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The Institute for Christian Legal Studies (ICLS),
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The Mission of ICLS is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study Biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

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STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God, as well as the practical implications of the Christian faith for their daily work. The Journal exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The Journal seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work, and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across the ages.

Given the depth and sophistication of so much of the best Christian legal scholarship today, the Journal recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The Journal seeks to be a forum where complex issues may be discussed and debated.

EDITORIAL POLICY

The Journal seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of the Institute for Christian Legal Studies, Christian Legal Society, Regent University School of Law, or other sponsoring institutions or individuals.

To submit articles or suggestions for the Journal, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.



POST-POSTMODERNISM

Engaging the New Spirit of the Age with Clarity, Conviction, and Compassion

BY THADDEUS WILLIAMS

Fifteen years ago in Paris, I had a conversation with a young existentialist who said something as unflattering as it was memorable: “Whatever the world does the church does ten years later and worse.” My new friend was talking about Christian music, describing a decade lag factor, a slowness to recognize and adapt to cultural changes that, in his estimation, rendered the church musically irrelevant.

It is obvious to even the most casual observer that culture is undergoing seismic shifts, shifts that are drastically altering the landscape of law, politics, religion, family, sexuality, and more. If it takes ten years for us to reckon seriously with the reality of these shifts, we will find ourselves culturally irrelevant (as some would argue we already are). Redemptive Christian engagement with public life—to “seek the welfare of the city” in Jeremiah’s words—requires that we gain clarity on the new spirit of the age, that we understand the emerging metanarratives that are reshaping our national consciousness and legal institutions.

THE NEW MORAL LEGISLATORS

One way to describe the shifting landscape is as a transition from a postmodern outlook to what we might call “post-postmodernity.” Just as postmodernism was both a coming to fruition of modern thought, as well as a discernible break from it, so there are both continuities and breaks between postmodernism and what we now find sweeping through American law and culture. My focus here is on the breaks, two in particular.

The first can be seen in the way that “legislating morality” has moved from being strictly verboten in the postmodern milieu (at least in principle) to becoming the “new normal.” In my Fall 2014 piece “Beyond Capes and Cowbells” I argued that the notion of moral neutrality in law is a ruse, that the claim “Keep morality out of law” is really a euphemism for “I want to keep your morality out of law so I can get mine in.” I was speaking to what

has been a long-standing tactic of public persuasion for at least a generation. Painting any legislation you might oppose in a moral light, showing its supporters to be moralistic zealots seeking to impose their ethical framework on the rest of us (perhaps even equating it with the ever-dreaded “theocracy” for maximum effect), was a winning strategy for swaying public opinion. It became standard fare in politics during the heyday of postmodernism.

After all, one of the axioms of the postmodern ethos is unfettered individual freedom, including moral freedom from any power, including the power of government, to cast moral judgment on the self-defining “I.” This was enshrined in *Planned Parenthood v. Casey* with Justice Kennedy’s famous redefinition of freedom as “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Ronald Dworkin, one of the most articulate and influential champions of this new freedom, branded it the “right to moral independence,” which entails that the law must treat competing moral visions with “equal concern and respect.”¹ D.A.J. Richards likewise defended “the fundamental liberal imperative of *moral neutrality with regard to the many disparate visions of the good life*.”²

This is no longer the case. In the wake of *Windsor* and *Obergefell*, “keep morality out of law” style arguments can no longer be made with a straight face, either in the public sphere, the courtrooms, or in the halls of legislation. The Supreme Court majority did not issue these rulings because they were economically efficient or the formal deductions of existing law, but because they believed they were the right thing to do, “right” in an explicitly and unapologetically *moral* sense of the word. Those who celebrate the Court’s decision and activist judges who have extrapolated on its precedent are not merely celebrating legal or political victories, but also moral victories, the triumph, as they see it from within their own plausibility structure, of equality over discrimination, love over hate, etc.

¹ See Dworkin’s *TAKING RIGHTS SERIOUSLY* (Cambridge, MA: Harvard University Press, 1978) and *SOVEREIGN VIRTUE: THE PRACTICE OF EQUALITY* (Cambridge, MA: Harvard University Press, 2002).

² D.A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW*, 9 (Totowa, NJ: Rowman and Littlefield, 1982). Emphasis in original.

This represents a clear and decisive break from post-modern style legal reasoning. You can no longer live under the legal protection of Kennedy's "right to define one's own concept of existence" if your concept happens to include the notion that male and female represent beautiful distinctions that should be celebrated rather than erased, or if you happen to believe that mother and father cannot be made interchangeable or optional categories without something precious being lost. The law should no longer embody Richards' "moral neutrality with regard to.... disparate visions of the good life" or treat you with Dworkin's "equal concern and respect" if your vision of the good life clashes with the new sexual orthodoxy.

This is the first shift into what I have been calling post-postmodernism. From another angle, of course, this is nothing new. Postmoderns also enshrined their own moral visions in law over and against others. In J. Budziszewski's words, "their own views of the good prevail without challenge, just by pretending that they aren't really views of the good."³ What is new is that post-postmoderns no longer pretend. Their view of the good is openly celebrated and marketed to the masses as precisely what it is, a view of the good that they are seeking to legislate over and against rival visions of the good. There was what Harvard's Lon Fuller called "the pretense of the ethical neutrality of positivism." In Fuller's words, "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions."⁴ That "pretense of ethical neutrality" is now gone and buried (and with the rhetoric of his Windsor and Obergefell rulings, we may say that Justice Kennedy was its undertaker).

In the wake of Windsor and Obergefell, "keep morality out of law" style arguments can no longer be made with a straight face.

FROM "TRASHING" TO THE TRIUMPH OF METANARRATIVE

With this shift toward "moralistically legislating morality" and away from "legislating morality while pretending not to" comes another significant break from post-modernism. It is a related shift from "trashing" to the triumph of metanarrative. Postmodern theorists (I am thinking here especially of Foucault) were adept at exposing metanarratives as power-plays. This postmodern impulse took shape in American Jurisprudence as the Critical Legal Studies movement. CLS (not to be confused with the Christian Legal Society!) became known for "trashing" legal opinions and rulings, that is, doing the postmodern deconstructionist's work of stripping away the veneer of legal objectivity ("unmasking" to use Foucault's term) to show this or that law as a mere subjective power-play. Myron Steeves clarifies:

Critical Legal Studies persuaded much of the legal academy that no one had

anything to say that wasn't limited to their own particular experience and that would, thus, become oppressive if advanced by law against a boarder scope of society. This deconstructionist critique would seem to render conversations about morality and law useless.⁵

Indeed, as CLS scholar Joseph Williams Singer puts it, "legal reasoning is a way of simultaneously articulating and masking political and moral commitment.... Law and morality have no rational foundation that once and for all compels persons to prefer certain institutions and rules above others."⁶

Post-postmoderns, by contrast, are perfectly happy to compose morally-charged metanarratives and use them in precisely the power-seeking ways that the

³ J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE, xiii (San Francisco, CA: Ignatius Press, 2011).

⁴ LON FULLER, POSITIVISM AND FIDELITY TO LAW: A REPLY TO PROFESSOR HART, HARVARD LAW REVIEW, 71 (1958) reprinted in JURISPRUDENCE, CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM, 2nd Edition, Eds. Hayman, Levit, and Delgado, 630 (WEST 2008).

⁵ MYRON STEEVES, HEALING THE BREACH BETWEEN LAW AND VIRTUE, JOURNAL OF CHRISTIAN LEGAL THOUGHT, 1-3: 2 (Fall 2014). The deconstructionism of the CLS opened the movement to some serious critiques. Perhaps most fatal were that CLS dishes out sharp criticism of whatever policies it finds disingenuous and oppressive, but offers nothing constructive, no meaningful, specific, helpful solutions. Second came the realization that there is nothing to keep deconstructionism from deconstructing itself, showing its own work to be nothing but a masked power-play, nothing beyond a self-serving bias to keep the deconstructionist's axe from striking the trunk of the CLS movement itself.

⁶ JOSEPH WILLIAM SINGER, THE PLAYER AND THE CARDS: NIHILISM AND LEGAL THEORY, THE YALE LAW JOURNAL, Vol. 94, Number 1, 3-20:14-15 (November 1984).

postmodern found so disingenuous and oppressive. Hear the tone of the new metanarrative:

Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval in doing so... Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society.⁷

Homosexuality must make its moral case, not merely its civil-social rights. It must show the deep spirituality of homosexual love.⁸

I think the future of the world, the hope of the world depends on us, that men who love men are the only people who can save this planet. That is our purpose.⁹

A good, old-fashioned postmodern deconstructionist could trash such statements and the explicitly moralistic metanarrative they reflect, “unmasking” them as power-plays to marginalize and oppress people who seek to live by traditional sexual ethics. But we have entered a new phase in which to question such statements in the legal academy or the public sphere automatically renders you the oppressor.

PLOT HOLES IN THE POST-POSTMODERN METANARRATIVE

What, then, is to be done in light of these shifts? How do we engage the post-postmodern metanarrative that now wields so much power in law and culture? Since ideas have consequences and bad ideas have bad consequences, our answer must include understanding (and lovingly subverting) that metanarrative. We must expose its plot holes and how they hurt God’s precious image-bearers. And we must do so while speaking and living out before what Francis Schaeffer called “the watching world” a more beautiful, compelling, and true narrative—the Gospel of Jesus’ death and resurrection and the life-giving implications of his Lordship over all of existence.

This issue of the *Journal* works toward those ends by identifying and challenging several crucial plot points of the post-postmodern metanarrative. In “Arthur Leff’s God-Haunted World,” Douglas Groothuis, a leading philosopher from Denver Seminary, exposes a core

problem in this metanarrative, namely, how it “collapses into nihilism or authoritarianism.” Groothuis reveals this problem by revisiting a seminal article from Yale law professor, Arthur Leff, in which Leff argues cogently that there are simply no valid substitutes for God in society. For Leff—himself an avowed atheist—no law, no government, no autonomous individual can possibly evaluate and endorse competing moral and legal claims in the way that a divine being can. Thus the legal institutions of societies premised on atheism (and political-legal systems premised on methodological atheism) become arbitrary and/or authoritarian. Groothuis resurrects Leff’s arguments and expands them for our current cultural moment.

