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

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

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

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

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

EDITORIAL POLICY

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

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

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



A NEW THEOCRACY

Politics and Law as Irrepressible Religiosity

BY THADDEUS WILLIAMS

In 1981, Francis Schaeffer released *A Christian Manifesto*, a believer's riposte to *The Communist Manifesto* and *Humanist Manifesto*. Schaeffer opens his manifesto, "The basic problem of the Christians in this country in the last eighty years or so, in regard to society and in regard to government, is that they have seen things in bits and pieces instead of totals."¹ Schaeffer cites the American church's hand wringing over sexual perversion, secular indoctrination in public education, the assault on family life, and the trampled rights of the unborn. "But," Schaeffer laments, "they have not seen this as a totality—each thing being a part, a symptom, of a much larger problem."

Three years prior, Alexander Solzhenitsyn delivered his seminal (and for many, feather-ruffling) commencement speech at Harvard. Like Schaeffer, Solzhenitsyn argued that addressing society's problems at the surface of legal and political categories, rather than root moral and spiritual categories, "prevents one from seeing the size and meaning of events" and "makes space for the absolute triumph of absolute Evil in the world."² Eighty years before that, at Princeton University, Abraham Kuyper began his now famous Stone Lectures with the observation that there are "two life systems wrestling with one another, in mortal combat." The combatants, according to Kuyper, were modernists seeking to "build a world of [their] own from the data of the natural man, and to construct man himself," striving to vanquish "with violent intensity" those "who reverently bow the knee to Christ." This Kuyper saw as "the struggle in Europe" and "the struggle in America."³

The "bits and pieces" approach that Schaeffer criticized, the myopic "legalism" that Solzhenitsyn rejected, and the failure to reckon with the epic worldview

showdown that Kuyper saw raging behind the headlines remain just as relevant in the early 21st century as they were in the late 19th and 20th centuries. They beckon us to behold a bigger picture, to see through to the issues behind the issues of our day. For Schaeffer, Solzhenitsyn, and Kuyper that fundamental issue is, in a word, *worldview*, the behavior-shaping belief systems surrounding the perennial questions of metaphysics (what is real?), epistemology (how do we know what is real?), and ethics (how should we live in light of what we know about what is real?).

IRREPRESSIBLE RELIGIOSITY

Let us bring the Apostle Paul into the conversation. For Paul, worldview is foundational, yes, but there is a still deeper issue. That is the worship issue, the question of ultimate commitments, who or what we elevate as the *summum bonum* not merely in theory, but in real life. At this bedrock spiritual level, according to Paul's argument in Romans 1, there are two, and only two, options—Creator-worship or creation-worship.⁴ The question is not *whether* we are worshipping. Worship is an inevitable fact of human existence. "Man," according to Dostoyevsky, "has no more constant and agonizing anxiety than find as quickly as possible someone to worship."⁵ The real question is, *Who* or *what* do our thoughts, emotions, and actions say is the most important thing in existence?

A growing congregation of scholars is catching up with Paul's ancient insight. Serious students of western civilization from a vast range of disciplines are increasingly seeing worship (often beyond the pale of traditional "religion") as a dominant motive force in

¹ FRANCIS SCHAEFFER, *A CHRISTIAN MANIFESTO* 1 (1981).

² ALEXANDER SOLZHENITSYN, *A World Split Apart*, Commencement Speech at Harvard (1978).

³ ABRAHAM KUYPER, *LECTURES ON CALVINISM* 11 (1999). Emphasis in original.

⁴ For a superb theological and cultural analysis of this point see PETER JONES, *ONE OR TWO? (2010) AND THE OTHER WORLDVIEW* (2015).

⁵ FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV*, 297-298 (1978). David Foster Wallace echoes, "In the day-to-day trenches of adult life, there is actually no such thing as atheism... Everybody worships. The only choice we get is what to worship" (*This is Water*, Commencement Speech at Kenyon College [2005]).

our culture. Economist Bob Goudzwaard argues that everyone “absolutizes” something. We all serve god(s), take on the image of our god(s), then build society in our (that is, in our gods’) image.⁶ Feminist author, social critic, and atheist professor Camille Paglia concurs, “Human beings need religion, they need a religious perspective, a cosmic perspective. And getting rid of the orthodox religions because they were too conservative has simply led to [a] new religion.”⁷ Paglia identifies this new religion as “political correctness.” She labels it a form of “fanaticism,” citing her experience with second-wave feminists, whom she likens to “the Spanish Inquisition” seeking to “destroy” her for committing “heresy.” Culture commentator Andrew Sullivan also recognizes the religious undertones behind what are typically considered secular spaces in our society. Sullivan notes that “once-esoteric neo-Marxist ideologies—such as critical race and gender theory and postmodernism, the bastard children of Herbert Marcuse and Michel Foucault—have become the premises of higher education, the orthodoxy of a new and mandatory religion.”⁸ Anthropologist Paul Hiebert sees a new “dominant religion in the West.” Says Hiebert, “A new Western religion emerged to offer us meaning based on self-realization, not forgiveness of personal sins and reconciliation with God and others. Self had become god and self-fulfillment our salvation.”⁹

We would do well to wake up to this reality. The most pressing cultural, political, and legal issues of our day are, fundamentally, worship issues. They are contemporary expressions of humanity’s irrepressible religiosity. To ignore this Pauline insight is to limit ourselves to “bits and pieces,” miss “the size and meaning of events,” and render ourselves oblivious to “the struggle” in the West.

Creation-worship is nothing new. This is one reason for the frequent New Testament warnings against false gospels.¹⁰ These warnings came not from the cool abstraction of ivory towers, but from the context of real

first-century communities confronted with real first-century heresies. The Philippians and Galatians reckoned with the Judaizers’ synergistic gospel of salvation by circumcision. The Colossians grappled with proto-Gnostic asceticism, and the recipients of John’s epistles faced an incipient Docetism. As time rolled on, the church encountered new pseudo-gospels to subvert—the Montanist’s gospel of salvation by ecstatic experience, the Pelagian’s gospel of salvation by the moral competence of creaturely freedom, and more. Interpreting today’s rising movements through the Pauline lens of worship opens our eyes to see competing political ideologies for what they are—false gospels. They promise salvation, but can never deliver. They leave millions missing out on the only One who can bring actual redemption to broken systems and the broken people who make them. Taking humanity’s irrepressible religiosity seriously helps us not only engage legal issues, but, like Paul and the historic church at its best, expose the idols of our age and their powerlessness to save.

We would do well to wake up to this reality. The most pressing cultural, political, and legal issues of our day are, fundamentally, worship issues.

“NOT A GAME”

Before clarifying the doctrines of the new religion, we need Schaeffer’s reminder:

I need to remind myself constantly that this is *not a game* I am playing. If I begin to enjoy it as a kind of intellectual exercise, then I am cruel and can expect no real spiritual results. As I push the man off his false balance, he must be able to feel that I care for him. Otherwise I will end up only destroying him and the cruelty and ugliness of it all will destroy me as well.¹¹

Schaeffer spent his career analyzing and engaging culture. He was known to weep often for a generation that had been held captive by destructive philosophies and heretical theologies. In doing so, Schaeffer followed in Paul’s footsteps, the Apostle who said “with tears

⁶ BOB GOUDZWAARD, *AID FOR THE OVER-DEVELOPED WEST*, 114-115 (1975).

⁷ CAMILLE PAGLIA, *Feminism: In Conversation with Camille Paglia*, interview with Claire Fox, Institute for Ideas, 47:50-48:30 (November 4, 2016), <https://www.youtube.com/watch?v=4y3-KlesYRE>, retrieved September 26, 2017.

⁸ ANDREW SULLIVAN, *America Wasn’t Built for Humans*, NEW YORK MAGAZINE (September 18, 2017).

⁹ PAUL HIEBERT, *TRANSFORMING WORLDVIEWS: AN ANTHROPOLOGICAL UNDERSTANDING OF HOW PEOPLE CHANGE* 170 (2008).

¹⁰ See Matt. 24:15; Acts 20:29-31; Rom. 17:17-18; Gal. 1:6-9; 2 Cor. 11:4; 2 Tim. 4:24; 2 Pet. 3:16-18.

¹¹ FRANCIS SCHAEFFER, *THE GOD WHO IS THERE* 127 (1968). Emphasis added.

that many live as enemies of the cross of Christ” (Phil. 3:18, emphasis added). Paul was imitating Jesus, who entered Jerusalem, saw people “harassed and helpless like sheep without a shepherd,” and lamented (Matt. 9:36).

To lament for those who have succumbed to the trending religions of our day requires us to see them as image-bearers of God with irreducible value. If God is our object of worship in reality and not merely in creed, then we will see and engage his image-bearers *as image-bearers*.¹² Our methods and motives will expose our innermost allegiances. If we play by the rules of the *zeitgeist*, then our analysis will be little more than a self-righteous exercise in dehumanizing those we disagree with, expanding the chasm between a tribalized “us” and a demonized “them.” This ‘new normal’ is not only incompatible with the gospel (in which our righteous standing is based solely on our position in Christ, not our political position), but also with Jesus’s anti-tribal Commission (not suggestion) to *go* into the world with that good news (Matt. 28:19).

We are talking about ideas that have real consequences for real people. It is easy to be self-righteously tickled by problems in the ideology of others. It is much more difficult (and requires supernatural help) to be genuinely and even tearfully concerned that someone created to know and enjoy God in Christ has been taken in by a false gospel. Spirit-generated love becomes the driving motivator for the cultural analysis and engagement of the Creator-worshipper.

THE POSTMODERN PRIMER

Before getting into the specific doctrines of the new religion, there is one more question to ask. Why now? Why do our religious appetites seem to be expressed with such escalating political zeal in the 21st century? I have developed these themes elsewhere, but briefly, Western

culture has been living under postmodernism for half a century, give or take, and postmodernism is dull.¹³ As Solzhenitsyn saw, “the human soul longs for things higher, warmer, and purer than those offered by today’s mass living habits.”¹⁴

In other words, postmodernism is deeply out of sync with human nature. It clashes with our deepest drives and most pressing existential needs. When God constructed the human *telos* He designed us to run and thrive on meaning. We are wired for objective, not subjective, Creator-formed, not creature-fabricated, transcendent and God-centered, not transient and self-oriented meaning. Christian theism offers something worth living and dying for. It is centered on Someone infinitely bigger and more interesting than ourselves. The postmodern fixation on the Self offers us, in the final analysis, nothing worth living or dying for. I do not mean in the final *abstract* analysis, as in, if we were to build logical syllogisms from the core premises of postmodernism, they would all eventually converge on the conclusion that life is meaningless. I believe that to be the case. However, I am arguing that the postmodern project is not merely a philosophical failure. It has also proven void of meaning in the real lives of real people.¹⁵ This is essential to understanding our current religious crisis. We crave a meaning that is bigger than ourselves and the postmodern *ethos* can never provide such meaning. Thus, postmodernism has a shelf life.¹⁶ Deprive a culture of transcendent meaning long enough and that culture will take to politics with the ferocity of an absolutist religious fanatic. *Akrasia* begets activism. Relativism begets radicalism. In Dostoyevsky’s words, “Unlimited freedom begets unlimited despotism.”¹⁷

History demands that we do not take this phenomenon lightly. Historian Richard Evans has argued that the young men of 1920s Germany who were drawn to violent

¹² In other words we must consciously reverse the trend observed by Andrew Sullivan when he says, “Liberals should be able to understand this by reading any conservative online journalism and encountering the term ‘the left.’ It represents a large, amorphous blob of malevolent human beings, with no variation among them, no reasonable ideas, nothing identifiably human at all” (supra note 8).

¹³ See *Beyond Capes and Cowbells* (Fall 2014) and *Post-Postmodernism* (Fall 2016) in JOURNAL OF CHRISTIAN LEGAL THOUGHT, and Chapter 2 of REFLECT: BECOMING YOURSELF BY MIRRORING THE GREATEST PERSON IN HISTORY (2017).

¹⁴ Solzhenitsyn, supra note 2.

¹⁵ Solzhenitsyn adds, “If humanism were right in declaring that man is born only to be happy, he would not be born to die. Since his body is doomed to die, his task on earth evidently must be of a more spiritual nature. It cannot be unrestrained enjoyment of everyday life. It cannot be the search for the best ways to obtain material goods and then cheerfully get the most of them. It has to be the fulfillment of a permanent, earnest duty so that one’s life journey may become an experience of moral growth, so that one may leave life a better human being than one started it. It is imperative to review the table of widespread human values. Its present incorrectness is astounding” (*Id.*).

¹⁶ See WILLIAMS, *Beyond Capes and Cowbells* 8.

¹⁷ FYODOR DOSTOEVSKY, *THE POSSESSED* 365-366 (2009).

extremism “weren’t looking for ideas, but meaning... a pick-me-up to restore a sense of personal significance.”¹⁸ “Violence” Evans argues, “was like a drug for such men.”¹⁹ “Hostility to the enemy *de jour* —Communists, Jews, whomever—was the core of their commitment.”²⁰ As Christian Piccolini, ex-White Nationalist and founder of Life After Hate, commented after the recent racist demonstrations in Charlottesville, “I believe that people become radicalized, or extremist, because they’re searching for three very fundamental human needs: identity, community and a sense of purpose.”²¹

Elizabeth Corey recognizes similar undercurrents in the rise of the intersectionality movement, which she identifies as...

...a quasi-religious gnostic movement, which appeals to people for precisely the reasons that all religions do: It gives an account of our brokenness, an explanation of the reasons for pain, a saving story accompanied by strong ethical imperatives, and hope for the future. In short, it gives life meaning.²²

This bestowal of meaning is precisely what religion offers that postmodernity cannot. Subject our meaning-craving human nature to a few decades of intense meaning deprivation and you have a compelling answer to the question, ‘why now?’

