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CONSCIENCE, COERCION AND THE CONSTITUTION: SOME THOUGHTS

DWIGHT G. DUNCAN*

It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.¹

—Mark Twain

I. INTRODUCTION

The ability of people to object to, and thus disregard, legal requirements for reasons of conscience has always been a matter of controversy. Recent examples include the question of whether pharmacists who object to the “morning after pill” can be forced to dispense it against their conscientiously held beliefs, or whether a private adoption agency can be forced to serve homosexual couples contrary to its principles. Sometimes the objection is religiously motivated, and, increasingly in our secularized world, it is not.

Historically, the question of conscientious objection was associated with the military draft and coerced military service. More recently, it has extended to abortion and medical decisions generally, such as the ability of Jehovah’s Witnesses to refuse blood transfusions, or Christian Scientists to forego medical attention entirely and substitute spiritual treatments instead, or pro-lifers to refuse to participate in assisted suicide in places like Oregon, where it is legal. The question of conscientious objection has arisen in connection with sex education in the public schools, and with whether people with moral objections to homosexual practice can be

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¹ Mark Twain, *Following the Equator and Anti-imperialist Essays* 195 (Oxford University Press 1996) (1903).

punished for hate speech or for some type of prohibited discrimination on the basis of sexual orientation. However, this article is concerned with gaining a more general understanding of conscientious objection: opposition to and refusal to obey a legal requirement, whether general or specific, for reasons of morality and ethics—in a word, conscience.

The United States Constitution offers a limited safe harbor for conscience, particularly from being coerced in matters of belief and expression. State constitutions may offer other protections, and federal and state statutory law and regulations may offer still more. But ever since the 1990 decision of the United States Supreme Court in *Employment Division v. Smith*,² the Free Exercise Clause of the First Amendment has been of very limited use in protecting religiously motivated conduct as such.

As a consequence, this article will argue that the most viable constitutional strategy for protecting conscientious objectors is to bracket the question of whether it is religiously motivated. Rather, it will focus simply on the question of whether it is a sincerely held moral conviction, while seeking to expand existing freedom of speech case law under the First Amendment to the United States Constitution to maximize protection for people of conscience from being obliged to act contrary to their conscience.

To the extent that constitutional protection is inadequate, statutory protection and exemptions can be enacted or expanded. Furthermore, to the extent the government finds a sufficiently compelling reason to be served thereby, the government can provide the contested practice using paid volunteers or government employees—anything other than coercing action contrary to the consciences of private parties.

The military's move from the draft to an all-volunteer army is a successful example of such an approach. A similar market-style solution could be devised to address the problem of dispensing the morning-after pill or conducting gay adoptions. Let public agencies or private entities that are

² *Employment Division v. Smith*, 494 U.S. 872 (1990).

willing to do the tasks that others find morally problematic. A better way is needed to accommodate conscientious objections than to force people's consciences to bend or break before the coercive power of government.

After examining the military conscription background, where the statutory exemption for conscientious objectors has been interpreted by the courts to equate deeply felt non-religious reasons for conscientious objection with religious ones, the first half of this article goes on to consider some First Amendment cases that begin to articulate a constitutional grounding for conscientious objection in the Free Speech Clause, while refusing to privilege specifically religious reasons for conscientious objection under the Free Exercise Clause. The second half of the article then considers a possible way to resolve these problems by using market solutions. Historically, this was done by abolishing the draft and by using government funding to protect those conscientiously opposed to abortion. An attempt is made to apply this approach to two current issues involving gay adoptions and the "morning-after" pill.

II. THE MILITARY BACKGROUND

In times of war, and even in times of peace, the United States has used conscription to meet its military needs. The military draft, which began during the Civil War and existed before the introduction of an all-volunteer military army in the 1970s, was the context in which claims of conscientious objection were made and heard by courts. A statutory exemption existed for those "person[s]... who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form."³

In 1965, the statute further defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political,

³ The War and National Defense Selective Service Act, 50 U.S.C.S Appx §456 (j).

sociological, or philosophical views or a merely personal moral code.”⁴ Two observations may be made about this statutory provision for conscientious objectors: (1) it only extended to opposition to participation in war in any form; and thus did not countenance what could be called selective conscientious objection: objection to this or that particular war but not necessarily to all wars; and, (2) it only covered religiously-motivated conscientious objection rather than conscientious objection out of a “personal moral code.”

