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ARTICLES

REVIEWS

CULTIVATING CHARACTER IN LAW AND CULTURE

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Christian Legal Society (CLS), founded in 1961, seeks to glorify God by inspiring, encouraging, and equipping Christian attorneys and law students—both individually and in community—to proclaim, love, and serve Jesus Christ through the study and practice of law, through the provision of legal assistance to the poor and needy, and through the defense of the inalienable rights to life and religious freedom.

COVER EMBLEM

The inside design symbolizes the spirit of a builder in its dislocated features resembling the architecture of layered bricks and the four pillars representing the four ministries of CLS. The branches represent harvest and the ongoing mission of the Church to toil the land, water the seeds, and pray to God to send the increase. The circle represents completion—embodied in the incarnation and second coming of Christ as the proverbial Alpha and Omega.

"For we are co-workers in God's service; you are God's field, God's building." (1 Corinthians 3:9)

STATEMENT OF PURPOSE

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

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

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work; and, second, to provide legal scholars a 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 time.

While the *Journal* will maintain a relatively consistent point of contact with the concerns of practitioners and academics alike, it will also seek to engage outside its respective milieu by soliciting work that advances the conversation between law, religion, and public policy. 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.

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 calling. 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 Christian Legal Society or any of the other sponsoring institutions or individuals.

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Law and the Cardinal Virtues

*by David VanDrunen**

Introduction

The concepts of *character* and *virtue* are closely related. In fact, one way to define virtue is as a good character trait of a person or group of people. Thus, a study of character and law rightly inquires what virtues are important for practicing law or simply living well under the law. While perhaps every virtue is potentially relevant, the *cardinal virtues* are especially worth consideration.

Prudence, justice, courage, and temperance are the traditional cardinal virtues, as recognized in both classical philosophy and Christian theology.[1] The Western moral tradition has emphasized these four not to downplay the importance of other virtues, but because all others can be classified as sub-virtues of one of them. This implies that a person who truly has the cardinal virtues possesses all other virtues as well. And, if so, reflecting on the cardinal virtues provides a focused way of considering the importance of virtue for law.

I affirm these traditional convictions about the cardinal virtues, with a few qualifications. For example, I believe there are some uniquely Christian virtues—faith and hope, for instance—that cannot be comprehended under any cardinal virtue, and there is one virtue I believe is better classified as a fifth cardinal virtue than categorized under one of the traditional four (about which I say more below). In general, however, there are good reasons why the tradition of four cardinal virtues has had such staying power and has proven compelling to such a wide range of thinkers.

In this article, I argue that possessing each of the cardinal virtues is crucial for practicing law well and for living well under the law. This is true, least controversially, for the virtue of justice. But the other three traditional cardinal virtues are crucial as well. I also suggest that we should recognize a fifth cardinal virtue—the twofold virtue of fear of God and humility—in order to give the best account of these matters.

I write this article from a Christian theological perspective, but I discuss these cardinal virtues not as uniquely Christian virtues but as natural human virtues. That is, all human beings, whether Christians or not, can possess these virtues to a certain degree.[2] These virtues will never be perfect in sinful humans, nor can they serve as any basis for reconciliation with God. Moreover, salvation in Christ strengthens and transforms these virtues in Christians.[3] But, in this article, I consider them merely as natural human virtues and thus as relevant for all people, whether believers or not.

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1 *See, e.g.,* Plato, The Republic bk. IV; Aristotle, Nicomachean Ethics bks 3-6; Saint Augustine, *The Catholic and Manichaean Ways of Life, in* The Fathers of the Church 22-38 (Donald A. Gallagher & Idella J. Gallagher trans., 1966); Thomas Aquinas, Summa Theologiae 2a2ae 47-148 (hereinafter "Summa").

2 Scripture describes people outside the covenant communities of Abraham and Israel who obviously possessed these four virtues. For instance, Jeremiah and Obadiah acknowledged the wisdom of the Edomites. *Jeremiah* 49:7; *Obadiah* 8. With respect to justice, Abimelech of Gerar rebuked Abraham for doing "things that ought not to be done" in calling his wife his sister. *Genesis* 20:9. With respect to courage, the Egyptian midwives defied Pharaoh and didn't kill the Hebrew babies. *Exodus* 1:15-21; *see also* David Novak, Natural Law in Judaism 49-50 (1998) (defense of seeing the midwives as Egyptians). And with respect to temperance, the oracle of King Lemuel's mother urged him to exercise self-control toward women and wine. *Proverbs* 31:1-9; *see also* David VanDrunen, Divine Covenants and Moral Order: A Biblical Case for Natural Law 395 (2014) (on King Lemuel as a Gentile).

3 This is a big claim which is beyond the focus of the present study. I offer an extensive discussion in Part 2 of my forthcoming volume from Baker Academic entitled Reformed Moral Theology: Law, Virtue, and Spirituality.

The Virtue of Justice

When considering the cardinal virtues and law, the virtue of justice seems to be the obvious place to begin. While I argue below that the other cardinal virtues are actually just as important, justice is certainly the virtue most directly related to the law and thus the natural starting point for our discussion.

"Justice" is a common word in everyday language. People ordinarily use it to describe a desirable state of affairs (e.g., "in light of the world's problems, I want to work for justice") or the function of institutions (e.g., "justice is the proper goal of our legislatures and courts").[4] But here we consider justice as a virtue or character trait. In this sense, justice isn't something *done* or *achieved,* but a characteristic of a person or group of people. A person with this virtue is disposed to love and promote what is just. Human beings tend to act according to character. Thus, it is unlikely that a society's legislature or courts will make just decisions unless many of its legislators, judges, and lawyers possess the virtue of justice. This implies that working for justice as a state of affairs or function of institutions, without taking interest in the virtue of justice, is likely to be in vain. Where citizens, legislators, judges, and lawyers are unjust, one will inevitably find injustice.

What then is this virtue? Utilizing classical definitions, I define justice as the *disposition toward right relations with others, achieved by giving to each his due.*[5] This definition has three elements worth noting. One is that justice entails *giving* or *rendering.* Strictly speaking, the just person isn't the one who has good theories about justice, but rather who inclines toward treating others justly. A second aspect of the definition is that justice disposes toward giving to *each* his due. On the one hand, this indicates that justice has a universal dimension. The person who gives what's due only to some, but not to others, is unjust precisely for that reason. A test of a person's justice is whether she inclines to do what's just even toward those she dislikes or easily overlooks. On the other hand, the one who's attentive to *each* realizes that one person isn't due the same things as another. While I should incline to treat all people justly, I owe rather different things to my wife, to my son, to my students, to my neighbors, and to strangers. The third aspect of the definition is that justice disposes toward giving to each his *due.* When people interact in daily life, they don't think merely in terms of what they *owe* to each other or what others can rightly *claim* from them. But this is what justice concerns. A world in which people only give others their due would be a good world in many respects but would lack things such as mercy and generosity, which give less and more than what's due, respectively.[6]

Justice has numerous sub-virtues. *Impartiality,* for example, is the disposition to overcome bias and prejudice that would base judgment on irrelevant criteria. Furthermore, the person of *equity* is able to recognize exceptional cases in which the demands of justice require setting aside the general rule. These sub-virtues have direct relevance for making, applying, and living under the law. Many other sub-virtues of justice are less directly relevant, although certainly important for the moral life generally. These include (in their older meanings) the virtue of *religion,* the disposition toward rendering God his due honor; and *piety,* which renders to other humans the respect and obedience appropriate to their station.[7] Other sub-virtues that dispose people to render what they owe others are *friendliness* or *amicability, thankfulness,*[8] and *truthfulness.*[9]

Prudence, Courage, and Temperance

While justice is the obvious virtue necessary for practicing or living under the law well, the other

4 *Cf.* Jean Porter, Justice as a Virtue: A Thomistic Perspective 1-2 (2016).

5 Many theologians define justice in this way. *See, e.g.,* Summa, *supra* note 1, at 2a2ae 58.1; William Perkins, *Third Book of the Cases of Conscience, in* 8 The Works of William Perkins 423 (J. Stephen Yuille ed., 2019).

6 Mercy and generosity are highly desirable, though not easily categorized as natural human virtues. I have no space here to discuss this further.

7 *See, e.g.,* Summa, *supra* note 1, at 2a2ae 81 and 121 (respectively).

8 *See, e.g.,* Daniel A. Westberg, Renewing Moral Theology: Christian Ethics as Action, Character and Grace 181 (2015); John Casey, Pagan Virtue: An Essay in Ethics 173-75 (1990).

9 *See, e.g.,* Summa, *supra* note 1, at 2a2ae 109.

cardinal virtues are just as important. One way to understand this is by considering the typical order of the cardinal virtues, at least in the Thomistic tradition: prudence comes first, followed by justice, followed by courage and temperance.[10] I believe this order is exactly right. And, if so, it implies that prudence is the necessary prerequisite of justice, and that justice will fail to reach its goal without courage and temperance. Before I explain further, a brief description of each of these other cardinal virtues may be helpful.

Prudence is *perception of the moral order of the world, especially in understanding the proper ends of human life and the means to achieve them in light of relevant circumstances.*[11] It recognizes patterns of what sorts of conduct tend to produce fruitful or destructive results. It reflects a sort of mastery of living properly in the world. Wise people understand the craft of life, perceiving the best way to think, speak, and act in the myriad circumstances that confront them. Its sub-virtues include *alertness,* being attentive to the surrounding world and its shifting circumstances, as well as *circumspection,* the ability to reflect carefully on the possible courses of action a particular situation presents.[12] Two other sub-virtues are *docility* (teachability or open-mindedness)[13] and *shrewdness,* the decisiveness necessary when a situation calls for decision.[14] Finally, wisdom entails *resourcefulness,* the knack for identifying the best use of the resources at hand.

Courage is *firmness of purpose toward proper goals in the face of obstacles, danger, and fear.* The courageous person has the bravery, strength, and resolve to endure sorrowful and terrible things for the sake of pursuing what's right. *Perseverance* and *patience* are two sub-virtues of courage. The first is the disposition to press on toward the good in the face of obstacles,[15] while the latter disposes people to endure opposition while doing the right thing.[16] *Resilience,* "doing well in adversity"[17] and having "general strength in difficulty," perhaps integrates perseverance and patience.[18] Other sub-virtues include *enterprise,* an entrepreneurial initiative in pursuit of the good, and *magnanimity,* by which people aspire to do great and difficult things appropriate to their station and opportunities.[19]

Temperance is *desiring, using, and/or enjoying good things well.*[20] According to some moral theologians, temperance especially concerns the goods of food, drink, and sex, given their allure.[21] These point us to three sub-virtues of temperance: *moderation with respect to food, sobriety,* and *chastity,* respectively. But other important goods also require temperance. Thus, its other sub-virtues include *frugality,* the inclination to acquire and enjoy material goods appropriately; *industriousness,* the disposition to work hard but not excessively; *inquisitiveness,* the disposition to combat ignorance by seeking edifying and appropriate knowledge; and *gentleness* and *meekness* (or

10 *See* Summa, *supra* note 1, at 2a2ae; *cf.* Josef Pieper, Prudence (Richard Winston & Clara Winston trans., 1959) (see discussion in chapter 1).

11 *Cf.* David VanDrunen, Politics after Christendom: Political Theology in a Fractured World 137-49 (2020). I prefer the term "wisdom" but use "prudence" here because of its historical familiarity.

12 *Cf.* Summa, *supra* note 1, at 12a2ae 49.7.

13 *Id.* at 2a2ae 49.3.

14 *Id.* at 2a2ae 49.4.

15 Thomas's description of perseverance sounds more like my definition of patience: "the endurance of difficulty arising from delay in accomplishing a good work." Summa, *supra* note 1, at 2a2ae 137.2.

16 Thomas puts it in terms of safeguarding the good of reason against sorrow. *See* Summa, *supra* note 1, at 2a2ae 136.1.

17 Craig Steven Titus, Resilience and the Virtue of Fortitude: Aquinas in Dialogue with the Psychosocial Sciences 9, 148 (2006).

18 *Cf. id.* at 241-66.

19 *See* Summa, *supra* note 1, at 2a2ae 129 (Thomas's fascinating reworking of Aristotle's magnanimity in Book 4 of *Nicomachean Ethics*).

20 For Thomas, temperance "withdraws man from things which seduce the appetite from obeying reason." Summa, *supra* note 1, at 2a2ae 141.2.

21 *See, e.g., id.* at 2a2ae 141.4.

perhaps *self-possession*), the inclination to respond to provocation without undue anger.

We now return to the order of the virtues. As considered above, prudence perceives what is right in the various situations of life. Thus, prudence must precede and be foundational to justice because justice requires an understanding of the world: without perceiving what people owe to each other, a person cannot meaningfully be disposed to giving others what's due. Only the prudent have the understanding necessary to be just.

While justice must follow prudence, justice must precede courage and temperance. This is because justice orients people toward their duties with respect to one another, while courage and temperance merely ward off dangers that threaten to derail us from these duties.[22] Courage and temperance add nothing positive to the duties justice requires. Courage simply keeps people from falling prey to fears that threaten to scare them away from perseverance in the good. Temperance simply imparts the self-control necessary so that pleasures don't divert people from their responsibilities.

But the main point here is not that courage and temperance are properly ordered after justice, but that a just person must have courage and temperance if justice is to achieve its ends. Without courage, a person may be disposed to give others their due but will fail to follow through because he gives way to fear about the consequence of doing what's right. Without temperance, a person disposed to give others their due will fail to follow through because overindulgence distracts or disables her.

It isn't difficult to see the relevance for a legal context. We might imagine a legislator or a judge with the virtue of justice. But if the legislator is overcome by fear of losing reelection if she supports the just position on a controversial policy issue, or if the judge is paralyzed by fear of his colleagues' derision if he issues the right verdict in a contentious case, cowardice will keep their inclination to justice from accomplishing its end. Or we might consider a lawyer or an ordinary citizen with the virtue of justice. If the lawyer's excessive drinking hinders his ability to defend a client effectively or the ordinary citizen's greed compels her to break the law to reap a greater profit, intemperance will overcome their disposition to justice.

A Fifth Cardinal Virtue

Considering virtue and law through the lens of the traditional four cardinal virtues is very illuminating, but doing so isn't quite sufficient. At least three issues indicate why.

First, there are reasons to doubt that *all* the natural virtues can be categorized under one of the cardinal virtues. Consider *humility,* for instance, the disposition to regard and present oneself honestly, especially with respect to one's flaws and limitations. The classical Greek philosophical tradition didn't acknowledge humility as a virtue and, thus, didn't try to place it under one of the cardinal virtues. But each human being is inherently vulnerable and needy, which indicates that humility is a proper character trait for everyone. Under which cardinal virtue should we categorize it then? The Thomistic tradition has placed humility under temperance: it involves moderation in how we view and evaluate ourselves.[23] This is plausible. But we could just as plausibly place humility under justice, for if justice involves giving what's due to myself (as well as to others), then I must evaluate myself properly, which is what humility does. Furthermore, Proverbs intimately associates humility with wisdom, so perhaps humility belongs under prudence. In short, humility is closely connected with several of the traditional cardinal virtues, and it's difficult to know where to categorize it.

A second issue concerns the *fear of God.*[24] God reveals himself in the natural order and all people know him and are obligated toward him through this testimony of nature (e.g., Rom. 1:18-32). Accordingly, the Old Testament several times ascribes the "fear of God" to Gentiles, those outside the covenant communities of Abraham and

22 For Thomas, prudence and justice "direct one to good simply," while courage and temperance withdraw people from evil. *See* Summa, *supra* note 1, at 2a2ae 157.4.

23 *See* Summa, *supra* note 1, at 2a2ae 161.

24 In a similar vein, a long Christian tradition distinguishes a *slavish* fear of God found even among some non-Christians from a filial fear unique to believers. *See, e.g.,* Summa, *supra* note 1, at 2a2ae 7.1, 19; 3 Wilhelmus à Brakel, The Christian's Reasonable Service 291-92 (Bartel Elshout trans., 1994).

Israel.[25] Sometimes these Gentiles displayed fear of God better than people of faith did (e.g., Gen. 20:9-11; cf. 2 Chr. 35:21-22; 36:13). In these biblical contexts it seems to refer to recognition of accountability to a divine judge, with far-reaching implications for legal contexts. For those in authority, it serves as a check on power, as with Abimelech of Gerar (Gen. 20:9-11; cf. 42:18; Ezra 7:23). For those without power, it emboldens them to defy unjust rulers, as with the Egyptian midwives (Exod. 1:17, 21). Those who lack this virtue think they can get away with evil (see Ps. 36:1-2) and commit atrocities (e.g., Deut. 25:18). For Paul, lacking fear of God was climactic proof of human sinfulness (see Rom. 3:18). It's difficult to say precisely what this fear of *God* is. The people who had it in the biblical texts above were presumably pagan polytheists. They didn't embrace an orthodox theology or worship God rightly, yet apparently some lingering true knowledge of the divine judge—whether triggered by natural (Rom. 1:19-20, 32) and/or special revelation (see Gen. 20:3-8)—pulled them back from doing terrible things.[26]

Fear of God must be a natural human virtue, but to which cardinal virtue does it belong? Justice is a tempting answer, given the link between justice and the fear of God in the biblical texts above, and given the fact that fear is something which God is due. But there's also a close relation between wisdom (prudence) and the fear of the Lord in Proverbs. What's more, scripture doesn't place fear of God under prudence or justice but vice versa: scripture treats fear of God as the source of prudence and justice. As with humility, the fear of God seems to resist categorization within the traditional framework.

The third issue concerns the vice of *pride,* an excessive love for oneself and an inordinate desire for one's own excellence—ultimately a desire to elevate oneself above God. Christian moral theology has often reckoned pride to be the root vice, such that all other vices stem from this obsession with oneself.[27] Which virtue does pride oppose? In a sense, it stands contrary to every virtue. But if we can identify this single root vice that underlies all the others, shouldn't we be able to identify a single root virtue that uniquely stands opposite pride?

I suggest that one move can address and resolve all three of the preceding issues: we should recognize a twofold virtue—*the fear of God and humility*—as the root of the cardinal virtues. We can retain most of the traditional understanding of these virtues, but we should add a fifth virtue to their number. Three interrelated considerations support this conclusion.

First, there are strong reasons for regarding fear of God and humility not as two separate virtues but as a single, twofold virtue—as two sides of the same coin. To fear God is to have a proper estimate of God, but a proper estimate of God entails having a proper estimate of oneself. A person cannot truly recognize God's greatness without simultaneously recognizing her own lowliness. From the other direction, true humility can hardly co-exist with rejecting God's sovereign authority, the ultimate non-humble act.[28] True humility and true fear of God entail one another. Proverbs 15:33 offers interesting confirmation in the way it pairs these two virtues: "The *fear of the Lord* is instruction in wisdom, and *humility* comes before honor."

Second, this twofold virtue uniquely corresponds to pride as root of the vices. If pride is an

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25 These texts ordinarily speak of the fear of God rather than "fear of the LORD," a term scripture often applies to godly members of the covenant community. This is surely not a coincidence. Compare 2 Chronicles 19:19 with 20:19 as an example of deliberate change in terminology.

26 *Cf.* Aleksandr I. Solzhenitsyn, 1 The Gulag Archipelago, 1918-1965: An Experiment in Literary Investigation 147 (Thomas P. Whitney trans., 1973) ("Power is a poison well known for thousands of years. If only no one were ever to acquire material power over others! But to the human being who has faith in some force that holds dominion over all of us, and who is therefore conscious of his own limitations, power is not necessarily fatal. For those, however, who are unaware of any higher sphere, it is a deadly poison. For them there is no antidote.").

27 *See, e.g.,* John Cassian, The Institutes 12.1; Summa, *supra* note 1, at 2a2ae 162.

28 According to Thomas, "Humility, considered as a special virtue, regards chiefly the subjection of man to God, for Whose sake he humbles himself by subjecting himself to others" and "humility is caused by reverence for God." *See* Summa, *supra* note 1, at 2a2ae 161.1 ad. 5, 161.4 ad.1.

29 *Cf.* Michael C. Legaspi, Wisdom in Classical and Biblical Tradition 63-64 (2018).

excessive esteem of one's own excellence, then it stands in direct opposition to a fear of God that esteems God as the most excellent being. But it also stands in direct opposition to humility, which refuses to esteem oneself more than is fitting. What does pride oppose? Fear of God *and* humility, simultaneously and inseparably.

Third, if the twofold virtue of fear of God and humility is root of the traditional cardinal virtues, it explains why it's so difficult to place either fear of God or humility as a sub-virtue under any of the four. Just the opposite is true: the four cardinal virtues should be categorized under fear of God and humility. Prudence has primacy among the traditional cardinal virtues, but according to Proverbs, fear of God and humility underlie prudence. Proverbs highlights fear of the Lord at three crucial points: at the beginning of the book (1:7), its middle (15:33), and its end (31:30). In the first two, the fear of the Lord is the "*beginning* of knowledge" and "*instruction* in wisdom." It's clear which has the priority, and it makes sense.[29] The very things necessary for growing in prudence (observation, taking counsel, reflection, prayer) entail the humility to recognize one's ignorance, weakness, and need to learn. Still, it's not a one-way street. Growing in prudence should reinforce humility and the fear of God even as these latter two virtues catalyze further growth in wisdom. Prudence and humility/fear of God exist in a reciprocal or symbiotic relationship.

Conclusion

If this analysis is correct, it has sobering implications. People do not ordinarily associate legislatures, courts, or law firms as bastions of humility and the fear of God. But that is perhaps why many don't associate them with justice either. Those without the virtues of humility and the fear of God inevitably see the world in distorted ways, and those who see the world in distorted ways inevitably err in understanding what is due to fellow human beings, no matter how often they appeal to the mantra of "justice." Christians who desire more just societies can hardly be uninterested in whether their fellow citizens possess justice as a virtue, and all the other cardinal virtues as well.

The Necessity of Hope in Legal Education: Character Development in Pluralist Contexts

*by Kenneth Townsend**

Introduction

Americans distrust lawyers more than other professionals.[1] Due to negative media portrayals, widespread skepticism regarding lawyer morality, and all-too-plentiful examples of high-profile lawyerly misconduct, lawyers are viewed with skepticism, if not disdain, by the American public.[2] Growing evidence suggests that lawyers are also unhappy, reporting higher rates of depression, anxiety, and substance abuse than other professionals.[3]

Many factors have contributed to the reputational and well-being crises facing lawyers. One is that law schools have often been slow to adapt to changing professional landscapes. If law students are to become lawyers who live and lead with integrity and purpose, law schools must approach legal education more holistically. Law schools must continue to train students to "think like a lawyer," while also equipping students to develop the moral habits and capacities—the *character*—to live successful and flourishing lives.

