Spring 2005

Introduction

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Symposium: Religious Liberty in America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth

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The essays comprising this symposium, *Religious Liberty in America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth*, revolve around the theme of freedom of conscience, Williams's core idea, and are a celebration of his seminal contributions to religious liberty. In all probability, Williams was born in London in 1603.[1] Williams was a seminal thinker on religious freedom, the idea and utility of the social contract, and the relationship between church and state. In the United States, Williams is significant because he is the first American thinker on religious freedom,[2] and thus we might attribute to Williams's work the development of those unique American conceptions of religious freedom: integrity of conscience, equality, toleration, pluralism, separation of church and state, and non-establishment of churches. Williams's work resonates beyond America's borders, both in his time and in our time.

The distinguished group of scholars participating in this

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1. Edward J. Eberle, *Roger Williams's Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 429 (1999).

2. *See id.* at 427.

Symposium examine some of the dimensions of Williams's thought on religious freedom as it radiates today in conceptions of religious liberty, illuminating the richness and intricacy of Williams's ideas. In the first essay, *Roger Williams on Liberty of Conscience*,[3] I examine the life and thought of Williams, establishing the theme of the conference. Williams was an interesting man, learned in five languages, reporter of speeches and sermons in the Star Chamber for Lord Coke, educated at Cambridge, friend of John Milton and Oliver Cromwell, and author of the first book published in English on the language and customs of Native Americans.[4] Williams was also our country's first rebel, having been kicked out of Massachusetts Bay in the winter of 1636 for his disagreement with the colony's policies.[5]

Propelled by his disagreeable experience in Massachusetts, Williams reconceived the idea of religious freedom. His central argument was the cause of conscience, "that each person is entitled through the medium of conscience to communicate with the divine in matters spiritual, and that no person or authority is entitled to exert force or otherwise coerce the sacred haven of conscience."[6] From this premise, Williams elaborated on the primacy of conscience, developing a full-blown theory of religious freedom. Some of these ideas included: a guarantee of conscience on equal terms for all people, regardless of race, gender or creed; tolerance of conscience-motivated conduct; the separation of church and state; and the non-establishment of a church. I examine these concepts more carefully in my essay.[7]

Roger Williams wrote in the seventeenth century, inspired by the Protestant Reformation and the vibrant discussion over church and state during the eventful time of the English Civil War. His was an essentially religious-inspired elaboration of conscience, although he also theorized about the secular role of the state. Our time, of course, bears little relationship to the state of nature of seventeenth century New England. Yet, the justification and reach of freedom of conscience is no less pressing a matter for

3. Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289 (2005).
4. Eberle, *supra* note 1, at 429, 430, 437.
5. Eberle, *supra* note 3, at 301.
6. *Id.* at 290.
7. *See generally id.*

us today as we consider the role conscience plays in issues like conscientious objection to military or other compelled service or ritual (such as prayer in the school or the pledge of allegiance), or the emerging role of Islam in western society (such as women publicly wearing head scarves at schools or the public square), or the public broadcast of calls to prayer.

Steven Smith, in his wonderful essay *The Tenuous Case for Conscience,*[8] takes up the question: What is the meaning of freedom of conscience today? He asks and sketches tentative answers to two fundamental questions that have great meaning for contemporary constitutional culture. First: What is conscience? What does it mean to say someone acted from "conscience?" Second: Why should "conscience" merit special respect or accommodation from society or from the state? Examination of these questions helps illuminate perspectives on Williams's seminal inquiries.

Smith defines the first question in minimalist terms: conscience describes a person acting "on the basis of a sincere conviction about what is morally required or forbidden."[9] With this minimalist conception of conscience, there is enough for Smith to proceed to his second question concerning why acts of conscience should be entitled to special respect from society. Smith examines this question in a philosophically rigorous manner, subjecting the claim to conscience to careful consideration from the moral objectivist, moral authentic, conventionalist, subjectivist and nihilist perspectives.

The end result of Smith's philosophical investigation is that there may be no satisfying reason from an analytical standpoint to justify special treatment of conscience in society today. The solicitude we ordinarily accord conscience may have more to do with conventional acceptance of the idea that acts performed for authentic, sincere motivations merit special respect within constitutional culture. The ensuing 400 years since Williams's rooting of conscience on certain metaethical objectives have severely contested those objectives truths, and we are left with the raw material Williams started with: man and woman, their free will, and their basis for acting.

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8. Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

9. *Id.* at 328.

