Journal of Christian Legal Thought

VOL. 4, NO. 3
WINTER 2014

Journal *of* Christian Legal Thought

VOL. 4, NO.3 | WINTER 2014

PUBLISHED BY

The Institute for Christian Legal Studies (ICLS), a Cooperative Ministry of Trinity Law School and The Christian Legal Society, founded as a project of Regent University School of Law.

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.

STATEMENT OF PURPOSE

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

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

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

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

EDITORIAL POLICY

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

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

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

WALKING AROUND IN ANOTHER'S SKIN

By Michael P. Schutt, Editor in Chief

I recently re-read Harper Lee's 1960 classic *To Kill a Mockingbird*, and I had forgotten that the novel is not simply about a lawyer and his pursuit of justice. At its core, it is a story about growing up, about coming of age in a world that does not always make sense and is not always safe and predictable.

That a lawyer, Atticus Finch, is the steadying anchor and a true compass in an upside-down world, is a lawyer's bonus that has made for hundreds of law review articles and countless Continuing Legal Education programs. Yet the protagonists of the story are children. Jean Louise Finch, or "Scout"—six-years old at the beginning of the novel—grows into the wider world over three summers, and she tells of these formative years in retrospect, through her childish eyes. The story is beautiful mainly because of these eyes and their perspective on the world, a world that seems to be changing. Her safe, normal world gives way before her eyes to a dangerous and unfamiliar one. The innocence of a child in the face of "grown-up" conflict, hatred, and outright evil seems to me to be the broadest theme of *To Kill a Mockingbird*.

The instruction and example of Atticus Finch, Scout's father and lawyer-statesman of Macomb County, has made him the most beloved lawyer—fictional or not—in American history. (Perhaps he is the only beloved lawyer in American history, but I digress).

Art by Emily Hopkins

Early on, Atticus reproves Scout: "You will never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it." This simple theme of empathy—perhaps even grace—touches every page of the story.

This sort of instruction and straightforward morality is what makes Atticus Atticus. It is Atticus Finch who embodies the simple moral truths—and there are a slew of them—that enrich the novel. It is this basic, even childlike, morality and his stubborn determination to live it that links Atticus to his children, and ultimately, to their engagement with a dark and difficult world.

Jesus recommended child-like faith to his followers and also instructed them at one point to engage the world "innocent as doves." At the same time, however, he admonished them to be wise as serpents, and even "wary of men."

It is in this integration that Atticus is our role model. He knows the world. He has taken the measure of his neighbors, and he knows their courage, their cowardice, their fears, and their prejudice. He does not become like them or excuse their sin. There is no mushy "tolerance;" instead he has graceful empathy. He doesn't teach Scout not to judge; he teaches her to judge rightly and to act with sacrificial love.

He simply tries to walk around in his neighbor's skin and then do what is right.

Atticus challenges his white neighbors to "walk around in the skin" of a black man. He demands that his lower middle-class children "consider things" from the "point of view" of poor white families and the

mysterious and maligned Boo Radley, who lives across the street. To Atticus, walking around in the skin of others is a practice, not a proverb.

This remains a painfully powerful challenge today, relevant both directions across a variety of religious, political, ethnic, and financial divisions. The novel suggests how infrequently human beings are inclined to such a task and how difficult a task it is, even when undertaken. It takes a sort of grace, an others-awareness that is rare. It was rare in the 30's when the book is set, rare in the 60's when Lee wrote, and rarer still today in our age of self-promotion, image, media hype, and ambition. As this others-awareness unfolds in the parenting, lawyering, and living of Atticus Finch, one is struck by the staggering difficulty of actually "considering something from another's point of view."

This realization is all the more affecting in light of current high-profile public tension surrounding the marriage debates, claims of racial injustice, religious freedom discussions, and political discourse generally across the country. The public punditry and discourse surrounding these issues and incidents features a little bit of everything. A little bit of everything, that is, except "considering something from another's point of view." We all have our take, our spin, our opinion, but with few exceptions, we show very little empathy or grace. This is no less true for more intimate community and academic discourse than it is across the sound-bite-handicapped news media.

Atticus challenges his white neighbors to "walk around in the skin" of a black man. He demands that his lower middle-class children "consider things" from the "point of view" of poor white families and the mysterious and maligned Boo Radley, who lives across the street. To Atticus, walking around in the skin of others is a practice, not a proverb.

We cannot actually *be* someone else, and we have no real desire to walk around in someone else's skin. It is unnatural, uncomfortable, and even painful. Often, it is also counter-cultural. In *Mockingbird*, the moral courage of Atticus is grounded in a counter-cultural empathy that is and was always destined to be a losing proposition. "Are we going to win, Atticus?" asks Scout. "No, honey."

Hence, a battle for the child-like.

Mockingbird's epigraph is from Charles Lamb: "Lawyers, I suppose, were children once." At once foreshadowing this major theme and linking the main characters, it is a wonderful tease.

The essay from which the quote is taken finds Lamb reminiscing, not coincidentally, on the barristers—"the old benchers"—of the Inner Temple in London, where he spent his early childhood.[1] These were larger-than-life figures to the young Charles, and memories of the place itself were almost mythical. Lamb remembers the marble figures of the courtyard fountains:

> The artificial fountains of the metropolis are, in like manner, fast vanishing. Most of them are dried up, or bricked over. Yet, where one is left, as in that little green nook behind the South Sea House, what a freshness it gives to the dreary pile! Four little winged marble boys used to play their virgin fancies, spouting out ever fresh streams from their innocent-wanton lips, in the square of Lincoln's-inn, when I was no bigger than they were figured. They are gone, and the spring choked up. The fashion, they tell me, is gone by, and these things are esteemed childish. Why not then gratify children, by letting them stand? Lawyers, I suppose, were children once. They are awakening images to them at least. Why must every thing smack of man, and mannish? Is the world grown up? Is childhood dead? Or is there not in the bosoms of the wisest and the best some of the child's heart left, to respond to its earliest enchantments? The figures were grotesque. Are the stiff-wigged living figures, that still flitter and chatter about that area, less gothic in appearance? or is the splutter of their hot rhetoric one half so refreshing and innocent as the little cool playful streams those exploded cherubs uttered?[2]

To Kill a Mockingbird asks those questions inspired by Lamb: "Is there not in the bosoms of the wisest and the best some of the child's heart left?" It takes the heart

[1]Charles Lamb, *The Old Benchers of the Inner Temple*, in Essays of Elia, 88 Ancient and Modern British Authors 90 (1835).
[2]Id. at 93.

of a child, of course, to playfully engage the mysterious and violent Boo Radley, to break up an angry mob with an innocent greeting, to see the world as it could be. But it also takes a wise and graceful heart to do those kinds of things, knowing all the while the real danger of the fallen world, the real hate involved, the real cost of walking around in someone else's skin.

