

## RIGHTS OF CONSCIENCE AS LIMITS OF POWER

In considering "rights of conscience as limits of power," the limits referred to are exclusively moral limits, one of the only two kinds of limits that rights as such entail, the other kind being legal limits.<sup>1</sup> Conscience, conceived as a psychological force, can no doubt limit power in ways that are properly studied by psychologists, but that is well outside the scope of this inquiry. Rights have, at least usually, to be understood as relative to obligations.<sup>2</sup> And obligations are legal or moral limits imposed on the exercise of human power.<sup>3</sup> Prescinding from the realm of law and attending to the realm of ethics, my title may therefore be re-enunciated more clearly as referring to rights of conscience insofar as they entail moral obligations, limiting the justifiable exertion of power. The broad questions I wish to consider are, therefore, whether or not, and if so to what extent, conscience entails such obligations. But those are still very broad questions and, useful though it might be to treat them fully, the purpose of this discussion requires narrowing them still further. And in order to do that it will be necessary to define, at least tentatively, the only seriously ambiguous term included in those questions, namely, the term conscience.

Consultation of a good historical lexicon will suffice to discover that, in English as in modern European languages generally, the term conscience is remarkably ambiguous, and that its ambiguity has increased over the course of its history.<sup>4</sup> I, for my part, can make no sense whatever of the intention expressed or implied by some writers, of stating what conscience "really" means.<sup>5</sup> Conscience, as a venerable item of both popular and technical vocabularies, means everything that intelligible and conventional users of language have used it to refer to, regardless of whether the statements in which they have employed it be considered true or false, wise or foolish. In selecting a single meaning one inevitably ignores questions, which may well be interesting and important, that would logically arise if other meanings had been selected instead. Ideally, one should take up each such meaning in turn, but that again exceeds my present purposes. I shall therefore ask for the indulgence Socrates showed to Critias—"I have no objection to your giving names any signification which you please,

<sup>1</sup>For an extremely helpful elucidation of the much-abused term "rights," see Joel Feinberg, "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970), pp. 243-60.

<sup>2</sup>There has been much discussion of whether or not rights always entail obligations, and whether or not obligations always entail rights. I am supposing only what is not, to my knowledge, controversial, that rights usually entail obligations. For a stimulating introduction to the complexities of the matter, see David Lyons, "The Correlativity of Rights and Duties," *Nous* 4 (1970), pp. 45-57.

<sup>3</sup>A carefully distinctive account of what is meant by a legal right comprises the first part of a keenly perceptive lecture by H.L.A. Hart, "Definition and Theory in Jurisprudence," *The Law Quarterly Review* 70 (1954), pp. 32-49.

<sup>4</sup>"Opinions as to the nature, function, and authority of conscience are widely divergent, varying from the conception of the mere exercise of the ordinary judgment on moral questions, to that of an infallible guide of conduct, a sort of deity within us. Popularly the word is often used for the whole moral nature . . .", *The Compact Edition of the Oxford English Dictionary* (New York: Oxford University Press, 1971), vol. I, p. 522.

<sup>5</sup>A recent example of this approach is provided by Richard P. McBrien, *Catholicism* (Minneapolis: Winston, 1981), pp. 998-1001.

if you will only tell me what you mean by them"<sup>6</sup>—and assign to conscience one of the meanings it has had, at least since the Middle Ages, in intelligible and conventional discourse. Although my choice is not inevitable, neither is it strictly arbitrary, for the meaning selected has enjoyed technical status in more than one major school of thought about ethics, and it neither begs nor trivializes the question under consideration. It is the meaning taken as primary by Thomas Aquinas, some of his predecessors and nearly all of his followers.<sup>7</sup> And it is the meaning adopted for purposes similar to ours, and for reasons that he carefully explains, by Eric D'Arcy, in his study, recently re-published, *Conscience and Its Right to Freedom*.<sup>8</sup> I hope neither my admiration for nor my indebtedness to that book will be obscured by the fact that the point I mainly wish to make entails disagreement with a rather fundamental feature of its argument.

