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BOOK REVIEW SYMPOSIUM

CONSCIENCE AND THE COMMON GOOD: AN INTRODUCTION

ROBERT K. VISCHER[†]

Americans justifiably cherish the liberty of conscience as an essential limitation on state power, but our longstanding commitment to conscience has proven to be little help in resolving an expanding range of conscience claims. Increasingly, the individual who invokes conscience is opposed not by the state but by the similarly conscience-driven claims of other individuals and groups. As a bulwark against state power, a robust right of conscience is indispensable. As a trump card that empowers individuals to shut down the moral claims of other marketplace actors, a right of conscience becomes significantly more problematic.

Consider the case of Elane Photography, a flash point in the emerging battle over conscience that erupted from a simple email exchange.¹ Vanessa Willock contacted Elane Photography, a husband-and-wife photo agency in Albuquerque, New Mexico, to inquire about photographing her same-sex commitment ceremony. Co-owner Elaine Huguenin emailed back: “We do not photograph same-sex weddings. But thanks for checking out our

[†] Professor of Law and Associate Dean for Academic Affairs, University of St. Thomas Law School (Minnesota). This Essay is taken in significant part from ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010). The Essay was presented in conjunction with a panel discussion of the book held in November 2009 at the University of Notre Dame as part of the Center for Ethics and Culture’s annual fall conference.

¹ *Willock v. Elane Photography, LLC*, No. 06-12-20-0685 (N.M. Hum. Rts. Commission Apr. 9, 2008), available at <http://volokh.com/files/willockopinion.pdf>, *aff’d*, *Elane Photography, LLC v. Willock*, No. D-202-CV-200806632 (N.M. Dist. Ct. Dec. 16, 2009), available at <http://www.telladf.org/userdocs/ElanePhotoOrder.pdf>.

site!”² Willock filed a complaint with the state human rights commission, alleging a violation of the state’s public accommodations law, which covers sexual orientation. At the hearing, Willock testified that the email “was a shock” and caused her “anger and fear.”³ Jonathan Huguenin explained at the hearing that they made sure that “everything that we photographed—everything we used our artistic ability for”—was in line with their Christian values.⁴ The commission rejected the photographers’ constitutional claims, found that they unlawfully discriminated on the basis of sexual orientation, and ordered them to pay attorney’s fees of nearly \$7,000 to Willock.

Unlike the conscience cases pitting the individual against the state—for example, disputes over conscientious objectors to the military draft⁵ or Jehovah’s Witness students forced to pledge allegiance to the flag⁶—both sides in the Elane Photography case can wrap themselves in the mantle of conscience. Willock acted on her belief in the moral legitimacy of same-sex relationships by seeking to solemnize her commitment with the same celebratory trappings that have long been part of traditional marriage ceremonies. The Huguenins acted on their belief in the immorality of same-sex relationships by refusing to participate in the celebration of such a relationship. While Willock’s critics argue that liberty of conscience should not be interpreted as empowering individuals to force others to assist their morally contested projects, the Huguenins’ critics argue that liberty of conscience should not be interpreted as a license for marketplace providers to define their professional duties so as to discriminate against members of historically marginalized groups.

New Mexico law unjustifiably allowed Willock’s conscience to trump the Huguenins’ consciences. Granting an unfettered right of conscience to the Huguenins would have similarly cast conscience as a trump card, a conversation-stopper. Under either outcome, conflicting claims of conscience become winner-take-all contests for state power. An observer could not be blamed for concluding that the right of conscience is morphing from a

² Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three Act Story*, NPR (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91486340>.

³ *Id.*

⁴ *Id.*

⁵ *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 164–65 (1965).

⁶ *See, e.g.*, *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

bulwark against government encroachment into a more broadly enforceable right to individual autonomy.

To get a firmer grasp on conscience, we need to reclaim a dimension of the term that is discernible from its earliest usage: Conscience is a set of moral truth claims that can be shared with others. Though the concept of conscience as shared knowledge has often been lost amid the individualist clamor of American “rights talk,” it remains easy to discern. The dictates of conscience are defined, articulated, and lived out in relationship with others. Our consciences are shaped externally; our moral convictions have sources, and our sense of self comes into relief through interaction with others. By conveying my perception of reality’s normative implications, my conscience makes truth claims that possess authority over conduct—both my own and the conduct of those who share, or come to share, my perception. Conscience, by its very nature, connects a person to something bigger than herself, not only because we form our moral convictions through interaction with the world around us, but also because we invest those convictions with real-world authority in ways that are accessible, if not agreeable, to others. This is the relational dimension of conscience. My new book, *Conscience and the Common Good*,⁷ attempts to explain this relational dimension and trace its implications for our most pressing debates about conscience.