The statutory provision for conscientious objection was rather stingy, then, as it accommodated only the totally pacifist position, what has been a minority religious perspective on warfare similar to the perspective of groups like the Quakers or Jehovah’s Witnesses. Doubtless, this was deliberate and served to keep down the number of potential conscientious objectors and maximize the number of conscripts. It should be noted, though, that the more mainstream Western moral tradition regarding warfare, the “just war theory,”⁵ argued for the morality of some wars and the immorality of others. It was thus a selective conscientious objection view, that of the Catholic Church for example, which the statute did not accommodate. The statute accommodated only the total pacifist position.

The difference between selective conscientious objection and total pacifism is illustrated by the recent Vatican decision to declare Franz Jägerstätter, an Austrian Catholic farmer who was beheaded for refusing to serve in the Nazi army during World War II, a martyr.⁶ He was not,⁷ nor is Catholic

⁴ *Id.*

⁵ See, e.g., Catechism of the Catholic Church, paras. 2308, 2309, <http://www.vatican.va/archive/catechism/p3s2c2a5.htm#III> (last visited Oct. 16, 2007) (explaining the Catholic Church’s position on “just war”). See e.g., Wikipedia, http://en.wikipedia.org/wiki/Just_War (discussing “just war”).

⁶ *Promulgazione di Decreti Della Congregazione delle Cause Dei Santi*, June 6, 2007, http://212.77.1.245/news_services/bulletin/news/20340.php?index=20340&po_date=01.06.2007&lang=en (last visited Sept. 7, 2007). For more information on Franz Jagerstatter’s life, see GORDON CHARLES ZAHN, IN

teaching,⁸ opposed to all war, just to the Nazis' war of aggression (though, in judging that the war was immoral, he was not supported at the time by his priest and local bishop). If Franz were in the United States and refused to serve in what he considered an unjust war, then he would not have qualified for the exemption for conscientious objectors. The fact that he was declared a martyr means that the Catholic Church considers that he died for his faith and that his conscientious objection was religiously motivated. He would have met that aspect of the United States statutory exemption requirement, though not the requirement that he be opposed to war in any form.

A series of United States Supreme Court decisions beginning in 1965, tried to expand the reach of the exemption beyond theistic religions. In *United States v. Seeger*,⁹ the Court ruled the reference to "Supreme Being" in the statute required only "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."¹⁰

A subsequent case, *Welsh v. United States*,¹¹ as a matter of statutory interpretation, extended the reach of the conscientious objector exemption to a person who was philosophically committed to not injuring or killing another human, but who refused to characterize his opposition as "religious." Perhaps more significantly, Justice Harlan concurred in the result (the Court's opinion was a plurality opinion) on constitutional grounds: "[H]aving chosen to exempt, [Congress] cannot draw the line between theistic or non-theistic religious beliefs on the one hand and secular

SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JAGERSTATTER
(Holt, Rinehart and Winston, 1965).

⁷ Bruce Kent, *Franz Jaggerstatter*, Peace People Series (July 1991)
<http://www.paxchristi.org.uk/PeacePeople/Jagerstatter.PDF> (last visited
Oct. 16, 2007).

⁸ Catechism of the Catholic Church, *supra* note 6.

⁹ *United States v. Seeger*, 380 U.S. 163 (1965).

¹⁰ *Id.* at 176.

¹¹ *Welsh v. United States*, 398 U.S. 333 (1970).

beliefs on the other.”¹² Even though the rest of the Court did not join him in that view, it seems that Justice Harlan’s view is the most honest under the establishment clause.¹³ In sum, though the protection for conscientious objectors from compulsory military service is statutory and not constitutional, the Supreme Court has consistently extended it to moral and not only religious beliefs.

In suggesting that conscientious objection be available to those who are opposed to laws for secular reasons, rather than just religious ones, a problem arises. A religiously-based reason is a certifiably *bona fide* and sincere reason of conscience, whereas a secular reason needs to be verified as truly a reason of conscience, as opposed to, say, a simple preference. For example, one could be opposed to service in a particular war like the Nazis’ war of aggression or the current war in Iraq, because one considered it evil and immoral, or simply because one preferred to go about one’s business or wanted to spend the time at a resort. The former reason would qualify as conscientious objection, but not the latter ones. To extend the right of conscientious objection to the latter would give everyone an automatic exemption from laws that they did not want to obey for any reason, which would completely undermine the rule of law.