In the sense chosen, conscience is not a faculty but a judgment, expressing one's personal conviction about the rightness or wrongness of some particular line of conduct one might take.<sup>9</sup> Conscience in this sense is a moral judgment, and one that refers directly to concrete behavior, and exclusively to the concrete behavior of the person whose judgment it is. It does not enunciate broad ethical principles, nor does it judge the behavior of others, although it may, of course, derive from broad ethical principles from which judgments concerning the behavior of others can likewise derive.<sup>10</sup>

It can now be said that the rights of conscience as limits of power are, in one sense, implicit in the very definition we have adopted. For according to that definition, it is the nature of a person's conscience to set moral limits to the exercise of that person's power. To question that would be equivalent to asking whether or not one is morally obliged to do what one is convinced one is morally obliged to do. And such a question is vacuous inasmuch as it implies that the same proposition can be for the same subject simultaneously a matter of conviction and of doubt. "Doubtful conscience" is made self-contradictory by our definition of conscience.<sup>11</sup>

That reduces the practical issue to whether or not it is the right of one person's conscience to limit anybody else's power. Can a concrete personal moral conviction arrived at by one individual impose moral obligations on others? That was the question D'Arcy addressed when he proposed to argue: "A has a certain duty entails A has a corresponding right," and went on to observe that

<sup>6</sup>Plato, *Charmides*, in B. Jowett, *The Dialogues of Plato*, (New York: Random House, 1920), vol. I, p. 13.

<sup>7</sup>For a thorough account of the development of this meaning, with generous citation of primary sources, see Odon Lottin, *Psychologie et morale aux XIIIe et XIVe siècles*, vol. II (Gembloux: Duculot, 1948), pp. 103-349.

<sup>8</sup>Eric D'Arcy, *Conscience and Its Right to Freedom* (London: Sheed and Ward, 1961).

<sup>9</sup>If (reason) concludes that, everything considered, this is an action fitting human nature and present circumstances, it pronounces the final moral judgment which is called conscience: I ought to do this." Clifford G. Kossel, "Aquinas, Thomas, Moral Views of," in Vergilius Ferm, ed., *Encyclopedia of Morals* (New York: Greenwood, 1969), pp. 16-17.

<sup>10</sup>Thomas Aquinas takes for granted that the judgment of conscience will always be arrived at deductively; that supposition is unnecessary to the present argument.

<sup>11</sup>This is not to deny that both practical and theoretical questions are raised by the fact that moral judgments can be held with more or less firmness, and credited with more or less probability, nor is it to suppose that the protracted disputes over "probabilism," "probabiliorism," and "equiprobabilism" were ever, in a philosophical sense, satisfactorily resolved. But that unfinished, and currently neglected business, does not affect the present issue.

"to the extent that we succeed in proving that A has a right to follow his conscience, to that same extent others have the duty to respect it."<sup>12</sup> It becomes clear that what he means by respecting it is refraining from interference with the following of it. The rights of conscience D'Arcy wishes to defend are, therefore, negative rights; he neither asserts nor denies that having a duty in conscience establishes any claim to positive assistance in performing it.<sup>13</sup>

Actually, D'Arcy's ultimate objective was more particular than the title of his book might suggest. He was specifically interested in upholding the right of citizens to religious liberty, freedom from political interference with worship understood to be a moral obligation.<sup>14</sup> He saw the issue of religious toleration as a special case of "conscience and its right to freedom." He accordingly explains that the core of his argument comprises two elements, first "that a man has some ground for a strict claim to freedom of conscience," and second "that he can validly urge that claim against the State."<sup>15</sup> In discussing the former element he states that "the ground on which . . . the claim to freedom of conscience is based is the absolute duty never to act against conscience."<sup>16</sup> He observes that this is a different kind of claim from that of rights deriving from contract, and he refers to it as one of those "essential human rights" that "derive from the natural order itself and belong to what St. Thomas calls 'natural justice'."<sup>17</sup> He points out that within a Thomistic framework "the more intimately a given 'object' (in the broad sense) is connected with the integrity of the human personality, the more stringently is it protected by natural justice."<sup>18</sup> This latter notion is elucidated in the following paragraph:

In fact, the starting point of Thomist theory is not an end conceived as a major premise, but the human person with its multiple and bewildering complex of goods and potentialities. It is the human person, rather than his end, who is sovereign and ultimate; or, to be more accurate, it is indeed the end of the individual person, but this is not to be narrowly conceived as the attainment of happiness after death, but the far more complex end of the total harmonious fulfillment of the potentialities of the individual person.<sup>19</sup>

D'Arcy is particularly concerned to emphasize that the teleological grounding of rights that he derives from Thomism is not based solely on a goal of eternal happiness beyond the grave. He points out that exclusive concentra-

<sup>12</sup>Erik D'Arcy, *op. cit.*, p. 191.

<sup>13</sup>I would suggest parenthetically that it could be useful to ask of any theory purporting to vindicate the rights of conscience, whether or not it implies any positive duty to actually assist conscientious behavior, and if not, why not.

<sup>14</sup>Erik D'Arcy, *op. cit.*, preface. It may be recalled that D'Arcy's study was published on the eve of the Second Vatican Council, which issued the Church's first doctrinal pronouncement on religious liberty, *Dignitatis humanae*. It is interesting to compare D'Arcy's argument with that of the Council, bearing in mind the comment of John Courtney Murray, that "It was necessary for the Council to present an argument for the principle of religious freedom, lest anyone should mistakenly think that the Church was accepting religious freedom merely on pragmatic grounds or as a concession to contemporary circumstances. However, it was not the intention of the Council to affirm that the argument as made in the text is final and decisive. Complete and systematic study of the arguments for religious freedom is a task left to the scholars . . ." in Walter Abbott, ed, *The Documents of Vatican II* (New York: America Press, 1966), p. 680, n. 7.

<sup>15</sup>Erik D'Arcy, *op. cit.*, p. 206.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*

<sup>18</sup>*Ibid.*

<sup>19</sup>*Idem*, p. 210

tion on that goal would justify, for example, the forcing of baptism upon infants regardless of their parents' wishes, a practice which Thomas in fact condemned as violating natural rights. Nevertheless, D'Arcy does not wish to leave other-worldly goals out of account altogether, for he also points out that "Thomas sees the perfecting of potentialities in this present life as equipping one for the maximum enjoyment of the vision of God, which his theology promises."<sup>20</sup>

Evidently, it can be no simple matter to build a practical system of rights on the natural tendency of individuals to realize their human potentialities. For, as D'Arcy concedes, "there will be room for disputes about many goods that contribute to the fulfillment of the human person."<sup>21</sup> Any program of self-fulfillment has to be more or less selective; some potentialities must languish if others are to flourish, and some values must be slighted if others are to be cultivated. As D'Arcy says, "many such questions call for the nicest discernment and judgment, within the hierarchy of human goods, before the demands of natural justice are settled."<sup>22</sup> "But," and this statement of D'Arcy's goes to what for this discussion may be considered the heart of his matter, "in our own investigation the good in question is indisputably supreme: the sovereign end of the human person."

