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Steven D. Smith

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The Promise and Perils of Conscience

*Steven D. Smith**

I. INTRODUCTION

My assignment is to comment on a paper by Professor Rodney Smith¹ about conscience, and also to try to tie this specific subject into the conference's overall theme: LDS Perspectives on Law. At first glance, this seems not to be an easy assignment. Oliver Cowdery and section 134 of the *Doctrine & Covenants*² made some important statements about conscience, but those statements also seem to be quite general—almost platitudinous, we might think—so they do not in any explicit way address the more specific questions about conscience that lawyers and courts confront today.³ In addition, I understand Professor Smith's conclusion to be that, except in some details, Oliver Cowdery's views on conscience were approximately the same as those that James Madison had expressed half a century earlier,⁴ and, we might add, that

* Warren Distinguished Professor of Law, University of San Diego. It was a pleasure to participate in the LDS Perspectives on Law Conference, held at Brigham Young University on October 19, 2001, and an honor to be able to comment on Rodney Smith's paper, and to do so with Fred Gedicks, Professor of Law at the J. Reuben Clark Law School at Brigham Young University. I have counted Rod and Fred as good friends for many years, and have admired how, in different ways, they have thoughtfully integrated LDS perspectives into their scholarship.

The views expressed in this Comment do not necessarily reflect the views of the Church of Jesus Christ of Latter-day Saints, the J. Reuben Clark Law School, or the Brigham Young University Law Review.

1. Rodney K. Smith, *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants*, 2003 BYU L. REV. 891. Rodney K. Smith is Herff Chair of Excellence in Law, Cecil C. Humphreys School of Law, University of Memphis.

2. The *Doctrine & Covenants* is part of the canon of scripture of the Church of Jesus Christ of Latter-day Saints.

3. Some of the more specific questions of conscience relevant to lawyers and courts are thoughtfully discussed by Professor Rodney Smith in his other writings on this subject. See, e.g., Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience"*, 1996 BYU L. REV. 645; Rodney K. Smith, *Conscience, Coercion, and the Establishment of Religion: The Beginning of the End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993).

4. See Smith, *supra* note 1, at 934–40 (noting that Cowdery's views are quite similar to those of Madison).

were common in Protestant America. Indeed, a quotation from Joseph Fielding Smith that Professor Smith repeats suggests that this may have been the whole point of section 134, that is, to assure fellow citizens that members of the Church of Jesus Christ of Latter-day Saints were *not* idiosyncratic, or at least not subversive, but rather held essentially the same views on conscience, religious freedom, and church-state separation that most other Americans held.⁵

How then can these early Latter-day Saints' views on conscience provide a distinctive LDS perspective on law? I want to offer, in summary form, two responses to that question. First, a commitment to conscience imports a conception of the person that is crucial but sorely missing in today's legal discourse. Second, LDS experience gives Latter-day Saints a distinctive perspective from which to appreciate the *dangers* of conscience. The first point, discussed in Part II of this Comment, suggests the contribution of an *appreciation* of conscience in the unbelieving neighborhoods of the world.⁶ The second point, discussed in Part III of this Comment, suggests the possibility of an *overappreciation* of conscience that has sometimes been a hazard in what we might call

5. *See id.* at 929 n.139. The quotation is as follows:

The reason for the article on "Government and Laws in General," is explained in the fact that the Latter-day Saints had been accused by their bitter enemies, both in Missouri and in other places, as being opposed to law and order. They had been portrayed as setting up laws in conflict with the laws of the country. This bitterness went so far that an accusation was brought against them, on one occasion in a Missouri court, of disloyalty because they believed that at some future time the Lord would set up his own kingdom which would supersede the government of the United States, and so believing that the time would come when such a kingdom would be established, they were disloyal to the United States. Every pretext that could be imagined against the Saints to try to show them disloyal and rebellious against established government, was brought into use.

2 JOSEPH FIELDING SMITH, CHURCH HISTORY AND MODERN REVELATION 30–31 (1953).

6. *See generally* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1078–79 (1996). Professor Laycock states,

I have heard several colleagues say that religious claims are absurd, ridiculous, irrational, or unworthy of respect. I have never heard a colleague, at any of the three law schools where I have taught, make a religious claim in an academic context. When the student chapter of the Christian Legal Society at The University of Texas needed a speaker, I knew of only three or four church-attending colleagues on a faculty of sixty-five, none in the evangelical mode the students were seeking.