The American Bar Association (ABA) is increasingly attuned to these and related concerns. In 2022, it revised the standards that govern law schools to elevate values-based education. For the first time, the updated Standard 303(b) requires that law schools "provide substantial opportunities to students for . . . the development of a professional identity," which the ABA's interpretive guidance defines as the "values, guiding principles, and well-being practices considered foundational to successful legal practice."[4]

The practice of law requires honesty, open-mindedness, civility, empathy, resilience, and practical wisdom, among many other virtues, but it is far from inevitable that law schools—even with updated ABA standards—will undertake meaningful engagement with the virtues of character that law students need in their lives and careers. As paradigmatic liberal institutions, law schools have a complicated relationship with virtue. Liberal institutions rely upon and presume the widespread existence of intellectual, moral, and civic virtues, but liberal theory has historically been hesitant about promoting character or virtue. That squeamishness is rooted in liberalism's commitment to neutrality, individual autonomy, tolerance of diversity, procedural over substantive justice, and the general separation of public and private realms.[5] Alternative accounts of liberalism have emerged, however, that eschew such hesitation and promote a more direct, explicit role for liberal institutions in cultivating liberal virtues. While aspirational accounts of liberalism are right to recognize the need for engaging

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1 Megan Brenan, *Nurses Keep Healthy Lead as Most Honest, Ethical Profession,* Gallup (Dec. 26, 2017), https://news.gallup.com/poll/224639/nurses-keep-healthy-lead-honest-ethical-profession.aspx?g_source=Economy&g_medium=newsfeed&g_campaign=tiles.

2 *See, e.g.,* Staci Zaretsky, *Scientific Study Concludes No One Trusts Lawyers,* Above the Law (Sept. 24, 2014), https://abovethelaw.com/2014/09/scientific-study-concludes-no-one-trusts-lawyers/.

3 *See, e.g.,* Anne Brafford, Well-Being Toolkit for Lawyers (2018), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.pdf.

4 American Bar Association, ABA Directory & Midyear Meeting Schedule (2022), *available at* https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/300-midyear-2022.pdf.

5 *See, e.g.,* John Rawls, A Theory of Justice (1971); Bruce A. Ackerman, Social Justice in the Liberal State (1980).

virtue directly, these perspectives risk presumption and dogmatism if they fail to recognize the limits of their own reach.[6]

Christian perspectives likewise often alternate between those who see little, if any, hope for Christian virtue in American public life[7] and those who intend to remake liberal institutions in a fully Christian image.[8] The first group suffers from despair, while the latter is endangered by presumption.

As a result, one of the greatest obstacles to meaningful engagement with character in legal education is the elusiveness of proper hope—of hope that there is a principled way to cultivate character in law school settings without undermining the integrity and autonomy of diverse populations. Those involved in developing and implementing law school programs and curricula—whether or not they are conscious of the language and categories of character or virtue—should develop and exercise the virtue of hope if a more holistic, values-based education is to be undertaken in meaningful and productive ways in American law schools. Hope, then, acts as an enabling or facilitating virtue for the exploration and development of other virtues.

Despair, Presumption, and Hope

Hope is often viewed in popular culture as an emotion or feeling, but Michael Lamb's recent book *A Commonwealth of Hope* makes a compelling case for reclaiming hope as a virtue.[9] Contrary to traditional interpretations of St. Augustine of Hippo, which view him as pessimistic about the possibility of hope in public life, Lamb reexamines the saint's life and works to uncover a version of the thinker who gives even contemporary audiences reasons for finding hope.[10] Drawing upon Augustine's sermons, as well as his more well-known texts, Lamb outlines an account of hope as a middle-way virtue between despair (a vice of deficiency) and presumption (a vice of excess).[11] Given Augustine's Christian commitments, this virtue is especially relevant within Christian legal thought, but the structure and function of the virtue is also useful for anyone seeking to educate lawyers, whether Christian or not.

A. Despair

One of the greatest obstacles to integrating character in American legal education is despair—a sense that it is simply not possible or appropriate. Skeptics might raise a range of concerns, including that educating character is often futile, especially in adults;[12] that there is not enough time to add character education to already full syllabi and course programs;[13] or that measuring character growth is too difficult to assess.[14] Skepticism toward character education runs much deeper than these practical concerns, however.

1. The Despair of Neutralist Liberalism

A dominant strand of liberal political theory is uncomfortable engaging with character or virtue. The hesitation of "neutralist liberals" is rooted in concerns that virtue cultivation will turn paternalistic and undermine liberalism's foundational commitment to neutrality by imposing a particular moral vision on individuals.[15] These concerns

6 *See, e.g.,* Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy (2000).

7 *See, e.g.,* Alasdair MacIntyre, After Virtue (1981); Stanley Hauerwas, The Peaceable Kingdom: A Primer in Christian Ethics (1983).

8 *See, e.g.,* Adrian Vermeule, *A Christian Strategy,* First Things (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy [https://perma.cc/N4YAJWTP].

9 Michael Lamb, A Commonwealth of Hope: Augustine's Political Thought 59 (2022).

10 *Id.* at 267-68.

11 *Id.* at 59-60.

12 *See, e.g.,* Melissa Korn, *Does an 'A' in Ethics Have Any Value?*, Wall St. J. (Feb. 6, 2013), https://www.wsj.com/articles/SB10001424127887324761004578286102004694378.

13 *See, e.g.,* Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum,* 2013 J. Disp. Resol. 159 (Spring 2013).

14 *See, e.g.,* Richard Smith, *Character Education and the Instability of Virtue,* 56 J. of Phil. of Educ. 889, 891 (2022).

15 *See, e.g.,* Rawls, *supra* note 5; Ackerman, *supra* note 5; Stanley Fish, Save the World on Your Own Time 24 (2008).

are most pronounced in contexts of public education, where the authority of the state over minors accentuates existing concerns and where the First Amendment limits the reach of various state actions to constrain or compel speech, religious exercise, or expressive association.[16]

The logic of neutrality extends to liberal institutions more generally, including to the law itself. In a liberal society such as the United States, law and legal institutions instantiate and embody the norms and values of the liberal state. At the heart of arguments for neutrality are concerns about the justification and legitimacy of state power. What happens, neutralists ask, when the laws of a state are the product of reasoning that cannot be comprehended or accepted as legitimate by certain groups because of their moral or religious convictions?[17] Will those laws not lack legitimacy in the eyes of those citizens? In the context of legal education, might character-based professional identity formation produce lawyers who are captured and compromised by so-called "comprehensive doctrines"?[18]

In a way, lawyers are paradigmatic liberal citizens. Lawyers, like good liberal citizens, must separate their personal values from their public or professional roles and prioritize procedural fairness over substantive visions of the good life. This means that an initial obstacle to developing character education efforts is overcoming the despair that law schools might feel about embarking on the fraught terrain of character education. Law school professors, administrators, and students occupy and constitute core institutions of liberalism and, as such, often absorb the norms and values of liberalism whether consciously or not, leading relevant parties despairing about the legitimate possibility of incorporating character into legal education.

2. The Despair of Christian Withdrawal

While there are plenty of reasons for Christians to be concerned about trends in the modern world, including in higher education, it is important for Christians to cultivate hope even in the face of challenges. This hope is not blind optimism, but rather a capacity for acting reasonably to attain future goods, even in the face of doubts.[19]

There is a long—and in many respects, noble—tradition of Christian thought that reminds Christians to be in this world, but not of this world,[20] and that highlights the risks of being compromised and corrupted by the world.[21] Remaining uncorrupted carries its own risks, however. From a Christian perspective, the more Christians remain separate from the institutions that shape our world, the less likely those institutions will be influenced, even if indirectly, by the values and concerns of Christians.

Alasdair MacIntyre has argued, for example, that modern liberal societies reflect a post-virtue world in which only "simulacra of morality" remain.[22] Given this state of affairs, there are limits to what any Christian could or should hope to accomplish in engaging, much less reforming, secular institutions. Law offers, according to MacIntyre, an alternative rationality to Christianity, and lawyers, as the "clergy of liberalism," are especially bound to resist a virtue-oriented world as they sustain and promote the norms of the liberal order.[23]

Stanley Hauerwas similarly cautions Christians about trading our commitments for potential relevance in the world. Influenced by Anabaptist queitism, as well as MacIntyre's critique of liberalism, Hauerwas argues, for example, that it is a "false hope" for Christians to partner with worldly institutions for the sake of producing virtuous citizens.[24] In seeking relevance,

16 *See, e.g.,* Ackerman, *supra* note 5.

17 Rawls, *supra* note 5, at 11-22.

18 John Rawls, Political Liberalism 387 (1993).

19 Lamb, *supra* note 9, at 31.

20 *Romans* 12:2; *John* 17:14-16.

21 *See, e.g.,* Hauerwas, *supra* note 7.

22 MacIntyre, *supra* note 7, at 2.

23 Alasdair MacIntyre, Whose Justice? Which Rationality? 344 (1988).

24 Stanley Hauerwas & Charles Pinches, Christians Among the Virtues: Theological Conversations with Ancient and Modern Ethics 149 (1997).

Christians will lose sight of our primary charge, which is to build the church and to inhabit the virtues that define the Christian life.[25] Drawing upon MacIntyre's call in the last sentences of *After Virtue*[26] for "another . . . St. Benedict," Rod Dreher, for example, has argued in *The Benedict Option* for a "strategic withdrawal" of Christians from the institutions of liberal democracy since "business-as-usual lives in America" are no longer possible.[27]

If Christians see liberal institutions as too fallen to engage productively or the risk of compromising Christian virtue too great, it is hard to see how these Christians will move beyond despair to having hope that law, including legal education, can take character seriously.

B. Presumption

Presumption can also be an obstacle to developing the sort of hope that law school leaders will need to integrate character meaningfully and appropriately into law school curricula. Presumption is a form of pride and can lead to associated vices, including smugness, dogmatism, and the dismissal of perspectives that do not fit neatly within a particular ideological framework.

1. The Presumption of Aspirationalist Liberalism

Recognizing the limits of neutralist liberalism and the despair about virtue it licenses, some political theorists have outlined more robust, aspirational accounts of virtue.[28] Stephen Macedo, for example, offers a John Dewey-inspired "tough-minded liberalism"[29] as a response to neutralist accounts of liberalism that downplay the role of virtues. Macedo celebrates the "transformative dimension of liberalism"[30] where the liberal state actively promotes liberal virtues and where "people are satisfied leading lives of bounded individual freedom."[31] In this model, the state "must shape the way people use their freedom, and mold people in a manner that helps ensure that liberal freedom is what they want."[32]

The liberal virtues worth promoting, according to Macedo, include "individual liberty and responsibility, tolerance of change and diversity, and *respect for the rights of those who themselves respect liberal values.*"[33] While the virtue of tolerance—along with associated virtues of humility, open-mindedness, and civility—are valuable, Macedo's interpretation of this virtue points to the dangers of aspirationalist liberalism. "Tolerance" loses all meaning if liberal society is bound to respect the rights only of those who themselves respect liberal values.

Character education must resist despair as well as presumption. Efforts at character education will fail if the embrace of character education in law schools becomes prideful or dogmatic and brooks no dissent from other perspectives.

2. The Presumption of Christian Integralism

An ascendant critique of the law of liberalism can be found in the so-called integralists. No thinker has been more prominently associated with the rise of integralism than Harvard Law School's Adrian Vermuele. Rather than withdrawing from liberal society, Vermuele proposes a strategy of "*ralliement*," whereby Christians "transform [liberal society] from within."[34] This transformation, according to Vermuele, is not compatible with a "long-term rapprochement with liberal-demo-

25 Hauerwas has sometimes resisted the claim that he advocates withdrawal, but his work has regularly been interpreted as calling for such. *See* Lamb, *supra* note 9, at 355-56.

26 MacIntyre, *supra* note 7, at 2.

27 Rod Dreher, The Benedict Option: A Strategy for Christians in a Post-Christian Nation 2 (2018). It is worth noting that MacIntyre has expressed skepticism of Dreher. *See "A New Set of Social Forms": Alasdair MacIntyre on the "Benedict Option,"* Tradistae (April 21, 2020), https://tradistae.com/2020/04/21/macintyre-benop/.

28 *See, e.g.,* Macedo, *supra* note 6.

29 *Id.* at 5.

30 *Id.* at 15.

31 *Id.*

32 *Id.* (Macedo's emphasis).

33 Stephen Macedo, Liberal Virtues 258 (1991) (emphasis added).

34 Adrian Vermuele, *Ralliement: Two Distinctions,* Josias (March 16, 2018), https://thejosias.com/2018/03/16/ralliement-two-distinctions/.

cratic political orders."[35] For Vermuele and other integralists, the liberal order is so fundamentally flawed that Christians should be razor focused on "superseding [liberal democracy] altogether" and replacing it with Christian leaders and institutions.[36]

Fellow integralist Edmund Waldstein writes longingly of a pre-modern world in which "'church' and 'state' did not exist as separate institutions; rather, spiritual and temporal authority cooperated together within a single social whole for the establishment of an earthly peace, ordered to eternal salvation."[37]

Such presumption is clearly in tension with the goal outlined in the introduction of hoping for a principled way to cultivate character in law schools without undermining the integrity and autonomy of diverse populations. The integralists' presumption risks compromising the efforts of Christians who seek to influence, but not take over, institutions of public life. While Christians should feel comfortable engaging and critiquing liberal institutions, that engagement should keep in mind the risks that accompany any presumption of total alignment between theological aspirations and political realities.

Principled Pluralism[38]

A. Hope and Pluralism

The temptations of despair and presumption reflect different responses to the fact of pluralism. While it is tempting for Christians to seek to avoid or to conquer difference, hope calls for a different response. Hope entails acknowledging pluralism in the public realm, in all its messiness, but acting with reason and conviction to attain future goods, even in the face of difficulties and doubts.[39]

Here, again, Augustine offers guidance. "Although Augustine believes that God is the ultimate object and ground of hope," Lamb notes, "his vision of the commonwealth does not necessarily require citizens to order their hopes toward the same ultimate ends."[40] People with very different ends can nevertheless "make common use of those things which are necessary to this mortal life", even when guided by a "different faith, a different hope, and a different love."[41] For better or worse, law schools remain "necessary to this mortal life," and law school leaders should not expect a consensus on the ultimate objects of faith, hope, or love anytime soon. Law school leaders can, however, seek "common agreement" on the proximate ends of legal education: to prepare students with the knowledge, skills, and moral capacities to live successful and flourishing lives. This "common agreement" provides a basis for ongoing conversation about specific objects of hope, including hope for cultivating character in law schools without undermining the integrity and autonomy of diverse populations.

B. Virtues of Pluralism

Hope is an important facilitating virtue that enables law school leaders to consider the possibilities, and the value, of character education. Much more could (and should) be written about other virtues that will benefit law school leaders as they design and implement character education programs that are both principled and respectful of difference. Humility, for example, will be helpful for law school leaders tempted to view values education as an opportunity to limit, if not eliminate, ideological diversity on their campuses. Character education cannot be turned into a tool or guise for producing ideological clones.

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35 *Id.*

36 *Id.*

37 Edmund Waldstein, *An Integralist Manifesto,* First Things (Oct. 2017), https://www.firstthings.com/article/2017/10/an-integralist-manifesto.

38 This phrasing is inspired by the Aspen Institute's *Principled Pluralism: Report of the Inclusive America Project* (June 2013), *availale at* https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/Principled-Pluralism_0.pdf and by Wake Forest's Principled Pluralism initiative, *available at* https://leadershipandcharacter.wfu.edu/news/principled-pluralism-fellowship-religious-political-polarization/.

39 Lamb, *supra* note 9, at 31.

40 *Id*. at 267.

41 *Id*. (citing *Augustine's City of God*).

Empathy, the virtue that helps us understand or imagine another's experience or perspective, will be important for law school leaders to channel as they remind themselves that law students enter law school with a wide range of backgrounds, beliefs, and aspirations. The process of learning to "think like a lawyer" and associated professional identity formation can be a disorienting experience for students even in the best of circumstances. Additional empathy will likely be needed for law students as law school leaders incorporate new moral, ethical, and character dimensions into legal education.

A generosity of spirit will also be key for law school leaders as they reckon with the extraordinary responsibility that comes with integrating virtue-oriented content into the law school experience. Law school leaders will have different visions of what character education entails, and those involved should strive to interpret each other generously and not lose sight of their obligation to prepare students for personal and professional success.

Without humility, empathy, and generosity of spirit, legal educators may despair of ever achieving alignment or presume that the only way they can do so is by asserting one dominant vision of virtue without making appropriate room for differences.

C. Practices of Pluralism

Several practices will be important for law school leaders to maintain as they implement character education efforts. These can be seen as expressions of hope in the face of pluralism and will help ensure the legitimacy and support—among faculty, staff, and students—for content that falls outside the typical scope of legal education.

1. Be practical, not abstract

Law students are busy and will understandably focus their time and energy on the tasks and topics that feel most important. If success is measured by traditional metrics such as grades and career trajectories, students will focus on such outcomes. Law professors likewise tend to prioritize the content that students need to pass traditional exams and, ultimately, the bar exam. As such, abstract discussions of virtue or character will likely be met with skepticism from law students and law professors alike.

A model I use in my teaching involves a four-step process of inviting students to: (1) identify their personal purposes and the purposes of the profession; (2) consider occupational hazards and professional pressures that might challenge their purposes; (3) select relevant virtues in responding to those hazards; and (4) choose concrete strategies for cultivating relevant virtues.[42] For example, students might identify purposes such as serving clients with zeal, earning a good living for their family, or making the world a better place before reflecting on associated occupational hazards, e.g., balancing competing demands, navigating all-consuming work cultures, or having little agency in one's work. Students might then identify virtues needed to respond to these and other pressures (such as resilience, temperance, or courage) before selecting concrete strategies, such as engaging with virtuous exemplars or developing friendships of accountability, to aid them in developing relevant virtues. A grounded, iterative structure like this helps students to see and to be regularly reminded of the relevance of virtues for their future legal careers.

2. Be specific, not comprehensive

While it is valuable for students and faculty to understand the relationship between virtues, it is also important not to try too much too soon. Character education in pluralist settings works best when specific virtues are highlighted rather than promoting "virtue" or "character" in general. If character education is seen as a guise for implementing "comprehensive doctrines,"[43] it is liable to scare away those worried about character education becoming paternalistic.

As I have worked with law professors at Wake Forest and other law schools in recent years, the initial skepticism towards generic categories of character or virtue almost inevitably subsides when the conversation turns to specific virtues or particular character traits. It is hard to deny that lawyers need to be honest, coura-

42 *See, e.g.,* Michael Lamb et al., *Seven Strategies for Postgraduate Character Development,* 17 J. of Character Education 81 (2021).

43 Rawls, *supra* note 18, at 387.

geous, empathetic, resilient, open-minded, and wise—among many other things. If these virtues are necessary, but are not featured prominently in most law school curricula, the legal academy must acknowledge this gap and take steps to close it.

3. Be inclusive, not exclusive

Legal educators will need to recognize that no single group has a monopoly on conceptualizing character in the context of legal education. Many, but not all, accounts of virtue will emerge from the premises and values of liberalism. Some law students will take a purely pragmatic approach regarding the function of character education. Others will latch on to character formation because it resonates with their religious backgrounds or ideological commitments. While law schools should be prepared to teach character in ways that connect with the institution's mission and with the needs of the profession, law schools should generally take an open-minded, inclusive approach to character formation and integration. Principled pluralism requires proceeding simultaneously with conviction about one's values along with humility about the scope and potential limits of those values.

Legal education often leaves students feeling like they must bracket their values in order to prepare for the practice of law. By taking seriously the "values, guiding principles, and well-being practices" essential to law practice, law schools can create openings for students to bring their full selves, including their religious beliefs and values, into the process of legal education. Adopting a character-based approach to professional identity formation can provide a basis for connecting the student's identity, values, and career aspirations. This is only possible, however, if law schools are hospitable to the richness, as well as the messiness, that might emerge when various, and even conflicting, identities and values come into contact. Such engagement across differences might even provide occasions for character development. As students encounter perspectives and values different from their own, they will be prompted to develop virtues such as open-mindedness, civility, and generosity.

Conclusion

Practicing law requires a range of virtues that have historically been absent, or only indirectly engaged, in the law school experience. There is growing awareness of the need for legal education to take a more holistic approach to professional identity formation, and the ABA's recent updates to Standard 303(b) provide a prompt for law schools to think more broadly about the "values, guiding principles, and well-being practices" most essential for law practice. Meaningfully integrating values and character into the student experience requires maintaining hope that such an enterprise is possible and appropriate. Michael Lamb's Augustinian-inspired account of hope as a virtue between despair and presumption offers Christians, as well as non-Christians, a model for understanding how to maintain hope even in the face of deep disagreement.

Teaching Character in Law School

by Benjamin V. Madison III and John M. Napier***

Introduction

Morality, character, and identity are inextricably woven together. The formation of professional identity is a relatively new way of describing the cultivation of character and moral scrutiny. The professional identity movement has taken hold in law. No longer must we deal with the pretense that law is not interested in morality. The Carnegie Institute for Teaching and Learning's *Educating Lawyers* (the Carnegie Report)[1] and the Clinical Legal Education Association's *Best Practices in Legal Education* (the Best Practices Report),[2] both published in 2007, took a definitive stand. The Carnegie Report exposed law school's unbalanced emphasis on logic and cognitive skills at the expense of "the wider matters of morality and character."[3] The Best Practices Report echoed this point by noting that "depression among law students is primarily caused by the negative impact that legal education has on students' moral development."[4] These reports marked a major shift in law and legal education.

Then Dean of Regent University School of Law, Jeff Brauch, saw the opportunity such a shift represented for faith-based law schools.[5] The reports called the effort to develop moral judgment and character "professional identity formation," rather than "professionalism," useful. We know the authors are not urging external conformity to rules. Instead, they seek to promote change in the place that matters most—from within. In short, something many of us have believed for a long time has become the predominant view: morality, character, and identity can be cultivated and fostered. The effort to teach these areas is more art than science, but, in terms of the importance, we need to do our best to encourage students to engage the ideas, topics, and questions that can affect their development. From a faith-based law school's perspective, this course and approach attempts to further the Apostle Paul's admonishment to help train law students "to be godly."[8] Paul explains, "[f]or physical training is of some value, but godliness has value for all things, holding promise for both the present life and the life to come."[6] The role of law professors to set a course for teaching morality and character, which are elements of godliness, is nearly absent from law school curricula in a substantive way, even amongst many faith-based law schools. We see this as an essential role of the law professor in helping guide the students to determine who they want to be as attorneys and through what rubric they will make those difficult and inevitable moral decisions that always come, and come quickly, in the practice of law.

In this piece, we describe a course we have been teaching for more than a decade that both encourages students to discern their calling in law and to develop the characteristics of a Christian lawyer.[7] Our course is one of the earliest efforts to respond to the challenge identified by the Carnegie and Best Practices Reports. As with any effort,

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1 William M. Sullivan et al., Educating Lawyers: Preparation for the Practice of Law (2007) (hereinafter "The Carnegie Report").