In “Rousseau’s Bargain,” P. Andrew Sandlin (President of the Center for Cultural Leadership) echoes and deepens Groothuis’ insights by clarifying ways in which the state has attempted to fill God-sized shoes from the Enlightenment to present day legal struggles. In particular, Sandlin shows how American law and politics have increasingly struck a bargain first proposed in modern form by Jean Jacques Rousseau: You seek liberation from any moral authority, any family, church, guild, school, or any other institution that may bind you to a moral vision that you feel limits your expression and autonomous self-rule.¹⁰ We—the State—will liberate you by overpowering those institutions. All we ask in return is your liberty. In Sandlin’s words, “Individuals were willing to give up political liberty in order to gain moral liberty.” Following the theological tradition of Kuyper and Dooyeweerd, Sandlin advances a more compelling narrative of freedom, a narrative anchored in the truth of a Christian worldview in which liberty can be nurtured and flourish in “the various independent but overlapping God-created spheres, like family, church, school, business, arts, sciences, technology, and so on,” and the state becomes a true state rather than a false god.

In “Public Morality and Allegedly Private Vice,” Princeton’s Robert George argues that the kind of “moral liberty” the state, under Rousseau’s bargain, vows to preserve is not exercised in a bubble in which only the self-determining individual is effected. Contrary to the now dominant metanarrative, George argues that moral liberty—the freedom to produce and indulge in pornography, for example—is hardly an innocuous matter of “the State having no business in the bedrooms of the nation” (in the oft cited slogan of Canadian Prime

⁷ PAULA ETTTELBRICK, *LESBIANS, GAY MEN, AND THE LAW*, 398, 400.

⁸ CHRIS HINKLE, *More than a Matter of Conscience: Homosexuality and Religious Freedom*, AAR, 2000, 112.

⁹ CHRISTIAN DE LA HUERTA, *Articles of Faith: In the Spirit of Pride*, www.thetaskforce.org, (16 June 2005).

¹⁰ For a probing historical analysis of this shift toward individual expressionism as the dominant worldview in the West, see “The Age of Authenticity” in CHARLES TAYLOR’S *A SECULAR AGE* 473-504 (Cambridge, MA: Harvard, 2007).

Minister, Justin Trudeau). Such sexual “freedom” (which becomes its own form of slavery) carries with it inevitable public consequences, often at the expense of others liberties and rights. For example, George argues, “It is the attitudes, habits, dispositions, imagination, ideology, values, and choices shaped by a culture in which pornography flourishes that will, in the end, deprive many children of what can without logical or moral strain be characterized as their right to a healthy sexuality.”

In his contribution “Bigots or Prolifers?” Ryan Anderson speaks to a related plot point of the post-postmodern metanarrative, how it seeks to “define opposition to same-sex marriage as nothing more than irrational bigotry,” a definition that left unchallenged will “pose the most serious threat to the rights of conscience and religious freedom in American history.” Anderson points out that while those who disagree with the pro-life position do not, with a few exceptions from the more militant far Left, treat pro-life Americans as bigots or seek to garner the force of law to coerce pro-life citizens to be complicit in the abortion industry (with the recent exception of Obama’s HHS mandate). Anderson asks what the pro-marriage movement can learn from the pro-life movement, which weathered charges of being on “the wrong side of history” only to become the

majority view of the American public and has celebrated more legal victories on behalf of exploited women and the unborn in the last half-decade than the previous four decades combined?¹¹

Post-postmodernism is here. Whether it is here to stay or for how long will be contingent, in part, on our ability to meaningfully engage its metanarrative and articulate with clarity, conviction, and compassion, the better, truer story.

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Editor’s Note

This issue of the Journal is the third in the *Law & Virtue* series, sponsored by our partner Trinity Law School. *Law & Virtue* guest editor Thaddeus Williams has once again done a masterful job, putting together a rich and provocative issue, featuring thoughtful articles from respected scholars. Christian Legal Society and Regent University School of Law are grateful to Trinity Law School and Dr. Williams for their continuing partnership in the *Law & Virtue* project. The *Law & Virtue* series is rooted in the vision of former TLS Dean Myron Steeves, whose passion for faithful Christian thought in the legal academy has been an inspiration to hundreds of law students and professors for several decades. I want to express my deep appreciation to Dean Steeves for his vision, encouragement, and partnership with ICLS, Christian Legal Society, and the *Journal of Christian Legal Thought*.

Michael P. Schutt, Journal Editor-in-Chief

¹¹ Fordham University’s Charles Camosy notes that “2013 saw the second highest number of ‘pro-life’ state laws passed in American history... surpassed only by the year 2011, which holds the record.” For more on this staggering upsurge in pro-life convictions and legislation over the last five years see CHARLES CAMOSY, *BEYOND THE ABORTION WARS: A WAY FORWARD FOR A NEW GENERATION*, Chs. 1-2 (2015).



ARTHUR LEFF'S GOD-HAUNTED WORLD

An Atheist Ponders the Implications of God's Existence on Morality, Law, and Politics

BY DOUGLAS GROOTHUIS

Secularists fear the intrusion of religion into law, claiming that the holy camel's nose would nose its way all the way to theocracy. Thus, they seek to marginalize religious claims and push them into the private world of thought, family, and church. But what secularists often fail to see is that law divorced from divine authority collapses into nihilism or authoritarianism. Jurisprudence then becomes a matter of procedure and tradition, divorced from any fixed and objective truths about morality that can be applied to law. Consider, as a case-in-point, the Supreme Court confirmation hearings for Clarence Thomas. As law professor, Lawrence Tribe, wrote in *The New York Times*...

... Clarence Thomas, judging from his speeches and scholarly writings, seems instead to believe judges should enforce the Founders' natural law philosophy—the inalienable rights “given man by his Creator”—which he maintains is revealed most completely in the Declaration of Independence. He is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.¹

For Tribe and many others, the appeal to “inalienable rights,” rights from any source higher than the government itself, is intolerable. Another example comes from Seventh Circuit Judge, Richard A. Posner, who argues as follows,

Since we are just clever animals, with intellectual capabilities oriented toward manipulating our local and physical environment, we cannot be optimistic about our ability to

discover metaphysical entities, if there are any (which we cannot know), whether through philosophy or any other mode of inquiry... Renouncing the quest for metaphysical knowledge need not be cause for disappointment, however, because it means that . . . there is no deep mystery at the heart of existence. Or at least no deep mystery worth trying to dispel and thus worth troubling our minds about.²

For all his certainty, Posner summarily begs the question in favor of naturalism. He somehow knows that “we are just clever animals,” as if there were not several sound arguments to the contrary.³ Further, if we are just clever animals—with no ability to discern objective reality—could we ever be clever enough to even realize our objective status as mere animals? All knowledge would be withdrawn and Posner himself would be epistemologically muted.

Contrary to Tribe and Posner's perspective, we find the view that without God, meaningful law becomes impossible. One of the most powerful (but little recognized) arguments for this view comes from a surprising source—an atheistic law professor writing in a reputable law journal. In his article, “Unspeakable Ethics, Unnatural Law,” for the *Duke Law Journal*, Yale Law School professor, Arthur Leff, argued that unless God is taken to be the moral authority behind human law, the law collapses into various arbitrary arrangements, none of which can survive the taunt, “But says who?” I revisit Leff's arguments below, as they expose the issues behind the issues in the legal and political trends and controversies of our day.

¹ LAURENCE TRIBE, “Clarence Thomas and Natural Law,” *NEW YORK TIMES*, July 15, 1991. On Thomas's hearings and Leff's ideas, see Philip Johnson, “Nihilism and the End of the Law,” *FIRST THINGS*, July 1993. Available at: <http://www.firstthings.com/article/1993/03/002-nihilism-and-the-end-of-law>.

² RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (Boston: Harvard University Press, 2003), 4-5.

³ See DOUGLAS GROOTHUIS, *CHRISTIAN APOLOGETICS: A COMPREHENSIVE CASE FOR BIBLICAL FAITH* (Downers Grove, IL: InterVarsity Press, 2011).

ARTHUR LEFF: LAW IN THE ABSENCE OF GOD

Leff begins his argument by claiming that contemporary people want to believe two contradictory things:

- (1) [There is a] complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously.
- (2) We are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be.⁴

Statements (1) and (2) are logically incompatible. Nevertheless, “What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.”⁵ Leff believed that this tension “between found law and made law” explained much of what has been written about law recently, particularly regarding the lack of authority for law itself, that “we are able to locate nothing more attractive, or more final, than ourselves.”⁶

Leff argues that for one to find law in an authoritative source, one “must reach for a set of normative propositions in the form ‘one ought to do X,’ or ‘it is right to do X,’ that will serve” as the foundation for a legal system.⁷ This found law “is not created by the finder, and therefore it cannot be changed by him, or even challenged.”⁸ If we imagine a legal system based on moral obligations that are absolutely binding, such as “Thou shalt not commit adultery,” we must recognize that this moral evaluation needs an *evaluator*, that is, “some machine for the generation of judgments on states of affairs.”⁹

If the evaluation is to be beyond question, then the evaluator and its evaluative processes must be similarly insulated. If it is to fulfill its role, the evaluator must be the unjudged judge, the unruled legislator, the premise maker who rest on no premises, the uncreated creator of values. Now what would you call such a thing if it existed? You would call it Him.¹⁰

Such a “God-grounded system has no analogies,” according to Leff. Either God exists or does not exist, but if God exists nothing can take God’s place with respect to ethical evaluations. If God exists as the supreme Evaluator then “we do not define God’s utterances as unquestionable.” They simple are unquestionable, given the nature of God and given the nature God has given us. “We are defined, constituted, as beings whose adultery is wrong, bad, sinful. Thus committing adultery in such a system is ‘naturally’ bad only because the system is supernaturally constituted.”¹¹

Leff then argues that God’s pronouncements would be “performative utterances.” These are statements that neither describe states of affairs nor reflect them. Rather, performative utterances constitute states of affairs by the performance of the utterance themselves. If one says he is taking a walk, he describes a fact. But if one says “I apologize,” or “I swear,” one is accomplishing something through the utterance itself. Consider the utterances by those officiating at weddings, “I now pronounce you husband and wife,” and those officiating at graduations, “By the authority invested in my by X, I confer degree Y upon this class.” Leff points out that these words to not magically create the realities. They are the function of certain rules and must be uttered by the appropriate person and not by an imposter or interloper. I cannot convene the US Senate by uttering the exact words used by the Vice President of the United States. Leff argues that there is no natural means to give a normative performative utterance regarding morality:

A statement of the form, ‘you ought to do X,’ ‘it is right for you do X,’ or ‘X is good,’ will establish oughtness, rightness, or goodness only if there is a set of rules that gives the speaker power totally to determine the question. But it is precisely the question of who has the power to set such rule for validating evaluations that is the central problem of ethics. . . . There is no one who can be said a priori to have that power unless the question posed is also being begged. *Except, as noted, God. It necessarily follows that the pronouncements of an omniscient, omnipotent, and infinitely good being*

⁴ ARTHUR ALLEN LEFF, “Unspeakable Ethics, Unnatural Law,” DUKE L. J., Volume 1979 December, No. 6, 1229.

