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# PRINCIPLED OR PRAGMATIC FOUNDATIONS FOR THE FREEDOM OF CONSCIENCE?\*

*John T. Noonan, Jr. \*\**

## I

Let me begin with testimony:

Joan in her last moments had wonderful contrition and broke out into words so Catholic and devout that they moved everyone in that great throng, including the English cardinal and many other Englishmen. She asked me to stay with her at the end and humbly begged me to go to a nearby church and bring her a cross, and I held it erect before her eyes, until her passing, so she could always and ceaselessly see the cross. In the middle of the flames, she never stopped confessing and crying out in a loud voice the holy name of Jesus Christ, or imploring most devoutly the help of the saints. As she expired and bowed her head, she professed the name of Jesus, a sign of the faith with which she was animated, just as we read of St. Ignatius and many holy martyrs.

The executioner came to me and my associate, Brother Martin Lavenu, immediately after the burning, impelled by a wonderful and terrible penitence. It was as if he despaired of receiving pardon from God after what he had done to her, who, as he said, was such a holy woman. He also affirmed that although he had several times put the wood and coals upon her entrails and heart, he could in no way consume her heart or reduce it to cinders; and at this he was amazed, as if it were an evident miracle.<sup>1</sup>

The witness is a priest, Ysambart de la Pierre, who was with Joan of Arc in her last moments in Rouen in May, 1431. Before he helped her at her death he had been an official signatory of two statements: the first, that Joan was a lying, devil-inspired heretic; the second, that she was not only a heretic but a relapsed heretic. What was the relapse? Her English jailers would not give her her clothes. Hence she was compelled to resume the men's clothes she had been wearing and had promised to renounce. For this offense she was burned. An experienced bishop, assisted by members of the faculty of theology at

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1. P. Doncoeur & Y. Lanhers, *La Réhabilitation de Jeanne La Purcelle. L'enquête ordonnée par Charles VII* 39 (J. Noonan trans. 1956).

Paris, the leading theology faculty, in the world pronounced judgment on Joan of Arc. How could the Catholic Church, after over a thousand years of sharing governmental power, devise a system that with such great learning, elaborate inquiry, and deliberate cruelty destroy a saint on such trivial grounds with such a pretense of legality?

The judgment, it may be objected, was produced by the manipulations of the secular power, in this case the English. But the system that produced the judgment relied on secular force for its sanctions and so was open to secular manipulations. The roots of the system are principled and pragmatic and are tangible in St. Augustine, who justifies the employment of force against heretics (although not against complete unbelievers) on two grounds. The first is his exegesis of the New Testament: In the parable of the wedding feast (*Matthew* 22:9), the host says, "Go out into the highways and hedges and whomever you find, compel them to enter." The highways and hedges, Augustine says, are "heresies and schisms." The host of the wedding banquet, he teaches, is the Lord, and so it is the Lord who has the wedding guests compelled.<sup>2</sup> The second ground is Augustine's own experience: When the Donatists were flourishing, it had seemed to him right to ask the emperor not to punish the heresy. However, the emperor had done so anyway. The imperial laws had worked. Augustine stated, "It has benefitted many as we have proved by experience and continue to prove, that they first be compelled by fear or suffering so that afterwards they can be taught. . . . Many who are, as it were, bad slaves and wicked runaways have been called back to the Lord by the lash of temporal scourges."<sup>3</sup> Exegesis and good results rationalize the imperial use of force to constrain conscience.

The next decisive step at the level of theology is taken by Thomas Aquinas: comprehensive rationalization of the death penalty for heretics. First, Thomas takes up the text, "Compel them to enter" and endorses Augustine's exegesis.<sup>4</sup> In addition, he argues that the Church may subject heretics to force because, unlike complete unbelievers, they are promise-breakers. They have failed to keep faith. Therefore, they are to be forced to keep their promise. Worse, they have corrupted the faith. Corruptors of the coinage suffer death. So much the more should those who corrupt the faith. Finally, relapsed heretics are even more deserving of death on utilitarian grounds. Re-

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2. AUGUSTINE, LETTER 185, CORRECTION OF THE DONATISTS, 45 CORPUS SCRIPTORUM ECCLESIASTICORUM LATINORUM (C. Gerold trans. 1866) 23.