A CREATION WORSHIPER’S SYSTEMATIC THEOLOGY

We can now better appreciate the doctrinal convictions sweeping through culture. Borrowing from the taxonomy of systematic theology, in particular, Theology Proper, Anthropology, Hamartiology, Soteriology, and Eschatology, I sketch the shape of today’s secular faith. (It is only a sketch, as a full doctrinal exposition would require a multi-volume Secular Systematic Theology text as long as Aquinas’s *Summa* or Barth’s *Dogmatics*.)

One challenge of clarifying the theology of today’s emerging religion is that it is hardly a monolith. In his article “Millennials are in Election Hell Because Politics Has Become Their Religion,” Peter Burfeind identifies this rising religion as a rebooted Gnosticism.²³ (On Gnosticism, see P. Andrew Sandlin’s helpful piece in the current issue.) Paglia identifies it as “political correctness.” Elizabeth Corey dubs it “the church of intersectionality.” New York University social psychologist Jonathan Haidt labels it an “extremely intense, fundamental social justice religion.” Other monikers like “cultural Marxism” and “neo-paganism” occur with frequency in the literature.

Indeed, there are multiple “denominations” with a wide range of dogmatic emphases. Nevertheless, there are strong theological threads that tie these denominations together, a discernable mere orthodoxy. In describing this shared theological core, I opt for the term

¹⁸ JIM FRIEDRICH, *American Demons: The Horror of Charlottesville*, (August 13, 2017), <https://jimfriedrich.com/category/protest/> retrieved September 26, 2017.

¹⁹ RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 220-221 (2004).

²⁰ *Supra* note 18.

²¹ MAQUITA PETERS, *A Reformed White Nationalist Speaks Out On Charlottesville*, NPR (August 13, 2017), interview available at <http://www.npr.org/2017/08/13/543259499/a-reformed-white-nationalist-speaks-out-on-charlottesville>, retrieved September 22, 2017.

²² ELIZABETH COREY, *First Church of Intersectionality*, FIRST THINGS (August 2017), <https://www.firstthings.com/article/2017/08/first-church-of-intersectionality>, retrieved September 21, 2017. Corey adds, “It posits a classic orthodoxy through which all of human experience—and through which all speech must be filtered. Its version of original sin is the power of some identity groups over others. To overcome this sin, you first need to confess, i.e., “check your privilege.” And subsequently live your life and order your thoughts in a way that keeps this sin at bay. The sin goes deep into your psyche, especially if you are white or male or straight, that a profound conversion is required.”

²³ Burfeind is following renowned political philosopher Erik Voegelin. See Voegelin’s *THE NEW SCIENCE OF POLITICS, ORDER AND HISTORY, AND SCIENCE, POLITICS AND GNOSTICISM* (1968). According to Burfeind, “Voegelin identifies six characteristics of the gnostic psychic mechanism. (1) It begins with a dissatisfaction with one’s situation. (2) Lacking a doctrine of original sin, the drawbacks of one’s situation are attributed not to anything in him, but rather to the constitution of the world, or even nature itself, at a minimum to the intrinsic corruption of the world’s systems and institutions. (3) Contrary to all evolutionary evidence, but faintly recalling the paradisaical Eden of traditional religion, the gnostic “just knows” salvation is possible, that the world can be changed into something special. (4) For this salvation to occur, the order of being itself must be changed in a historic process. As Voegelin writes, “From a wretched world a good one must evolve historically.” (5) This historical change in the order of being lies within the capacity of human action. (6) Knowledge, or gnosis, here becomes the central concern, for only one enlightened about history’s proper course can help spearhead the world-historical change” (*Millennials Are In Election Hell Because Politics Has Become Their God*, THE FEDERALIST [November 17, 2016])

Contemporary Western Creation-Worship, a Romans 1:25 inspired designator that captures what I take to be the root doctrine from which the diverse denominations sprout.

Theology Proper and Anthropology. Historic Christianity has always affirmed the Creator-creature distinction. One of the many distinctions between God and us is his unique, authoritative role in determining *that* humans would exist (we are contingent; he is not), and also *why* we exist. The built-in meaning of human nature, what we exist *for*, our *telos*, traces its origin to our transcendent Creator. Human nature is not like a bowl of alphabet soup—a senseless jumble of floating letters that can be arranged at our leisure. Human nature is more like a book—we are *authored* beings with meaning and purpose. Authoring the meaning of human nature is a God-sized task.

In Contemporary Western Creation Worship, by contrast, the author of our *telos* is, unsurprisingly, the creature. As Ru Paul put it in a recent interview with *Time*, “Drag has always served a purpose. We mock identity. We’re shape-shifters. We are God in drag. And that’s our role to remind people of that.”²⁴ Under this doctrinal tenet, the autonomous “I,” the self-creating self, takes the sovereign mantle of man-making that God held in traditional theology. Solzhenitsyn describes it as “the proclaimed and enforced autonomy of man from any higher force above him.” (In this sense, the new secular religion is as old as Adam.)

The doctrine of self-creation was once the domain of professional philosophers. Nietzsche had his *ubermensch*, Sartre his dogma that “existence precedes essence,” and Foucault his “technologies of the self.” Then come movements in Critical Theory, particularly Critical Race Theory, Queer Critical Theory, and the recent upsurge of so-called “Dignity Jurisprudence” (See Roberta Ahmanson’s helpful piece in the current issue). This erasing of the Creator-creature distinction, the fundamental redefinition of our species from the made to

the makers, has since spilled from the ivory towers and flooded virtually every square inch of Western culture.²⁵ And the indoctrination begins early.²⁶

There is a problem with this doctrine that, despite constant propaganda to the contrary, is becoming increasingly apparent in the West. The omnipotence-demanding task of constructing an entire person’s nature is forced onto our all-too-shaky and finite shoulders. Tragically, we buckle under the impossible weight. (And churches are called to serve as trauma recovery centers for those crushed by the mainstream credo of self-construction.) As I argue elsewhere, it is not a coincidence that the meteoric rise of the gospel of autonomous self-making since the 1960s corresponds with a crescendo of brokenness. “From 1960 to the turn of the 21st century, America doubled its divorce rate, tripled its teen suicide rate, quadrupled its violent crime rate, quintupled its prison population, sextupled out-of-wedlock births, and septupled the rate of cohabitation without marriage (which has been established as a significant predictor of divorce).”²⁷ I am not arguing that shifting the weight of self-making from the Creator to the creature’s shoulders is the exclusive factor in these unnerving statistics. But, if we take seriously Paul’s Romans 1 argument about the disarray that ensues from creation-worship, then we would be missing something profound if we limit ourselves to a sociological (at the exclusion of a spiritual) account of our present brokenness.

To offset the weight of this autonomy, many turn to other finite creatures to validate their self-made selves. The collective “We” is invoked to do some of the existential heavy-lifting that the autonomous “Me” can not muster. For deeply spiritual and not mere social reasons, people seek universal celebration of their constructed identities. This takes us to the soteriological doctrines of Contemporary Western Creation-Worship.

Hamartiology and Soteriology. In Christian soteriology (doctrine of salvation) we find the doctrine of justification. Justification refers to, among other things, the

²⁴ RU PAUL. *Time* 100 (April 19, 2017).

²⁵ Sociologist Thomas Luckmann, noticed this rising trend back in the 1960s. “The individual,” says Luckmann, “is left to his own devices in choosing goods and services, friends, marriage partners, neighbors, hobbies and ... even ‘ultimate’ meanings in a relatively autonomous fashion. The consumer orientation, in short, is not limited to economic products but characterizes the relation of the individual to the entire culture” (THE INVISIBLE RELIGION 98 [1967]).

²⁶ For example, an episode entitled *We’re All Potatoes at Heart* from the animated Disney Jr. show “Small Potatoes” concludes with a talking potato telling a vast audience of impressionable minds, “I think it’s great to be different and unique because then everyone has their own different way of doing things and there’s no wrong or right answer for doing something.” As Augustine quotes Horace in THE CITY OF GOD (1.3), “new vessels will for long retain the taste of what is first poured into them.”

²⁷ WILLIAMS, REFLECT 73 (2017). For careful documentation of these unnerving facts see DAVID MEYERS, THE AMERICAN PARADOX (2000). There is also the 400% rise in antidepressant use from 1988 to 2011 documented by the U.S. Center for Disease Control (“NCHS Data Brief, No. 76 [October 2011]).

divine act whereby God declares a sinner “not guilty!” on the basis of Christ’s redemptive death and resurrection. God is the Judge, Satan is “the accuser,” and Jesus is our Defense Attorney who appeals to his own completed death sentence so we can be declared not guilty. If we leave God out of the process of living free from guilt, then where must we turn for that authoritative declaration? We turn to the next biggest entity we can imagine. We turn to Society. Media, the law, education, entertainment, the local business owner—we must get *everyone* to declare us, in unison, “not guilty!” We must demonize and silence anyone who fails to acknowledge and celebrate our guiltlessness. The Little Sisters of the Poor, the baker, the photographer, and the Christian University become the collective functional equivalent to Satan and his minions in an historic Christian demonology.

Psychologists, according to Elizabeth Nolan Brown, have found that the kind of moral outrage we typically classify as altruistic “is often a function of self interest, wielded to assuage feelings of personal culpability for societal harms or reinforce (to the self and others) one’s own status as a Very Good Person.”²⁸ This constant imputation of guilt to others—*they* are the bigots, *they* are the phobics, *they* are the fascists—offers a subjective sense of something very close to (and yet infinitely far from) what Christ offers in the Gospel. It offers those in a perpetual state of outrage “status as a Very Good Person” in Brown’s terms, a forensic declaration of imputed righteousness in the language of the Reformers. Note well, this false means of declaring ourselves “not guilty” often occurs among Christians on the Right. Rather than our justification coming from Christ, and Christ alone, we seek our own “not guilty” verdict by transferring all guilt onto the Left. (With the alt-right, which is anti-Gospel to its rotten core, justification takes on nationalistic and racist overtones, in which all evil can be imputed to those with more melanin in their skin cells.)

Embedded in this secularized view of justification, we find a doctrine championed by the French Revolutionaries that remains an essential dogma of Contemporary Western Creation Worship. In Jean

Jacques Rousseau’s words, “Man is naturally good... It is by our institutions alone that men become wicked.”²⁹ Abraham Kuyper clarifies the main point of departure between this secular faith and historic Christianity, “two absolutely differing starting points.” That point of departure is whether we view man “in his present condition as normal, or as having fallen into sin, and having therefore become abnormal.”³⁰ For abnormalists, like Jeremiah, Solomon, and Paul, the human heart is desperately sick (Jer. 17:9), full of moral insanity, (Eccl. 9:3), and dead in transgressions and sins (Eph. 2:1). Those who recognize such abnormality...

...maintain the miraculous as the only means to restore the abnormal; the miracle of regeneration; the miracle of the Scriptures; the miracle in the Christ, descending as God with His own life into ours; and thus, owing to this regeneration of the abnormal, they continue to find the ideal norm not in the natural but in the Triune God.³¹

If, however, we are unfallen, then humanity “moves by means of an eternal evolution from its potencies to its ideal.”³² This clarifies ways in which #loveslove and #lovewins have become defining slogans of the new religion. What is presupposed and then *imposed* is a normalist account of human nature. You must corroborate and celebrate my happiness *as I currently conceive of happiness in all of my unfallen perfection*. Anything less is bigotry. From an abnormalist perspective, by contrast, love is not constricted to always say ‘be who you are.’ It can also say ‘*become* who you are’ when that needs to be said. It is a love, like God’s, that can passionately and zealously pursue the beloved’s redemption and flourishing. Love can only be redemptive if we are in need of redemption (i.e., abnormal/fallen).

Kuyper’s normalist/abnormalist distinction captures one of the deepest rifts in contemporary faith, why we often talk past one another. Recall the driving thesis of evolutionary zoologist Alfred Kinsey in the mid-20th century. Every sexual drive and behavior becomes justified as “normal mammalian behavior.” The scientific

²⁸ ELIZABETH NOLAN BROWN, *Moral Outrage is Self-Serving, Say Psychologists*, REASON.COM (March 1, 2017).

²⁹ See LETTERS TO MALESHERBES IN THE COLLECTED WRITINGS OF ROUSSEAU, vol. 5, Ed. Christopher Kelly, 575 (1995); OEUVRES COMPLÈTES, vol. I, Eds. Bernard Gagnebin and Marcel Raymond, 1136 (1995). As Solzhenitsyn noted in his 1978 Harvard speech, “Such a tilt of freedom in the direction of evil has come about gradually, but it was evidently born primarily out of a humanistic and benevolent concept according to which there is no evil inherent to human nature. The world belongs to mankind and all the defects of life are caused by wrong social systems, which must be corrected” (supra note 2).

³⁰ Kuyper, *supra* note 3 at 132, 54.

³¹ *Id.* at 132.

³² *Id.*

community eventually rejected Kinsey's spurious research. His normalist worldview assumptions about human sexuality, however, have risen over the last fifty years to become cardinal dogmas of the Western mainstream. This occurred largely through the work of 20th century thinkers like Herbert Marcuse with his *Eros and Civilization* (1955), Paul Goodman with *Growing Up Absurd* (1960), and Norman O. Brown with *Love's Body* (1966). "We knew that at bottom their gospel, was a sexual one," says one scholar of Marcuse, Goodman, and Brown, "that sex was their wedge for reorienting all human relations."³³

When Paul describes the move from Creator to creation-worship, one of the first places that this self-destructive exchange expresses itself is in the realm of human sexuality. How does the new sexual orthodoxy, the legacy of Marcuse, Goodman, and Brown, relate to Paul's insight? One helpful way to answer that question is with the doctrine of divine impassibility. In historic Christian theology, the Creator-creature distinction entails that the Creator is impassible and we the creatures are not. The doctrine of impassibility is not that of an unfeeling, statuesque God, as often caricatured, but a God who feels perfectly. The Creator lacks the emotional volatility we find in creatures.³⁴ God's feelings are just, unerring, and authoritative.