⁵ Id.

⁶ Id.

⁷ Id., 1230.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id., 1231.

are always true and effectual. When God says, “Let there be light,” there is light. And when God sees that it is good, good is what it is.¹²

Leff then demurs that he cannot settle the existence of God or whether God can ground a legal system. (I will argue in a moment, however, that he has—even against his wishes—given a powerful moral argument for the existence of God.) Leff asserts that he brought up the matter to show why legal theorists are in near despair of insuring legal or ethical propositions as moral binding without “supernatural grounding.”¹³ Only God’s will could survive “the cosmic ‘says who?’” and remain authoritative. Legal and ethical theory must reckon with “the fact that, in the Psalmist’s words, there is no one like the Lord. If he does not exist, there is no metaphorical equivalent.” This is because:

No person, no combination of people, no document however hallowed by time, no process, no premise, nothing is equivalent to an actual God in this central function as the unexaminable examiner of good and evil. The so-called death of God turns out not to have been just His funeral, it also seems to have effected the total elimination of any coherent, or even more than momentarily convincing ethical or legal system dependent upon authoritative extrasystemic premises.¹⁴

God, as the “final evaluator” could provide the moral premises that are outside of the merely human system.¹⁵ In contrast, any surrogate evaluator “must be one of us, some of us, all of us—but it cannot be anything else.”¹⁶

Leff then invokes the tension between wanting and rejecting “found law,” which began his article. This realization results in an “exhilarated vertigo” wherein we both exalt that “We’re free of God” and despair that “Oh God, we’re free.”¹⁷ In the absence of God, any legal or moral system will be differentiated by its axiomatic choice of who serves as the evaluator of states of affairs.

“Who among us, that is, *ought* to be able to declare ‘law’ that *ought* to be obeyed?”¹⁸ Leff then analyzes social God-candidates, who serve as finite evaluators for law and morality.

First, he examines Descriptivism, which takes legal systems as brute facts to be interpreted. This might be called “legal conventionalism,” and has affinities with the “legal positivism” movement of Oliver Wendall Holmes in the 20th century, although Leff doesn’t use that term or name its proponents. Descriptivism explores “what rules are actually obeyed” without trying to justify or condemn them. For example, “If law is defined as the command of the sovereign, then the sovereign is defined as whatever it is the commands of which are obeyed.”¹⁹ There is no “extrasystemic” (to use Leff’s earlier phrase) principle available by which to judge the sovereign. So Descriptivism “validates” every legal system equally.²⁰ “Under Descriptivism, it is impossible to say that anything ought or ought not be.”²¹ With no law above human law, no legal system can be singled out as morally better than any other. Each legal system becomes an *ersatz* god. Although Leff does not mention this, even Nazism would be so validated under Descriptivism (which was precisely the argument of self-defense invoked by those who carried out the Third Reich’s legal orders). This is a legal variant of cultural relativism. But, in the absence of God, why should the sovereign, or whoever generates law, “be entitled to final respect?” asks Leff.²²

This leads Leff to entertain a second option. Perhaps “each person is his own ultimate evaluative authority.” In this approach “God is not only dead, but He has been ingested seriatim at a universal feast,” since individuals now arrogate to themselves the divine prerogative of declaring good and evil through performative utterances: “what is said to be bad or good, wrong or right, is just that for each person, solely by reason of it being uttered.”²³ We become, in effect, what Leff calls “godlets,” little deities speaking our own private moral universes into being. The problem with Descriptivism was that it

¹² Leff, 1232; emphasis added.

¹³ Id., 1232.

¹⁴ Leff, 1232.

¹⁵ Id., 1233.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id, emphasis in original.

¹⁹ This is a tautology, but Leff does not note it.

²⁰ Id., 1234.

²¹ Id.

²² Id., 1235.

²³ Id.

validated any normative system; the problem with “the ‘God-is-me’ approach—call it ‘Personalism’—is that it validates everyone’s individual normative system, while giving no instruction in, or warrant for, choosing among them.” How can a multiplicity of Gods, all with identical moral rank and authority, be morally regulated—in the absence of a final evaluator above them? They cannot. When “Godlet preference” is the only basis for “interdivinity transactions,” anything goes.²⁴ Appeals to contracts or treaties fall flat, since on the Personalist view, “a promise ought to be kept only if each promiser thinks it ought to be kept; the value of promise-keeping is no different from any other.”²⁵ We are trapped in a society of godlets exercising their arbitrary evaluations and volitions.

Thus, Descriptivism and Personalism fail because “the receptacle for God’s evaluative role cannot...be either ‘wherever it is’ or ‘equally in everyone.’” Perhaps, though, we can find some way to distinguish between individuals quantitatively or qualitatively. “One might choose to stand, that is, on the most evaluations or the best ones.”²⁶ But such Majoritarianism also fails since the principle that “the majority opinion should set the law” cannot itself be generated by any final evaluator. Nor can it be derived from the incommensurate evaluations of the various godlets. “The moment one suggests a criterion” for choosing between godlet preferences “then individual men have ceased to be the measure of all things, and something else—and that necessarily means someone else—has been promoted to the (formally impossible) position of evaluator in chief.”²⁷

Perhaps, Leff muses, logic will come provide an immanent *deus ex machina* for the problem of normative evaluation. The considered judgments of rational people whose moral systems are internally consistent should count more than the slapdash moral whims of the illogical. But here too, the rational moralist can only be favored if “someone has the power to declare careful, consistent, coherent, ethical pronouncements ‘better’ than the sloppier, more impulsive kind. Who has that power and how did he get it?”²⁸ To go beyond Leff, even if we make logical consistency a sufficient requirement for any plausible ethical system (since any system of thought should be logically consistent with itself), there could be two or more internally consistent ethical

systems that, nevertheless, contradict to each other. If so, one could not decide between them on the basis of logic alone.

Leff then considers other possible sources of evaluations (including making a political Constitution into a God), but all of them are subject to the same essential problem, which he refers to as “the cosmic ‘sez who’” objection. That is, who determines that is good or evil, valuable or worthless? According to Leff, these determinations are always evaluations (moral judgments), and moral judgments are made by mere mortals. He summarizes this search for alternative evaluators by saying that, “There is no way to prove an ethical or legal system superior to any other, unless at some point an evaluator is asserted to have the final, uncontrollable, unexaminable word. That choice of unjudged judge, whoever is given the role, is itself, strictly speaking arbitrary.”²⁹ A world without God is a world without moral authority of any kind, except arbitrary godlet preferences. “If we go to find what law ought to govern us, and if what we find is not an authoritative Holy Writ but just ourselves, just people making the law, how can we be governed by what we have found?”³⁰

Having argued that all law and morality requires normative evaluations and that normative evaluations are arbitrary without God, Leff ends the article in a poetically striking fashion. He has argued himself into a corner, but from that corner he cries out for something his own worldview cannot allow:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us “good,” and worse that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore, unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:
Napalming babies is bad

²⁴ Id., 1236.

²⁵ Id., 1237.

²⁶ Leff, 1237.

²⁷ Id., 1238.

²⁸ Id., 1238.

²⁹ Id., 1240.

³⁰ Id., 1247.

Starving the poor is wicked
 Buying and selling each other is depraved
 Those who stood up and died resisting
 Hitler, Stalin, Amin, and
 Pol Pot—and General Custer, too—
 have earned salvation.
 Those who acquiesced deserve to be
 damned.
 There is in the world such a thing as evil
 [All together now:] Sez who?
 God help us.³¹

While Leff claimed earlier that he would refrain from settling the question of God's existence or nonexistence, he affirms God's nonexistence by the statement, "It looks as if we are all we have." Yet just a few words below, Leff affirms the existence of objective evil regarding war, poverty, slavery, and acquiescence to evil rulers. He then asserts the existence of objective good—using the religious language of heaven and hell—regarding those who oppose or fail to oppose tyrants: "There is in the world such a thing as evil." But even *this statement* is subject to the "Sez who?" objection. In light of this conundrum he can only write, "God help us."

LEFF AGAINST LEFF

I address Leff's dilemma in two arguments that converge on the same conclusion.

1. If there is no God, then morality and law lose their foundations and there is no objective good and evil. Leff is supported in this by Bertrand Russell, Friedrich Nietzsche, Max Stirner, Michael Ruse, Jean-Paul Sartre, Albert Camus, Dostoyevsky, and others.
2. There is objective good and evil. Leff: "There is in the world such a thing as evil."
3. Therefore (a): It is false that (i) morality and law lose their foundations and false that (ii) there is no objective good or evil.
4. Therefore (b): God exists as the Ultimate Evaluator.
5. Therefore (c): Given (2), the only adequate basis for law is God.

The argument may be further simplified as a *disjunctive syllogism*:

1. Either God exists (who provides the ultimate moral evaluation) or nihilism is true (all moral evaluations are arbitrary) and there is no moral basis for law.
2. Nihilism is not true because there is objective good and evil. Leff: "There is in the world such a thing as evil."
3. Therefore (a) God exists (as the ultimate moral evaluator).
4. Therefore (b): There is a moral basis for law.

If Leff wishes to escape nihilism, he must accept these arguments, *which are developed from his own reasoning*. But to escape nihilism and give law any normative force, he must accept God as the "final evaluator" or the "evaluator in chief." Instead, Leff calls out to the God whose existence he denies.

