

# JOURNAL *of* CHRISTIAN LEGAL THOUGHT

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**The Institute for Christian Legal Studies (ICLS)**,  
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Legal Society.

**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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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, Trinity Law School, 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](mailto:mschutt@clsnet.org).



## TRIBES THINKING

### *The Epistemology of Social Justice*

BY THADDEUS WILLIAMS

Justice is not something we seek on some wispy clouded plane of Platonic forms. Public policy does not bubble into existence from a bathtub of quantum particles. Law is never practiced in a vacuum. Our quest for a more just world occurs just there, in the *world*, a world with cathedrals and chicken sandwich shops, board rooms and beer commercials, Super Bowls and social media feeds, a world animated by real people with pulses and plausibility structures. The world in which we do our legal justice work is a world shaped by worldviews, our underlying beliefs about the perennial “big questions,” questions of ultimate reality, human origins, life’s meaning, the nature of truth, goodness, and beauty, the fate of humankind, the fate of the universe, and more.

### EPISTEMOLOGY AND LAW

Every worldview features what philosophers call an “epistemology.” Everyone has an epistemology, whether or not we have learned the fifty-cent term. It is how we, consciously or tacitly, answer the questions, “How do we know what we know?” “What are the marks of justified true beliefs?” “How do we decipher between truth and falsehood?” How we answer those questions shapes culture, including law.

It is eye-opening to view the historic movement of Western culture as, among other things, a series of seismic epistemological shifts. With its waving banner of *sola Scriptura*, the Protestant Reformation was one such shift. Reformers like Hus, Luther, Calvin, Bucer, and Knox sparked an epistemological revolution in seeking to restore God’s Word to a place of supreme epistemic authority. “What rule hath God given to direct us how we may glorify and enjoy him?” asks the Westminster

Shorter Catechism. Answer: “The Word of God, which is contained in the Old and New Testaments, is *the only rule* to direct us how we may glorify and enjoy him.”<sup>1</sup> The French Revolution and the ensuing Enlightenment were also, among other things, epistemological revolutions. The Parisians who crowded into Notre Dame cathedral in 1792 to sing hymns to a teenage girl dressed as the “goddess of reason” were making an epistemological statement: Reason and science are where we stake our utmost faith! And so modernity was born. The 20<sup>th</sup> century witnessed another major epistemological shift with the advent of postmodernity, deconstructing all claims of objective knowledge, confining all truth to the subjective realm, leaving us all “lords of our tiny skull-sized kingdoms, alone at the center of all creation” in the words of David Foster Wallace.

Each of these shifting epistemological epochs finds some expression in the legal world. The Christian emphasis on God as the Source and Standard of truth inspired jurisprudential traditions that highlight the “law above the law,”<sup>2</sup> with its corresponding emphases on inalienable rights, religious freedom, checks and balances to curb human corruptibility, and more.<sup>3</sup> Likewise the legal positivism of Oliver Wendall Holmes<sup>4</sup> and legal formalism of Langdon and Harvard Law around the turn of the 20<sup>th</sup> century are essentially what modernist epistemology looks like when expressed as legal theories. The same could be said for postmodern epistemology and the legal realism and critical legal studies of the later 20<sup>th</sup> century. It is not my purpose here to unpack all the complexities of *how* culturally trending epistemologies shape law, but to make the far more modest point *that* culturally trending epistemologies shape law.

<sup>1</sup> Emphasis added.

<sup>2</sup> See JOHN WARWICK MONTGOMERY, *THE LAW ABOVE THE LAW* (1975). For detailed historical analysis, see HAROLD BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITIONS* (2003).

<sup>3</sup> For a popular analysis of how a Christian worldview spawned and sustained these legal norms, see FRANCIS SCHAEFFER, *A CHRISTIAN MANIFESTO* (2005).

<sup>4</sup> See OLIVER WENDALL HOLMES, *The Path of the Law*. *HARVARD LAW REVIEW* 10:457 (1897).

## “TRULY EXECUTE JUSTICE”

Why does it matter? Francis Schaeffer answers in the opening of *A Christian Manifesto*:

The basic problem of the Christians in this country in the last eighty years or so, in regard to society and in regard to government, is that they have seen things in bits and pieces instead of totals. They have very gradually become disturbed over permissiveness, pornography, the public schools, the breakdown of the family, and finally abortion. But they have not seen this as a totality—each thing being a part, a symptom of a much larger problem. They have failed to see that all of this has come about due to a shift in worldview—that is, through a fundamental change in the overall way people think and view the world and life as a whole. . . . What we must understand is that [different] world views really do bring forth with inevitable certainty not only personal differences, but also total differences in regard to society, government, and law.<sup>5</sup>

If we seek to bring our Christianity to bear meaningfully upon our legal professions, we must move beyond a fragmented “bits and pieces” view. We must reckon seriously with the totalizing worldviews being expressed in contemporary legal trends.

Let us think about it biblically. The Bible does not merely say, “Do justice,” but to “truly execute justice” (Jer. 7:5 cf. Jer. 22:3; Zech. 7:9). We are not merely commanded to execute justice, but to *truly* execute justice. That presupposes there are *untrue* ways to execute justice, ways of trying to make the world a better place that are not in sync with reality as God defines it and end up unleashing more havoc in the universe. The God who commands us to seek justice is the same God who commands us to “test everything” and “hold fast to what is good” (1 Thes. 5:23). Jesus himself did not seek justice at the level of headlines and hearsay. One of the marks of the Messiah is that, “He shall not judge by what his eyes see, or decide disputes by what his ears hear, but with righteousness he shall judge the poor, and decide with equity for the meek of the earth” (Isa. 11:3-4). When he encountered a

group in protest over what they saw as the gross injustice of Sabbath day violations, he calls out their unwarranted moral outrage, their failure to get at the real issues: “Do not judge by appearances, but judge with right judgment” (Jn. 7:24).<sup>6</sup>

We cannot separate the Bible’s commands to do justice from the Bible’s commands to be discerning. Bad epistemologies generate false beliefs that can easily dupe us into thinking we are doing great work for others, when in reality we are doing them damage. It follows that if we really care about working toward justice—giving both God and others what is due them—then we should care about epistemology.

## TRIBES THINKING

What, then, are the trending epistemologies of our day? The epistemology we see making its way through our public education, universities, media, entertainment, religious institutions, politics, and law at an astonishing pace is what we may call “Tribes thinking.” According to Tribes thinking, reality is best interpreted as a story of oppressor groups versus oppressed groups. Why call it “Tribes thinking”? Because within this epistemology this story of the oppressed versus the oppressors is typically told in one of six ways:

*T, beware the Theocrats.* The oppressors are right-wing Christians, trying to cram their outdated morality down everyone else’s throats with the coercive powers of law.

*R, beware the Racists.* The oppressors are those who marginalize and dehumanize people who do not share their skin tone or ethnic identity.

*I, beware the Islamophobes.* The oppressors are those who fear that most if not all Muslims are hate-mongering terrorists rather than peace-loving neighbors.

*B, beware the Bigots.* The oppressors are those who use their heteronormative power to deny the rights and humanity of the LGBTQ community.

*E, beware the Exploiters.* The oppressors are those whose capitalist greed leads them to use

<sup>5</sup> FRANCIS SCHAEFFER, *A CHRISTIAN MANIFESTO*, 17, 20-21 (2005).

<sup>6</sup> Likewise, Paul prayed for the Philippians that their “love may abound more and more, with knowledge and all discernment” (Phil. 1:9). He told the Romans not to conform to the world, but renew their minds “that by testing you may discern what is the will of God, what is good and acceptable and perfect” (Rom. 12:2). He commands us to “take every thought captive to obey Christ” (2 Cor. 10:5), and that includes the way we think about law and justice.

and abuse the poor for their own selfish, materialistic gain.

*S, beware the Sexists.* The oppressors are men who deny equal rights, equal access to power, and equal pay to maintain a patriarchal tyranny over half our species.

To a mind operating under this epistemology, these six oppressor categories—theocrats, racists, Islamophobes, bigots, elitists, and sexists—combine to best explain the world around us. In the field of jurisprudence, such Tribes thinking forms an essential (if often unstated) premise of much of the literature in Critical Legal Studies, Critical Race Theory, and Queer Critical Theory.<sup>7</sup>

## WHAT TRIBES THINKING GETS RIGHT

Can we say anything positive about the epistemology Tribes thinking? Yes. Most epistemologies start with real insight before they go too far. The empiricists were right that our five senses can help us get at reality, just as the rationalists were right that logic and mathematics can help us get at reality. They went wrong when they ditched the ten million truths that can't be tested in a lab or proven by an equation.

The first thing to note about Tribes thinking is that there is an undeniable and even gut-wrenching measure of truth to it. There is no shortage of real-world examples of Christians taking political power to dangerous extremes, people being dehumanized for their skin color, moderate Muslims being treated like bloodthirsty jihadists, homosexuals being ousted from their homes and treated like a subhuman scourge, capitalists who have valued profits over people, and men who have trampled on women. We must say with tears, all of that is true. If we take the Bible seriously, we must strive to make all of that untrue. We must work toward a world in which the full humanity of everyone as image-bearers of God is not

only respected, but cherished, and not only in theory, but also in action.

That is where Tribes thinking can be helpful. But if we are to “truly execute justice” for the battered, we should ask: “Can Tribes thinking go wrong?” “Is it possible that an epistemology designed to open our eyes to injustice might blind us to ways in which we unwittingly add to the net injustice in the universe?”

One of the most common ways epistemologies glitch and crash is when they start processing the world in one and only one way. A Wall Street tycoon starts with an insight—It is good to make money. In its proper place, this insight yields more hard work than hedonism, more generosity than greed, and more industriousness than impulsivity. At its best, the insight that it is good to make money would not crowd out God, family, friendship, honesty, rest, loving neighbors, caring for the poor, and the other good things in life. Before long, our tycoon's insight becomes an idol that warps his mind. On account of his epistemological tunnel vision, he does not, or rather he *cannot*, see a breathtaking stretch of beach. It hits his retinas. But he cannot really see it. He can't see sunrays producing a lightshow on the ocean ripples that looks like

ten million tiny cameras flashing. All he sees is untapped beachfront property that could, with some investment savvy, go for billions. Given his epistemology, he can only see the world in one color: green.

To the old colonizers the whole world became plunder. To the postmodernists the whole world became a power play. The human mind has an uncanny way of finding one bit of true knowledge into a part of reality and then totalizing it as the only way knowing anything about everything. We need what Abraham Kuyper called a “unity of view,” since “the question about the origin, interconnection and destiny of everything that exists cannot be suppressed.”<sup>8</sup>

There is nothing wrong with our insuppressible need for grand stories. We are designed to live in big

*Bad epistemologies generate false beliefs that can easily dupe us into thinking we are doing great work for others, when in reality we are doing them damage.*

<sup>7</sup> See the articles under each respective school of Jurisprudence in ROBERT HAYMAN, NANCY LEVIT, AND RICHARD DELGADO, EDS., *JURISPRUDENCE, CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM* (2002).

<sup>8</sup> ABRAHAM KUYPER, *LECTURES ON CALVINISM*, 113 (1999). Kuyper adds, “and the *veni, vidi, vici* [I came, I saw, I conquered], wherewith the theory of evolution with full speed occupied the ground in all circles, inimical to the Word of God, and especially among our naturalists, is a convincing proof how much we need unity of view.”

meaningful narratives. Without them, Dostoyevsky observed, we tend to go “stark, raving mad.” The problem occurs when our grand stories are not as grand as they seem. They don’t pry the world open to us to behold more, but cram the world into a tiny box and lock us inside. They make God’s Technicolor world appear to us in two-tone. This leads us to consider two problems with the Tribes thinking that is increasingly sweeping through the legal world.

## PROBLEM 1: SEEING WHAT IS NOT THERE

Take the insight taught over and over in the Bible—there are real oppressors in the world and there are people who are truly oppressed. There is a big difference between believing and acting on that insight, and adopting Tribes thinking as our epistemology. One helpful way to tell the difference is to honestly ask ourselves: “How do we process evidence that oppression may *not* be the best explanation in this or that case?”

When oppression—a true insight into *some things*—becomes the way of seeing *most things* or *all things*, then our story of the world ceases to be a grand story. Just as our tycoon could not really *see* a beach, he could only see dollars and cents, so we lose our ability to see the world when we see our default categories become oppressor groups versus oppressed groups.

Take the hot button issue of the gender pay gap. If I process the world through Tribes thinking, then I am left with one and only one interpretation—sexism. That totalizing answer forbids all kinds of important questions. Does the gender pay gap have anything to do with women voluntarily leaving the workforce or going half-time because many find the prospect of bearing and raising babies to be a more worthwhile and fulfilling venture than decades of overtime office drudgery? Could a gap exist because statistically men are more disagreeable than women, on average, and disagreeableness is a documented marker of negotiating for bigger paychecks? Could it have something to do with men being more attracted to industries that can be more easily scaled, as opposed to, say, the disproportionately female represented health care industry? Is it relevant that, in many fields, women make more than men when numbers are adjusted to account for overtime hours? Could the gap have ten or twenty or a hundred other contributing factors? Are we allowed to seriously ponder research

into these factors or should we simply write off the researchers as members of the He-Man Woman-Hater’s club, protecting their patriarchal privilege?

My point is *not* that factors other than sexism explain the gender pay gap. That case has been made. My point is not even whether that case is true or false. My point is that if our minds are programmed by Tribes thinking, then the question itself—“Do factors other than sexism help explain the gender pay gap?”—will probably never cross our minds. If the question does pop into our heads, then our epistemology will kick in and quickly suppress it. Why? Because, by the logic of Tribes thinking, the very act of questioning the sexist story of the pay gap is to commit the unpardonable sin of siding with the oppressor groups over the oppressed. If someone else poses the question to us, then again Tribes thinking kicks in and stores them away in our mental files under S for sexist, M for misogynist, or P for patriarchal oppressor. Then their files can quickly be dragged into the trash bin for permanent deletion. This mindset not

only trashes any relationship with that person as a person, but also any hope of ever meaningfully thinking about that person’s perspective. In short, it can make us both closed-hearted and closed-minded.

Before long, we can barely scroll through our Netflix suggestions without the righteous indignation kicking in. *Braveheart*. A three-hour celebration of toxic masculin-

ity. *The Patriot*. Shameless American exceptionalism. *Sleepless in Seattle*. Heteronormative propaganda. *Lord of the Rings*. Eurocentric racism. *The Ten Commandments*. Propaganda for a Judeo-Christian theocracy. *Scarface*. Villainizes immigrants. *Argo*, *Zero Dark Thirty*, *American Sniper*. Big budget Islamophobia. *Alladin*, *Mulan*, *Princess and the Frog*. Racial stereotyping. *Captain America*. More like Captain White Privilege.

We are talking about what psychologists call “concept creep,” a well-documented phenomenon. Like spilling ink into a tub of water, a concept begins to fractal outward in all directions until the entire tub is clouded. One valid way of seeing something spreads into the only way of seeing everything. Concept creep is how someone with the insight—racism exists—can eventually become so cloudy-minded that Veggie Tales can only be seen as racist propaganda, despite several shows dedicated to loving people who are different. Concept creep is how J.R.R. Tolkien’s *Lord of the Rings* can be

*Concept creep is how J.R.R. Tolkien’s Lord of the Rings can be read as racist Eurocentrism, despite the author’s vocal anti-racism.*

read as racist Eurocentrism, despite the author's vocal anti-racism.<sup>9</sup> Sociologist Melanie Dupuis in her book *Nature's Perfect Food: How Milk Became America's Drink* argues that "By declaring milk perfect, white northern Europeans announced their own perfection." When a totalizing view of the world grips our minds, we begin experiencing things that are often not there. We start seeing racism in vegetable cartoons, tasting white supremacy in a glass of milk, hearing sexism in a holiday jingle, feeling oppression in the impact of a dodgeball, and smelling homophobia wafting from our chicken sandwiches.