It takes courage to have the heart of the child toward one's neighbors, knowing the world for the unsafe and unpredictable place that it is.

Mike Schutt is director of the Christian Legal Society's Attorney Ministries and the Institute for Christian Legal Studies ("ICLS"), a cooperative ministry of CLS and Trinity Law School in Santa Ana, California, where he is a Visiting Professor. He has taught Professional Responsibility, Torts, and Christian Foundations of Law, among other courses.

Schutt also serves InterVarsity Christian Fellowship as National Coordinator of its Law School Ministry and directs Law Student Ministries for CLS. He is the author of Redeeming Law: Christian Calling and the Legal Profession (IVP 2007). He taught on the Regent University full-time law faculty from 1993-2013 and currently teaches at Regent as an adjunct. He is an honors graduate of the University of Texas School of Law.

He writes and travels from his home in Mount Pleasant, Texas, where he lives with his wife Lisa and their youngest son, Jack. He has two married children who, with their wonderful spouses, are saving to support their parents in their old age.

He is the Editor in Chief of the Journal.

Editor's Note: The Journal is published three times a year, and the issue you hold in your hands is the final issue of 2014, albeit a bit behind schedule.

Our goal for the year-end issue is to share some of the excellent addresses from the Christian Legal Society national conference and Scholars' Symposium each year. This year, I am pleased to feature in these pages two outstanding talks from our Boston conference last October.

Dr. Robert George opened our festivities with thoughtful address on the contrasting philosophies of John Stuart Mill and Cardinal Newman. We are pleased to offer his paper on that topic here. With the bookend closing address, John Stonestreet did a wonderful job of suggesting some solutions for those of us feeling squeezed by the cultural shifts we have experienced over the past decade. We publish his remarks here in the format they were given—as an address Sunday morning at the conference. We were pleased to hear from both of these men at the conference, and I am grateful for their permission to reproduce their remarks here. I trust you will be encouraged and inspired by them.

I am also pleased to have Michael Avramovich featured here as well. Michael was gracious to respond to my pleas for a response to *Evangelicals and Catholics Together on Law* from an Orthodox perspective. I am grateful for his thoughtful comments. I pray the discussion continues apace on how believers across traditional and historic lines can speak to the law—and act as lawyers—to the glory of Christ.

TWO CONCEPTS OF LIBERTY… AND CONSCIENCE

By Robert P. George

John Stuart Mill and John Henry Newman were the greatest English public intellectuals of the 19th century. They were men of deep and wide learning and formidable intelligence. Both wrote powerful defenses of freedom. Mill's was in the form of an essay entitled simply "On Liberty" (1869). There he defended what he described as "one very simple principle [that is] entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion." That principle has been dubbed Mill's "harm principle":

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.

Mill's principle is frequently invoked in cocktail party conversations and in freshman class discussions. It has, however, been sharply criticized even by philosophers of a generally liberal persuasion, such as the late H.L.A. Hart of Oxford University, who argue that it is too sweeping in ruling out paternalistic reasons for limiting certain forms of liberty. More conservative philosophers, I myself among them, have been even more skeptical and critical. For present purposes, though, I am less interested in the scope or breadth of Mill's principle, or with its content, than with its ground. What, for Mill, provides the moral basis for respecting people's liberty? What is the basis of the obligation?

Mill doesn't hide the ball.

> It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

Mill grounds his principle of liberty and the obligation to respect it in the belief that respect for liberty will, in its consequences, be net beneficial to … well, to whom? Or to what?

To the community? Which community? Local? National? Imperial? International? Mill doesn't exactly say. As we've seen, he does, however, say this: The concept of utility that must govern as the criterion of morality in our choosing, and as the ground of moral obligation, including the obligation to respect and protect liberty, must be utility "in the largest sense, as grounded on the permanent interests of man as a progressive being."

So note two things about Mill's defense of liberty, whether it is freedom of speech, which is a freedom Mill treats as quite central, or freedom of religion, which interests him less, or any other freedom. First, the ultimate basis of the moral claims of freedom is social benefit: "utility." It is not "abstract right." Second, Mill's view of humanity is imbued with 19th century optimism and belief in progress. Man is naturally good—a "progressive being." He therefore will, in his cultural and personal maturity, do well by himself and others if only he is left free of paternalistic and moralistic constraints to engage in experiments in living from which he, corporately and individually, will learn what conduces to happiness and what does not. Freed from the old moralisms and religious and other superstitions—liberated to be the progressive being that, by nature, he is—he will flourish. Those old moralisms and superstitions—far from preventing him from descending into vice and degradation, or even assisting him in that project—tie him down and wound his spirit. They profoundly impede (and have impeded) his full flourishing and self-realization. Free to do as they please, free to do what they want to do so long as they do not harm others, mature persons in mature cultures will, on the whole, want to do good and productive—i.e., utility enhancing—things.

I began my academic career by writing several articles and a book that were severely critical of the concept

and defense of liberty that readers are offered by Mill. I see no reason today to alter any of those criticisms. But Mill was by no means completely wrong. The naïve optimism and progressivism—they were wrong, to be sure. And the utilitarianism, that was wrong, too. The Christian philosophical anthropology Mill regarded as a relic of superstitious ages has proved to be far more plausible and reliable than the alternative that Mill, quite uncritically, accepted. And utilitarian and other forms of consequentialism in ethics are in the end unworkable and even incoherent. They presuppose a kind of commensurability of human values and their particular instantiations that simply does not square either with reality or with conditions of deliberation and choice. The basic aspects of human well-being and fulfillment that, together, constitute the ideal of integral human flourishing are reducible neither to each other not to some common substance or factor they share. These basic human goods, though they all provide more-than-merely-instrumental reasons for action and are partially constitutive of our all-round well-being (which is how and why they constitute more-than-merely-instrumental reasons—they are intrinsic, rather than merely instrumental, goods), are good not in a univocal sense, as if they were constituted by the same substance but merely manifested it differently, but only in an analogical sense. They differ substantially as distinct dimensions of our flourishing and fulfillments of our capacities as human persons (rational animals); they are, as such, incommensurable in a way that renders hopeless the utilitarian project of identifying an option for choice—or even a rule for choosing—that promises "the greatest happiness of the greatest number," or the production of the net best proportion of benefit to harm overall and in the long run."

So where was Mill right? He was right, in my opinion, in forgoing an appeal to "abstract right" and looking for the moral ground of liberty in a consideration of the well-being and fulfillment—in a word, the flourishing—of human beings (what he calls in Chapter Three, paragraph 2 "the end of man" and characterizes in paragraph 10 as "bringing human beings themselves closer to the best they can be"). People have rights, including rights to liberties, because there are basic human goods, i.e. ends or purposes that not only conduce to, but *constitute*, their flourishing. The full defense of any particular liberty, including the freedom of religion, requires the identification and defense of those human goods, those basic aspects of human well-being and fulfillment, that the liberty secures, protects, or advances.