2 Roy Stuckey et al., Best Practices for Legal Education (2007) (hereinafter "Best Practices").

3 The Carnegie Report, *supra* note 1, at 129.

4 Best Practices, *supra* note 2, at 34 (citing Steven Hartwell, *Moral Growth or Moral Angst: A Clinical Approach,* 1 Clinical L. Rev. 115, 118-19 (2004)).

5 Jeffrey A. Brauch, *Faith-Based Law Schools and an Apprenticeship in Professional Identity,* 42 Univ. of Toledo L. Rev. 593 (Spring 2011).

6 *Korematsu v. United States,* 323 U.S. 214 (1944).

7 *Id.* at 226-29.

we have had successes and failures. However, we have built on the successes and learned from the failures. We hope that our sharing these efforts will encourage others to "go and do likewise."[8]

A First-Year Law School Course Designed to Start the Development Process

Overarching Focus on Students Seeking Their Calling

Entitled "Foundations of Practice," the central objective is for students to explore and, ideally, find the area of law to which God is calling each student to serve others.[9] We also seek to cultivate the character traits that will permit our students to succeed in serving others. The character traits will be the same for a Christian lawyer serving in any area of the law. A trial lawyer has to be honest with the court and others. A lawyer negotiating a business deal has to be honest. All lawyers must seek to serve their clients and communicate diligently and effectively. Students can adapt the character traits of a Christian in the area of law to which they are called.

For too long law schools, by encouraging values that lead to dissatisfaction because they are unrelated to a person's internal sense of purpose, have done great harm. Larry Krieger and Kennon Sheldon's longitudinal studies comparing law students to students in other forms of higher education were among the first to demonstrate law schools' negative impact on students.[10] Fortunately, Professor Krieger, teamed with the clinical psychologist Sheldon, found that a different path brought more satisfaction to lawyers.[11] The tests sought to identify whether grades, law review membership, and the like had a bearing on the lawyer's well-being. They did not![12] Conversely, internal values for choosing work—"interest, enjoyment, or effectuating core values"—produced a "very strong" correlation with well-being.[13] As Krieger and Sheldon observed: "This finding is particularly important, because law students have been found to turn away from internally motivated careers, often in favor of more lucrative or prestigious positions, after beginning law school."[14] That turn leads ultimately to dissatisfaction and the well-known maladies resulting from ignoring one's internal values.

Krieger and Sheldon's concept of following one's intrinsic values as a means to satisfaction is rooted in psychology.[15] But their work supports our belief—that students will find most rewarding the areas of law to which God has called them. Likewise, those who ignore God's call and seek wealth or prestige will typically find them unrewarding. What those who find their vocation discover is the power of purpose. When one sees meaning in one's work, that makes all the difference. Lawyers who come at their roles from the "intrinsic" (i.e., soul-centered) approach will find satisfaction. Those who seek external goods, ones they know are not important to them in the deepest sense, feel that they are not doing what they were made to do. We can think of nothing sadder.

Two specific ways in which we have students, throughout the semester, focus on discerning their calling involves (1) testing by our School of Psychology and Counseling and (2) assigning a Discernment Plan that students

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8 *Luke* 10:37 (NIV).

9 Joseph Allegretti has explained well the concept of law as a calling:

> I began by asking: Is law a calling? The answer is yes—but not yes in the abstract or yes in all cases. The answer is yes for those who see their work as a means to serve God and neighbor, and who pass through the testing place and training ground of law school. For those lawyers, law is not just a profession—what I *profess* it to be. It is something more, a part of my religious life—what I am *called* to be by God.

Joseph G. Allegretti, The Lawyer's Calling: Christian Faith and Legal Practice 32 (1996).

10 *See, e.g.,* Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence,* 52 J. Legal Edu. 112, 117 (2002).

11 Kennon M. Sheldon & Lawrence S. Krieger, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 Geo. Wash. L. Rev. 554 (2015).

12 *Id.* at 576-79.

13 *Id.* at 580-81.

14 *Id.* at 580.

15 *Id.* at 562-65.

work on with their faculty mentors and turn in at the end of the course. Partnering with Regent's School of Psychology and Counseling has allowed us to have experts in personality and vocational tests present on the tests, administer the tests, and then counsel students on the results. The NEO-PI-3 is a reliable, valid personality test recommended by our School of Psychology faculty.[16] In addition, the School of Psychology and Counseling administers the Strong Interest Inventory, a vocational assessment test. The results of these tests are confidential. We tell students that they need not discuss them with anyone other than the School of Psychology clinicians.

Students are given the option in their Discernment Plan of explaining the findings of the NEO-PI-3 test and the Strong Interests Inventory. Alternatively, we allow them to do a 360-degree assessment that seeks to provide some of the same information on a person's strengths and areas of challenge. The usefulness of this information is not to typecast a student but rather to give students a sense of their strengths, areas of challenge, and potential areas in which they can grow. If we are asking them to discern the areas of law in which their gifts best fit, it helps to provide an objective assessment that can help them identify gifts and challenges. Most students, in our faculty's experience, affirm that the test results confirm what they intuitively knew about themselves; however, discussing these findings with a clinician and then with the faculty mentor assigned to the student (if the student chooses to reveal the results) helps them have others discuss the areas in which they are most comfortable, areas in which perhaps they can grow, and generally to help with the discernment process.

In our early years of teaching this course, we also used Neil Hamilton's *Roadmap: The Law Student's Guide to Meaningful Employment.*[17] Because we wanted a plan that focused more on discerning one's calling in the law, we developed our own Discernment Plan.[18] The student prepares the plan in their first year; the faculty mentor remains with the student throughout law school. Thus, the faculty mentor asks the student about revisions to the Discernment Plan or whether the student wants to remain on the course originally outlined in the plan. We have found the plan to be a valuable way to ensure students are intentional in their discernment. It also requires them to take concrete steps to explore the areas that they discern as potential ones in which they will practice, and it has the benefit of providing a way of structuring students' efforts to explore the law.

Helping Students Cultivate Character Traits They Will Use in Fulfilling Their Calling

Regent was fortunate to contribute to the follow-up to the Carnegie Report and Best Practices Report. Entitled *Building on Best Practices for Legal Education: Transforming Legal Education in a Changing World*, this 2015 publication expanded on the recommendations of the Carnegie and Best Practices Reports. The chapter for which we were responsible identified the values that should be taught to law students.[19] The values are indicative of character traits based on the consensus of previous studies (the MacCrate Report in the 1990s, and the two major 2007 reports) identified as essential to serving clients. The eight goals/traits identified are: (1) Integrity—Being True to Self; (2) Honesty; (3) Diligence/Excellence; (4) Fairness/Seeks Justice & Truth; (5) Courage/Honor; (6) Wisdom/Judgment; (7) Compassion/Service/Respect for Others; and (8) Balance.[20]

In Foundations of Practice, we assign reading from various sources that address these values/traits. We have traditionally found it helpful to require students to post online comments on assigned readings and to have each student respond to at least two posts. That has ensured

16 *See* Robert R. McCrae et al., *The NEO-PI-3: A More Readable Revised NEO Personality Inventory,* 84 J. of Personality Assessment 261 (June 2005).

17 Neil W. Hamilton, Roadmap: The Law Student's Guide to Meaningful Employment (2d ed. 2018).

18 A copy of the instructions we give students in the syllabus for preparing this plan is attached as an Addendum to this piece.

19 L.O. Natt Gantt, II & Benjamin V. Madison III, *Teaching the Newly Essential Knowledge, Skills, and Values in a Changing World, in* Building on Best Practices: Transforming Legal Education in a Changing World 253-70 (Deborah Maranville et al. eds., 2015).

20 *See id.*

greater preparedness for class discussions. We mix group discussions in class, particularly when a reading includes an ethical dilemma or challenges a person's character in a way that students can discuss how they would handle the issue. Another approach that has worked well is to have students role-play a scenario and discuss the potential resolutions, including the pros and cons of each approach. We mention a well-known bias in predicting one's future actions as being ethical. We seek ways in which one can build character and develop methods that will help students reach sound moral and ethical questions.

Further, we have required written submissions explaining the methods students would follow in resolving an ethical dilemma provided to the class. We find the class discussion most engaging when students have written on a question with prompts that force them to consider the various parties affected by a decision.[22] Role-playing also effectively highlights how to deal with Rambo lawyering and how to deal with inappropriate conduct (i.e., usually contact the court or recess a deposition, for instance). Ultimately, we also ask students what the consequences are to the lawyer who engages in such behavior. The goal, of course, is to allow students to realize such a lawyer will suffer—not only in one's view of oneself, but also in a system that requires some degree of cooperation.

Another approach that has worked well is the exemplar method. We assign groups to choose a lawyer who reflects one of the eight values/traits listed above. We provide students with a list of potential candidates. We also allow groups to nominate their subject and usually concur if the subject represents the value/trait. The groups are responsible for meeting, researching their subject, preparing a presentation, and showing it to the professors before they do it in class. The group members then take turns presenting the lawyer. One of the most interesting phenomena is that, while we have some favorites, such as Abe Lincoln, many groups choose lawyers who are not well known. We encourage them to do so and provide resources such as David Linder and Nancy Levit's book, *The Good Lawyer.*[21] Presentations on lawyers of whom most have never heard have included John Doar, the Justice Department lawyer who personally accompanied James Meredith, a young black student, when the University of Mississippi racially integrated. Doar then later stopped a riot after the assassination of Medgar Evers. Doar was an example of a lawyer who displayed courage, honor, and sought justice in enormously difficult circumstances that were life-threatening (though he would have rightly bestowed those attributes to James Meredith before himself). Another lesser-known lawyer is Orville Bloathe, a small-town lawyer whose honesty and integrity earned great credibility and whose wisdom helped serve his community in many legal matters that helped keep families peaceful and together.

The presentations on lawyers such as Doar and Bloathe have a great impact. Students see lawyers who are not mythologized but were everyday people who act with dignity and respect—for which they are now admired.

Recent Efforts to Bring Students in Dialogue with Christians in Law Practice

A course in forming professional identity should expose law students to legal professionals and allow for dialogue. We have had an alumni panel in one class each year. This class was often the highlight of the semester. Students got to ask these professionals questions about practice and learn more about what life in law is like. We realized that the course would benefit from more such interaction.

Having guest speakers and other professionals practicing law speak to the class and display the character traits that we intend to teach has also been enormously effective. Professor Napier invited his former law partner, who is, as of this writing, the Attorney General for the Commonwealth of Virginia, Jason Miyares. Attorney General Miyares presented to the class and entertained questions. The Attorney General spoke about many of the beautiful aspects of, and ongoing difficulties, faced in American public service and life. He rooted the foundation of American law in Judeo-Christian values and laws

21 David O. Linder & Nancy Levit, The Good Lawyer: Seeking Quality in the Practice of Law (2014).

22 For example, client's interest, usually in how best to achieve results; lawyer's interest, at times at odds with a client's interest—*e.g.,* the lawyer wants to file in a court system that does not move quickly because the lawyer has too many cases or does not like the pressure the court brings to bear.

in the Old Testament, showing the concepts of equity and protection of the least member of society is inherent in those values and texts while giving more recent examples of amazing and ordinary people taking a stand for justice and the appropriate reform in the rule of law. Afterward, he invited students to a more informal discussion where the conversation continued.

In addition, one of the sources we used was Thomas Shaffer and Robert Cochran's *Lawyers, Clients, and Moral Responsibility.*[23] Professor Cochran was able to join us for one class and discussed his and Tom Shaffer's different models of attorneys. In their book, Cochran and Shaffer outline four main archetypes of lawyers: Godfather, Hired Gun, Guru, and Friend. The lawyer as Godfather decides what is best for the client and brings about that end, without any real regard to the client's moral misgivings, or with a paternalistic hand in convincing the client of the lawyer's viewpoint and approach.[24] The lawyer as Hired Gun is the one who does whatever the client wants, regardless of circumstance or moral effect, "empowering" the client's viewpoint and ends without questioning the means.[25] The lawyer as Guru is the lawyer who takes a position of moral and/or intellectual superiority and tells the client what to do, not based on the client's interest but based on the lawyer's sense of morality.[26] Finally, Cochran and Shaffer detail the lawyer as Friend, what they see as the most optimal disposition for a lawyer to take when the lawyer will be most concerned with the "goodness of the client," counseling with skill, and raising appropriate moral issues and potential outcomes with the client.[27] When Professor Cochran was able to visit our class this last year, he was able to lay out these four archetypes/approaches to lawyering and raise tough questions for the students to consider on the effects of these approaches in the actual practice of law. We also see raising these ethical, moral, and attitudinal approaches to lawyering in the first year of law school as a great advantage to students in exposing them to considerations most law students do not get until later years in law school and, in some cases, not until they practice law.

Finally, we took students to a law firm, where they observed what the firm was like and had the chance to listen to some of the lawyers discuss what practice is like. Lawyers at the firm were able to give practical advice on the mistakes and successes they have had in their practices, with special emphasis on humility and being willing and able to admit mistakes, even to opposing counsel, in a way that does not prejudice the client and actually fosters trust and comradery with the other side.

Overall, the course, as we teach it, is attempting to implement thoughts and ideas for orienting the students to consider the type of lawyer they want to be from the very first year of law school, not waiting until they are interns, externs, or practicing lawyers to determine who they want to be as moral agents in the practice of law and how they want to practice. Imagine how much better off we, who are or were lawyers, would have been if we were able to consider these types of questions from the beginning of law school rather than only wrestling with what a contract is or how the rule against perpetuities functions. Morality, character, and identity are as essential, if not more so, to the shaping and forming of law students into good lawyers as the blackline rules and persuasive skills that are ubiquitous in all other law school classes taught today.

Conclusion

The Institute for the Advancement of the American Legal System (IAALS) surveyed over 24,000 lawyers and asked for the qualities the respondents considered most important in law practice.[28] The results were telling: 76% of the characteristics had to do with character traits. It's nice

23 Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients & Moral Responsibility (1994).

24 *See id.* at 5-15.

25 *See id.* at 16-29.

26 *See id.* at 30-41

27 *See id.* at 42-65.

28 Institute for the Advancement of the American Legal System, Foundations for Practice: The Whole Lawyer and the Character Quotient (July 26, 2016), *available at* https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient.

to have such a study reflect something that we have found firsthand. Law schools need to do as much as possible to cultivate character. We have outlined some of the efforts that have produced results. A common theme in our efforts is that students need to be challenged from their first year on to discern the area of law in which they are called to practice and how they will handle themselves, i.e., to determine what kind of lawyers they want to be and not just what area of law they want to practice. We trust that students who exercise discernment and grow in character will find satisfaction in practice.

ADDENDUM (Discernment Plan from Foundations of Law Syllabus)

Although you will post by March 31 a rough draft of your *Plan for Discernment of Vocation Law* (Discernment Plan) after meeting with your faculty mentor and others, you will not post the final until the end of the class. Posting the rough draft by March 31, and sending it as an attachment to your faculty mentor, will help you progress on the Plan and not leave it until the end of the semester. Consider having Career Services, your faulty Mentor, your alum mentor (if you sought one), your student mentor, or anyone you think would be helpful look over your Discernment Plan.

Following are the instructions for the content and the format of the Discernment Plan:

a. **Part 1 of the Discernment Plan.** Consider the results of the Personality and Vocation Tests administered at the beginning of the class, the information you gather from meeting with your professor mentos, and reflecting on the results of these, what gifts or talents you have, what areas of law you have found most interesting (or are looking forward to exploring), and what calls do you sense from God for you to serve other in the legal field. We realize you have limited experience. However, we have found that students have more to go on than they may initially think in developing a Discernment Plan. You have a sense of the talent and gifts you have. You will also receive feedback from the tests and discussions with your faculty mentor. You also should include challenges you want to work on in this draft to achieve your goals better. For instance, if you have difficulty with time management, you would list that and suggest ways you will improve. Alternatively, do you hold yourself to such a high standard that you are not even enjoying yourself? If so, you're not alone. Most of us in law are "Type A" personalities and need to develop a more realistic way to view ourselves, as we know we will need to learn new skills and improve.

Your meetings with the clinicians at the Psychological Counseling Center, and the personality and vocational interest inventories are confidential. Your meeting with the clinician regarding the results of your NEO-PI 3 and Vocational Interest Inventory ought to provide you with some basis for this part of your Discernment Plan. However, we are not requiring you to include those in your Discernment Plan unless you so choose. You also can choose not to discuss the results with your faculty mentor if you so desire and simply tell them what you are willing to discuss. It's up to you how much you want to discuss. Students have found it useful in the past to discuss the results with their faculty mentor. For instance, students who have scored high on neuroticism are able to realize that's not a "bad" thing. (The Director of the Psychological Services Center told us when we said the term was "pejorative" that if she wanted a lawyer, she'd want one who scored high on neuroticism.) Someone high on neuroticism will be good at meeting deadlines, turning in "clean" (proofed) materials, etc. However, that person will also want to develop healthy ways to deal with stress (non-negotiable exercise, sleep routine, etc.). In the longer term, the person will want to explore what they can control (and worry about) and what they cannot control. The Serenity Prayer says you also develop a practice of asking for the wisdom to know the difference. That comes through regular prayer and people telling you what they "see" without judging. You do not want "yes" men or women who affirm everything no matter what. You want those (often look for persons with life experience) who can tell you objectively what they see. Then, over time you can develop the practice of letting go to God those things over which one has no control. Building a support network is also a great idea.

The results of your Vocational Interest Inventory are also confidential. You only have to disclose them to your faculty mentor if you so choose. The Vocational Interest inventory is to be taken as a guide. For instance, one of my colleagues was told that the best job for her was as

a bartender. That's because she's great at talking with people. Your Mentor can help you analogize to law practice the results you receive. However, you can decide the extent to which you want to share the results of any tests, as already stated.

Part 1 of your Discernment Plan will thus address the areas of practice to which you are likely best fitted in light of the strengths and challenges you share with your mentor. If you choose to discuss the NEO-PI 3 and Vocational Interest Inventory, the Discernment Plan would also reflect how that helps you in your discernment process.

b. **Part 2 of the Discernment Plan.** Moreover, the class will discuss a diverse group of judges and lawyers. These judges and lawyers will expose you to a wide range of potential areas of practice. No one expects you to pin down exactly what you will do with your legal training in your first year. However, you need to start the process. Prayer is the most important way to sense the Holy Spirit; we also commend that. As you will see, we also believe you need to act. What concrete steps will you take this semester and in the summer to get exposure to different parts of, and roles in, the legal system?

This part of the Plan will describe specific actions you plan to take over the summer (or earlier). The items need to be concrete. For example, an item would say, "I will contact lawyers in _____ [list specific lawyers or at least firms].[29] These offices or departments will ideally include lawyers who practice in the areas of practice in which you are interested and will ask to meet with these lawyers by _____ [Insert date]. If I do not hear back by _____ [insert later date], I will call _____ [lawyer or firm and ask to whom I can talk about my interest in working for [the lawyer or firm]." Your faculty mentor can help you decide on areas of practice to explore. (At Orientation Part II, Dean VanEssendelft will ask you for three faculty members you would like as a mentor. She will then assign you a mentor by mid-to-late February. You can then set up a meeting with your mentor.) It would help if you also met with Career and Alumni Services to discuss the areas of practice they suggest you consider. Career and Alumni Services offers regular panels of attorneys in different practice areas.

c. Students usually make the most fundamental decision about whether they see themselves going to court. If so, you'd be a trial attorney. That could be civil or criminal (prosecution or defense). That's very basic, but at least a start. We suggest you not make this decision before you at least observe some trials, talk to lawyers who do trial work, and pray about it. Some who swear they never would do trial work are great trial lawyers. Others who think they will be trial lawyers do something outside of court. You will only know once you try to expose and inform yourself. There are many areas of practice other than trial work. Often these are referred to as transactional work. Doing business transactions is one example. Being a lawyer specializing in wills, trusts, and estates offers yet another possible area to serve others through your legal training. Alternatively, you could handle real estate transactions. Your faculty mentor and/or the professors for this course are another resource. Professor Napier has primarily done real estate transactions. Professor Madison did civil trial work and, in pro bono cases, criminal defense. If you are interested in an area of the law, go to a professor who teaches that area and ask them about practicing in that area. Another well-kept secret is that all trials are open to the public. Thus, you can observe federal, state, etc. proceedings. General District Court in Virginia is a sure bet to have cases tried, whereas you'd want to check with the court to ensure a federal or state circuit court trial will move forward.

Your Discernment Plan *needs to record specific efforts you have made.* Indicate with whom you talked, the date, and what you discussed. When, for instance, did you meet with your faculty mentor? When did you meet with Career Services? What have you done to inform yourself of different potential areas to which you can be exposed in the summer between your first and second year? More than general descriptions will be required. Be specific so that if we check with the person you list as having met with on a given

[29] By "firms," we are also contemplating that you may explore the kind of work that a governmental law office performs, the in-house counsel's office of a law firm, or the legal department of any organization (profit or nonprofit).

date, we can confirm that you did so. Similarly, if you observe a trial or proceeding, you need to identify the court, the name of the case, the date, and what you learned.

In Part 2 of your Discernment Plan, you will also identify classes, externships, and internships. Here is the link to information on externships and internships: https://www.regent.edu/acad/schlaw/academics/externships.cfm (The primary difference between these is you get academic credit, if approved by Professor McKee or Professor Alcaide, for the externships. Internships are not for academic credit.). Professor Alcaide has told me she is happy to discuss opportunities with anyone. Please schedule an appointment with her by emailing sandalc@regent.edu. In addition, you could do extracurricular activities in which you plan to participate over your time in law school. You can find student organizations at: https://www.regent.edu/school-of-law/law-student-life/student-organizations/. We are encouraging you to become involved in only a few activities. Indeed, you should discuss with your faculty mentor how to limit your involvement and be selective. Your classes come first.

The point of the Discernment Plan is to explore, in concrete ways, the areas in which you may be interested. Regular prayer ought to be a part of any Christian's discernment process.

Post a draft to Blackboard of Parts 1 and 2 of your Discernment Plan by March 31 at midnight. Please also email your faculty mentor the rough draft so they can confirm it is consistent with your discussion and for their knowledge.

d. **Part 3 of the Discernment Plan.** Where do you believe you will find purpose in the legal field? If you are discerning God's will, *something that may (and usually does) become clearer over time,* you are almost assured of finding meaning and fulfillment in your chosen work area. We are saying the challenges of a field will be challenging. We are saying that you will sense you are making a difference in that field, and, in so doing, you will be showing God's love to others through your work and appreciating your ability to serve Him and others. You may need clarification on where to go by the time you get to this part. However, the important thing is that you note your initial sense after doing the specific tasks identified in Part 1 and Part 2.