If we care about ending actual sexism, then we should welcome with open minds the question of how much of the gender pay gap can actually be laid at the feet of actual sexism. Otherwise, we aren't fighting the real problem, but air boxing our own ideological projections of the problem. The extent to which we are only air boxing our own ideological projections of the problem is the extent to which we are trivializing divine image-bearers suffering from actual sexism, racism, or other sinful 'isms.' By diverting our finite injustice-fighting energies in every direction all at once, Tribes thinking unintentionally marginalizes the already marginalized. Calling most everything racism hurts the victims of actual racism. Calling most everything sexism hurts the victims of actual sexism, and so on.

Ask any good doctor, any good psychologist, any good parent, any good mechanic. A mechanic who cares about cars and their owners, who is not merely trying to fleece his customers, will do everything in his power to ask questions, run diagnostics, and get down to the real problems. A mechanic who simply dumps oil into every car without taking a serious look under the hood, will be create more broken-down cars and stranded drivers on the roadside. Maybe it's a worn timing chain, a busted transmission, or a shot alternator. Actually fixing problems requires more than a one-dimensional diagnosis. Asking unpopular questions, openly gathering and assessing the facts, doing the hard work necessary to hit bedrock problems is, in fact, one of the most loving

things we can do for our oppressed brothers and sisters. Contrary to popular opinion, questioning whether and to what extent sexism, racism, or any other anti-biblical 'ism' is the real problem is taking sides *for* the oppressed. It is to push back against the kind of concept creep that further marginalizes the marginalized.

Yes, doing so is risky. You will not win any virtue awards or popularity contests. Online mobs are ever poised to pounce. They may call you names. They may flag you for hate speech and get your social media accounts deactivated. The question is: "Do we take the Bible's commands to "truly execute justice" seriously enough to endure the online mobs?" My point is not to answer such questions, and it is certainly not to deny the reality of racism, sexism, or economic exploitation. It is simply that caring about justice requires a commitment to truth. We could no more separate truth from justice than we could subtract one side from a triangle and still consider it a triangle. The extent to which Tribes thinking predetermines answers to hard questions that effect real people is the extent to which it obscures truth and unintentionally leaves more people broken on the roadside. If we are afraid to ask these questions with open minds, if we equate asking the questions with racism, bigotry, and sexism, if we are not willing to follow the evidence wherever it leads, then we should ask ourselves: "What do we care about more, loving the oppressed in truth or marching to an ideological beat and saluting the onlooking culture so it does not brand us with a scarlet T, R, I, B, E, or S?"

## PROBLEM 2: MISSING WHAT IS THERE

Tribes thinking not only causes us to see what *is not* there, at times; it also causes us to miss what, in many cases, *is* there. If we look at history and can see no nuance or beauty, nothing to preserve or treasure, only a long brutal tale of oppressors exploiting and pillaging minority groups, then something has gone terribly wrong with our mental operating systems. We are unable to process so much of history. If we read great literature

<sup>9</sup> As Brian Brooks points out, "When a Nazi-affiliated publisher attempted to publish his works in Germany, he asked whether the author was of 'Aryan' descent. Tolkien, a noted cultural anthropologist, first dismantled the fictitious 'Aryan' label, then gave this brilliant reply: 'But if I am to understand that you are enquiring whether I am of Jewish origin, I can only reply that I regret that I appear to have no ancestors of that gifted people. . . I cannot, however, forbear to comment that if impertinent and irrelevant inquiries of this sort are to become the rule in matters of literature, then the time is not far distant when a German name ['Tolkien' was of Germanic origin] will no longer be a source of pride.'" (*Give Stories the Benefit of the Doubt: The "Lord of the Rings" Orc Controversy Reveals a Disturbing Trend in Our Attitudes Toward Stories*, Chimes Newspaper [December 14, 2018]). See KATHERINE TIMPF, *Lord of the Rings Slammed for Perpetuating Racism through Depiction of Orcs*, NATIONAL REVIEW (November 27, 2018).

and we can only see dead white guys writing stories to push patriarchal oppression, then something has gone terribly wrong. We lose the capacity to process so much literary truth and beauty. When we pass someone on the street and don't see a unique person, but an exemplar of an identity group, when we project all the historical transgressions of that group onto the flesh-and-blood person before us, something has gone terribly wrong. We are missing so much of who people actually are.

Tribes thinking not only blinds us to a lot of truth, goodness, and beauty in the world, it also keeps us from seeing a lot of deception, injustice, and ugliness that do not fit into its field of vision. It dupes us into seeing oppression in places where it isn't and keeps us from seeing oppression where it is. In other words, Tribes thinking is often not as inclusive nor as concerned for the oppressed as its proponents claim. Its solidarity circle includes non-Christians, people of color, Muslims, LGBTQ people, the economically poor, and certain people with two X chromosomes, that is, those who fall within the TRIBES acrostic. And of course we should care about all of those people as divine image-bearers. If, however, we care about the oppressed even more than we care about a particular political ideology, then...

*Should we care about women exploited by the abortion industry?* *Roe v. Wade* was a decision impacting millions rendered by seven powerful men in 1973. While hailed as a landmark decision for the liberation of women, 64-percent of women who seek abortions said they felt pressured by others to have abortions. Over half thought that abortion was "morally wrong." Less than 1-percent said they felt better about themselves, 77.9-percent felt guilt, and 59.5-percent felt that "part of me died."<sup>10</sup> A massive fourteen-year study found that 81-percent of women who had an abortion were more

likely to experience mental health problems.<sup>11</sup> That is not to speak of the physical toll that has been inflicted on female image-bearers by the multi-billion dollar, profit-maximizing abortion industry. Does our vision of justice include these women or take their harrowing stories seriously?<sup>12</sup>

*Should we care about the voiceless babies terminated by the abortion industry?* According to the World Health Organization, abortion was the leading cause of death worldwide in 2018, tallying 42 million victims.<sup>13</sup> That is 42 million divine image-bearers who fell victim to the suction tubes, curette blades, and Mayo scissors of the abortion industry.<sup>14</sup> That is 80 image-bearers terminated in the last minute you have been reading, more than one per second. In places like Iceland "the abortion rate for children diagnosed with Down syndrome approaches 100-percent."<sup>15</sup> In the United States, 90-percent of pre-born humans diagnosed with Downs are terminated.<sup>16</sup> "In Asia, widespread sex selective abortions have led to as many as 160 million 'missing' women—more than the entire female population of the United States. Recent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States as well."<sup>17</sup> In cities like New York, more black image-bearers are aborted than are born. Human beings *in utero* literally cannot voice their oppression. Are we willing to be the voice for those millions of divine image-bearers who do not enjoy the same size, developmental, locational, or breathing privileges we do?

*Should we care about children who have endured split homes?* There are mountains of research documenting the advantages of being raised by two parents. Mom and dad sticking together, for all of their imperfections, corresponds with higher levels of academic and career success, lower rates of criminality and mental disorder. In

<sup>10</sup> VINCENT RUE, PRISCILLA COLEMAN, JAMES RUE, AND DAVID REARDON, *Induced Abortions and Traumatic Stress: A Comparison of Russian and American Women*, MEDICAL SCIENCE MONITOR 10, no. 10, 5-16 (2004).

<sup>11</sup> PRISCILLA COLEMAN, *Abortion and Mental Health: A Quantitative Synthesis and Analysis of Research Published, 1995-2009*, BRITISH JOURNAL OF PSYCHIATRY (2011).

<sup>12</sup> See, for example, Sarah Owens, *I Went to Planned Parenthood for Birth Control, But They Pushed Abortion*, THE FEDERALIST (September 28, 2015).

<sup>13</sup> See MICAH BILGER, *Abortion Was the Leading Cause of Death Worldwide in 2018, Killing 42 Million People*, December 31, 2018.

<sup>14</sup> On the methods used to dismember tiny image-bearers, see FRANCIS BECKWITH, *DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE*, 83-92 (2007).

<sup>15</sup> CLARENCE THOMAS, *Box v. Planned Parenthood of Indiana and Kentucky, Inc.* Justice Thomas cites George Will, *The Down Syndrome Genocide*, WASHINGTON POST, A23, col. 1 (March 15, 2018).

<sup>16</sup> CAROLINE MANSFIELD, SUELLEN HOPFER, AND THERESA MARTEAU, *Termination Rates after Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, PRENATAL DIAGNOSIS 19, no. 9, 808-812 (1999).

<sup>17</sup> CLARENCE THOMAS, *Box v. Planned Parenthood of Indiana and Kentucky, Inc.* Justice Thomas cites M. Hvistendahl, *Unnatural Selection: Choosing Boys Over Girls, and the Consequences of a World Full of Men* (2011).



order to achieve equality, should diversity committees work to dismantle two-parent privilege and ensure that candidates from broken homes are given more seats at the table? How often does what now brands itself “social justice” champion the cause of strong intact families as a justice issue? (Instead, one of the world’s most popular “social justice” organizations declares its “guiding principle” to “disrupt the Western-prescribed nuclear family” in its mission statement.<sup>18</sup>)

*Should we care about the victims of the exploitative pornography industry?* Pornography is a 97-billion-dollar industry. In 2018, more than five-and-a-half billion hours of pornography were consumed on a single porn site, with 33.5 billion visits. According to the Internet Watch Foundation, recorded child sexual exploitation (otherwise known as “child porn”) is one of the fastest-growing online businesses, with over 624,000 child porn traders discovered in the U.S.<sup>19</sup> Analysis of the 50 most popular pornographic videos found that 88-percent of scenes contained physical violence. Then there are the established links between pornography and human trafficking, rape, domestic violence, impaired brain function, broken relationships, and depression.<sup>20</sup> With the exploitation of divine image-bearers happening on such a massive scale, why are repenting of pornography addictions and fighting to bring down the dehumanizing pornography industry so rarely mentioned in the same breath as “social justice”?

*Should we care about the millions of Christians imprisoned or executed around the globe?* A pervasive narrative in our culture uses a broad brush to paint Christians as the oppressors, the driving force behind the theocracy, racism, Islamophobia, bigotry, exploitation, and sexism in the world. To many in the Tribes mindset, it is obvious which side of the Oppressor-Oppressed equation Christians fall on. Yet according to *Newsweek* in 2018, “Christian persecution and genocide is worse now than ‘any time in history.’” This includes being targeted, imprisoned, beaten, raped, hung, crucified, and bombed for claiming Jesus as Lord. Every month an average of 345 Christians are killed for faith-related reasons, 105 churches or Christian buildings are burned or attacked, and 219 Christians are detained without trial, arrested, and imprisoned.<sup>21</sup>

*Should we care about the desperately oppressed victims of far-Left systems like communism and socialism?* By modest estimates, the quest to achieve economic equality between the rich and poor through communist and socialist policies has resulted in a catastrophe to the tune of 100 million dead image-bearers in the 20<sup>th</sup> century alone. Nevertheless, several studies show that support for socialism is trending high in the United States, particularly among younger generations. These are the same generations in which one-third believe that more people perished under George W. Bush than Joseph Stalin, almost half are “unfamiliar” with Mao Zedong and the 50 million victims of his plan for economic equality, and a majority don’t know the meaning of the word “Gulag.” If it is truly about ending oppression, why are so many quick to fall for the lofty rhetoric of “compassionate” political visions that led to the oppression and termination of more image-bearers in the last century than any other system? Can they state with clarity why their version of socialism would not yield similar catastrophic results as the socialist regimes, past and present?

In short, the tunnel vision of Tribes thinking tends to leave these millions of oppressed image-bearers in the dark.

Of course, we must not commit the same error in the opposite direction. This is where Tribes thinking can serve as a helpful reminder. Non-Christians, ethnic minorities, Muslims, homosexuals, the poor, and women are also our divine image-bearing neighbors Scripture commands us to love. Given the political polarization of our day it is easy, not to mention self-serving, to see our side as caring about others and the other side as cruel. But it is not so black-and-white. Often the Left and Right simply have different “others.” If we are taking our cues more from Scripture than from the culture wars, then we will not become the Priests and Levites with fixed eyes on the horizon, galloping past bodies on the side of the road. Christians should be known less as culture warriors and more as Good Samaritans who stop for battered image-bearers, whether they are black, white, brown, male, female, gay, straight, rich, poor, old, young, Muslim, Christian, Jewish, atheist, capitalist, socialist, Republican, Democrat, near, far, tall, short, or smaller than a peanut.

<sup>18</sup> *What We Believe*, blacklivesmatter.com, retrieved July 10, 2019.

<sup>19</sup> *20 Mind-Blowing Stats About the Porn Industry and Its Underage Consumers*, May 30, 2019, [fightthenewdrug.org](http://fightthenewdrug.org), retrieved July 9, 2019.

<sup>20</sup> *Pornography & Public Health: Research Summary*, NATIONAL CENTER ON SEXUAL EXPLOITATION, August 2, 2017, [endsexualexploitation.org](http://endsexualexploitation.org), retrieved July 9, 2019. See also *How Porn Fuels Sex Trafficking*, August 23, 2017, [fightthenewdrug.org](http://fightthenewdrug.org), retrieved July 9, 2019.

<sup>21</sup> *What is Christian Persecution*, [opendoorsusa.org](http://opendoorsusa.org), retrieved July 9, 2019.

Tribes thinking, for all of its claims of inclusivity, is very clear about who is and is not worth stopping for. While it can help us see hurting people we may have otherwise passed, it also shuns important questions and redefines “oppression” in a way that leaves far too many image-bearers bleeding out on the roadside. It is the church’s job to embody for the watching world a better way.

## FROM “BITS AND PIECES” TO “TOTALS”

This issue of the *Journal* was composed with that vision in mind. Neil Shenvi and Pat Sawyer analyze the history and trademark doctrines “Critical Theory and the Social Justice Movement,” helping us better discern between justice in a biblical worldview and its counterfeits in the 21<sup>st</sup> century. In “Law Follows Culture, Except When It Doesn’t,” Jeffery Ventrella helps us grasp how law both *shapes* and is dynamically *shaped by* conflicting visions of human identity, meaning, and flourishing. Douglas Groothuis casts a vision of dual kingdom citizenship for the 21<sup>st</sup> century, clarifying how a Christian worldview forms the soil from which “the first freedom”—religious freedom—both sprouts historically and finds sustenance for the future. P. Andrew Sandlin rounds out the discussion with a call to “Stand Your Ground” in this cultural moment.

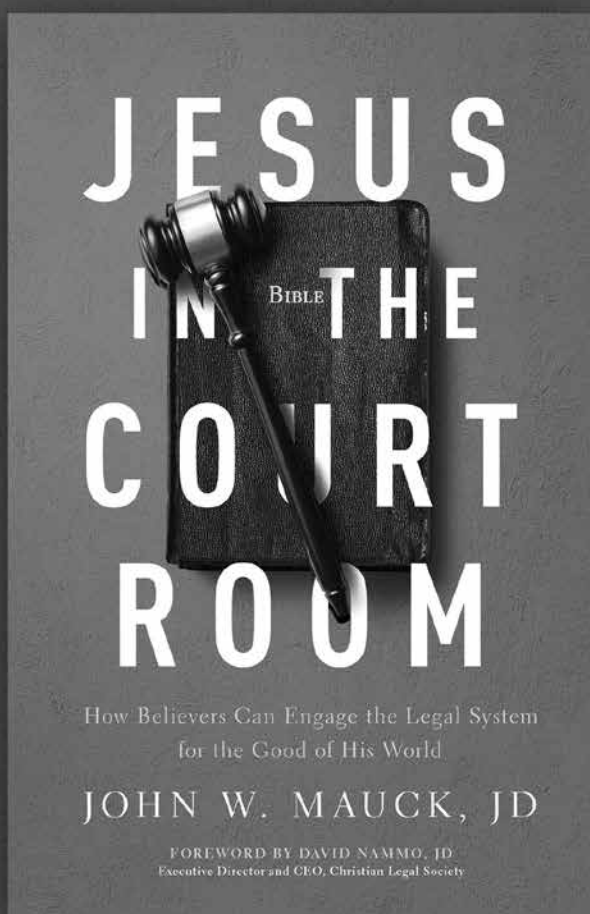
It is my prayer that this issue of the *Journal* helps us move together from the “bits and pieces” mentality Schaeffer criticized to a more comprehensive vision of how the Lordship of Jesus touches on every share inch of existence—including epistemology, race, sexuality, oppression, entertainment, citizenship, religious liberty, and, of course, law.