And so, for example, I have in various writings offered a detailed account and defense of religious freedom as necessary for the protection of the human good of *religion*, considered as the active quest for spiritual truth and the conscientious effort to live with integrity and authenticity in line with one's best judgments regarding the ultimate sources of meaning and value, and to fulfill one's obligations I spiritual and moral matters I both the public and private dimensions of one's life.

Now, John Stuart Mill, as I mentioned earlier, wasn't greatly interested in religious freedom, though he did not, so far as I can tell, disdain it. The trouble was, I think that he had something of a tin ear for religion, at least in its traditional manifestations. His "harm principle" would, of course, extend to religious activity and practices, but I doubt that he viewed those as having much real value. They would, I suspect he believed, soon wither away in an age of freedom (since man is a "progressive being," and freedom brings "enlightenment").

By contrast, John Henry Newman did not have a tin ear for religion. He was a religious genius. And his understanding of religion enabled him to produce an account of freedom—in particular the freedom of conscience—that was profoundly superior to Mill's, and from which we today have much to learn. Like Mill, Newman does not appeal to "abstract right" as the ground of liberty, but instead locates the foundation of honorable freedoms in a concern for human excellence and human flourishing. Newman has the immense advantage over Mill of believing in human fallenness (what Christian faith knows as original sin), and so is spared naïve optimism and faith in human progress. Moreover, as a serious Christian, a utilitarian approach to moral decision-making (and all that is presupposes and entails) has no appeal whatsoever to Newman. So he is spared that, too. He is cognizant of both the need for *restraints* on freedom, lest men descend into vice and self-degradation, and on the supreme importance of central freedoms as conditions for the realization of values that truly are constitutive of the integral flourishing of men and women as free and rational creatures—creatures whose freedom and rationality reflects their having been made in the very image and likeness of God.

Newman's dedication to the rights of conscience is well-known. Even long after his conversion from Anglicanism to Catholicism, he famously toasted "the Pope, yes, but conscience first," as he put it in his *Letter to the Duke of Norfolk* (1875). Our obligation to follow conscience was, he insisted, in a profound sense primary and even overriding. Is there a duty to follow the teachings of the Pope? Yes, to be sure. As a Catholic, he would affirm that with all his heart. If, however, a conflict were to arise, such that conscience (formed as best one could form it) forbade one's following the

Pope, well, it is the obligation of conscience that must prevail.

Of course, many a contemporary dissenting Catholic would be tempted right there to shout "right on, brother Newman!" But that's only if they didn't know the rest of the story. For Newman, though the most powerful defender of freedom of conscience, held a view of conscience and of freedom that could not be more deeply at odds with the liberal ideology that is dominant (even, dare one say, orthodox?) in the contemporary secular intellectual culture, and in those sectors of religious culture that have fallen under its influence. Let's permit Newman to speak for himself, for he had already identified in the 19th century the tendency of thought about rights, liberty, and conscience that would become the secular liberal orthodoxy in the late 20th:

> Conscience has rights because it has duties; but in this age, with a large portion of the public, it is the very right and freedom of conscience to dispense with conscience. Conscience is a stern monitor, but in this century it has been superseded by a counterfeit, which the eighteen centuries prior to it never heard of, and could not have mistaken for it if they had. It is the right of self-will.

Conscience, as Newman understood it, is the very opposite of "autonomy" in the modern liberal sense. It is not a writer of permission slips. It is not in the business of licensing us to do as we please or conferring on us "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, conscience is one's last best judgment specifying the bearing of moral principles one grasps, yet in no way makes up for oneself, on concrete proposals for action. Conscience identifies one's *duties* under the moral law. It speaks of what one must do and what one must not do. Understood in this way, conscience is, indeed, what Newman said it is: a stern monitor.

Contrast this understanding of conscience with what Newman condemns as its counterfeit. Conscience as "self-will" is a matter of feeling or emotion, not reason. It is concerned not so much with the identification of what one has a duty to do or not do, one's feelings and desires to the contrary notwithstanding, but rather, and precisely, with sorting out one's feelings. Conscience as self-will identifies permissions, not obligations. It licenses behavior by establishing that one doesn't feel bad about doing it, or, at least, one doesn't feel so bad about doing it that one prefers the alternative of not doing it.

I'm with Newman. His key distinction is between conscience, authentically understood, and self-will—conscience as the permissions department. His core insight is that conscience has rights *because it has duties*. The right to follow one's conscience, and the obligation to respect conscience—especially in matters of faith, where the right of conscience takes the form of religious liberty of individuals and communities of faith—obtain not because people as autonomous agents should be able to do as they please; they obtain, and are stringent and sometimes overriding, because people have duties and the obligation to fulfill them. The duty to follow conscience is a duty to do things or refrain from doing things not because one wants to follow one's duty, *but even if one strongly does not want to follow it*. The right of conscience is a right to do what one judges oneself to be under an obligation to do, whether one welcome the obligation or must overcome strong aversion in order to fulfill it. If there is a form of words that sums up the antithesis of Newman's view of conscience as a stern monitor, it is the imbecilic slogan that will forever stand as a verbal monument to the "Me-generation": "If it feels good, do it."

This essay is from Robert P. George, Conscience and Its Enemies (2013), and was the basis for his address to the CLS conference. It is used by his permission, for which the Journal *is grateful.*

Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. He has also taught at Harvard Law School. He has served as Chairman of the U.S. Commission on International Religious Freedom and as a presidential appointee to the U.S. Commission on Civil Rights. He has also served on the President's Council on Bioethics and UNESCO's World Commission on the Ethics of Science and Technology. He was a Judicial Fellow at the Supreme Court of the United States, where he received the Justice Tom C. Clark Award. A Phi Beta Kappa graduate of Swarthmore College, he holds degrees in law and theology from Harvard and a doctorate in philosophy of law from Oxford University, in addition to many honorary degrees. He is a recipient of the U.S. Presidential Citizens Medal and the Honorific Medal for the Defense of Human Rights of the Republic of Poland, and is a member of the Council on Foreign Relations. His most recent book is Conscience and Its Enemies *(ISI Books).*

RESPONDING TO CULTURAL PRESSURE

By John Stonestreet

I love the work of the Christian Legal Society. I love what happens day in and day out whenever everyday Christians are called to the everyday ministry that God has given them in their various arenas of life and culture. Chuck Colson did too, and would often quote Abraham Kuyper, who said, "There is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry, 'Mine!'"