3. *Id.* at 23-25.

4. 2-2 AQUINAS, SUMMA THEOLOGIAE Q.10, Art. 8 (Leonine ed. 1903).

lapsed, they will infect others; and moreover, "if they escaped without punishment, others would more securely relapse again into heresy."<sup>5</sup>

The squalid scenes that took place in Rouen in 1431 were not envisaged by Augustine and Thomas; but at the level of theory, they provided sustenance for the system that produced those scenes. The two greatest theologians of the Western Church had blessed the use of force against the heretic; the rest was detail, to be worked out by the ecclesiastical establishment in conjunction with its silent, necessary partner, the secular power. One detail was important and was dealt with by the canonists. The Fourth Lateran Council forbade clerics to participate in blood judgments. Ecclesiastical judges could not lawfully sentence anyone to capital punishment. But the punishment for Joan, as for any relapsed heretic, was death. As she said to the Bishop of Beauvais—again I quote an eyewitness—"Bishop, I die by you."<sup>6</sup> The standard legal formulas proclaimed that the ecclesiastical judge in a heresy case merely abandoned a relapsed heretic to the secular power.<sup>7</sup> The death penalty was imposed by the State not the Church. Few legal fictions have been so transparent or so tragically useful.

In retrospect, it is clear that the canonists' creation of the legal fiction was a mistake—a typical example of a mask being slipped, all too easily, over those responsible, so that the ecclesiastics' own responsibility for the blood shed was, if not successfully concealed, still unacknowledged. Thomas' use of contract theory to catch the heretic as promise-breaker also involved other inappropriate legal fictions—the fiction that the heretic had personally committed himself to the faith by the baptismal vows uttered in his name; the fiction that the heretic was morally culpable when his beliefs altered from what was defined as orthodoxy. In addition to fictions, Thomas added one of those analogies that nearly every student of law can see is dangerous: the comparison of counterfeiting with heresy—the comparison containing the implication that heretics were unscrupulous criminals of the same order as counterfeiters; the comparison confusing the material realm of property and the spiritual realm of truth.

Thomas made mistakes in legal reasoning. His mentor, Augustine, made mistakes in exegesis. He turned a parable about the nature of the kingdom of God into a prescription for persecution. He made the overanxious host of Jesus' story into the Lord and transferred from the context of a story to the context of the law the words "Com-

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5. 2-2 *id.* at Q. 11, Art. 4.

6. *Deposition of Jean Toutmoillé*, O.P. in DONCOEUR, *supra* note 1, at 80.

7. H.C. LEA, *A HISTORY OF THE INQUISITION OF THE MIDDLE AGES* 1, 535 (1955).

pel them." And with an arbitrariness of the most fanciful kind he identified highways and hedgerows with schisms and heresies. With great rhetorical skill and great neglect of other portions of Scripture, Augustine—like the rankest fundamentalist—fashioned a club out of a line of texts; and it was a club to be put to deadly use. But why did Augustine make such an elementary blunder? Because experience—that is, his own observation of the life of the Church in North Africa—made him think that compulsion worked, was beneficial, led to good Christian lives.

## II

I can point out today the errors in Augustine and Thomas, secure in the knowledge that the Second Vatican Council in *Dignitatis humanae personae* teaches the right of every human being to be free from coercion in matters of conscience. But how did we move from the theology of Augustine and Thomas to the position accepted by nearly every civilized person today? Let me begin with two thinkers who reasoned pragmatically, and first with Thomas himself.