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# CRITICAL THEORY AND THE SOCIAL JUSTICE MOVEMENT

BY NEIL SHENVI AND PAT SAWYER

The Western tradition has been asking questions like “what is good?” and “what is justice?” for millennia. Both Christians and non-Christians have attempted to provide answers consistent with their philosophical and theological pre-commitments, leading them to very different conceptions of what a good life and a just society look like. In recent decades and especially in the last few years, questions of social justice have come to dominate our cultural discourse. But what is “social justice”? And is it compatible with Christianity?

Unfortunately, those questions are almost unanswerable, because definitions of “social justice” vary wildly. On the one hand, Christians might take this term to mean the application of biblical principles to society’s laws and institutions, an endeavor to which few Christians would object. On the other hand, the manifestation of social justice that has captured the imagination of academia, the media, and the broader culture does not emerge from Christian foundations. Instead, we will argue that this particular conception of social justice is best understood as an application of critical theory, a broad area of knowledge that seeks to understand society primarily through the lens of power and emancipation. A grasp of the basic premises of contemporary critical theory will help us recognize where its vision of justice is compatible with Christianity and where it falls (often woefully) short.

## WHAT IS CRITICAL THEORY?

The Frankfurt School, a group of philosophers and sociologists working in Germany during the 1920s and 1930s, coined the term “Critical Theory.”<sup>1</sup>

They sought to extend Marxist analysis beyond economic exploitation to show how domination occurs through the machinery of culture. But their goal was not merely descriptive. They insisted that a truly critical theory should not just seek to *explain* but to *transform* society, making it more just, democratic, and equitable.

While the work of the Frankfurt School was pioneering, critical theory has expanded dramatically over the last nine decades. In its broadest sense, the term “critical theory” or “critical social theory” now encompasses entire disciplines. In the field of jurisprudence, it includes Critical Legal Theory and Critical Race Theory and also encompasses Critical Pedagogy and Queer Theory. Given such a sprawling, amorphous category, trying to answer the question “What is critical theory?” is challenging.

An indirect approach is both more concrete and more helpful. Instead of asking “What is critical theory?” we can ask: “What ideas are at the root of terms like *intersectionality*, *white privilege*, *white fragility*, *color-blind racism*, and *heteronormativity*, which have become so ubiquitous today?” Where do these concepts come from? Undeniably, the scholars who coined or popularized these terms, scholars such as Kimberlé Crenshaw, Peggy McIntosh, Robin DiAngelo, Eduardo Bonilla-Silva and others, are engaged in a form of critical social theory. In their writings, we find several basic tenets that undergird their approach to social analysis. We will explore three: the social binary, hegemonic power, and standpoint theory.

## THE SOCIAL BINARY

First, the social binary is the idea that society can be separated into dominant, oppressor groups and subordinate, oppressed groups along axes of race, class, gender, sexuality, physical ability, age, and a host of other factors. Sensoy and DiAngelo write, “A critical approach to social justice refers to specific theoretical perspectives that recognize that society is *stratified* (i.e., divided and unequal) in significant and far-reaching ways along social group lines that include race, class, gender, sexuality, and ability.”<sup>2</sup> Furthermore, “For every social group, there is an opposite group . . . the primary groups that we name here are: race, class, gender, sexuality, ability status/

<sup>1</sup> See STEPHEN ERIC BRONNER, *CRITICAL THEORY: A VERY SHORT INTRODUCTION* (2011) or DAVID INGRAM AND JULIA SIMON-INGRAM, *CRITICAL THEORY: THE ESSENTIAL WRITINGS* (1992).

<sup>2</sup> OZLEM SENSOY AND ROBIN DIANGELO, *IS EVERYONE REALLY EQUAL?*, xx (2017).

exceptionality, religion, and nationality.”<sup>3</sup> Similarly, sociologist Beverly Tatum writes:

People are commonly defined as other on the basis of race or ethnicity, gender, religion, sexual orientation, socioeconomic status, age, and physical or mental ability. Each of these categories has a form of oppression associated with it: racism, sexism, religious oppression/anti-Semitism, heterosexism, classism, ageism, and ableism, respectively. In each case, there is a group considered dominant (systematically advantaged by the society because of group membership) and a group considered subordinate or targeted (systematically disadvantaged).<sup>4</sup>

Although the social binary is an important concept, some elaboration is in order.

First, a particular individual may be both oppressed and privileged at the same time via their participation in different groups, e.g., a black man who is oppressed with respect to his race, but privileged with respect to his gender.

Second, these categories can be fluid. For example, the field of “Critical White Studies” investigates how various ethnic immigrant groups were absorbed into the category of “white” over the course of the 19<sup>th</sup> and 20<sup>th</sup> centuries: “Whiteness, it turns out, is ... shifting and malleable.”<sup>5</sup> Similarly, Eduardo Bonilla-Silva argues that a “triracial order” is emerging in the U.S. such that some “assimilated” Latinos, Native Americans, and Asians are coming to be accepted as “white” while Japanese Americans, Asian Indians, and Middle Eastern Americans will occupy a class he calls “Honorary Whites,” leaving Blacks, Dark-skinned Latinos, and Vietnamese Americans to occupy the “Collective Black” category.<sup>6</sup>

Finally, the concept of intersectionality recognizes that our identity categories interact in complex ways. In their definition of intersectionality, Bilge and Collins write:

Intersectionality is a way of understanding and analyzing the complexity in the world, in people, and in human experiences. The events and

conditions of social and political life and the self can seldom be understood as shaped by one factor...when it comes to social inequality, people’s lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other.<sup>7</sup>

Although the concept of intersectionality does not overturn or reverse the social binary, it does rightly recognize that groups are not monolithic. For instance, a rich, highly-educated, abled, straight, black woman and a poor, uneducated, disabled, lesbian, white woman may not immediately find solidarity solely on the basis of their shared gender.

## HEGEMONIC POWER

The notion of *hegemony* is a second important idea in the work of many contemporary critical theorists. The modern concept of hegemony was largely developed by Neo-Marxist theorist Antonio Gramsci, who used it to describe how the ideology of the ruling class convinced people to consent to their own exploitation.<sup>8</sup> DiAngelo and Sensoy define hegemony as “The imposition of dominant group ideology onto everyone else in society. Hegemony makes it difficult to escape or to resist believing in this dominant ideology, thus social control is achieved through conditioning rather than through physical force or intimidation.”<sup>9</sup>

Crucially, hegemonic power is seen by contemporary critical theorists as a key component of oppression. Oppression is not defined solely in terms of violence, cruelty, or coercion. Instead, oppression includes supposedly “neutral,” “universal,” and “objective” norms that are embedded in culture and benefit the dominant group. In her seminal essay “Five Faces of Oppression,” Iris Young writes:

...oppression also traditionally carries a strong connotation of conquest and colonial domination... New left social movements of the 1960s and 1970s, however, shifted the meaning of the concept of oppression. In its new usage, oppression designates the disadvantage and injustice some people suffer not because a tyrannical

<sup>3</sup> *Id.* at 44.

<sup>4</sup> BEVERLY TATUM, *The Complexity of Identity: ‘Who Am I?’*, READINGS FOR DIVERSITY AND SOCIAL JUSTICE, 11 (2000).

<sup>5</sup> RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY*, 89 (2017).

<sup>6</sup> EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS*, 4TH EDITION, 228 (2014).

<sup>7</sup> PATRICIA HILL COLLINS AND SIRMA BILGE, *INTERSECTIONALITY*, 2 (2016).

<sup>8</sup> IAN BUCHANAN, *OXFORD DICTIONARY OF CRITICAL THEORY*, 236-237 (2018).

<sup>9</sup> SENSOY AND DIANGELO, *supra* note 2 at 224.

power coerces them, but because of the everyday practices of a well-intentioned liberal society... Oppression in this sense is structural, rather than the result of a few people's choices or policies. Its causes are embedded in unquestioned norms, habits, and symbols.<sup>10</sup>

## STANDPOINT THEORY

The third important concept shared by these scholars is the claim that knowledge is "socially situated," an idea that has its roots in standpoint theory. In particular, our social location as a member of either a dominant group or a subordinate group will influence our access to truths about oppression. Oppressed people have greater access to such truths through their "lived experience" while people from dominant groups are blinded by their participation in systems of oppression. José Medina explains:

...oppressed groups do have a distinctive set of experiences and ... are better positioned and better equipped for a particular kind of *epistemic subversion*... As Mills puts it, 'Hegemonic [dominant] groups characteristically have experiences that foster illusory perceptions about society's functioning, whereas subordinate groups characteristically have experiences that (at least potentially) give rise to more adequate conceptualizations.'<sup>11</sup>

Similarly, Kafi Kumasi describes one of the "key concepts" of critical race theory as the idea of "voice":

Voice [is] the ability of a group such as African Americans or women to articulate their experiences in ways that are unique to it... Through storytelling and counternarratives, disenfranchised people(s) are provided the intellectual space to 'name their own realities' in areas, such as academia, where they have been previously marginalized... A CRT [Critical Race Theory] framework recognizes the centrality of experiential knowledge of people of color and views this knowledge as legitimate, appropriate, and critical to understanding, analyzing, and teaching about racial subordination.<sup>12</sup>

Using these three concepts of the social binary, hegemony, and standpoint theory, we can now better understand how the scholars writing within this particular iteration of critical theory conceptualize social justice.

Social justice is here identified as "the elimination of all forms of social oppression... based on a person's gender, race, ethnicity, religion, sexual orientation, physical or mental ability, or economic class."<sup>13</sup> Since oppression includes hegemonic discourses that conceal the interests of the ruling class beneath the guise of "objectivity," these scholars work to expose and deconstruct these norms and values and dismantle the systems which perpetuate them. Since oppressed people are better equipped to recognize oppression, it is argued, people from dominant groups should defer to oppressed people's "lived experience" in seeking to identify and dismantle these unjust systems.

## SOCIAL JUSTICE AND CHRISTIANITY

With the important caveat that we are only attempting to address social justice as it is conceptualized within the context of contemporary critical theory, we are now prepared to compare and contrast it to Christianity.

There are certainly many areas of overlap. For instance, the Bible recognizes chattel slavery, cruelty, exploitation, violence, and theft as wicked forms of actual oppression. God commands us as Christians to "set the oppressed free and break every yoke" (Is. 58:6). The Bible also moves us beyond purely individualistic accounts of injustice. Our systems and institutions can indeed promote, normalize, and encourage sin, — for instance, as they did under Jim Crow laws in the past or as they do under abortion laws today. Likewise, we are shaped by hegemonic cultural narratives that will warp our values. Conservative Christians of all people should recognize how we are bombarded with standards of beauty, sexuality, and materialism that we must resist as false and deceptive. Finally, all of us should approach these questions with humility, should reject any favoritism which ignores marginalized voices, and should recognize that our own experiences are limited by our particular social location.

The biggest conflict between Christianity and a conception of social justice rooted in critical theory is how they both function as a metanarrative, a story that frames all of reality. If the story arc of Christianity is from creation, to fall, to redemption, to restoration, the arc of contemporary critical theory is from oppression, to activism, to equity. Most important is the role that human beings play in these narratives. In Christianity, God enters into human history to rescue us and to do for us what we cannot do for ourselves. God's action in redemption is what moves us from the problem (sin) to the solution (salvation). In contrast, contemporary critical theory conceives

<sup>10</sup> IRIS YOUNG, *Five Faces of Oppression*, READINGS FOR DIVERSITY AND SOCIAL JUSTICE, 36 (2000).

<sup>11</sup> JOSE MEDINA, *THE EPISTEMOLOGY OF RESISTANCE*, 46 (2013).

<sup>12</sup> KAFI D. KUMASI, *Critical Race Theory and Education*, BEYOND CRITIQUE, 211 (2011).

<sup>13</sup> MARY MCCLINTOCK, *How to Interrupt Oppressive Behavior*, READINGS FOR DIVERSITY AND SOCIAL JUSTICE, 483 (2000).

of activism as something that human beings do to move ourselves from the slavery of oppression to the promised land of equity. This work is what distinguishes the “good people,” who care about social justice, from the “bad people,” who are apathetic or antagonistic towards the cause of social justice. Either we believe that humanity’s greatest problem is sin and spiritual death or we believe that it is injustice and temporal oppression. Either we believe that only God can save us or we believe that we can save ourselves. We cannot believe both.

Another major conflict is in epistemology, i.e., how we know truth. Within Christianity, truth is known through revelation, whether the general revelation of reason and nature, or the special revelation of Scripture. While personal experience can illuminate God’s revelation, all experience needs to be evaluated in light of the Bible and objective evidence. Moreover, the doctrine of the perspicuity of Scripture holds that the great truths of the gospel are available to all men and women, not only to those who occupy certain social locations.

In contrast, any social justice movement which draws heavily on standpoint epistemology will call into question whether “oppressor” groups can grasp the nature of oppression. This false perspective will have devastating effects on our ability to discern theological truth from error. How do we know that the Five Solas of the Reformation or even the creeds of the early church are actually, objectively true and not merely the gloss of a particular group of men interested in justifying their own power? On what basis do we critique liberation theology or feminist theology if we are blinded by our white privilege or male privilege?

Finally, social justice movements grounded in contemporary critical theory will conflict with basic Christian ethical categories, especially surrounding issues of gender and sexuality. Secular social justice activists, especially those influenced by the paradigm of intersectionality, do not view issues of race, class, gender, and sexuality in isolation, but see them as forming interlocking systems of oppression. Hence, they do not believe it’s possible to separate racism from sexism or homophobia or transphobia. As antiracist educator and activist Ibram X. Kendi writes: “To truly be antiracist is to be feminist. To truly be feminist is to be antiracist... We cannot be antiracist if we are homophobic or transphobic... To be queer antiracist is to understand the

privileges of my cisgender, of my masculinity, of my heterosexuality, of their intersections.”<sup>14</sup>

For all of these reasons, the central ideas of contemporary critical theorists must be rejected by Christians. While we can appreciate and learn from their analyses of particular issues, we must recognize that they have adopted a framework that is fundamentally incompatible with Christianity in numerous ways.

## CONCLUSIONS

In this brief article, we can only gesture towards the kind of full treatment that contemporary critical theory deserves. Interested readers should consult the more detailed exposition in our booklet “Engaging Critical Theory and the Social Justice Movement” (Ratio Christi, 2019). Even more importantly, they should read the primary sources for themselves rather than relying solely on secondary commentary and interpretation.

Too often Christians have ignored injustices, leaving our culture seeking answers in secular ideologies. The dangers posed by the secular social justice movement are best addressed by recognizing the validity of some of the movement’s concerns, fighting the true evils and injustices that exist within our society, and working to bring our neighbors the hope and healing that is only found in the gospel.