III. THE FREE SPEECH CASES

The Free Speech Clause of the First Amendment has served as the constitutional basis for protecting conscientious belief. In ruling that the refusal of Jehovah’s Witness school children to salute the flag and pledge allegiance was protected by the First Amendment, the Supreme Court in 1943 famously wrote:

[T]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own

¹² *Id.* at 356 (Harlan, J. concurring).

¹³ U.S. CONST. Amend. 1 (“Congress shall make no law respecting an establishment of religion...”).

mind, left it open to public authorities to compel him to utter what is not in his mind. . .

¹⁴ If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹⁵

Since this expansive view of what the First Amendment protects was issued in time of war, it is not surprising that there was a qualification immediately following the “no official orthodoxy” line: “If there are any circumstances which permit an exception, they do not now occur to us.”¹⁶ Compulsory military service was a possible exception.

Justice Murphy’s concurring opinion ended rather dramatically, with a ringing endorsement of freedom of conscience under the constitution:

Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.¹⁷

¹⁴ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

¹⁵ *Id.* at 642.

¹⁶ *Id.* The footnote in the Court’s opinion at that point, said: “The Nation may raise armies and compel citizens to give military service (citation omitted). It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.” *Id.* at 642.

¹⁷ *Id.* at 646 (Murphy, J., concurring).

In dissent, Justice Frankfurter described the case as involving the competing claims “of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience.”¹⁸ While arguing that religious freedom did not entail an exemption from generally applicable laws, even Frankfurter recognized that “any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order.”¹⁹

Under the rule of the *Barnette*²⁰ case, the treason case of Sir Thomas More, executed in 1535 in London for refusing for reasons of conscience to swear to the oath of supremacy (wherein Henry VIII was declared “Supreme Head of the Church in England”) would have had to have been dismissed. This famous conscientious objector, who was recently voted “Lawyer of the Millennium” by the Law Society of Great Britain,²¹ was being required to swear to something in which he did not believe. According to *Barnette*, the First Amendment’s Free Speech Clause places that outside the government’s power.

Another instance where the Supreme Court upheld the freedom of conscience to dissent from official orthodoxy was the case of *Wooley v. Maynard*,²² in which another Jehovah’s Witness covered up the motto of his license plate, “Live Free or Die,” because he conscientiously disagreed with it.

[F]reedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. See [*Barnette*.] . . . The right to speak and the right to refrain from speaking

¹⁸ *Id.* at 647 (Frankfurter, J., dissenting).

¹⁹ *Id.* at 654.

²⁰ *Id.*

²¹ www.thomasmorestudies.org/reputation_1.html (citing Law Society of Great Britain’s Gazette of Dec. 1999) (last visited Oct. 16, 2007).

²² *Wooley v. Maynard*, 430 U.S. 705 (1977).

are complementary components of the broader concept of ‘individual freedom of mind.’²³

This “individual freedom of mind,” which *Barnette* had first referred to,²⁴ could also be called “freedom of conscience.”

An important discussion of freedom of conscience takes place in the case of *Girouard v. United States*,²⁵ which dealt with an appeal from a denial of naturalization to a Seventh Day Adventist because he refused to say he would be willing to take up arms in defense of the United States. Previous cases had upheld the government’s right to refuse citizenship on that basis: “[A]n alien who refuses to bear arms will not be admitted to citizenship.”²⁶ Though these were all statutory cases, like the conscientious objection cases involving compulsory military service, the statutory interpretation was doubtless influenced by constitutional values of freedom of thought and conscience.

Holding that denial of naturalization is inappropriate because of a refusal to take up arms, Justice Douglas wrote,

The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.²⁷

Quite significantly, the 1946 *Girouard* decision overruled a 1931 precedent, which dealt with a minister who was denied naturalization because he would not “promise in advance to bear arms in any and all future wars, even against

²³ *Id.* at 714.

²⁴ *Barnette*, 319 U.S. at 637.

²⁵ *Girouard v. United States*, 328 U.S. 61 (1946).

²⁶ *Id.* at 63.

²⁷ *Id.* at 68.

his conscientious religious scruples.”²⁸ *United States v. Macintosh* was a 5-4 decision, with a resounding dissent written by Chief Justice Hughes:

Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires

²⁸ *United States v. Macintosh*, 283 U.S. 605, 610 (1931).

obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts.²⁹

By reversing the *Macintosh* precedent, the Hughes dissent in effect became the law of the land at the end of World War II in the *Girouard* decision.