Put simply, my central claim is that, if our society is serious about freedom of conscience, we must also be serious about cultivating and maintaining the conditions necessary for morally expressive and formative relationships to thrive. The problem today is that the state, in *Elane Photography*⁸ and other cases, pays insufficient heed to these relationships, effectively giving the individual customer’s conscience a trump over the provider’s conscience through the imposition of broad nondiscrimination laws. Increasingly, such laws appear aimed not simply at ensuring access to an essential good or service but at enshrining

⁷ ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010).

⁸ *Willock v. Elane Photography, LLC*, No. 06-12-20-0685 (N.M. Hum. Rts. Commission Apr. 9, 2008), available at <http://volokh.com/files/willockopinion.pdf>, *aff’d*, *Elane Photography, LLC v. Willock*, No. D-202-CV-200806632 (N.M. Dist. Ct. Dec. 16, 2009), available at <http://www.telladf.org/userdocs/ElanePhotoOrder.pdf>.

nondiscrimination as a blanket requirement for providers' participation in the marketplace.

Too often, however, the response of those concerned with the erosion of providers' liberty is to champion the recognition of a blanket right of conscience on their behalf. They ask the law to immunize an individual provider's conscience-driven marketplace conduct from state penalty or employer reprisal. If an individual employee of a provider has the unfettered legal right to make her own decisions about the morally contested goods and services she will provide, it becomes more difficult for institutions to create and maintain their own distinct moral identities.⁹ A vibrant liberty of conscience requires morally distinct institutions, not just morally autonomous individuals.

Morally distinct photo agencies presume a degree of institutional authority over dissenting employees. If individuals are the only actors legally empowered to stake out distinct moral identities, we are left with a morally homogenous landscape of institutional providers, which in turn damages the cause of conscience by making it more difficult for individuals to gather in venues for the mutual formation, articulation, and living out of shared moral commitments. Individualized conceptions of conscience—whether espoused by the consumer or the provider—do not hold much promise for resolving the new wave of conscience battles because they overlook the relationships that are key to conscience's long-term flourishing.

The state would more prudently support the liberty of conscience by stepping back from the winner-take-all language of rights talk and allowing Vanessa Willock and the Huguenins to live out their convictions in the marketplace. Assuming that other wedding photographers are willing and able to shoot a same-sex commitment ceremony, the state should leave the Huguenins to answer to the consumer, not the state, and allow consumers to utilize market power to contest or embrace the moral norms of their choosing. Rather than making all photography agencies morally fungible via state edict, the market allows the flourishing of plural moral norms in the provision of these services. Individual consciences can thrive through overlapping webs of morality-driven associations and

⁹ See, e.g., Rob Stein, "Pro-Life" Drugstores Market Beliefs, WASH. POST, June 16, 2008, at A1 (noting rise of pro-life pharmacies).

allegiances, even while diametrically opposed consciences similarly thrive. At the same time, if the Huguenins cannot find market support for their agency's moral claims, they would not have the right to force other agencies to hire them and accommodate their claims of conscience. They should have the freedom to create an economically viable agency with a distinct moral identity; they should not have the authority to hinder the cultivation of another agency's conflicting moral identity.

Wedding photographers, obviously, play a very small role in today's conscience battles. Participants in an exploding array of debates over the provision of goods and services in our society tend to invoke conscience as a freestanding, absolute value without acknowledging—much less articulating—the real-world relationships and associational ties that empower individuals to live out the dictates of conscience. Pharmacists in many states have claimed a right of conscience to refuse to dispense any pharmaceutical to which they object morally—typically abortifacients, contraceptives, or anti-depressants—without fear of losing their jobs. At the same time, pharmacy customers have argued that their own rights of conscience entitle them to receive any legal pharmaceutical at any licensed pharmacy “without delay, without hassle and without a lecture.”¹⁰ Many states have enshrined one side or the other's claim into their laws. Consumer-provider conscience battles have also erupted, for example, over a Christian physician's refusal to provide reproductive assistance to a patient because she is not married¹¹ and Muslim taxi drivers' refusal to transport passengers carrying alcohol.¹²

Other legal challenges have taken aim more directly at an organization's moral identity, particularly its religious identity, based on perceived threats to the consciences of individual employees or customers. E-Harmony, a leading dating website founded by an evangelical Christian, was forced via litigation to

¹⁰ Press Release, State of Ill. Dep't of Fin. and Prof'l Regulation, Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005) (quoted in <http://www.freerepublic.com/focus/f-news/1386987/posts>).