Much of what has been discussed here at this conference, and one of the things that is heavy on my heart and mind, is this question: How are Christians going to respond to the cultural pressure that we are increasingly feeling in this country? I know that you feel it, particularly in your work in the law. This cultural pressure is increasing all around us, and it is not just with the influx of more visible immorality. What we are feeling is a shrinking space for religious belief in the public square. Recent public events, court decisions, and agency actions simply highlight what we already know to be true—that the cultural pressure on Christians is increasing.

How, then, are we going to respond? First, let's begin by agreeing that escape is not an option.

There are two ways I think that Christians are tempted to escape. One is to escape into safety. Trust me, that is a temptation I feel as a dad. I want to keep my daughters safe. But I am convinced that safety has become an idol of American culture and specifically of the church. When we look through the narrative of Scripture, it doesn't seem that God is concerned with keeping us safe.

A second temptation is to retreat into our Christian communities. Of course, our Christian communities are where we are to be formed, sharpened, and sent out. But, the temptation is to retreat into the sacred, to draw a line as if there is a sacred space to protect and preserve. So, we'll fight to protect our language and our houses of worship and our stuff, but we'll be tempted to think that out there, that is not sacred. The result will be to slowly move more and more into dividing the sacred and secular.

We don't live in separate worlds, one sacred and one secular. There's just one world, and "the earth is the Lord's, and the fullness thereof." This is the world that we live in, and there is this illusion that we're going to be able to live without being influenced by the "outside" world. I am, on a weekly basis, trying my best to help especially those of us that are involved in full-time ministry and pastoral work to realize this. I think specifically, for example, in the case of same-sex marriage, what we're hearing from a lot of pastors is, "Well, I'll draw the line when they make me officiate a wedding."

I will defend that pastor's right to not have to violate his conscience in that way, but if I believe in the sacredness and the authority of Jesus Christ over the Church, I believe in the authority of Jesus Christ over everything. And so, I believe in the sacredness of all callings: your calling, my calling, the baker, and the dancer, and the artist, and the plumber, and the lawyer, and the doctor, and the pastor. In short, I believe in the sacredness of this pastor's right not to violate his conscience, but I believe also in the rights of all of us not to have to violate our consciences. We can't retreat back into our Christian space. We can't escape back into our Christian space and pretend that this is either possible or faithful to the Gospel. It is not.

There are in fact worldviews that teach followers to escape. Buddhism is an escapist worldview. The idea is that we can reach a state of mind where we can escape from desire, and then it will be a perfect world. Hinduism is an escapist worldview. Through a cycle of births and rebirths, one escapes from physical reality. "Oprahism" is an escapist worldview. If I just think really positive thoughts about the world, the world will bend to my will.

Christianity is not an escapist worldview, and this text, this New Testament text that we read this morning[1] tells us why it's not an escapist worldview. In 2 Corinthians, chapter 5, Paul ends this wonderful argument about the role and the place of Christians in the world by giving us the why. Verse 21: "For our sake, he made him to be sin who knew no sin, so that in him we might become the righteousness of God." That verse explains to us one of the reasons why escape is not an option for the Christian.

Escape is not an option for the Christian because of who God is revealed to be in the pages of Scripture. God

[1] 2 Corinthians 5:14-21.

is not an aloof God. God is not a God who stays up in the heavenlies and asks us to come find him. God is a God who turns his trajectory, from *Genesis* all the way through *Revelation*, towards his people in the real world of the human predicament. The posture of God, starting in the garden, is to descend and to condescend to us, to be with us. He is not an escapist God. He is a present God, in this time, and he makes himself known in this time and space.

Think about it: God comes down and walks with Adam and Eve in the cool of the day. God comes down and deals personally with Cain. God comes down and walks with Enoch. God comes down and calls Noah out of the wickedness. God comes down and reveals himself to a polytheist named Abram, and says, "I'm going to make of you a great nation." He comes down and appears to Isaac and Jacob. Then he comes down and appears to Moses in the burning bush. Then he comes down and leads the children of Israel out of Egypt by the pillar of fire and the pillar of cloud. Then he embodies the tabernacle, and he embodies the temple, and he is there in the words of the prophets. Then we find Jesus, God incarnate, "For in him all the fullness of God was pleased to dwell" (*Col* 1:19). Jesus said, "It is good that I go away, because if I go away, I'm going to send you the Holy Spirit" (see *John* 16:7).

Throughout the entire pages of Scripture, God comes down, God comes down, God comes down, God comes down. Because of what God did in Jesus Christ, 2 *Corinthians* 5:21, he made him to be sin. We do not have an escapist God, so we cannot be his escapist people.

But this passage teaches us more about why escape is not an option. It is not just because of who God is revealed to be. It is because of who the Christian is revealed to be. This is one of my favorite passages. I love "re" words. I do. And if you look through the New Testament, what you find is re- word after re- word after re- word after re- word that describes who we are in Christ, describing the impact of the Gospel in our lives and in our communities. Words like restoration and renewal and repentance and resurrection. Words like restoration, and this is my favorite, in 2 Corinthians 5: "reconciliation."

Now the thing we know about re- words is quite simply this: re- words always imply, "again." Something was right, went wrong, and must be fixed. Reconciliation has to do with relationships. Reconciliation has to do with the fact that we were made whole and blessed in particular relationships. These relationships have gone wrong, and these relationships now, in Christ, are being put back together. We often talk about how, as Christians, our relationship with God is restored.

In addition, wherever Paul tells us our relationship is restored to God, he almost always walks through how we can be restored to all of the other relationships that we have. Ephesians spends a ton of time on family. Romans spends time on how we can be reconciled to the governing authorities. In other words, the impact of restoration is as wide as creation itself.

In other words, the point of being Christian is not to be saved from our humanness. The point of being a Christian is to be saved to our humanness. The Bible doesn't begin in Genesis 3, that everything's wrong. It begins in Genesis 1, where everything is very good, and that is what is broken, and that is what Christ came to fix. The first Adam messed it up; the second Adam is going to restore it. Over and over in Scripture, we have this implication that what it means to be Christian is to be restored and renewed, and, in Paul's language right here in 2 Corinthians 5, reconciled.

Thomas Howard, in his book *Evangelical Is Not Enough* says: "The incarnation takes all that properly belongs to our humanity and delivers it back to us redeemed. All of our inclinations and proclivities, that belong to us, and that were stolen away into the service of false Gods, are returned to us in the Gospel." Here is his punchline: "He did not come to thin out human life. He came to set it free." What if that's true? Well, we have to go back to Genesis, and look at God's created intent. God's created intent was not to take us out of the world. God's created intent was to put us into the world and tell us, "Be fruitful and multiply. Fill the earth, and subdue it" (Genesis 1:28).

Christianity doesn't remove that. Christianity restores our call to be here in the world, working, making things better, making things reconciled, confronting evil, promoting good, and making the world a place that honors and glorifies God. Escape is not an option.

