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CLAIMS OF CONSCIENCE, CLAIMS OF COMMUNITY

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

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INTRODUCTION

American legal scholarship and political debate have often centered on the clash between individual self-understanding and government power. The right of conscience—to define one’s beliefs and to act on those beliefs in public and private spheres—has classically been understood as presenting a claim against state power. But the law has also recognized instances in which the community can assert claims, including claims of common beliefs, upon the individual desires of its citizens. A dispute then usually gets resolved through either invocation of right as a “trump” which ends the debate, or the state prevails in the name of a basic common good, such as equality, to overrule the individual right. For example, in *Minersville School District v. Gobitis*, the Supreme Court ruled that a statute requiring a public pledge of allegiance was constitutional and enforceable against those whose religious beliefs prohibited them from making the pledge,¹ while in *West Virginia State Board of Education v. Barnette*, the Court reversed itself, finding that requiring such a pledge would violate “individual freedom of mind.”²

In his book, Robert Vischer, a professor at St. Thomas University School of Law, argues that this traditional understanding of how to understand and resolve rights claims is

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¹ 310 U.S. 586, 599–600 (1940), *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

² *Barnette*, 319 U.S. at 637, 642.

becoming less helpful in light of new currents in law and society. His thesis in *Conscience and the Common Good* (“Conscience”) is,

Increasingly, the individual claiming conscience is opposed not by state power, but by the similarly conscience-driven claims of nonstate entities. Few of us would dispute the notion that liberty of conscience is an essential feature of the political order, but that broad consensus has proved to be of little help in resolving an expanding range of disputes involving conscience.³

These disputes range across a variety of disciplines and issues, including whether pharmacies—or individual pharmacists within a pharmacy—can refuse to provide prescriptions of contraceptives, whether voluntary associations can control the composition of their membership, whether a corporation can use its assets to pursue social or ethical values rather than profits, and the internal workings of family relationships. The implications of these new conscience-driven conflicts have been largely unacknowledged in court decisions and legislation. Rather than recognize the “moral marketplace” in which different actors in the public sphere use their conscience to determine their conduct, courts have instead impressed a uniform view based on non-conscience concepts, such as equality, or have resorted simply to the language of individual rights. But this resort to “rights talk”⁴ is generally inapposite, because the central issue in these disputes is no longer whether state power infringes on the exercise of conscience—such as the claims of “conscientious objectors”⁵ to oppose the Vietnam-era military draft⁶—but rather whose conscience claim is recognized by state power, and indeed whether the state should intervene at all.

I. THE MEANING OF CONSCIENCE

But what is conscience? In two early chapters, Vischer explains the development of the notion of conscience in law and, more broadly, in Western thought. Conscience has several characteristics relevant to Vischer’s inquiry: First, it is *relational*—that is, conscience necessarily involves the application of belief that results in action. That belief is itself

³ ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD* 2 (2010).

⁴ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 7–9 (1991).

⁵ *United States v. Seeger*, 380 U.S. 163, 164 (1965).

⁶ See, e.g., *Welsh v. United States*, 398 U.S. 333, 339–40 (1970); *Seeger*, 380 U.S. at 164–65.

based on “moral claims originating outside” of the individual conscience, as Vischer’s analysis of the objector cases of the 1960s and 1970s makes clear.⁷ Because of this relational dimension to conscience, its assertion cannot be simply a “black box” that closes off debate.⁸ The recognition of moral claims that spur decisions based on a conscientious application of those claims should allow for further discussion, analysis, and ultimately judgment.

Further, conscience requires the use of judgment in facts about the world and relies necessarily on external constraints or commands. These need not be religious commands, but nevertheless strongly held beliefs that relate to the world are the root of conscience and allow such claims to be a “path of dialogue” rather than a “path of isolation.”⁹ For the law, that presents a difficulty, because not every action that is conscience driven must be legal; yet the law must nevertheless distinguish among appropriate and inappropriate expressions of conscience.¹⁰ Vischer then spends a chapter tracing both of these characteristics of conscience, through the Patristics, Scholasticism, the Reformation, and the Enlightenment, before arriving at our own time in the development of narratives of identity by Charles Taylor and Alasdair MacIntyre, among others.¹¹ In the Western view, conscience is not fixed or static: It is a “dialogue with the will” that allows us, among other things, to communicate our moral convictions to others in the world; but it also “facilitates personal coherence by bringing . . . everyday decision making into alignment with . . . overarching values and priorities.”¹²

Finally, conscience is related to, but not the same as, religious liberty. The freedom to worship freely is a subset of conscience, but one that naturally has been privileged over other types of conscience—until recently.¹³ The Protestant dissenters who immigrated to the colonies and ultimately founded the

⁷ See VISCHER, *supra* note 3, at 23.