One of the conditions for attaining this is substantial fidelity to moral duty; and this, as our earlier inquiries found, consists in following one's conscience. Therefore the possibility of so following conscience is a strict demand of natural justice. Where there is question of goods that contribute helpfully, but not indispensably, to the integral perfection of the human person, he has a conditional claim upon them; it is conditional, namely, on its being compatible with the comparable goods of other people; it can be subordinated to the common good. But where there is question of goods that contribute as necessary conditions to the sovereign end of the individual person, the claim is unconditional; natural justice forbids its subordination to any other end. St. Thomas instances our mortal life as being such a good, and therefore as being so protected by natural justice; but moral integrity is a greater good even than mortal life; therefore it creates a still stronger claim to that which is needed for its attainment, namely, the freedom to be faithful to the dictates of conscience.<sup>23</sup>

D'Arcy takes up immediately, as the main objection to this view, the familiar observation that often an individual "does not know what is best for him."<sup>24</sup> In some such cases it might therefore seem that interfering benevolently with someone's following the bidding of his own conscience could contribute more to his moral development or fulfillment than would freedom in the sense of non-interference. D'Arcy states that "Thomas has provided us with the answer to this." Namely, "A man's moral fulfillment and stature is measured above all by the performance of his will; the will, in its turn, is assessed according to its conformity with its own proper object. But the proper object of the will is not the good as it exists objectively, or as it is known to some moral genius with a skill and an insight superior to one's own: it is the good as apprehended and presented to a man by the judgment of his own reason."<sup>25</sup>

It is only towards the end of his book that D'Arcy deals with what, in my

<sup>20</sup>*Idem*, p. 213

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

<sup>23</sup>*Idem*, p. 214

<sup>24</sup>*Idem*, p. 215

<sup>25</sup>*Idem*, pp. 215-16.

opinion, is a far more serious objection to his general thesis. It is an objection that follows from the very terms of his Thomistic explanation of why even a faulty conscience has a claim to freedom. For if the claim to freedom of conscience belongs to a broader right of self-fulfillment, including moral fulfillment measured by the will's conformity to its proper object, it can be reasonably argued that one's freedom to will conscientiously would remain intact even if one were prevented from actually doing one's will. For Thomas' teaching incorporates the Stoic doctrine that one is not morally worse off for being forcibly prevented from doing what one conscientiously wills to do.<sup>26</sup> "In this sense," as D'Arcy concedes, "the State simply cannot violate the right to freedom of conscience" and "the human will is in principle never constrained to act against the dictates of conscience."<sup>27</sup>

D'Arcy's answer to this objection is uncharacteristically and, in my judgment, unfortunately brusque. He does not question its theoretical validity, but he dismisses its practical relevance. The gist of his response is that being prevented from doing what one conscientiously wills to do tends to inhibit or discourage conscientious willing itself, at least for the unheroic majority of persons. This seems plausible enough in cases in which freedom to do one's conscientious will was persistently denied. But it does not seem to me in the least evident that any such effect must result from merely occasional prevention from acting in accordance with conscience. Indeed, the very opposite effect would seem no less likely to occur. And if that is correct, it would appear that D'Arcy's argument could be applied validly only to a continued practice, or policy, of preventing conscientious behavior.

D'Arcy does not acknowledge this complication. I suspect that a main reason for his overlooking it is because this whole matter of distinguishing between interior and exterior freedom only comes into his book after he has turned away from the general ethical question of freedom as a right of conscience and focussed, perhaps too narrowly, on the special ethical question of religious freedom as a civil liberty. Practically speaking, the latter question is mainly one of policy or continued practice, rather than one of isolated interferences with conscientious behavior. But this practical solution of the special problem of religious liberty from State interference gives no satisfactory support to D'Arcy's general thesis about freedom of conscience. It makes the right to freedom of conscience entail little more than an obligation not to impede conscientious behavior to such an extent that interior conscientiousness is eroded, so to speak, by continued frustration.

Now this is a very much more modest claim than the one previously implied in D'Arcy's contention that the right to freedom of conscience is more unconditional than even the right to life itself. In fact, in D'Arcy's last analysis, the immorality of interfering with freedom of conscience might seem to be reduced to what Catholic moral jargon used to categorize as occasions of sin, an elaboration of the idea of scandal. A way is thereby laid open to extensive casuistry, and I doubt that such casuistry would have much trouble establishing a probable opinion that in many cases interference with the outward execution

<sup>26</sup>See Thomas' treatment of the question, "Whether the external action adds anything of goodness or badness over and above the internal action" in *Summa Theologiae* Ia IIae, XX, 4.