IV. THE FREE EXERCISE CASE

In the 1990 case of *Employment Division v. Smith*, a majority of the United States Supreme Court, however, endorsed Frankfurter's point about no religious exemptions from generally applicable laws under the Free Exercise Clause of the First Amendment³⁰ (although protection of conscience from government-coerced official orthodoxy remains under the Free Speech Clause). The *Smith* case involved a couple of state workers dismissed because of their use of peyote, a controlled substance, in Native American ritual.³¹ Justice Scalia wrote for the Court, finding that all that is needed to sustain a law that is generally applicable and not specifically targeted at religious practice is some rational basis.³² There is only heightened judicial scrutiny of the law if it deliberately targets religious practice or burdens some other constitutional freedom as well (producing a "hybrid" claim).³³

²⁹ *Id.* at 633-634 (Hughes, C.J., dissenting).

³⁰ *Employment Division v. Smith*, 494 U.S. 872 (1990).

³¹ *Id.*

³² *Id.*

³³ *Id.*

Of course, there is some heightened judicial scrutiny of laws that govern expressive conduct or symbolic speech. In addition, the First Amendment right to remain silent (or freedom from compelled speech) serves as an avenue for protecting conscience and its expression.³⁴

Thus far, we have seen how religious and secular reasons for conscientious objection tend to be treated the same by our legal system and that there is some First Amendment basis for recognizing “freedom of conscience” in that broad sense. The rest of this article will explore the use of market solutions to the dilemma of legal obligations forcing people to act against their conscience.

V. A SUGGESTION TO LET THE MARKET HANDLE THE PROBLEM

Since the 1970s, the problem of how to handle conscientious objectors from compulsory military service has been largely eliminated by abolishing the draft and instituting an all-volunteer military. Although there are some questions about whether such an arrangement is sufficient to produce enough soldiers in time of war, the United States has been able to rely on the free market and volunteers to fill its military needs. (However, there seems to be a significant problem attracting recruits and getting people to re-enlist in the present war in Iraq, for example). Since no one is forced to act against his or her conscientiously held beliefs, the problem of conscientious objection does not arise in that context.³⁵

Another area of the law that seems to have finessed the problem of conscientious objectors is the system of public financing for controversial medical procedures. Abortion is

³⁴ See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

³⁵ Of course, there still remains the problem of what to do with the soldier who freely enlisted but who subsequently finds that what he is asked to do is morally problematic. International and military law would protect him from having to obey orders that involved the killing of innocent civilians, for instance.

the obvious example here. The Hyde Amendment, which cut off federal funding for non-therapeutic abortions and was upheld by the United States Supreme Court, in effect recognized that such abortions were morally abhorrent to a significant group of the citizenry, and as a result those citizens would not be forced to pay for it through their tax dollars.³⁶ Further, the Weldon Amendment forbids recipients of federal funds from discriminating against individuals or institutions because they refused to perform abortions or refer people for abortions.³⁷

Earlier, the so-called gag rule had been operative, which cut off federal funds for family planning services that counseled or referred for abortion. The Supreme Court, in *Rust v. Sullivan*,³⁸ affirmed this regulation.

At the state level, a number of laws protect conscientious objection against abortion. The Massachusetts law is interesting because it essentially protects health care workers who refuse to participate in abortions for either religious or moral reasons and prohibits any discrimination against those opposed to abortion in government-funded programs. Thus, it functions like a state version of the Weldon Amendment at the federal level: use of state funds is the basis for, in effect,

³⁶ The Hyde Amendment was first enacted by Pub.L. No. 94-439, title II, sec. 209, 90 Stat. 1434 (1976). The Supreme Court upheld the enactment in *Harris v. McRae*, 448 U.S. 297 (1980).

³⁷ Consolidated Appropriations Act, 2005, §508(d), Pub.L. No. 108-447, 118 Stat. 2809, 3163 (2004). This Act states:

(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. (2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan. *Id.*

³⁸ *Rust v. Sullivan*, 500 U.S. 173 (1991).

purchasing respect for conscientious objection by private parties in receipt of the funds.³⁹

The Massachusetts General Laws state, in part:

A physician or any other person who is a member of or associated with the medical staff of a hospital or other health facility or any employee of a hospital or other health facility in which an abortion or any sterilization procedure is scheduled and who shall state in writing an objection to such abortion or sterilization procedure on moral or religious grounds, shall not be required to participate in the medical procedures ... and the refusal of any such person to participate therein shall not form the basis for any claim of damages on account of such refusal or for any disciplinary or recriminatory action against such person. The refusal of any person who has made application to a medical, premedical, nursing, social work, or psychology program in the commonwealth to agree to counsel, suggest, recommend, assist, or in any way participate in the performance of an abortion or sterilization contrary to his religious beliefs or moral convictions shall not form the basis for any discriminatory action against such person.⁴⁰

This is an ideal statutory provision for conscience, religious or moral, protecting people of conscience from being required to violate their conscience in performing, or recommending or in any way participating in abortion.