¹¹ *Benetiz v. N. Coast Women's Care Med. Group, Inc.*, 131 CAL. 2d 364 (2003).

¹² John Reinan, *Taxi Proposal Gets Sharp Response*, STAR TRIB. (Minn.) (Feb. 27, 2007 8:25 PM), <http://www.startribune.com/local/11586646.html>.

begin offering matchmaking services for same-sex relationships.¹³ In the same vein, state universities have revoked recognition of Christian student groups that exclude non-Christians;¹⁴ state legislatures in California and New York have forced Catholic Charities to cover the cost of contraceptives for employees;¹⁵ and the Massachusetts legislature required Catholic Charities to place children with same-sex couples as a condition of maintaining its license to perform adoption services, leading to the group's decision to terminate the services.¹⁶ The modern inclination is to presume that the cause of conscience is represented by the individuals whose own exercise of conscience may be burdened by an organization's distinctive moral identity. Little attention is paid to the conscience-facilitating function of the organizations themselves.

The current trend stems, at least in part, from a failure to distinguish the common good from the collective good. References to "the common good" may have achieved a new ubiquity in the 2008 presidential election,¹⁷ but their traces stretch as far back as Aristotle. Today's invocations are often unhelpfully vacuous, but Aristotle got to the heart of the matter

¹³ Elizabeth Holmes, *EHarmony's Same Sex Dating Site Launches*, WALL ST. J. BLOGS (Mar. 31, 2009, 12:01 AM), <http://blogs.wsj.com/digits/2009/03/31/eharmonys-same-sex-dating-site-launches/>.

¹⁴ See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

¹⁵ See *Catholic Charities of Sacramento v. Superior Ct.*, 85 P.3d 67 (Cal. 2004) (upholding California law); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 7 N.Y.3d 510 (2006) (upholding New York law).

¹⁶ See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

¹⁷ See, e.g., Barack Obama, President of the U.S., Inauguration Address (Jan. 20, 2009), available at <http://www.whitehouse.gov/blog/inaugural-address/> ("The success of our economy has always depended not just on the size of our gross domestic product, but on the reach of our prosperity; on the ability to extend opportunity to every willing heart—not out of charity, but because it is the surest route to our common good."); Thomas L. Friedman, Op-Ed., *Finishing Our Work*, N.Y. TIMES, Nov. 5, 2008, at A35 ("[Obama] will only succeed if he is able to articulate a new politics of the common good.") (quoting Harvard professor Michael Sandel) (internal quotation marks omitted); Jane Lampman, *'08 Race Has Got Religion. Is that good?*, CHRISTIAN SCI. MON., May 28, 2008, at 1 ("The voters care more about the common good than the culture wars.") (quoting Rev. Jennifer Butler of Faith in Public Life, the group that sponsored the Compassion Forum debate between presidential candidates); Jon Meachem, *The Editor's Desk*, NEWSWEEK, Apr. 14, 2008, at 4 ("Politics being politics, big reforms requiring economic sacrifice and devotion to the common good are not easy to accomplish . . ."); *Larry King Live* (CNN television broadcast Feb. 13, 2008) ("We are going to be able to win . . . on an appeal to the common good.") (remarks of Democratic strategist David Wilhelm).

by linking social welfare with the possibility of conflicting values—a nascent embrace of value pluralism. In contrast to Plato, who attempted to eliminate potential grounds of conflict such as private property and exclusive sexual relations, Aristotle defended the importance of interpersonal bonds. In Martha Nussbaum's words, Aristotle saw in the "good city" that the "contingent conflict of values is . . . a condition of the richness and vigor of civic life itself."¹⁸ Particular bonds and loyalties among citizens provide civic life with "sources of motivation and concern that could be found in no other way."¹⁹ Put simply, "personal separateness" is "an essential ingredient of human social goodness."²⁰

The state, as society's only legitimate purveyor of coercive force, must act with deference toward the dimension of the common good that is not defined by the collective will. This is why it is so important that the state recognize and respect the rights needed to protect the human person from overbearing state incursions on both individual and *associational* autonomy. 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.

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. But the exercise of state authority must be premised on a vision of society that is not always apparent in today's debates about conscience. The liberty of conscience presumes a meaningful degree of state self-restraint.