<sup>27</sup>Eric D'Arcy, *op. cit.*, p. 265.

of an interiorly conscientious will would be a rather remote occasion of sin, and therefore permissible if done for sufficiently good purposes. For such interference would not constitute a direct assault on interior moral integrity, but only a factor that might or might not, depending on circumstances, contribute to its diminution, a potentially demoralizing influence.

None of this is intended to deny that rights of conscience as limits of power are in fact supported by the kind of argument D'Arcy develops. But they are not shown to be unconditional or inalienable rights. I am not at all sure that Thomas Aquinas would have objected to that result, which is, after all, compatible with his own intolerant norms for the treatment of heretics and infidels.<sup>28</sup> Neither am I sure that a majority of our own contemporaries would object to it. But that D'Arcy himself would object to it seems plain from the whole tenor of his book, even granting that his argument makes an impressive practical case for a State policy of religious toleration.

If my criticism of D'Arcy's argument is a fair one, it remains to be asked whether any other kind of ethical argument might serve to make a stronger case for rights of conscience—or, more correctly, a case for stronger rights of conscience. I should like now to propose that we do have access to such an argument, and one that makes no more assumptions than D'Arcy's own, while deriving its force from one of the most universally accepted of all ethical principles. The principle in question is not only enunciated in the Christian Scriptures but, according to one authority, "has a prominent place in all the major religions and most minor ones . . . , has been enunciated by pagan philosophers both before and after Christ, and by Sophists . . . and anti-Sophists" so that its "nearly universal acceptance" and "promulgation by persons of considerable intelligence though otherwise of divergent outlooks, would . . . seem to provide some evidence for the claim that it is a fundamental ethical truth."<sup>29</sup> You will probably have guessed that the object of that description is what, in various formulations, has come to be known as the Golden Rule.

For my purposes, no great nicety is required about the wording of the Rule, nor does it make any critical difference whether the principle be expressed negatively, as by Confucius in the *Analects*, or positively, as by Jesus in the Gospel according to Matthew.<sup>30</sup> Let us settle for any minimally controversial rendering that expresses a general duty not to treat other persons as one would not wish to be treated by other persons. The very least such a principle must presuppose is the tautology that one ought to do one's duty. But since doing one's duty depends on human volition, it can also be inferred that one ought to want to do one's duty. And since wanting to do one's duty would be insincere unless one wanted to be able to do one's duty, it can be further inferred that one ought to want to be able to do one's duty. Hence, the very idea of duty implies that, first, one ought to do something; second, one ought to want to do it; and third, one ought to want to be able to do it. But, if one ought to want to be able to do one's duty, one ought to want others not to prevent one from

<sup>28</sup>"Bluntly, there are two rights which St. Thomas would deny: the right of heretics to life, and the right of all unbelievers to practise their own form of worship." Erik D'Arcy, *op. cit.*, p. 157.

<sup>29</sup>Marcus G. Singer, "Golden Rule," in Paul Edwards, ed., *The Encyclopedia of Philosophy* (New York: Macmillan, 1967), p. 366.

<sup>30</sup>*The Analects of Confucius*, translated and annotated by Arthur Waley (New York: Vintage, 1938), p. 198. *Matthew* 7:12//*Luke* 6:31.

doing it. And, if the Golden Rule is valid, one must by the very same token reject as immoral any prospect of preventing others from doing their duty. In assenting to that inference, one is morally committed to respecting the rights of conscience. For clearly, one ought not to interfere with the conscientious behavior of others if one ought to want one's own conscientious behavior not to be interfered with.