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<sup>14</sup> IBRAM X. KENDI, HOW TO BE AN ANTIRACIST, 189, 197 (2019).



## LAW FOLLOWS CULTURE, EXCEPT WHEN IT DOESN'T

JEFFERY J. VENTRELLA

“Tastes great!” “Less filling!” This famous “lite beer” ad campaign promised the world a bubbly malt-and-hop libation that both tastes good and slows the onset of a beer belly. Law and culture can be viewed similarly: Does law follow culture or does law catalyze culture, or perhaps, like great taste and low calories, can both be true?

Another beer commercial illustrates, and answers, this question. The scene opens in a cozy pub that feels like Brooklyn or Queens. Locals exchange greetings. “How ya’ doin’?” to which they respond in kind, “How you’ doin’?” Another guest arrives in a straw hat, no doubt from a flyover state. He is greeted, “How ya’ doin’?” He gushes, “Well, thanks for asking; I’m doing fine. Just got in today. My brother-in-law picked me up at the airport, mighty big airport y’all got here, and the people here are so nice.” The locals are aghast. The humor flows from the clash of two competing cultures which shape the operative social expectations. To the neighborhood folks, “How ya’ doin’?” is a friendly acknowledgment of presence and nothing more. The stranger, however, interprets the language literally and proceeds to answer it fully. In his view, courtesy requires providing a fulsome answer to each “inquirer.” Hence the cognitive dissonance. Hence the comedy.

This illustrates a crucial point: What we label “culture” actually consists of a multiplexity of cultural dynamics. This multiplexity influences, shapes, conveys, and cross-pollinates our social expectations, plausibility structures, moral imaginations, unspoken permissions, and boundaries. This feeds into “what counts” as facts, what frames what’s possible, what is permissive conceptually on multiple levels, including how we think about law.

Consider non-legal cultural examples. Until 1954, running a sub-four-minute mile was conceptually impossible. Today, every world class runner breaks that barrier. Or consider climbing rocks without the aid of gear. The Holy Grail of free soloing consists of the 3000+ foot sheer granite wall known as El Capitan, located in

Yosemite National Park. No one had ever free soloed that wall and several have died trying, until June 3, 2017 when Alex Honnold accomplished this feat in less than four hours. Both of these accomplishments were abstractly possible as in the inane shibboleth “anything is possible,” but certainly not in any realistic sense. The collective cultural imagination simply could not conceive of either feat. Now it can. Why? The cultural paradigm—not the track, nor the granite wall—had shifted.<sup>1</sup>

A similar dynamic occurs regarding law and society today.

### BEYOND THE BLACK LETTER

The laws of society reflect far more than the “black letter” of what has been legislated. Society includes “mini-platoons,” as Edmund Burke noted, that define permissions, set expectations, and inform and enforce the “law” of society beyond the “black letter” law. For example, I competed in traditional Tae kwon-do for years. Part of every student’s training consisted of sparring practice, rotating among all the ranks. The positive “black letter” law governing sparring was clear: “No excessive physical contact.” Sparring focused on technique and control. Power, however, was developed on bags and boards, not persons. But there was always “that guy,” the aggressive brown belt itching to test for black belt. “That guy” would often thump lesser skilled students and sometimes hurt them, transgressing the dojang’s positive law. The black letter law’s existence, and then even its publication by the Master, “Watch the excessive contact!” did not do the trick. They did not restrain Mr. Aggressive. Weaker students continued to get thumped.

The Master understood the cultural relationship between positive law and operative society. With subtle eye contact and a head nod, he would alert the sparring black belts of “that guy’s” noncompliance with his positive law. This wordless social act, not the published positive law, granted permission for black belts to enforce that positive law by dropping Mr. Aggressive with a well-timed, powerful technique, followed by the Master

<sup>1</sup> The notion that shifting paradigms recalibrate plausibility structures applies even to “hard science.” See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2012).



intoning with a slight smile, “Watch the excessive contact,” this time sardonically directed to the enforcer. Meanwhile, Mr. Aggressive, gasping for air while writhing on the ground, finally understood the import of the positive law. It was not the black letter positive law, nor the Master’s authoritative verbal warning that achieved this result. It was the school’s culture that enforced it, making it real via particular conduits and transmitters, namely, black belt students.

The same dynamics apply to what is normally considered law: legislative actions and judicial declarations. Accordingly, we dare not “do law” without understanding and taking these dynamic facets of society and culture into account. Justice Oliver Wendall Holmes serves as a case-in-point for how culture and its plausibility narratives impact the operation and application of law:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. ii. Three generations of imbeciles are enough.<sup>2</sup>

Notice how cultural assumptions generate a legal logic that goes far beyond the “flat text” at issue.<sup>3</sup> First, understand the writer’s context. Holmes fought in the Civil War and was writing less than a decade after the Great War had ended—times of great strain, drain, and pain. Second, the Court takes notice that factors of the common good should matter. Society should, wherever possible, work to minimize strain, drain, and pain. Third,

the Court asserts that some citizens “sap the strength of the State,” causing new strain, drain, and pain, which in Holmes’s mind, form the crux of the matter. The question then becomes how to remedy this harm. Fourth, he describes, using utilitarian lenses, the draconian projected harm caused by those who sap the State’s strength, namely, drastic crime deserving capital punishment and starvation due to their own alleged imbecility.<sup>4</sup> These four factors stem not from statutory positive law, but from extra-legal cultural cues.

Justice Holmes then brings a legal principle to work: “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” The Court, given this purported legal cover, thereby affirmed Virginia’s involuntary sterilization statute because “Three generations of imbeciles are enough.”<sup>5</sup> Case closed: law and culture have spoken decisively. How was such a thing even conceivable in a free society? Because culturally derived plausibility narratives set and shaped the Court and the extant culture’s moral imagination.

## CULTURAL HOMILETICS

We often speak of “low” culture or “high” culture: Warhol or Rembrandt, Taylor Swift or Beverly Sills, James Patterson or Tom Wolfe? Yet, what is culture? The question is actually a fairly recent one and the answer gets murky quickly. There is a lot of recent scholarship and the topic is nuanced and complicated.<sup>6</sup> For present purposes, however, there is no need to probe the depths of these recent studies. Rather it suffices to note that “creation” is what God does and “culture” is what mankind does.<sup>7</sup> And, since mankind is created by God, mankind is inherently religious. This means in part that the culture mankind produces is likewise inherently religious and cannot at bottom be neutral as to morality or religion.

Culture also includes the ideas produced by mankind. While ideas do have consequences, bad ideas have victims.<sup>8</sup> Yet, ideas require conduits, champions, and translators; they do not act alone, as Kevin Vanhoozer notes: “Ideas do not make their way in history

<sup>2</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927), referenced and discussed in JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 113 (2018).

<sup>3</sup> This is no departure from Originalism or textualism as the optimal interpretive choice – executing the law may include but differs from interpreting it. See NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019).

<sup>4</sup> One may wonder why the State should not care more for those who have less and are the weakest.

<sup>5</sup> *Buck*, 274 U.S. at 207.

<sup>6</sup> See WILLIAM EDGAR, CREATED & CREATING: A BIBLICAL THEOLOGY OF CULTURE (2017).

<sup>7</sup> This taxonomy appears throughout the thinking of John M. Frame. See JOHN M. FRAME, THE DOCTRINE OF THE CHRISTIAN LIFE, 854 (2008): “Creation is what God makes; culture is what we make.”

<sup>8</sup> JOHN STONESTREET AND BRETT KUNKLE, A PRACTICAL GUIDE TO CULTURE, 80 (2017).

except they be carried by persons and institutions.”<sup>9</sup> Consequently, we also need to probe and understand the mechanism and impact of their popularizing transmitters. If culture is “religion externalized,”<sup>10</sup> then it matters immensely who is “ordained” to “preach” the “culture’s homilies.” Is it the “Dear Leader” of North Korea, the Central Party of China, Fox News or CNN, *The Nation* or *National Review*, or, as in the matter above, the Supreme Court? In the West, the predominant and enduring cultural icons—the preachers—deliver the sermons that structure the broader culture’s plausibility narratives. These preachers consist of those institutional voices who traditionally wore literal robes to connote authority:<sup>11</sup> Academic preachers define norms. Legal preachers enforce norms. Religious preachers absolve or condemn actors.<sup>12</sup> These “cultural robes” or icons deliver cultural homilies, which promote cultural practices to embody the ascendant cultural worship/reigion.<sup>13</sup>

It is not always easy to identify the icons who shape our cultural perceptions. Who today knows John Graham Chambers? Chambers formed ideas ultimately endorsed by John Douglas. Who? Douglas was the 9<sup>th</sup> Marquess of Queensbury. So? Those ideas provided the foundational rules for boxing known as the Queensbury Rules. Yet, neither Chambers nor Douglas are boxing’s icon in the way that Muhammad Ali or Mike Tyson have become. While James Naismith is known to basketball scholars, is there any real doubt that LeBron James, not Naismith, is the world’s basketball icon? Few today know Alfred Kinsey and what they do know is distorted by Hollywood. However, Hugh Hefner’s *Playboy* life epitomizes the sexual revolution.

These sorts of relics, artifacts, and icons can be just as influential and culturally impactful as a

SCOTUS opinion. Do we read Marx, or does *Animal Farm* inform us about Communism? Do we study and ponder Joseph Campbell’s neo-Buddhist *The Power of Myth*, or do we watch *Star Wars* to find that the “Force is with us”?<sup>14</sup> Then there is marketing that seeks to sell more than mere products. Marketing pushes and embraces messages, and messages always carry a non-neutral worldview, incubating and popularizing the plausibility structures that further shape law and culture.

Frito-Lay markets its “Rainbow Doritos” and a cultural message is sent: Homosexuality is as normal and “every day” as snacking. Burger King markets its “Special Pride Whopper” with the tagline “Be Your Way.” The message behind the meal is that one’s identity may be constructed. Once constructed, that identity can include affirming and celebrating same-sex desires culminating over sharing food – a communion event of sorts. The Gap has a “Be One” ad campaign featuring a male couple sharing a T-shirt. Borrowing from while subverting Genesis 1 and Matthew 19, two persons, irrespective of biological complementarity, can become one flesh. Tylenol “updates” the iconic Thanksgiving meal painting of Norman Rockwell with a female couple behind the slogan “Family is what you make it out to be.” Thus, aspirin can be used to send a worldview message that “family,” like “identity,” is neither natural, nor biological, but rather a construct of autonomous human desire. Examples could be multiplied.

Such relics incubate, cultivate, catalyze, order, and affirm habits of thought and action, which both affect and derive from culture. They shape our deep culture, which is to say, they shape our loves, longings, loyalties, labors, and liturgies, as John Stonestreet observes.<sup>15</sup> They shape another “L word”—law.

<sup>9</sup> KEVIN J. VANHOOZER, CHARLES A. ANDERSON, MICHAEL J. SLEASMAN, Eds., *EVERYDAY THEOLOGY: HOW TO READ CULTURAL TEXTS AND INTERPRET TRENDS*, 102 (2007), emphasis added.

<sup>10</sup> See HENRY R. VAN TIL, *THE CALVINISTIC CONCEPT OF CULTURE*, 200 (1972): “[C]ulture is simply the service of God in our lives; it is religion externalized.”

<sup>11</sup> Some contend that media likewise should be considered a cultural robe given their undisputed cultural impact. However, media are better categorized as being translators and transmitters of the robes’ messages.

<sup>12</sup> This tripartite division reflects John Frame’s triperspectival structure: Situation, Person, and Norm. See JOHN M. FRAME, *A Primer on Perspectivalism*, <https://frame-poythress.org/a-primer-on-perspectivalism>

<sup>13</sup> This is how Paul understands “real reality” after the Fall: truth is suppressed; truth is exchanged for the lie (*ho pseudos*); the creation, rather than the Creator, is worshipped; unrighteousness is practiced; and then unrighteousness is approved – Romans 1:18-32. For an exposition of this in law and public policy, see VENTRELLA, CHRIST, CAESAR, AND SELF: A PAULINE PROPOSAL FOR UNDERSTANDING THE PARADOXICAL CALL FOR STATIST COERCION AND UNFETTERED AUTONOMY (2016).

<sup>14</sup> For a compelling and popular theological understanding of how George Lucas brought Campbell’s paganism to the masses, see PETER JONES, *THE GNOSTIC EMPIRE STRIKES BACK: AN OLD HERESY FOR THE NEW AGE* (1992); and *SPIRIT WARS: PAGAN REVIVAL IN CHRISTIAN AMERICA* (1997).

<sup>15</sup> See JOHN STONESTREET AND BRETT KUNKLE, *A PRACTICAL GUIDE TO CULTURE*, 39 (2017).

## LEGAL HOMILETICS

Since culture is what man does, it follows that, in a deep sense, law *is* culture. Law, therefore, serves as a powerful icon, artifact, relic, champion, catalyst, and conduit.<sup>16</sup> This carries three implications. First, law as culture is never neutral. Rather, positive law serves as a conduit for prior moral choices and those choices expressed statutorily will reflect either just or unjust substantive content. As Scripture says, “Can wicked rulers be allied with you, those who frame injustice by statute” (Ps. 94:20)? “They had not obeyed my rules, but had rejected my statutes and profaned my Sabbaths, and their eyes were set on their fathers’ idols. Moreover, I gave them statutes that were not good and rules by which they could not have life” (Ezek. 20:24, 25).

Second, law as culture is pedagogical, impacting beyond the particular prescriptive dictate. Scripture clarifies, “What then shall we say? That the law is sin? By no means! Yet if it had not been for the law, I would not have known sin. For I would not have known what it is to covet if the law had not said, ‘You shall not covet’” (Rom. 7:7). Third, law as culture signals, informs, and then functions in far broader cultural roles. Law *mirrors*, setting a comparative standard (i.e., “Do I measure up?”). Law *muzzles*, unleashing or restraining by granting or withholding permission (i.e., “Will Society ignore, permit, forbid or mandate X?”). Law also *maps*, diagramming the way of “being right” and living “the good life” (i.e., “What must I do?”). The problem is that not all mirrors, muzzles, and maps function well.

Problems arise as law discharges these functions. The legally coerced sterilization of *Buck v. Bell* did not create the eugenics culture, but it arose from it. That

*Since culture is what man does, it follows that, in a deep sense, law is culture. Law, therefore, serves as a powerful icon, artifact, relic, champion, catalyst, and conduit.*

ambient eugenics culture “in the air” provided fertile ground that shaped the moral imagination and plausibility structures granting permission and then actively supporting forced sterility. In particular, the scientific *ethos* bred, spread, and “validated” Social Darwinism. The concurrent political ethos, informed and energized by both Marxist and religious Progressives, sought utopia. This potent combination was transmitted by key elite popularizers like Teddy Roosevelt and Woodrow Wilson.<sup>17</sup> This milieu catalyzed legal reactions. Between 1907 and 1918, fifteen states involuntarily sterilized 3233 people.<sup>18</sup> The states’ citizens, however, pushed back, and rightly so. From 1912 to 1921, eight states faced challenges to these provisions with citizens winning seven of them, while sustaining only a single loss.<sup>19</sup>

Eugenics would not die so easily, however. Legal victories were neither swift nor definitive given the extant culture. The cultural elites supporting sterilization composed a national rather than state-based litigation strategy by contriving a lawsuit involving Virginia’s provision.

As Judge Sutton notes, the trial was a sham; Carrie Buck never received justice and this led not only to *Buck v. Bell* affirming the provision, but also federalizing the issue, thereby stopping debate. This squashed both state law and citizen dissent. Put differently, once the Supreme Court in *Buck* “granted permission” for eugenic regulation, dissent was no longer morally plausible. Culture followed law.