With this historic definition of impassibility, we can better clarify the sexual orthodoxy of our age. When the Creator-creature distinction is erased, we ascribe impassibility to ourselves. We elevate our own feelings, including our sexual feelings, to sacred status. Historically, ascribing unquestionable authority to one's own feelings was considered arrogance. It is now

called "authenticity."³⁵ In Kuyper's categories, it is the "normalist" view writ large. Just as God's feelings in traditional theology are expressions of his very nature, so our feelings come to define our very identities.³⁶ Colin Campbell clearly captures this dogma:

The 'self' becomes, in effect, a very personal god or spirit to whom one owes obedience. Hence 'experiencing,' with all its connotations of gratificatory and stimulative feelings becomes an ethical activity, an aspect of duty. This is a radically different doctrine of the person, who is no longer conceived of as a 'character' constructed painfully out of the unpromising raw material of original sin, but as a 'self' liberated through experiences and strong feelings from the inhibiting constraints of social convention.³⁷

Eschatology. This leads us to the eschatological vision of Contemporary Western Creation Worship. Sin is no longer an internal category. (How, after all, could *telos*-defining, impassible deities of like us be in violation of a higher moral law if our desires *are* the highest moral law?) Sin must be found only "the institutions" according to Rousseau and the French Revolutionaries, or "the oppressors" in the categories of neo-Marxism. The great and final triumph over evil, then, becomes a triumph over any institution or oppressor who dares question the self-defined self.

What emerges is a kind of secular postmillennialism in which intersectional alliances of self-defined selves must mobilize for the great eschatological struggle. Cultural, political, and legal efforts become a spiritualized

³³ MORRIS DICKSTEIN, *GATES OF EDEN: AMERICAN CULTURE IN THE SIXTIES* (1977). Philip Yancey counters, "I might feel more attraction towards a reductionistic approach to sex if... I senses that the sexual revolution had increased respect between the genders, created a more loving environment for children, relieved the ache of personal loneliness, and fostered intimacy. I have seen no such evidence."

³⁴ Kevin Vanhoozer retrieves an old distinction that effectively makes the point. On the one hand you have passions, which are (as the name implies) passive and which often overrule reason and are subject to evil. On the other hand are affections, which are active, good (and which Vanhoozer explains in terms of cognitive concernedness that is theodramatic and covenantal). In short, God has affections but not passions. See Chapters 8-9 in VANHOOZER, *REMYTHOLOGIZING THEOLOGY: DIVINE ACTION, PASSION, AND AUTHORSHIP* (2010).

³⁵ For deeper analysis of this point see Ch. 2 "Emote," from my book, *REFLECT*.

³⁶ In the words of one proponent of the new orthodoxy, Alex Garner, "Our sexuality is *at the core* of our humanity" (quoted in JACOB ANDERSON-MINSHALL, *The New Gay Sexual Revolution*, *THE ADVOCATE* (May 15, 2017), <https://www.advocate.com/current-issue/2017/5/15/new-gay-sexual-revolution>, retrieved September 24, 2017). As Philip Yancey notes, "If humanity serves as your religion, then sex becomes an act of worship. On the other hand, if God is the object of your religion, then romantic love becomes an unmistakable pointer, rumor of transcendence as loud as any we hear on earth" (*RUMORS OF ANOTHER WORLD*, 88). In other words, sexuality is an inherently religious matter, the way we think about it and the way we engage in sexual acts will be a fundamental expression, consciously or not, of either Creator or creation worship.

³⁷ Colin Campbell quoted by Craig M. Gay in *Sensualists Without Heart: Contemporary Consumerism in Light of the Modern Project*, in *THE CONSUMING PASSION*, ed. Rodney Clapp 28 (1988).

quest to usher in the new heavens and a new earth. This quest is every bit as eschatological and utopian as it was for the 18th century French Revolutionaries and the 20th century Marxists. But, we must say with tears, this new revolution also renounces the Creator-creature distinction. Drastically overestimating our goodness and underestimating our propensity for evil, it will prove just as dystopian.³⁸

“SAVE THE WORLD FROM SUICIDE”

Above are some of what may be called “the Deep Dogmas” of Contemporary Western Creation Worship. There are also what we might call “Cosmetic Dogmas,” the attractive doctrines on the public face of the religion that draw converts (even many from the church). These Cosmetic dogmas sounds uncannily like the *shalom* the Bible envisions and the kingdom Jesus inaugurated. We want to help the poor and end oppression. We want a world forever purged of racism, where justice prevails and greed and tyranny are permanently replaced with compassion and love.

If we want to winsomely engage contemporary creation-worshippers we must make it abundantly clear that the Bible is anti-oppression to its core. It has inspired the Wilberforces, Bonhoeffers, Martin Luther King Jrs., and Lee Jong-Rak’s of history³⁹ to bring about justice. To mute the Bible’s clarion calls against oppression would be a travesty, particularly in this cultural moment. It would perpetuate a false dichotomy and drive anyone who cares about ending oppression into the arms of Contemporary Western Creation Worship, rather than toward the God of the Bible who commands (not suggests) that we “seek justice, correct oppression; bring justice to the fatherless, plead the widow’s cause” (Isa. 1:17).

The problem, then, is not with the quest for justice and the end of oppression *per se*. Such a quest is deeply biblical. The problem is what happens when the quest for justice is hijacked by the Deep Dogmas of Creation Worship. When we disavow the Creator, we unwittingly

lose all that the Creator means for our humanity—our *telos*, our intrinsic and irreducible worth as image-bearers, a realistic sense of our fallibility, and our universal need for grace. (On the effects of this dehumanization in human rights law and personal data sharing, see Andrew DeLoach and Stephen Kennedy’s articles in the current issue). Without the Creator-creature distinction, we fundamentally misunderstand human nature and end up the unwitting oppressors in our quest for liberation. Just study the effects of Marxism in the modern world.

To see what genuine Creator-worship offers the justice-seeker, consider Martin Luther King Jr. Like all Creator-worshippers, King was an abnormalist. He believed in the reality of human fallenness and, therefore,

our need for supernatural grace as we seek a better world. In King’s words:

By opening our lives to God in Christ, we become new creatures. This experience, which Jesus spoke of as the new birth, is essential if we are to be transformed non-conformists... Only through

an inner spiritual transformation do we gain the strength to fight vigorously the evils of the world in a humble and loving spirit.⁴⁰

King’s Creator-worship made him a clear-eyed realist about his own fallenness and perpetual need for grace. It prevented him from elevating himself as the supreme source and standard of righteousness.

With its Deep Dogmas of self-definition, normalism, human impassibility, and self-justification, Contemporary Western Creation Worship produces an altogether different kind of justice-seeker. For him, evil is ever lurking in systems of oppression, and never in his own heart. Paulo Freire’s warning that “the oppressed, instead of striving for liberation, tend themselves to become oppressors”⁴¹ is totally lost on such a justice-seeker. His system of worship leaves no space for authentic introspection, no reason to ask for forgiveness, “no category of corruption within the heart to warrant self-critique.”⁴² This is not a recipe “to fight vigorously

Without the Creator-creature distinction, we fundamentally misunderstand human nature and end up the unwitting oppressors in our quest for liberation.

³⁸ I discuss this further in 2.1 of *LOVE, FREEDOM, AND EVIL* (2011).

³⁹ On Pastor Lee Jong-Rak’s heroic efforts to bring life and justice to the abandoned infants of modern day Seoul, South Korea see WILLIAMS, *REFLECT* 129.

⁴⁰ MARTIN LUTHER KING JR., *STRENGTH TO LOVE* 16 (2010).

⁴¹ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1993). Marvin Frankel echoes, “The powerless call out for tolerance [which], achieving power, they may soon forget” (*FAITH AND FREEDOM: RELIGIOUS LIBERTY IN AMERICA*, 111 (1994))

⁴² WILLIAMS, *LOVE, FREEDOM, AND EVIL* 78.

the evils of the world in a humble and loving spirit,” as King said. It is an impetus for the hubris and loathing that is presently ravaging the West.

Make no mistake; what is now unfolding in western law and politics is not a face-off between religious theocrats and freedom-loving secularists who seek a religiously neutral state. What we are seeing is nothing less than a new theocracy. It is the dogmatic faith of Contemporary Western Creation Worship working to silence all heretics and enshrine itself as the only legal faith of the land. It is a faith in which the creature, not the Creator, defines the human *telos*. It is a faith with no holy God as a pride-deflating reference point to realistically assess our own fallenness and fallibility. It is a faith that projects all evil from our own hearts onto any institution that refuses to celebrate our autonomous identities. It is a faith striving to usher in a new heavens and a new earth, centered not on Christ but on Self, guided not by Saint Paul or Saint Peter, but by Saint Rousseau, Saint Marx, and Saint Marcuse. Make no mistake; it is a faith.

How do we engage its zealous practitioners? We do so with tears because we love them. And we do so with the same tried-and-tested method the church used with the Judaizers, Gnostics, and Pelagians of old. We preach “the Gospel once for all entrusted to the saints.” We herald the good news that only Jesus can define the human *telos* in the deeply meaningful ways that we cannot. We offer the good news that we no longer have to pretend, and force others to pretend, that we are perfect. Jesus is perfect, and through his substitutionary death for our evil, he offers a new identity as infinitely beloved sons and daughters of God. We preach the good news of his bodily resurrection, by which he inaugurated the age to come, with all of its *shalom* and justice that the West has tried to realize with such antithetical and oppressive

effects. We preach the same Gospel that was able to bring real racial reconciliation to first century Jews and Gentiles, and real liberation to the slaves of American and British history. We preach the only gospel that offers real meaning to our generation of image-bearers created to know and enjoy God. To those gasping for air under the crushing weight of Contemporary Western Creation Worship, we preach the Gospel.

The world is trying the experiment of attempting to form a civilized but non-Christian mentality. The experiment will fail; but we must be very patient in awaiting its collapse; meanwhile redeeming the time: so that the Faith may be preserved alive through the dark ages before us; to renew and rebuild civilization, and save the World from suicide.

—T.S. Eliot⁴³

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⁴³ T.S. ELIOT, *Thoughts After Lambeth* in *SELECTED ESSAYS* 342 (1977).



THE NEW DIGNITY

Gnostic, Elitist, Self-Destructive Will-to-Power

BY ROBERTA GREEN AHMANSON

Planned Parenthood executives bargain to sell aborted body parts, Bruce Jenner strikes a pose across the cover of *Vanity Fair*, Justice Anthony Kennedy spews purple prose in *Obergefell*, and California Governor Jerry Brown signs a law allowing doctors to kill.

All in the name of dignity.

Underlying all of these events is a rapid and radical transformation in our culture's understanding of what it means to be human, and, in particular, what it means to have dignity. Dignity apparently justifies abortion, transgenderism, the redefinition of marriage, and physician-assisted suicide. But what exactly constitutes this New Dignity? The work of George Kateb, professor emeritus at Princeton, provides a clue. In a book titled *Human Dignity* (Harvard, 2014), Kateb writes: "Since nature has no *telos*, the human species is at its greatest when it breaks out of nature." Human dignity is grounded, according to Kateb, in our ability to defy nature—to go beyond natural limitations and thereby create ourselves anew. Kateb agrees with Sartre: the freedom to "become different through an upsurge of free creativity," which "can never be conclusively defined or delimited," is "the philosophical anthropology that underlies human dignity." This is the meaning of human dignity in a world with no clear origin, no purposeful end, no intrinsic meaning, and nothing real beyond matter in motion.

The New Dignity demands new positive freedoms, freedoms *to*—to remake our gender, to marry someone without regard to sex or the procreative potential of the union, to choose our time to die and enlist the medical profession in ending our lives, to not only abort a child developing in the womb but also to harvest his or her body parts for commercial gain. It also calls for new negative freedom, freedoms *from*—from all unwanted pain or discomfort, from limitations on what I can do to or with my body, from language or ideas that offend

me or that challenge decisions I have made. Dignity is no longer so much about *who* or *what* we are; it is about what our unfettered will can do, and what it can forbid others to do.

CHRISTIAN SEXUAL ETHICS AND THE ANCIENT WORLD

This represents a transformation the likes of which the West has not experienced since the fourth century. Historian Kyle Harper describes the tectonic shift that took place as Christian ideas of sexuality and personhood uprooted and replaced ancient Greco-Roman understandings.¹ As Giulia Sissa documents, among Greek elites, older men were expected to have younger male lovers.² This was considered the highest form of love, even though it was not physically procreative.

While the Romans were less appreciative of same-sex relationships, they too were clear that, for men, sexual relations outside marriage were the norm. The *mater familias* was to be chaste and faithful, a loyal wife and loving mother. The *pater familias*, however, was not held to such a high standard. It was expected that he would engage in sexual relationships beyond his marriage bed, with both men and women. As Harper points out, those extramarital relationships were almost always with men and women who were slaves. These "partners" were mere objects for use, commanded to perform.

Into this established social order, Christianity came. It not only preached a resounding rejection of these sexual norms, it also championed human dignity in a new way. The Gospel proclaimed that every human being has inestimable worth and value, because every human being is created in the image of God. Human beings have an eternal destiny and therefore are not to be treated as objects.

Imagine what this meant to the slave woman or man who had been forced to submit his or her body to a master. To those who did not have a voice, who indeed

¹ See KYLE HARPER, *FROM SHAME TO SIN* (Harvard, 2013).

² See GIULIA SISSA, *SIN AND SENSUALITY IN THE ANCIENT WORLD* (Yale, 2008).

did not have a personal “face,” Christianity said: that is most assuredly *not* who you are. Your body belongs to you, and it belongs to God. Whatever has been done to you and your body is covered by the death and resurrection of Jesus Christ. As the Apostle Paul wrote, in Christ there is neither male nor female, Jew nor Greek, slave nor free. It may be difficult for us to fully appreciate how profoundly transformative this was in the ancient world.