For many, you will have a goal of reaching a position requiring interim steps. If you know you would like to work in the U.S. Attorney's office, that office requires you to have three years of courtroom experience before you qualify. Thus you would have to take your steps in stages. If that is what you anticipate, do not hesitate to chart a plan that involves stages in which you take a first job that would qualify you for another. The point is to pursue whatever it is that you sense will bring purpose to your work. That's the hallmark of fulfilling your calling. Please explain in your discussion of this Part 3 in your Discernment Plan how you hope to find a role in the legal profession in which you sense a purpose consistent with God's call.

e. Format: The Plan should be typed in 12-point type, Times Roman font, double-spaced. Part 1 should be at least two to three pages. Part 2 should be at least three to four pages (or longer if you wish). Part 3 should be at least two pages (or longer if you wish).

Please post your final Discernment Plan by April 15 at midnight. Please email your final Discernment Plan to your faculty mentor for their information.

Should Legal Education Be Transformative?

*by Edward A. David**

Introduction

Browse the website of an elite law school, and you will likely find grand statements about the institution's "transformative" education. Harvard, for instance, claims that its "learning environment" is student-centered and "transformative."[1] Not wanting to be outdone, Emory prides itself on having several "transformative . . . learning environments."[2] Gestures toward transformation abound. But what exactly is a transformative education? And why is the corresponding promise of transformation so often made?

I suspect that the ubiquity has to do with the influence of Jack Mezirow who, in the late 1970s, pioneered a novel account of adult learning known as transformative learning theory.[3] At its core, Mezirow's theory holds that student identities, or "perspectives," change for the better when students are exposed to "transformative" experiences.[4] Such experiences—which may include on-site learning and exposure to different viewpoints—go all the way down. They completely change how a person feels, thinks, and acts. Thus, they stand against older, more superficial forms of learning—rote memorization, for example.

Affirming the modern individual, Mezirow's account of transformation has become a mainstay in educational theory.[5] And so, looking back at Harvard, Emory, and similar institutions, I think it reasonable to interpret their transformative rhetoric through a Mezirowian lens. Their copywriters may not have studied under Mezirow, but his influence looms behind the screen.

Let us assume then that the transformative rhetoric of some law schools has, in fact, been influenced by Mezirow. We now ask whether legal education *should* be transformative in a Mezirowian sense. Immediately, the answer seems obvious. Of course it should! What student wouldn't want to be changed for the better? But certainly, there is more to Mezirow's theory than this, and one should wonder about *what* a transformed self would look like and *how* that self might come to be. In short, students should question and be critical when lured by "transformative" promises. As Stanley Hauerwas might say, their "character"—one's very self—depends on this.[6]

Given the stakes, a healthy dose of criticism is in order. Therefore, in what follows, I interrogate Mezirow's theory of transformative learning. And I do so with an eye toward Christian character which is "exactly what makes us what we are," yet (as I demonstrate below) is precisely what Mezirow's transformation would seek to eliminate.[7] Certainly, then, a different type of transformation—one that respects the character of students—would be welcome. On this front, the Christian tradition has many resources to offer. I explore these resources in the second half of this essay by reconstructing transformative learning upon Christian foundations.

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1 *Student Life,* Harv. L. Sch., https://hls.harvard.edu/student-life/ (last visited July 15, 2023).

2 Jasmine Reese, *Investing in Student Flourishing*, Emory Law. (Winter 2022), https://law.emory.edu/lawyer/issues/2022/winter/worth-noting/investing-in-student-flourishing/index.html.

3 Sharan B. Merriam & Laura L Bierema, Adult Learning: Linking Theory and Practice 84-86 (2014); Andrew Kitchenham, *The Evolution of John Mezirow's Transformative Learning Theory,* 6 J. Transform. Educ. 104, 119–20 (2008).

4 Kitchenham, *supra* note 3, at 104-05; Joe Levine, *Jack Mezirow, Who Transformed the Field of Adult Learning, Dies at 91*, Colum. Univ. (Oct 11, 2014), https://www.tc.columbia.edu/articles/2014/october/jack-mezirow-who-transformed-the-field-of-adult-learning-d/.

5 Kitchenham, *supra* note 3; Levine, *supra* note 4; Merriam & Bierema, *supra* note 3.

6 Stanley Hauerwas, The Peaceable Kingdom: A Primer in Christian Ethics 39 (2003).

7 *Id.*

What is Transformative Learning?

As we begin, it is important to state that transformative learning should not be demonized. Mezirow's theory has important strengths and admirable ambitions. And one can see why its features may have been tacitly adopted by law schools and other educational institutions. In this section, I outline its main features. But, in the section that follows, I highlight ways in which transformative learning falls short.

So, what is transformative learning?

Mezirow first articulated his theory in 1978 through a sociological study of women returning to higher education.[8] That articulation features ten phases of a learner's transformational journey. It begins with a "disorienting dilemma" and culminates in a reintegration of one's knowledge, skills, and relationships based on "conditions dictated by . . . [a newly acquired] perspective."[9]

Since that first iteration, Mezirow developed his account in various ways. Most significantly, he elaborated upon the theory's normative foundations such that, by the early 2000s, Mezirow had clearly strengthened its distinctly liberal commitments. Chief among these is a deep suspicion of "fixed" viewpoints. Thus, Mezirow writes that transformative learning is "learning that transforms problematic frames of reference—sets of fixed assumptions and expectations (habits of mind, meaning perspectives, mindsets)—to make them more inclusive, discriminating, open . . . and emotionally able to change."[10] Continuing, he defines these frames of reference in the following way: they are simply "[t]aken-for-granted" and include a range of phenomena, such as "fixed interpersonal relationships, political orientations, cultural bias, ideologies, schemata, stereotyped attitudes and practices, occupational habits of mind, religious doctrine, [and] moral-ethical norms."[11]

For Mezirow, it is the fixed nature of frames of reference that singles them out as problematic. To change them for the better, Mezirow insists that they must be subject to criticism—specifically a "rational process of critically assessing one's epistemic assumptions."[12] The chief way to do this, he claims, is a form of dialogue known as "critical-dialectical discourse," which elevates transformative learning into "emancipatory learning"[13]—learning that frees a person from their former, and current, chains.

In sum, transformative learning has three parts: (1) it assumes that students come to the classroom with *problematic frames of reference*; (2) it asks students to critically reflect upon their assumptions and to change them through *critical-dialectical discourse*; and, thus, (3) it aims to *transform* students' frames of reference.

Transformation Into What? How?

If we were to take a bird's-eye view, we would be enamored with the general aspirations of transformative learning. Again, who would not want to be changed for the better, to be more critical and open-minded? But the devil is in the details. And in each part of Mezirow's theory, there are important features to interrogate. In this section, I raise two sets of moral objections, relying not on theological arguments but on the assumptions and internal inconsistencies of transformative learning itself. Before doing so, however, allow me to briefly elaborate upon the theory's central feature: critical-dialectical discourse.

Inspired by the political philosophy of Jürgen Habermas, Mezirow defines critical-dialectical discourse as "a form of dialogue in which the validity of ideas is seen as hypothetical and is explicitly addressed as problematic."[14] Mezirow writes: "In discourse, we suspend our *a priori* judgment about the value of an idea and let the weight of evidence . . . establish or negate its va-

8 Jack Mezirow, Education for Perspective Transformation: Women's Re-entry Programs in Community Colleges (1978).

9 Kitchenham, *supra* note 3, at 105.

10 Jack Mezirow, *Transformative Learning as Discourse,* 1 J. Transform. Educ. 58, 58 (2003).

11 *Id.* at 59.

12 John M. Dirkx et al., *Musings and Reflections on the Meaning, Context, and Process of Transformative Learning: A Dialogue Between John M. Dirkx and Jack Mezirow,* 4 J. Transform. Educ. 123, 133 (2006).

13 Mezirow, *supra* note 10, at 60–61.

14 Jack Mezirow, *Concept and Action in Adult Education,* 35 Adult Educ. Q. 142, 143 (1985).

lidity. . . [I]t is a consensus among participants . . . that determines validity."[15] Discourse thus understood has a certain liberal appeal: no idea is inherently better than the other, and validity is reached through a consensus among equals. Indeed, Mezirow himself associates transformative learning with democratic participation. Both, he claims, are "an important means of self-development . . . producing individuals who are more tolerant of difference, sensitive to reciprocity, [and] better able to engage in moral discourse."[16]

Here, too, the general aspirations are to be admired, especially in the context of legal education. But insofar as transformative learning goes all the way down, affecting student identities, we should remain skeptical. In fact, the more one examines Mezirow's theory, the more its liberal aspirations collapse into illiberal mandates.[17]

A. Critical-Dialectical Discourse Is Illiberal

First, consider transformative learning's central feature, critical-dialectical discourse, which, as just noted, aims to arrive at a (moral) consensus among participants.[18] This aspiration is as unrealistic as it is illiberal.

To start, it is highly unlikely that all students (i.e., dialogue partners) will enter critical discourse having truly suspended their *a priori* judgements—including their own values. As David Hume says, and as Jonathan Haidt empirically confirms, "[moral] reason is . . . the slave of the passions."[19]

Furthermore, in an ethically pluralist student body, some or even many dialogue partners may embrace moral systems that rub against the radical liberal ethos of transformative learning. For instance, some students may espouse community-based ethics that consider interpersonal relationships, not individual autonomy, to be morally paramount. Such relationships hold communities together: their functional effectiveness relies upon fixed perspectives (traditions, mores, conventions, etc.) that community members view as authoritative.

While such perspectives can and do develop over time, and while certain perspectives probably ought to morally change, critical-dialectical discourse seems to wish upon them a state of permanent instability. This would undermine their functional effectiveness. From a communal ethic, such undermining can destroy associations themselves. From a liberal ethic, it can harm the associating individuals in turn. In this sense, then, critical-dialectical discourse tends toward the illiberal: its ideal involves a flattening of substantive moral perspectives—including those espoused by diverse groups—for the sake of consensus.

Indeed, transformative learning's notion of consensus *is* illiberal. Mezirow claims that the use of evidence in discourse "would lead *any* rational, objective and informed judge to come to the *same* conclusion."[20] This is an astonishing claim that deserves two rejoinders. First, for the sake of argument, assume that Mezirow's judge endorses a Rawlsian form of rationality, a type of public reason that adjudicates by "political values alone," not by deeply held convictions or "comprehensive doctrine[s]."[21] In a "veil of ignorance" scenario, critical-dialectical discourse could result in a shared conclusion concerning treatment of the least well-off in society, for instance.[22] However, in actual fact, unbridled passions and private interests would likely chip away at that idealized consensus.

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15 *Id.*

16 Mezirow, *supra* note 10, at 62.

17 A similar complaint is made regarding transformative learning and consent. *See* Douglas W. Yacek, *Should Education Be Transformative?*, 49 J. Moral Educ. 257 (2020).

18 Transformative learning also addresses non-moral phenomena such as scientific theorems. However, given Mezirow's emphasis upon personal transformation, I stress the theory's moral aims.

19 David Hume, A Treatise of Human Nature II.3.3, 415 (David F. Norton & Mary J. Norton eds., 2006); Jonathan Haidt, The Righteous Mind: Why Good People Are Divided by Politics and Religion 29 (2013).

20 Mezirow, *supra* note 14, at 143 (emphasis mine).

21 John Rawls, *The Idea of Public Reason Revisited, in* The Law of Peoples with "The Idea of Public Reason Revisited" 129, 164 (1999).

22 John Rawls, Justice as Fairness: A Restatement 15 (Erin Kelly ed., 2001).

Following this, a second and more important criticism emerges: critical-dialectical discourse is stricter than Rawls's public reason in an important sense. It demands liberal consensus with respect to *personal* views and thus infiltrates private life. By contrast, public reason (in theory) is only concerned with *public* views (dealing with "constitutional essentials") and so is far less personally threatening than transformative learning.[23] This asymmetry is inappropriate for a theory that is held out to be "the other side of the coin" of democratic participation.[24]

Finally, consider the procedural nature of critical-dialectical discourse. In modern democracies, proceduralism entails the rule of law, which helps ensure fair processes and equal access to justice.[25] Critical-dialectical discourse offers a procedure for consensus-making and so falls within a proceduralist ideal. Yet, insofar as that procedure disparages only certain perspectives, critical-dialectical discourse is not the liberal tool that Mezirow considers it to be. Indeed, critical-dialectical discourse treats certain perspectives unequally in the first instance. As Mezirow claims:

> not all frames of reference are equal; some are more useful in dealing with diverse or changing circumstances . . . Generally speaking, frames of reference that are more inclusive, differentiating, open to other perspectives, [and] critically self-reflective . . . are better able to deal with a wider range of decision-making.[26]

Normatively loaded, critical-dialectical discourse is biased from the start. What grounds are there for students to trust it?

B. Transformative Learning Lacks Moral Coherence

Perhaps students would place more trust in transformative learning if they could understand, and critically engage with, the details of its underlying moral theory. Unfortunately, this is a difficult task. For it seems that transformative learning is animated by theories that are incompatible with each other. Indeed, it could be utilitarian, pragmatic, (il)liberal, or (surprisingly) of an ethically naturalist hue.

Consider a utilitarian characterization: would transformative learning attract the Benthamites among us—students who see legal education as a means to, say, high salaries? Mezirow might think so. After all, transformative learning values frames of reference that are "useful" for "diverse or changing circumstances."[27] Today's legal market is certainly changing.

Yet, Mezirow elsewhere suggests that transformative learning is pragmatic, perhaps in a Deweyan way. In particular, he says that critical-dialectical discourse is "simply . . . found to work *better* in more circumstances than . . . other options."[28] But better for what? Like most pragmatists, Mezirow (mostly) refrains from offering fixed ethical guidance: in a certain sense, anything goes.

However, if transformative learning is to really motivate (and if the "transformative" rhetoric of law schools is to be more than hot air), then it would do well to adopt an inspiring moral purpose. Of course, to do this, transformative learning must be *for* a specific thing. Most schools might say that transformation is for justice. This is appropriate and sensible. But Mezirow would say that transformative learning is for the formation of a certain type of student, one with no "fixed" normative commitments. Here, again, we verge into the illiberalism as discussed above.

All that said, another—and surprisingly plausible—characterization is available: transformative learning could be aligned with a form of ethical naturalism. (Maybe, then, a school's natural lawyers would be keen to support it.)

Elaborating on critical-dialectical discourse, Mezirow claims that its procedure is "predicated

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23 Rawls, *supra* note 21, at 168.

24 Mezirow, *supra* note 10, at 62.

25 Lon Fuller, The Morality of Law 153 (Yale Univ. Press rev. ed. 1969).

26 Jack Mezirow, *Beyond Freire and Habermas: Confusion. A Response to Bruce Pietrykowski,* 46 Adult Educ. Q. 237, 238 (1996).

27 *Id.*

28 Jack Mezirow, *On Critical Reflection,* 48 Adult Educ. Q. 185, 188 (1998) (emphasis mine).

upon universal principles" that relate to the operation of reason itself. [29] Such principles include judgment, meanings, and validations. And they, Mezirow claims, explain shared values across space and time. "Some . . . validations are universal in scope," he writes. "This is why quite different cultural traditions share many of the same values—like life, health, children, kinship, love . . . while often making different interpretations of how to apply them."[30]

Mezirow may not equate these values with "eternal verities" (indeed, he rejects "an order of reality that transcends the empirical world"), but his comments seem to endorse a form of ethical naturalism.[31] Would he claim that these values should inform moral reasoning? Would he thus find moral wisdom outside of a consensus-seeking procedure? If so, then transformative learning may not be so aggressively positivist as one might think.

With this possibility in hand, let us leave Mezirow's fuddled ideas behind. Perhaps we can make better moral sense of transformative learning by looking elsewhere.

A Theological Reconstruction

Thus far, I have argued that transformative learning is problematic due to its illiberal tendencies and moral incoherence. I raised these points by attending to its own assumptions and internal inconsistencies, and, notably, no theological critique was needed. At this point, however, we would do well to turn our criticism into positive construction, converting the weakness of transformative learning into its strength. Wisdom from the Christian tradition can help.

In this section, then, I provide an alternative construction of Mezirow's theory. I retain its three parts—pertaining to frames of reference, critical-dialectical discourse, and transformation—but recast them using Christian ethical intelligence. It is this intelligence that helps us appreciate what a genuine and ethically appropriate form of transformation might look like. As I suggest below, true transformation entails a caring and patient cultivation of student character.

A. Recognizing the Good in Different Viewpoints

Recall the first part of Mezirow's theory: it assumes that students come to the classroom with a *problematic* frame of reference. Recall, too, that it immediately views some frames of reference as more problematic than others. Behind this judgement, I propose, is a restrictive notion of rationality, one that too readily discounts "fixed" beliefs and commitments.

How might a Christian perspective respond? To start, we turn to reason as conceived within the Christian tradition. In some of its most influential strands, the tradition treats human reason more generously than Mezirow's implicit account. For instance, with Saint Augustine, tradition holds that reason always reaches out to the good: even if a desired end is ultimately morally questionable, reason finds in it a semblance of goodness.[32] This point is adopted by Saint Thomas Aquinas, as well, who notes that conscience—even when it errs—responds to the goodness that is rationally perceived.[33] In other words, a Christian account of reason is positive and affirming in the first instance: everyone pursues good; there are (good) reasons for their actions and beliefs.[34]

This is all very well, one might say. But a critic would point to the moral judgements that Christian reasoning would eventually make. Such judgements, the critic would stress, can be equally dogmatic and ready to condemn. This rejoinder, however, misses the point. At issue here is the *immediacy* with which reason reaches its moral conclusions. Reason within Mezirow's paradigm judges immediately, based on tenuous notions of fixedness or utility. Christian rea-

29 *Id.*

30 Mezirow, *supra* note 26, at 237.

31 Mezirow, *supra* note 28, at 188.

32 Saint Augustine, The City of God against the Pagans bk. XIX, ch. 1 (R. W. Dyson tran., 1998).

33 Thomas Aquinas, Summa Theologiae pt. I, q. 79, art. 13 (English Dominicans ed., 1964).

34 *See, e.g.,* Oliver O'Donovan, Resurrection and Moral Order: An Outline for Evangelical Ethics (2d ed. 1994); G.E.M. Anscombe, *Modern Moral Philosophy, in* Human Life, Action and Ethics: Essays 176 (Mary Geach & Luke Gormally eds., 2005).

son, on the other hand, recognizes (perceived) good(s) from the very beginning; and only later, through *informed* deliberation, does it sift the wheat from the chaff and thus terminate in moral conclusions.[35]

I address *what* may inform Christian moral reasoning immediately below. But first, let us replace Mezirow's notion of rationality with our Christian alternative. Now, transformative learning—in its first part—no longer considers student perspectives to be initially problematic. Instead, it accepts students' frames of reference as immediately "valid," as aiming toward intelligible goods. While those frames may eventually require moral adjustment, our renewed first part remains open to the goods and reasons pursued.

B. Embracing Community Membership

The second part of Mezirow's theory asks students to reflect upon their assumptions and to change them through the exacting norms of critical-dialectical discourse. One of the troubles with this demand is its assumption that the human person is little more than a transcendental "I." Never fully attached to prior moral convictions, this "I," as Hauerwas might say, is "impersonal" and "free from [a given] history."[36] It is infinitely malleable through choice.

This post-Kantian characterization is problematic for reasons relating to moral identity and formation. One way to debunk it is to use empirical data that underscore the contextualized (including habitual) aspects of human nature. For instance, moral psychologists affirm that humans form deeply engrained habits early in life and within particular communities.[37] It is difficult to change them and can even be dangerous to do so.[38]

Complementing the psychological, we look to Christian insights that speak to our nature as storied, or "historied," beings. Hauerwas reminds us that human existence is, in fact, "historically determined," such that "our moralities are [inescapably] historical."[39] David Fergusson, too, notes that ethical commitments "*must* be borne by a community in which historical examples are remembered and interpreted in the light of new circumstances."[40]

Christian thinking, then, both recognizes the givenness of our communal existence and affirms this as something good. For that groupish nature is the foundation upon which our personal histories, i.e., our moral character, is built. And, indeed, God builds through the words of the church, through "a very definite story with [morally] determinative content," says Hauerwas.[41] This is the church's story of Christ: through it, we "see the world rightly."[42]

Is moral formation confined to the church alone? By no means. Any community in which excellence is practiced can positively shape our habits of mind.[43] And so, even if we acknowledge the church as the most complete moral community, we can still affirm the moral contributions of virtuous community life—no matter its concrete manifestations.

A Christian perspective thus takes umbrage with Mezirow's transcendental "I," the person psychologically unmoored from prior convictions. In its place, a renewed vision of transformative learning would embrace (fixed) communal narratives for their normative value. It would encourage students to embrace those narratives and to be open to learning from new ones. No mandate of perpetual change is required. The

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35 Aquinas, *supra* note 33; *see also* Haidt, *supra* note 19, at 47 (describing the distinction between moral judgment, which is made immediately and emotionally, and moral reasoning, which requires deliberate thought).

36 Hauerwas, *supra* note 6, at 39.

37 *See, e.g.,* B. R. Andrews, *Habit,* 14 Am. J. Psychol. 121, 144 (1903); *see also* Aristotle, Nicomachean Ethics bk. I, chs. 7-9 (W. D. Ross trans., 2009).

38 Haidt, *supra* note 19, at 59; Yacek, *supra* note 17.

39 Hauerwas, *supra* note 6, at 29.

40 David Fergusson, Community, Liberalism and Christian Ethics 53 (1998) (emphasis mine).

41 Hauerwas, *supra* note 6, at 30.

42 *Id.*

43 Alasdair MacIntyre, After Virtue: A Study in Moral Theory (3rd ed. 2007).

contextualized "I" has permission to be and to grow.

C. Cultivating Character

The final part of Mezirow's theory is its intended end: the transformation of students' frames of reference. Based on our discussion above, a Christian re-interpretation could read as follows: the end of transformative learning is a *transformation in moral vision,* one that results (in part) from an acknowledgement of the goodness sought in students' frames of reference and from an appreciation of the communal narratives that may inform those views.[44]

On this construction, transformation is a complex, moral phenomenon. It entails an interaction between right moral reason and a patiently cultivated moral character (the former flows from the latter, while the latter is shaped by the former).[45] It requires individual agency and communities of excellence (virtue cannot be forced into an individual, but it requires communal support).[46] And, importantly, it can be imagined in plural ways (different stories, reaching toward different goods, can be lived together, in the same time and place).[47]

Education that strives for *this* type of transformation may rightly be called liberal. And educators who aim towards it do so with a certain humility: they are open to student perspectives; they encourage critical discourse; and they ensure the scales are not tipped against certain individuals and communities. These efforts engender trust in the procedures and aims of transformative learning.