Thus, in virtue of the Golden Rule it can be firmly maintained that "A has a certain duty entails A has a corresponding right," inasmuch as A's duty obliges B not to prevent A from doing his duty, just as B wants not to be prevented from doing his own duty. And this he is obliged to want if he sincerely wants to do his duty, that is, if he wants to be moral at all.

The argument for rights of conscience that I have here offered in the hope of improving on D'Arcy's may seem to involve the replacement of a teleological argument by one that is basically deontological. That is, I believe, only partly correct. Up to a point, D'Arcy's argument is very comparable to John Stuart Mill's even though the latter's defense of liberty, based on utilitarianism, discards natural law and the abstract notion of right.<sup>31</sup> For both of them, what is decisive are "the permanent interests of man as a progressive being."<sup>32</sup> My own argument, for the reasons I have already explained, sets aside that teleological emphasis not as false but as insufficient and dispensable. However, although my argument is in that sense less specifically teleological than D'Arcy's, it does not really involve more deontology. It is merely a simpler argument, whose deontology is more explicit and whose teleology is both more implicit and more general.<sup>33</sup> For it is plain that D'Arcy's whole approach to the matter tacitly presupposes that each of us has a duty not to act in ways that are deleterious, above all, morally deleterious, to others. That is, he has to be presupposing some general principle of non-injury or beneficence towards others. Otherwise there could be no reason for ethical concern over what happened to their moral development or personal fulfillment. D'Arcy does not actually formulate any principle of that kind. But of all such principles, it would be hard to find any that enjoys wider acceptance than the Golden Rule. And it is my contention that nothing more is needed, and that nothing better is available, than that principle, together with a conventional analysis of the implications of moral duty, in order to establish that conscience has a right, and a strict right, to freedom.

A strict right. But is it an altogether unqualified right that this argument justifies? Does it impose the conclusion that one ought not to prevent others from doing what they are convinced they ought to do, no matter what that happens to be? A negative answer to that question seems to me to follow from the argument itself.

For although I introduced the argument with the tautology that one's duty is what one ought to do, that was merely for the sake of clarifying terms. The beginning of the argument itself is a very general ethical imperative, the Gol-

<sup>31</sup>John Stuart Mill, *On Liberty* (Indianapolis: Bobbs-Merrill, 1956), p. 14.

<sup>32</sup>*Ibid.*

<sup>33</sup>Since it is unnecessary for my argument to dispute whether the Golden Rule is a deontological or a teleological principle, I relegate to a footnote my opinion that it is a principle in which teleology and deontology happily coalesce, and that this is one of the features that contributes to its popularity among people who are morally serious without being ethically doctrinaire.

den Rule, to the effect that one ought not to do to others what one would not have others do to oneself. Without repeating the argument, it may be noted that the validity of its conclusion depends on the validity of the Golden Rule itself.

When, therefore, I go on to say that I ought to do my duty, ought to want to do my duty, ought to want to be able to do my duty, and ought to want others not to prevent me from doing my duty, duty is not an empty category. From the outset it is presupposed that, whatever may be said more specifically about duty, it always carries the general implication that one ought not to do to others as one would not have others do to oneself.

When, therefore, I conclude that I ought to want others not to prevent me from doing my duty, I cannot extend that conclusion to mean that I ought to want others not to prevent me from violating the Golden Rule. For I should be contradicting the first principle of my argument if I were to claim that it was my duty to violate the Golden Rule.

But that limitation, imposed by the Golden Rule, on what I ought to want others not to do to me, entails a corresponding limitation on what I ought not to do to others. That is, this argument does not oblige me to abstain from preventing others from violating the Golden Rule. In other words, the right of conscience that can be justified by the Golden Rule does not entail an obligation to refrain from inhibiting actions irreconcilable with the Golden Rule. This is certainly not to say that it implies a general obligation to interfere with such actions; in certain circumstances there might be morally excellent reasons for not doing so. But it is to say that this argument, predicated on the Golden Rule as a first principle of ethics does not offer any moral protection to violations of that Rule: itself.

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