It took two hundred years for this understanding of human dignity to permeate the culture, but by the sixth century the Christian idea of faithful marriage between a man and a woman became the social norm. Celibacy and virginity were valued as ways for men and women to leave the objectification and enslavement of their bodies behind and celebrate those bodies in fruitful work for the world. Thus were laid the foundations for the Christian conception of human dignity that was embraced by the West into the twentieth century.

THE CHRISTIAN VISION OF DIGNITY IN THE MODERN ERA

In the modern era, this Western conception of dignity is exemplified by the Irish Constitution of 1937, in which dignity is clearly tethered to Christian roots. The Preamble begins, “In the Name of the Most Holy Trinity, from Whom all authority and to Whom, as our final end, all actions both of men and States must be referred” before making reference to “the dignity and freedom of the individual” that the constitution seeks to protect.

Similarly, the 1948 United Nations Universal Declaration on Human Rights, drafted in no small part under the influence of philosopher Jacques Maritain, opens with the words, “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Article 1 asserts, “All human beings are born free and equal in dignity and rights.” We can see running through the Declaration the broad outlines of the older conception of human dignity: it is intrinsic to all human beings and inalienable; it is pre-political, or “already there,” so to speak, and can therefore only be recognized and acknowledged; it can neither be conferred nor taken away by the State.

That paradigm is now all but destroyed in the West. From the highest levels of the academy and the courts to popular culture and the mainstream media, dignity is no longer understood as an inherent inalienable quality with which we are “endowed by our Creator,” as in the Declaration of Independence. Instead, dignity is understood as our freedom to defy nature and create ourselves anew, free from discomfort and pain and unconstrained by the natural order.

IS DIGNITY “STUPID”?

In 2008, Harvard neuroscientist Steven Pinker made the argument that the concept of human dignity is nonsensical and, well, stupid. His article, “The Stupidity of Dignity,” appeared in the *New Republic* in response to the collection of essays, *Human Dignity and Bioethics*, compiled by the President’s Council on Bioethics, which was chaired by Leon Kass. Pinker claimed bluntly that “dignity” was nothing more than a Trojan horse for smuggling religious ideas into bioethics—a domain that should be closed to anything other than a wholly materialist science.

Still, Pinker’s argument didn’t carry the day. Instead of abandoning the concept of human dignity, the New Dignitarians did something much more clever and more powerful: they kept the word but completely transformed its meaning. Since Jeremy Waldron delivered the 2009 UC Berkeley Tanner Lectures on Human Values, “Dignity, Rank, and Rights,” there has been a spate of new books on the meaning and importance of human dignity. Kateb’s *Human Dignity* came out in 2011 and Michael Rosen’s *Dignity: Its History and Meaning* in 2012, both published by Harvard University Press. In Britain, the collections *Understanding Human Dignity* and *The Cambridge Handbook of Human Dignity* came out in 2013 and 2014, to name but a few. So much for Pinker and the stupidity of dignity.

A SELF-DESTRUCTIVE WILL TO POWER

A close reading of these volumes and of recent court decisions, such as those written by Justice Kennedy in *Lawrence*, *Windsor*, and *Obergefell*, makes it clear that we have left any notion of human dignity based on the *imago Dei* far behind. “God,” according to Kateb, “is only another way of saying that we cannot dissolve certain perplexities.” For him and the other New Dignitarians, “We are left with no choice but to assume that human science is objective knowledge of nature”—which, it is implied, is the only knowledge we are capable of acquiring.

And so, this New Dignity is founded on nothing more than a self-creating will to power that is so thoroughgoing as to become, in the last analysis, self-destructive. Central to the New Dignity are the newly minted rights to refashion one’s body to suit one’s subjective preferences, to end the life of one’s offspring—not only those unborn, but infants as well, according to the Groningen protocol in the Netherlands—and, finally, to take one’s own life in the timing and manner of one’s own choosing.

For more on the latter two items, we can look to a recent *Economist* editorial advocating doctor-assisted suicide—not only for terminally ill patients, but for anyone

suffering from a medical problem, mental illness, or existential despair.³ The article even endorses euthanasia for children. Brushing aside the grave concerns about assisted suicide voiced by the disability rights community, the article quotes the physicist Steven Hawking, who described keeping someone alive against his wishes as the “ultimate indignity.” There’s that word again.

The *Economist* goes on to tether this new right of death on demand to other favorite rights asserted by the New Dignitarians: “Competent adults are allowed to make other momentous, irrevocable choices: to undergo a sex change or to have an abortion. People deserve the same control over their own death.” Since human dignity is now grounded in the power of the autonomous will to create oneself anew and to defy nature, the Christian concepts of creation and incarnation are but historical artifacts. The body is not integral to the self, but merely the raw material out of which we create something radically novel, even transcendent.

THE GNOSTIC ELITISM OF THE NEW DIGNITY

The New Dignity is a Gnostic project, and Gnosticism was always an elitist enterprise. As it was in the Greek and Roman worlds, so now there are signs that this New Dignitarian playground will be open and available only to serve the desires and the projects of cultural and political elites. For those on the margins, it portends new forms of enslavement.

The writings of the apostle Paul and the teachings of Jesus gave birth to a new culture built on human dignity. Today’s apostle of the New Dignity, Anthony Kennedy, has provided the movement with its own sacred text. An acquaintance recently attended a wedding (of a man and a woman, and not in a church) where the first “reading” at the ceremony was a passage from the majority opinion in *Obergefell*.

HANG ON FOR THE RIDE

The same ingenious alchemy used on the word “dignity” is now at work on the US Constitution. Religious

liberty and First Amendment rights will provide scant protection. Dissent, even if grounded in religious beliefs, is assumed to cause stigma, shame, and emotional injury—dignitarian harms that cannot be permitted.

I will leave it to the philosophers to trace the genealogy of the New Dignity—from Descartes with his anthropological dualism, to Kant with his self-legislating autonomous will, to Nietzsche’s will to power, to Sartre’s claim that existence precedes essence, to Derrida’s free play in the absence of stable natures, to contemporary thinkers like George Kateb, Jeremy Waldron, and Michael Rosen who attempt to locate a purely secular or materialist grounding for human dignity.

I will leave it to the constitutional lawyers to trace the genealogy of the New Dignity in the courts—from *Griswold’s* invention of a right to privacy, to *Roe’s* placement of abortion upon this privacy foundation, to *Casey’s* expansion of abortion by means of its seminal “sweet mystery of life” clause, to *Romer* and *Lawrence*, which explicitly introduced the New Dignity jurisprudence, to *Windsor*, which expanded this jurisprudence, and finally to *Obergefell*, which gave the New Dignity a definitive juridical form.

For now, at the very least, I can say the New Dignity may well be the harbinger of a social transformation the likes of which we have not seen in the West for 1400 years. The wave is cresting, and the tsunami will reach shore before we know it. As the bumper sticker says, “Your body may be a temple, mine is an amusement park.”

Hang on for the ride.

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³ *The Right to Die*, *ECONOMIST* (June 27, 2015), available online at <https://www.economist.com/news/leaders/21656182-doctors-should-be-allowed-help-suffering-and-terminally-ill-die-when-they-choose>, retrieved September 27, 2017.



OUR CULTURAL COUNTERDREAM

Remaking Human Beings and Unlawing the Law

BY ANDREW R. DELOACH

Few depictions of the evolution of culture can transport us more intensely from terror to delight as the *Oresteia* of Aeschylus. It is the classical celebration of the triumph of human progress. It begins in the darkness of primitive ritual, barbaric vendetta, and blood feuds. It culminates with the triumph of civic order, restoration, and justice. The utter savagery of the house of Atreus gives way to the harmonious democracy of the Areopagus, Athena's high court for communal justice.¹ This is "a story of creation" in which the creators grow more human as the culture created grows more humane.²

And yet it is also a story of re-creation—the redefinition of culture and of humanity. As the *Oresteia* tells of the struggle to form the institutions of democracy, it anticipates the pains of preserving them, even in our day. With order and stability come reflex and reaction. Cultural stasis frustrates our expectations of perpetual renewal, and leaves "a reservoir of unused, turbulent energies."³ The weighty demands of progress drive our culture urgently on toward utopia, always with the possibility of new conflict and "a new barbarity."⁴ It is not difficult to observe how obstructed desires cause our culture to seethe with frustration, indifference, and hate. Against Athena's settled order we witness the postmodern "counterdream": the savage dissolution of all limits that restrain our freedom.

In this dream, however, the cultural redefinition begins not in violence but in boredom—in the metaphysical boredom and discontent known as *acedia*. The great hope of this metaphysical boredom, in its abhorrence of the necessary limitations of law and of creation itself, is unconstrained freedom in the total redefinition of human nature. *Telos* and the transcendent are voluntarily surrendered. The end result is the loss of both dignity and the capacity for love, and with them any ultimate basis for human rights.

ACEDIA AND THE EMPIRE OF DESIRE

At the heart of this present cultural redefinition is the vice of *acedia*. The one it infects is actively engaged in a revolt against limits, place, order, and even life itself.⁵ Whether for the fourth-century monk or the postmodern man, *acedia* is an indifference toward truth and goodness, and a hatred of the created world: it "abhors what God has given, namely reality and the limits of order...."⁶ Inevitably, such hatred wants to be free from the world—along with any authoritative worldview, norms, or history. With this revolt comes "a profound withdrawal into the self," the unencumbered, autonomous self who seeks in wild abandon for complete satisfaction of personal desires.⁷

¹ ROBERT FAGLES AND W.B. STANFORD. "THE SERPENT AND THE EAGLE: A READING OF 'THE ORESTEIA,'" 14, 81. *THE ORESTEIA*, BY AESCHYLUS. Tr. Robert Fagles (Penguin 1977).

² *Id.* at 87. There is far more to be said on this topic that ought to be left to an expert in Greek tragedy. It will suffice to point out that Fagles' point here is one of several reasons why it is appropriate to consider Greek tragedy in a discussion of culture, justice, and (especially) humanity. As Nicholas Rudall, professor of classics at University of Chicago, has aptly explained, Aeschylus and the other Greek tragedians were largely engaged in inventing the philosophy of what it means to be human.

³ GEORGE STEINER, IN *BLUEBEARD'S CASTLE: SOME NOTES TOWARDS THE REDEFINITION OF CULTURE*, 17 (Yale University Press 1971).

⁴ Fagles, *supra* note 1 at 97. Here Fagles and Steiner coincide in their recognition of the possibility—the tendency, even—of recurring catastrophe. Indeed, what Steiner describes as the "inescapable drive towards war, towards a supreme assertion of identity at the cost of mutual destruction" is a fundamental feature of human culture, and particularly our modern culture. (STEINER, *supra* note 3 at 24.) His thesis parallels much of the thesis of this article.

⁵ R.J. SNELL, *ACEDIA AND ITS DISCONTENTS: METAPHYSICAL BOREDOM IN AN EMPIRE OF DESIRE*, 61 (Angelico Press 2015).

⁶ *Id.* at 10.

⁷ Jean-Charles Nault, *Acedia: Enemy of Spiritual Joy*, *COMMUNIO* 31 (Summer 2004), 245-46, <http://www.communio-icr.com/articles/view/acedia-enemy-of-spiritual-joy>, retrieved September 14, 2017.

But more than hatred undergirds this revolt. As Michael Hanby points out, our cultural counterdream is less about celebration of self, pursuit of pleasure, or will to power than the hopelessness of boredom.⁸ And this is not mere tedium—boredom with some *thing*. It is a fatigue and indifference that, though consumed by desire, can find no intrinsic value in the objects of its desire. It is at ease with nihilism. The “roused and thwarted energies of dreams and desires” that characterize this boredom—uncaptivated by transcendent truth, goodness, or beauty—are redirected toward unadulterated expressions of will.⁹ This is freedom founded on voluntarism, and technology is the preferred means of satisfaction, whether it be entertainment (which “presumes the state of boredom as the norm”¹⁰) or the making, re-making, and ending of human life.¹¹ Thus, the pervasive *acedia* of our day, what George Steiner prophetically called the great *ennui*, is “a long whine of loathing, of nausea at the apparently unshakeable regimen” of created reality, being, order, and law.¹²

Indeed, this *acedia* is now more than an individual vice. It is a cultural malady in full revolt against the Western (Judeo-Christian) tradition and with it, the Christian understanding of the human being. What Alasdair MacIntyre and Charles Taylor (and Steiner before them) have described as “malaise” is a societal struggle to attribute worth to anyone other than ourselves—and even to our selves.¹³ “The meaninglessness of the world,” says Snell, “allows us to treat it and others and ourselves exactly as we wish.”¹⁴ Our bored culture refuses any debt either to order or to others.

The Christian view of being, and of human beings, is fundamentally relational. Human beings are ordered toward others. This is part of our *telos*, our created purpose, our being the bearers of God’s image. The *imago Dei* is given freely to us so that, in response, we would be a living gift to others. We are more truly human—and truly free—when we trust in the Creator to orient our desires and actions according to the limitations He has given for our good.