Conclusion

If legal education is to be transformative, then it should be transformative in a Christian sense. At its bare minimum, this requires neither an institutional display of Christian credentials nor a formal association with a church. Instead, it requires Christian insight, including an openness to reason and an appreciation of diverse communal narratives, including religious stories. Stories in particular are to be valued—for they not only inspire us to become better, but they also constitute our very selves. Thus, Christian character lies at the heart of genuine transformation.

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44 *See generally* Stanley Hauerwas, Vision and Virtue: Essays in Christian Ethical Reflection (1981); Stanley Hauerwas, Character and the Christian Life: A Study in Theological Ethics (1985).

45 *See* John Finnis, Aquinas: Moral, Political, and Legal Theory 23 (1998) (discussing self-determining action). Consider also the relation between virtue and practical reasoning. *See, e.g.,* Alasdair MacIntyre, Dependent Rational Animals: Why Human Beings Need the Virtues 92 (1999); *see also* Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 J. Ethics 163 (1999) (offering a critical survey of theories of virtue in relation to reason).

46 *See* Lisa Tessman, Burdened Virtues: Virtue Ethics for Liberatory Struggles 107-32 (2005) (offers a discussion of virtue and force). MacIntyre's developing thoughts around virtue and community are also worth noting. *See, e.g.,* MacIntyre, *supra* note 43; Alasdair MacIntyre, Whose Justice? Which Rationality? (1988); MacIntyre, *supra* note 45.

47 One should not be naïve about this. Tensions can and will arise. *See* Joshua Hordern, Loyalty, Conscience and Tense Communion: Jonathan Edwards Meets Martha Nussbaum, 27 Stud. Christ. Ethics 167 (2014) (offers a Christian approach to the "tense communion" that features in social life today).

Rethinking the Concept of Neighbor: Christian Nationalism & Undocumented Refugees in the Immigration Reform Debate

*by Jonathan C. Augustine**

Introduction

I am an ordained Christian minister who studied law and had the benefit of seminary education. Because of my educational training and service in the church, I see immigration—and the United States' failure to enact meaningful immigration reform laws—through both legal and faith-based lenses. That dual perspective is exactly why I call out America's "Otherism,"[1] and challenge readers to rethink the concept of "neighbor" as outlined in the famed parable of the (Good) Samaritan.[2]

Although I *do not* believe America is a "Christian nation,"[3] I do believe scripture should be a moral guide for Christianity's faith adherents in America.[4] Oddly enough, however, because of the reluctance of so many American pastors to be "political,"[5] many evangelical Christians only

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1 I use the term "Otherism" as a close derivative of xenophobia in that it is rooted in a fear of the "Other." Although Otherism acknowledges differences in the social construct of race and social differences, based on sex and/or gender, it should not be confused with either racism or sexism. Otherism is more closely connected with the recently popularized "Great Replacement Theory" or "White Replacement Theory," whereby whites have voiced more opposition to Jews, minorities, and immigrants for fear that said groups are replacing them in America's social hierarchy and general population. *See, e.g.*, Jonathan C. Augustine, *A Theology of Gumbo for the Divided States of America,* What Went Wrong?, https://www.whatwentwrong.us/a-theology-of-gumbo-for-the-divided-states-of-america (last visited Aug. 4, 2023).

2 *See Luke* 10:25-37 (NRSV).

3 *See, e.g.,* Richard T. Hughes, Myths America Lives By: White Supremacy and the Stories That Give Us Meaning 83 (2018) ("Nowhere does the Constitution mention God or any other religious symbol. And when, finally, the First Amendment to the Constitution speaks of religion for the very first time, it makes perfectly clear that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' In other words, while the American people would be free to practice any religion, they would also be free to practice no religion at all.").

4 *See generally* Ellen Clark Clémot, Discerning Welcome: A Reformed Faith Approach to Refugees (2022); *see also* Stephan Bauman et al., Seeking Refuge: On the Shores of The Global Refugee Crisis 29 (2016) (providing that for those who profess to be Christians, the top authority on complex topics should be the Bible).

5 With respect to clergy activism, I specifically distinguish between pastors who are "political" and this politics of "partisanship," by noting that pastors' engagement in politics is expected in Christian ministry. *See generally* Jonathan C. Augustine, When Prophets Preach: Leadership and the Politics of the Pulpit (2023). Indeed, Jesus began his public ministry with a very *political* declaration:

> The Spirit of the Lord is upon me because he has anointed me to bring good news to the poor. He has sent me to proclaim release to the captives and recovery of sight to the blind, to let the oppressed go free, to proclaim the year of the Lord's favor.

Luke 4:18-19. Moreover, in the wake of Martin Luther King, Jr.'s, success in leading the Montgomery Bus Boycott, the genesis of the Civil Rights Movement, he addresses the nature of Christianity, and impliedly its *political* birth amid Jewish marginalization within the Roman empire by writing, "[t]he Christian ought to always be challenged by any protest against unfair treatment of the poor, for Christianity is itself such a protest." Martin Luther King, Jr., Stride Toward Freedom: The Montgomery Story 93 (Beacon Press 2010) (1958). The English word *politics,* as derived from Greek, literally means "affairs of the cities." *See* Augustine, *supra* note 5, at 19.

see immigration as a political, social, or cultural issue and have not considered the Bible's teachings on the subject as part of their faith journey.[6] I challenge readers to adopt perspectives on immigration that are consistent with scripture while simultaneously encouraging faith adherents to engage in civil disobedience, or *divine obedience*, when the laws of the land conflict with the laws of God.[7]

With a nod toward Jesus's interaction with a fellow Jew, a lawyer, and one of the Bible's most popular ambiguties regarding the definition of a "neighbor," I apply lessons from the parable of the (Good) Samaritan to argue that its American readers should be guided by Jesus's teach-

6 Bauman, *supra* note 4, at 29.

7 *See generally* Jonathan C. Augustine, *A Theology of Welcome: Faith-Based Considerations of Immigrants as Strangers in a Foreign Land,* 19 Conn. Pub. Int. L.J. 248 (2020); *see also* Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders, and Passage of Voting Rights Act,* 21 S. Cal. Interdisc. L.J. (2012).

8 Although the "Make America Great Again" (a/k/a "MAGA") narrative is widely associated with the 2016 and 2020 presidential campaigns of Donald Trump, my use of the term is by no means limited to any individual or particular political campaign. Instead, my usage describes a socially regressive brand of politics often characterized by discrimination against immigrants, minorities, and Jews, with roots in Christian nationalism. *See, e.g.,* Obery M. Hendricks, Jr., Christians Against Christianity: How Right-Wing Evangelicals Are Destroying Our Nation and Our Faith (2021). In specifically identifying the brand of identity politics I describe as Christian nationalism, how it is has been coopeted by evangelical Christians, and how the same is deeply interwoven within the MAGA political narrative, Obery M. Hendricks writes:

> Christian nationalism not only purveys the myth that America was founded as a Christian nation but also that it should be governed according to the biblical precepts that Christian nationalists themselves identify as germane . . . . Thus, Christian nationalism is best understood as a political ideology that holds that America's government is not legitimate, nor can it be, until its laws and policies are thoroughly consistent with the Christian nationalists' narrow, sometimes idiosyncratic, and at times convoluted readings of the biblical text. This, while the tenets of evangelicalism essentially comprise right-wing evangelicals' religious beliefs, Christian nationalism is the political ideology that guides and motivates the pursuit of their social interests in the world. The spectacle we see taking place in the public square today is right-wing evangelicals' Christian nationalist convictions taking precedence over their religious beliefs. This is fully reflected in right-wing evangelicals' voter turnout for Donald Trump . . . . Indeed, despite his well-earned reputation for racism and moral indecency, those who most enthusiastically supported his candidacy are numbered among the most ardent evangelical believers.

Id. at 4; *see also* Jonathan C. Augustine, Called to Reconciliation: How the Church Can Model Justice, Diversity, and Inclusion 73 (2022).

9 Sociologists Andrew Whitehead and Samuel Perry argue that the United States currently has several cultural and political issues driving a wedge down the middle of its existence, including immigration reform. Andrew L. Whitehead and Samuel L. Perry, Taking America Back for God: Christian Nationalism in the United States ix (2020). In attempting to contextualize Christian nationalism, an often-misunderstood factor that contributes to the country's increasing polarization, the authors write the following:

> Though journalists and historians have bandied about the term a good deal in the past decade, we mean 'Christian nationalism' to describe an ideology that idealizes and advocates a fusion of American civic life with a particular type of Christian identity and culture. We use 'Christian' here in a specific sense. We are not referring to a doctrinal orthodoxy or personal piety. (In fact, we find some Christian nationalists can be quite secular.) Rather, the explicit ideological content of *Christian* nationalism comprises beliefs about historical identity, cultural preeminence, and political influence . . . . This includes symbolic boundaries that conceptually blur and conflate religion religious identity (Christian, preferably Protestant) with race (white), nativity (born in the United States), citizenship (American), and political ideology (social and fiscal conservative). Christian nationalism, then, provides a complex of explicit and implicit ideals, values and myths—what we call a 'cultural framework'—through which Americans perceive and navigate their social world.

Id. at x (emphasis in original). Further, in *The Flag and the Cross,* the authors write, "[w]e define white Christian nationalism and identify white Christian nationalists using a constellation of beliefs. These are beliefs that, we argue reflect a desire to restore and privilege the myths, values, identity and authority of a particular ethnocultural tribe." Phillip S. Gorski & Samuel L. Perry, The Flag and the Cross: White Christian Nationalism and the Threat to American Democracy 14 (2022). Moreover, in describing that *particular* tribe (white, Anglo-Saxton Protestants) the authors go on to share that the tribe's political vision privileges it, to the exclusion of others, while putting the other tribes (*i.e.,* immigrants, minorities, and Jews) in their "proper" place. *Id.*

ings and reject the Otherism that has become so widespread, especially since the emergence of the "Make America Great Again" ("MAGA") political narrative,[8] and the resurgence of Christian nationalism,[9] specifically, *white* Christian nationalism.[10] Indeed, my central argument is that Christian nationalism's xenophobic Otherism must be combatted with a faith-based theology of welcome, *not* open borders, that sees immigrants, in general, and refugees,[11] in particular, as fellow human beings.

A. The Parable of the *Good* Samaritan and this Article's Focal Question

In the popular parable, a lawyer—likely a pharisaic theologian who was well-schooled in Mosaic law—tries to trick Jesus with a question about how he would inherit eternal life. Instead of directly answering the lawyer, Jesus tells him about three passersby who meet a man left for dead on the side of the road. Two of them, a priest and Levite, are both Jewish, just as is presumed about the wounded man in desperate need of assistance. They each go to the other side of the road to avoid any contact with their fellow wounded Jew. The third passerby, however, a *Samaritan*—someone of a different race and/or ethnicity—is moved to action

Considering the well-known differences between Jews and Samaritans, Jesus was obviously trying to prove a point about moving past Otherism and unconscious bias and embracing an ethic of empathy. With this famous parabolic discourse, Jesus gives us reason to reconsider what it means to be a "neighbor" to someone in need. Consider the following:

> Just then a lawyer stood up to test Jesus. "Teacher," he said, "what must I do to inherit eternal life?" He said to him, "What is written in the law? What do you read there?" He answered, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself." And he said to him, "You have given the right answer; do this, and you will live."
>
> But wanting to justify himself, he asked Jesus, "And who is my neighbor?" Jesus replied, "A man was going down from Jerusalem to Jericho, and fell into the hands of robbers, who stripped him, beat him, and went away, leaving him half dead. Now by chance a priest was going down that road; and when he saw him, he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But, a Samaritan, while traveling, came near him; and when he saw him, he was moved with pity. He went to him and bandaged his wounds, having poured oil and wine on them. Then he put him on his own animal, brought him to an inn, and took care of him. The next day he took

10 Anthea Butler describes this phenomenon of Christian nationalism, and specifically *white* Christian nationalism, as, "the belief that America's founding is based on Christian principles [and that], white [P]rotestant Christianity is the operational religion of the land, and that Christianity should be the foundation of how the nation develops its laws, principles, and policies." Anthea Butler, *What is White Christian Nationalism?, in* Christian Nationalism and the January 6, 2021 Insurrection 4 (Feb. 9, 2022), *available at* https://bjconline.org/jan6report.

11 Within the United States' immigration system, there are five broad categories used to classify people: (1) a United States citizen; (2) a lawful permanent resident; (3) a nonimmigrant; (4) an undocumented or unauthorized foreign national; and (5) a refugee. Ayodele Gansallo & Judith Bernstein-Baker, Understanding Immigration Law and Practice 3 (2d ed. 2020). Within the foregoing classifications, a *refugee* is specifically categorized as:

> [A] foreign national who faces persecution in his or her home country and has been granted protection so that s/he does not have to return there. Those who enter the United States as refugees receive their status while outside the country; individuals already physically present in the United States who seek protection apply for asylum and, if granted, are known as asylees. Refugees and asylees are expected to apply for lawful permanent resident status after one year of the grant of their protective status and eventually can apply to become citizens.

Id. There is also an ethical issue of disconnect worth noting. The United Nation's Convention on the Status of Refugees of 1951 assures refugees seeking asylum in another nation-state that they will not be returned to the country from which they fled. Under the United States' policies, however, an unauthorized resident seeking asylum is not considered a refugee for purposes of applying the Convention. Clémot, *supra* note 4, at 9 (internal citations omitted).

> out two denarii, gave them to the innkeeper, and said, "Take care of him; and when I come back, I will repay you whatever more you spend." Which of these three, do you think, was a neighbor to the man who fell into the hands of the robbers?" He said, "The one who showed him mercy." Jesus said to him, "Go and do likewise."[12]

Jesus creates a space for introspective reflection on the duty people of faith have in responding to those in need. Similarly, Martin Luther King, Jr., addressed this parable while speaking the night before his assassination in Memphis, Tennessee, noting that although the priest and the Levite asked the question, "What will happen to me, if I stop and help this man?", the Samaritan appropriately reversed the question, "If I do not stop and help this man, what will happen to him?"[13]

So many immigrants are in the same position as the nameless man—"left for dead"—in that they desperately need assistance, too. Moreover, because of the parable's background—the cultural and ethnic differences that existed between Jews and Samaritans—Jesus is also giving a lesson on human commonality and the necessity that we move past social constructs, like race, to help one another.

B. This Article's Structural Organization

This Article structurally proceeds in five parts. In building upon the foundation established in this Introduction, Part II contextualizes the xenophobic ideology of Christian nationalism by looking at America's historical perspectives of "welcome" and "unwelcome" toward immigrants, with a focal point of how immigrants have been treated in recent years, partially because of economic fears and various forms of race-based politics.

In building upon Part II, Part III explores examples of the practice of welcome evidenced in scripture before Part IV pivots to briefly highlight America's legal history in immigration, specifically why immigration control is a measure of congressional authority and how Congress has discriminatorily enacted immigration laws. Part V then concludes this Article by revisiting Jesus's parabolic lesson, in response to the lawyer's question, and encouraging all to welcome those refugees already living in America

How Otherism Keeps Immigrants Out of America

A. America's Two Perspectives on Immigration

The United States has two very different perspectives on immigration.[15] Inasmuch as both perspectives are literally as old as America itself, both perspectives also have a very relevant place, in terms of today's political dichotomy of attitudes towards immigrants. Consider the following:

> The history of the United States' immigration policy reflects the tension of the two Americas that has been a part of the national debate since the founding of the country. As some colonist frowned upon German speakers, other attacked Catholics and Quakers. By the time the nation's second president, John Adams, took office, the debate was on between the two visions of America—one nativistic and xenophobic, the other embracing of immigrants. As such, the country has

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12 *Luke* 10:25-37.

13 Martin Luther King Jr., *I See the Promised Land, in* A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 285 (James M. Washington ed., 1986).

14 The United States has a well-documented history of treating different immigrants—based on race, ethnicity, and socioeconomic status—*differently.* As the authors of *Immigration Law and Social Justice* remind us:

> There have always been two Americas. Both begin with the understanding that America is a land of immigrants. One America has embraced the notion of welcoming newcomers from different parts of the world, although depending on the era, even this more welcoming perspective may not have been open to people from certain parts of the world or different persuasions.

Bill Ong Hing et al., Immigration Law and Social Justice 12 (2d ed. 2022).

15 *Id.*

> moved forward with policies that fall somewhere in the middle.[15]

I respectfully argue that, at the center of these divergent perspectives—acting almost like a line of demarcation—is the Bible's perspective(s) on immigration.[16]

One American perspective of "enlightenment and welcome" has been supported by progressive, faith-based policies that seek commonality with geographic neighbors, especially those fleeing religious persecution from their countries of origin.[17] This perspective sees America as a place that provides refuge and hope to nationals of other lands, especially those who immigrate to America's borders in search of opportunity. Indeed, George Washington is reported to have said, "[t]he bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions."[18]

In yesteryear, as people began populating America in specific waves, and as those waves became associated with discernable racial and ethnic groups, this enlightenment and welcome perspective lent itself to the popular cliché that America is a "melting pot." As a physical reminder of this perspective, Ellis Island's Statue of Liberty, dedicated as a gift from France in 1886, includes the following words from the Jewish-American poet Emma Lazarus:

> Give us your tired, your poor, Your huddled masses yearning to breathe free; The retched refuse of your teeming shore, Send these, the homeless, tempest-tost to me. I lift my lamp besides the golden door.[19]

With respect to that figurative golden door of entry into the United States, there is indeed a popular expression that provides, "America is a nation of immigrants."[20]

As a sharp contrast, however, the other perspective is one of (un)welcome. It is supported by a brand of *white* Christian nationalism that sees America as "set apart" by divine order and operating independently from the Jews, minorities, and immigrants who want to live in the American neighborhood, where only *real* Americans are welcome. Based on my argument of how *white* Christian nationalism influences the immigration debate, consider the following:

> "[W]ho is American" has been defined and redefined throughout our history. When restrictionists—the standard bearers of the Eurocentric real American concept—have had their way, exclusionist rationales have been codified reflecting negative views toward particular races or nationalities, political views (e.g., communists or anarchists), religions (e.g., Catholics, Jews,

16 As an irony, the Bible also depicts two different perspectives on immigration, in the books of Genesis and Exodus, as Egypt was under the leadership of two different pharaohs. In Genesis, when Joseph's Hebrew father and brothers fled famine and sought refuge in Egypt, that pharaoh welcomed the Israelites immigrants and offered them the best of the land. *See Genesis* 47:6. Conversely, however, the pharaoh depicted in Exodus believed that Joseph's Hebrew descendants "had become too numerous" and consequentially presented risks to national security. *See Exodus* 1:9. The same fear articulated by the Exodus pharaoh is the fear undergirding the White Replacement Theory's anti-immigrant bias, *see, e.g.,* Augustine, *supra* note 1, and the xenophobia behind Trump's immigration policies. *See generally* Augustine, *A Theology of Welcome, supra* note 7, at 247-48.

17 *See, e.g.,* Clémot, *supra* note 4, at xi (introducing readers to Roby, an Indonesian refugee who fled religious persecution and was active as a member of the congregation Clémot serves until Immigration and Custom Enforcement agents arrested him after dropping his daughter off at her New Jersey high school).

18 Hing et al., *supra* note 14, at 10 (internal citations omitted).

19 *Id.* at 11.

20 This general statement must be qualified, from an African American perspective, because America's foundational system of chattel slavery laid a foundation for the country's racially infused immigration system. Professor Rhonda V. McGee addresses this reality by writing:

> [S]lavery was, in significant part . . . an immigration system of a particularly reprehensible sort: a system of state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low economic cost.

Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. Rev. 273, 277 (2009).

> Muslims), or social groups (e.g., illiterates, homosexuals). Those grounds for exclusion are every bit about membership in a Eurocentric American standard that requires that undesirables be kept out.[21]

Indeed, in the eyes of some, any threat to God's "original" establishment of the hierarchy of America—including the inclusion of *immigrants*, minorities, and non-Christians as part of America's sociopolitical order—is antithetical to God's intention for God's "chosen nation."[22]

B. How Xenophobic "Otherism" Fuels the Immigration Debate

As many Americans are concerned about the economy, the politics of (white) Christian nationalism can use economic fears as a basis to practice (un)welcome toward immigrant refugees. Indeed, many Americans have been influenced by political rhetoric that immigrants not only drain the economy but are also taking away American jobs.[23] "The presumption at the root of these concerns is that resettling refugees means a net *cost* to the national economy of the country that receives them. Interestingly, while many Americans believe that refugees and immigrants more broadly are a 'drain' on the economy, economists almost universally reach a different conclusion."[23] Research instead shows that immigrants have a *positive* impact on the economy of the country that receives them, partly because they are consumers, paying rent, buying food, cars, gas, cell phones, *etc.*, and their purchasing power leads to profits for American businesses that go on to hire more people.[25]

In specifically addressing the economic issue of immigration, and debunking the credibility of popular cultural fears that immigrants take away from the American economy, the authors of *The Everyday Crusade: Christian Nationalism in American Politics* document:

> In 2017, the Bureau of Labor Statistics estimated foreign-born workers constituted 16.9 percent of the American labor force. The nation would be unable to meet its economic needs without the presence of immigrants who fill a variety of occupations requiring either a certain skill level or that are undesirable to native-born workers. Immigrants have taken on physical labor occupations, such as farming and construction.[26]

Moreover, "[m]ost economists also agree that the average American-born worker actually sees their wages *positively* impacted by the presence of immigrants, because most immigrants tend to work in fields that *complement*, rather than compete with, the work that most Americans are either willing or able to do."[27] This shows that immigrants play a positive part in contributing to the American economy.

The fear of losing power, along with economic fears, are only two aspects of America's historic practice of (un)welcome. As part of the United States' perspective of (un)welcome, immigrants have always been vilified in American culture.

> Immigrants become easy targets for harsh treatment because they have a distinctly negative image in popular culture . . . . [T]he emotion-laden phrase "illegal aliens" figures prominently in popular debate over immigration. "Illegal aliens," as their moniker strongly implies, are law-breakers, abusers, and intruders, undesirables we want excluded from our society. The very use of the term "illegal aliens" ordinarily betrays a restrictionist bias in the speaker. By stripping real people of their humanity, the terminology

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21 Hing et al., *supra* note 14, at 12.

22 Butler, *supra* note 10, at 4.

23 Bauman et al., *supra* note 4, at 66-67.

24 *Id.* at 66 (emphasis in original).

25 *Id.* at 66-67.

26 Eric L. McDaniel et al., The Everyday Crusade: Christian Nationalism in American Politics 114 (2022).

27 Bauman et al, *supra* note 4, at 67. It also bears noting that "[e]conomists also find that immigrants positively impact the fiscal well-being of the nation that receives them, paying more in taxes than they receive in benefits." *Id.*

helps rationalize the harsh treatment of undocumented immigrants.[28]

A Theology of Welcome in Scripture: What Does the Bible Say About Immigration?

