole of Vischer’s study.

The common good provides Vischer’s principle criterion for defining the role of the “state” or central governing authority. What then does Vischer mean by the “common good?” Here is his programmatic approach to his second pole:

The common good does not lend itself to easy definition . . . but five different perspectives [subsidiarity, sphere sovereignty, organic solidarity, the moral marketplace, and cultural cognition] informed by philosophy, theology, and sociology help fill out its content and clarify its connection with conscience. All five aim to justify the decentralization of social power, including moral authority.²⁷

For purposes of saying what the common good is, Vischer has hand-selected a list of five “perspectives” that “[a]ll . . . aim” to justify decentralizing the governing authority.²⁸ Why would this be a promising heuristic for discovering *the common good*? Again, the term has a set of historically attested meanings, some of which are mutually inconsistent. What is the justification,

²⁶ *Id.* at 106.

²⁷ *Id.* at 104.

²⁸ *Id.*

however, for taking up the topic of the common good by working out the implications of principles of decentralization? Must we not begin by attending to the implications of claim that there are *goods*, some of which are truly *common*, and which may therefore require the work of the *common* governing authority? Are there not goods that are potentially common to *all* groups within civil society? Or is the commonality of goods largely limited to associations within civil society? Vischer seems to hold the latter view, but on what ground?

I do not wish to understate the analytical difficulties involved in giving an account of the common good, but I do wish to highlight the ways in which Vischer is generally not talking about the same thing the Catholic tradition has talked about in terms of the common good. The disconnect is not complete, but it comes pretty close to comparing apples and oranges, rather than the aforementioned Fujis and Granny Smiths. Is systematic distortion not the assured result when the concept of the common good is deployed in a world stripped of goods that are truly common—and not just to subsets of civil society? When inquiring into goods, including the common good, do we not need to recall that the good is that which perfects something as an end?

The traditional concept of the common good leads to a role for the state that is far more robust than the one Vischer prefers. In connection with formulating his classic definition of law, St. Thomas Aquinas notes that the common good is made up of many things—*constat ex multis*—including “justice, virtue, peace, tranquility, friendship, communication, and communion.”²⁹ These are the objects and aims of law because, as St. Thomas says in part of that classic definition, law just is an ordinance of reason for the *common good*, and promulgated by him or them that have authority over the political community.³⁰ There is, moreover, a priority among the elements of the common good. “It seems clear,” as Clifford Kossel, a contemporary commentator on Aquinas explains, “that good order of the community, which results in peace and tranquility, is the first aim of human law. It is foundational; without it, people cannot live together.”³¹

²⁹ Clifford G. Kossel, *Natural Law and Human Law*, in *THE ETHICS OF AQUINAS* 169, 178 (Stephen J. Pope ed., 2002).

³⁰ *Id.*

³¹ *Id.*

Can Vischer abide this role for the governing authority? On the one hand, he writes:

The state's self-restraint helps ensure that the common good is not defined and imposed from above as either a uniform, fixed norm or as an idiosyncratic product of office-holders' own moral claims, but is instead realized from the bottom up, constituted by the conscience-driven decisions and day-to-day actions of individuals and the communities to which they belong.³²

He then adds: "The state's self-restraint cannot be absolute, of course, for the common good requires a level of social justice and order that only state authority can ensure."³³

Why have the scales been weighted in favor of a minimalist state and against the conditions of multiple common goods? If we are truly concerned about the common good, must we not also ask—starting from the requirements of order and tranquility, and moving out from those to other common goods—what governing acts are required or desirable if the elements of the common good are to be achieved? I see no reason to assume that goods common to civil society will be achieved by groups, and their members, doing their own thing. There is no *necessary* objection to laws for the common good being promulgated "from above"³⁴ and no *necessary* reason to suppose that office holders will be any more or less idiosyncratic than those souls that put them into office. Kossel continues:

[The common good of order] may require many sets of laws to order the various functional groups working for the common good. (Ia IIae, q. 95, a. 4). The main requirement for such laws is that they be just; especially they must observe distributive justice by an equitable sharing of the burdens and rewards of social life among the citizens according to function and merit.³⁵

And these—a just peace, order, and tranquility—while good in themselves, also serve the further ends of the growth of the other common goods that are virtue and friendship. All of these are shared goods, for which the governing authority is responsible and that are to be achieved, when necessary and as appropriate, through laws that only the governing authority can enact.