Yet just as escape is not an option, neither is accommodation. Accommodation is not an option for any Christ-follower. Though every square inch belongs to Jesus Christ, every square inch is also counterclaimed by the enemy. We cannot capitulate.

There are two ways that we accommodate. First, we accommodate by adopting the false teachings of the world. We have watched, for example, over the past few years, as some of the deep divisions plaguing mainline Protestantism have made headway in evangel churches. Many evangelicals actually are beginning to buy the lie that the Church has been wrong on issues of sexuality for 2000 years, and we have got to make it all right, by an accommodation to the spirit of the age.

Second, we are tempted to accommodate not only in our message, but also in our methods. It is very easy,

for example, to adopt what the quirky French theologian Jacques Ellul called "the political illusion," which consists in believing that all problems are political, and therefore our solutions are also all political.

Making this all the more difficult, I believe, in the days to come, is that we are going to see, more and more, that taking stands that the Bible asks us to take is going to make us *persona non grata* in the broader cultural community, There are many today that accommodate unbiblical ideas for the "greater good" or even "for the sake of the Gospel." Some are claiming today that if we take a biblical stand, our message will be compromised. If we say something about this issue, if we draw the line here, then actually we're not going to be able to share Christ with the unbeliever, and that's too high of a price to pay. So some are saying.

I want to quote my friend Owen Strachan, who's a theologian at Boyce College. "God's morality does not get in the way of God's Gospel." The God that created human beings in his image, created them male and female, put them together, called them to be fruitful and multiply and fill the Earth and subdue it, that's the same God who sent Jesus Christ to fix the project. These two things are not in conflict.

We often take refuge in Matthew 28:19-20. We all know that as that Great Commission: "Go into all the world and make disciples," but if you have one of those red-letter Bibles, you'll realize that that speech that Jesus gave does not begin in verse 19. It begins in verse 18: "All authority has been given to me, in Heaven and on earth. Go therefore and make disciples."

A disciple is someone who follows one who is in authority. Jesus claimed "all authority" for himself. The only Jesus Christ that the Scripture gives us is the Jesus Christ who is the Alpha and the Omega, the beginning and the end, the Lord of Heaven and earth. That's the only one we have. It is very tempting to remake Jesus in our image, to make him a buddy Jesus; to make him a health, wealth, and prosperity Jesus; to make him this Jesus, or that Jesus, or a political Jesus, or a conservative or a liberal Jesus.

Jesus is the Jesus who is the King of kings and the Lord of lords. He is over everything that has ever existed, and by his Word, all that exists was brought into existence. By his death and resurrection it is reconciled to himself. That's the God we have. That's who he is revealed to be.

These equal and opposite temptations, to escape and to accommodate, have their source in the same fundamental mistake that Christians in every generation are tempted to make. The temptation is to see ourselves living in the cultural story, to really believe that the world that we see around us is the truth about life and the world. But Scripture tells another story, a bigger story. Not a different story, but one that is bigger. It tells the story of the creation of all things, to the new creation of all things. From the heavens and earth, to new heavens and new earth. What it tells us is that we don't actually live from the cultural story.

The true story of the world is the story of a God who created the world, and who went to rescue it when it was broken. When we live out of that true story of the world, we live out Paul's message here of reconciliation. He assumes that there is a larger story of creation, fall, redemption, restoration at work. That is what we—and he—mean by "reconciliation." Things are going to be made right again.

If escape is not an option, and accommodation is not an option, then this is the biblical call: *hopeful engagement*. We are called to be hopefully engaged in the world in which we live. There are a whole lot of things here to unpack. Let me just highlight a few.

First, there are two enemies of hope. One enemy of hope is optimism. Optimism and hope are not the same thing. Optimism is a utopian fantasy that looks at the world and says things aren't that bad. Just give us the right amount of time, and the right economic levers, and just give us the right structures of power, and we'll make this world a better place. But things are not okay in the world. In fact, things are so bad that God died for it. How bad must things be, if God had to die?

The other enemy of hope is despair. Recently, I was in California with a pastor, a nationally known sort of guy who is in the battle. He was in the war for Prop 8. He was in the war over DOMA. He fought, and fought, and fought, and won—and it was all eventually overturned. This man looked at me with great despair and said, "John, it's over. We've lost."

I completely understand where he was coming from. This guy was not an observer; he was in the arena. He deserves our respect for being in the arena. But I did think to myself, wait a minute. What is *it* that is "over"? Who are "we" that have lost? The story of the world is not the story of the Supreme Court. It's not the story of a Federal court. It's not the story of a law or a particular administration. It is not the story of ISIS, and it is not the story of global economic breakdown.

The story of the world is that Jesus Christ has risen from the dead. One of the guys with whom Chuck Colson worked closely was a Catholic thinker named Richard John Neuhaus. Neuhaus once wrote a spectacular article called "Telling the World Its Own Story," in which he said: "Christians have not right to despair, because despair is a *sin*. And Christians have not reason to despair, quite simply, because Christ has risen."

No matter what happens in the whole history of the world, the thing that will never change is, Christ has

risen. ISIS keeps chopping off heads; Christ has risen. Another global economic breakdown causes societal chaos; Christ has risen. Miley Cyrus puts out another album; Christ has risen. Christ has risen.

What does it look like to be people of hope, people who are engaged?

I want to offer you four questions. Four questions, as we walk day in and day out, into our spheres of work, of influence, of family, of society, of community, of houses of worship, and everything else, that will help us live out reconciliation, redemption, and truth in the world that we live in.

First, *what is good around me that I can promote, and protect, and preserve?* Christians are *for* the good. I saw a church billboard recently that read, "Jesus is the only good thing left in a bad world." If that is true, why would I come to your church? That's not what the Scripture tells us. The Scripture does not say we live in a bad world. It says we live in a good world that has been deeply broken and is fallen, infected, and infused by evil. There's good in the image of God that we find in every person. There's good in creativity. There's good in legal work. There's good in policy programs. We can celebrate the good.

Second, *what's missing that we can add?* There is plenty missing. Hope is missing. Justice is missing. There is truth that is missing. How can we add truth into our spheres of influence in the law, at home, in our neighborhoods? How can we add justice and mercy and grace and goodness?

Third, *what is evil that I can stop?* When William Wilberforce decided to do something about slavery, he was not the first to confront the issue. There were many Christians at work, some buying slaves and setting them free or teaching them to read. But Wilberforce decided he could do more. Christians must oppose evil. To pretend like there's a safe zone that we can retreat to is just not reality.

Fourth, and finally, *what is broken around me that I can restore?* It might be a relationship. It might be a legal policy. It might be an institution. It might be an organization. It might be a family. It might be a door. Because we live in a world where God is concerned with time and place, I am convinced to the utter core of my being that God loves it when broken things get fixed.