Each of the main papers in this Symposium was commented on by scholars of the first rank; Smith's essay was commented on by Kathleen Brady. In Brady's comment, *Foundations for Freedom of Conscience: Stronger than You Might Think,*[10] she examines Smith's arguments in support of protecting conscience and concludes that each of Smith's underlying assumptions about morality – conventionalist, subjectivist, nihilist and objectivist – provides a plausible case for freedom of conscience, in contrast to Smith's conclusion that only moral objectivism provides a conceivable basis for such a freedom. Even nihilism, Brady claims, might justify conscience because accommodation of conscience is likely to be necessary in a polity to avoid compulsion and its accompanying psychological pain. Subjectivism rests on a principle of self-legislating morality that empowers each of us to determine our own moral vision. Conventionalism can be understood in a richer vein than simply compliance with community norms, but also to include an ongoing process of formation of norms and values that benefits greatly from views of dissenters like Roger Williams. Still, she agrees with Smith that moral objectivism, combined with moral authenticity, provides the strongest case for freedom of conscience. In this respect, we can view the work of Roger Williams and other founders of the idea of freedom of conscience as laying the basis for American conceptions of religious freedoms. Moreover, these pioneers, as well as those working within other religious traditions, can be acknowledged as helping interpret and understand our uniquely human condition, attempting to make sense of and live with the Reality we seek to know.

In Michael Perry's provocative essay, *A Human Right to Religious Freedom,*[11] he addresses core questions as to the meaning of the morality of human rights, concentrating on the international dimension of religious freedom encapsulated in the International Covenant on Civil and Political Rights (ICCPR).[12] The framing of religious freedoms in the ICCPR follows the foundational concep-

10. Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger than You Might Think*, 10 ROGER WILLIAMS U. L. REV. 359 (2005).

11. Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture*, 10 ROGER WILLIAMS U. L. REV. 385 (2005).

12. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

tions of Roger Williams, including acknowledgment of an equal claim to religious liberty of all people, and that people's exercise of religious liberties can be limited only by legitimate claims to law, order, public safety or the like. Justification and assessment of each claim – both to religious freedom and to law and order – must be made and resolved to determine the scope of religious freedom within a polity. These foundational matters underlie the concept of religious freedom in human rights regimes today, whether in a national constitutional order (such as Canada, Germany or the United States) or in international legal regimes (such as the ICCPR).

In his essay, Perry probes the meaning of a human right to religious freedom by juxtaposing different components of the right: the meaning of dignity as compared to the meaning of freedom. Perry advances his examination by hypothesizing a sort of utopian country called Elysium, in which the majority of the population is committed to an exclusivist religion which holds that only their faith is "the one true faith" (TOTF) leading to eternal salvation.[13] The tenets of Elysian faith are admirable and grounded in the western tradition, including those espoused by Roger Williams and John Locke: acknowledgment of the inherent dignity of all people; disablement of government from coercion of conscience; and guarantee of practice of religion, although in private for practitioners of faith other than the established exclusivist faith of Elysium. However, on account of Elysian exclusivist belief, TOTFers forbid their government to enact measures inconsistent with their faith and, further, believe it to be their calling to save souls for eternal salvation. This quandary forces to the fore the meaning of dignity. Does dignity mean each person has free choice over fundamental matters like religion? Or does dignity mean, alternatively, acknowledgment of the sanctity of each person so much so that another person is compelled, let alone justified, to act in service of such sanctity, here by saving souls?

These core questions force confrontation of the meaning of religious freedom as a category of human rights, which Perry next considers. Does the concept of religious freedom protect the right of Elysians to act exclusively? Or does religious freedom guarantee the right of each person to choose and practice a faith of choice?

13. *See* Perry, *supra* note 12, at 401.

There are, perhaps, no ultimate answers to these questions. Instead, they raise intriguing possibilities and alternative conceptions that merit careful consideration and discussion. What is clear, Perry concludes, is that there is no moral consensus on these matters. Different cultures can define and situate the right differently in their societies. Part of the conception of universal human rights is appreciation and acknowledgment of cultural difference. Dialogue across cultures may yield a richer understanding of the meaning of a human right.

Richard Kay, and Jónatas Machado commented on Perry's paper, in keeping with the dialogue of the conference. In his comment, *Michael Perry's Right to Religious Freedom,*[14] Richard Kay takes up two particular aspects of the right Perry describes. Kay first considers the important question of how to make the case for a right to religious freedom for those who believe in human rights, like the exclusivist Elysians Perry describes, but who also believe in an exclusivist path to salvation. There is no good answer here, Kay suggests. History and human nature demonstrate that rational argument has limited appeal to religious conviction and religious difference. The world of reason and faith are not easily bridged. And thus, the prospects of broad religious liberty may be least where it is most in need.

The second aspect of Perry's right Kay addresses is the consequence of defining the right in a qualified way. In a sense, the definition of religious rights reflects the underlying culture in which it arises. For example, western culture has frequently framed religious rights around the dichotomy of inner belief as compared to outward behavior. However, we should recognize that the framing of religious rights, if not perhaps all rights, tends to lock-in the views of the majority determinants of that culture. In our example, for instance, emphasis on inner belief tends to reflect the cultural orientation of western European thought. Other cultures, such as Islam, emphasize more doing than feeling. Islam thus may be more disadvantaged by a belief/action dichotomy. It pays to heed the cultural roots of legal rules.