³² VISCHER, *supra* note 5, at 103.

³³ *Id.*

³⁴ *Id.*

³⁵ Kossel, *supra* note 29 (citations omitted).

Catholic social doctrine follows Aquinas and others in resisting the anarchist notion that “the state governs best that governs least.” As James Coleman has explained, summarizing a hundred years of the tradition descending from Leo XIII:

Catholic social theory . . . does not denude the state of essential authority. Rather the state represents the highest, indispensable, and most responsible agency for determining the common good Against liberalism Catholic social teaching holds governments responsible for the well-being of society. The Catholic concept of a “common good,” which is something *structural* and more than the mere additive summation of individual goods, militates against the nightwatchman state of classical liberalism.³⁶

Catholic social theory does indeed also teach the relative autonomy of intermediate groups and the value of plural social forms and the correlative pluralism of authorities. Catholic social doctrine does not, however, weight the scales in favor of smallness. As Coleman explains,

[t]his principle of the autonomy of intermediate groups needs to be juxtaposed against a no-less-strong counter-principle of state authority; that is, wherever the welfare of a community requires concerted common action, the unity of that common action must be assured by the state. “No bigger than necessary” has as its corollary “as big as needed to achieve the common good.”³⁷

These normative claims cannot, I think, be squared with the following descriptive but verging-on-normative claim by Vischer that “[t]oday, the separation between the state’s judgment and the citizenry’s well-being is uncontroversial.”³⁸

The Church through her social doctrine wishes to controvert any such separation, insisting instead that the governing authority’s role involves discerning and implementing the requirements of the common good. Vischer does, predictably, license the state to use its “coercive power” for the purposes of preventing “actionable ‘harm’ or illegitimate market interference.”³⁹ As one makes one’s way through the chapters of *Conscience and the Common Good*, though, one discovers that

³⁶ John A. Coleman, *Neither Liberal nor Socialist: The Originality of Catholic Social Teaching*, in ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT 25, 37 (John A. Coleman ed., 1991).

³⁷ *Id.* at 38.

³⁸ VISCHER, *supra* note 5, at 118.

³⁹ *Id.* at 119.

what is missing above all is any sense that the principal reason for an individual's subordination to civil society and its governing authority is not an individual's personal fulfillment, including protection from "harm" by others or even antitrust violations. The excellent reason for that subordination is, rather, that the principal objects of an individual's fulfillment are themselves essentially common goods, such as the good of civic friendship.

For all this, though, I would not wish to leave the impression, at least not yet, that I suspect Vischer of being a wolf in the sheep's clothing of bottom-up localism and the autonomy of groups to take non-harm causing actions. Vischer's concerns are timely, even if some of the proposed solutions are, in my estimation, overdrawn. If the governing authority proves itself to be incapable of identifying and acting on behalf of the common good, as some believe is the case today, the subordination which would ordinarily be a good may turn out to be a rotten apple. Meanwhile, however, it remains for the people not to shut down the state and send Congress home but instead to elect representatives who will govern so as to impose the requirements of the common moral order on civil society.

Will our elected officials do as much? Perhaps, if they have creditable reason to believe that the members of civil society will hold them to account when they fail in that task. Will *we* hold them to account? "The State," as Jacques Maritain explained, "is the particular agency which specializes in matters dealing with the common good of the body politic, . . . but the state is a part, not a whole, . . . being a part in the service of the people, it must be controlled by the people."⁴⁰ Maritain continues:

[W]hen the people confer authority on their rulers, while retaining through their elected representatives a serious control over them, they give to them something—a *right*,—of which they are not themselves either the author or the principle; for every right is, as such, founded on the universal order which God had in view [including truly common goods].⁴¹

The true wolf in sheep's clothing is a populace that has lost its desire for truly common goods.

⁴⁰ JACQUES MARITAIN, MAN AND THE STATE 202 (Catholic University of America Press 1998) (1951).

⁴¹ JACQUES MARITAIN, ON THE CHURCH OF CHRIST: THE PERSON OF THE CHURCH AND HER PERSONNEL 63 (Joseph W. Evans trans., 1973).