Because God is a restorative God, and that is precisely what he is doing in our lives and in our world.

Thank you.

John Stonestreet is a Fellow of the Chuck Colson Center for Christian Worldview and co-host of BreakPoint (with Eric Metaxas). His latest book, Restoring All Things (co-authored with Warren Cole Smith) takes the themes of this talk to a practical level, calling Christians to hopefully engage culture for the sake of the Kingdom of God.

AN ORTHODOX BELIEVER'S RESPONSE TO *EVANGELICALS AND CATHOLICS TOGETHER ON LAW*

By Michael Avramovich

I am deeply humbled to respond to more than two thousand years of Church teaching on the proper role of law and government. I write this with great spiritual trepidation and humility as I hold no official position in Orthodoxy, other than as a sinful man saved by God's grace, and as a follower of my Lord and Savior Jesus Christ. As I began to read and study *Evangelicals and Catholics Together on Law* ("ECT"), I was struck by the question why Orthodox Christians were not included in the drafting of this document, as many Orthodox have participated actively in the drafting of, for example, the Manhattan Declaration. I believe that many thoughtful and learned Orthodox Christians can agree with the principles laid out in the ECT. I believe that had Orthodox believers in the law been involved, it could have resulted in a stronger and more compelling document.

Among many non-Orthodox Christians, Orthodoxy is an enigma. As is the case in Western Christianity, Orthodoxy has a rich and complex intellectual history, and there have been spiritual renewals and reformations throughout its history. As one example, the term iconoclasm has come into our language from a period of Byzantine history in the 8th century when violent conflict arose between those who wanted to use Christian images, or icons, and purists who claimed that such images were idols. This religious controversy created significant economic and political divisions in Byzantine society that lasted for decades.

The Eastern Orthodox Church (hereinafter the "Orthodox" or "Orthodoxy") is the second largest Christian church in the world, with an estimated 300 million adherents. Orthodox believers live primarily in Eastern Europe, Russia, and the Middle East, and are the religious affiliation of the majority of the people in Bulgaria, Greece, Romania, Russia, Serbia, and Ukraine. Significant minority populations exist in Bosnia, Albania, Kazakhstan, Jordan, Palestine, Israel, Lebanon, and Syria. And as Orthodox missionaries evangelize throughout the world, Orthodox live in practically every nation of the world. There is even one Orthodox parish in Pyongyang, North Korea, even though that nation is deeply repressive to all Christian belief. Millions of Orthodox live in the United States and Canada.

Orthodoxy is composed of self-governing ecclesial bodies, referred to as autocephalous jurisdiction, that often encompass a nation (such as Russian, Greek, or Serbian Orthodox), but it is not always so. Orthodoxy is governed by a Holy Synod, which has the duty to preserve and teach Biblical and patristic traditions, and to guide church practice. Like other Christian churches, Orthodox bishops trace their lineage back to Christ's apostles through apostolic succession. However, in non-doctrinal, non-liturgical matters, Orthodoxy has always sought to share in and adopt local cultures from practices compatible with Orthodoxy. Since 1054, Orthodoxy has been separated from the Roman Catholic Church by schism.

Fundamental to Orthodoxy is a deep and rich spirituality, which embraces the whole world-outlook of the individual, including an ethical code. Orthodox spirituality penetrates all strata of social life, including political movements, popular customs, the wisdom of the common man, and even in national folklore. Of course, as ECT recognizes, there has never been a Christian civilization in the full meaning of the word. Further, Orthodoxy, as do all Christians, has long recognized that a Christian in society struggles continuously between Christian and pagan beliefs and practices, and today in the West, battles against secular forces. Orthodoxy does not seek to destroy non-Christian forces in society, but rather seeks to transform them through the power of the Holy Gospel.

From my perspective, the ECT was shaped by the classical Scholasticism of Roman Catholicism and by Enlightenment philosophies of governance and law, which have greatly influenced Western thinking about law and government. Among Evangelicals in particular, both biblical and Enlightenment thinking have been influential in shaping the proper and balanced role of law and government, as most of the founders of the United States were Protestant. Enlightenment thinking has further shaped church governance in individual churches and parishes in American Evangelicalism, and has been exported through its missionaries. However, it is important to note that the intellectual forces that have transformed and influenced political and legal thinking in the West bypassed the Byzantine Empire, and later, most of

Russia, the Balkans, and Eastern Europe. For example, Russia had a medieval civilization until the time of Peter the Great (about 1700) and knew no development comparable to the Renaissance. As a result, Russia and other Orthodox-majority countries did not experience any cleavage between religious and secular culture. In fact, until their emancipation from serfdom in 1861, it can be stated that the Russian people were medieval in their Christian faith and world-outlook. And as has been observed by scholars and other observers, the Russian people moved directly from the Middle Ages into the atheistic society of Communism. All of the great classical Russian writers, especially Dostoevsky and Tolstoy, recognized the source of Russia's moral strength and culture in the Russian people, who were transformed through Orthodoxy. However, the history of Orthodoxy has also been shaped by political and social events, some of which have been of a catastrophic nature.

For purposes of the ECT, Orthodox history, both for good and for ill, has been closely tied to, and used by, authoritarian governments. In fact, much of Orthodoxy today continues to be influenced by the intellectual currents from the Byzantine era. (Even today, Orthodoxy's Holy Liturgy and other worship services, and the elaborate vestments worn by its clergy, mirror the royal courts of the Byzantine Empire.) We often forget that after the collapse of the Western Roman Empire in the 5th century A.D., the eastern half of the Roman Empire continued its existence for an additional one thousand years until it fell to the Ottoman Turks in 1453. Although it continued to maintain its Roman state traditions, Byzantium turned toward Greek rather than Latin culture at an early stage. The Christianization of Rome that began under the Emperor Constantine in the 4th century, expanded in the Byzantine Empire as Serbs, the Rus, and Bulgarians converted to Orthodoxy beginning in the 9th century. These roots and traditions go very deep: To this day, my family still celebrates October 31st (the Feast of St. Luke on the old, Julian calendar) as the holy day when centuries ago the clan to which my family belongs became Christ-followers and were baptized.