Contemporary culture recoils at this idea. Inordinate will turns us away from others, away from communion with the Creator and our fellow human beings. With this comes “sadness about what ought to gladden us most,” namely, participation in the created order and the life of God.¹⁵ In its place, inordinate desire for unfettered freedom compels the erasure of those beneficial limitations within which our selves and our societies truly flourish. Our culture grows more willing to harm and even kill each other in its perverse longing for satisfied desires.¹⁶ While traditional cultures constrain and limit desire, our culture maintains that desires (so long as they harm no one else) ought to form culture.¹⁷ This is the counterdream, the “postmodern metaphysical dream” that R. R. Reno so astutely calls the Empire of Desire, which at once feeds on and is polluted by “an antinomian sensibility.”¹⁸

We are trained to be suspicious of longstanding moral traditions; we are told to adopt a critical attitude toward inherited norms. ... It serves a moral conviction, widespread though often tacit: that human beings flourish to the

⁸ Michael Hanby, *The Culture of Death, the Ontology of Boredom, and the Resistance of Joy*, COMMUNIO 31 (Summer 2004), 184–185, <http://www.communio-icr.com/articles/view/the-culture-of-death-the-ontology-of-boredom-and-the-resistance-of-joy>, retrieved September 14, 2017. According to Hanby, boredom differs from *acedia* and the related concept of *ennui*; his distinction of boredom from these two, though not inapt, is rather cursory. In fact, his definition of boredom as a “double nullity of both subject and world” coheres well with the lengthy descriptions of *acedia* (and boredom) in Snell and Nault, and with Steiner’s concept of “the great *ennui*,” which can only be mentioned but not developed here.

⁹ Steiner, *supra* note 3 at 22.

¹⁰ Hanby, *supra* note 8 at 185.

¹¹ *Id.* at 188. Hanby explains (quoting John Paul II) that “the use of science to subordinate vulnerable life” is a danger “inherent in the culture of death, obsessed with ‘programming, controlling, and dominating birth and death.’” See also OLIVER O’DONOVAN, *BEGOTTEN OR MADE? 2-3* (Oxford 1984).

¹² Steiner, *supra* note 3 at 22.

¹³ See Snell, *supra* note 5 at 72.

¹⁴ Snell, *supra* note 5 at 60.

¹⁵ JEAN-CHARLES NAULT, *THE NOONDAY DEVIL: ACEDIA, THE UNNAMED EVIL OF OUR TIMES*, 80 (Ignatius Press 2015).

¹⁶ Snell, *supra* note 5 at 61.

¹⁷ R. R. Reno, *Marriage, Morality, and Culture*, FIRST THINGS (September 2009), <https://www.firstthings.com/web-exclusives/2009/09/marriage-morality-and-culture>, retrieved October 1, 2017.

¹⁸ R. R. Reno, *Empire of Desire: Outlining the Postmodern Metaphysical Dream*, FIRST THINGS (June 2014), <https://www.firstthings.com/article/2014/06/empire-of-desire>, retrieved October 1, 2017. Reno’s article, together with Hanby’s, is indispensable reading on the subject of our culture’s voluntaristic pursuit of limitless freedom and the cultures of desire and death it creates.

degree that they're free to satisfy their personal desires. ... [W]e push these social mores, disciplines, and restraints to the margins of our souls, creating space for bespoke lives tailored to our desires.¹⁹

Acedia has turned us inward, and thus prohibits our attention to the other. It is self-love with no room for self-giving love. It has produced a deranged (dis-arranged) view of the human being as instrument and resource, raw material for the making. In this post-cultural Empire, human beings live in “the mode of unrepressed bodies” seeking and finding satisfaction,²⁰ willing its project of creating unlimited freedom—all the while longing for a violent dissolution.²¹

UNCONSTRAINED FREEDOM

Undoubtedly, the project of our culture has become “the liberal pursuit of unconstrained freedom” in every sphere of life.²² Our Empire grows ever more disgusted with the triumph of the *Oresteia*. Such imposed order is an affront to unfettered desire. This revolt is founded not on the protection of justice and human rights but on the extension of freedom—“the abolition of limits which constrain and direct us.”²³ Scientific technique is made an accomplice in the pursuit of freedom even from “the necessities imposed upon us by our bodily nature.”²⁴ The despisers of Western (and particularly Christian) culture “will not rest until they have leveled every aspect of human life.”²⁵

The preferred means of achieving this reconstructed reality is the law. While technology (particularly medical technique) may often be the implement, it is the law that imposes. And so it has been by and through

the law—specifically the courts—that our culture has asserted its will, demanding rights and freedoms previously unwritten and unknown. The unmistakable watchword of this revolution is “equality.” But equality as shorthand for “equal rights under law” is a pretext, because the law always limits. What our culture desires is not equality but limitless freedom. Whether it be the right to contraception,²⁶ abortion,²⁷ or same-sex marriage,²⁸ the demand to legally abolish these limits was laid down, and the U. S. Supreme Court willingly contrived rights in the “penumbras” and “emanations” of otherwise explicit Constitutional guarantees. Countless examples of such reasoning abound in our jurisprudence—limited only by the imagination of the jurists and their capitulation to the will of the culture.

If any contrivance of the courts clearly illustrates Reno’s antinomian impulse to create “space for bespoke lives,” it is Justice Kennedy’s doctrine that freedom grants the right to define *and* express one’s own concept of human existence, identity, and

meaning.²⁹ Abortion is championed in the name of privacy and women’s healthcare, and marriage is reinvented as mere state recognition of love and the right “not to be condemned to live in loneliness.” These are simply the foundation stones of the right to define. Any limitation on the Kennedy doctrine will be easily swept aside when pressed to its logical end. Unrestricted autonomy must permit assistance in dying to relieve oneself and others of burden at the end of life—and for that matter, any time before. The right to define must permit one to assume a gender (actually known or artificially invented) contrary to his or her biological sex, without need of justification. The concomitant right to express

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and thus prohibits our attention
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¹⁹ *Id.*

²⁰ *Id.*

²¹ Steiner, *supra* note 3 at 23.

²² O’Donovan, *supra* note 11 at 20. Although O’Donovan limits this pursuit to the private realm, it has arguably erupted into the public realm. In fact, it seems that O’Donovan was at least aware of this trend, for he recognizes “the imposition of society’s projects and purposes upon the way reality is understood” and the “struggle with society to exact a reality-concession.” *Id.* at 25-26.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ R. J. Snell, *Advent in the Deathworks*, FIRST THINGS (December 2016), <https://www.firstthings.com/web-exclusives/2016/12/advent-in-the-deathworks>, retrieved October 4, 2017.

²⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁸ *Obergefell v. Hodges*, 576 U.S. (2015).

²⁹ This is a synthesis of the doctrine crafted by Kennedy in two significant Supreme Court decisions: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Obergefell v. Hodges*, *supra* note 28.

this identity demands that everyone else must honor the artifice. If “love is love” forms the only boundary on what constitutes a marriage, then certainly marriage as a concept cannot long be limited to two persons, but must be open to polyamory and polygamy. Even the limitation to *persons* must fall. Marriage to robots and even self-marriage (“sologamy”) are coming increasingly into fashion. One simply cannot be condemned to live in loneliness, even if one lives alone. Once we have begun the revolt, what principled reason remains to refuse the right to define?

What remains is the continuation of the project. Abolition must proceed, impermissible limits must fall. And this use of law-for-freedom is carried out in unison with technology-for-freedom. We are a technological society not because of what we *do* with technique, but because of the way we *think* of everything we do “as a kind of mechanical production.”³⁰ As Oliver O’Donovan explains, “the technological transformation of the modern age has gone hand in hand with the social and political quest of Western man to free himself from the necessities imposed upon him by religion, society, and nature.”³¹ Even our use of law becomes a manipulative and mechanistic production of legislative change by artifice. The metaphysically bored and legally bound circumvent the democratic process and find a willing plaintiff to create a test case and force it through the courts.³² Success brings legal recognition and satisfaction of desire.

But even that satisfaction remains bound by law. The Kennedy doctrine, despite its seeming openness to any redefinition, is nonetheless limited in *Obergefell*: freedom permits the right to define “within a lawful realm.” Marriage is changed, but remains limited. Abortion can’t be had without State and medical assistance.³³ Here, then, is the problem for the postmodern counterdream. To attain the unconstrained freedom so desired and willed, our culture needs our legal system. Law is the means of imposing the revolutionary will. But once

that new freedom is won, the law stands in the way of still more freedom. Freedom remains fettered. The only solution, and the most logical outgrowth of the Empire of Desire, becomes a violent dissolution of the law itself.

THE ORESTEIA IN REVERSE

Our Empire, as Reno explains, has rules and regulations—“minimal but bright-line limits.” But they stand in the way of our desire for unconstrained freedom. And so they are softened, from hard law to flexible norms, eventually reaching expressions of altogether meaningless preference. “The Empire’s anti-law holds sway: It is forbidden to forbid.”³⁴ What’s more, this negative right *against* forbidding necessarily entails a *positive* obligation to yield and affirm.

In the past, the instruments of political power have been used to tear down official forms of limitation and censure so that desires can find their satisfactions. ... Our present and widespread social censure of moral censure inculcates and reinforces a non-judgmental ethos. Now we are embarking on a much more aggressive program. Everybody should have access to ... affirmation. Everybody has a right to feel normal.³⁵

Now the law—with its inherent limits and order—must be vanquished. It seems we are practically begging to play out our own end of ancient Greek tragedy, and no more tragic a character than Oedipus will do. Responding to the flippant dismissal of religious authority by Jocasta, mother-wife of the King, the Chorus admonishes them both:

Great laws tower above us, reared on high
Born for the brilliant vault of heaven—
Olympian Sky their only father,
Nothing mortal, no man gave them birth ...³⁶

³⁰ O’Donovan, *supra* note 11 at 3, 73.

³¹ *Id.* at 6.

³² For example: *Roe v. Wade*, 410 U.S. 113 (1973); *Hollingsworth v. Perry* 570 U.S. (2013) (a challenge to the voter-passed Constitutional amendment prohibiting same-sex marriage in California); *Gill v. Office of Personnel Management*, 682 F.3d 1 (1st Cir. 2012) (a challenge, filed by the Gay & Lesbian Advocates & Defenders, to the Defense of Marriage Act); *United States v. Windsor*, 570 U.S. (2013) (a challenge to the Defense of Marriage Act, filed with assistance from the A.C.L.U.).

³³ Dr. Grégor Puppincq, *Abortion and the European Convention on Human Rights*, IRISH JOURNAL OF LEGAL STUDIES, Vol. 3(2) 2013, 161, http://ijls.ie/wp-content/uploads/2013/07/IJLS_Vol_3_Issue_2_Article_8_7_Comparative_Puppincq.pdf, retrieved October 1, 2017.

³⁴ Reno, *supra* note 18. Reno continues: “Legal regulation of personal behavior, family life, and social interactions expands in order to take over the ordering, harmonizing function once performed by an unofficial but deeply internalized cultural *nomos*.”

³⁵ Reno, *supra* note 17.

³⁶ SOPHOCLES, *Oedipus the King*, in THE THREE THEBAN PLAYS, 209, lns. 957-60. Tr. Robert Fagles (Penguin 1984).

But the Chorus also recognizes the desire of these mortals to be free from authority—particularly religious authority—and sees their will to destroy that foundation: They are dying, the old oracles sent to Laius,

Now our masters strike them off the rolls.
Nowhere Apollo's golden glory now—
The gods, the gods go down.³⁷

Following ancient precedent, our present society has discarded Western Judeo-Christian foundations; our masters “strike them off the rolls.”³⁸ Moral order is replaced by social order. Law is permitted, even used, to unlaw itself.³⁹ Thus, the Kennedy doctrine must permit everything. Choose your child's sex and even demand its health with pre-implantation genetic diagnosis.⁴⁰ Make your child with a donated gamete and surrogate womb regulated by simple contract. Make for yourself a different gender, or even make yourself a different sex. Make your own *child* a different gender and assault the course of human growth.⁴¹ Make an entire population free of Down syndrome.⁴² Set the value of persons not on their being human but on their possession of abilities—both at beginning and end of life.

We have seen the beginnings of this mentality in various “living document” interpretations of constitutions and human rights treaties. We are all too familiar

with this practice in the United States. It manifests itself in triumphant (and terrifying) fashion in Europe, where the European Court of Human Rights embraces an “evolutive interpretation” of the European Convention on Human Rights, “adapting it to the changes that have taken place over time—to changes in society, in morals, in mentalities, in laws, but also to technological innovations and scientific progress.”⁴³ We cannot but be alarmed by the European Court's reliance on “consensus” and “continuing international trend” as indicators of acceptable limits. Once the Court is satisfied with the appearance of consensus or trend in domestic laws, the remaining countries of Europe will have no choice but to fall in line, the decision being imposed upon them.⁴⁴ This and many of our own courts are increasingly willing to negate the voice of democracy.

If the *Oresteia* is a celebration of the triumph of human progress, this *Oresteia*-in-reverse is the triumph of digress, the unmaking of law, and the retribution of savage will against democracy—all in the yearning for unfettered freedom. Reno is correct in saying that “[t]he destruction of civilization—the abolition of repression—becomes the great imperative against imperatives.”⁴⁵ In this post-cultural world we simply seek and find satisfaction of desire. This antinomian Empire must finally vanquish the limits of law.

³⁷ *Id.* at 210, lns. 994–97.

³⁸ Would that our culture were not so short-sighted and unwilling to heed the ancient wisdom that followed the tragic downfall of Oedipus. In Sophocles' *Antigone*, written before but occurring chronologically after the events in *Oedipus the King*, the Chorus sings the praise of “Man the master, ingenious past all measure” who “conquers all, taming with his techniques....” This strikes us as the ideal anthem for postmodern man, yet the Chorus continues with a striking warning to men ancient and contemporary: “When he weaves in/the laws of the land, and the justice of the gods/that binds his oaths together/he and his city rise high—/ but the city casts out/that man who weds himself to inhumanity/thanks to reckless daring.” SOPHOCLES, *Antigone*, in *THE THREE THEBAN PLAYS*, 76–77, lns. 391–415. TRANSLATED BY ROBERT FAGLES. (Penguin 1984).

³⁹ I am indebted to Jeff Shafer for bringing this concept from Milton to my attention in his outstanding article on the use of this technique by the transgender movement. The idea, according to Milton, is that no law can permit activity that attacks that very law, “no law, that is, that ‘intends not to unlaw itself.’” Jeff Shafer, *Supreme Incoherence: Transgender Ideology and the End of Law*, *FIRST THINGS* (March 2017), <https://www.firstthings.com/web-exclusives/2017/03/supreme-incoherence-transgender-ideology-and-the-end-of-law>, retrieved September 12, 2017. I only discovered Shafer's article midway through preparing my own, but it has been enormously helpful.