Viewed from the perspective of the common good, state deference to conscience does not simply represent a laissez-faire judgment that individual liberty should be maximized for its own sake. A robust liberty of conscience actually bolsters the type of decentralized social bonding that has been lauded as a hallmark of American life; there is a close relationship between social

¹⁸ MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 353 (rev. ed. 2001).

¹⁹ *Id.*

²⁰ *Id.*

health and the maintenance of a robust web of nongovernmental, freely chosen human associations known as “civil society.” Associations formed via the impetus of conscience possess an independent normative authority, empowering citizens through a shared sense of identity, purpose, and meaning to participate in projects that are bigger than themselves.

My book’s portrayal of the common good requires us to step back from our dominant rights-driven political theory—today shaped in significant part by the work of John Rawls²¹—in which persons are conceived of as “free and independent selves, unencumbered by moral or civic ties they have not chosen.”²² To an extent, this entire book seeks to answer questions posed by Michael Sandel in his own efforts to push back against rights-oriented liberalism with insights gleaned from the republican tradition: “How might our political discourse engage rather than avoid the moral and religious convictions people bring to the public realm? And how might the public life of a pluralist society cultivate in citizens the expansive self-understandings that civic engagement requires?”²³ Sandel may not agree with all of my conclusions, but we start with similar concerns, as do other writers, such as Charles Taylor, Michael Walzer, and Alasdair MacIntyre, who frequently bear the “communitarian” label.²⁴ Indeed, conscience’s relational dimension can be understood as a lens through which to bring our citizens’ “expansive self-understandings” into clearer focus. It is the self-transcendence of our myriad moral claims that, when given social space to flourish, contributes powerfully to the common good.

The relationship between the common good and the freedom of associations does not seem to resonate as strongly in our society as it once did. Exhibit A offered by advocates for more aggressive state action in this area is the Civil Rights Act of 1964, which prohibits discrimination based on race, among other

²¹ See generally JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM (1993).

²² MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 6 (1996).

²³ *Id.* at 7.

²⁴ Challenging the depiction of a person as a “free and independent self” is a common theme of these writers, but my engagement with their work does not rely on the “communitarian” label, both because their work fits uneasily within any unified characterization, and because they themselves have expressed discomfort with the label.

grounds, by employers and places of public accommodation, including restaurants and hotels.²⁵ If the relational dimension of conscience demands that we allow individuals to express and live out their moral convictions in the marketplace, permitting them to appeal to like-minded citizens in an ongoing contest over the common good, the Civil Rights Act is a troubling case. It can be read as having short-circuited the “bottom up” conversation over the good, imposing a collective vision of racial equality on public and private actors alike.

Nevertheless, today the Civil Rights Act is rightfully praised as a vital measure by which America’s aspirational ideals became more closely aligned with its reality, and its success has emboldened subsequent advocates of social justice to embrace a top-down approach to our nation’s moral contests. Extrapolating from the Jim Crow South to today’s “culture war” landscape is tricky business, though. Three questions are central to the inquiry.

First, what is the cost of maintaining space in which divergent claims of conscience can operate freely? If the government proposes to shut down the moral marketplace and enshrine one set of claims as binding law, there should have been a deliberate judgment that the continued viability of the dissenting claims exacts too great a cost on the common good. For example, prohibiting discrimination in employment or housing are vastly different propositions than prohibiting discrimination by a Christian fraternity.²⁶ A business owner whose moral convictions lead him to employ only whites—or men, heterosexuals, etcetera—threatens the excluded individuals’ ability to function in society by foreclosing economic opportunity. While there is a job market, determining access to employment is more difficult than determining access to goods and services. It is relatively easy to determine the policy of every pharmacy in town regarding the sale of the morning-after pill, for example, and an individualized inquiry of the affected customer is unnecessary. One can only speculate as to whether a job

²⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000a, 2000e-2 (2006).