In Russia, Tsar Peter I abolished completely the patriarchate of the Russian Orthodox Church, and made it a department of the government ruled by senior bishops and lay bureaucrats appointed by the Tsar. From 1721 until the Bolshevik Revolution of 1917, the Russian Orthodox Church was essentially transformed into a governmental agency, and during the tsarist era, the Church was even allowed to levy taxes on peasants. The Bolshevik Revolution, through the establishment of the Soviet Union, created the first state to have the objective to eliminate religion from society. This led to a severe period of Christian persecution for the Orthodox. The Soviets confiscated church property, mocked religious faith, persecuted and martyred believers, and taught atheism in the schools. Devout Christians were precluded from advanced study and universities. Churches were converted into museums of atheism. Although Orthodoxy was never officially outlawed in the Soviet Union, in Albania, under the communist dictator Enver Hoxha, it was outlawed completely. The result of the actions by the Soviets, and later by Communists in other countries, was to transform the Orthodox Church into a persecuted and martyred church. In the first five years after the Bolshevik revolution, dozens of bishops and 1,200 priests were executed. By the end of the Khrushchev era in October 1964, the Communists had murdered more than 50,000 clergy, along with up to twenty million Orthodox and other Christian believers. Of those who survived, many were tortured, sent to prison and labor camps, or to mental hospitals. Of the clergy who were not forced out, imprisoned, or martyred, their places taken by docile clergy, many of whom had close ties with the notorious KGB. Today, there is persecution and ethnic cleansing affecting Christians, both Orthodox and others, in many parts of the Middle East.

I take the time to recount this history as Orthodox believers remain skeptical of any benign nature of powerful and authoritarian governments. For many of us, we know through history that the somewhat successful American experiment of great personal and religious liberty, and limited government, is an aberration in world history. Our Orthodox experience has been to prepare and recognize what was noted long ago by Archpriest Avvakum, "Satan has obtained our radiant Russia from God, so that she may become crimson with the blood of martyrs." Such is an Orthodox understanding that law and government are rarely on God's side. Thus, the Orthodox remain skeptical of rational philosophy and the ability of man to think clearly and honorably about law and political governance (think Marx and Engels, Mao, Pol Pot, Ho Chi Minh, and others). Orthodox recognize that our minds and thinking are clouded by our sinful nature, even when we are redeemed by Jesus Christ.

Theologically, Orthodoxy and Roman Catholicism are close, with a relative unanimity in doctrine. During the Second Vatican Council, the Council noted that differences between Catholicism and Orthodoxy were complementary, rather than contradictory. Decades later, Pope Saint John Paul II, describing Orthodoxy and Catholicism, explained that the Church was "breathing with her two lungs." And yet, in the study of God's revelation in Jesus Christ, Orthodoxy and Catholicism have followed different methods. Orthodoxy recognizes that our ability to reason, and thus to understand, is in the

words of St. Paul, as though we look through the mirror darkly. As a result, regarding the ECT, Orthodoxy recognizes that human reason is limited in writing and executing laws, and developing governmental structures, for attaining God's righteous justice in this world. Human reason will always be flawed because even converted man is flawed. Why is there such skepticism against the use of reason in law? In contrast to the West, Orthodoxy reminds us that none of the early Church Fathers accepted or embraced Aristotle's metaphysics. Therefore, the Orthodox believe that the scholasticism in Roman Catholic thinking that has accepted Aristotelian logic is misplaced. There is a certain skepticism throughout Orthodoxy spirituality that human knowledge, as an offspring of reason, can never be compared to God's Revelation in Jesus Christ. Human reason cannot bring us to God, and faith does not grow out of reason. Further, human reason can never be greater or even comparable with Biblical teachings, which are, of course, God's divine revelation. As a result, in Orthodoxy, there is a limit in our ability to establish governmental and constitutional structures in any society that can foster human flourishing especially in the absence of a transformed life through Jesus Christ. And even with men and women of good will who have been transformed by the power of Christ, the sinful natures of man tends towards corruption and concentrations of power, both economic and political. Lord Acton's dictum that power corrupts and absolute power corrupts absolutely resonates deeply with Orthodox believers as we have been firsthand witnesses of the evils of power for centuries. However, Orthodoxy also recognizes that this does not mean that the effort to foster justice and righteousness should not go forward based upon Biblical principles.

Orthodox thinking about natural law is also complementary to Roman Catholic thinking, and could enlighten the ECT. As one example, the great seventh century Byzantine thinker, St. Maximus the Confessor, observed that natural law, written law, and the spiritual law were all revelations from the Logos of God, the Lord Jesus Christ. According to St. Maximus, the first principle of natural law is the Golden Rule of doing unto others as you would have them do unto you. The written law, given to us in Holy Scripture, teaches us to love our neighbors as ourselves (do not lie, steal, murder, commit adultery, and so forth). And through Jesus Christ and His revelation of the law of grace, we are taught to love our neighbors more than we love ourselves ("greater love hath no man than this than to lay down his life for another.") St. Maximus further recognized that as we live in society, all law must be governed by these principles, or they are solely laws of sin and of the flesh. St. John Chrysostom, the fourth century Archbishop of Constantinople, preached the following in his Homily XII:

> When God formed man, he implanted within him from the beginning a natural law. And what then was this natural law? He gave utterance to conscience within us; and made the knowledge of good things, and of those which are the contrary, to be self-taught. For we have no need to learn that fornication is an evil thing, and that chastity is a good thing, but we know this from the first. And that you may learn that we know this from the first, the Lawgiver, when He afterwards gave laws, and said, "Thou shalt not kill," did not add, "since murder is an evil thing," but simply said, "Thou shalt not kill;" for He merely prohibited the sin, without teaching. How was it then when He said, "Thou shalt not kill," that He did not add, "because murder is a wicked thing?" The reason was that conscience had taught this beforehand; and He speaks thus, as to those who know and understand the point. Wherefore when He speaks to us of another commandment, not known to us by the dictate of consciences He not only prohibits, but adds the reason. When, for instance, He gave commandment respect the Sabbath: "On the seventh day thou shalt do no work," He subjoined also the reason for this cessation. What was this? "Because on the seventh day God rested from all His works which He had begun to make." … For what purpose then I ask did He add a reason respecting the Sabbath, but did not such thing in regard to murder? Because this command was not one of the leading ones. It was not one of those which were accurately defined of our conscience, but a kind of partial and temporary one; and for this reason it was abolished afterwards. 1524 κατελύθη μετὰ ταῦτα. See on Matt. v. 17, Hom. XVI. (1), St. Augustin, contr. Faust. vi. 4, speaks of it as allegorical, and now become superfluous in the letter. And Ep. lv. (al. cxix.), (Ad inq. Jan. i. 2), c. 22, he writes, "of all the Ten Commandments only that of the Sabbath is enjoined to be observed figuratively, which figure we have received to be understood, not to be still celebrated by rest of the body." St. Chrys. on Gen. ii. 3, Hom. X. (7), has, "Now already from the beginning God offered us instruction typically (αἰνιγματωδῶς), teaching us to dedicate and separate the one day in

> the circle of the week wholly to employment in things spiritual;" thus making the Sabbath a type of the Lord's Day, and rest from secular, of rest in spiritual work.But those which are necessary and uphold our life, are the following; "Thou shalt not kill; Thou shalt not commit adultery; Thou shalt not steal." On this account then He adds no reason in this case, nor enters into any instruction on the matter, but is content with the bare prohibition.[1]

Thus, Orthodox thinking on the law is that the closer that a society's laws are consistent with natural law and the Golden Rule, Scriptural written law, and yes, even Christ's spiritual law, then we can better balance Orthodoxy's pessimism about man's goodness with the Scriptural ideal that man is obligated to pursue true justice for all.