Leff's argument captures an essential insight about the nature of objective moral values. Moral values imply a moral evaluator of some kind. If the realm of evaluators is limited to the human-all-too-human, then evaluations always remain subjective and subverted by someone else's evaluations. Since human's prize order over chaos, the net result is not likely anarchism, but totalitarianism. When not restrained by natural law (which is based on God's ultimate evaluations), the state easily lays claim to the throne of God himself.

Unwittingly, perhaps, Leff's argument, when suitably adapted, provide strong rational support for both the existence of a personal and moral God and for a moral basis for civil law. This is no small thing in a day when law is unanchored in any final authority, a day when we should again heed the voice of the ancient Psalmist:

Can a corrupt throne be allied with you—
 A throne that brings on misery by its decrees?
 The wicked band together against the righteous
 And condemn the innocent to death.
 But the Lord has become my fortress,
 And my God the rock in whom I take refuge.
 He will repay them for their sins
 And destroy them for their wickedness;
 The Lord our God will destroy them. (Psalm
 95:20-23).

WHERE DO WE GO FROM HERE?

Given the tidal wave of recent legal decisions on same-sex marriage and religious freedom, we see American law and legal theory spitting on the grave of natural law.

³¹ Id., 1249; brackets are in the original.

The Evaluator-in-Chief has been voted out of office. Since I am neither a prophet nor the son of a prophet, I will not predict the fate of our (nearly) godless legal system. It may be too late to recover the natural law philosophy of the Declaration of Independence and the strong Judeo-Christian heritage of America. Nevertheless, like-minded citizens (Christian and otherwise) should resist the deconstruction of law into arbitrary arrangements of mere social power. Whatever the legal result, we should speak the truth to power in humility and with intellectual competence, come what may. The prophet Micah lights the way: “He has shown you, O mortal, what is good. And what does the LORD require of you? To act justly and to love mercy and to walk humbly with your God” (Micah 6:18). To work toward this noble end, we need not write another Constitution or destroy the present social order. A return to the sources of American civil government is the tonic so desperately needed. To this end, I propose three strategies:

First, the Christian basis for law and the bankruptcy of secular law should be studied at every level of education. The philosophy of law is not an esoteric discipline fit only for experts. It is not a *worldly* endeavor that Christians should avoid. Instead, a nation’s philosophy of law will shape its concept of human rights (e.g., abortion on demand), the family (e.g., same-sex marriage), and the role of religion in civil society (e.g., tax exemption and freedom of religion for churches). Christian colleges should offer philosophy of law as stand-alone courses and as part of introductory philosophy courses. Theological seminaries should explore the insights of biblical law and ethics as they pertain to the individual, the church, and the state. Law schools, both secular and religious, should teach jurisprudence with historical and intellectual rigor. Secular schools should not ignore or spurn natural law theories, but give them their intellectual due.³² Churches and other religious bodies should educate their members on the meaning and importance of civil law, since the fate of American civilization is at stake.

Second, Christians and others committed to natural law working in the field of law should band together to educate and encourage each other. As Ecclesiastes counsels: “Though one may be overpowered, two can defend themselves. A cord of three strands is not quickly broken

(Ecclesiastes 4:12). Groups such as the Christian Legal Society, Alliance Defending Freedom, and the Federalist Society are key groups in knitting this cord of three strands into a strong coalition.

Third, talented young women and men should also be encouraged to consider law as a vocation, as a ministry for the common good and for God’s glory. Some Christians falsely believe that church-related work is more spiritual or godly than secular work, such as law. Thus, gifted and devout youths might be directed toward a seminary education and not a legal education. This secular-sacred dichotomy finds no place in the Bible. All of life should be lived under the lordship of Jesus Christ and according to the truth of the Bible as we love God with all our being and our neighbor as ourselves (1 Corinthians 10:31; Matthew 22:37-40). Someone may be called to be an attorney as much as someone else may be called to be a pastor.³³ We should be grateful that the great social reformer William Wilberforce went into politics instead of the pastorate, otherwise the British slave trade may have lasted much longer.³⁴

FINDING REFUGE IN GOD

Opposition to slavery yesterday or slavery today—human trafficking and other forms—requires just laws and their efficient enforcement. Leff’s case that a truly moral law requires and ultimate Evaluator gives us this metaphysical foundation. If we desire law based on a sturdy moral evaluation that will not leave us with nihilism or totalitarianism, then we must base that moral reality on nothing less than God himself. Again, the Psalmist speaks:

Why do the nations conspire
And the peoples plot in vain?
The kings of the earth rise up
And the rulers band together
Against the Lord and against his anointed, saying,
“Let us break their chains
And throw off their shackles.”
The One enthroned in heaven laughs;
The Lord scoffs at them.
He rebukes them in his anger
And terrifies them in his wrath, saying,
“I have installed my king

³² A graduate of Denver Seminary took a jurisprudence class at the University of Denver Law School in which natural law theory was scarcely mentioned.

³³ On the meaning of calling, see OS GUINNESS, *THE CALL* (Nashville: Thomas Nelson, 2003) and TIMOTHY KELLER, *EVERY GOOD ENDEAVOR* (New York: Dutton, 2012).

³⁴ See ERIC METAXIS, *AMAZING GRACE: WILLIAM WILBERFORCE AND THE HEROIC CAMPAIGN TO END SLAVERY* (New York: HarperOne, 2007).

On Zion, my holy mountain.”
 I will proclaim the Lord’s decree:
 He said to me, “You are my son;
 Today I have become your father.
 Ask me, and I will make the nations your
 inheritance,
 The ends of the earth your possession.
 You will break them with a rod of iron;
 You will dash them to pieces like pottery.”
 Therefore, you kings, be wise;
 Be warned, you rulers of the earth.
 Serve the Lord with fear
 And celebrate his rule with trembling.
 Kiss his son, or he will be angry
 And your way will lead to your destruction,
 For his wrath can flare up in a moment.

Blessed are all who take refuge in him
 (Psalm 2)³⁵

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³⁵ For a philosophical expansion of the arguments in this article see DOUGLAS GROOTHUIS, *The Moral Argument in CHRISTIAN APOLOGETICS: A COMPREHENSIVE CASE FOR BIBLICAL FAITH* (InterVarsity Press, 2011).



ROUSSEAU'S BARGAIN

How Egalitarianism becomes Authoritarianism

BY P. ANDREW SANDLIN

If you want to understand the sweeping shifts in American culture, you might want to think of the legend of St. George and the dragon.¹ St. George devoted his life to killing dragons, and when he had killed them all, he lost his life's passion, so he invented new dragons. St. George, you see, *needed* his dragons. In the same way, the Left began by killing the dragon of arbitrary state authority, but quickly moved on to slay alleged arbitrary church authority and, more recently, Caucasian authority, paternal and maternal authority, capitalist authority and, in these last decades, heterosexual authority. The Left are liberators eternally in search of the oppressed whom they must liberate. They are on one never-ending liberation crusade, and if there are no oppressed, they must invent them.

This is what Kenneth Minogue terms "the oppression-liberation nexus."² While the Right in recent times has won political elections, the Left has, in many ways, won the culture. This means, above all else, an eternal liberation crusade. Communist Revolutions are simply one major example: to liberate workers from employers. The broader agenda is cultural liberation of all kinds, and western leftist elites differ from Lenin and Mao only in degree and in methods employed, not in principle. Mao used the end of a gun barrel; western elites use public schools, major foundations, entertainment, art, and the force of law. The objective is identical: liberation of the oppressed, "oppressed" meaning any class that can claim social inferiority.

In this liberation crusade, classical liberalism has been gradually transformed in its views of equality, from equality of *processes* to equality of *results*.³ The early liberals, influenced by Christianity and its view of law, wanted a level operational field. The law cannot privilege one class over another. This is what the Bible teaches. You cannot be penalized or rewarded for being white or

black, or rich or poor, or young or old, or male or female. You get equal treatment under the law.

DRAGON-SLAYERS OF THE LEFT

The Left soon discovered that this procedural equality didn't generate the equal results it was seeking. If procedural conditions were equalized, some people ended up with more than others. That is, equality isn't a fact of nature. To a dragon-slaying liberation crusade, this natural inequality was unacceptable, so they declared war on nature. The real enemy is reality, so reality must be altered. They did this by equalizing results. They used confiscatory taxation to equalize economic results, hiring quotas to equalize sexual and racial results, un-lose-able games to equalize youth athletic results, abortion to equalize childbearing-responsibility results, and, now, same-sex "marriage" (SSM) to equalize marital results.

SSM is not the ultimate battle in this liberation crusade. It has been discovered that while homosexuals (for example) can be given the legal freedom to marry, they can still suffer social rejection or opprobrium. This inequality cannot be permitted. So, long-oppressed classes must have the right to approval. Herein lies the origin of speech codes. If you have a right to approval, you don't have a right to disapprove of other people. This right to approval, like all rights, must be legally enforced.

The rub comes when this right conflicts with other rights, like the right to religious expression. The conflict between sexual liberty and religious liberty is unlikely to be one the religious will win, in large part because of the broad and increasing acceptance of an idea President Obama has espoused more than once in public: that the religious have a freedom to worship, and that is where it ends. When you leave the pew, you must leave your faith there.⁴ This was the Marxist approach.

¹ KENNETH R. MINOGUE, *THE LIBERAL MIND* (New York: Vintage, 1968), 1.

² KENNETH R. MINOGUE, *THE SERVILE MIND* (New York and London: Encounter, 2010), 296.

³ THOMAS SOWELL, *A CONFLICT OF VISIONS* (New York: William Morrow, 1987), 121–140.

⁴ BENJAMIN DOMENECH, "The Future of Religious Liberty," http://www.realclearreligion.org/articles/2013/06/26/the_sexual_revolutions_consequences.html#.Ucvh4aEmFKM.facebook, accessed June 27, 2012.

One of its defining maxims was, “[R]eligion is a man’s private concern.”⁵ And it has increasingly become the Western democratic approach: your religious convictions regarding human sexuality are fine, just as long as you keep them in church, or, more preferably, between your two ears.