²⁶ See Jon Sanders, *Taste—Houses of Worship: The College Code*, WALL ST. J., Aug. 27, 2004, at W13 (reporting on the University of North Carolina’s decision to revoke recognition of a Christian fraternity for refusing to open membership to non-Christians).

applicant who was discriminated against by one employer would have found comparable employment elsewhere, and the inquiry will be highly individualized, encompassing many different factors, including the applicant's qualifications and interests, the overlap in timing between the applicant's search and available openings, and the respective compensation and benefit packages associated with those openings. Given the centrality of employment to a person's ability to function in society and the difficulty in implementing a nondiscrimination framework triggered on access, the state is justified in enforcing nondiscrimination norms against employers.²⁷

There is also a housing market, but it is not enough that a person has access to a house; for access to be meaningful, there needs to be a meaningful choice of homes and locations. Economic reality and covert discrimination already limit meaningful access, but permitting overt discrimination could quickly worsen the patterns of segregation that already consign historically marginalized minorities to neighborhoods that exacerbate their marginalization. As such, the state prudently excludes certain marginalizing traits of prospective tenants/buyers from the landlord/seller's legitimate consideration. This dynamic is not present in the market for roughly fungible goods and services.

The schooling of our children is a thornier example: on one hand, the education of a child is inexorably linked to economic and political participation as an adult; on the other hand, educational choices are powerful expressions of conscience. Provided that exclusionary private schools do not take on a de facto public identity or crowd out viable non-exclusionary schooling alternatives in a particular community, however, a government mandate of equal access to all private schools is too steep a price to pay in terms of conscience.

Whether or not one agrees with my conclusions about the wisdom of applying nondiscrimination law in these areas, the point is that these are the sorts of observations and arguments that lawmakers should be offering, not simply sweeping rhetoric about the value of equality. The limits of conscience should not

²⁷ Allowing religious organizations to consider religion in hiring is important to the relational dimension of conscience. Religion-based hiring exemptions do not stack the deck in favor of religion but simply give religious organizations the same ability to pursue their missions that secular organizations enjoy.

be defined categorically. Lawmakers should not shut down the moral marketplace by deciding that its continued operation is not worthy of their respect; they should determine that its operation is incompatible with securing goods that are foundational to participation in our society.

Second, what sort of conscience-driven conversation has preceded the law's intervention? Our nation struggled with the question of race for centuries before the legal system made a concerted effort to make racial equality a reality. By comparison, a serious conversation on society's treatment of gays and lesbians has only arisen in the last forty years, and the narrower question of extending marriage to same-sex couples reached the headlines only in the past decade or so. A requirement that employers offer the same benefits to same-sex partners of employees as those offered to spouses looks different in 2011 than in 1999. This is not to minimize potential or perceived hardships as the law waits for the social conversation to unfold; rather, the point is that the space required for dissenting claims of conscience to operate may change over time. Gauging the appropriate level of deference to conscience is not a popularity contest, but the degree of deference is a function, in part, of the opportunity for majority-defying ideas to be lived out in the marketplace. Political actors will disagree about how long the marketplace conversation should be permitted to proceed; my point is simply that the inquiry preceding state intervention should encompass not just questions of *how* and *why*, but *when*.

Third, does the proposed legal intervention secure the foundational premises of the common good while minimizing the coercive impact on conscience? In other words, is the intervention narrowly tailored to achieving the foundational good? It is difficult to imagine how the Civil Rights Act could have accomplished its objective—the dismantling of Jim Crow—without such an aggressive stance. Back in 1944, Sterling Brown had explained that, “however segregation may be rationalized, it is essentially the denial of belonging.”²⁸ To be clear, “belonging” as an abstract legal right is dangerous. Conscience draws individuals into associations grounded on shared commitments, and the vitality of conscience thus presumes the power to

²⁸ James C. Cobb, *Brown and Belonging*, in *THE BROWN DECISION, JIM CROW AND SOUTHERN IDENTITY* 56, 57 (2005) (internal quotation marks omitted).

exclude. The wisdom of granting a legal entitlement to “belong” depends on the object of the “belonging.” Economic, political, and educational opportunities are non-negotiable building blocks for participation in American society. The Civil Rights Act went far beyond these, targeting theaters, restaurants, and hotels. But context is key. In the 1960s, African-Americans in the South faced a society that was hard-wired for their subjugation and exclusion. As Risa Goluboff explains, “Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.”²⁹

Moreover, in terms of the moral contest over integration and racial equality, the marketplace was not functional in any meaningful sense. Voluntary integration was practically impossible because, as the head of the Georgia Council on Human Relations explained, “[n]o one wants to be a martyr or a hero. Everyone wants to make his dollar without disturbance.”³⁰ Even apart from moral claims, bottom-line considerations kept business owners from breaking ranks. As a Mississippi district attorney later commented, “The Civil Rights Act is probably the best thing that ever happened to the South” because “[i]t took us over what was inevitably coming, and it was going to come by violence or bloodshed.”³¹ It was practically impossible to narrowly target employment discrimination in the Jim Crow South because that was just one element of a tightly woven social web of segregation. More precisely tailored legal intervention is possible—and indeed, prudent—in nearly all of the hot-button moral debates today.