Addressing the question, "Are the rites of infidels to be tolerated?" in the *Summa Theologica*, Thomas says that Jewish rites are to be tolerated because they foreshadow Christian rites and continues:

But the rites of other infidels, which bear nothing true or useful, are not to be tolerated in the same way except perhaps to avoid some evil, to wit, scandal or a division that could arise from this or an obstacle to the salvation of those who would gradually be converted to the faith if they were tolerated. On this account the Church has sometimes tolerated the rites of even heretics and pagans when there was a great multitude of infidels.<sup>8</sup>

The analysis is straightforward calculation. If more harm than good would be done by persecution, persecution is to be avoided. No immunity for the religious ceremonies of unbelievers is admitted in principle. Thomas explains the Church's toleration of "even heretics" in terms of numbers. Where there are lots of adversaries, repression of their rites is to be avoided. The practical reasons are so evident that after the Church lost ground in the sixteenth century, they provided a pragmatic charter for toleration. As late as the present century they dominated Catholic teaching. The Catholic "thesis" was that a good government should repress heresy. The Catholic "hypothesis" was that in certain circumstances repression would do more harm than

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8. 2-2 AQUINAS, Q. 10, Art. 11 (Leonine ed. 1903).

good; the hypothesis was held to be verified in modern cultures. Pragmatically, Catholics were committed to tolerance.

A second pragmatist: James Madison, defending the Constitution of the United States in 1790, writes:

Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious belief in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.<sup>9</sup>

Madison's reasoning is not dissimilar from Thomas's. Where there are many different religions, intolerance is impractical. Madison is only more emphatic: "the best and only security" is numbers, because numbers ensure that no single sect will prevail.

Madison's reasoning also parallels the basis for political freedom which he masterfully sets out in Number 10 of *The Federalist Papers*. Factions, he says, are built into democratic political life, and a majority dominated by a faction will "vex and oppress" its opponents. But the power of factions is mitigated by representative government chosen from a broad territory. "Extend the sphere," he writes, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . ."<sup>10</sup>

I have little doubt that if pluralism had not existed in fact in the America of 1790—if there had not been a plurality of Protestant churches, none of whom could realistically expect to rule the country—there would have been far less interest in adopting the First Amendment. I have been unable to discover any country before 1790 where a religious majority, sure of its beliefs and certain of its power, granted universal liberty of conscience. Americans in 1790 were not so different from the people of other times and places. Catholics were less than 1% of the population; Jews were even fewer.<sup>11</sup> Protestants

9. Address by James Madison, June 12, 1788, in 11 MADISON'S PAPERS 130 (W. Hutchinson & W. Rachal eds. 1962).

10. JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS 61 (1937).

11. Maryland, the most Catholic of colonies, had 7,692 reported Catholics in the 1750's and 92,038 Protestants, J. T. ELLIS, CATHOLICS IN COLONIAL AMERICA 358 (1965). There were very few Catholics in New York, *id.* at 369; in Pennsylvania, where there was freedom to practice their religion, there were 1,365 out of a population of about 250,000, *id.* at 376. The oldest Jewish community, Newport, Rhode Island, had about 600 Jews out of a population of 6000. J.R. MARCUS, THE COLONIAL JEW IN AMERICA 1, 319. (1970).

granted religious freedom to Protestants. They did so on the practical grounds enunciated by Madison: no church should dominate.

The trouble with these pragmatic arguments is that they offer no assurance of religious freedom to any discrete and insular minority. Thomas's reasoning would authorize the Church to foster the suppression of other religions wherever the number of pagans or heretics are too small to resist. Madison's reasoning is reassuring only as long as a healthy plurality of churches thrives. Neither of these practical thinkers hold out hope for the minority against whom several dominant sects combine. If all the others gang up against it, there is no great division in the country, no risk to the rulers, no security for the victim. The practical result of these practical arguments is that might will make right. Religious freedom can be squelched when a combination of churches concentrate in suppressing insignificant and impotent infidels.

Let us turn from these apparently precarious and inconclusive practical reasons for religious freedom to principled theories starting again with Thomas Aquinas. Thomas asks whether you are bound to follow your conscience whether it is right or wrong. Conscience, he says, is "a certain application of knowledge to action"; it is "a dictate of reason." To act against your conscience is to act against your reason. To act against reason is always sinful. You are morally obliged to obey your conscience. Specifically in the context of religious error, Thomas asks whether this obligation holds when your reason erroneously proposes something as God's commandment which is in reality evil. He answers that you are still obligated to follow your conscience; for "it is the same thing to flout the dictate of reason and the commandment of God."<sup>12</sup> In other words, when your conscience tells you that something should be done, you go against reason and against God in doing otherwise.