⁸ See *id.* at 22–23.

⁹ See *id.* at 22.

¹⁰ See *id.* at 23.

¹¹ See *id.* at 48–72. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

¹² See VISCHER, *supra* note 3, at 71–72.

¹³ See *id.* at 36.

United States viewed conscience as a relationship between the individual and God, a relationship that no power—ecclesial or political—could mediate.¹⁴ That basic protection has now evolved into a more general protection of deeply-held beliefs.¹⁵ Yet, as Vischer notes, religious liberty also presents a threat to secular assertions of conscience: Thus, Establishment Clause jurisprudence has paradoxically treated religious conduct—as opposed to belief—as sometimes worth restricting in the name of public goods, even though enshrining liberty of conscience does not have the same provocative resonance to some as upholding laws that may seem to “establish” religion.¹⁶

II. MARKET ACTOR AND MARKET UMPIRE

Once Vischer lays out the intellectual foundation for his understanding of conscience, he sets out to review the place of conscience in different legal settings in a section titled “Implications.”¹⁷ These cases do not confront the *Gobitis* conundrum, in which national symbols of unity clash with the beliefs that unity is meant to protect. Rather, the newer cases change the government’s role from market umpire—adjudicating numerous conscience claims but recognizing a pluralist moral marketplace—to market actor—itself expressing some social or moral norm.¹⁸ These different facets of state power, Vischer argues, need to be kept separate and, on this topic, Vischer devotes chapters to pharmacies, corporations, voluntary associations, corporations, the legal profession, and the family.¹⁹

Acknowledging that the state can be a moral actor recognizes that it has a legitimate interest in promoting common values. Yet that role must be circumscribed in many cases by a preference for the state’s acting merely as moral umpire, allowing multiple social and community networks and their attendant moral claims to flourish in the marketplace. Relying

¹⁴ See *id.* at 34.

¹⁵ See generally *id.* at 39–43.

¹⁶ See *id.* at 40–43; see also *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

¹⁷ See generally VISCHER, *supra* note 3, at 9, 123.

¹⁸ See *id.* at 6–8.

¹⁹ See *id.* at 10–11, 103.

on the work of communitarian political theorists such as Michael Walzer, Vischer sees a correlation between maintaining the common good and the notion of state 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 life²⁰

We are not atomistic individuals, asserting rights in a social vacuum. Rather, we are citizens embedded in a collection of diverse communities. State action should allow these communities to express themselves and their claims in accordance with their beliefs.²¹

Vischer invokes a number of principles, such as subsidiarity and “sphere sovereignty,”²² to flesh out his conception of the role of the state.²³ Subsidiarity, as it has been used in Catholic social thought and by political bodies such as the European Union, holds that problems should be dealt with by the social or political body of the smallest relevant size and closest connection to the community.²⁴ This principle, therefore, expresses a preference for non-governmental actors first and smaller government actors second: It “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.”²⁵ Sphere sovereignty, derived from the work of nineteenth-century Protestant pastor Abraham Kuyper, envisions different realms of authority, or spheres, accorded to different groups such as political units, voluntary associations, or churches.²⁶ These different spheres do not derive their power or authority from the state, but operate on their own within their respective area of

²⁰ *Id.* at 102.

²¹ *See id.* at 103.

²² *Id.* at 106 (internal quotation marks omitted).

²³ *See id.* at 104–10.

²⁴ *Id.* at 105–06. Subsidiarity was first announced as a Catholic social principle by Pope Pius XI. *See* POPE PIUS XI, ENCYCLICAL LETTER *QUADRAGESIMO ANNO* ¶ 79 (1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

²⁵ *See* VISCHER, *supra* note 3, at 105.