Id. For recent expressions of this assessment of contemporary culture, see HUSTON SMITH, WHY RELIGION MATTERS: THE FATE OF THE HUMAN SPIRIT IN AN AGE OF DISBELIEF (2001); GREGG EASTERBROOK, BESIDE STILL WATERS: SEARCHING FOR MEANING IN AN AGE OF DOUBT (1999). *But see* PHILIP JENKINS, THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY (2002). Obviously, no simple description can do justice to the complex reality.

the believing world. Oliver Cowdery might serve, in part tragically, as a sort of living illustration of both points.

II. CONSCIENCE AND THE BELIEVING PERSON

To introduce the first point that a commitment to conscience imports a crucial conception of the person that is missing in legal discourse, let me start with an observation that Lon Fuller made several decades ago. Though we may often fail to notice the fact, Fuller explained that legal discourse implicitly contains some conception of the person, some image of what a person is.⁷ Accepting Fuller's insight, I would say that legal discourse today is pervaded by two principal images of the person: first, the *person as interest seeker* and second, the *person as autonomous agent* (or perhaps the *person as chooser*). We might say that the first kind of person—the person whose essence and purpose is to maximize his interests—is a latter-day descendant of the Tribe of Bentham. The second person, whose essential, defining feature is autonomy, descends from the lineage of the Tribe of Kant. The first image has solid contemporary support in the sciences and social sciences—in evolutionary psychology and economics, for instance—while the second image is entirely orthodox in the liberal political and moral tradition represented today by prominent thinkers such as Raz, Dworkin, and Rawls.

In short, both conceptions of the person have impressive credentials, and I readily concede that both conceptions capture important aspects of what it means to be a person: we *do* have interests and we *do* make choices. However, both images also have severe limitations. In the area of religious freedom, for instance, the interest-seeking person and the autonomous person seem a bit awkward or out of place. We quickly recognize something incongruous, almost grotesque, in the occasional attempt to understand religion or religious freedom primarily in economic or interest-seeking terms. And we also know that attempts to collapse religion into autonomous choice do violence to the very nature of believing and believers. We need not go to the other extreme—to

7. Specifically, Fuller was worried about what he viewed as the pernicious effects on law of a conception of the nature of man taken over from the behavioral sciences. He contended that many legal thinkers of his time had adopted a Skinnerian view that saw the person as a helpless victim of outside forces. Fuller believed that this depiction was undermining the efficacy of law, which necessarily depends on "the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for defaults." LON L. FULLER, *THE MORALITY OF LAW* 162 (rev. ed. 1969).

Schleiermacher's view that "[t]he essence of religion consists in the feeling of an absolute dependence"⁸—to realize that religion does not primarily consist in our autonomous choices about how to achieve self-realization.

I believe that Professor Smith captures this point well in *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants* when he explains, with support from Gordon B. Hinckley, president of the LDS Church, as well as from his own experience, that conscience is based not on choice so much as on duty, or even a kind of compulsion.⁹ The classic expression was Martin Luther's: "Here I stand; *I can do no other.*"¹⁰

The unsuitability of the prevailing conceptions of the person for some areas of law reflects a deeper deficiency, I believe: standing alone, those conceptions simply do not capture the distinctive character of human beings. They do not explain what it is that leads us to say that persons are inviolable, or sacred, or perhaps infinitely precious. They miss what lies behind the claim that human beings are made "in the image of God."¹¹ In that respect, the standard conceptions, despite their limited truth, serve to obscure what it is that makes us interested in such things as human rights or constitutional rights. A Vatican II document puts the point this way: "[W]ithout the Creator the creature would disappear. For their part, . . . all believers of whatever religion have always heard His revealing voice in the discourse of creatures. But *when God is forgotten the creature itself grows unintelligible.*"¹² "Unintelligible," of course, is the sort of adjective often used to describe the modern jurisprudence of religious freedom. There is not time here to elaborate on the connection, but I suspect that it is quite real.¹³

One of the virtues of talking about conscience, I believe, is that conscience is a notion that still has considerable resonance with people—even academics—of a variety of religious and secular persuasions, and it is also a way of challenging the prevailing

8. Quoted in WILLIAM P. ALSTON, RELIGIOUS BELIEF AND PHILOSOPHICAL THOUGHT 3 (1963).

9. See Smith, *supra* note 1, at 936–37 & n.156.

10. Whether Luther uttered the exact words that have come down in legend is doubtful, see OWEN CHADWICK, THE REFORMATION 56 (1964), but they capture the essence of his statement.