Does not this teaching of Thomas lay the foundation of freedom of conscience? Who would compel a person to act against his reason and against God? Would not any religion be perverse that on religious grounds persecuted a person for following what his reason and religion told him was right? Thomas himself subverts the thrust of these arguments by supposing that when conscience errs, there is a moral fault at the root of the error; he leaves open the possibility that punishment might be due the fault, although not due the action in accordance with conscience. He leaves wide latitude for persecutors

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12. 1-2 AQUINAS, at Q. 19, Art. 5.

to focus on the arrogance or negligence that led to the error they detect in conduct faithful to conscience.

A different tack was taken by Baruch Spinoza in 1670. While Thomas had written as a member of a dominant majority, Spinoza was a minority of one. In his *Tractatus Theologico-Politicus* he wrote apropos the ruling powers:

I concede that they can rightly rule most oppressively and send citizens to death for the most trivial reasons. But, because they cannot do such things without great risk to their rule as a whole, I can also deny that they have an absolute capability to do these and similar things, and I can consequently deny that they have an absolute right to do so. For, as I have shown, the rights of the Supreme Powers are determined by their capability.<sup>13</sup>

The natural inability of the rulers to achieve absolute control is converted by him into a principle. What cannot be done should not be attempted.

The totalitarian technology of the twentieth century undid this kind of principle. It may be impossible to control another's mind and speech at every moment. It is certainly possible to control many men's minds on particular occasions—hence the art of brainwashing. It is common to control everyone's speech on particular occasions. No one speaks his mind all the time. An intolerant ruler could say to Spinoza, "That's all I ask—power to control speech on particular occasions; I will specify the occasions. You say what cannot be done should not be done. I reply that the suppression of speech can be accomplished and therefore by your own criterion is legitimate."

So far we have sought reasons from philosophy. Suppose we turn to Christian theology. The first defender of complete freedom of conscience who writes in English—and one of the earliest defenders anywhere—is a Christian theologian, Roger Williams, author of *The Bloudy Tenent of Persecution*, published in 1644. He declares that he will show:

First, that the blood of so many hundred thousand souls of Protestants and Papists, spilt in the wars of present and former ages, for their respective consciences, is not required nor accepted by Jesus Christ, the Prince of Peace. . . .

Fifthly, all civil states with their respective constitutions and administrations are proved essentially civil and therefore not

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13. B. SPINOZA, *Tractatus theologico-politicus*, in SPINOZA, *THE POLITICAL WORKS*, ch. 20 (A. Wernham ed. 1958).

judges, governors, or defenders of the spiritual or Christian state and worship.

Sixthly, it is the will and command of God that since the coming of his Son the Lord Jesus, a permission of the most paganish, Jewish, Turkish, or anti-Christian consciences and worships be granted to all men in all nations and countries. . . .<sup>14</sup>

This declaration marvelously integrates Christian experience—the experience of bloody slaughter in religious persecution—with an appeal to the teaching of Jesus and a reflection on the nature of civil government in the light of that teaching. Williams is faithful to the program he sets out. He demonstrates with an abundance of references to Scripture and to the history of Christian intolerance that it is contrary to the will of God as manifested by Jesus Christ that any conscience be denied religious liberty. Not on any obviously pragmatic grounds, not by an appeal to the nature of things, not by any abstract reflection on human beings, but by invoking the Gospel, Roger Williams becomes the proclaimer of religious freedom.

The experience that led Roger Williams to see what the Gospel required was both vicarious and personal. Vicariously he identifies with all those hundreds of thousands killed in wars of conscience. Personally he had himself suffered exile for the exercise of his conscience. Persecution, a negative experience, led him to perceive clearly and to prize dearly the freedom the Gospel requires.