²⁶ *Id.* at 106; *see also* ABRAHAM KUYPER, *SPHERE SOVEREIGNTY* (1880), reprinted in ABRAHAM KUYPER: A CENTENNIAL READER 461, 467 (James D. Bratt ed., 1998).

authority.²⁷ While the boundaries of the different spheres are permeable, the concept—that a society should be ordered “around individuals and the communities to which they commit themselves”—is foundational for Vischer.²⁸

The state cannot always be neutral, of course. Certain basic common goods—such as security and basic social justice—cannot be ensured when the state simply backs out of the public square. In these circumstances, the state acts as a moral agent rather than a mere moral umpire. As a moral agent, the state can assert its own moral views and inject them into the marketplace. But this conduct must be tempered. For example, equality is a common value, yet the furtherance of that value need not result in a top-down imposition of obligations on private actors. Only when individuals cannot meaningfully access the good sought to be achieved should the state step in and mandate access. In Vischer’s words:

[T]he state’s commitment to equality need not preclude the partiality that invariably arises in meaningful human relationships. . . . [T]he state should focus its equality initiatives on ensuring access to goods and services, not on enshrining equality as a nonnegotiable requirement for marketplace participation. When the market is not providing access, state intervention may be appropriate.²⁹

Thus, in analyzing the “pharmacy wars,” Vischer is sensitive to questions of access and choice: To demand that all pharmacies provide contraception, for example, when a consumer has multiple options, elevates equality of access at the expense of a legitimate diversity of opinion and expression of moral values.³⁰ The determination of such a demand, however, may be different in an area without such ready access.³¹ Yet the recent laws in California and New York that require religious hospitals to pay for contraceptives as part of their health insurance coverage hinder, rather than promote, conscience because they simplistically “favor the individual in any contest against group

²⁷ VISCHER, *supra* note 3, at 106; *see also* KUYPER, *supra* note 26, at 468.

²⁸ *See* VISCHER, *supra* note 3, at 109.

²⁹ *Id.* at 119.

³⁰ *See id.* at 151.

³¹ *See id.* at 172.

authority” and in doing so fail to recognize “the organization’s interest in serving as a communal embodiment of a distinctive set of beliefs.”³²

Individuals within an organization may have different beliefs—even beliefs that conflict with the overarching purposes of the organization—yet that should not obligate the organization to defer to those beliefs. *Boy Scouts of America v. Dale* provides a stark example.³³ The Boy Scouts of America’s (the “Scouts”) belief that scouting was inconsistent with a scoutmaster’s homosexuality collided with Dale’s fundamental understanding of himself as a person.³⁴ The Court needed to determine whether to recognize the Scouts’ beliefs as an institution, or to let individual rights trump that institutional understanding.³⁵

Vischer counsels for deference to associational expression. The state, within reasonable limits, should not impinge on those beliefs in the pursuit of its own agenda.³⁶ This deference includes providing public funding to organizations that espouse beliefs different than the state’s so long as those beliefs do not limit the services the organizations provide.³⁷ For example, the Salvation Army may express an institutional identity rooted in its Christian belief, but it may not receive public funding if assenting to that belief is a precondition for receiving its services.³⁸

The state may take an even more active role in the moral marketplace. It may set up its own programs or institutions to express its opposition to the beliefs of other organizations or groups—for example, it may establish an adoption agency that places children with same-sex couples, even if religious agencies will not.³⁹ What the state may not do is diminish that group’s ability to contribute to the moral or cultural discourse.⁴⁰

³² See *id.* at 151.

³³ 530 U.S. 640 (2000).

³⁴ See *id.* at 650–53.

³⁵ See *id.* at 659–60.

³⁶ See VISCHER, *supra* note 3, at 103, 152–54.

³⁷ See *id.* at 145–46.

³⁸ See *id.* at 145.

³⁹ See *id.* at 150.

⁴⁰ See *id.* at 151.

CONCLUSION

Vischer's vision of conscience and the role of the state in protecting its legitimate exercise is not rooted in the simplistic protection of "rights" against oppressive communities. Rather, he proposes a rich account of how beliefs are expressed in actual life, through expressive associations and the relational context in which persons express themselves. *Conscience* is an implicit critique of the liberal school of jurisprudence represented by figures such as Ronald Dworkin. Indeed, Vischer's analysis explains why Dworkin's own argument that rights *should* trump associational expression is ultimately unworkable.⁴¹ Like David Tubbs's recent book on liberalism, *Conscience* highlights the relative poverty of liberal discourse in confronting rights claims in a pluralist society—putatively its greatest strength—and proposes a more flexible and principled alternative.⁴²

⁴¹ See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) ("Rights are best understood as trumps over some background justification for political decisions that state[] a goal for the community as a whole.").

⁴² See generally DAVID L. TUBBS, FREEDOM'S ORPHANS: CONTEMPORARY LIBERALISM AND THE FATE OF AMERICAN CHILDREN (2007).