In 1927 the nation had “learned” via *Buck* that eugenics is social good and that attacking healthy tissue served that noble purpose. The law further catalyzed culture. The iconic Supreme Court speaking via an iconic justice, had shelved debate by federalizing the

<sup>16</sup> It’s often noted that “Politics is downstream from culture” or that “law follows culture.” While it is correct to understand that “bare” positive law often reflects and/or influences that which exists in the broader cultural narrative, it is mistaken to classify that law as something different or distinct from culture. Because it is what mankind does, positive law IS culture. It can be differentiated from other aspects of culture but does not reside in a different taxonomic category.

<sup>17</sup> Both Wilson and Roosevelt professed Christianity in the Reformed tradition, Presbyterian and Christian Reformed respectively. Roosevelt, for example, once quipped that he “wish[ed] very much that the wrong people could be prevented entirely from breeding.” JEFFREY S SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW, 87 (2018). This ought to sound a sober warning to Christians who think only rank unbelievers, apostates, and Nazi pagans could embrace and enact policy based on eugenics.

<sup>18</sup> California performed 79% or 2558, *Id.* at 84-132.

<sup>19</sup> The loss occurred in Washington State which affirmed the statute. *Id.*, at 93.

issue. The wind had changed and state policy makers again responded,<sup>20</sup> but this time aligned with the Supreme Court's newly approved direction. Within two years, 12 states following *Buck's* safe harbor enacted such statutes. Within four years another 10 states followed suit. By 1931 a total of 28 states authorized coercively sterilizing its own citizens.<sup>21</sup> Law both followed and created culture.

Another well-intended cultural moment occurred three years later in 1930 lighting a fuse leading not just to practical sterility, but to the actual death of millions and thereby ultimately provided legal and cultural "cover" for directly attacking the creational norm of marriage and the ontological binary character of humanity, male and female.

## THE LEGAL ROAD TO ROE AND BEYOND

In 1930, the 7<sup>th</sup> Anglican Lambeth Conference broke with 2,000 years of Christian ethical practice by permitting within narrow confines the use of contraception between married spouses.<sup>22</sup> As we shall see, this cultural move precipitated a host of legal consequences. In addition, a key catalyst from another robe of culture, the Academy (Science) also poured gasoline upon Lambeth's spark, namely, the invention and promotion

of chemical hormonal contraception (i.e., "the Pill").<sup>23</sup> These twin cultural predicates positioned the legal culture to accelerate and approve the consequences of these ideas.<sup>24</sup> A series of SCOTUS rulings beginning in 1965, just five years after the Pill, led unmistakably brick by brick<sup>25</sup> from contraception to abortion to same-sex "marriage" to today's transgender moment. These bricks will be assessed for their legal and cultural messages.

***Griswold (1965)***. The Court first considered contraception in *Griswold*<sup>26</sup> five years after the Pill.<sup>27</sup> There, the Court "found" in what it deemed "emanations" and "penumbras" that a right of privacy hovers somewhere in the Constitution. This legal apparition was then used to nullify an 1879 Comstock law.<sup>28</sup> Because law is culture, every decision conveys both a legal message as well as a cultural message.

*Griswold's Legal Message*: States may not forbid access to contraception for married couples, thereby federalizing the issue.

*Griswold's' Cultural Message*: The procreative aspect of sexuality may be properly and permissibly separated from the unitive aspect of Sexuality.

The win or "victory" consisted NOT of giving married couples condoms or pills; rather, the win was this latent

<sup>20</sup> Adapted from JEFFREY S SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW*, chapter 5 (2018). Note well, no state below the Mason-Dixon Line enacted and enforced these provisions until 1919, enervating the common myth that asserts that sterilization policies were the racist products of Southern "Lost Cause" revenge. Rather, the progressively-infatuated areas rushed to sever fertility of certain citizens: New England and the West Coast.

<sup>21</sup> Ironically, Hitler was democratically elected two years later. Der Fuhrer tardily joined the eugenics party long after Roosevelt and Wilson.

<sup>22</sup> Resolution 15 reads in relevant part: "in those cases where there is such a clearly felt moral obligation to limit or avoid parenthood, and where there is a morally sound reason for avoiding complete abstinence, the Conference agrees that other methods may be used, provided that this is done in the light of the same Christian principles." Resolution 16 expressed "abhorrence of the sinful practice of abortion." Resolution 18 deemed "sexual intercourse between persons who are not legally married" to be "a grievous sin." The reality is that Resolution 15 provides the philosophical predicate to erase the ethical boundaries articulated by Nos. 16 and 18 and that in turn provides grounds for legally approving that "grievous sin" [fornication] and that abhorrent "sinful practice" [abortion] and beyond. The legal and cultural reality after 1930 bears this out.

<sup>23</sup> Eugenicist and founder of Planned Parenthood, Margaret Sanger championed and channeled funding for the Pill. GEORGE GRANT, *GRAND ILLUSIONS – THE LEGACY OF PLANNED PARENTHOOD*, 74, 75 (1988).

<sup>24</sup> Compare Romans 1:32 – unrighteous practices press for approval.

<sup>25</sup> Chief Justice John Roberts' first public address quipped, "The rule of law is a cathedral we have to build brick by brick." See <https://althouse.blogspot.com/2006/03/rule-of-law-is-cathedral-we-have-to.html>.

<sup>26</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>27</sup> ADF takes no position regarding non-abortifacient contraception, either as a matter of Christian conviction, or legal policy; the remarks accompanying this section simply illustrate how ideas within both the general and legal cultures impact law, or as Paul put it, practices must be approved (Rom. 1:32).

<sup>28</sup> Comstock laws, named after anti-vice activist and U.S. Postal Inspector, Anthony Comstock, aimed at curtailing pornography and sexual trafficking; they were never intended nor used to prosecute married couples who sought access to contraception. Nor was contraceptive access occluded in Connecticut. The case was a setup lacking any basis in an actual deprivation of freedom.

philosophical move of separating the Procreative from the Unitive purpose of sexuality.<sup>29</sup>

**No-Fault Divorce (1970).** The next brick came not from the Court, but from policy mavens: no-fault divorce. Pitching this as providing relief to “trapped” women, the reality is that the messages here undermined marriage in general and women in particular.<sup>30</sup>

*No-Fault’s Legal Message:* Permission granted to divorce unilaterally for any reason or no reason, irrespective of the other’s consent or the instigator’s prior vowed commitment.

*No-Fault’s Cultural Message:* Man may separate what God has joined with relative ease.

**Eisenstadt (1972).** Given the predicates of *Griswold* and the advent of no-fault divorce, the Court, when asked, logically extended them outside the marital bond.<sup>31</sup>

*Eisenstadt’s Legal Message:* States may not forbid access to contraception for fornicating couples.

*Eisenstadt’s Cultural Message:* Fornication is one equally valid option among many for sexual expression; commitment via marriage for sexual expression is merely optional and aspirational at best.

**Roe (1973).** *Roe’s* brick, and it becomes a jurisprudential cornerstone, faces the failure of contraceptive technology. When *technos* supplants *telos*,<sup>32</sup> what “can be done” will supersede what “should be done.” When contraceptive technology fails, a wrongly calibrated compass only seeks and applies the “next thing” to “remedy” the technological failure—in this context, erasing the “evidence of the product of conception.” *Roe* proclaims powerful and unfortunately enduring legal and cultural messages.

*Roe’s Legal Message:* The Court invented a purported constitutional right to “terminate pregnancy” predicated on *Griswold’s* invented “privacy” notion. The purpose of this “right” exists to “correct” or remedy a contraceptive failure. This solution federalized the issue.

*Roe’s Cultural Message:* Children result from some failure, either of planning or technology; fertility becomes pathology, and choice becomes the ultimate or determinative standard of ethics.

**Casey (1992).** The Court revisited the legality of abortion in 1992. It seemed that the reality of abortion—the killing of innocent children—weighed heavily and hopes surged that *Roe* would be overruled. It was not.<sup>33</sup> Instead, a new articulated rationale for abortion emerged, rooted not in *Roe’s* privacy concoction, but in a broader conception of unfettered personal autonomy, euphemistically labeled a “liberty interest.” This new brick would come to bear the weight of many other paradigm-shifting subsequent rulings.

This new rationale, emanating from the pen of Justice Kennedy, drives many subsequent rulings that bulldoze other behavioral norms rooted in pre-political reality and the created order. *Casey* guides the culture’s moral free-soloing with these lofty, though vacuous words: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>34</sup>

*Casey’s Legal Message:* The Court affirmed *Roe’s* core holding while rejecting its trimester scheme and instead based the “right” on a liberty interest. “Liberty” as now conceived becomes a predicate for more far-reaching legal rulings.

*Casey’s Cultural Message:* The Court, citing women’s purported reliance interest on being able to order their lives around abortion’s availability, then referenced itself as being an institution whose reputation would be called into question if it eroded this reliance interest, thereby reinforcing the Court’s cultural and iconic function.

**Romer (1996).** Four years following *Casey*, these fore-going legal and cultural bricks affected matters beyond both marriage and hetero-coupling. In *Romer*,<sup>35</sup> the Court, speaking through Justice Kennedy, reviewed a

<sup>29</sup> Confirming this: the day following the ruling one of *Griswold’s* attorneys noted that the predicate for attacking anti-abortion laws had been set. Scholarly writing by a co-attorney mapping the actual strategy appeared six months later. JENNIFER ROBACK MORSE, *THE SEXUAL STATE*, 114 (2018).

<sup>30</sup> See JENNIFER ROBACK MORSE, *THE SEXUAL STATE* 191-262 (2018).

<sup>31</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972), used “equal protection” to strike down Massachusetts’ prohibition on contraceptive distribution to unmarried couples.

<sup>32</sup> See VENTRELLA, *FROM TELOS TO TECHNOS: IMPLICATIONS FOR A CHRISTIAN PUBLIC LIFE AND ETHIC* (2017).

<sup>33</sup> Reportedly, the Court’s initial vote did reverse *Roe*, but then Justice Kennedy changed his vote. See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* (2007). Justice Kennedy’s jurisprudence figures prominently as a legal and cultural driver in the arenas of sexuality and autonomy, underpinning the departure from legally preferring and protecting creational norms.

<sup>34</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>35</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

popularly enacted state constitutional amendment that favored recognizing heterosexual bonds, but not recognizing homosexuality as a “suspect class” under equal protection analysis. The Court invalidated the amendment using the lowest level of scrutiny, the so-called rational basis test.

By jettisoning the legal significance of marriage’s unitive and procreative purpose, as well as marriage being the exclusive venue for sexual expression, and by embracing abortion as being a deadly arrow chosen from one’s liberty quiver, the legal and cultural foundation now existed for ruling that no rational basis linked preferring heteronormativity over any other sexual desire.

*Romer’s Legal Message:* States may neither affirm, nor prefer, the ontological design of human sexuality. There can be no rational nexus between such a preference and the common good.

*Romer’s Cultural Message:* Absent a legally appropriate rationale, the only rationale for preferring heterosexuality is animus.

**Lawrence (2003).** *Romer* sets the stage for constitutionally normalizing same-sex sexual expression. *Lawrence*<sup>36</sup> presents another set up litigation with dubious origins in order to attack a criminal proscription of sodomy.<sup>37</sup> When invalidating this statute, *Lawrence* invokes all the now familiar cultural buzzwords: choice, dignity, liberty, animus, et. al.

*Lawrence’s Legal Message:* No state may ban same-sex sodomy as the only rationale for such bans would be animus. This federalizes the issue.

*Lawrence’s Cultural Message:* Morality plays no role re: legal ethics; choice and autonomy suffice. Love is love.<sup>38</sup>

**Windsor (2013).** *Windsor*<sup>39</sup> challenged the federal Defense of Marriage Act (“DOMA”), an act designed to provide uniformity for the federal approach to marriage under provisions of federal law so that matters such as bankruptcy,

pension plans, military, immigration, et al. would enjoy greater predictability and consistency. The Court, speaking through Justice Kennedy, rejected that approach.

*Windsor’s Legal Message:* The federal government may not prefer the ontological design of human sexuality.

*Windsor’s Cultural Message:* Opposing same-sex “marriage” stems exclusively from *animus*, harboring the purpose and intent to disparage and injure homosexuals.

**Obergefell (2015).** The final step for legally deconstructing marriage lay in federalizing marriage completely, and thereby invalidating over the laws of over thirty states that defined marriage as the legal union between one man and one woman. Following its *Roe* path, the *Obergefell*<sup>40</sup> Court via Justice Kennedy dispensed with all remaining marriage laws as written and codified by states via their elected representatives.

*Obergefell’s Legal Message:* Marriage must be constitutionally defined to include same-sex couples as a law-conferred dignity.<sup>41</sup>

*Obergefell’s Cultural Message:* Marriage is no-longer natural or pre-political in any relevant sense. Thus, “family,” “husband,” “father,” “wife,” and “mother” are merely legal constructions.

The pretext of tolerance has passed; the practices must be approved by the State favoring certain third parties as against disfavored third parties, thereby federalizing the issue. Thus, “Our culture exploits its own holiness code to squeeze us to ‘confess’ non-sins while simultaneously demanding that we excuse, accept, and approve actual sins against God’s holy law.”<sup>42</sup>

**The Equality Act (2019).** Progressive advocates seeking to capitalize on the aforementioned legal and cultural predicates have crafted misleadingly named legislation: The Equality Act (H.R. 5). This act, designed to comprehensively alter extant federal law, explicitly inserts “sexual orientation” and “gender ideology” into

<sup>36</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>37</sup> DALE CARPENTER, *Strange Justice*, <https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html>.

<sup>38</sup> The notion that positive law is free from morality, or that morality plays no role in it, is philosophically naïve at best. The reality is that every law draws a line as to what’s permitted or required and what is not – that is an ethical enterprise and thus involves morality. The key question reduces not to whether one can legislate morality, but who’s morality will be legislated. For biblical illustrations, recall notes 28 and 29 above.

<sup>39</sup> *U.S. v. Windsor*, 570 U.S. 744 (2013).

<sup>40</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>41</sup> This is a crucial point: dignity is no longer inherent, but rather stems from legally imposed categories. This move sets the stage for what is referenced as the “Transgender moment,” which necessitates a deconstruction of the natural and pre-political. See RYAN P. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT* (2019).

<sup>42</sup> I owe this insight to New Testament professor and scholar Ardel Caneday, September 19, 2019. See Romans 1:32.

multiple facets of federal law.<sup>43</sup> Moreover, it purports to explicitly override constitutional protections for religious exercise.<sup>44</sup>

H.R. 5 is a federal version of SOGI<sup>45</sup> laws impacting public accommodations. These provisions would legally and negatively impact religious freedom, but more fundamentally, they also undermine reality as it exists. Consider Nancy Pearcy's discussion regarding the far-reaching philosophical impact of SOGI provisions:

The long-term impact of SOGI laws will be even more destructive, however, erasing legal recognition not only of women [Sports, e.g. wrestlers and track and golf] but also of the family. Stella Morabito, senior contributor to *The Federalist*, explains: "Once you basically redefine humanity as sexless you end up with a de-humanized society in which there can be no legal 'mother' or 'father' or 'son' or 'daughter' or 'husband' or 'wife' without the permission from the State. If you abolish sex distinctions in law, you can abolish state recognition of biological family ties, and the state can regulate personal relationships and consolidate power as never before." The state can make decisions regarding how parents educate their children, what medical treatment they use, what discipline they enforce, and so on, far beyond any current regulations. More fundamentally, the state can decide who counts as a child's parents to begin with. Until now,

it was nature (biological relationship) that defined who counts as a parent. The state saw its role as merely recognizing this natural reality. But under SOGI laws there will no longer be a presumption in favor of the child's biological parents. When gender is de-naturalized, parenthood will also be de-naturalized.<sup>46</sup>

Accordingly, by the mutual impact of culture and positive law, a creational norm—the family—will be subsumed under the political and legal order for its ontology and ordering. SOGI laws deconstruct pre-political and natural realities. Thus, if two men are deemed equivalent to a father and a mother, then kinship becomes legally irrelevant. This means that the body and what it signifies must be legally silenced because it repudiates the notion of "liberty" as now redefined. Biology becomes, in effect, the enemy of liberty.<sup>47</sup>

With this cultural and legal move, reality is rejected;<sup>48</sup> subjective desires and autonomous appetites rule. Make no mistake. This too is a non-neutral, spiritual move which leads to Gnosticism, whether acknowledged or not. Wright notes:

We are not, after all, defined by whatever longings and aspirations come out of our hearts, despite the remarkable rhetoric of our times. In the area of human well-being, that is the road to radical instability; in the area of theological

<sup>43</sup> H.R. 5 passed the House but has not yet been considered by the Senate.