Our concern for conscience must derive not simply from our commitment to honor the freedom of individual citizens but from our belief that individuals are most likely to flourish in a certain type of society, one that is oriented to the common good through the operation of a vibrant marketplace of moral ideals and norms. It is not that associations will cease existing when the state begins regulating the moral claims that they make upon

²⁹ RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 7 (2007).

³⁰ JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975*, at 192 (2006) (quoting Frances Pauley) (internal quotation marks omitted).

³¹ *Id.* at 195 (quoting Jesse Boyce Holleman) (internal quotation marks omitted).

and through their members, but they will cease serving their key social function. Michael Walzer observes that “no group life of intensity and value is possible if members of the various groups are repeatedly driven into what must seem to them morally degrading performances.”³² The embrace of moral pluralism—not only vis-à-vis individuals but also vis-à-vis the groups to which they commit themselves—is a foundational genius of American society. We must continue to reject the notion, as Walzer puts it, that the “only obligations on which a democracy rests, and which its citizens ought to respect, are obligations to itself.”³³

Nevertheless, freedom for Elane Photography may still appear to have a tenuous relationship with the common good. At a minimum, it is safe to say that state-coerced photography in violation of conscience elicits nowhere near the amount of public sympathy as does state-coerced military combat or the pledge of allegiance to the flag. The Huguenins appear, to many, to be misguided zealots who should seek another line of work or, at best, unfortunate but unavoidable casualties in the noble struggle for human equality. As noted civil rights scholar—and current member of the Equal Employment Opportunity Commission—Chai Feldblum remarked at the time, “[I]f you run a wedding photography service, even if you don’t like the fact that those two ex-gays are getting married, you’d better have someone on your staff who will take those pictures.”³⁴

Such responses derive from a superficial conception of conscience, one that lacks the depth and breadth of conscience’s relational dimension. Suggesting that the Huguenins can honor their consciences by keeping their moral beliefs out of the marketplace ignores the external orientation of conscience, discernible from its earliest invocations as moral belief *applied* to conduct. Respecting conscience as an internalized set of beliefs does not authentically respect conscience.

Similarly short sighted is the idea that the Huguenins can avoid the problem by hiring an employee who is willing to shoot events that their own moral convictions do not permit them to shoot. This approach solves nothing unless we conceive of

³² MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 140 (1970).

³³ *Id.*

³⁴ *Talk of the Nation: Gay Rights Law Faces Legal, Religious Challenges* (NPR radio broadcast June 16, 2008) (quoting Chai Feldblum).

conscience in individualist terms, as though its claims apply to my own conduct and no further. In reality, conscience refers, literally, to shared moral belief, and while not every claim of conscience will actually be shared, such claims are, by their nature, susceptible to sharing. As such, the Huguenins' resistance to offering, through creative hiring, a "full service" photography agency is not an imperialist expansion of conscience's interior domain; it is a natural outgrowth of conscience's relational dimension. Institutions do not possess a conscience in any real sense, but they do embody distinct moral identities that are shaped by their constituents' consciences. When we preclude the cultivation and maintenance of such institutional identities, it is not just moral pluralism that suffers; it is the cause of conscience itself.

If we care about conscience, we have to care about the Huguenins—in particular, about the state's punishment of their refusal to photograph an event they find immoral. But in our rights-soaked legal culture, it is easy to choose sides against the state; less so against Vanessa Willock. We must remember, though, that Vanessa Willock has become a functional stand-in for the state. It is one thing for Willock's supporters to target the hearts, minds, and wallets of their fellow citizens through advocacy, protests, and boycotts; it is quite another to bring state power down on the heads of those who have aggrieved them. In the short term, the state can vindicate the conviction that gays and lesbians should enjoy the same treatment as heterosexuals in their attempt to secure goods and services in the marketplace. In the long term, though, even if we applaud a particular moral claim imposed by the state on dissenting consciences, each instance paves the way for an increasingly top-down approach to the common good. Fighting for the reins of state power to determine which vision of the good will prevail in law and which will be vanquished is no substitute for the day-to-day contests over which visions of the good will find support and sustenance among the citizenry, which visions will wither for lack of moral persuasiveness, and which can flourish alongside each other. Conscience, and the relational paths by which it forms the common good, bear a legitimacy founded on human nature. This legitimacy warrants the state's deference but should not require its approval.