The second part of the Massachusetts law is premised on state funding:

³⁹ MASS. GEN. LAWS ANN. ch. 112, §12 I (2007).

⁴⁰ *Id.*

Conscientious objection to abortion shall not be grounds for dismissal, suspension, demotion, failure to promote, discrimination in hiring, withholding of pay or refusal to grant financial assistance under any state aided project, or used in any way to the detriment of the individual in any hospital, clinic, medical, premedical, nursing, social work, or psychology school or state aided program or institution which is supported in whole or in part by the commonwealth.⁴¹

Here the state is using the power of the purse strings to further protect individuals conscientiously opposed to abortion. Of course, it is not the money that is at issue, but the principle. But relying on the market to, in effect, purchase voluntary compliance is preferable to simply forcing people to act.

VI. TWO CURRENT CONTROVERSIES

The issue of legal accommodation of conscientious objection remains topical: Two current controversies involve the morning-after pill and gay adoption. Illinois has purported to require pharmacists and physicians to dispense the morning-after pill.⁴² Similarly, Massachusetts has recently decided that Catholic Charities must stop doing adoptions because of the refusal of the Catholic Church to serve homosexual couples.⁴³ One can well ask whether such coercion of private parties to act against their conscience or be driven from the field is wise, as a matter of public policy.

⁴¹ *Id.*

⁴² 29 Ill. Reg. 5586 and 29 Ill. Reg. 13639, 13640, codified at 68 Ill. Admin. Code §1330.91(j) (2005).

⁴³ Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, March 11, 2006, available at http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/ (last visited Oct. 16, 2007).

If the government thinks that access to the morning-after pill is so important, why not rely on government dispensaries or willing volunteers to do it? Let the market meet the need. People and institutions that find the morning-after pill morally problematic would not be required to do what they regard as “dirty work,” sully their consciences.

Similarly, government agencies or willing private agencies could (and do) serve homosexual couples in their desire to adopt. Why coerce unwilling private entities that find homosexual adoptions problematic?

In Massachusetts, two state administrative regulations cause problems. One requires that “placement agencies” for adoption not discriminate in providing services on the basis of marital status or sexual orientation, among other things.⁴⁴ Another regulation, from the Department of Social Services, similarly prohibits discrimination on those grounds by entities that receive state funding to assist with adoptions of special-needs children. The receipt of government funding of course complicates the ability of Catholic Charities to “discriminate.”⁴⁵ If it refused the funds, though, it could still continue to provide adoption services according to its conscientious judgment, if the argument of this article were accepted.

The clash arises because Catholic Charities is refusing to place children with homosexual couples because it conflicts with church teaching. So over a matter of principle, when the state made Catholic Charities choose, the agency chose the pope.

Now, admittedly the acting-on-principle angle was undermined when *The Boston Globe* reported that Catholic Charities has placed thirteen children with same-sex couples in the past.⁴⁶ Some have wondered if Catholic Charities is

⁴⁴ John Garvey, *State Putting Church Out of Adoption Business*, BOSTON GLOBE, March 14, 2006, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/03/14/state_putting_church_out_of_adoption_business/ (last visited Oct. 16, 2007).

⁴⁵ *Id.*

⁴⁶ See Wen, *supra* note 43.

really standing on principle or just hiding behind the Vatican's cassock.

But it is important to note that on the point of same-sex adoption, the Vatican has been clear. In 2003, the Vatican's Sacred Congregation for the Doctrine of the Faith issued a document condemning adoption by homosexuals. It was signed by the head of the congregation, Cardinal Joseph Ratzinger (now Pope Benedict XVI), and approved by John Paul II.

The document calls same-sex parenting arrangements "gravely immoral" because,

[T]he absence of sexual complementarity in these unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development.⁴⁷

Obviously, not everybody agrees with that assessment. And given Catholic Charities' checkered record on same-sex adoption, it is obvious that even Catholics in a position of authority have not always followed the church's teaching.