11. *Genesis* 1:27.

12. *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] § 36, in THE DOCUMENTS OF VATICAN II 234 (Walter M. Abbott, S.J. ed., 1966) (emphasis added).

13. I try to develop this thesis in a more sustained way in *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233.

conceptions of the person as interest seeker or as autonomous agent. Of course, many academics today do not understand conscience in anything like the way that James Madison and Oliver Cowdery did. Marie Failinger has observed that “[w]hat began as an argument that government must ensure a free response by the individual called distinctively by the Divine . . . has, in modern-day cases, become an argument for the protection of human autonomy.”¹⁴ As a result, “[w]hile the word ‘conscience’ is still used, it has come to mean very little beyond the notion of personal existential decision-making.”¹⁵ Still, any close examination of the notion of conscience will show, I think, that conscience cannot be reduced either to mere interest seeking or to autonomous choice.¹⁶

In short, commonly held commitments to conscience do not square well with the conceptions of the person as interest seeker or the person as autonomous agent. An understanding of conscience—even in its modern, nontheistic versions—pushes us to recognize a different conception, or what I would call the “person as believer.”¹⁷ This conception is not only evident in founding documents like the *Declaration of Independence* (with its “We hold these truths . . .”), but also in the first words of Christian creeds: the “I believe” of the *Apostles’ Creed*, and the “We believe” of the *Nicene Creed* and of the *LDS Articles of Faith*. The continuing prestige of conscience provides an opening, I think, to introduce the *believing person* back into legal discourse.

If that introduction could succeed, we might then be able to take the next steps to ask, Why is “believing” such a crucial part of what it is to be a person, and *in what* does the believing person believe? Conceivably, those questions might eventually lead to a recognition of the person as a creature or, as LDS Church members would say, a child of God.

LDS scholars are not alone in taking these questions seriously, of course, nor are we alone in professing a commitment to a religious understanding of conscience. Indeed, though it would be hard to quantify the point, my own sense (based mostly in recent years, I admit, on

14. Marie A. Failinger, *Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses*, in *LAW AND RELIGION* 81, 93 (Rex J. Ahdar ed., 2000).

15. *Id.* at 94.

16. Thus, scholars like David and Susan Williams have persuasively shown that voluntarist accounts do not capture much of what religion and conscience have meant in our American religious history. See David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 *CORNELL L. REV.* 769 (1991).

17. See *supra* note 13.

attendance at sacrament meetings and Primary meetings¹⁸) is that today Latter-day Saints talk about conscience less than some other Christian traditions do,¹⁹ and there are probably reasons for this, one of which I will notice shortly in Part III. Still, there seems to be no hesitation in affirming the ideas of section 134 of the *Doctrine & Covenants*. Moreover, our understanding of conscience in the terms used by people like James Madison and Oliver Cowdery may help us to address the underlying questions about what makes us persons, and about what makes persons distinctively valuable.

To put the point differently, what Oliver Cowdery said about conscience may have been largely platitudinous in *his* time, but it is not in ours. LDS Church members *still* believe what our ancestors said about conscience—and, even more importantly, we believe what those statements presuppose about God and ourselves—when much of the rest of the academic world does not. Our counter-cultural stance in this respect may support not a *unique* perspective, perhaps, but at least a distinctive, and distinctively valuable, contribution to legal thought.

III. THE DARK SIDE OF CONSCIENCE

Along with Oliver Cowdery and James Madison, LDS Church members celebrate conscience, but beneath our celebration we also understand that conscience, like fire, is both a blessing and a threat. Talk of conscience is typically calculated to emphasize that saving and duty-imposing belief resides in the *individual*. Claims of conscience often have a “Declaration of Independence” quality to them: they are asserted for the purpose of freeing the individual, to some extent, from the constraints of the community or from collective authority.

In many situations, the collective authority from which the individual seeks a measure of independence is the state or the government; in many other situations, it is the church. Historically, the Protestant emphasis on conscience was in large part calculated to show the ostensible errors of Catholic Christianity, which asserted the necessity of the *church* in teaching individuals what to believe and how to live. Catholic teaching

18. The incessant theme in Primary meetings in 2002 was “Follow the Prophet”; I do not recall any “sharing time” discussions of conscience. We *did* regularly sing “I Am a Child of God,” and we recited and sang the “We Believe” of the *Articles of Faith*.