⁴⁰ Puppink, *supra* note 33 at 160, citing *Costa & Pavan v. Italy*, No. 54270/10, 28 August 2012.

⁴¹ A recent, and entirely representative, statement on Twitter by a parent prescribing puberty blocking medication to her child: “Forcing their bodies to go through puberty because people like you don't understand their experience is abhorrent. You don't get to decide.” (Posted October 2017).

⁴² See, e.g., Alexandra Desanctis, *Iceland Eliminates People with Down Syndrome*, *NATIONAL REVIEW* (August 2017), <http://www.nationalreview.com/article/450509/down-syndrome-iceland-cbs-news-disturbing-report>, retrieved September 4, 2017.

⁴³ JEAN-PAUL COSTA, “What are the limits to the evolutive interpretation of the Convention?” *Dialogue between Judges* (European Court of Human Rights, Strasbourg, 2011), 5, quoted in *THE ‘CONSCIENCE OF EUROPE’ NAVIGATING THE SHIFTING TIDES AT THE EUROPEAN COURT OF HUMAN RIGHTS*, 8 (ADF International 2017).

⁴⁴ PAUL COLEMAN, *EVOLUTION, CONSENSUS, AND THE MARGIN OF APPRECIATION*, 22. *THE ‘CONSCIENCE OF EUROPE’ NAVIGATING THE SHIFTING TIDES AT THE EUROPEAN COURT OF HUMAN RIGHTS*. (ADF International 2017).

⁴⁵ Reno, *supra* note 18.

**THE CONSEQUENCE:
OPTICAL DEMOCRACY**

The intended consequence of this unlawing is a total redefinition of human nature and a negation of settled doctrines. Authority and limitations must be nullified in favor of perpetual preference. But the unintended, and far more dire, consequence, is the disqualification even of preference and so the complete annihilation of human dignity. It is what Cormac McCarthy described as “optical democracy”:

In the neuter austerity of that terrain all phenomena were bequeathed a strange equality and no one thing nor spider nor stone nor blade of grass could put forth claim to precedence. ... [H]ere was nothing more luminous than another...and in the optical democracy of such landscapes all preference is made whimsical and a man and a rock become endowed with unguessed kinships.⁴⁶

Our Empire of Desire becomes a landscape where no one thing has precedence over another. Humans are not exceptional but equivalent in relation and dignity with a rock. Life is not sacred at *any* stage. Unconstrained freedom negates itself.⁴⁷

This optical democracy is an anthropological crisis in our culture. Abortion, euthanasia, in vitro fertilization, transgenderism, and many more practices have “impaired the manner in which physical life itself and its legal protection can coincide in time.”⁴⁸ Obviously much more than our social institutions and practices are at stake. We have called “the intelligibility of humanity” into question.⁴⁹ As Oliver O’Donovan tells it, “[w]e have stamped the decisions of our will upon the material which the world has offered us, to form it in this way and not in that.”⁵⁰ The inexorable result is that what

we “make” of humanity is altogether *alien* from our true humanity.

Thus, the autonomy so cherished, so idolized, by the discontents of our culture must inevitably reject the dignity of others as a threat to personal sovereignty.⁵¹ Unconstrained freedom cannot logically acquiesce to co-exist with human dignity, and thus with human nature. The loss of human dignity means that we have also lost the historic basis for human rights.⁵² But far worse, when all rights are transformed into preferences and all preferences are made whimsical, we have lost the ability to call anything—*anyone*—good or bad, “intrinsically desirable or detestable.”⁵³ Put simply, it means that we have lost the capacity to love, and with it our very humanity.

Overcoming acedia requires more of us than simply maintaining a correct worldview. It calls for affirmation of our own being and our proper work and dignity.

**OVERCOMING
ACEDIA: REJOICING
IN THE GIVENNESS
OF THINGS**

Everything we have has been given to us. Our own existence is maintained by the sustaining grace of God. Whatever freedom we have is purely a gift, and

our dependency on God does not reduce our worth. Rather, our dignity is founded on the fact the God, in Christ, freely chose to create us in His image. Contrary to the *acedia* that drives our culture’s pursuit of unlimited freedom, true freedom is found in the givenness of creation, in the limits that God has created to order us for our happiness and good. Happiness does not come from unrestrained desire. It comes from desiring to live according to the limits that transcend our individual desires.⁵⁴ This is true freedom, dependent on relationship to our Creator, who overcomes *acedia* in the incarnation of Jesus Christ and his gift of saving and reconciling grace.⁵⁵

Overcoming *acedia* requires more of us than simply maintaining a correct worldview. It calls for affirmation

⁴⁶ CORMAC MCCARTHY, BLOOD MERIDIAN, OR THE EVENING REDNESS IN THE WEST, 258-59 (Vintage International 1985).

⁴⁷ Hanby, supra note 8 at 187.

⁴⁸ Puppink, supra note 33 at 149.

⁴⁹ Hanby, supra note 8 at 198.

⁵⁰ O’Donovan, supra note 11 at 1.

⁵¹ Snell, supra note 5 at 13-14.

⁵² See, e.g., the Preamble to the Universal Declaration of Human Rights (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

⁵³ Hanby, supra note 8 at 187.

⁵⁴ Reno, supra note 17.

⁵⁵ Nault, supra note 15 at 85-87.

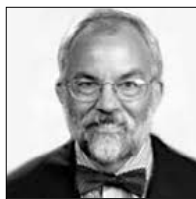
of our own being and our proper work and dignity.⁵⁶ We must, with the Holy Spirit's help, rejoice in the order of God's creation and the truth of reality. Revolt against the given order in our humanity reduces relationships (particularly man/woman relationships) to "simply a profound form of play."⁵⁷ But a proper and joyous relationship honors the other as created and, therefore, possessed of a goodness that is not merely good *for* something. For both joy and love presuppose the goodness and beauty of another,⁵⁸ which are not whimsical but are intrinsic to the other. In joy and self-giving love we can say to another: It is good that you exist.

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⁵⁶ Snell, *supra* note 11 at 97.

⁵⁷ O'Donovan, *supra* note 11 at 17.

⁵⁸ Hanby, *supra* note 8 at 196.



DATA AND DIGNITY

Protecting the Truth of Real Things

BY STEPHEN KENNEDY

Dignity is like love and music. We know what it is until we are asked to define it. Nevertheless, dignity has meaningful and often unexplored connections with personal data in our century. Social security, driver's license, and bank account numbers, genetic, computer, and employer's codes all give the appearance of being little more than pieces of neutral, objective factoids—*data*. However, once digitized, collected, collated, analyzed, dissected, and stored by government agencies, schools, social science researchers, medical insurance companies, cellular networks, and other commercial concerns, all these bits of data become something else. We are all rightly concerned to discover what others know about us, and what they do with what they know. Such questions have real implications for how we think about human dignity in our technological age.

Normally we disclose knowledge about ourselves to others voluntarily, carefully, and slowly in the context of ordinary human relationships. We reveal little to those whom we call acquaintances. The greater the friendship, trust, and affection the greater the self-disclosure. For tens of thousands of years this is the way people have navigated our relational worlds.

Now, in the technological age, we are compelled to disclose more and more about ourselves to complete strangers.¹ Recognizing this new vulnerability, those who collect and analyze and store all this data assure us that it's only *data*. All is well, it's safe, secure, and confidential. Then we inevitably discover that this is not the case. For some reason they have delivered it to government agents, sold it to commercial agents, or otherwise passed it on to those we never authorized to have it. We gradually learn that strangers know more about us than we thought, they have relayed it to other strangers, and that this data, in the digital age, has no shelf life.

The protection of human dignity cannot be divorced from the protection of human data. Moreover, since personal data is typically contained in words, words themselves must retain dignity. They must communicate truth

about real things. If words have no dignity—no capacity to shape and inform the truth about people—then no one will seriously protect them, even words *about us*. If words are *mere* data floating around the digitized universe, people who have that data have little incentive to keep it private, secret, and secure. Privacy is not an abstraction. It is knowledge about the truth concerning real people. Privacy means that there are things that are not for everyone to know.

As a professor of law and ethics, I want to challenge lawyers and human rights advocates to ponder the extreme difficulty of protecting personal data in the modern world. It is not merely a matter of norm-setting and compliance mechanisms. Human rights education is not enough. We face cultural conditions that are averse to the protection of personal data. Below I examine three social processes of modernization that are arrayed against protecting personal data.

THREE SOCIAL THREATS TO PERSONAL DATA

First, there is *objectification*, the ensemble of social factors that causes more and more distance between people so that we more readily regard one another as mere objects, statistics rather than real people. Those with our data will probably never have to face us and explain their behavior if they sell or otherwise abuse it. If we are mere statistical quantities, if words are mere objects that signify nothing real about us, then why should they care about our privacy? The documentary, "The Smartest Guys in the Room," exposes precisely how such objectification occurs, as Enron stole hundreds of millions of dollars from individual investors and state energy agencies.

Second there is *commodification*—the ensemble of social factors that further alienates us into viewing one another as mere bundles of economic desires. Marketers of goods and services want to mold and shape our desires so that we will buy their products. (Governments often become complicit insofar as keeping people

¹ Jacques Ellul saw this coming. I recommend his prescient works *THE TECHNOLOGICAL SOCIETY*, *THE TECHNOLOGICAL SYSTEM*, and *THE TECHNOLOGICAL BLUFF*.

preoccupied with consumption diverts otherwise critical eyes away from the government itself, as long as it delivers the goods.) People who use data to target sell products are too often willing to steal, barter, and sell that data for the competitive advantage it affords. Platitudes about the right to privacy have little impact in a world where words like “data,” “information,” and “knowledge” are perceived to be a morally neutral and depersonalized. But these words, despite their different etymologies and nuances, all indicate realities that give shape and substance to who we are.

Third, there is *politicization*—the ensemble of social factors that increases alienation by training us to regard one another as mere bundles of political preferences. Politicians don’t have time to worry about the people who will vote for them. That is now the job of ‘handlers’ and campaign advisors, consultants and managers who specialize in spinning images and sound bites. Everything, in our current cultural climate has been politicized, even professional sports. Political campaigns no longer treat us reasonable creatures seeking rational engagement with the issues. We are treated as mere objects for mass manipulation.

We should be properly fearful of being *objectified*, *commodified*, and *politicized* because people with power can easily manipulate us (and their data about us) to their own advantage. Data about us, however, does have a decidedly moral component. We certainly want people who have this data to be responsible with it. Sadly, the social processes of modernization create cultural conditions that are hardly encouraging.

THREE INDIVIDUAL THREATS TO PERSONAL DATA

When we move from the social processes of modernization to a more individual level, the problems are compounded. Scholars of the Critical Studies and deconstructionist movements tell us that people want to misuse our data in order to have ‘power.’ This is partially true. People don’t merely want power; we want power over someone *for something*. Power over others has a myriad of deep motivators, which cannot be ignored.

People may want power in order to win a *rivalry*. Rene Girard’s work on the *mimetic* nature of human desire posits that people misuse knowledge due to *envy*. In other words, we want power over those we envy. We want what others have, which is a fruit of rivalry. Rivalry gives rise to envy, and our information disclosures (willing or unwilling) can help people get what they desire from us, whether notoriety, fame, wealth, or love. Rivalry that leads to envy causes people to grasp anything, including our personal data, to get what they want. In too many cases, this striving leads to violence.

(I won’t explore this point further since it’s all there in Shakespeare, Dostoevsky, Tolstoy, and Proust.)

People also seek power in order to satisfy *greed*. Commercial corporations are designed to maximize efficiencies for the maximization of profit. If misusing people’s disclosures leads to an economic advantage, then so be it. Greed generates increasingly serious forms of oppression. It simply wants for the sake of quenching an insatiable desire for more, a desire that often expresses itself as the desire to live off the labor of others. Greed motivates the currency-trader as much as the slaver and the pimp. (The oldest profession, by the way, is not prostitution. It is the pimp, the slaver, the one who would live off another person’s work.)

Lastly, people want power in order to overcome *fear*. Governments have a duty to protect their people, and officials will not get re-elected if enemies are regularly inflicting terror on the public. Furthermore, terror is terrifying in itself. This drives many to abuse personal data (and even physical integrity) in order to overcome the paralyzing fears that accompany violence.

THE VIOLENT TURN

For the past decade of teaching human rights law, I have of necessity become a student of violence. This includes historical incidences in places like the former Ottoman Empire, Nazi Germany, Rwanda, and Cambodia, as well as the political, sociological, ideological, cultural, religious, and psychological origins of violence.

Violence is always accompanied by the degradation of the word. When people collect, analyze, and store what we have disclosed to them, they owe us a special fiduciary duty of care to protect that knowledge from misuse. Instead, they begin to make profiles. Profiles can be thought of as sophisticated stereotypes. The problem with stereotypes is that they cannot truly represent anyone accurately. In our data-driven age, stereotypes become a habit of mind, a shorthand because people have neither the time nor desire to know people as they really exist. Therefore, profiles can be easily coopted for harmful purposes. Recall Gregory Stanton’s stages to genocide: classification, symbolization, dehumanization, organization, polarization, preparation, extermination, denial. Profiles are a critical component of the first three stages. They are not inevitable stages, but they are on the typical historic track to massacre.

When envy, greed, and fear combine with the social forces of modernity, they can all too easily become catalysts for violence. Governments in merely contractual relationships with their citizens can easily dissolve those loose contractual bonds to release social tensions. Turning again to Rene Girard, we find the social practice of *scapegoating*. Political, economic, and cultural rivalries

often fill society with tensions. Leaders typically avoid a serious national discussion about what is wrong as it might implicate them in the problem. Instead, they look for a scapegoat in some minority or another, often recent immigrants or an unpopular minority. There they conveniently lay blame.