Moreover, since no society guarantees absolute approaches to rights but rather some version of ordered liberty, balancing be-

14. Richard S. Kay, *Michael Perry's Right to Religious Freedom*, 10 ROGER WILLIAMS U. L. REV. 427 (2005).

tween claims of rights and claims of order is inevitable. A survey of different rights regimes – such as those in place in Canada, the European Convention on Human Rights and the United States – demonstrates that acts of independent courts enforcing rights regimes represent, at bottom, acts of human judgment. The consequences for human rights are not necessarily favorable: religious practice may receive little more protection from rights regimes than would be the case in their absence, pursuant to cultural decisions. In either case, rights are subject to human decision making.

In his comment on Perry's article, *Freedom of Conscience and The Rights of Non-TOTFers,*[15] Jónatas Machado unpacks the root assumptions about religious freedom posed by Perry in his thought experiment on the hypothetical Elysium. The Elysian exclusivist conception of religious freedom collides with our understanding of fundamental rights in a constitutional democracy. Rights-based constitutional democracy rests on the premise of popular sovereignty and freedom of conscience with respect to religious affairs. Commitment to democracy means that free and equal citizens must settle upon the ruling principles of society through open communication, free debate and the democratic process. Official commitment to a given doctrine, such as TOTF, violates these democratic principles because an exclusivist doctrine is placed above such debate.

Likewise, free and equal conscience means, at bottom, that each person determines his or her own faith. Pre-commitment to an exclusivist faith violates freedom of conscience, both for those who subscribe to TOTF (because they may have no opportunity to make the voluntarily choice to commit to TOTF, and because they are hindered in changing their faith as well), and for non-believers in an Elysian-like, exclusivist faith (because they are coerced to follow the tenets of the majority view). So evaluated, we can see that modern conceptions of religious freedom lie on principles of free choice, voluntarism and mutual respect. Any establishment of religion, therefore, rests on coercion of conscience in some manner. Thus, Machado asserts, national or international concepts of religious freedom should rest on principles of democracy, free discussion, equality and freedom of conscience.

15. Jónatas Machado, *Freedom of Conscience and The Rights of Non-TOTFers,* 10 ROGER WILLIAMS U. L. REV. 439 (2005).

Finally, Professor Machado addresses the idea of religion in Europe in his thought-provoking article, *Freedom of Religion: A View from Europe,*[16] published in conjunction with this symposium. Machado poses the provocative hypothesis that all human thought starts with essentially religious or ideological motivations, a driving force that helps explain, in part, the development of sources of knowledge. He then traces the influence of religion/ideology on the development of western history, including such epochal events as the Middle Age Crusades, the Protestant Reformation, the ensuing great contest over religion in seventeenth century Europe – including the Civil War which resulted in England, and the Thirty Years War which ravaged the European continent and ended only in 1648 at Osnabrück and Münster, Germany with the Treaty of Westphalia – and the more contemporary Holocaust of the twentieth century.

Machado then sharpens his focus to the evolution of religion as a freedom to be practiced as a human activity and to be protected in the polity as a form of right. He recognizes that this originally Protestant-inspired notion was refined by major figures like Roger Williams and John Locke in seventeenth century England and New England. An essentially Anglo-American Puritan notion, it stressed the importance of individual conviction and choice in religious matters, the need for free and voluntary association as religious practitioners in a church or congregation, and, in some varieties (e.g., Roger Williams) separation of church and state.

By contrast, the essentially American understanding of separation of church and state was not received as well in Europe. On the whole, Europe tended toward protection of religious freedom through established religious groups, either favoring an established church (such as the Church of England), favoring a preferred church (such as the Catholic Church in countries like Spain, Portugal or Italy), or favoring groups of established churches or associations, as was the historical and is the contemporaneous practice in Germany. The main experiment in separation of church and state in Europe is currently in France, under the principle of *laicité.*

16. Jónatas Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451 (2005).

Machado then traces the treatment of religious liberties in national and international rights regimes. He draws heavily on the jurisprudence of the European Court of Human Rights, covering such contemporary and controversial topics as the wearing of head scarves by Islamic women in a secular Muslim country like Turkey,[17] proselytism by Jehovah's Witnesses in orthodox countries like Greece,[18] and presentation of a satirical, critical film exploring the relationship between "religion, money, sex and power," directed at the Catholic Church.[19] These cases and others are contrasted with treatment of similar issues in other national orders – such as the United States, Germany and France – and international rights regimes, making for a full airing of religious freedoms transnationally today.

Returning to our theme, we can see that, indeed, "religious liberty in America and beyond" flourishes and is to be celebrated. Part of the human condition consists of striving for the transcendent or the good. We all strive to make our peace and form our own relationship with what we may call the reality we know, or the dimension we perceive to be beyond. In this, we share the journey embarked upon by Roger Williams over 400 years ago.

17. Leyla Sahin v. Turkey, App. No. 44774/98 (June 29, 2004).

18. Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993).

19. Otto-Preminger Inst. v. Austria, App. No. 13470/87, 19 Eur. H.R. Rep. 34 (1994); Machado, *supra* note 17, at 505.