ROUSSEAU’S INGENIOUS DEAL

The state becomes the mechanism for securing this liberation from disapproval. This concept traces its origin to the 18th-century French philosopher Jean-Jacques Rousseau, whose influence on the modern world has been incalculable. Rousseau made an interesting and novel proposition: “My views will liberate you from all the traditional authorities to which you have been subject. The only authority to which you have to be subject is the state.”⁶

In the medieval and Reformation worlds, there were all sorts of social institutions to which men belonged, e.g., the family, the church, guilds, clubs, schools, and so forth. These institutions had rules that bound individuals (non-coercively). While the state (usually) did not and could not enforce those rules, they were strong rules. By the 18th century, many individuals wanted “liberation” from such institutions. Rousseau basically appealed, “Give me a state strong enough to wipe out the authority of these institutions, and I will give you individual liberty — except, liberty from the state itself.” This, in fact, essentially happened during the French Revolution. The Roman Catholic Church was gutted, the medieval guilds were destroyed, and the family was diluted. What became all-powerful was the state.

Why were so many individuals willing to make this trade? Institutions like the family and the church entail certain moral demands. The state only demands subservience. *Individuals were willing to give up political liberty in order to gain moral liberty.* Or, more accurately, they were willing to enslave themselves to the state as long as they could emancipate themselves from moral standards.⁷ This, I suggest, has been the course of political liberalism over the last 200 years in the West. The state

is the enforcer of the “oppression-liberation nexus.” Your freedom to practice homosexuality (including SSM) is protected; your freedom to start a degree-granting Christian college is *not* protected. Your freedom to abort an unborn baby is protected; your freedom to pass on all your wealth to your heirs is *not* protected. Your freedom to produce and disseminate pornography is protected; your freedom as a pastor to endorse a Christian political candidate is *not* protected. Virtually any sort of sexual “preference” is permitted, just as long as you acquiesce to the state’s power.

Rousseau was willing to get rid of the family community, the church community, and the business community by empowering the political community. He was a communalist, but the only community left standing in his system was the state.

THE CHRISTIAN MESSAGE OF LIBERTY, NOT EGALITARIANISM

This is in sharp distinction from the Christian worldview in which family, church, and business communities retain significant strength and sovereignty from state power. These so-called “private” institutions are “buffers” between the individual and the state. They are institutions that rival the state and compete for the individual’s allegiance. This is why a Rousseauian view of the state (that is, the leftist view) has such a strong historic antipathy toward these institutions. If people start relying on the family and the church for moral instruction, health, education, welfare, and so on, if they commit themselves to these communities — the kind of state that the left seeks becomes largely redundant and relatively small. But the all-

encompassing state is exactly what Rousseau’s view of the “good life” is all about. The state guarantees everybody’s “good life.” This is why today’s political liberals, following Rousseau, want to subordinate all other communities to the political community. This is why they love politics. It gives them freedom from other communities that demand morality.

It should now be clear why egalitarianism forms such a hindrance to Christian culture. Christian culture

The all-encompassing state is exactly what Rousseau’s view of the “good life” is all about. The state guarantees everybody’s “good life.”

⁵ OWEN CHADWICK, *THE SECULARIZATION OF THE EUROPEAN MIND IN THE 19TH CENTURY* (Cambridge: Cambridge University Press, 1975), 81.

⁶ ROBERT NISBET, *THE SOCIAL PHILOSOPHERS* (New York: Thomas Y. Crowell, 1973), 148, 268.

⁷ This is the theme of Jeffery J. Ventrella’s superb new book, *CHRIST, CAESAR, AND SELF: A PAULINE PROPOSAL FOR UNDERSTANDING THE PARADOXICAL CALL FOR STATIST COERCION AND UNFETTERED AUTONOMY* (Center for Cultural Leadership, 2016).

⁸ See HERMAN DOOYEWEERD, *ROOTS OF WESTERN CULTURE* (Ancaster, Ontario, Canada: Paideia Press, 2012), 41–61.

is all about various independent but overlapping God-created spheres (like family, church, school, business, arts, sciences, technology, and so on) each operating to glorify God in culture under his authority.⁸ The new egalitarianism prohibits by political coercion the life and development of these separate spheres. And there can be no Christian culture apart from the freedom of these institutions.

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PUBLIC MORALITY AND ALLEGEDLY PRIVATE VICE

BY ROBERT P. GEORGE

Theorists of virtue and public morality—from the ancient Greek philosophers and Roman jurists on—have noticed that apparently private acts of vice, when they multiply and become widespread, can imperil important public interests. This fact embarrasses philosophical efforts to draw a sharp line between a realm of “private” morality that is not subject to law and a domain of public actions that may rightly be subjected to legal regulation.

Considered as isolated acts, someone’s recreational use of narcotics or hallucinogenic drugs, for example, may affect the public weal negligibly, if at all. But an epidemic of drug abuse, though constituted by discrete, private acts of drug taking, damages the common good in myriad ways. This does not by itself settle the question whether drug prohibition is a prudent or effective policy. It does, however, undermine the belief that the recreational use of drugs is a matter of purely private choice into which public authority has no legitimate cause to intrude.

Much the same is true of pornography. Even in defending what he believed is a moral right to pornography, the late Ronald Dworkin identified the *public* nature of the interests damaged in communities in which pornography becomes freely available and widely circulates. Legal recognition of the right to pornography would, Dworkin conceded, “sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their children’s development. It would limit their ability to bring about the cultural structure they think best, a structure in which sexual experience generally has dignity and beauty, without which their own and their families’ sexual experience are likely to have these qualities in less degree.”

In my book *Making Men Moral: Civil Liberties and Public Morality* and elsewhere, I have argued that Dworkin’s efforts to derive from the principle of equality a moral right to pornography never manage to overcome the force of the public interest in prohibiting or restricting pornography that he himself identifies. That interest is *not*, fundamentally, in shielding people from shock or offense, as many people wrongly assume. It involves something much more substantial: the interest of every

member of the community in the quality of the cultural structure that will, to a large extent, shape their experiences, their quality of life, and the choices effectively available, to themselves and their children, in a domain of human affairs marked by profound moral significance. It is the public interest in establishing and maintaining a milieu that is supportive of virtue and inhospitable at least to what the famed British jurist Lord Patrick Devlin described as “the grosser forms of vice.”

When we bring this reality into focus, it becomes apparent that the familiar depiction of the debate over pornography regulation as pitting the “rights of individuals” against some amorphous “majority’s dislike of smut” fails to comport with the facts of the matter. The public interest in a cultural structure—in which, as Dworkin said, “sexual experience has dignity and beauty”—is the concrete interest of individuals and families who constitute “the public.” The obligations of others to respect, and of governments to respect and protect, their interests is a matter of justice.

It is in a special way a matter of justice to children. Parents’ efforts to bring up their children as respecters of themselves and others will be helped or hindered—perhaps profoundly—by the cultural structure in which children are reared. Whether children themselves ever get a glimpse of pornographic images in childhood is not the fundamental issue. A decent social milieu cannot be established or maintained simply by shielding children from such images. It is the attitudes, habits, dispositions, imagination, ideology, values, and choices shaped by a culture in which pornography flourishes that will, in the end, deprive many children of what can without logical or moral strain be characterized as their right to a healthy sexuality. In a society in which sex is depersonalized, and thus degraded, even conscientious parents will have enormous difficulty transmitting to their children the capacity to view themselves and others as persons rather than objects of sexual desire and satisfaction.

There is more to the picture. We know that a more-or-less unbridled culture of pornography can result in a sexualization of children that robs them of their innocence and even places them in jeopardy of sexual exploitation by adults. Can anyone honestly deny that

we have witnessed a shameful sexualization of children in our own culture? Every day, it seems, we hear of cases of the sexual abuse of children and adolescents by trusted adults. The problem of pedophile sex tourism to places like Thailand is a dirty secret that will sooner or later break upon the American consciousness and conscience. Should we be surprised at such a phenomenon? Think about the sexualization of adolescents in contemporary music, television, movies, and commercial advertising. Consider the notorious Calvin Klein ads on New York City buses depicting young people in sexually provocative poses. Abercrombie and Fitch took things to the logical next step by peddling thong swimwear to twelve-year-old girls.

Sometimes obscenity or pornography is defined in such a way as to exclude anything qualifying as “art” from falling into the category. I see no reason for this, whether we consider the issue from the point of view of possible legal regulation or from some other perspective. Someone might argue that the artistic value of certain pornographic depictions—you may recall Robert Mapplethorpe’s photograph of a bull whip in a rectum—provides a reason (or additional reason) to immunize it from legal regulation. But such depictions remain pornographic, and their negative impact on public morality cannot be denied. Moreover, it is difficult to see how any degree of artistic merit could justify the insult to morally conscientious taxpayers when they are forced to pay for pornographic depictions.

Art can elevate and ennoble. It can also degrade and even corrupt. Whatever should be done or not done by way of legal restriction of pornographic art, we ought not to make things easy on ourselves by pretending that art cannot be pornographic or that pornographic art cannot degrade. Nor ought we to avert our gaze from the peculiar insult and injustice involved in the government funding of pornography.

There are real and substantial human and personal interests competing with those desires or interests we label “freedom of expression” when it comes to the question of art and pornography. If we, as a society, are to decide against these interests—particularly if we are to do so categorically—we should face up to what we are prepared to sacrifice, particularly when it comes to

the well-being of children. And if judges are to impose a decision against these interests on a public that views the matter differently, they should shoulder the burden of providing a compelling legal and moral justification for doing so.

It will not suffice to make mere appeals to “established constitutional principles” or to the fact that a right to free speech is enumerated in the constitutional text, whereas interests competing with it in the case of pornography are not mentioned. The truth is that so-called established constitutional principles on free speech and pornography are, at best, weakly justified in the cases. A bare reliance on the mere fact of an enumeration of a right to free speech will simply confirm the validity of the arguments that Hamilton and other Founders advanced against the Bill of Rights—namely, that the enumeration of certain rights would distort the scheme of liberty established in the body of the Constitution by miseducating Americans about the nature of constitutional government and the moral substance of their rights.

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BIGOTS OR PRO-LIFERS?

The Future for Defenders of Marriage

BY RYAN T. ANDERSON

With its 2015 decision in *Obergefell v. Hodges*, the Supreme Court has brought the sexual revolution to its apex—a redefinition of our civilization’s primordial institution, cutting marriage’s link to procreation and declaring sex differences meaningless. The court has usurped the authority of the people, working through the democratic process, to define marriage. And it has shut down debate just as we were starting to hear new voices—gay people who agree that children need their mother and their father, and children of same-sex couples who wish they knew both their mom and dad.