But the teaching could not be clearer. For Catholics, the Catholic Church's highest authority has spoken decisively on an issue of faith and morals. It should hardly be surprising that Catholic organizations, if they wish to remain Catholic,

⁴⁷ Congregation for the Doctrine of the Faith, Considerations regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons, June 3, 2003, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (last visited Sept. 7, 2007).

are required by their religion to act in a manner consistent with church teaching.

Adoptions, we are told, are different, because these placement agencies act in a governmental capacity, rather than *in loco parentis*. Why does a mere license from the government, or even government funding, make them governmental actors? After all, birth mothers can veto prospective adoptive parents for any reason or no reason at all — because they are the wrong race, or the wrong sexual orientation, or the wrong religion — even though the government itself obviously could not discriminate in that manner.

Furthermore, the fact that Catholic Charities does not place children with homosexual couples does not prevent homosexual couples from adopting through some other agency. In fact, in the Worcester diocese of Massachusetts, the practice has been to refer such couples to other agencies.

More radically, what sense does it make for the regulations to prohibit discrimination on the basis of marital status? Does that really mean that it would be wrong for a private adoption agency to prefer placing kids with married couples, rather than singles or unmarried couples? If so, then the law is, as Mr. Bumble duly noted, “a [sic] ass — a idiot.”⁴⁸

Now come our state legislators, who have announced they will make no exemption from the anti-discrimination state regulations governing adoption for religious organizations. To vindicate the alleged rights of a relative handful of adult homosexuals to adopt and to force private organizations to serve them, our state leaders would force faithful conscientious Catholics to get out of the adoption business altogether.

Consider the impact. The church and its associated charitable endeavors have helped thousands of orphans find loving homes. In pure numbers, same-sex couples seeking to adopt are relatively few.

⁴⁸ CHARLES DICKENS, *OLIVER TWIST*, 520 (Dodd, Mead & Co. 1941) (1837).

Some say the numbers are not the most important things because the argument is over a matter of principle. But what is the principle that state officials are defending? It is not whether same-sex couples can adopt children. Rightly or wrongly, that matter has already been decided in favor of same-sex adopters.

The principle at issue is whether same-sex couples can adopt children through every entity in the commonwealth that wishes to assist in adoptions, regardless of the religious beliefs of the people and organizations that want to do that charitable work.

The argument presented here would say that government should be more respectful of people's consciences. People should not be forced to do things that violate their conscience. If the morning-after pill or gay adoptions are so important to the commonwealth, then legalize the use of the pill or authorize gay adoptions. State agencies can offer these services or pay private parties to do so on a volunteer basis. But people of conscience should not be forced to do so against their will and judgment, for better or worse. It may happen, of course, that some people would go without services that they would otherwise want, but in a free society, respect for conscience should not dragoon people into acting against their deeply felt moral convictions. That is just the price we pay for a free society.

Our Constitution eliminated religious tests for public office and inserted the ability to make legally binding commitments by affirmation as well as oath to accommodate the conscientious objection of Quakers to swearing oaths. The guarantee of religious freedom that begins the First Amendment and the broad scope of freedom of speech and association that fills it out, and indeed the provision of the Fifth Amendment against compelled self-incrimination, all manifest a solemn respect for freedom of conscience vis-à-vis the law and the government. The conscientious objection does not have to be religiously motivated, so long as it is sincere.

The compelled speech cases provide the clearest vindication of freedom of conscience from government

coercion but do not protect against the military draft. For that and many other conflicts, statutory protection for conscience is necessary. Similarly, the conscientious objection to abortion and other types of medical procedures has generally been protected around the country by various types of legislation, both federal and state. There has also been a trend to condition receipt of state funds on respecting conscience, and the example of the abolition of the military draft and its replacement by more attractive recruiting efforts all point in the direction of using the free market to meet the perceived needs of society, rather than rely on government compulsion.

St. Francis of Assisi, the famous thirteenth-century friar who founded the Franciscans, had this piece of advice for his followers with respect to conscience: "If a superior commands his subject anything that is against his conscience, the subject should not spurn his authority, even though he cannot obey him."⁴⁹ When governmental authority and individual conscience come into conflict, the government should for its part relent, if possible, and thus make it easier for the citizen to not spurn its legitimate authority.

⁴⁹ ST. FRANCIS OF ASSISI, WRITINGS AND EARLY BIOGRAPHIES, ENGLISH OMNIBUS OF SOURCES FOR THE LIFE OF ST. FRANCIS Admonitions, III, 80, (Marion A. Habig ed., Franciscan Herald Press 1973).