Although some sociopolitical issues are not directly addressed in scripture, the Bible repeatedly speaks to immigration. For example, the book of Leviticus clearly provides: "When an alien resides with you in your land, you shall not oppress the alien. The alien who resides with you shall be to you as a citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt."[29] Moreover, "[t]he Hebrew word *ger*—translated variously into English as *foreigner, resident alien, stranger, sojourner,* or *immigrant*—appears ninety-two times in the Old Testament. Any of those references mention God's particular concern for the foreigner."[30]

The Bible is a sacred narrative of God's interaction with humanity wherein migrants play key roles in an unfolding story. "Throughout Scripture God has used the movement of people to accomplish his greater purposes. Like immigrants today, the protagonists of the Old Testament left their homelands and migrated to other lands for a variety of reasons."[31]

A. Brief Considerations of Immigration in the Old Testament

In Genesis 11, Abram, later Abraham, is introduced as an immigrant from Ur to Haran, later journeying to Canaan, with a stay in Egypt. His decision to leave Ur and bring his family to Canaan parallels the stories of many immigrants who leave their homelands to cross borders based on their faith.[32] Indeed, Abraham's immigrant faith journey—a direct parallel to so many that have been detained and or deported under United States policies—is a critical foundation of America's three most popular religions—Christianity, Judaism, and Islam—all considered Abrahamic faith traditions.[33]

Additionally, the Genesis 18 narrative also shows Abraham extending hospitality and welcome to foreigners (immigrants). When three strangers arrived at his home, little did Abraham know they were messengers from God. He was simply eager to be hospitable. Consider the following:

> The Lord appeared to Abraham by the oaks of Mamre, as he sat at the entrance of his tent in the heart of the day. He looked up and saw three men standing near him. When he saw them, he ran from the tent entrance to meet them, and bowed down to the ground. He said, "My lord, if I find favor with you, do not pass by your servant. Let a little water be brought, and wash your feet., and rest yourselves under the tree. Let me bring a little bread, that you may refresh yourselves, and after that you may pass on—since you have come to your servant." So they said, "Do as you have said." And Abraham hastened into the tent to Sarah, and said, "Make ready quickly three measures of choice flour, knead it, and make cakes." Abraham ran to the herd, and took a calf, tender and good, and gave it to the servant, who hastened to prepare it. Then he took curds and milk and the calf that he had prepared, and sent it before them; and he stood by them under the tree while they ate.[34]

Abraham's ready welcome to foreigners was no doubt the consequence of his own experiences as an immigrant. This dynamic is like modern-day immigrants to the United States being embraced by those who came before them,

28 Hing et al., *supra* note 14, at 13.

29 *Leviticus* 19:33-34.

30 Bauman et al, *supra* note 4, at 30.

31 Matthew Sorens & Jenny Yang, Welcoming the Stranger: Justice, Compassion & Truth in the Immigration Debate 86 (2018).

32 *Id.*

33 Augustine, *A Theology of Welcome, supra* note 7, at 254.

34 *Genesis* 18:1-9.

helping new immigrants to acclimate and orient to the American culture.

In further following the Genesis narrative, by chapter 37, Joseph, Abraham's great-grandson, also became an immigrant. Unlike Abraham, however, Joseph's journey as an immigrant *was not* by choice. Much like the many enslaved Africans who began America's immigration system as victims of human trafficking,[35] Joseph was sold into slavery by his brothers.[36] Indeed, this parallels the many Africans who came, in shackles, to what is now the United States. From an African American perspective, therefore, Joseph's forced immigrant journey parallels the origins of the Black entry into America.

In Exodus, God used Moses to lead the Israelites from an oppressive dictatorial governmental rule in Egypt, essentially as migrant refugees, who were promised eventual habitation of the land of Canaan.[37] "The Israelites, under Moses' leadership, became refugees fleeing persecution in Egypt and escaping, with God's help, to a new land where, like many refugees today, they found new challenges."[38] Indeed, in drawing a parallel between the scriptures referenced herein and America's current immigration posture, it's apparent that many migrants also face significant challenges in the United States.

B. Brief Consideration of Jesus and Other Select Refugee Heroes in the Bible

As Canada was famously receiving a host of resettling Syrian refugees, in December 2015, an Anglican church in Newfoundland posted a sign that read: "Christmas: a Story About a Middle East Family Seeking Refuge."[39] That sign was indeed a reminder that before Jesus's ministry—a ministry that began with an ethic of social justice, given his status as marginalized Jew living under the Roman Empire's totalitarian regime—Jesus was born to Mary and Joseph, refugee parents who were forced to flee their land of occupation. Their flight from persecution is the often-untold part of the Christmas story:

> When [the magi] had gone, an angel of the Lord appeared to Joseph in a dream. "Get up," he said, "take the child and his mother and escape to Egypt. Stay there until I tell you, for Herod is going to search for the child to kill him."
>
> So he got up, took the child and his mother during the night and left for Egypt, where he stayed until the death of Herod.[40]

Although this text provides no details about their journey from Bethlehem to Egypt, or about how the refugee family was treated after arrival, if human history is an indicator, some would have met them with welcome and hospitality and others would have seen them as a threat.[41] If they were perceived as a threat, as so many refugees have been in the United States, consider the following: Where did they find food and shelter? Did local carpenters complain that Joseph would take work that they otherwise would have? Were they harassed, as a fashionable exercise of the dominant culture?[42]

Although Jesus is unquestionably the most important example of a refugee in scripture, many other biblical figures were forcibly displaced, too. Jacob fled his homeland under the threat of violence from his brother, Esau (Gen. 27:42-44). Moses fled from Egypt to Midian, initially because Pharoah sought to kill him (Ex. 2:15). When being persecuted unjustly by King Saul, David escaped on multiple occasions to the land of the Philistines, where he sought asylum under King Achish (1 Sam. 21:10, 27:1). Similarly, the prophet Elijah evaded the persecution of the evil King Ahab and Queen Jezebel by trav-

35 *See* Magee, *supra* note 20, at 277.

36 *Genesis* 37:27-28.

37 *Exodus* 3:7-8.

38 Sorens & Yang, *supra* note 31, at 88.

39 Bauman et al, *supra* note 4, at 31 (internal citations omitted).

40 *Matthew* 2:13-15.

41 Bauman et al, *supra* note 4, at 32.

42 *Id.*

eling out into the wilderness; so desperate he was in his situation that he "prayed he might die" (1 Kings 19:1-4). In the New Testament, we see how persecution in Jerusalem forced the earliest followers of Jesus to scatter—and also how God ultimately used this evil for good, as those apostles took the gospel with them and planted some of the earliest churches (Acts 8:1, 4-5).[43]

Indeed, with scripture as a moral guide for both personal and social governance, I urge this Article's readers to adopt a disposition of welcome, with respect to refugees who are already living in the United States and contributing to the economy.

A Cursory Overview of America's Legal History of Discrimination in Immigration.

The United States Constitution is clear that only Congress has the plenary power to pass immigration laws: "Congress shall have the power to establish a uniform Rule of Naturalization."[44] In recognizing and elaborating upon this vast power, Professor Erwin Chemerinsky writes, "Congress has been accorded broad power to regulate immigration and citizenship. Indeed, the Court has held that 'over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'"[45]

Professor Chemerinsky goes on to highlight that "Congress has thus been recognized as having plenary power to set the conditions for entry into the country, the circumstances under which a person can remain, and the rules for becoming a citizen."[46] Congress has proven to use this constitutionally enumerated plenary power in ways that discriminate based on both race *and* ethnicity.[47]

A. The Discriminatory Origins of Congress' Plenary Power Over Immigration

Before the infamous Chinese Exclusion Act of 1882,[48] Congress proved to engage in racial discrimination as early as 1790, with the Naturalization Act:

> Scholars generally trace the beginning of racially restrictive U.S. immigration policies to laws directed at various immigrant groups. Prior to 1870, the subordination of people of African descent was further underscored by the fact that people from Africa *could not* become U.S. citizens through naturalization.[49]

Conversely, however, "[t]he Naturalization Act of 1790 established procedures for free *white* persons to achieve citizenship after just two years of residency, which later became five."[50]

Further, only eight years after the Nationalization Act of 1790, wherein Congress engaged in *racial* discrimination, it responded to perceived threats by foreign powers, particularly France, by engaging in *ethnic* discrimination. Congress passed a series of individual laws, including the Naturalization Act of 1798, the Alien Friends Act, the Alien Enemies Act, and the Sedition Act (collectively known as the Alien and Sedition Acts of 1798), that made it more difficult for immigrants to become U.S. citizens, increasing the residency requirement to 14 years.[51] In elaborating on this history, Pro-

43 *Id.* at 32-33.

44 U.S. Const. art. 1, § 8, cl. 4.

45 Erwin Chemerinsky, Constitutional Law: Principles and Policies 289 (4th ed. 2011) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

46 *Id.*

47 There is a difference between racial discrimination and ethnic discrimination. Congress has engaged in both, with respect to its sordid history in immigration. Race is a social construct, and discrimination based on race is based on immutable characteristic (*e.g.*, the Jim Crow segregation Blacks were forced to endure, in the American South, because of skin color). *See* Augustine, *supra* note 5, at 69 (citations omitted). Ethic discrimination, however, is different. Rather than being based on immutable characteristics, ethic discrimination might be based on culture, religion, or national origin. "To illustrate the difference between race and ethnicity, consider both the similarities and differences between whites and Jews in Nazi Germany. At face value, both groups shared common *racial* characteristics. Jews, however, shared certain distinct cultural and religious traits." *See id.* at 70 (emphasis in original).

48 Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. Stat. 58, 59, *repealed* by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

49 Hing et al., *supra* note 14, at 19 (emphasis added).

50 Gansallo & Bernstein-Baker, *supra* note 11, at 5 (emphasis added).

fessor Gabriel Chin writes, "[t]he first naturalization act, in 1790, permitted only free white persons to become naturalized citizens; persons of African nativity and descent were added in 1870. When person of 'races indigenous to the Western Hemisphere' were added in 1940, only members of Asian races could not naturalize."[52]

At face value, therefore, the genesis of American immigration law was rooted in both racial *and* ethnic discrimination.[53] Inasmuch as Congress' enumerated power over naturalization has become recognized as "plenary,"[54] congressional power of the admission of aliens into the Unites States is absolute.[55] It comes from the Supreme Court's infamous ruling in *Chae Chan Ping,* a/k/a "The Chinese Exclusion Case,"[56] an opinion that is regarded as the fountainhead of immigration law's plenary power doctrine.[57] The Supreme Court has also affirmed that Congress' plenary power in immigration includes the right to exclude aliens based on race.[58]

B. Restrictions on Immigration Led to Clear Patterns of Discrimination Against Immigrants

The history of American colonization of Native Americans as the "original" immigrants, and the forced immigration of enslaved African people, is a history entangled with not only the policies of white Christian nationalists, but also with a more fundamental question of who were "real Americans."

The initial wave of immigrants to America lasted until about 1803, bringing white, predominately English-speaking, and mainly Protestant Europeans.[59] The next wave, however, which began in the 1820s and lasted until the immigration restrictions detailed below, was more ethnically diverse and consequentially more controversial for "real Americans." There were "more Catholics and Jews, more Southern Europeans, and non-English speakers."[60] The stage was set, therefore, for prejudice and discrimination in Congress' exercise of its plenary power in immigration.[61]

From the late 1800s into the 1920s, over 22 million immigrants entered the United States, during a time when the country experienced major industrial growth. During the first two decades of twentieth century, as southern and eastern Europeans entered the United States in large numbers, 60 percent were from Italy, Austria, Hungary, and the area that became the Soviet Union.[62] As the xenophobic politics of fear became an issue, divisions also began to cement, between whites and non-whites, as a part of *ethnic* discrimination. "As immigrant populations from eastern and southern Europe swelled," write Ayodele Gansallo and Judith Bernstein-Baker, "resistance also grew to new groups considered to be inferior, uneducated and economic competitors."[63]

In looking at population waves, and noting certain groups that were (un)welcome, the authors of *Immigration Law and Practice* note the following:

> In 1907, the Dillingham Commission, a bi-partisan congressional group, was

51 *See id.* (internal citations omitted).

52 Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 13 (1999) (internal citations omitted). Indeed, it was Congress' racialized discrimination against Asians that was the subject of the Chinese Exclusion Act of 1882, which was upheld in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

53 *See* Augustine, *supra* note 5, at 69-70.

54 *See* Chemerinsky, *supra* note 45, at 289.

55 *See, e.g.,* Chin, *supra* note 52, at 5.

56 *Chae Chan Ping v. United States,* 130 U.S. 581 (1889).

57 David A. Martin, *Why Immigration's Plenary Power Endures,* 68 Okla. L. Rev. 29, 30 (2015).

58 *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (Douglas, J., dissenting); *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903); *see also United States v. Ju Toy*, 198 U.S. 253, 261 (1905).

59 *See* Hing et al., *supra* note 14, at 11.

60 *Id.*

61 *See supra* notes 58-60.

62 Hing et al., *supra* note 14, at 11.

63 Gansallo & Bernstein-Baker, *supra* note 11, at 7.

> formed to study the impact of immigration on the United States. The commission's work, which was completed in 1911, concluded that immigrants from Eastern and Southern Europe were a major threat to the United States economy and culture and proposed limiting immigrants from these regions. One vehicle to achieve this was a new literacy requirement that was enacted into law in the Immigration Act of 1917.[64]

Congress also passed the Emergency Quota Act in 1921,[65] limiting the number of immigrants from any region to three percent of the population already living in the United States in 1910. The impact of this legislation was to favor Northern and Western Europeans who were present in the United States in the largest numbers at the time.

Further, because of the Immigration Act of 1924, most Asian nationals *could not* immigrate to the United States. Moreover, Asian nationals who were already in the country were barred from becoming citizens.[66] With passage of the Immigration and Nationality Act of 1952, although Congress lifted the absolute bars to the immigration and naturalization of Asians, it established "quota systems" for Asian countries.[67]

By 1965, during the height of the Civil Rights Movement, Congress eliminated the last vestige of anti-Asian racial policy, with passage of the Immigration and Nationality Act Amendments of 1965, a law that also eliminated quota systems.[68] In highlighting the significant effect of the 1965 amendments, while also cautioning readers and advocates, Professor Chin writes:

> Under current law, no races are explicitly favored in the awarding of immigrant or nonimmigrant visas, and many believe that no particular nations are advantaged or disadvantaged as an indirect means of racial preference. Yet, the power to select immigrants on the basis of race is said to remain at the ready. *Chae Chan Ping* and *Fong Yue Ting* continue to be cited in modern decisions of the Supreme Court; because all constitutional immigration law flows from these cases, even decisions that do not cite them must rely on cases that do.[69]

It is therefore obvious that, given the impact of American immigration law's racialized and discriminatory history, policy advocates must consider whether America's current policies are still undergirded by an anti-immigrant bias

C. The Post-1965 Diversity of Immigrants Who Entered America and the Xenophobic Politics of Fear

After the repeal of immigrant quota systems in 1965, the racial and ethnic backgrounds of immigrants to the United States became much more diverse. Indeed, rather than maintaining the status quo of the racial and ethnic minorities already in the United States, the Immigration and Nationality Act of 1965 opened the door for foreign nationals from all over the world to immigrate to the United States. Scholars note:

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64 *Id.* (internal citations omitted).

65 Emergency Quota Act, Pub. L. No. 67-5, 42 Stat. 5, § 2(a) (1921).

66 *See generally* Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153.

67 *See generally* Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175. Popularly known as the McCarran-Walter Act, Pub. L. No. 82-14 (1952), this legislation was a partial response to concerns about communists being present in the United States. It permitted the exclusion or deportation of noncitizens who were deemed to be subversive and engaged in activities that could be detrimental to the public interest. President Harry S. Truman regarded the 1952 legislation as discriminatory, but it passed over Truman's veto. *See* Gansallo & Bernstein-Baker, *supra* note 11, at 8.

68 Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amending several sections in 8 U.S.C.). Even the 1965 amendments were still "discriminatory" in that they retained per-country limits. *See* Immigration and Nationality Act § 202 (a)(2), 8 U.S.C. § 1152 (a)(2); *see also* Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 Geo. L.J. 2105, 2108 (1997). At the law's signing ceremony, President Lyndon Baines Johnson is reported to have said, that the new law "corrects a cruel and enduring wrong in the conduct of the American nation." Gansallo & Bernstein-Baker, *supra* note 11, at 9.

69 Chin, *supra* note 52, at 15 (internal citations omitted).

> [O]f all [United States] immigrants in in fiscal year 2000, 65 percent were from Asia and Latin America. The 2000 census found that one-third of the foreign-born population in the United States was from Mexico or another Central American country, and a quarter was from Asia. Fifteen percent were from Europe. As a result of the immigration policies since 1965, including new refugee laws in 1980 and a legalization (or amnesty) program for undocumented immigrants in 1986, the ethnic makeup of the country is changing.[70]

Some argue that the Immigration and Nationality Act of 1965's primary purpose was to reunite families—a purpose that became the driving force for increasing ethnic diversity—as more and more groups left their home countries to resettle in the United States.[71] The legislation also allowed immigration into the United States based on special work-related skills and refugee status, thereby contributing to the United States' current racial and ethnic composition. Indeed, since 1965, many more Asian immigrants came to America, including large numbers of Southeast Asian refugees in 1975, after the Vietnam War, prompting fears about maintaining the "American way of life."[72]

In 1986, with Ronald Reagan as president, Congress began to take an anti-immigrant position of (un)welcome toward foreign nationals from certain countries. Indeed, the nation turned away refugees fleeing Haiti, Guatemala, and El Salvador, while accepting similarly situated Cubans and Nicaraguans.[73] These very controversial and discriminatory actions led faith leaders to provide sanctuary to immigrant refugees, in the form of a 1980s Sanctuary Movement, that was a direct response to Reagan-era policies making political asylum difficult for Central Americans fleeing civil conflict.[74]

What is a person of faith called to do when conflicted by civil laws they morally deem to be unjust? I argue that, in the context of discriminatory and inhumane treatment toward immigrant refugees, the answer *must be* to engage in the type of civil disobedience that was typical in both the Sanctuary Movement of the 1980s and the Civil Rights Movement of the 1950s and 60s.[75]

Revisiting the Lawyer's Question: "And Who Is My Neighbor?"

Inasmuch as I have been clear in advocating for civil disobedience, in the image of Martin Luther King's prophetic leadership,[76] I also deeply respect a similar position of advocacy taken by Ellen Clémot. In *Discerning Welcome,* although Clémot arguably embraces the "spirit" of civil disobedience, she advocates for a more nuanced political theology of discernment that supports welcoming refugees as neighbors.[77]

As part of her political theology of discernment, Clémot outlines two competing per-

70 Hing et al., *supra* note 14, at 11-12.

71 Gansallo & Bernstein-Baker, *supra* note 11, at 9.

72 Hing et al., *supra* note 14, at 16.

73 *Id.* at 1-2.

74 *See generally* Judith McDaniel, *The Sanctuary Movement, Then and Now,* Religion & Pol. (Feb. 21, 2017), https://religionandpolitics.org/2017/02/21/the-sanctuary-movement-then-and-now.

75 *See generally* Augustine, *supra* note 5, at 93-98; *see also* Augustine, *A Theology of Welcome, supra* note 7, at 262-69.

76 Augustine, *A Theology of Civil Disobedience*, *supra* note 7, at 264-66. I discuss King's unwillingness to obey an "unjust" law in 1963 after Birmingham, Alabama Police Commissioner Eugene "Bull" Connor refused to issue King a parade permit to protest against Birmingham's discriminatory treatment of Blacks. Rather than obey a law he deemed to be *morally* unjust, King decided to protest anyway. He was arrested and incarcerated on Good Friday and over Easter Weekend. In April 1963, he wrote the famous "Letter From Birmingham City Jail," a treatise on civil disobedience, wherein he cites the Holy Bible's *Daniel* 3 example of civil disobedience of the famed three Hebrew boys. In relevant part, King writes:

> Of course, there is nothing new about this kind of civil disobedience. It was seen sublimely in the refusal of Shadrach, Meshach, and Abednego to obey the laws of Nebuchadnezzar because a higher moral law was involved. It was practiced superbly by the early Christians who were willing to face hungry lions and the excruciating pain of chopping blocks before submitting to certain unjust laws of the Roman Empire.

Id. at 266 (internal citations omitted).

77 Clémot, *supra* note 4, at xxi.

spectives—*cosmopolitanism* and *communitarianism*—as well as a *new cosmopolitanism* that is a hybrid of the two perspectives. I believe the hybrid is arguably the most palatable position at this point in the American chronology to combat the divisive character of white Christian nationalistic ideals. Further, in considering the literal and figurative borders created by these ideals, I call on readers to ask themselves the question at the heart of the parabolic discourse: "And who is *my* neighbor?" But first, let's define our terms"

Cosmopolitanism makes the case for "no borders"—from both the ethical perspective (i.e., that all human beings should be treated with dignity and have access to other nation-states) and from a Christian perspective (grounded in a Catholic social teaching), which sees all refugees in the image of the Christ Child, who was also made a refugee after his family fled governmental persecution after his birth.[78]

From the exact opposite perspective, *communitarianism* favors nation-state sovereignty and embraces the independence of each nation-state to regulate entry into its *polis*. "In our world, of nation-states and bordered territories," writes Clémot, "every sovereign nation has established entrance policies toward migrants in order for the nation-state to maintain its culture, religion, and politics. Here lies the challenge for the refugee seeking a safe haven."[79] Several Christian ethicists who advocate for the *communitarianism* position also recognize an ethical quagmire that his position creates: the nation-state must be able to set rules and policies that lead to protection, which consequently create the very incentive that attracts refugees.[80] The inherent conflict to be resolved, therefore, is how the nation-state can support human flourishing by a safe place, wherein relationships can be grown in social solidarity.[81] Further, I most certainly agree that there must be limits on how many refugees a nation-state can admit to its membership to maintain its stability.[82]

Third, there is a hybrid perspective between *cosmopolitanism* and *communitarianism*: the "welcoming wall" of *new cosmopolitanism*. This "welcoming" or "porous" wall goes to the very heart of the question of identifying who is a neighbor. In a post-9/11 existence, the reality is that the world is comprised of bordered nation-states. Mindful of this reality, *new cosmopolitanism* seeks to find a balanced approach between a policy rooted in welcome and the affirmation of humanity that attracts refugees to America. Indeed, writes Clémot, "[a]dopting 'borders that welcome' remind us that the true end of humanity is not for a protected society, but rather the possibility of human flourishing in communion with God."[83]

Inasmuch as I believe *civil disobedience* should be done to comply with *divine obedience*, such actions should also be targeted to prompt Congress to act and pass meaningful immigration reform legislation, especially considering the current reality of the American state. Is there room for compromise? Given the rise of white Christian nationalism, and how it has most recently influenced American politics, I believe civil disobedience to help immigrant refugees is necessary to place pressure on Congress to act in the interest of America.