<sup>44</sup> Just how a *statutory* provision can purportedly enervate a *constitutional* protection in view of the supremacy clause (Art. VI, Cl. 2) remains mysterious – and dubious. For a broad popular critique of H.R. 5, see <https://www.adflegal.org/detailspages/blog-details/allianceedge/2019/05/29/the-equality-act-would-mean-more-cases-like-these>. See also <https://www.adflegal.org/detailspages/blog-details/allianceedge/2019/05/01/what-you-need-to-know-about-the-inequality-of-the-equality-act>.

<sup>45</sup> Sexual Orientation, Gender Identity laws. Numerous political entities have enacted SOGIs. Most, if not all, negatively impact religious freedom.

<sup>46</sup> NANCY PEARCEY, *LOVE THY BODY: ANSWERING HARD QUESTIONS ABOUT LIFE AND SEXUALITY*, 212-213 (2018).

<sup>47</sup> Consider Psalm 2's description of the State and its legal actors (kings and rulers) who reject the norms of God and His Christ:

Why do the nations rage  
and the peoples plot in vain?  
The kings of the earth set themselves,  
and the rulers take counsel together,  
against the Lord and against his Anointed, saying,  
"Let us burst their bonds apart  
and cast away their cords from us."

<sup>48</sup> As to the ethical implications of "preferred personal pronouns" and their correlative and necessary denial of reality, see, Ventrella, <https://www.christianlegalsociety.org/journal-christian-legal-thought-2018-vol-2>, and also, McLAUGHLIN, <https://www.thepublicdiscourse.com/2019/09/S6717/>. For a cogent positive presentation of ontological claims at the highest level of litigation, see, R.G. AND G.R. HARRIS *Funeral Homes Inc. v. Equal Employment Opportunity Commission*, *Brief amici curiae of Scholars of Philosophy, Theology, Law, Politics, History, Literature, and the Sciences filed*. (Distributed).

beliefs, it leads to Gnosticism (where you try to discern the hidden divine spark within your self and then be true to it).<sup>49</sup>

### CAN THE BRICKS BE REPLACED?

Where do we go from here? What's next strategically? What's next legally? Can such matters even be argued in America's courts, pushing back against the bricked edifice of radical autonomy, unfettered choice, and ill-defined liberty? Can the bricks be replaced?

If law follows culture except when it doesn't, then not only may such arguments confidently be made, but they ought to be wisely made. What it means to be human hangs in the balance. Biology is binary, not bigoted. It is binary since maleness and femaleness stem from the Creator's creational norm: "So God created man in his own image, in the image of God he created him; male and female he created them" (Gen. 1:17). This good design is linked to the Creator Himself. Therefore, our ultimate choice concerning biology rests on aligning with the Creator; there can be no neutral or middle ground: "And if it is evil in your eyes to serve the Lord, choose this day whom you will serve, whether the gods your fathers served in the region beyond the River, or the gods of the Amorites in whose land you dwell. But as for me and my house, we will serve the Lord" (Josh. 24:15).

Today's cultural cathedral<sup>50</sup> needs renovation; its jurisprudential bricks need replacing. The stakes could not be higher since with both law and culture (and law *as* culture), we either affirm reality or defy it. Let us commit to creating beautiful culture, including positive law, that promotes human flourishing, flourishing for all in the presence of a glorious cultural cathedral. Precisely because law follows culture except when it doesn't, this is plausible, reasonable, and inevitable. So, "How ya' doin'?"

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<sup>49</sup> N.T. WRIGHT, *THE DAY THE REVOLUTION BEGAN*, 398 (2016).

<sup>50</sup> See JEFFERY VENTRELLA, *THE CATHEDRAL BUILDER: PURSUING CULTURAL BEAUTY* (2007).





## CHRISTIAN CITIZENSHIP AND RELIGIOUS LIBERTY

DOUGLAS GROOTHUIS

**W**hat is citizenship? We may define citizenship as a privileged status that includes responsibilities, rights, and protections conferred on us by duly appointed authorities, civil and divine. Consider Paul. He appealed to the rights due him from his Roman citizenship in spreading the gospel (Acts 22:22-19). He claimed earthly rights in the cause of heavenly goals—to teach, preach, and defend the gospel and build up the church in the world. Since our identity transcends the immanent categories of this world, Paul could also speak meaningfully of the Christian’s “citizenship in heaven” (Phil. 3:20). This is one of the unique and profound features of a Christian worldview—it includes and yet transcends this world. C. S. Lewis captured this well:

If you read history you will find that the Christians who did most for the present world were just those who thought most of the next. The Apostles themselves, who set on foot the conversion of the Roman Empire, the great men who built up the Middle Ages, the English Evangelicals who abolished the Slave Trade, all left their mark on Earth, precisely because their minds were occupied with Heaven. It is since Christians have largely ceased to think of the other world that they have become so ineffective in this.<sup>1</sup>

Heaven issues orders to earth—even a rebellious earth that Christ Jesus came to save—and earth will obey, inasmuch as the living God intervenes. How, then, might we honor Christ as Lord of heaven as earth as we seek to exercise our dual citizenship?

That question has more gravitas in a warning from Jesus himself: “From everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked” (Lk. 12:48). The Apostle Paul adjured us to “Pay careful attention, then, to how you walk, not as unwise

but as wise, redeeming the time, because the days are evil. Therefore do not be foolish, but understand what the Lord’s will is” (Eph. 5:16-17; see also Jam. 4:13-17; Ps. 90:12).

One way into this topic of wisely stewarding our citizenship is to locate citizenship itself within the domain of “spirituality.” Although Christ-followers belong to a Kingdom that is beyond this world and cannot be shaken by the vicissitudes of this world, a biblical spirituality addresses everything of import in this life and the next. As theologian and activist, Francis Schaeffer wrote:

True spirituality covers all of reality. There are things the Bible tells us as absolutes which are sinful—which do not conform to the character of God. But aside from these things the Lordship of Christ covers all of life and all of life equally. It is not only that true spirituality covers all of life, but it covers all parts of the spectrum of life equally. In this sense there is nothing concerning reality that is not spiritual.<sup>2</sup>

The same sweeping vision is expressed by Dutch theologian and politician Abraham Kuyper with his oft-quoted credo: “There is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry, Mine!”<sup>3</sup> Neither Schaeffer nor Kuyper were theocrats. Both respected the religious liberty of those with whom they disagreed. Nevertheless, their high view of Jesus Christ impelled them to labor to bring Christian principles and perspectives into every square inch of life.

### THE DYNAMICS OF THE KINGDOM

Christians are citizens of a kingdom that has present application as well as a future fulfillment. Jesus said that if he cast out demons by the finger of God (as he did), then the Kingdom had come upon his hearers (Matt. 12:28). Moreover, Jesus assured us that the Kingdom would

<sup>1</sup> C.S. LEWIS, *MERE CHRISTIANITY*, 57 (2001).

<sup>2</sup> FRANCIS SCHAEFFER, *A CHRISTIAN MANIFESTO*, 19 (1981).

<sup>3</sup> ABRAHAM KUYPER, quoted in *ABRAHAM KUYPER: A CENTENNIAL READER*, ED. JAMES D. BRATT 488 (1998).

gradually permeate the world. In his shortest parable, Jesus said, “The kingdom of heaven is like leaven that a woman took and mixed into three measures of flour, until all of it was leavened” (Matt. 13:33). Leaven works in a slow and measured manner. He claims the same thing in the following parable, but at more length:

This is what the kingdom of God is like. A man scatters seed on the ground. Night and day, whether he sleeps or gets up, the seed sprouts and grows, though he does not know how. All by itself the soil produces grain—first the stalk, then the head, then the full kernel in the head. As soon as the grain is ripe, he puts the sickle to it, because the harvest has come (Mk. 4:26-29).<sup>4</sup>

Given this already-not yet dynamic of God’s Kingdom, Christians are delivered from spiritual, cultural, and political impatience. The Messiah, not the church, is in charge of the millennium. There are no templates for winning the world by next year. Utopia awaits the Eschaton. As God told Zechariah, we should not “despise the day of small things,” since God will bring about the proper effects in due time (Zech. 4:10). In a memorable statement (made more memorable by Martin Luther King’s paraphrase), Theodore Parker put the Christian hope this way in a sermon in 1853: “I do not pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice.”

While delivering us from a jittery spirit of revolutionary impatience, the gospel also frees us from a resigned pessimism and fatalism. We belong to a kingdom that cannot be shaken (Heb. 12:28). The gates of hell will not prevail against the church (Matt. 16:13). After his glorious disquisition on the bodily

resurrection of Jesus, the Apostle Paul concludes by writing: “But thanks be to God! He gives us the victory through our Lord Jesus Christ. Therefore, my dear brothers and sisters, stand firm. Let nothing move you. Always give yourselves fully to the work of the Lord, because you know that your labor in the Lord is not in vain” (1 Cor. 15:57-58).

Christianity can thrive in the power of the Holy Spirit and according to the Word of God no matter what the odds against it. Throughout history, one tyrant after another has tried vainly to expunge the gospel from the globe. All have failed. Perhaps Chairman Mao se Tung was the most spectacular failure. He attempted to eliminate Christianity from China—closing churches, expelling missionaries, and persecuting Christians—while killing 70 million of his own citizens to usher in his Marxist-Maoist utopia.<sup>5</sup> Nevertheless, Christianity is thriving in China today.<sup>6</sup> Some estimate there may be more Christians in China today than members of the Communist Party.

Although Christianity may thrive under any social and political condition, it behooves followers of Christ to work to win and to preserve religious liberty for themselves and for others. When God’s people went into exile in Babylon, they were not living in their promised land. Nevertheless, God challenged them to thrive:

This is what the LORD Almighty, the God of Israel, says to all those I carried into exile from Jerusalem to Babylon: “Build houses and settle down; plant gardens and eat what they produce. Marry and have sons and daughters; find wives for your sons and give your daughters in marriage, so that they too may have sons and daughters. Increase in number there; do not decrease. Also, seek the peace and prosperity of the city to which I have carried you into exile. Pray to the LORD for it, because if it prospers, you too will prosper” (Jer. 29:4-7).

*Although Christianity may thrive under any social and political condition, it behooves followers of Christ to work to win and to preserve religious liberty for themselves and for others.*

<sup>4</sup> See R. J. Rushdoony’s insightful commentary on this verse, *First the Blade*, <https://chalcedon.edu/resources/articles/first-the-blade>.

<sup>5</sup> See JUNG CHANG, *MAO: THE UNKNOWN STORY*, 1 (2011).

<sup>6</sup> On religion in China today, see RODNEY STARK AND XIUHUA WANG *A STAR IN THE EAST: THE RISE OF CHRISTIANITY IN CHINA* (2016).

Christians in America today are not as constrained as the ancient Israelites, but all Christians are exiles in that we are not yet citizens of a fully purged and renewed creation (Rev. 21-22). We are part of a world that is groaning in travail for its redemption (Rom. 8:16-24; Eccl. 9:11). The Apostle Peter applies this exilic theme to the formation of Christian character: “Beloved, I urge you as sojourners and exiles to abstain from the passions of the flesh, which wage war against your soul. Keep your conduct among the Gentiles honorable, so that when they speak against you as evildoers, they may see your good deeds and glorify God on the day of visitation” (1 Pet. 2:11-12).

So how might citizens of heaven and of earth make the most of their time in our current political climate? We should first consider the Christian heritage of religious liberty, then look at the American context.

### RELIGIOUS LIBERTY IN THE WEST

In a recent book, *Liberty in the Things of God*, distinguished historian Robert Lewis Wilkin argues that modern notions of religious liberty are rooted in and emerged from a Christian view of religion, conscience, and the state. Consider two figures. In light of the persecutions of the early Christians in the Roman Empire, the Church Father and apologist, Tertullian (160-220 A.D.) stated this in his *Apology*: “It is only just and a privilege inherent in human nature that every person should be able to worship according to his own convictions. For one person’s religion neither harms nor hurts another.”<sup>7</sup> Another church father, Lactantius (240-320 A.D.), in his *Divine Institutes*, stated that religious belief cannot be coerced and should be left to conscience: “There is no room for force and violence because religion cannot be compelled. Let words be used rather than blows, that the decision may be free.”<sup>8</sup> Wilkins makes a convincing and detailed case that Christianity is the truest and deepest source for religious liberty in the West. But let us turn to the United States in some detail.<sup>9</sup> We should first know our philosophical and political roots as Americans.

America’s founding was unique in that its constitutive documents were intentionally drafted by intellectuals with a rich understanding of the religion of the Old

and New Testaments and the political philosophies of Western antiquity.<sup>10</sup> The Declaration of Independence, drafted by Thomas Jefferson, tells the world why America had to rebel against England. In so doing, it declared the rationale for America’s existence; and it did so in decidedly theological terms:

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*

Many seek to deny the theological nature of this claim. In summarizing the thesis of Jill Lepore’s work *We Hold These Truths* (2018), *The Chronicle of Higher Education* says, “The American Revolution, Lepore shows, was also an epistemological revolution. The country was built on truths that are self-evident and empirical, not sacred and God-given.”<sup>11</sup> However, Jefferson claimed they were self-evident precisely because they were not empirical. “All men are created equal” is an *a priori* and universal statement of objective and absolute moral value. As such, it depends on no empirical state of affairs whatsoever. Rather, the statement affirms that human beings have objective moral worth entirely because of their divine and sacred origin.<sup>12</sup> Current secularists can only deny this theologically charged vision of human rights by either disavowing the Declaration entirely or deconstructing it illegitimately.

Tragically, the Republic did not seize upon the full application of these truths all at once. As Martin Luther King declared as late as 1963 in his rousing “I Have a Dream” sermon:

In a sense we have come to our nation’s capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be

<sup>7</sup> Quoted in ROBERT LEWIS WILKINS, *LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM*, 1 (2019). See pp. 10-24 for Wilkins’s treatment of Tertullian.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> See STEVEN WALDMAN, *SACRED LIBERTY: AMERICA’S LONG, BLOODY, AND ONGOING STRUGGLE FOR RELIGIOUS FREEDOM* (2019).

<sup>10</sup> Os Guinness documents this well in *LAST CHANCE FOR LIBERTY* (2018). See also RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER*, 4TH ED. (2003).

<sup>11</sup> EVAN GOLDSTEIN, “*The Academy is Largely Itself Responsible for Its Own Peril*,” *CHRONICLE OF HIGHER EDUCATION* (November 30, 2018).

<sup>12</sup> See OWEN ANDERSON, *THE DECLARATION OF INDEPENDENCE AND GOD: SELF-EVIDENT TRUTHS IN AMERICAN LAW* (2017).

guaranteed the unalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked “insufficient funds.” But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.