We may add to this the mobility of violence, which is the basis for frustration/aggression theory. You get chewed out at your job, for example. Since you cannot yell back at your boss, you come home and yell at your children. The violence you want to direct at your superior is transferred to your children. Your emotions are relieved either way. We rarely want to admit our own failures, so we blame others. This mobility of violence occurs on both a micro and a macro level.

In *Purify and Destroy: The Political Uses of Massacre and Genocide*, Jacques Semelin discusses what he calls “the pernicious tree of propaganda.” Agreeing with Girard about scapegoating, he explains the mechanism by which scapegoating leads to violence. The leadership of a society invents what he calls “the imaginaire of destruction.” This imaginaire, or story, creates a common past of suffering and trauma that inspires a critical mass of listeners to respond, “Look what they’ve done to us. We’ll never let that happen again!” As Semelin argues, this story of past suffering is the trunk of the ‘pernicious tree of propaganda.’

It sprouts two large branches that together make up its entire stature: the almost eternal principle of grandeur and purity of our people who ... will not put up with such humility again” and the other branch which demonizes the ‘other’, which is “the source of all our people’s unhappiness.”²

This is precisely what occurred in Ottoman Turkey, Nazi Germany, the former Yugoslavia, Rwanda, Sudan, Liberia, Cambodia, and North Korea.

If words do not signify real knowledge about real people, then communication is reduced to a power play, and the distinction between *persuasion* and *propaganda* disappears. What are we to do when we lose a category of words that signify reality? We are at the mercy of manipulators who are more than eager to know more and more about us so that they can further their own ends. No area of the world has such a long record of non-violence that it can consider itself safe from the racial, ethnic, religious, and nationalist violence that such manipulators may unleash.

Scapegoating generates propaganda, propaganda leads to violence, and violence is followed by *denial*. I don’t mean the therapeutic denial of pop psychology, but the denial of the victims of violence. In his important analysis, *States of Denial: Knowing about Atrocities and Suffering*, sociologist Stanley Cohen analyzes 7 official accounts of denial:

1. Denial of knowledge: “I didn’t know about all that.”
2. Denial of responsibility: “I didn’t order them to do that.”
3. Denial of injury: “No one really got hurt.”
4. Denial of the victim: “They started it, and we only responded proportionally.”
5. Condemnation of the condemners: “You’d do it too if you were us.”
6. Appeal to higher authorities: “I had to do it. It was ordered.”
7. Moral indifference: “No means is to be excluded to bring about the triumph of our noble cause.”³

Whichever official account is chosen, denial always follows on the heels of violence. In every case, it entails the degradation of words, draining their true significance regarding real violence against real people. These accounts weave a lie about the people and the officials who violate them. Vaclav Havel was more than familiar with such propaganda, so he often wrote about living ‘outside the lie.’ If, however, we no longer believe that words can communicate truth about real people (what Josef Pieper called “the truth of real people”) how do we know whether we are inside or outside the lie? If words and knowledge about people is morally neutral, then what habits of mind help us discern whether an official account is ever truth or fiction?

Even friendship, which the ancients believed to be a corrective to merely contractual relationships, has itself been profoundly degraded. This occurs quietly in the process of *contractualization*—reducing all human relationships to that of a contract. Lawyers drafting international treaties have to be especially careful not to imagine that everything can be solved contractually. Many relationships simply defy contractual reduction. A contract is *quid pro quo*, this for that. A great contractarian philosopher, Immanuel Kant argued that marriage is a contract for the mutual use of the genitals. But surely he has missed the point entirely. Marriage, like friendship, is a covenant characterized by forgiveness,

² JACQUES SEMELIN, *PURIFY AND DESTROY* 77 (2009).

³ STANLEY COHEN, *STATES OF DENIAL* (2001).

love, and grace. The increasing contractualization of human relationships has led to the diminishing of friendship. The relationships we have with the governments, researchers, and commercial enterprises who possess our data are lost in a fog. I telephoned my doctor recently, and was told by the answer-machine that all the “agents” were busy, but that all “customers” are important. Agents, not *nurses*. Customers, not *patients*. The consequence of all this is a great loss of the beneficence, generosity, and forgiveness characteristic of genuine, humanizing friendships and authentic community. As we increasingly lose these habits, few will care to protect data about our *persons*.

CONCLUSION

What, then, are we to do about protecting personal data in a way that reflects real human dignity? I join with American novelist, Wendell Berry, who has famously reminded us that we are losing the capacity for “standing by words.” In his book by that title, he argues that words frame ideas and they have the dignity of ideas, including the idea of human rights. To preserve the dignity of people we have to preserve the dignity of words about people. Words and ideas are never neutral. What we know about others creates duties of care, including the fiduciary duties concerning personal data. The crisis concerning personal data is not primarily about bank account numbers and the genetic information some researchers have stored away. It represents a crisis concerning the ways we *regard* each other, *relate* to each other, and *respect* what we disclose about ourselves. Data is a human dignity issue.

Ours is a crisis born of bad experience: we have thought that there is a kind of knowledge that bears no moral responsibility, but we have been wrong. Knowledge about people, by its very nature *as* knowledge, concerns some *one*, and it confers obligations of trust and care. Our modern crisis is about an unwillingness to resist knowing what we have no right to know about others, and the unwillingness to take responsibility for what we rightfully do know. In order to protect the rights of weak, oppressed, persecuted, and powerless *people*, *human rights* must be more than a slogan. Human rights must protect the truth about real people who speak words that merit protection. If “human rights” is just a slogan then it will be another tool for those who want to manipulate others for their own purposes. People have the right to be known as they are, not as profiles and stereotypes. To stand by words is to stand by the truth that words signify about people.

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THE NEW DUALISM

The “Christian” Enemy of Christian Culture

BY P. ANDREW SANDLIN

One of the greatest enemies of Christian culture from within the church is dualism. Outside of the church, dualism has become one of the driving worldview pre-commitments currently shaping American law and culture. For the sake of the church and the world we seek to engage with the Gospel, it behooves us to understand the forms dualism takes throughout history and in today’s world.

Broadly speaking, dualism is the division of life into two antithetical spheres or principles. One of the earliest forms of dualism was Gnosticism,¹ which posited two gods, the good god of the mind and spirit and the evil god of nature and materiality. The Gnostics perceived salvation as deliverance from the material world by means of secret knowledge (*gnosis*) to a few, select initiates. Gnosticism was a pagan invention, but it did not leave the church unaffected. Many early heresies in the church were gnostically tinged (an example was Docetism, which denied that Jesus had an actual material body).

Dualism comes in many forms, but it almost always privileges one aspect of created reality and devalues its polar opposite. Dualism is an example of apostate thinking, which always begins when sinful man turns away from worshipping the true God and absolutizes one aspect of the created order.² This dualism comes in at least five forms that must be recognized and resisted for the cultivation of authentically Christian culture.

IDEAL-HISTORICAL DUALITY

Plato famously taught that the eternal world of Forms (or Ideas) stands behind our material world. More than anything else, the ancient Greeks feared disorder and chaos. They had suffered from deprivations of war and the violence of anarchy. They saw the world as constantly changing, and this ebb and flow frightened them. Above all else, they wanted order, immutability, and permanence. This is what Plato’s doctrine of the eternal Forms provided. All the flawed, impermanent things on earth had a perfect, permanent Ideal in eternity. Every

earthly chair reflected the ideal chair; every historical expression of justice or beauty was a diluted clone of its eternal Form. We might think that this inspired the Greeks to reorder this world in light of the Forms. This rarely happened. Far more common was an escapist desire for renounce and abandon this present world for the Ideal world. This is why death became a great longing for the philosophers of Greek antiquity. Plato believed in preexistent souls. Your eternal soul is encased in a human body and at death is released to return to the ideal world. You can easily understand why Socrates wasn’t afraid of death and, in fact, invited it.³

Plato’s fanciful dualism has been widely discredited philosophically. Almost no educated people believe it today—except Christians. Most don’t know what Plato believed, but they do see eternity and time in expressions remarkably analogous to Plato’s. They long for heaven, and see earth as a pale reflection of the eternal state. Like Plato, they don’t use this view as a springboard to conform the earth to heavenly patterns (“They will be done on earth as it is in heaven”). Rather, like Socrates, they long for escape—not to the world of the Forms, but to their heavenly home.

It’s not hard to grasp how this earth-heaven dualism hinders Christian culture. If one of the Christian’s prime objectives is escape from earth, Christian culture can hardly be a priority.

IMMATERIAL-MATERIAL DUALITY

I noted that Plato saw the body as a form of prison from which man’s main goal was escape at death. This is one exhibition of the immaterial-material duality. Many ancients, following the Gnostics, posited materiality as evil or at least sub-par. The truly good and virtuous things were beyond our sensory world. It’s not hard to see why Christians would purchase stock in this view. After all, God himself is immaterial, as are the cardinal Christian virtues of faith, hope, and love. Most of the things we hold most dearly are immaterial. But not all.

¹ THOMAS MOLNAR, *UTOPIA, THE PERENNIAL HERESY* (1967).

² HERMAN DOOYEWEERD, *THE TWILIGHT OF WESTERN THOUGHT* 31 (2012).

³ RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND* 43 (1993).

Recent Christianity cares about redemption, but it has a deeply impoverished view of creation (nature). To many Christians, nature just isn't that important—the only thing important is getting souls saved. They actually don't want escape from sin; they want escape from their bodies; they want to escape from their humanity; they want to escape from this world. They think that prayer and Bible reading and quiet contemplation are “spiritual,” but trees, the ocean, good food, making money, enjoying nature, and basketball are not spiritual.

But in the Bible, the conflict is never between physical and non-physical; it's between righteousness and sin. Sin is the problem; materiality is not the problem. The godliest man who ever lived—Jesus Christ—lived and died and rose again in a body. If you don't care about the material world, you can't care much about culture, even Christian culture.

SOUL-BODY DUALITY

The Immaterial-Material duality fosters the Soul-Body duality. Plato held to a tripartite view of man, but almost all the ancient Greeks posited a soul-body division of some sort. To the ancient Greeks man is made up of several distinct, and potentially independent, parts. The soul is the principal part of man—it is his insubstantial existence, which conforms to eternal, supra-temporal Forms. It existed before his body did, and it will exist after the body is gone. The body, in fact, is simply the house of the soul. More accurately, it is the prison of the soul. According to the Greeks, bodily existence is unnatural for man. It is an alien part that prevents him from realizing what he could if he were not imprisoned within it. It constrains man to time and space and subjects him to sickness and weariness. The soul, however, is the “good ghost in the machine.”

Traditional Christian anthropology has been either bi-partite or tri-partite. In any case, it has preserved the soul-body duality, which it inherited from the Greeks. The ancient Hebrews, by contrast, held, as the Bible itself does, a unified view of man.⁴ They were not materialists, certainly not in the modern sense. They believed that man consists of both materiality and non-materiality. However, these two were interwoven. Man isn't man without his body. A soul-body duality need not (and often has not) hindered Christian culture, but it certainly can, and it has. On this view, soul corresponds to heaven, while body corresponds to earth. Man is

made for heaven, not earth, so Christian culture isn't a priority.

INTERNAL-EXTERNAL DUALITY

Perhaps even more of a hindrance is the internal-external duality. This duality gets to the heart of dualism's aversion to Christian culture. Man is made for a vertical relationship with God, and this relationship is a heart matter. Most Christians realize that the Bible places great emphasis on man's heart. Some believe this term is a synonym for emotion, but this belief is misguided. They speak of “head” religion versus “heart” religion, a false antinomy.⁵ The heart is the inner core of man's being. “Heart” is roughly synonymous with “the synthesis of belief, intellect, will, intuitions, and emotions that govern the person.” In other words, “head” religion is heart religion. Even if Christians understand the right definition of heart, they sometimes set it in radical opposition to man's exterior life.

In fact, they even buy into the vast interiorization project that has afflicted our world since Romanticism. This “interiorization project” is a retreat from the objective realities of God's created world into the subjectivism of human experience. Romanticism revolted against the cold, sterile impersonalism of the Enlightenment, which highlighted objective, universal reason. Romanticism tried to recover the uniqueness of the individual, but it did so without God's Word. Eventually it simply replaced autonomous, objective, universal standards with autonomous, subjective, individual standards.⁶ For the Enlightenment, man was the measure of all things. For Romanticism, *the* man, singular, the rugged individual, became the measure of all things. We sometimes call this historical transition “the inward turn.”

In the church's version, this meant that internal piety—prayer, Bible reading, and personal vertical devotion to God—was most important. External piety—especially the visible church and its sacraments, and communal visible adherence to God's moral law—took second chair. Less important still was concern for God's moral law in society itself. After all, God wants the heart, not external adherence to law, which can easily lead to Phariseeism (or so it has been thought). So, God judges everything by our pious interior experiences. He isn't so interested in our visible actions, and particularly with the visible actions of the society in which he's placed us. If anything, the external world is dangerous,

⁴ OSCAR CULLMANN, *Immortality of the Soul or Resurrection of the Dead: The Witness of the New Testament*, IMMORTALITY AND RESURRECTION, Krister Stendahl, ed., 9-53 (1965).

⁵ GORDON H. CLARK, RELIGION, REASON, AND REVELATION 92-94 (1986).

⁶ ISAIAH BERLIN, THE ROOTS OF ROMANTICISM (1999).

since it can seduce us from God, whom we find in the internal world. The fact that the Bible says it's man's heart—his interior, not the external—that's the source of his sins seems not to be a part of this mental calculation. In any case this Christian "interiorization project" leaves little room for Christian culture, which is manifestly external and as a result, that project is a hindrance to Christian culture.