Conclusion

By inviting readers to introspectively ask themselves the parabolic question, "And who is my neighbor?", I have expressly shared that, while rejecting the myth that America is a "Christian nation," I do embrace Christian teachings that foster human flourishing and create a space of welcome for immigrant refugees who are already living in America, as "neighbors," while paying taxes and contributing to the American economy. Indeed, the position of Catholic social teaching embraces a penchant for the poor, and

78 *Id.* at 10-15.

79 *Id.* at 16.

80 *Id.* at 17.

81 *Id.* at 17-18.

82 *Id.* at 17.

83 *Id.* at 21-22.

those likely to be in the most necessitous state, just like the unnamed and unidentified (presumably Jewish) man who received help from the *good* Samaritan

I hope we will all recognize that, although all of humanity is our neighbor, for the purpose of a palatable action item, we should call on members of Congress to enact meaningful immigration reform legislation designed to offer pathways to citizenship for the many refugee neighbors who are already in our neighborhoods.

Does Content Moderation Cultivate Virtue Online? Toward a Vision of the Digital Public Square Rooted in Free Speech and Religious Freedom

*by Jason Thacker**

Introduction

When people think about the proper role of faith and the cultivation of virtue in the public square, we most often focus on the nature of government, the proper function of civil laws, and what roles the church and the state are to play in public life. But in recent decades, questions of cultivating virtue in the public square have expanded in a myriad of ways as our societies must now think deeply about the role of another powerful and influential party that has an outsized influence in shaping the free exchange of ideas and our interactions with our neighbors. As visions of globalization and the realities of technological expansion took hold in the late 20th century, large and increasingly powerful private companies began to dominate much of our personal and social life across industries, including communication, manufacturing, defense, education, and more. In recent years, much of this global power and influence has been centralized in technology companies that develop, maintain, and promote new ways of facilitating conversations and social connections in our personal lives, politics, business, and more. As technology policy expert Klon Kitchen noted, "There is perhaps no industry more globalized than the technology industry."[1] Kitchen goes on to note that "these companies are more than just players in the game of global politics, they are often the arena itself."[2]

As Christians think about the nature and role of law in society today, especially given the rise of a transnational technological order, wisdom implores us to consider the ways in which this industry is shaping public discourse and personal behavior through various content moderation policies and community guidelines that govern what can and cannot be shared online. Questions abound such as how these various policies should be fashioned to represent holistic visions of the good in a pluralistic society, how we might go about cultivating civic virtue in a digital first world, whether free speech is truly necessary for a functioning society, and whether it is even possible or desirable to craft a neutral set of policies for this new public square. To go about answering these types of questions in light of the Christian moral tradition, this article will argue that content moderation policies are actually modeled after an inherently perfectionist and constructivist account of common good as opposed to an anti-perfectionist vision that seeks to prize neutrality. This latter view is most often publicly promoted by these companies especially in relation to issues of sexuality and gender. These content policies are designed to shape public discourse from the top down toward a particular vision of the common good and public morality rather than achieve some level of a pluralistic neutral standard.

Technology companies have a crucial role to play in shaping the public square and the virtues needed to promote a healthy society and democracy today, but they must do so with eyes wide open to the true diversity of the people that they serve within the context of robust protections for free speech and religious freedom. First, the scope and stated goals of content moderation will be explored through the lens of major technology companies like Meta, X (formerly Twitter), and Google/YouTube. Second, three

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1 Klon Kitchen, *The New Superpowers: How and Why the Tech Industry Is Shaping the International System*, 49 Nat'l Affairs (Fall 2021), https://nationalaffairs.com/the-new-superpowers-how-and-why-the-tech-industry-is-shaping-the-international-system.

2 *Id.*

visions for the public square and public morality will be examined in light of the Christian moral tradition. Third and finally, these ideas will be briefly applied to pressing questions of free speech and religious freedom in a digital age and how these companies might better go about the task of content moderation in the digital public square. Instead of emotional knee-jerk responses and heated exchanges over critical topics of the digital public square today, Christians should rather dig deep into the wells of the moral and political tradition of the past in order to understand the proper social role of these major technological players in facilitating and cultivating a sense of public virtue alongside traditional actors including the government, the church, and the family.

The Purpose and Current State of Content Moderation

Shifting away from traditional centers of power and social order, the vast majority of today's public conversation and global communication is now facilitated through major social media platforms centralized and governed by companies such as Meta, Amazon, Google, X, ByteDance, and many more. Long gone are the days of hyper-localized interactions and debates in physical public squares under the purview of governments or even the centralized nature of news and information through major networks or cable affiliates. Our digital revolution has revolutionized how we communicate with one another in society and brings with it challenging questions of how to go about cultivating public virtue. These challenges are even more difficult given the widespread polarization and tribalization in society, with debates over the very nature of truth taking center stage in the public square.[3]

This new public square has become a central fixture of life throughout much of the world, where we take to social media and online communities to gain information, insight, and to share our opinions and lives for all to see.[4] Most users see their platforms, their posts, and their profiles as something uniquely owned and individually managed, but in reality users simply use these tools and post content to them rather than owning these small tapestries of their online lives. Each day millions and millions of pieces of content are posted online for the world to see. Whether one has ten or even thousands of followers/friends online, individuals today have unprecedented access to information and the ability to share their thoughts/opinions with people all around the world. A few swipes with a thumb and one's thoughts, opinions, or ruminations can be accessed around the world within seconds. As our society often celebrates how traditional information gatekeepers (e.g., government, religion, and the press) have lost the level of power and authority over what is said and who can say it, many of the initial promises of technology and social media have been exposed as overly optimistic given trends toward the replacement of traditional gatekeepers with new, privately-owned versions, without any direct public oversight or accountability. In addition, dreams of bringing the world closer together and into deeper, more authentic relationships have been shattered as our social bonds feel more strained than ever before and even the very nature of truth being questioned with the ubiquitous rise of mis/disinformation across ideological boundaries.[5] With such unprecedented access to information and the ability to share with people all around the world, it quickly becomes apparent that not all posts and content are created equal. Whether it is seemingly mean-

3 I've discussed these themes elsewhere, including the breakdown of truth in a digital age. *See* Jason Thacker, *Pursuing Truth in an Age of Fake News, Misinformation, and Conspiracy Theories,* 12 J. Christian Legal Thought 39 (Fall 2022).

4 It is not without controversy to even speak of the "digital public square" today given that technology companies are independent, third parties made up of people who have various protections for their own speech. Thus, the digital public square is very private in nature even as the reach is public in scope. *See generally* David French, *Can the Government Save Us from Ourselves?: The Legal Complexities of Free Speech and Content Moderation, in* The Digital Public Square: Christian Ethics in a Technological Society (Jason Thacker ed., 2023).

5 *See generally* Neil Postman, Technopoly: The Surrender of Culture to Technology 71-91 (1993) (offering more content on the demise of traditional information gatekeepers); Jason Thacker, *Dangers in the Digital Public Square: Navigating Conspiracy Theories and Misinformation in a Post-Truth Age, in* The Digital Public Square: Christian Ethics in a Technological Society (Jason Thacker ed., 2023) (discussing the rise of mis/disinformation and how to navigate these tensions).

ingless content designed to capture our attention for profit or simply to distract us from our lives, much of what we see online is not aiding us in developing or cultivating wisdom and true virtue. It is dumbing us down and radically altering how we see the world around us.

Content moderation is the practice of screening and sorting user-generated content online according to a set of policies/guidelines often predefined by a platform that users agree to be governed by when utilizing a particular app or service. Each social media platform governs speech and online activity through the use of codes of conduct, acceptable use policies, and community guidelines, all of which are routinely developed and enforced without much, if any, public involvement. The oversight of this broad governance over public speech and sentiment is often unaccountable to individual users or even the public outside of the potential for vast market pressure often portrayed through digital means. Whether or not the public acknowledges this, companies historically do have First Amendment protections for the types of speech they will promote and a fiduciary responsibility to their shareholders, and they inescapably infuse their guidelines and policies with their own personal and corporate ideological commitments.[6] Nothing is truly neutral or secular no matter how hard we try, including the digital public square.

Given the overwhelming amount of information paired with the deep fallenness of humanity, content moderation has become a ubiquitous tool that many of these major technology companies employ to create safer and more comfortable environments online. As one of the largest social media platforms in the world, Meta notes that they are "committed to giving people a voice and keeping them safe," utilizing various tools to accomplish this goal.[7] Indeed, without any form of content moderation, users would likely not be able to, nor desire to be part of these online communities given the tendency of some to oversaturate these digital public squares with violent, extremist, vulgar, fake, and spam-filled content.[8] X owner Elon Musk noted this when he posted in October 2022 that "Twitter obviously cannot become a free-for-all hellscape, where anything can be said with no consequences!" This sentiment is true of all social media platforms.[9] If a user loses interest or feels uncomfortable, they will naturally step away to another platform or even may leave social media all together.[10] But not all content moderation polices/community standards are created equal even if there is significant overlap in terms of illegal content surrounding child exploitation, fraud/deception, or restricted goods/services, and dangerous content, e.g., incitement of physical violence, abuse, spam,

6 One aberration in this trend of unaccountable oversight and governance was the creation of the independent Oversight Board by Facebook (Meta) in 2020, which reviews Meta's content moderation practices and has the power to override the company's decisions on individual cases. The board also can speak into and influence content moderation policies and often pushes for more clarity and transparency from the company.

7 Meta Transparency Center, https://transparency.fb.com/ (last visited July 28, 2023).

8 While it is true and will be touched on later that the definitions of "violent," "extremist," and "vulgar" vary person to person, it is nevertheless true that most people prefer some form of content moderation even if we may disagree with the current rules or definitions of terms like "hate speech" and what is deemed free speech online today. This dynamic will be explored in depth below.

9 Elon Musk (@elonmusk), Twitter (October 27, 2022, 9:08 AM), https://twitter.com/elonmusk/status/1585619322239561728.

10 One recent example of this is the shift in content moderation policies and the politization of X/Twitter since the purchase by Elon Musk in 2022. Regardless of one's views on Musk or the purchase of the company, shifts in policies and user satisfaction have led to some users stepping back from or even abandoning the platform in hopes of finding somewhere that they feel more comfortable. Early reports indicated that user and user engagement began to slip amid the Musk purchase of Twitter. At the time of writing, Meta launched Threads—a direct competitor to X—but it remains unclear if this platform will be sustainable even amid the current downward trend at X. *See* Josh Taylor & Josh Nicholas, *Twitter Traffic Sinks in Wake of Changes and Launch of Rival Platform Threads,* Guardian (July 10, 2023), https://www.theguardian.com/technology/2023/jul/10/twitter-traffic-sinks-in-wake-of-changes-and-launch-of-rival-platform-threads-elon-musk.

harassment.[11] While many policies are clearly defined and enjoy a large consensus among the general public, it should be noted that there are specific policies—especially around so-called hate speech and/or objectionable content—that is largely ill-defined and highly disputed in the public square.[12] This can be seen in the significant differences on how these companies handle such content, including what is considered nudity, mis/disinformation, and harassment/cyberbullying.[13]

According to Google's 2023 transparency report concerning the content moderation on YouTube, over 6.4 million videos were removed from the platform from January 2023 to March 2023 alone. During this same period, 8,749,977 channels were also removed for violating the community guidelines.[14] Google states that the purpose of their community guidelines is to "maintain a safe and vibrant community" and that these guidelines "set the rules of the road for what we don't allow on YouTube." They note that they "do not allow pornography, incitement to violence, harassment, or hate speech" and that they "rely on a combination of people and technology to flag inappropriate content and enforce these guidelines."[15] Interestingly, Google highlights that 94.8% of the channels removed were for "spam or misleading content" and 34.3% of the video content removed was for "child safety." These numbers are staggering given the amount of content that is allowed on the platform each day. Even if one (rightfully) disagrees with parts of a company's content moderation policies or community guidelines, including how these companies define hate speech and objectionable content, it is clear that, without any type of moderation or filtering, these platforms would be overwhelmed with spam, misleading content, and child exploitations that even the most ardent defenders of free speech would agree must be contained, removed, and mitigated. A world without content moderation is not one that many would want to promote, much less participate in. Content moderation is thus central to the modern digital communication architecture, even if there are significant and concerning aspects to how certain policies are crafted and how these policies are enforced.[16]

Visions for Public Morality and Our Digital Age

Many, if not all, the questions society asked in light of these technological innovations have to do with deeper and more fundamental visions of society, the good, and standards of public morality. It is easy to become enamored with the novel aspects of how technology is revolutionizing our society and how it is opening up new pathways for human connection. But at the most basic level, societies ask the same fundamental questions we have always asked simply in light of new opportunities and expanded moral horizons of what is possible. As we consider what seem to be novel questions of content moderation, free speech, and civic virtue in a digital age, questions such as what is the common good, how do we go about cultivating virtue, and what are the limits of free speech take center stage. These are questions that scholars and practitioners have long considered, even if the application of political philosophy, law, and ethics in a digital world reveals unique questions given the ubiquity of social media and mass communication

11 For a comparison of three major social media company content moderation policies/community standards, see Facebook Community Standards (https://transparency.fb.com/policies/community-standards/), X (formerly Twitter) rules (https://help.twitter.com/en/rules-and-policies/twitter-rules), and Google/YouTube's Community Guidelines (https://support.google.com/youtube/answer/9288567).

12 *See generally* Jason Thacker, *Where Do We Draw the Line on Hate Speech?,* Ethics & Religious Liberty Comm'n (Aug. 9, 2021) (discussing the ill-defined nature of hate speech in content moderation standards), https://erlc.com/resource-library/articles/where-do-we-draw-the-line-on-hate-speech/.

13 One example of these differences in content moderation polices is how Meta and Google do not allow pornography/nudity on their platforms, but X does as along as it is deemed consensual.

14 *YouTube Community Guidelines Enforcement,* Google Transparency Report, https://transparencyreport.google.com/youtube-policy/removals (last visited Aug. 2, 2023).

15 *Id.*

16 *See generally* Jason Thacker, *Free to Tweet?,* Liberty Mag. (June 2022), https://www.libertymagazine.org/article/free-to-tweet.

today. We need not recreate the wheel in order to navigate some of the challenges we face today since questions of public morality and the cultivation of civic virtue have long been debated in the public square.

For much of the 20th century, amid the rise of the "secular" public square—driven by visions of acceptance and tolerance for all views in a pluralistic society—it was seen as morally wrong to insatiate a particular vision of morality into public laws and the social order, as it would compromise the personal autonomy that is cherished in the modern project. As political philosopher and professor of jurisprudence Robert P. George rightly notes, "laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason." He goes on to note: "Law can command outward conformity to moral rules but cannot compel the internal acts of reason and will which make an act of external conformity to the requirements of morality a moral act."[17] Two primary visions emerge for navigating and cultivating virtue in the public square. First, proponents of a perfectionist account see laws as aiding in developing a richer personal and public morality; and, second, an anti-perfectionist liberal account rejects this vision of the formative effects of the law and instead sees human autonomy as the highest good in the pursuit of a morally neutral public order.

Perfectionism is the general concept that political action and laws should be "concerned with helping people to lead morally upright and valuable lives" and that a "good political society may justly bring to bear the coercive power of public authority to provide people with some protection from the corrupting influence of vice."[18] This vision of public morality is traditionally rooted in a fixed, objective understanding of truth and ethics, as well as an understanding that the presence of limits on personal and social behavior is actually helpful in cultivating a sense of virtue and wisdom. Elements of this view can be found in figures such as St. Thomas Aquinas when he writes that the "purpose of human law is to lead men to virtue, not suddenly, but gradually."[19] George highlights this tradition, writing:

> laws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self-constituting choices by which people form their character, and in turn affect the milieu in which they and others will in the future have to make such choices.[20]

Perfectionist accounts traditionally highlight the reality of human fallenness and personal vice, as well as how individuals are not truly autonomous beings who are always the best judge of what is truly right and good.

On the other side of this divide over how we view public morality in contemporary society is an anti-perfectionist account that sees humanity as primarily morally autonomous beings and that the public order must be seen as morally neutral, i.e., not promoting any set of moral virtues, nor upholding vice.[21] As George writes, "contemporary critics of [the central perfectionist tradition of legislating morality] maintain that criminal laws designed to uphold public morality are inherently unjust" because they take sides on matters of public morality and seek to promote one set of ideals above others.[22] George notes that an anti-perfectionist account is primarily promoted by mainstream contemporary liberalism and that this tradition "rejects the central tradition's aspirations to 'make men moral' on the ground that perfectionist law and policies violate fundamental principles of justice and human rights."[23] He continues by showing that "Orthodox liberals maintain that the moral perfection of human beings, while in itself desir-

17 Robert P. George, Making Men Moral: Civil Liberties and Public Morality 1 (2001).

18 *Id.* at 20.

19 Thomas Aquinas, Summa Theologiae pt. I-II, q. 95, art. 1; *see also* George, *supra* note 17, at 130 (discussing perfectionism as a liberal ideal where human autonomy is seen as central to the social order).

20 George, *supra* note 17, at 47 (emphasis original).

21 *See generally* Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America (1997) (discussing the myth of public neutrality and how this affects the role of religion in democracy).

22 George, *supra* note 17, at 1.

able, is not a valid reason for *political* action."[24] Thus, society should not seek to legislate morality, but to uphold distinct visions of justice, social order, and human rights that are often self-defined, whether individually, in terms of contemporary visions of expressive individualism; or, collectively, in terms of an original position or behind a "veil of ignorance" as noted by thinkers like John Rawls.[25]

Between these two primary visions of social order and public morality, George advocates for a *pluralistic* perfectionist theory, which seeks to account for the diversity of views in the public square while still holding fast to principles of civil liberties and the inherent formative power of law to promote virtue and restrain certain vices. This theory is built off the notion that the "common good is served by a social milieu more or less free from powerful inducements to vice."[26] While there are differing views of the common good and definitions of vice, it is nevertheless helpful to note here—as opposed to anti-perfectionists visions of the public square—that nothing is truly neutral and that someone's morality will be legislated in law or instantiated into these type of content policies. So, the question isn't about how best to maintain a sense of neutrality and pursue the fundamental notions of justice and human rights, but how might we go about seeing diversity and liberty as *instrumentally,* rather than *intrinsically* good—as many do within a liberal anti-perfectionist framework.[27] George highlights several of these instrumental goods, including free speech, free press, privacy, free assembly, and religious freedom—none of which are absolute or intrinsic rights. While issues of privacy are key to many of the debate in a digital age, questions of free speech and religious freedom are vital to this increasingly digital public square and the policies that shape our engagement with others online.[28]

Championing Free Speech and Religious Freedom Online

The United States has a long history of protecting free speech. To that end, tradition can be a helpful foundation upon which to craft content moderation policies that govern the digital public square. George writes that "speech is valuable when it makes possible co-operation; and co-operation is valuable when it is for the sake of worthy ends." Not only is free speech a central facet of constitutional rights in American life, but it serves an instrumental role in recognizing the dignity of all people, as well as protecting us from those who seek to control speech for bad motives. George rightfully points out that government officials throughout history have sought to suppress certain forms of speech to "silence their critics, weaken or harass their opponent, suppress 'dangerous' ideas, or repress disfavored minorities." He concludes saying that "officials sometimes act self-interestedly, vindictively, puritanically, chauvinistically, or cravenly."[29] This description has many parallels to the ways that some social media companies handle online speech, especially in regard to so-called hate speech or speech deemed unacceptable by some in the public square surrounding gender and sexuality.

For example, in the fall of 2021, Twitter (now X) defined hateful conduct in their content moderation policies by stating: "You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation,

23 *Id.* at 20.

24 *Id.*

25 John Rawls, A Theory of Justice 11 (Harvard Univ. Press rev. ed. 1999). Rabbi Jonathan Sacks explains expressive individualism as an ethic "without agreed principles or objectives truth . . . a world of relativism, subjectivism, and . . . authenticity, (where) the moral imperative is to become ourselves." Jonathan Sacks, Morality: Restoring the Common Good in Divided Times 18 (2020).

26 George, *supra* note 17, at 190.

27 *Id.* at 191-92.

28 I discuss the Christian right to privacy and how questions of privacy play out in a digital world further in other writings. *See,* e.g., Jason Thacker, *Always Known, But Rarely Loved: A Christian Ethical Assessment of Facial Recognition Technology,* 13 Africanus J. 4-16 (November 2021); Jason Thacker, *The Purpose of Privacy,* Ethics & Religious Liberty Comm'n (Feb. 1, 2021), https://erlc.com/resource-library/articles/the-purpose-of-privacy/.

29 George, *supra* note 17, at 198.

gender, gender identity, religious affiliation, age, disability, or serious disease. We also do not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories." The company went on to say: "We are committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that targets individuals with abuse based on protected categories."[30] But this type of limiting of speech not only discourages debate and dissent on important and debated issues such as sexual orientation, gender, and gender identity, but also limits—as George notes—the "effective functioning of political communities to achieve the common good of their members" that "depends on the freedom to communicate freely."[31] While one may not like certain ideas being shared online, forbidding their posting and dissemination in the digital public square leaves these decisions up to unaccountable platforms rather than society to set the norms as promoted in an anti-perfectionist vision of the proper use of law. These policies coerce and temper speech, promoting a particular vision of public morality whose presence is explicitly rejected by anti-perfectionist proponents. This ironic twist reveals the insolvency of an anti-perfectionist pursuit of public neutrality.

The question isn't if a particular vision of public morality is being promoted but whose vision will win the day and govern our speech/conduct online. George rightly points out that "people who are likely to have information and ideas relevant to good decision-making need to be free to participate in discussion and debate and to communicate their thoughts and information to decision-makers."[32] Robust protections for free speech naturally coincide with robust protections for religious freedom as well since it is not the role of government (nor powerful actors such a technology companies) to coerce belief or actions. As evangelical theologian and ethicist Carl F. H. Henry wrote, "it is not the role of government to judge between rival systems of metaphysics and to legislate one among other. Government's role is to protect and preserve a free course for its constitutional guarantees."[33] A pluralistic perfectionist theory allows for this informed debate and dissent, empowering individuals rather than strongarming the majority opinion on certain hot-button cultural questions.

George correctly notes that this pluralistic perfectionist theory of public morality will "not resolve all controversies about what morals laws any particular society should adopt or how the balance should be struck when, in certain circumstances, civil liberties come into conflict with one another or with other values worthy of special protection."[34] While George and those with whom he interacts with are focused on questions of law, government, and public morality as traditionally understood, the insights into the ways that laws naturally shape public morality and social behavior can help inform the debate over content moderation, whose policies and guidelines have similar, yet not exactly the same, shaping effects on human behavior.[35] While many rightfully disagree on particular policies, this does not mean that society must seek to instantiate a vision of social order grounded in moral autonomy, constructivists visions of public morality, nor free speech absolutism that can run afoul of fundamental principles of decency, respect, and neighborly love.