If the polls are right, there has also been an astonishingly swift change in public opinion. Most Americans now think that justice and equality, or at least good manners, require redesigning marriage to fit couples (at this point, *just* couples) of the same sex. Or at least they’ve been intimidated into saying so. I argue in my recent book, *Truth Overruled: The Future of Marriage and Religious Freedom*, that we are sleepwalking into an unprecedented cultural and social revolution. A truth acknowledged for millennia has been overruled by five unelected judges. The consequences will extend far beyond those couples newly able to obtain a marriage license.

If our society teaches a falsehood about marriage, it is harder for people to live out the truth of marriage. Marital norms make no sense, as a matter of principle, if what makes a marriage is merely intense emotional attachment, an idea captured in the bumper-sticker slogan “Love makes a family.” There is no reason that mere consenting adult love has to be permanent or limited to two persons, much less sexually exclusive. And so, as people internalize this new vision of marriage, marriage will be less and less a stabilizing force.

And if fewer people live out the norms of marriage, then fewer people will reap the benefits of the institution of marriage—not only spouses, but also children. Preserving the man-woman definition of marriage is the only way to preserve the benefits of marriage and avoid the enormous societal risks accompanying a genderless marriage regime. How can the law teach that fathers are essential, for instance, when it has officially made them optional?

There is nothing “homosexual” or “gay” or “lesbian,” of course, about the new vision of marriage that Justice Kennedy enshrined in law. Many heterosexuals have bought into it over the past fifty years. This is the vision of marriage that came out of the sexual revolution. Long before there was a debate about same-sex anything, far too many heterosexuals bought into a liberal ideology about sexuality that makes a mess of marriage: cohabitation, no-fault divorce, extramarital sex, non-marital childbearing, pornography, and the hook-up culture all contributed to the breakdown of the marriage culture. The push for the legal redefinition of marriage didn’t cause any of these problems. It is, rather, their logical conclusion. The problem is that it’s the logical conclusion of a bad train of logic.

If the sexual habits of the past fifty years have been good for society, good for women, good for children, then by all means let us enshrine that vision of marriage in law. But if the past fifty years have not been so good for society, for women, for children—indeed, if they’ve been, for many people, a disaster—then why would we lock in a view of marriage that will make it more difficult to recover a more humane vision of human sexuality and family life?

The essence of marriage as a permanent, exclusive male-female union, however, has become an unwelcome truth. Indeed, a serious attempt is well under way to define opposition to same-sex marriage as nothing more than irrational bigotry. If that attempt succeeds, it will pose the most serious threat to the rights of conscience and religious freedom in American history.

BIGOTS OR PRO-LIFERS?

Will the defenders of marriage be treated like bigots? Will our society and our laws treat Americans who believe that marriage is the union of husband and wife as if they were the moral equivalent of racists? Perhaps not. Think about the abortion debate. Ever since *Roe v. Wade*, our law has granted a right to abortion. And yet, for the most part, pro-life citizens are not treated as though they are “anti-woman” or “anti-health.” Those are just slurs from abortion activists.

After *Roe*, there was a political push to make all citizens pay for abortion and to force all healthcare workers and facilities—pro-life doctors and nurses, and Catholic hospitals—to perform abortions. The argument was that abortion was a constitutionally-protected right, and thus for the poor to exercise this right they needed taxpayer subsidies. And, further, abortion was a standard medical procedure, so all medical professionals and facilities should perform abortion, and all healthcare plans pay for abortions.

The abortion activists lost that debate. The pro-life movement won. Through legal protections such as the Hyde Amendment and the Church Amendment, taxpayer funds were prohibited from being used to pay for abortion, and pro-life citizens were protected from being forced to perform abortion. Until the HHS insurance-coverage mandates imposed under Obamacare, at least, there was wide agreement that pro-life citizens shouldn't be forced by the government to be complicit in what they see as the evil of abortion. Pro-life taxpayers, for example, have not been forced to fund elective surgical abortions, and pro-life doctors have not been forced to perform them. Even the HHS mandate only extended to abortifacient drugs and devices, not surgical abortion.

I saw this dynamic as an undergraduate at Princeton University. Even many of those who disagree with the pro-life cause can understand what motivates our concern. As a result, they tend to respect pro-lifers and recognize that the pro-life position has a legitimate place in the debate over public policy. And—this is crucial—it's *because of that respect* that pro-choice leaders generally respect the religious liberty and conscience rights of their pro-life fellow citizens.

Will the same tolerance be shown to those who believe the truth about marriage? Will the government respect their rights of conscience and religious liberty? It doesn't look good. So far, the trend has been in the opposite direction. We must now work to reverse that trend. And our work must start by helping our neighbors at least understand why we believe what we believe about marriage. Only if they can understand what motivates us will they respect our freedom to act on such motivation.

THE FALSE ANALOGY OF INTERRACIAL MARRIAGE

For years, the refrain of the Left has been that people who oppose same-sex marriage are just like people who opposed interracial marriage—and that the law should treat them just as it treats racists. Indeed, the *New York Times* reported that while the amicus briefs filed with the Supreme Court in *Obergefell* were evenly divided between supporters and opponents of state marriage laws,

no major law firm had filed a brief in support of marriage as the union of a man and a woman. "In dozens of interviews, lawyers and law professors said the imbalance in legal firepower in the same-sex marriage cases resulted from a conviction among many lawyers that opposition to such unions is bigotry akin to racism."

Same-sex marriage advocates insist that the Court's *Obergefell* ruling is not like *Roe v. Wade*, which engendered undying controversy, but like *Loving v. Virginia*, the universally-accepted decision that struck down bans on interracial marriage—a decision now so uncontroversial that most Americans have never heard of it. If that is true, then anyone who opposes *Obergefell* is an irrational bigot—the moral and legal equivalent of a racist.

But as I explain in my book, great thinkers throughout human history—and from every political community until about the year 2000—thought it reasonable and right to view marriage as a gendered institution, a union of male and female. Indeed, this aspect of marriage has been nearly a human universal—even while many other aspects about marriage have been subjects of contention. Viewing marriage as a gendered institution has been shared by the Jewish, Christian, and Muslim traditions; by ancient Greek and Roman thinkers untouched by the influence of these religions; and by Enlightenment philosophers. It is affirmed by canon law as well as common and civil law.

Bans on interracial marriage, by contrast, have no such historical pedigree. They were part of an insidious system of racial subordination and exploitation that denied the equality and dignity of all human beings and forcibly segregated citizens based on race. When these interracial marriage bans first arose in the American colonies, they were inconsistent not only with the common law of England, but also with the customs of every previous culture throughout human history.

As for the Bible, while it doesn't present marriage as having anything to do with race, it insists that marriage has everything to do with sexual complementarity. From the beginning of Genesis to the end of Revelation, the Bible is replete with spousal imagery and the language of husband and wife. One activist Supreme Court ruling cannot overthrow the truth about marriage that is expressed in faith and reason and universal human experience.

We must now bear witness to the truth of marriage with more resolve and skill than ever before. We must now find ways to rebuild a marriage culture. The first step will be protecting our right to live in accordance with the truth. The key question, again, is whether liberal elites who now have the upper hand will treat their dissenting fellow citizens as they treat racists or as they treat pro-lifers. While liberal elites disagree with the pro-life position, most understand it. With the exception of

the most hardened Planned Parenthood supporter, the recent videos have shocked the consciences even of liberals—and they certainly can understand *why* pro-lifers are concerned. They can see why a pro-life citizen defends unborn life—so, for the most part, they agree that government shouldn't coerce citizens into performing or subsidizing abortions. The same needs to be true for marriage. And we need to make it true by making the arguments in defense of marriage.

WHAT DO WE DO NOW?

In January 1973, the U.S. Supreme Court created a constitutional right to abortion throughout all nine months of pregnancy in *Roe v. Wade* and *Doe v. Bolton*. Pro-lifers were told that they had lost, that the issue was settled. The law taught citizens that they had a new right, and public opinion quickly swung against pro-lifers by as much as a two-to-one margin. One after another, formerly pro-life public figures—Ted Kennedy, Jesse Jackson, Al Gore, Bill Clinton—“evolved” in their thinking to embrace the new social orthodoxy of abortion on demand. Pundits insisted that all young people were for abortion, and elites ridiculed pro-lifers for being on the “wrong side of history.”

The pro-lifers were aging, their children increasingly against them. The only people who continued to oppose abortion, its partisans insisted, were a few elderly priests and religious fundamentalists. They would soon die off, and abortion would be easily integrated into American life and disappear as a disputed issue. But courageous pro-lifers put their hand to the plow, and today we reap the fruits. My generation is more pro-life than my parents' generation. A majority of Americans support pro-life policies, more today than at any time since the *Roe* decision. More state laws have been enacted protecting unborn babies in the past decade than in the previous thirty years combined. What happened? The pro-life community woke up and responded to a bad court ruling. Academics wrote the books and articles making the scientific and philosophical case for life. Statesmen like Henry Hyde, Edwin Meese, and Ronald Reagan crafted the policy and used the bully pulpit to advance the culture of life. Activists and lawyers got together, formed coalitions, and devised effective strategies. They faithfully bore witness to the truth.

Everything the pro-life movement did needs to be done again, now on this new frontier of marriage. There are three lessons in particular to learn from the pro-life movement that I explore at length in *Truth Overruled*:

1. We must call the Court's ruling in *Obergefell v. Hodges* what it is: judicial activism. Just as the pro-life movement successfully rejected *Roe v. Wade* and

exposed its lies about unborn life and about the U.S. Constitution, we must make it clear to our fellow citizens that *Obergefell v. Hodges* does not tell the truth about marriage or about our Constitution.

Nothing in the Constitution justifies the redefinition of marriage by judges. In imposing on the American people its judgment about a policy matter that the Constitution leaves to citizens and their elected representatives, the Court has inflicted serious damage on the institution of marriage and the Constitution. Our Constitution is silent on what marriage is. It protects specific fundamental rights and provides the structure of deliberative democracy by which we the people, retaining our authority as full citizens and not subjects of oligarchic rule, decide important questions of public policy, such as the proper understanding of marriage and the structure of laws defining and supporting it. The majority of the Court, however, has simply replaced the people's opinion about what marriage is with its own—without any constitutional basis whatsoever.