The great moral reformer was not denouncing the ideals of the American founding, but invoking them as a witness against injustice and a witness for the rights of “the Negro people.” He was right to “refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.” Progress has been made, and more progress needs to be made. The basic American system allows for it and encourages it. And, of course, Reverend Martin Luther King, a Protestant pastor, did not shy away from the religious basis for the rights and dreams of Americans.

I have a dream that one day this nation will rise up and live out the true meaning of its creed: “We hold these truths to be self-evident: that all men are created equal.”... I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together.

King easily made the transition from the Declaration to Scripture, quoting Isaiah 40:4. No one shouted him down, nor should history.

## THE FIRST FREEDOM

Building on the transcendent truths of the Declaration of Independence, the framers of “the American Experiment” stipulated its need for religious liberty in the First Amendment to the Constitution. Religious rights have been long-fought, hard-won, rare, and fragile. It is rare in world history, is fragile everywhere, and must be understood and preserved. To that end, let us revisit the five glorious freedoms it sanctions.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This Amendment disallows a *state church* while allowing the free enterprise and exercise of religious endeavor in the new nation. Religious ideas may freely influence politics and every other sphere of life, but religion may not be coerced or required of anyone. As in the early Christian movement, the gospel must win its adherents through persuasion, not conscript adherents through political machinations. Moreover, it was through the opportunities afforded by these five freedoms that the United States eventually broke the back of slavery, albeit at the hideous cost of a civil war.

But as the Korean war memorial says, “Freedom is not free.” Denizens of this fallen world often seek privileges for themselves that they would deny to others. We may not love our neighbor as ourselves nor want to grant him liberties that we crave. Our American freedoms were hard-won and are hard kept. Historical legal protections, as given in The Declaration and the First Amendment, become mute unless heeded and applied fairly, generation by generation.

The October 2019 issue of *Harper’s Magazine* featured a forum called “Constitution in Crisis.” Rosa Brooks, a law professor at Georgetown, began the forum by saying:

Let me tell a story about what I do in my constitutional law classes at Georgetown. In the very first session, I say to my students, “The United States has the oldest continually operative written constitution in the world. How do you feel about that?” And everybody goes into a “rah-rah, Constitution” mode. The US-born students look smug, and the non-US-born students look puzzled. After everybody has a chance to talk about how great it is that the United States has this very, very old written constitution, I ask them how they would feel if their neurosurgeon used the world’s oldest neurosurgery guide, or if NASA used the world’s oldest astronomical chart to plan space-shuttle flights, and they all get quiet.<sup>13</sup>

<sup>13</sup> *Constitution in Crisis: A Forum*, HARPER’S MAGAZINE (October 2019). Professor Brooks was not the only legal scholar to condemn the Constitution in this forum.

It is easy to imagine Owen Barfield and C. S. Lewis snickering sadly at such “chronological snobbery”—the claim that an idea is good because it is new or bad because it is old. In Lewis’s words, chronological snobbery is “the uncritical acceptance of the intellectual climate common to our own age and the assumption that whatever has gone out of date is on that account discredited.”<sup>14</sup> With technology, the newer versions are often better or more advanced. We certainly want the latest medical technology and expertise if we need brain surgery. But matters of human nature and the right ordering of human life together is entirely different, since these matters address perennial issues with a finite number of answers. As I mentioned, the founders worked from an essentially Judeo-Christian worldview—even if many of them were not practicing Christians—which was enriched by a copious knowledge of Greek and Roman forms of civil government. Their reasoning behind the Constitution was hammered out in the *Federalist Papers*.<sup>15</sup> Only by overturning this worldview, can one make the argument that the Constitution is wrong. Comments about it being out of date or antiquated are beside the point.

Given such chronological snobbery and the desire to reinvent America with no guidance from its founding principles, Christians should be in the forefront of defending the Constitution and its proper application today. To that end, promising students should be encouraged to enter law (as attorneys, professors and judges) and civil government—not only to protect religious liberty, but to safeguard all constitutional protections for all citizens. The Federalist Society encourages these ends and deserves our respect and support.<sup>16</sup> Moreover, pastors and teachers in churches should educate their parishioners on the basics of the American founding and our rights and responsibilities as American citizens. While church leaders may not want to instruct their congregations on exactly how to vote, they should, at a bare minimum, preach and teach in order to equip citizens to vote well and be knowledgeable participants in the political process.

*We certainly want the latest medical technology and expertise if we need brain surgery. But matters of human nature and the right ordering of human life together is entirely different, since these matters address perennial issues with a finite number of answers.*

## BEYOND THE CULTURE WAR

Although the conflict between Judeo-Christian views of civil society and those of secularism are deep and wide, Christians should remember the heavenly values of their Kingdom citizenship as they engage the hardscrabble world of culture and politics. The military language of an ongoing “culture war” has dominated much of Christian discourse for the last twenty-five years or so. Of course, there are more than two sides to most political or cultural conflicts, so it is better to speak of the role of competing perspectives on culture at large as opposed to a bi-polar battle. But more

importantly, followers of Christ should not comport themselves as *warriors* in their pursuits in public life, since Jesus said that “the meek shall inherit the earth” and “Blessed are the peacemakers, for theirs is the kingdom of heaven” (Matt. 5:5,9).

There is a life and death conflict raging between the Kingdom of Light and the Kingdom of Darkness in the invisible spiritual world—one that the Bible repeatedly warns us to understand. Paul instructs us on how to engage this battle:

For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms. Therefore put on the full armor of God, so that when the day of evil comes, you may be able to stand your ground, and after you have done everything, to stand. Stand firm then, with the belt of truth buckled around your waist with the breastplate of righteousness in place, and with your feet fitted with the readiness that comes from the gospel of peace. In addition to all this, take up the shield of faith, with which you can extinguish all the flaming arrows of the evil one. Take the helmet of salvation and the sword of the Spirit, which is the word of God. And pray in the Spirit on all occasions with all kinds of prayers and requests. With this in mind, be alert and always keep on praying for all the Lord’s people (Eph. 6:12-19).

<sup>14</sup> C. S. LEWIS, SURPRISED BY JOY, 252-54 (2017).

<sup>15</sup> *The Federalist Papers* are on line at: <https://www.congress.gov/resources/display/content/The+Federalist+Papers>.

<sup>16</sup> The Federalist Society web page: <https://fedsoc.org>.

On the titanic matters of life and death, the stakes could not be higher. The forces of darkness want to enslave human beings to unjust systems on earth and assign them to a place of eternal torment outside of God's loving presence. We are not shadow boxing. Nevertheless, the Christian way of persuasion and activism on the human stage is neither martial nor pugilistic, but rather irenic. Again, Paul instructs us:

Bless those who persecute you; bless and do not curse. Rejoice with those who rejoice; mourn with those who mourn. Live in harmony with one another. Do not be proud, but be willing to associate with people of low position. Do not be conceited. Do not repay anyone evil for evil. Be careful to do what is right in the eyes of everyone. If it is possible, as far as it depends on you, live at peace with everyone (Rom. 12:14-18).

Christians so situated may engage in *prophetic diplomacy*. The Bible gives us the lens through which to see the world aright. When we do, we find much that is wrong that needs to be put right. But rather than becoming bombastic protesters, angry activists, or partisan lobbyists, we must be countercultural enough to speak the truth in love in our inflammatory age.

## FREE CITIZENS OF HEAVEN AND EARTH

Heavenly citizens need never be demoralized by earthly powers, since they belong to a Kingdom whose origin and outcome is not of this world (Jn. 18:36). Yet, we must seek the welfare of the realm in which we are temporarily exiled, making the most of the responsibilities, rights, and opportunities granted us as earthly citizens. Whatever measure of religious freedom we experience on earth, we are free indeed as we follow Jesus, the one who claimed that "If you hold to my teaching, you are really my disciples. Then you will know the truth, and the truth will set you free" (Jn. 8:31-32).

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## STAND YOUR GROUND

P. ANDREW SANDLIN

Christian leaders who until the last five years stood for biblical truth and historic orthodoxy are caving in record numbers to what Francis Schaeffer called “forms of the world spirit.”<sup>1</sup> These include Cultural Marxism, “wokeness,” ideological feminism, same-sex “marriage” and “attraction,” and “Christian socialism.” Faithful followers, accustomed to trusting their leaders, are unsettled and perplexed. Has the church in the West really been guilty of “systemic racism”? Must Christians accept same-sex desire as normative? Are males simply presumed to be guilty of misusing power with females? Is insisting on the historicity of Adam and Eve a barrier to the gospel? It’s no wonder so many in the pews are anxious.

While Christian leaders can be sincere but misled, there can be little doubt that the chief impetus behind the current wholesale defection is simply craven compromise, the desire to curry favor and popularity in an apostate age suckled on individual autonomy. When leaders change their views on historically (and biblically) settled issues just a few years after these issues have become unsettled (and re-settled as apostasy) in the wider culture, we can be confident that we’re observing compromise, not sincere rethinking. A shift would be more laudable if it cut against the grain of the cultural fabric: if, for example, a Christian college president concluded that his institution should issue a formal declaration repudiating Obamacare, or that after much prayer a pastor proposes the church amend its statement of faith to

expressly oppose both garden-variety KKK racism as well as Left-wing “affirmative action” racism. It takes no courage, Francis Schaeffer taught us in the late 60’s, to wear blue jeans as an anti-establishment statement when almost everybody is wearing blue jeans.<sup>2</sup> I offer three guidelines to stand our ground.

### 1. DON’T FOLLOW ERRANT LEADERS

Meanwhile, followers, church members, laypersons, and patrons would be well advised to heed these items of counsel. First, the fact that your leaders change doesn’t mean you must change. The Bible is replete with warnings to errant leaders of godly followers, issued from the old covenant prophets to John the apostle. The calling of leaders is precarious precisely because of their measure of influence (Jas. 3:1). But sheep are not required to follow errant shepherds, and certainly not wolves. Don’t simply assume a pastor or popular speaker is faithful to the Lord. Don’t suppose that the size of his audience (or number of Twitter followers) is the measure of his faithfulness.

Examine his (or her!) teaching in light of the Scriptures. If the apostle Paul commended his followers for scrutinizing his own teaching (Acts 17:10–11), you can be certain that he expected all Christian followers to follow their lead. It is insufficient to quietly and covertly avoid evil. We must overtly expose it. The prime reason that we today find this expectation distasteful is that we have a diminished view of God’s holiness.

*We must expose cultural evils no less than individual evils. The Bible places a high premium on unity, and we dare not sunder it for “light and transient causes.” But Cultural Marxism, homosexuality, and socialism are not light and transient causes.*

<sup>1</sup> FRANCIS SCHAEFFER, *THE GREAT EVANGELICAL DISASTER*, 111-140 (1984).

<sup>2</sup> *Supra* note 1 at 99.



## 2. DON'T SUCCUMB TO SENTIMENTALITY

Second, don't be sentimental about institutions. If they leave the Faith, you must leave them. Churches that were once faithful to the Lord have drifted toward heresy (like City Church-San Francisco). Christian ministries that once championed Biblical faith have become little more than social clubs (the Salvation Army is a striking example). Christian colleges and seminaries that began with godly men on their knees wishing to establish a training center for devout young Christians have been gradually infested by unbelief, higher criticism, socialism, Darwinism, and Cultural Marxism. This is true of every Ivy League college, and increasingly true of a number of evangelical colleges and seminaries (like Wheaton and Azusa Pacific). Christians associated with these sorts of churches and institutions sometimes feel a sentimental loyalty: "I've been attending here for 40 years, and I feel comfortable." Or, "My parents are buried in the church cemetery." Or, "I'm a graduate of this college or seminary and just can't pull away." And they allow their sentimentality to blind them to the apostasy before their eyes. Many continue to support this apostasy with their attendance and money. This is wrong. Abandon apostasy and redirect your prayer, time, effort, and money toward orthodox, Bible-believing, uncompromising, culture-reclaiming churches and ministries. The fact that sectarians draw the lines too quickly and narrowly (over denominational distinctives, for example) doesn't mean there are no lines. There are bold, God-drawn lines, and they must not be crossed.

## 3. DON'T STAY MUTE IN THE FACE OF EVIL

In Ephesians 5:11 Paul writes, "Take no part in the unfruitful works of darkness, but instead expose them." As Calvin observed, we don't have the luxury of obeying only the first half of that verse.<sup>3</sup> The second half of that verse puts pressure on today's craven Christianity, which says, "I know that I must avoid sin, and I'll obey to

please God. But other people have to make up their own minds. They're responsible for their own actions. That's their business, not mine. I'll just go about my own life." But that is precisely what Paul does not say. He commands, first, that we separate ourselves entirely from the works of darkness. He also commands that we expose those works. In other words, it's not sufficient quietly and covertly to avoid evil. We must overtly expose it. The prime reason that we today find this expectation distasteful is that we have a diminished view of God's holiness. God deplores sin. It diminishes, it deranges, it destroys, and it damns. Curbing sin is a God-honoring act. We must, of course, curb it first in our own lives, and only then in the lives of others, always charitably; and we must never limit that exposure to the "private" sphere. We must expose cultural evils no less than individual evils. The Bible places a high premium on unity, and we dare not sunder it for "light and transient causes." But Cultural Marxism, homosexuality, and socialism are not light and transient causes.

## CONCLUSION

Ours is an age of rampant social depravity but, in addition, and even more tragically, pervasive defection within the church. It is analogous to what happened about 100 years ago when Protestant liberalism captured almost all of the mainline denominations in the U.S. and England. We will win the war, but there will be no victory without battles. We must stand charitably, firmly, without rancor, but also without flinching. Remember at all times that our great enemy is Satan and his minions. Soon in eternity we must stand before the Lord. Until then our charge is: Stand your ground in the evil day (Eph. 6:13).

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<sup>3</sup> JOHN CALVIN, COMMENTARY ON THE EPISTLE OF PAUL TO THE EPHESIANS IN CALVIN'S COMMENTARIES, 21:310-311 (1993).



## PROPOSED REGULATIONS WOULD PROTECT RELIGIOUS STUDENT GROUPS — AND WHY THAT MATTERS

KIM COLBY

Like one giant fireworks display celebrating Religious Freedom Day, on January 16, 2020, the Trump Administration announced numerous measures to protect religious freedom. The Department of Education proposed two regulations aimed at protecting religious student groups on public college campuses.<sup>1</sup>

Under the two essentially-identical regulations, a public college that receives a grant — either directly from the Department or indirectly through a state program administering Department grants — must agree to the following as one of the material conditions of the grant:

(d) A public institution shall not deny to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including full access to the facilities of the public institution and official recognition of the organization by the public institution) because of the beliefs, practices, policies, speech, membership standards, or leadership standards of the religious student organization.<sup>2</sup>

Christian Legal Society submitted a comment letter focused on factual examples that illustrate the need for the proposed regulations.<sup>3</sup> Forming the backbone of CLS's comment letter were quotes from many former college students found in letters they had submitted to the United States House of Representatives Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice for a 2015 hearing regarding free speech issues on public college campuses.<sup>4</sup>

In their first-hand accounts, the former students documented the stigma they felt, as well as the harm to their student groups, which occurred when their religious organizations were excluded, or threatened with exclusion, from campus. Unfortunately, their experiences exemplify the experiences of too many other religious students on college campuses, including students at major public university campuses in California, Ohio, Texas, Georgia, Idaho, Tennessee, Pennsylvania, Indiana, Iowa, Michigan, South Carolina, and Missouri. While this article can only highlight a few stories, the CLS comment letter includes more detailed discussion of the problems below, as well as other campuses touched by this issue.<sup>5</sup>

<sup>1</sup> "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program," 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (to be codified at 34 CFR Parts 75, 76, 106, 606, 607, 608, and 609).

<sup>2</sup> *Id.* at 3223, 3225.