19. For an eloquent and profound contemporary statement on the importance of conscience, see Pope John Paul II, *Veritatis splendor* [The Splendor of Truth], Papal Encyclical, (Aug. 6, 1993), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html.

had recognized the importance of conscience and had even taught that if confronted with a conflict between conscience and church teaching, an individual must follow his conscience.²⁰ Still, Catholic teaching had not left the individual alone with just his conscience and God, but had interposed a host of aids to instruct and influence the believer: church authorities, the sacraments, and centuries of accumulated Christian tradition. To some Protestants, these mediating materials represented an interference with conscience.

The basic proposition was expressed in a tract by the New England Protestant minister and legislator, Elisha Williams, who wrote in *A Seasonable Plea for the Liberty of Conscience and the Right of Private Judgment in Matters of Religion, Without any Controul from Human Authority*, that

To submit our Consciences to the Guidance of any Man, or Order of Men is not to reason and act according to our own Understanding And in every Instance wherein we thus submit our selves to the Direction of any humane Authority, so far we set aside and renounce all other Authority, our own Light and Reason, and even the Word of God and Christ And therefore if our Consciences are under the Direction of any humane Authority as to religious Matters; they cease to be under the Direction of CHRIST.²¹

Now I think we can see the appeal but also the dangers implicit in this position. We can agree, I suppose, that a degree of individual independence from both state and church is a good thing: we do not want individuals to be completely subordinated to, or absorbed into, either state or church, like cells in the human body. The merit of claims of conscience is that they remind us that, ultimately, it is individuals—not collectives—who believe and hope and love and are saved. The point is obvious, perhaps, but also easily forgotten, especially when the demands of solidarity are strong. And if conscience were infallible, if it were always the authentic voice of God speaking within us, then I suppose we would not need to worry about its more radical tendencies. But conscience, or what people take to be the voice of conscience, is not infallible; outlandish doctrines and wicked deeds have often been

20. Brian Tierney, *Religious Rights: A Historical Perspective*, in *RELIGIOUS LIBERTY IN WESTERN THOUGHT* 29, 36–38 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

21. ELISHA WILLIAMS, *A SEASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE AND THE RIGHT OF PRIVATE JUDGMENT IN MATTERS OF RELIGION, WITHOUT ANY CONTRoul FROM HUMAN AUTHORITY* 12–13 (Boston, S. Kneeland & T. Green 1744).

perpetrated, sincerely, in the name of conscience. Unchecked, conscience would threaten anarchy: civil anarchy if conscience is set up against the state, religious anarchy if conscience is set up against the church.

Perhaps more importantly, a single-minded reliance on conscience—and the consequent rejection of authority—threatens to leave the individual without reliable guidance or moorings. The fact is that God rarely if ever speaks to the believer directly and in a vacuum. His teachings come to us, usually, through the media of scripture and tradition and church. Even in Joseph Smith's accounts of direct heavenly visitations, the visitors speak in an inherited language; they typically use that language to quote scripture, and they implicitly rely on a host of concepts and understandings built up through centuries of Christian tradition. Without that tradition, it is hard to see how Joseph could even have conceived and *asked* the questions he posed, much less received or understood *answers* to those questions.

In reading the heart-felt fulminations of an Elisha Williams against those who would allow anything to mediate between the individual and God, we are tempted to ask how the independence for which Williams pleads could even be possible. What is the *Bible* itself, which Williams offers as the definitive and only guide,²² if not a sort of intermediary, collected and passed on by the Christian community, between God and us? What is Williams doing when he preaches sermons if not mediating, in a sense, between God and the congregation? Indeed, it would not be much of an exaggeration to say that the modern, debased conception of conscience is the culmination of notions like Williams's: there is a sort of natural progression from Williams's "right of private judgment"²³ to Thomas Paine's "My own mind is my own church"²⁴ to a notion of conscience as simply "personal existential decision making."²⁵

We can perhaps notice the risks implicit in conscience in Oliver Cowdery's own life. Professor Smith in *James Madison, John Witherspoon, and Oliver Cowdery: The First Amendment and the 134th Section of the Doctrine and Covenants* spends several pages discussing the circumstances of Oliver's excommunication.²⁶ His typically good-

22. *Id.* at 1 (asserting that "the Sacred Scriptures are the alone Rule of Faith and Practice to a Christian").