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30 *Hateful Conduct,* Help Center, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited February 16, 2022). It should be noted that these policies have been revised in part, but not in substance since Elon Musk's acquisition of the company in the fall of 2022. At the time of writing, most of this policy and explanation remains in place on the company's site.

31 George, *supra* note 17, at 203.

32 *Id.* at 204.

33 Carl F. H. Henry, The Christian Mindset in a Secular Society: Promoting Evangelical Renewal & National Righteousness 80 (1984).

34 George, *supra* note 17, at 189-90.

35 More research is needed in exploring the unique accountability and relationship of individuals to private companies, especially those who have an outsized influence in the public square like those who offer social media services.

The Proper Role of Individuals, Technology Companies, and Government in the Digital Public Square

As the Church considers the pressing questions of governing and moderating the new digital public square, we can draw from the wells of political and moral philosophy. The fundamental challenges we face in the public square today are not all that novel even as the application of these historic principles may be in today's ever evolving digital context. Instead of seeking an anti-perfectionist, neutral vision of the digital public square or seeking to instantiate a thick concept of a particular ideology into content moderation policies and community guidelines, technology companies should seek to model for society how to promote true free speech and religious freedom. They should seek to empower individuals to access and express divergent opinions on important social debates rather than seek to promote a particular moral vision and coerce behavior. Someone's vision of the good life will ultimately be promoted. Thus, empowering individuals and families to make these decisions rather than forcing public opinion from the top-down is the most inclusive and God-honoring way forward in these debates.

Individuals, industry, and the government need not see these debates over public morality and speech as needing to recreate the wheel, but rather should seek to partner together, recognizing our own fallibility and highlighting the need to embrace time tested First Amendment principles.[36] Just, equitable, and truly pluralistic societies must champion robust free speech and religious freedom protections as we seek to cultivate a more virtuous public square online. As we move into a new era of an increasingly digitized and privatized public square of social communication, we need not jettison the principles of free speech and religious freedom nor reject our nation's long history of jurisprudence and case law that has allowed the American experiment to continue into the 21st century. The challenges we face today may feel novel (and in some ways are unique), but, at the core, they reveal age-old questions of the common good and public morality. To solve them, we should strive to apply time-tested solutions, as we seek to navigate the debate over content moderation and social media.

36 *See generally* Jeremy D. Tedesco & Christiana Kiefer, *Content Moderation and Suppressing Speech: Are There Limits on Talking about Sexuality and Gender Online?, in* The Digital Public Square: Christian Ethics in a Technological Society (Jason Thacker ed., 2023) (discussing how the First Amendment ideals apply to the digital public square).

Jonathan C. Augustine, Called to Reconciliation: How the Church Can Model Justice, Diversity, and Inclusion (Baker Academic, 2022). 160 pp.

*Book Review by Katharine Brophy Dubois**

Called to Reconciliation: How the Church Can Model Justice, Diversity, and Inclusion by Jonathan C. Augustine is an exhortation for change within the evangelical church so that by example it can inspire change in secular society. This pleasingly compact work offers scriptural analysis and legal history alongside a vibrant, interdisciplinary synthesis of scholarship in support of Augustine's argument: the church must acknowledge salvific reconciliation and enact social reconciliation to enable civil reconciliation.

Eschewing the melting-pot theory of social and cultural cohesion popular in the twentieth century, Augustine begins the book with another metaphor: America can be like a good gumbo. But "[w]hat makes a gumbo *good*?" The answer: a "variety of diverse ingredients" (1). Gumbo should not be "a homogeneous soup but a richly diverse delicacy" (5). Good gumbo "incorporates difference" (1). In *Called to Reconciliation,* Augustine encourages the church to don its chef's hat and start cooking.

In an era when the United States is "anything but reconciled," how exactly does the church go about making itself "a space for diversity, inclusion, and cultural competency that can be an exemplar for society at large" (77)? Augustine provides a three-part recipe. First, he traces the scriptural bases of reconciliation through the egalitarianism expressed in the writings of the apostles Peter and Paul. Next, he locates the center of the Civil Rights Movement within that scriptural tradition and explains the correlative rise of White Evangelicalism. Finally, he pleads for the church to return to the diversity and inclusion of the Apostolic era so that it can serve as a model for animating justice in society at large.

Three types of reconciliation underpin this plan: salvific, social, and civil. Illuminated in scripture, salvific reconciliation describes the relationship between God and humans. Addressing the "kingdom at hand," social reconciliation "moves toward a political ethic rooted in . . . equal treatment of others" (21). Civil reconciliation, which is prophetically inspired yet legally instrumental, reaches beyond the church to the secular realm.

The apostolic theology of social reconciliation sits firmly at the center of Augustine's program, as it has in the church's past. Church, as taught by Peter and Paul, "implies diversity" (28). In their 2009 analysis of the scriptural roots of reconciliation, Ched Myers and Elaine Enns noted how the "social and theological" imperative to dismantle "the existing social architecture of division," which permeated Paul's writings to the early church, directly inspired civil rights leaders.[1] Reconciliation through diversity was in fact, says Augustine, the "foundational theology" of the Black church's "prophetic resistance" (38). By the 1980s, however, this interpretation of scripture had "fallen out of favor" in the mainstream church.[2] In *Called to Reconciliation,* Augustine seeks to re-popularize it. As a living example of social reconciliation, he namechecks New York City's Middle Church and its first African American and first female pastor, Rev. Dr. Jacqui Lewis, and quotes the church's website: "The diversity of our congregation and staff looks like a New York

* Lecturing Fellow in History, Duke University.

1 Ched Myers and Elaine Enns, Ambassadors of Reconciliation: New Testament Reflections on Restorative Justice and Peacemaking 101 (2009).

2 *Id.* at 84.

City subway but it feels like a home full of love" (115).

Coming together in this manner, Augustine says, "groups have left identity politics behind to engage in equity practices aimed at reconciliation" (2). Yet, in 2023, too few "groups" like Middle Church exist. Perhaps true social reconciliation is happening in pockets of America, but nationwide identity politics continue as virulent as ever, as politicians and influencers rush to align themselves with whatever identity issue will assure them viral attention. Although America's melting-pot metaphor has not aged well into the digital twenty-first century—for good reason—soup is in fact far more popular in the U.S. than gumbo. Americans eagerly call out "the Other" while feeding on mass-produced mush.

This is not new. Reconciliation through diversity seemed an insurmountable hill to climb to the leaders of the Civil Rights Movement, too. Civil reconciliation provides footholds. But first, social reconciliation requires forgiveness. Drawing on Archbishop Desmond Tutu's *No Future Without Forgiveness*, Augustine contends that "marginalized groups" must "forgive those who have marginalized them if the country is ever really going to move toward reconciliation" (23). Forgiveness repairs "broken relationships and social spaces" (24). In Augustine's conception, both salvific and social reconciliation are "Christ-centered and grounded in trinitarian theology." Civil reconciliation, on the other hand, though "deeply rooted in the notion that all people have equal value," is "primarily secular in scope" (19). Civil reconciliation comes into play when society seeks to repair its social divisions through "policy initiatives" (24).

Grounded in scripture, Augustine's notion of social reconciliation is church-forward, but its ultimate destination is not. Like Reverend Dr. William Barber II's declaration during Pope Francis's 2015 visit to the U.S. to speak about the environmental crisis with Congress—"there is no gospel that is not social"—Augustine makes the case that salvific reconciliation sustains social reconciliation.[3] As it was for the apostles Peter and Paul, and therefore the preacher-activists of the Civil Rights Movement, reconciliation with "the Other" must be a Christian's goal (11). Civil reconciliation, however, "is *not* necessarily Christian or even religious." Rather, "it is rooted in a moral ethic that seeks . . . governmental redress to remedy injustices" (26).

As examples of civil reconciliation in action, Augustine invokes the Voting Rights Act of 1965, "the most quantifiable measure to date of civil reconciliation's success;" and affirmative action, "the most controversial" attempt at generating circumstances that enable reconciliation (77). The success of the Voting Rights Act "in achieving its intended purpose" of diminishing racial discrimination in voting "underscores civil reconciliation's multidisciplinary importance:" faith-motivated people changed America's "legal landscape" (78). Similarly, just as Peter's program of social reconciliation between Jews and Gentiles forced people into "relationship with the proverbial 'Other,'" affirmative action "was adopted to open the eyes of both Blacks and whites to 'new truths' by breaking down social barriers and building commonality across racial lines" (80). Social diversity buttresses civil action.

Unfortunately, civil reconciliation lacks staying power. *Northwest Austin Municipal Utility District No. One v. Holder* (2009) and *Shelby County v. Holder* (2013) struck devastating blows to the Voting Rights Act of 1965. More recently, *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* (2023) ended the practice of affirmative action in American universities. Each "no longer has any teeth" (80). The Supreme Court is not alone in rejecting the ethos of reconciliation. In the months since the publication of *Called to Reconciliation,* from local municipalities to federal agencies, legislators have taken hacksaws to institutional diversity and inclusion efforts. State legislatures are prohibiting diversity training and hiring initiatives in public schools and universities. Even sensitivity training in the corporate sphere has come under the knife. Identity politics unites factions while fracturing communities (97). The vision of creating a more gumbo-like society in government and higher education seems more aspirational than ever.

Augustine, nevertheless, holds out hope. While white evangelical Christians have pushed back "against the fruits of civil reconciliation," ruptures in that church during the elections of

3 William J. Barber II, Revive Us Again: Vision and Action in Moral Organizing 96 (2018).

2016 and 2020 revealed its internal diversity. Embracing that diversity, Augustine says, is the church's duty and must be its destination "no matter how curvy the road might be" (100-03). Only then will it truly become *ekklēsia*—church—the "foundation for social reconciliation" (9). Heal social division within the church, and civil reconciliation will follow.

In the book's brief Epilogue, written after the January 6, 2021, attack on the Capitol Building, Augustine reminds readers of Reverend Barber's challenge to Americans given at the inauguration prayer service only weeks later, which was "to move past their political and socioeconomic divisions" and to work instead for justice (123-24). During the Civil Rights Movement and the terrifying early years of the Cold War, when many believed that humanity's social and political division would lead to its annihilation, the mystic Teilhard de Chardin wrote, "Nothing is precious save what is yourself in others and others in yourself. In heaven, all things are but one."[4] In *Called to Reconciliation,* Augustine prays for the church to recognize itself as one amidst its diversity and to become a rich, flavorful gumbo for the sake of enacting justice on earth.

4 Pierre Teilhard de Chardin, Hymn of the Universe 62 (1961).

Nathan S. Chapman and Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience (Oxford University Press, 2023). 240 pp.

*Book Review by Angela C. Carmella**

Introduction

In its constitutional interpretation, the U.S. Supreme Court has long cherry-picked historical information to bolster particular holdings, especially in Establishment Clause cases of the post-war era. In the not-so-distant past, the Court relied variously upon descriptions of ecclesiastical power in Europe, intolerant laws in England, and Virginia's experience of disestablishment to conclude that the "separation of church and state" was the clause's primary value. That notion of separation, and its particularly rigid formulation in the 1970s under the so-called "*Lemon* test,"[1] led to greater privatization of religion and greater secularization of public institutions, spaces, and coffers, whether legally required or as the result of a chilling effect caused by the desire to avoid litigation. It also placed the Establishment Clause in great tension with the Free Exercise Clause.

Nathan S. Chapman and Michael W. McConnell[2] in *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* describe this modern phenomenon and assert quite emphatically that this reading of the historical record is profoundly misguided. In an elegantly written, comprehensive guide to understanding the meaning of the Establishment Clause, they set forth a detailed history of post-Revolution disestablishment and argue that the primary value of that experience was not separation but the rejection of governmental support for uniformity of religious thought and practice. Not surprisingly, this rejection of religious uniformity facilitated greater freedom of religion and conscience—so much so that it led to the Second Great Awakening of the early nineteenth century.

The authors argue that the lessons from this state experience in the founding and early national period informed the understanding of the Religion Clauses and, therefore, should provide the template for how the Establishment Clause is interpreted. Indeed, Professor McConnell's earlier work in this area has already laid a foundation for the Court's interpretation.[3] *Agreeing to Disagree* will be regarded as an important guide for discerning the original public meaning of "establishment" as well as a major source of historical documentation.

The book arrives at a time when the Court has decided that "history and tradition" are key markers for its constitutional interpretation. Unlike earlier periods of the Court's jurisprudence, where history was invoked on an as-needed basis, there is now a more consistent use of historical analysis, even if it remains selective and incomplete. In its 2022 decision on the Second Amendment, striking a New York open carry "proper cause" requirement, the Court noted that the state had failed to meet its burden to show that its gun laws are "consistent with this Nation's historical tradition of firearm regulation."[4] In the same term, the Court rejected a constitutional right to abortion on the grounds

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1 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2 For full disclosure, I know one of the authors well. Professor McConnell, Robert Cochran, and I co-edited Christian Perspectives on Legal Thought (Yale Univ. Press 2001).

3 Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003).

4 *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).

that it failed to be "deeply rooted in the history and tradition" of the Nation, asserting this to be a requirement of unenumerated due process.[5]

And in a third case of 2022, the Court also invoked history and tradition in connection with the Establishment Clause. In *Kennedy v. Bremerton Sch. Dist.,* it held that a public school football coach could pray at the 50-yard line, finding that public school personnel have free exercise and free speech rights and rejecting the notion that the Establishment Clause might limit such activity in the absence of overt coercion of team members.[6] Forty years ago, the Court likely would have found that the coach's religious conduct advanced, entangled, or endorsed religion in violation of the clause, in order to protect the students from the pressures created by the coach's religious conduct. But in this decision, eschewing the "separationist" tests, the Court blithely referred to "history and tradition" without providing one wit of guidance as to its meaning.

Scholars wonder what *Kennedy's* invocation of history means for the future of establishment jurisprudence. In response, Professors Chapman and McConnell "describe how the historically-informed purposes of the Establishment Clause give guidance in a variety of contexts" (93). Their approach is sophisticated and nuanced. The concern, however, is that in time lower court interpretations might become wooden, much as was the case with the application of the *Lemon* test and much as we have already seen in the Second Amendment context.[7]

The Structure of the Argument

The first half of *Agreeing to Disagree* offers a lively tour through the historical record, taking the reader from the colonial and founding eras, through the nineteenth century and up through the mid-twentieth century and *Lemon.* Complex topics like state incorporation of the Establishment Clause (originally binding only the federal government) and the Blaine Amendments (reflecting an anti-Catholic bias against financial assistance to religious schools) are made highly accessible to the reader.

According to the authors, historical establishments, which existed in about half of the states after the Revolution, were characterized more or less by the following traits: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church" (18). These "hallmarks" of establishment gave way to a list of elements essential to *disestablishment:* (1) denominational equality; (2) free exercise/liberty of conscience; (3) church autonomy in doctrine, liturgy, and personnel; (4) no exclusive religious control over civic functions, no public prerogatives; (5) no religious taxes; (6) no compulsory church attendance or religious duties; and (7) no religious tests for civic and political participation (57).

The second half of the book measures the Court's decisions in modern controversies by fidelity to these elements, offering a rather scathing critique as it describes the resulting privatization of religion and secularization of the public sphere. Professors Chapman and McConnell argue that, with the exception of the school prayer cases (which they conclude involved coerced religious duties), the Court was woefully misguided whenever it struck down cooperation, assistance, acknowledgement, or expression that involved religion and government—parochial school aid, religion in public schools, religious accommodations, religious symbols in public spaces.

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5 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

6 *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). The Court chose to base its decision on a very narrow set of facts, when the coach was off-duty, as opposed to the many years of religious practice while on duty.

7 *Range v. Attorney General United States,* 69 F.4th 96 (3d Cir. 2023) (striking state law that prohibited food stamp fraudster from gun possession because the 1790 equivalent of this fraudster would have been permitted to have a gun); *United States v. Randy Price,* 2022 WL 6968457 (S.D. W. Va. Oct. 12, 2022) (striking federal law that criminalizes removal of serial number on a gun because the government failed to show the law was "consistent with the Nation's historical tradition of firearm regulation" as set in 1791); *U.S. v. Rahimi,* 61 F. 4th 443 (5th Cir. 2023) (striking federal statute prohibiting firearms possession by someone subject to domestic violence restraining order as inconsistent with history and tradition). The U.S. Supreme Court has granted certiorari in the *Rahimi* case.

The book skillfully lays out the erosion and ultimate abandonment of *Lemon.* The Establishment Clause, now a "blend of religious freedom and neutrality" (187), reinforces, rather than opposes, the Free Exercise Clause. School aid programs are no longer addressed under the Establishment Clause but are invalidated as free exercise violations if they exclude religious participants from neutral programs.[8] The ministerial exception, rooted in both clauses, ensures church autonomy on issues of personnel, governance, and doctrine.[9] Religious service organizations and businesses are accommodated so that they can conduct their missions according to their faith.[10] Passive religious symbols and vocal prayers in public spaces enjoy continued protection as long as religious favoritism is avoided.[11] (It should be noted that Professor McConnell played a seminal role in creating the intellectual basis for that erosion and redirecting the jurisprudence through sustained advocacy over the last 40 years.)

The authors' ultimate point is that the Constitution is agnostic with respect to religion—setting these basic terms to allow citizens to "agree to disagree"—but leaving religious influence on the culture to "the people." They argue that decentralized and deregulated religion—the result of historic disestablishments—is now better reflected in the current Establishment Clause's jurisprudence and that we are all better for it.

The Future

Even before publication of *Agreeing to Disagree,* some justices on the Supreme Court had begun to rely on the "six hallmarks" of establishment, as set out in an earlier article by Professor McConnell.[12] In 2022, Justice Gorsuch listed these traditional traits in his concurring opinion in *Shurtleff v. City of Boston,* where the Court found that it was not an establishment for a city to fly a Christian flag when hundreds of different flags had been flown.[13] He noted that the hallmarks help explain many of the Court's past cases as well as *Shurtleff* itself and offer guidance for future cases.[14] In essence, because religious symbols in public contexts were not problematic in the founding period, they could not violate the Establishment Clause.

When Justice Gorsuch penned the majority opinion of *Kennedy* just a few months after *Shurtleff,* he again cited Professor McConnell's hallmarks of an established religion in connection with the question of whether the coach had coerced students. Justice Gorsuch noted that, "[n]o doubt, too, coercion [of religious observance] along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First

8 *Carson v. Makin,* 141 S. Ct. 2883 (2022); *Espinoza v. Dept. of Revenue,* 140 S. Ct. 2246 (2020); *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017).

9 *Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 U.S. 694 (2012).

10 *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021); *Burwell v. Hobby Lobby Stores,* 134 S. Ct. 2751 (2014).

11 *American Legion v. American Humanist Ass'n,* 139 S. Ct. 2067 (2019); *Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014).

12 McConnell, *supra* note 3.

13 *Shurtleff v. City of Boston,* 142 S. Ct. 1583, 1603 (2022) (Gorsuch, J., concurring). In this concurrence, Justice Gorsuch quoted McConnell at length:

> Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.

Id. at 1609 (quoting McConnell, *supra* note 3, at 2110–12, 2131). Then Justice Gorsuch concluded that most of these hallmarks reflect forms of coercion regarding religion or its exercise. *Id.*

14 *Id.* at 1609-10 (Gorsuch, J., concurring). Note that Justice Thomas joined this concurrence.

Amendment."[15] Because he found no coercion, he found no establishment.

The problem, however, is that Justice Gorsuch appears to treat this "list" as an exhaustive description of what constitutes an establishment, when Professor McConnell did not intend it to be understood in that way.[16] While the two Gorsuch opinions focus heavily on the coercive aspects of the hallmarks of establishment, *Agreeing to Disagree* makes the significant claim that establishments can be both coercive and non-coercive. Officially proclaiming that a state is Christian or limiting some civil benefit to Christians is obviously an establishment even though no religious coercion and legal sanctions are involved (148-49). Indeed, several elements of historical disestablishment do not involve coercion to religious uniformity at all. (This insight could inspire the Court to walk back the coercion threshold it now appears to treat as mandatory.)

The "hallmarks" of historic establishments might provide a framework for conventional judicial interpretation that asks, for instance, whether the state action in question tends toward religious uniformity or instead facilitates religious freedom, diversity, and conscience; whether religious duties are coerced; whether funding acts like a religious tax; whether denominational equality is promoted or violated; whether church autonomy is protected or properly circumscribed; and, whether a religious institution is given state power or simply allowed to assist with a public task. In some circumstances, the fact that children are involved might provide greater justification for restriction, regulation, conditions, or adjudication; in others, greater justification for a hands-off approach to ensure that families, churches, and religious schools are decentralized and deregulated.

But what if, instead, courts don't engage in conventional interpretive methods but instead view the hallmarks as an exhaustive list? Might they then reflexively allow any state action that did not count as a trait of establishment in the founding period? How might they analyze recent Texas legislation that allows public schools to use chaplains in place of professional counselors?[17] Or Oklahoma's recent approval of a religious charter school?[18] Or any number of other situations, real or hypothetical, such as a religious exemption from a ban on child marriage; state money for religious schools (as part of a neutral funding program) where children receive virtually no secular instruction; or a law blocking negligence lawsuits against churches that did nothing to stop child sex abuse by its clergy? The historical record provides no direct answers.

My hope is that the influence of *Agreeing to Disagree* will be to offer a challenging and complex understanding of history on which to begin (but not end) our thinking about the public life of the nation. The authors are not concerned that a more permissive jurisprudence might embolden states to support a plethora of "soft" establishments or might reinforce the political power of the "religious right." Instead, they believe that a properly understood Establishment Clause would dampen rather than enflame the culture war extremes because it would "guarantee that neither side could use its momentary political power to impose an orthodoxy and suppress disagreement" (189). Indeed, they recommend that the lessons of religious disestablishment apply outside the context of religion to dismantle political and ideological systems of conformity that behave like establishments of old. Perhaps they can be convinced to focus their next book on exploring this intriguing extension.[19]

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15 *Kennedy,* 142 S. Ct. at 2429 n. 5.

16 These observations regarding Justice Gorsuch's opinions were made by Professor Andrew Koppelman at the 2023 Annual Law and Religion Roundtable.

17 Robert Downen, *Unlicensed religious chaplains may counsel students in Texas' public schools after lawmakers OK proposal,* Tex. Tribune (May 24, 2023), https://www.texastribune.org/2023/05/24/texas-legislature-chaplains-schools/.

18 David French, *Oklahoma Breaches the Barrier Between Church and State,* N.Y. Times, June 8, 2023, at A18.

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