<sup>3</sup> Letter from Kimberlee Wood Colby, Director of Center for Law and Religious Freedom of the Christian Legal Society to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Dept. of Education (Feb. 18, 2020), is at <https://tinyurl.com/rzenyqh>. The attachments to the letter are at <https://tinyurl.com/t79nypw>. Addendum A, the Christian Legal Society Amicus Brief in *Business Leaders for Christ v. University of Iowa*, is at <https://tinyurl.com/usq4f3k>. Addendum B, Dept. of Justice Statement of Interest in *Business Leaders for Christ v. University of Iowa*, is at <https://tinyurl.com/su9bbs9>.

<sup>4</sup> These letters were submitted in conjunction with CLS's testimony before the Subcommittee. *First Amendment Protections on Public College and University Campuses: Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary House of Representatives*, 114th Cong. 39-58 (June 2, 2015) (testimony of Kimberlee Wood Colby). The letters are found in the supplemental hearing record ("SHR") at <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HRG-114-JU10-20150602-SD003.pdf>.

<sup>5</sup> CLS Comment Letter at 7-19. See "Overview of the Problem Facing Religious Student Groups," Attachment T, at <https://tinyurl.com/t79nypw>.

### **1. California State University: Should the Nation's Largest University System Teach Students to Censor Other Students?**

With over 430,000 students on 23 campuses, Cal State is the largest four-year university system in the country. In 2015, Cal State administrators implemented a new policy under which it withdrew recognition for religious student groups that had religious leadership requirements. Religious groups that had had religious leadership requirements for over 60 years were abruptly derecognized. Ms. Bianca Travis, student president of the Chi Alpha group at the California State University Stanislaus campus from 2014-2015, noted, “[F]or the first time in almost 40 years, our student group was kicked off campus by the university’s administrators, all because of our religious identity.”<sup>6</sup>

**a. Religious groups must pay prohibitive rental fees for previously free space:** Religious student groups no longer had the same access to free meeting space and channels of communication that other student groups enjoyed. In her letter, Ms. Cinnamon McCellen, who was student president of Rejoyce in Jesus Campus Fellowship (“RJCF”) at the California State University Northridge campus from 2013-2015, explained that when the university derecognized her group, it “reluctantly” left the campus because it “could not pay the weekly rental fee of \$200 that CSU said we would have to pay to keep meeting in the room that we had held our weekly meetings in for free.” On behalf of the religious group, which tends to draw students largely from the African-American community, she concluded, “We feel that CSU is engaging in religious discrimination by excluding religious student groups from campus solely because they exercise their basic religious liberty to choose their leaders according to their religious beliefs.” She objected, “To call this discrimination is ridiculous.”<sup>7</sup>

**b. Universities’ double standard exempts fraternities and sororities while excluding religious student groups:** Like other universities, Cal State permitted fraternities and sororities to discriminate on the basis of sex in their selection of both their members and leaders but refused to permit religious groups to select their leaders on the basis of religion. Single-sex club sports teams, honorary societies, and a cappella groups are also allowed to proceed despite their discriminatory membership practices.

**c. Encouraging some students to censor other students’ religious beliefs teaches American and international students the wrong lesson:** Most troubling, the university actually trained students to censor other students. To process the constitutions of thousands of student organizations on all 23 Cal State campuses, the university enlisted students to read the constitutions of student organizations and “edit” them to conform to the university’s new policy. The “edited” constitutions were then returned to the student organizations with a warning that they would not be recognized unless they made the changes.

What does this mean for a free society when our public universities are training students in censorship? What lesson do the students learn other than that censorship of other students’ speech is their prerogative — or at least the prerogative of the State? All Americans will reap a society that is intolerant of minority religious beliefs and practices if this lesson continues to be taught on public college campuses.

And what of international students who come to observe American self-government and take home instead lessons in censorship? American colleges should exemplify the values of free speech and religious freedom with the hope that international students will return home inspired to improve protections for these most basic human rights. American universities should not teach international students that free speech and religious freedom are mere ideals to which only lip service is due.

Eventually Cal State retreated from its position by claiming, in an ambiguously worded letter, that religious groups would be allowed, in certain circumstances, to question leadership candidates regarding their religious beliefs. But the official policy continues to prohibit religious leadership requirements, and the religious groups remain on campus solely at the discretion of university administrators. Furthermore, in the past two years, some religious groups have again had problems obtaining recognition on individual campuses within the Cal State system.

### **2. Texas A&M University: How much should religious students be required to pay to choose their leaders?**

Dr. Ra’sheedah Richardson credits participation in RJCF with “encourag[ing] me to pursue academic excellence and to develop character traits like integrity, wisdom,

<sup>6</sup> Ltr. from Ms. Bianca Travis to Chairman Trent Franks (June 9, 2015) (SHR at 50), Attachment H, at <https://tinyurl.com/t79nypw>.

<sup>7</sup> Ltr. from Ms. Cinnamon McCellen to Chairman Trent Franks (June 10, 2015) (SHR at 48-49), Attachment G, at <https://tinyurl.com/t79nypw>.

composure and faithfulness that have been essential for a successful professional career.” She participated in RJCF during her undergraduate and graduate years at Texas A&M (“TAMU”). In 2011, university administrators pressured RJCF to remove its religious requirements for its leaders and voting members if it wished to remain a recognized student organization. Dr. Richardson explained:

Without student group recognition, we would not have been able to continue to meet freely on campus to encourage each other in our growth both spiritually and academically. According to TAMU policy, non-recognized student groups are required to pay \$100 per instance for each room reservation. It would have cost our group up to \$7,000 per academic year to continue to operate on campus. This is far too great a hardship for a small student group like RJCF to maintain.<sup>8</sup>

After legal counsel intervened, TAMU allowed RJCF to retain recognition while maintaining its religious requirements.

### **3. The Ohio State University: Should religious students’ free exercise of religion and free speech be put to a vote by other students?**

**2003-2004:** In 2003-2004, a law student demanded that the OSU Moritz College of Law derecognize the CLS student chapter because it had religious requirements for its leaders and voting members. Mr. Michael Berry, who was student president of the CLS chapter, found himself the subject of a hostile education environment in which he was “often the subject of name-calling, gossip, and rumor-mongering,” was “verbally admonished” by classmates for his religious beliefs, and was “warned by upperclassmen not to take courses by certain professors who were not likely to give [him] fair evaluations.”<sup>9</sup>

Only after CLS sought protection in court did the university revise its policy to state explicitly that religious student organizations could have religious leadership and membership requirements. As a result, CLS met without incident from 2004 to 2010.

**2010-2012:** But in 2010, OSU asked the student government whether the university should discard its policy and no longer allow religious student groups to have religious leadership and membership requirements. Predictably, the student government urged the university to drop its protection for religious student groups, declaring “that every student, regardless of religious belief, should have the opportunity... to apply or run for a leadership position within those organizations.”<sup>10</sup>

In 2011, the Ohio Legislature enacted legislation prohibiting public institutions of higher education from denying recognition to religious student organizations because of their religious leadership and membership requirements.<sup>11</sup> To date, 14 states have enacted legislation that protects religious student groups.<sup>12</sup>

### **4. Vanderbilt University: Should a university punish a religious student group for expecting the students who lead its Bible studies, prayer, and worship to “hold certain beliefs”?**

The proposed regulations would apply to public, not private, institutions of higher education, and therefore would not apply to Vanderbilt University. However, Vanderbilt’s exclusion of 14 religious groups because of their religious leadership requirements is an apt illustration of the mindset that religious students face on many public university campuses.

In August 2011, Vanderbilt told the CLS student chapter that it was “religious discrimination” to state in its constitution that it expected its leaders to lead its Bible study, prayer, and worship. According to Vanderbilt, this was forbidden because it indicated that CLS expected its leaders to “hold certain beliefs.” Nor could CLS require that its leaders agree with its basic religious beliefs.<sup>13</sup>

Vanderbilt told a small student group, which met for worship one night a week, that it must delete five words from its constitution’s leadership requirements in order to remain on campus. The five words were: “personal commitment to Jesus Christ.” The group had worked in good faith with Vanderbilt administrators to revise its constitution so that it could remain on campus, taking whatever changes the administrators required. But this

<sup>8</sup> Ltr. from Dr. Ra’sheedah Richardson to Chairman Trent Franks (June 10, 2015) (SHR at 58-59), Attachment I, at <https://tinyurl.com/t79nypw>.

<sup>9</sup> Ltr. from Mr. Michael Berry to Chairman Trent Franks (June 5, 2015) (SHR at 62-64), Attachment J, at <https://tinyurl.com/t79nypw>.

<sup>10</sup> The student government resolutions are Attachment K, at <https://tinyurl.com/t79nypw>.

<sup>11</sup> Ohio Rev. Code § 3345.023.

<sup>12</sup> A list of the 14 states’ laws is at <https://tinyurl.com/t9jztpt>.

<sup>13</sup> The Vanderbilt emails are Attachment L, at <https://tinyurl.com/t79nypw>.

last-minute demand to delete “personal commitment to Jesus Christ” crossed a line. The religious students left campus rather than recant their faith, as Vanderbilt seemed to require.

Tish Harrison Warren, a staff member with InterVarsity Christian Fellowship at Vanderbilt in 2011-2012 and a self-described “progressive evangelical,” wrote a powerful essay to convey her disconcerting realization that “the student organization I worked for at Vanderbilt University got kicked off campus for being the wrong kind of Christians.” In an attempt to find a compromise, Ms. Warren met several times with university administrators but to no avail, as she records:

The word discrimination began to be used—a lot—specifically in regard to creedal requirements. It was lobbed like a grenade to end all argument. Administrators compared Christian students to 1960s segregationists. I once mustered courage to ask them if they truly thought it was fair to equate racial prejudice with asking Bible study leaders to affirm the Resurrection. The vice chancellor replied, “Creedal discrimination is still discrimination.”

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It didn’t matter to them if we were politically or racially diverse, if we cared about the environment or built Habitat homes. It didn’t matter if our students were top in their fields and some of the kindest, most thoughtful, most compassionate leaders on campus. There was a line in the sand, and we fell on the wrong side of it.<sup>14</sup>

**5. Indiana University:** In August 2015, Indiana University announced it intended to change its policy to one that would not allow student groups to require their leaders to agree with the groups’ beliefs. As at other campuses, this proposed change would deny recognition to religious groups, many of which had for several decades met at IU with religious leadership requirements.

**a. While fraternities and sororities are exempted, religious groups are not:** In an FAQ explaining its new policy, the university forthrightly admitted that “a chapter of a religious student alliance would not be

permitted to forbid someone of a different religion, or someone non-religious, from running for a leadership position within the SGSO.” (“SGSO,” the acronym for “self-governed student organization,” is the university’s term for recognized student organizations.) The FAQ asked, “May SGSOs require students seeking to serve in leadership positions to be members of a particular religion?” The FAQ answered, “No.” But, predictably, the FAQ stated that fraternities and sororities would be allowed to continue to discriminate on the basis of sex in their selection of members and leaders.<sup>15</sup>

The student president of the CLS chapter at IU-Bloomington wrote about the unfairness of the burden that fell on religious, but not other, student groups: “The IU policy was what is sometimes referred to as a ‘laundry list policy,’ which prohibits discrimination only based on certain factors. In other words, the vegan group could turn away those who enjoyed hunting animals and the Republican students could turn away those who supported Democratic candidates, but the Christian group could not restrict its leadership to only those who shared their faith.”<sup>16</sup>

**b. Christian, Jewish, and Muslim groups protest the policy change:** Nineteen religious student groups, including Catholic, Muslim, Jewish, and Christian student groups, sent a letter to the administration expressing their concerns about the proposed new policy and its impact on religious groups’ ability to choose their leaders according to their religious beliefs.<sup>17</sup> After almost the entire academic year had passed with persistent communication from students, alumni, donors, and political leaders, the university announced that it would keep its long-standing policy under which religious groups could have religious leadership requirements.

**6. University of Iowa:** CLS has had a chapter at the University of Iowa College of Law since approximately the 1980s. The CLS constitution has consistently required that its leaders agree with its religious beliefs. On at least four occasions since 1999, often under pressure from the student government, the university has threatened to deny recognition if CLS did not remove its leadership requirement from its constitution. In 2004, however, the university sent CLS a letter confirming that

<sup>14</sup> Tish Harrison Warren, *The Wrong Kind of Christian*, Christianity Today 54, Vol. 58, No. 7 (Sept. 2014), <http://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html?start=2>.

<sup>15</sup> “Frequently Asked Questions about SGSOs and Indiana University’s Non-Discrimination Policy,” <http://policies.iu.edu/docs/academic-policy-docs/student-orgs-faqs.pdf>.

<sup>16</sup> Julia C. Payne, “Answering God’s Call for Christian Leadership,” *The Christian Lawyer*, Fall 2018, at 25-26, [https://christian-legalsociety.org/sites/default/files/2018-10/TCL%20Fall%202018\\_Updated\\_Web2.pdf](https://christian-legalsociety.org/sites/default/files/2018-10/TCL%20Fall%202018_Updated_Web2.pdf).

<sup>17</sup> The letter from the 19 religious groups is Attachment D, at <https://tinyurl.com/t79nypw>.

its religious leadership standards did not violate university policies.<sup>18</sup>

But in 2018, the university derecognized two religious groups because they required their leaders to agree with their religious beliefs. The groups turned to federal court. During the litigation, the university produced a remarkable court document in which it highlighted over 30 religious student groups, including the CLS chapter, which it intended to derecognize because of their religious leadership standards.<sup>19</sup> The university listed groups from the Jewish, Muslim, Sikh, Christian, and other faiths.

The Department of Justice filed a statement of interest in support of the religious student group, quoting *Trinity Lutheran Church v. Comer*, when it explained that “[t]he government also may not require a religious group ‘to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified.’”<sup>20</sup>

In 2019, the federal district court ruled that the university had unconstitutionally excluded the first religious group based on its religious viewpoint in violation of the Free Speech Clause.<sup>21</sup> Six months later, the court ruled in favor of the second religious student group on basically the same grounds.<sup>22</sup> But this time, the district

court ruled that three of the college administrators had lost their claims to qualified immunity and could be held personally liable for derecognizing the religious student group. Both cases are on appeal.

This recent development of college administrators being found personally liable for derecognizing a religious student group demonstrates that the proposed regulations will have the beneficial effect of protecting college administrators as well as religious student groups. College administrators need clarity on this issue in order to avoid costly litigation resulting in personal liability. In 2019, the Iowa Legislature enacted legislation to protect religious student groups on public university campuses and to protect taxpayer funds from being wasted on needless litigation.

When the regulations are final, the hope is that public college administrators will allow religious student groups, including CLS students, to meet in peace on campuses nationwide. If we accomplish that long-sought goal, it will only be due to the hard work — and courage — of so many students, often the CLS chapter presidents, who stood resolutely for religious freedom and free speech in a hostile environment — their own college campuses.

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<sup>18</sup> CLS’s *amicus* brief describing the problems it has experienced at the University of Iowa over the past 20 years is Addendum A, at <https://tinyurl.com/usq4f3k>.

<sup>19</sup> The University of Iowa document is Attachment C, at <https://tinyurl.com/t79nypw>.

<sup>20</sup> 137 S. Ct. 2012 (2017).

<sup>21</sup> *Business Leaders in Christ v. University of Iowa*, 360 F. Supp.3d 885 (S.D. Iowa 2019), appeal docketed, No. 19-1696 (8th Cir. Apr. 3, 2019).

<sup>22</sup> *InterVarsity Christian Fellowship v. University of Iowa*, 408 F. Supp.3d 960 (S.D. Iowa 2019), appeal docketed, No. 19-3389 (8th Cir. Nov. 5, 2019).

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