2. We must protect our freedom to speak and live according to the truth. The pro-life movement accomplished this on at least three fronts. First, it ensured that pro-life doctors and nurses and pharmacists and hospitals would never have to perform abortions or dispense abortion-causing drugs. Second, it won the battle—through the Hyde Amendment—to prevent taxpayer money from paying for abortions. And third, it made sure that pro-lifers and pro-life organizations could not be discriminated against by the government.

Pro-marriage forces need to do the same: ensure that we have freedom from government coercion to lead our lives, rear our children, and operate our businesses and charities in accord with the truth about marriage. Likewise, we must ensure that the government does not discriminate against citizens or organizations because of their belief that marriage is the union of husband and wife.

3. We must redouble our efforts to make the case in the public square. We have to bear witness to the truth in a winsome and compelling way. The pro-life movement accomplished this on different levels. Specialists in science, law, philosophy, and theology laid the foundations of the pro-life case with research and writing in their disciplines, while advocacy groups tirelessly appealed to the hearts of the American people. Pro-lifers did much more than preach, launching a multitude of initiatives to help mothers in crisis pregnancies make the right choice.

Now we must employ reason to make the case for the truth about marriage, communicate this truth to our

neighbors, and embody this truth in our families and communities. Just as the pro-life movement discovered the effectiveness of ultrasound and letting women speak for themselves, the pro-marriage movement will, I predict, find the social science on marriage and parenting and voices of the victims of the sexual revolution to be particularly effective. And just as grassroots pregnancy centers exposed the lie that abortion is a compassionate response to unplanned pregnancy, we must show what a truly loving response is to same-sex attraction.

THE CHURCH

The Church—either through action or inaction—will play a major role in the debate over the meaning of marriage. Below I suggest four things the church in particular should do to help rebuild a strong marriage culture:

1. Present an appealing and engaging case for biblical sexuality. The virtues of chastity and lifelong marriage are enriching, but after fifty years, the church has still not devised a compelling response to the sexual revolution. The legal redefinition of marriage could take place when and where it did only because the majority of Americans lacked a sound understanding of the nature of man and the nature of marriage.

The church needs to find a way to capture the moral imagination of the next generation. It needs to make the truth about human sexuality and its fulfillment in marriage not only attractive and appealing, but noble and exhilarating. This is a truth worth staking one's life on. In the face of the seduction of cohabitation, no-fault divorce, extramarital sex, non-marital childbearing, pornography, and the hook-up culture, what can the church offer as a more fulfilling, more humane, more liberating alternative? Until it finds an answer, the church will make no headway in the same-sex marriage debate, which is the fulfillment of those revolutionary sexual values.

A proper response to the sexual revolution also requires engaging—not ignoring—the best of contemporary thought, especially the best of contemporary secular thought. What visions of the human person and sex, of marriage and personal wholeness do today's thinkers advance? Exactly where and why do their ideas go wrong? The church needs to show that the truth is better than a lie, and that the truth can defeat all lies. While I provide a philosophical defense of the truth in *Truth Overruled*, we need theologians to continue developing theological defenses.

In these efforts, we shouldn't discount the potential of slumbering Christian communities to wake up. It's easy to forget that, in 1973, the Southern Baptists were in favor of abortion rights and supported *Roe v. Wade*.

Today they are at the forefront of the pro-life movement. Christians who are on the wrong side of the marriage debate today can change their minds if we help them.

2. Develop ministries for those with same-sex attraction & gender identity conflicts. People with same-sex attractions or gender identity conflicts, for whom fidelity to the truth about human sexuality requires special courage, need our loving attention. Pope Francis's description of the church as a field hospital after a battle is especially apt here.

These ministries are like the pro-life movement's crisis pregnancy centers. Abortion is sold as the most humane and compassionate response to an unplanned pregnancy. It's not. And pro-lifers' unprecedented grassroots response to women gives the lie to that claim. Likewise, those who believe the truth about marriage should be the first to walk with men and women dealing with same-sex attraction or gender identity conflicts, showing what a truly humane and compassionate response looks like.

Young people experiencing same-sex desire can face isolation and confusion as their peers first awaken to the opposite sex. They suffer humiliation if they say too much, but they bear the heavy burden of a secret if they keep silent. Parents and teachers must be sensitive to these struggles. We should fight arbitrary or abusive treatment of them. As relatives, coworkers, neighbors, and friends, we must remember that social hardship isn't limited to youth.

A shining example of ministry to those with same-sex attraction is Courage, an international apostolate of the Catholic Church, which has produced the documentary film *The Desire of Everlasting Hills*. Every community needs groups like this to help their neighbors with same-sex attraction discern the unique life of loving service to which God calls each of them and find wholeness in communion with others. But this work can't just be outsourced to special groups and ministries. Each of us needs to be willing to form deep friendships with men and women who are attracted to their own sex or struggle with their identity, welcoming them into our homes and families, especially when they aren't able to form marriages of their own.

After all, the conjugal view of marriage—that it is inherently ordered to one-flesh union and hence to family life—defines the limits of marriage, leaving room for meaningful non-marital relationships, especially deep friendships. This is liberating. Those with same-sex attraction, like everyone else, should have strong and fulfilling relationships. Marriage isn't the only relationship that matters. The conjugal view of marriage doesn't denigrate other relationships. Those who would

redefine marriage as a person's most intense or deepest or most important relationship devalue friendship by implying that it's simply *less*: less meaningful, less fulfilling. The greatest of Justice Kennedy's errors may be his assertion that without same-sex marriage some people are "condemned to live in loneliness." His philosophy of marriage is anemic. And as our society has lost its understanding of marriage, it has suffered a corresponding diminution, even cheapening, of friendship.

We all need community, and those who for whatever reason never marry will know certain hardships that the married are spared. We should bring those left dry by isolation into other forms of community—as friends, fellow worshippers, neighbors, comrades in a cause, de facto members of our families, big siblings to our children, and regular guests in our homes.

3. Defend religious liberty and help conscientious Christians witness to the truth. This task is especially imperative because a radical sexual agenda has become a nonnegotiable public policy. What should bakers and florists and photographers do? What should directors of local Catholic charities or Evangelical school teachers do?

There is no one single answer for every circumstance. Each person's situation will require a unique response, based on his vocation and the challenges he faces. The answers for schools and charities and professionals may vary with a thousand particulars, but the church will need to teach Christians the moral principles to apply to their own circumstances.

The church also has to help the rest of society understand the importance of freedom, particularly religious freedom. The national conversation on this important civil liberty hasn't been going well, and Indiana revealed how extreme a position the corporate and media establishments have staked out. They have the money and the megaphones. We have the truth.

4. Live out the truth about marriage and human sexuality. This fourth task of the church is the most important and the most challenging. Husbands and wives must be faithful to one another for better and for worse till death do them part. Mothers and fathers must take their obligations to their children seriously. The unmarried must prepare now for their future marital lives so they can be faithful to the vows they will make. And they need the encouragement of pastors who are not afraid to preach unfashionable truths.

Saints are the best evangelists. The same thing is true when it comes to marriage. The beauty and splendor of a happy family is our most eloquent testimony. In *Truth Overruled*, I explain, in clear and sober terms, the enormous task before us of defending our families, churches, schools, and businesses from opponents who now wield coercive power in government, commerce, and academia. My goal is to equip everyone, not just the experts, to defend what most of us never imagined we'd have to defend: our rights of conscience, our religious liberty, and the basic building block of civilization—the human family, founded on the marital union of a man and a woman.

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SPEAKING OF RELIGIOUS FREEDOM

Equipped to Defend Religious Freedom

BY KIMBERLEE WOOD COLBY, DIRECTOR,
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If we are to preserve religious freedom in a culture that no longer seems to comprehend, much less care about, the vital role religious freedom plays in a free society, then we must each become an ambassador for religious freedom. We must be equipped to discuss religious freedom cogently but simply, with the hope of perhaps persuading our fellow citizens that everyone has an interest in preserving religious freedom.

The purpose of this article is to highlight a handful of articles and books that will equip someone who has never read a Supreme Court decision about religious freedom or a book about the First Amendment to articulate a strong defense of religious freedom. Because the best scholars increasingly write in laymen's terms, these articles and books are readily accessible to non-lawyers, law students, and lawyers alike. Most are short articles, and all are easy reads and particularly worth reading.¹

The past 40 years represent a "Golden Age" of religious freedom scholarship. In suggesting the following articles, I am recommending writings published within the past four years. In making my selections, I have excluded older works for which these authors are better known and have neglected several religious freedom scholars whose work contributes significantly to the defense of religious freedom. This is an eclectic, rather than comprehensive, list.

Nor do I agree with everything that is said in these articles or with every position these scholars take. These are brave voices in an increasingly alien academy. They are staking reputations and taking hits for our religious freedom. Reading their work and using it to advance religious freedom in our circles of influence (work, school, church, friends) honors their efforts on behalf of us all.

WHY RELIGIOUS FREEDOM?

Four years ago, a well-known University of Chicago philosophy professor, Brian Leiter, wrote a book, *Why*

Tolerate Religion?, in which he questioned the need for protecting religious freedom.² Unfortunately, his doubts as to whether religious freedom is "worthy" of protection represent a swelling chorus throughout law school faculties that we ignore at our peril. Fortunately, Professor Michael McConnell and Professor Michael Paulsen not only have read his book, but each has written a thoughtful rebuttal that not only dismembers the doubts but also reinforces the core reasons why religious freedom must be protected in a free society. McConnell's and Paulsen's arguments overlap to some extent, but they offer rationales for religious freedom that differ enough as to substance, and their style and tone are so individualistic, that each piece deserves to be read on its own merits.

1. Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013)
2. Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014)

LEARNING TO SPEAK TO A FOREIGN CULTURE

Like any good ambassador, we must learn to speak the language of an increasingly unfamiliar culture if we are to promote religious freedom. First, of course, it helps to understand how the culture came to perceive religious freedom as a threat rather than an asset. Professor Doug Laycock has written several articles explaining the forces opposed to religious freedom from his perspective as a nonbeliever committed to a pluralistic society in which religious freedom is robustly protected. His warning that our culture is about to squander religious freedom is haunting when he writes: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle — suggesting that free exercise of religion may be a bad idea, or at least,

1 Many of these articles will be gathered on one CLS webpage to facilitate finding them. See <https://clsnet.org/religious-freedomtoolkit>.