23. *See id.*

24. 1 THOMAS PAINE, *Age of Reason*, in THE COMPLETE RELIGIOUS AND THEOLOGICAL WORKS OF THOMAS PAINE 5, 6 (New York, Peter Eckler 1892).

25. *See* Failing, *supra* note 14, at 94.

26. *See* Smith, *supra* note 1, at text accompanying notes 107–18.

hearted effort to give the kindest possible portrayal to all the characters—Oliver, Joseph, and the LDS Church in general—perhaps inclines to elevate faith-enhancing charity over a cruder credibility, and in doing so it forbears from noticing what we might call the dark side of conscience. Oliver disagreed with the church leadership over a fairly wide range of matters, but I think it would be fair to say that on the only point of disagreement specifically referred to in Professor Smith's paper—that is, a dispute over property—Oliver's position seems a bit bizarre.

As Professor Smith explains, Oliver had been accused of “virtually denying the faith by declaring that he would not be governed by any ecclesiastical authority or revelations whatever, in his temporal affairs,” and also for “selling his lands in Jackson County, contrary to the revelations.”²⁷ In his response, Oliver got into a discussion of whether land in this country is “allodial” or subject to “feudal tenures.” He asserted the rights of property ownership under English and American law and also alluded to principles of religious liberty and church-state separation. Then from these assorted legal propositions he somehow drew the conclusion that the Church was acting wrongly or beyond its authority by giving direction in these matters.²⁸

Oliver asserted other grievances (including a complaint about what we might now describe as the circumstances surrounding the origins of polygamy), and I admit to being in sympathy with some of Oliver's concerns. Even from a distance, though, I think we can say that on this specific issue of property, Oliver seemed confused. Why would he think that *civil law* governing property ownership would mean that a *church* cannot impose conditions or regulations on its members? Why would the fact that in this country property is allodial rather than feudal (whatever that means) preclude a church from giving direction to those who choose to belong to it, even in temporal affairs?

Reading Oliver's letter, we are tempted to say that a little legal learning is a dangerous thing.²⁹ However, the danger lies not just in legal

27. See The Oliver Cowdery Pages, at <http://OliverCowdery.com/history/Cdryhst2.htm> (last visited Sept. 22, 2003).

28. *Id.* I admit that I know none of the details of the Oliver Cowdery controversy.

29. The dangerousness of a little legal learning might help explain, by the way, why Oliver's decision to practice law also figured in the Church's accusations against him. The first charge asserted that Oliver was instituting a “vexatious lawsuit,” and the seventh charge accused him of “leaving his calling to which God had appointed him by revelation, for the sake of filthy lucre, and turning to the practice of law.” *Id.*

learning but also in a commitment to the primacy of conscience, because Oliver's dubious conclusions seem to have been closely interwoven with his understanding of conscience. Thus, immediately after his invocation of principles of religious freedom, he asserted that "[t]his attempt to control me in my temporal interests, I conceive to be a disposition to take from me a portion of my Constitutional privileges and inherent right." It was an effort, he said, to which "I cannot *in conscience* subscribe"³⁰ The context and specific controversy were different, but in the background you can almost hear the distant voices of Elisha Williams and Thomas Paine.

A full account of Oliver Cowdery's understanding of conscience would need to consider not only the general edifying declarations of section 134 of the *Doctrine & Covenants* but also the more disruptive conception of conscience at work in Oliver's later controversy with the Church. The fuller account might teach us not only about the value of conscience but also about the limits of conscience, and about the delicate, difficult task of reconciling the potentially atomistic claims of conscience with the imperatives of community and authority.

IV. CONCLUSION

Over the centuries, the task of reconciling the claims of conscience with the imperatives of community and authority is one with which governments and Christians, including latter-day Christians, have struggled. With benefit of hindsight, we may be inclined to conclude that at times collective needs and pressures have dominated the just claims of conscience; at other times individualist assertions of independence have overrun the legitimate values of community. In our own time, I believe we can see, depending on where and how we look, evidence of both kinds of imbalance. My suggestion is that LDS teachings and history should serve to make us aware of both the sacred value and the perils of conscience, in a way that might give us a valuable perspective to bring to the law.

30. *Id.* (emphasis added).

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