PRIVATE-PUBLIC DUALITY

This dualism is largely the effect of a creditable development in the West, the rise of classical liberalism, with roots in medieval Christendom and Protestant Christianity.⁷ Perhaps the fundamental distinctive of classical liberalism was its insistence on a zone of privacy for the individual. The state and the rest of society hold real claims on the individual, but these claims are never exhaustive. Man must be free to practice his religion, express his opinion, protect his property, assemble with like-minded people, and so on. Classical liberalism became the source of much of our modern political liberty. It also happens to have been shaped largely by early Protestant Christianity with its stress on man made in God's image, the inviolability of man's God-given conscience, and the right of the individual to interpret the Bible.

In time, however, this liberty severed its Christian roots. It degenerated into a radical individualism and privatism.⁸ The zone of privacy came to mean liberty from Christian society and its law and morality, the very factors that fostered liberty in the first place. The zone of individual privacy from moral law expanded, while the zone of privacy from state interference on other matters (like economic ones) contracted. The state became known as the "public" realm, purged of Christianity, and the individual's own moral and religious choices became entirely "private." This was a far cry from classical liberalism.

Privatization is the intentional reduction of Christianity by Christians to the very places that secularists declare it's safe to exist: the prayer closet, family

devotions, church on Sunday, or, at most, church social programs throughout the week. Privatization has had supporters from very early in church history (mystics, for example), but it became a widely accepted and practiced view only in the last two centuries. Christians came to believe that culture—including law, politics, and public policy—is inherently evil. The most "spiritual" Christians, therefore, are those least engaged with the culture. Christian spirituality can be exhausted by Bible reading, prayer, and (on rare occasion) personal evangelism. Anything beyond this is considered "worldliness."

Privatization, thereby, works in league with non-Christian forces to reduce Christianity to what Stephen Perks describes as a "personal worship hobby."⁹ Remarkably, many Christians and secularists agree about such privatization, and this strange merger is wielding increasingly force in American law. Secularists say, "Christianity should stay private." Christians respond, "Amen." Secularists say, "Christians should stay out of politics." Christians respond, "Amen." Secularists say, "God's Word has nothing to say to our society." Christians respond, "Amen." Secularists say, "Unbelievers should be calling all of the shots in society and culture." Christians respond, "Amen." Secularists say, "Christianity is a 'private worship hobby.'" Christians respond, "Amen," and retreat to their prayer closets. It is an odd and unsettling alliance in opposition to Christian culture.

When Christians purge these forms of dualism from the church, Christian culture might then start to become again a reality, and at a time when we need it most.

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⁷ M. STANTON EVANS, *THE THEME IS FREEDOM* (1994).

⁸ J. G. MERQUIOR, *LIBERALISM OLD AND NEW* 15-36 (1991).

⁹ STEPHEN C. PERKS, *THE GREAT DECOMMISSION* 12 (2011).



SPEAKING OF RELIGIOUS FREEDOM

Resuscitating Intolerance through Religious Tests for Judges

BY KIMBERLEE WOOD COLBY

In March 2017, the Wyoming Supreme Court censured Judge Ruth Neely because she publicly stated that she would not be able to perform same-sex wedding ceremonies because of her religious beliefs.¹ The Wyoming court's decision is antithetical to the basic principles upon which this country was founded, as embodied in the United States Constitution's absolute prohibition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."²

The Wyoming Supreme Court decision serves notice on every judge, as well as every attorney and law student who aspires to judicial office, that those who would decline, for reasons of religious conscience, to celebrate or otherwise solemnize a specific wedding ceremony may be deemed unfit to hold judicial office. Unfortunately, several other state ethics committees have issued similar advisory opinions in Arizona, Louisiana, Nebraska, Ohio, Pennsylvania, and Wisconsin. In addition to Wyoming, judges have been subject to disciplinary proceedings in Oregon and Washington State.

Judge Neely's case now rests in the hands of the United States Supreme Court.³ The Christian Legal Society, along with the National Association of Evangelicals and the Lutheran Church—Missouri Synod (to which Judge Neely belongs), recently filed an amicus brief urging the Court to review the case.⁴ The Court subsequently requested a response from the Wyoming Commission on Judicial Conduct and Ethics ("Wyoming Commission").⁵

JUDGE NEELY AND WYOMING'S RELIGIOUS TEST

Judge Ruth Neely held two judicial positions, as a municipal judge not authorized to solemnize weddings, and as a part-time circuit court magistrate who was authorized to perform wedding ceremonies for couples who independently contacted and paid her. Wyoming circuit court magistrates may decline to perform a wedding ceremony for personal reasons, no matter how trivial.

After same-sex marriage became legal in Wyoming, a local newspaper reporter asked Judge Neely whether she was "excited" about performing same-sex wedding ceremonies. She responded that her religious beliefs would not allow her to perform a same-sex wedding ceremony, but that other magistrates were willing to do so.

No same-sex couple had requested that Judge Neely perform a wedding ceremony, and she stood ready to refer any request to other magistrates who could perform same-sex weddings without violating their conscience. Nonetheless, the Wyoming Commission brought disciplinary charges against Judge Neely and recommended her removal from both judicial positions.⁶

By a 3-2 vote, the Wyoming Supreme Court upheld disciplining Judge Neely but reduced her punishment to a "public censure" and ordered her not to perform any weddings unless she also performed same-sex ceremonies. The ruling disqualifies from judicial office all Wyoming citizens who faithfully adhere to the religious beliefs of the Lutheran Church—Missouri Synod, of which Judge Neely is a member, as well as citizens who are Catholic, Orthodox Jewish, Southern Baptist,

¹ *In re an Inquiry concerning the Honorable Ruth Neely*, 390 P.3d 798 (Wyo. 2017).

² U.S. Const. Art. VI, cl. 3.

³ Petition for Writ of Certiorari, *Judge Ruth Neely v. Wyoming Comm. on Jud. Conduct and Ethics* (No. 17-195) (pet. filed Aug. 4, 2017), <https://clsnet.org/document.doc?id=1066>. Judge Neely is represented by Alliance Defending Freedom.

⁴ Brief of Amici Curiae Christian Legal Society, the Lutheran Church—Missouri Synod, and National Association of Evangelicals in Support of Petitioner (No. 17-195) (filed Aug. 31, 2017), <https://clsnet.org/document.doc?id=1065>.

⁵ Docket, *Neely v. Wyoming Comm. on Jud. Conduct and Ethics* (No. 17-195) (pet. filed Aug. 4, 2017), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-195.html>.

⁶ Appendix to Pet., *supra* note 3, at 111a-129a.

Mormon, Evangelical Christian, or Muslim. At least half of Wyoming citizens identify with one of these faiths.⁷

The Founders prohibited a religious test for federal office in the 1787 Constitution. Not only does the Constitution explicitly ban religious tests, it also provides a religious exemption for persons, such as Quakers and other Anabaptists, whose faith does not allow them to swear an oath. In three separate places, the Constitution provides that officeholders must “swear *or affirm*” to uphold the Constitution. Religious persons are not to be disqualified even by a facially neutral, generally applicable requirement that officeholders swear to uphold the Constitution.

Through the Religion Clauses of the First Amendment, the Supreme Court has prohibited states from requiring religious tests for public officeholders.⁸ The Founders were familiar with several models of religious tests. One type of religious test familiar to the Founders was a test that conditioned holding public office on participating in a religious ceremony, specifically, taking Communion in the Church of England at least once a year.⁹ Centuries later the ceremonies may differ, but it remains wrong to condition public office on participation in ceremonies that violate religious beliefs.

Requiring a judge to perform a same-sex wedding ceremony further violates the Religion Clauses because coerced participation in a religious ceremony represents a quintessential religious freedom violation.¹⁰ The free exercise violation is compounded because Wyoming allows magistrates to refuse to perform a wedding ceremony for various secular reasons but punishes magistrates who cannot perform a wedding ceremony for reasons of religious conscience.¹¹

The routine mechanism of recusal serves any legitimate state interest that may exist. Referral and recusal

are time-tested less restrictive alternatives. This is particularly true given that performing wedding ceremonies is not a core judicial function. And it is particularly true when withholding an accommodation will result in the disqualification of broad swaths of citizens from judicial office based on their religious beliefs.

OTHER STATES FLIRT WITH A RELIGIOUS TEST FOR JUDGES

Several state judicial ethics boards have issued advisory opinions that forbid judges from declining to officiate at same-sex wedding ceremonies. These include:

- The Supreme Court of Ohio Board of Professional Conduct stated that (1) a judge who performs civil marriages may not refuse to perform same-sex marriages based on personal, moral, or religious beliefs; and (2) a judge who discontinues performing all marriages to avoid marrying same-sex couples based on religious beliefs may be seen as manifesting bias and must be disqualified from all cases raising an issue involving sexual orientation.¹²
- The Arizona Supreme Court Judicial Ethics Advisory Committee stated that a judge may not decline to marry a same-sex couple unless he stops marrying all couples, with the possible exception of family and friends. The advisory opinion specifically stated that this rule applies to judges “with [a] sincerely held religious belief that marriage is the union of one man and one woman.”¹³
- The Nebraska Judicial Ethics Committee stated that the judicial code does not permit

⁷ Wyoming adults identify with the following faiths, as follows: Evangelical Protestant (27%); Mainline Protestant (16%); Catholic (14%); Mormon (9%); Jehovah’s Witnesses (3%); Native American Religions (1%); Buddhist (1%); Unitarians (1%); New Age (1%); Jewish (< 1%); Muslim (< 1%); Historically Black Protestant (< 1%); Orthodox Christian (< 1%); Hindu (< 1%). “Religiously unaffiliated” adults account for approximately 26% of the population, but that number includes not only atheists (3%), agnostics (3%), and religiously unaffiliated for whom “religion is not important” (10%), but also religiously unaffiliated for whom “religion is important” (10%). Pew Research Center, *Religious Landscape Study: Religious Composition of Adults in Wyoming* (May 12, 2015), <http://www.pewforum.org/religious-landscape-study/state/wyoming/> (last visited Aug. 26, 2017).

⁸ *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state constitutional provision requiring public officeholders to affirm belief in God violated First Amendment); *cf.*, *McDaniel v. Paty*, 435 U.S. 618 (1978) (state constitutional provision disqualifying clergy from holding state office violated First Amendment).

⁹ Michael W. McConnell, Thomas C. Berg & Christopher C. Lund, *Religion and the Constitution* 14 (4th ed. 2016).

¹⁰ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (establishment).

¹¹ *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹² Ohio Adv. Op. 15-001, 2015 WL 4875137, at *5 (Aug. 7, 2015).

¹³ Ariz. Jud. Adv. Op. 15-01, 2015 WL 1530659, *1 (Mar. 9, 2015).

a judge to refuse to perform same-sex marriages, “even if the judge states that the reason is based on sincerely held religious beliefs.”¹⁴

- The Deputy Counsel of the Pennsylvania Judicial Conduct Board opined that “a judge who decides not to perform wedding ceremonies for same-sex couples must opt out of officiating at all wedding ceremonies.” Furthermore, a judge who opts out of officiating all wedding ceremonies after previously publicly declaring her views about solemnizing weddings must disclose her “change in position about performing wedding ceremonies because it may be perceived as relevant to the judge’s ability to rule impartially” in cases in which the judge knows that a party appearing before him is gay or lesbian. For example, when the judge is hearing a landlord-tenant dispute and knows the landlord is gay or lesbian, she must disclose her “change in position about performing wedding ceremonies.”¹⁵
- The Wisconsin Supreme Court Judicial Conduct Advisory Committee has issued an advisory opinion that judges may not refuse to perform same-sex weddings if they perform opposite-sex weddings because of their religious beliefs, but they may decline to perform all weddings.¹⁶
- The Louisiana Supreme Court Committee on Judicial Ethics has issued a similar opinion.¹⁷

In addition to Wyoming, a judge has been disciplined, or recommended for discipline, in two states:

- Washington State Judge Gary Tabor “during an administrative meeting attended only by

judges and some court personnel” stated that he felt “uncomfortable” performing same-sex marriages and asked his fellow judges to officiate in his stead in the future. His comment was leaked to the press. The Washington State Commission on Judicial Conduct investigated. Judge Tabor accepted the least severe disciplinary penalty of “admonishment” for his conduct and agreed not to perform any weddings in the future.¹⁸

- The Oregon Commission on Judicial Fitness and Disability recommended that Oregon State Judge Vance Day be removed from office on several grounds, including that he indicated to his clerks that he would not perform same-sex weddings and told them to refer any requests to other judges.¹⁹

CONCLUSION

Any whiff of a religious test is cause for alarm. Tests targeting religious dissenters for exclusion from public office represent a regressive embrace of religious intolerance. The Wyoming Supreme Court decision resuscitates a practice that the Founders long ago set on the road to well-deserved extinction.

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¹⁴ Neb. Jud. Ethics Comm. Op. 15-1 (June 29, 2015), available at https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1_0.pdf.

¹⁵ Elizabeth A. Flaherty, Impartiality in Solemnizing Marriages, in Judicial Conduct Board of Pennsylvania Newsletter, No. 3 (Summer 2014), http://judicialconductboardofpa.org/wp-content/uploads/JCB_Summer_2014_Newsletter.pdf.

¹⁶ Wis. Sup. Ct. Jud. Cond. Adv. Comm. 2015 WLS928528, at *1.

¹⁷ Candace B. Ford, *Marriage, Religion, and the Art of Judging in Post-Obergefell Louisiana*, 43 S.U.L. Rev. 291, 314 (2016), quoting La. Sup.Ct. Comm. on Jud. Ethics, Formal Op. 263 (2015).

¹⁸ Jud. Disp. Op. 7251-F-158, 2013 WL 5853965, at *1 (Oct. 4, 2013).

¹⁹ *Inquiry Concerning a Judge Re The Honorable Vance D. Day*, No. SO 63844 (Or. Sup. Ct., oral arg. June 14, 2017).

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