² BRIAN LEITER, *WHY TOLERATE RELIGION?* (Princeton U. Press, 2012).

a right to be minimized.”³ Professor Laycock expands on the cultural forces at work, as well as his criticism of what he perceives to be the hypocrisy of both religious freedom opponents and advocates, in two articles addressing the culture wars and religious freedom.

Professor Tom Berg has written three articles to reclaim religious freedom as a right to be championed by those who view themselves as political liberals. The articles identify common ground that should be a meeting place in support of religious freedom for both liberals and conservatives. For example, Professor Berg explains in a 2013 article how typical “progressive” goals are advanced by religious freedom. In the process, he addresses how to define which third-party harms do and do not justify restrictions on religious freedom. In a 2015 article, he again presents religious freedom as consonant with liberals’ expansive understandings of the role of government while explaining why the welfare state must leave religious freedom substantial breathing space in which to thrive. In his 2016 article, Professor Berg explains why recent liberal attempts to limit religious freedom for religious institutions that provide social services — for example, the Obama Administration’s initial regulation limiting the religious exemption in the HHS Mandate to houses of worship that primarily serve and employ only members — demonstrate many liberals’ fundamental failure to understand the need to protect religious organizations’ freedom to maintain their distinctive requirements for members’ and leaders’ conduct, even as they fully participate in the provision of social services to their communities.

Learning to frame the arguments for religious freedom in terms that persons of varying political and social persuasions may share is vital to reclaiming the public square for religious freedom. Familiarization with Professor Laycock’s and Professor Berg’s recent works are essential to this endeavor.

3. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839 (2014)
4. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011)
5. Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013)
6. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J. L. & Gender 103 (2015)

7. Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341 (2016)

DRILLING DOWN ON PLURALISM

The declining commitment to religious freedom has not occurred in a vacuum. Instead, a similar decline in our society’s commitment to free speech and pluralism parallels the loss in commitment to religious freedom. Professor John Inazu’s 2016 book, *Confident Pluralism*, is a short (130 pages), highly readable, and engaging plea for a recommitment to pluralism in order to undo the severe erosion of the First Amendment rights of free exercise of religion, free speech, and assembly that has occurred in recent years. Professor Inazu identifies the basic constitutional detours that threaten our society’s commitment to these First Amendment rights, as well as three “aspirations” necessary to a pluralistic society: tolerance, humility, and patience. In a time when strident voices threaten to drown out rational discourse, Professor Inazu delineates a path that may appeal to millennials and their elders who hope to preserve freedom and pluralism by finding common ground with those who disagree with them. Law students in particular should take a study break to read this book in order to more fully participate in class discussions.

Similarly, yet in a more targeted way, scholars Stephen Monsma and Stanley Carlson-Thies explore the great good that religious organizations provide their communities, nation, and world through various social service programs. Those of us in faith communities take for granted that our congregations contribute in numerous ways to those around us, regardless of whether our neighbors share our faith. Increasingly, however, those outside our faith communities think that only the government provides social services, and they fail to understand why employees of faith may sometimes provide social services more effectively and efficiently than similar government programs. It is imperative that our faith communities publicize their contributions to their communities in a way that makes clear that the faith component is essential to their good works. A new study by Brian and Melissa Grim roughly calculates in dollars (approximately \$ 1.2 trillion) the tremendous good that religious organizations, congregations, and faith-based businesses contribute to the United States society.

8. John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (U. Chicago Press 2016)

³ DOUGLAS LAYCOCK, *SEX, ATHEISM, AND THE FREE EXERCISE OF RELIGION*, 88 U. Det. Mercy L. Rev. 407, 407 (2011).

9. Stephen V. Monsma and Stanley W. Carlson-Thies, *Free to Serve* (Brazos Press 2015)
10. Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 *Interdisciplinary J. of Research on Religion* 3 (2016), <http://www.religjournal.com/pdf/ijrr12003.pdf>

RELIGIOUS FREEDOM RECAST AS DISCRIMINATION

Current conflicts between religious freedom and the new orthodoxy of sexual autonomy, particularly in the abortion or LGBT contexts, have been addressed in several must-read articles.

Religious Organizations' Right to Employ Based on Religion: Title VII of the 1964 Civil Rights Act excludes religious organizations from its prohibition on discrimination on the basis of religion in employment decisions. But there is a strong push to amend Title VII to prohibit discrimination in employment on the basis of sexual orientation and gender identity, in addition to its longstanding prohibitions on discrimination on the basis of race, color, national origin, religion, and sex.

After the Supreme Court's re-definition of marriage in 2015, some academics have argued strongly that while Title VII protects the right of a Baptist college to hire only Baptist faculty, it should not allow the college to refuse to hire a professor who claims to be Baptist but is in a same-sex marriage. In other words, these academics claim that a religious employer can look only to the faith claims of an employee in deciding whether to employ him but cannot look at the employee's conduct to determine whether he or she sincerely shares the employer's faith. Professor Carl Esbeck masterfully dismantles this argument in a recent article that is a must-read for anyone wanting to understand an issue likely to be heard by the Supreme Court in the next decade.

11. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 *Oxford J. L. & Rel.* 368 (2015)

Dignitary harm: In many recent cases involving LGBT or abortion claims, the asserted harm has been a "dignitary harm." The claimant cannot point to any physical

or monetary harm, except that he or she has been offended. There is a similar move to restrict free speech because one person's speech offends another. Of course, the Supreme Court has uniformly rejected the notion that "offense" to one citizen justifies restricting another citizen's speech, but the idea reigns on college campuses. Many scholars, perhaps a majority, promote the idea that "offense" can justify restricting First Amendment rights, including speech and religious exercise.

For opponents of religious freedom, a recent article by Professor Douglas NeJaime and Professor Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religions and Politics*, 124 *Yale L.J.* 2516 (2015), is often cited as the best liberal exposition of the theory of "dignitary harm." Fortunately, one need not read that article because Professor Laycock explains and then demolishes its basic premises in a pithy article that concludes: "the dignitary harm of receiving a civilly communicated refusal to assist behavior that a conscientious objector views as immoral [does not] create[] a compelling government interest that overrides the right to conscientious objection."⁴

As already noted, this reliance on "offense" threatens tremendous harm to all students' First Amendment rights on college campuses, but the religious student groups remain most vulnerable. College administrators often woodenly misinterpret their colleges' nondiscrimination policies to prohibit religious student groups from publicly stating that they require their leaders to agree with the religious groups' religious beliefs. Numerous scholars have criticized the Supreme Court's decision in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), which allowed one state university to use an "all-comers policy" to discriminate against a religious student group, although, importantly, *Martinez* actually sidestepped deciding whether a nondiscrimination policy could constitutionally be used to restrict religious groups' right to choose leaders of their same faith. Criticism of *Martinez* is a theme of Professor Inazu's book and much of his other writings because it is irreconcilable with a pluralistic society that respects speech, assembly, and religious exercise as core constitutional rights. Professor Paulsen also has decimated Justice Ginsburg's majority opinion in an article that deems *Martinez* one of the worst decisions of the past fifty years, even while noting its limited viability.

Professor Richard Garnett has written several articles wrestling with the critical question of when discrimination is invidious, when it should be unlawful,

⁴ DOUGLAS LAYCOCK, RELIGIOUS LIBERTY FOR POLITICALLY ACTIVE MINORITY GROUPS: A RESPONSE TO NEJAIME AND SIEGEL, *Yale L.J. Forum* 369 (March 16, 2016), available at http://www.yalelawjournal.org/pdf/Laycock_PDF_wgm6xbh.pdf.

and when it is permissible to protect religious freedom or other freedoms necessary to a free society. His approach is thoughtful and designed to engage the reader in thinking in broader terms about the importance of this discussion for our society.

A variation on the “harm” theme is an oft-repeated claim that religious exemptions somehow violate the Establishment Clause if they, in any way, cause third-party harms. Professor Esbeck has demonstrated the fallacy of this argument in briefs and articles.

12. Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. Forum 369 (March 16, 2016)
13. Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 Regent U. L. Rev. 283 (2012)
14. Richard W. Garnett, *Religious Accommodations And — And Among — Civil Rights: Separation, Toleration, and Accommodation*, 88 S. Cal. L. Rev. 493 (2015)
15. Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in Austin Surat, ed., *Matters of Faith: Religious Experience and Legal Response* (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087599
16. Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 58 J. Church and State 1 (Mar. 14, 2016), <http://jcs.oxfordjournals.org/content/early/2016/03/14/jcs.csw003.extract>

RFRA’s critical importance: Of course, the much-maligned Religious Freedom Restoration Act (RFRA) is the single most important legal protection for religious freedom at the national level, and state RFRA’s exist in 22 states. All of the above scholars have written about

RFRA’s importance. With more than a little embarrassment, I will add three pieces that I (assuredly not a scholar) have authored to highlight their arguments in congressional testimony and two short pieces. Yet again, inaptly-named legislation, the “Do No Harm Act” has been introduced this Congress to eviscerate the federal RFRA. These pieces explain in laymen’s terms why RFRA is critically important to the defense of all Americans’ religious freedom.

17. Kimberlee Wood Colby, Written Statement Before the Subcomm. on the Constitution and Civil Justice of the House Judiciary Comm., *Hearing on The State of Religious Liberty in the United States*, June 10, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/06102014-Colby.pdf>
18. Kimberlee Wood Colby, *How the Religious Freedom Restoration Act Benefits All Americans* (two-page summary of RFRA’s benefits), <http://clsnet.org/document.doc?id=803>
19. Kimberlee Wood Colby, *The Religious Freedom Restoration Act*, *Christian Leadership Alliance*, Outcomes Magazine, Summer 2016, <http://clsnet.org/document.doc?id=967>

Reading one or all of these articles will equip the reader, whether a lawyer, law student, or layperson, to defend religious freedom over coffee, over the fence, or over work. Religious freedom may well depend on the ability of all of us to make a ready defense of this unalienable human right to our friends, neighbors, and co-workers.

Kimberlee Wood Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.

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