Williams, writing out of his own American experience and looking at European experience with the freedom of an American, I see as the principled progenitor of the First Amendment. John Locke, whose *Epistola de tolerantia* is two generations later, has little to say that Williams had not said; is equally theological; and, excluding both Catholics and atheists from his tolerant society, is much narrower. But to Locke's letter in English translation is no doubt due much credit for popularizing and making acceptable among humane Englishmen the idea of toleration. By the time James Madison grew up in Virginia and went to college at Princeton, freedom of conscience was as common a concept with the established Congregationalists of New England as with the new generation in Virginia. It was Madison's genius to grasp the importance of the concept and make it central to our political system.

As early as January 24, 1774, aged 23, he writes his friend Wil-

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14. R. WILLIAMS, *THE BLOODY TENENT OF PERSECUTION*, 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 3 (S. Caldwell ed. 1963).

liam Bradford about what the Church of England is doing to the Baptists in Virginia. A little earlier Madison had wished that Bradford (later Attorney General of the United States) would give up his career in the law to be a minister of the Gospel, to be, as Madison puts it, one of "the fervent Advocates in the cause of Christ." He addresses Bradford as a fellow believer when he says:

That diabolical hell-conceived principle of persecution rages among some and to their eternal infamy the Clergy can furnish their Quota of Imps for such business. . . . Pray for Liberty of Conscience.<sup>15</sup>

Madison's denunciation is charged with theological concepts. The persecuting clerics are a satanic species. The doctrine justifying their action is diabolical. If Hell's doctrine is "the principle of persecution," the opposite, it is implied, is the heavenly principle of freedom, for which Madison asks his friend's prayers.

Experience again fires this devotion to principle—in part, no doubt, the personal experience of observing the persecution which "rages" in Virginia. But the strength of Madison's outrage does not depend solely or chiefly on his sensitive distaste at the sight of half a dozen Baptist preachers jailed by Anglican magistrates. Far more than his own experience is the experience of persecution that educated men like Williams, Spinoza and Locke had contemplated since the Reformation. It is by virtue of that negative vicarious experience that a young American with a precocious sense of political structures could have a passionate sense of the folly and wickedness of persecution and its incompatibility with the light of the Gospel.

Augustine had the parochial experience of seeing coercion work; he had not considered its corrosive effects. Thomas, living in a world of dangerous fictions and analogies and concepts un nourished by experience, did not improve on Augustine's analysis. Neither theologian had seen saint after saint burned—not only Joan of Arc, a canonized saint, but also those whom Czelaw Milocz commemorates when he writes of

Our sister Lisabeth in the communion of saints—  
Of witches ducked and broken on the wheel  
Under the image of the cloud—enfolded Trinity  
Until they confess they turn into magpies at night.<sup>16</sup>

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15. Letter from Madison to William Bradford, (Jan. 24, 1774) in MADISON'S PAPERS at 1, 106.

16. C. MILOSZ, *Bells in Winter* in MILOSZ, BELLS IN WINTER, 69.

That kind of European experience, on the one hand, and the positive American experience of the nineteenth and twentieth centuries, on the other, was to confirm the correctness of Roger Williams and James Madison's position and to make it possible for all Christian denominations to reject the reasoning of Augustine and Thomas and to insist on the liberty of conscience from coercion.

To this point I have spoken of the pragmatic and the principled and the Gospel and the place of experience as though these categories were unrelated to each other. Of course, they are not. What is successful pragmatically—that is, what works in the long run—is what conforms to the good of human beings. What is principled is the expression of a value reflective of the human good. The Gospel itself is a Gospel that reveals what is good for human beings. Negative experience is experience that shows that something does not work, is contrary to the human good, is counter to the Gospel. Positive experience is experience of something that does work, conduces to the human good, is true to the Gospel. On both principled and pragmatic grounds, “the full and free exercise” of conscience, to use Madison's phrase, is justified; responsive to the Gospel of Christ; confirmed thousands of times over by human experience.