I commend the drafters of the ECT for their courage and dedication to discerning God's will in promoting justice and righteousness. Orthodoxy welcomes the efforts of our brothers and sisters in Christ to shape the development of law and governance through Biblical and Christ-centered principles that recognize the power of God's justice in the world. However, we also recognize, as do the drafters of the ECT, that true justice and righteousness cannot be established until the return of the Lord Jesus Christ to set up His Kingdom.

Michael Avramovich, B.A., M.B.A., J.D., LL.M, is a lawyer in private practice, and is Adjunct Professor of International Business and Trade Law at The John Marshall Law School in Chicago. He also serves as Chairman of the Human Rights Committee of the Northern Illinois Chapter of the Christian Legal Society. Michael and his wife, Susan, attend St. Archangel Michael Serbian Orthodox Church in Lansing, Illinois.

[1] St. John Chrysostom, Homilies Concerning the Statutes, *Homily XII* ¶ 9, in 9 Schaff, ed., Nicene and Post-Nicene Fathers 421 (2004).

Holt v. Hobbs: Reinforcing *Hobby Lobby*

By Kimberlee Wood Colby, Senior Counsel, Center for Law and Religious Freedom

Prisoner cases are a dime a dozen. Prisoners typically represent themselves, taking advantage of the prison library to draft their own pleadings. So it was for Gregory Holt, a particularly unsympathetic plaintiff incarcerated by the State of Arkansas for assaulting his girlfriend, and subsequently found guilty of making threats against President Bush's daughters.

After converting to Islam, Mr. Holt understood his faith to require that he grow a half-inch beard. But the Arkansas prison's grooming policy required prisoners to remain clean-shaven unless they had a dermatological condition that shaving irritated. Prison officials justified the policy on the grounds that if beards were allowed, a prisoner could change his appearance quickly to escape and could easily hide contraband. While this policy might seem reasonable, it was contradicted by policies at 43 other state prison systems, as well as the federal prison system, that allowed prisoners to wear beards for religious reasons.

After prison officials denied his request to be allowed to grow a beard, Mr. Holt filed a federal lawsuit under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a federal law passed by Congress in 2000 to protect prisoners and religious congregations against state and local governments' infringement of their religious liberty. RLUIPA is a sister statute to the better-known Religious Freedom Restoration Act (RFRA) of 1993 that protects all Americans' religious liberty against unjustifiable restrictions by the federal government.

RLUIPA and RFRA represent congressional efforts to plug the gaping holes in religious liberty created by the Supreme Court's 1990 decision in *Employment Division v. Smith*, which continues to profoundly affect religious liberty 25 years later. The Christian Legal Society was instrumental in passage of both RFRA and RLUIPA. Between them, the sister statutes provide the actual day-to-day protection for religious liberty that Americans usually mistakenly attribute to the First Amendment. Both RFRA and RLUIPA are essential to protecting our religious liberty.

Both statutes share a common framework for determining whether government action violates religious liberty. If a religious claimant shows that its sincere religious exercise is substantially burdened by the government's action, the burden then shifts to the government to demonstrate that its compelling interest cannot be achieved by a less restrictive means that would not burden that specific claimant's religious exercise. This strong balancing test does not predetermine winners and losers. Sometimes religious freedom wins, sometimes the government wins. Instead, RFRA insists that the *federal* government must actually justify its actions if they restrict a citizen's religious liberty, and RLUIPA requires *state and local* governments to make a similarly rigorous showing in the prison and zoning contexts.

Most importantly, Holt *provided timely reinforcement for the* Hobby Lobby *decision, which in its short life of six months had been severely mischaracterized and pointedly attacked by politicians, academics, and media for its rigorous application of RFRA's straightforward terms.*

Summarily losing in both the district and appellate courts, Mr. Holt handwrote his petition asking the United States Supreme Court to review his case. Having the Court grant review is nearly always a long-shot, but Mr. Holt's *pro se* petition seemed the longest of long shots. But then Justice Alito asked the Arkansas prison officials to file a response to Mr. Holt's petition. Mr. Holt's odds began to improve. Soon Professor Douglas Laycock of the University of Virginia School of Law, one of the foremost religious liberty experts, and the Becket Fund for Religious Liberty came alongside to help Mr. Holt with his case.

The Supreme Court granted Mr. Holt's petition in March 2014. That same month, the Court heard oral argument in the *Hobby Lobby* litigation, which included

two of the challenges to the HHS Mandate that were brought by numerous Christian business owners with religious objections to providing insurance coverage for drugs that they believed destroyed nascent human life. Three months later, the Court held in *Hobby Lobby* that RFRA protected the owners' free exercise of religion because the federal government had not used the least restrictive means to achieve its arguably compelling interest in requiring such insurance coverage. In holding for *Hobby Lobby*, the Court split 5-4 between its conservative and liberal wings to reject the United States Government's anemic interpretation of RFRA's protections.

Just six months later, on January 20, 2015, the Court unanimously ruled in favor of Mr. Holt. But unlike in *Hobby Lobby*, the conservative and liberal justices joined together to adopt a potent interpretation of RLUIPA's protection of prisoners' religious freedom. Indeed, the same United States government that had imposed the HHS Mandate on hundreds of religious business owners and nonprofits now argued that RLUIPA's terms required rigorous protection for religious prisoners' right to grow beards. CLS helped organize a brief filed by Cravath, Swaine & Moore LLP on behalf of CLS, Prison Fellowship Ministries, World Vision, and the National Association of Evangelicals in support of RLUIPA and its protection of prisoners' religious liberty.

… RLUIPA and RFRA intentionally provide greater protection for free exercise than the First Amendment provided even before 1990 and the Smith *decision. The relatively clean slate created by* Holt *and* Hobby Lobby *renews hope that religious liberty can again be vigorously protected.*

The Court's unanimous decision in *Holt v. Hobbs* is significant on several levels. Most importantly, *Holt* provided timely reinforcement for the *Hobby Lobby* decision, which in its short life of six months had been severely mischaracterized and pointedly attacked by politicians, academics, and media for its rigorous application of RFRA's straightforward terms. Somehow the Court's rigorous application of RLUIPA's same terms on behalf of a Muslim prisoner was more palatable to many of *Hobby Lobby*'s critics, although not to all. While distinguishing *Holt* from *Hobby Lobby* based on their belief that a third-party harm existed in *Hobby Lobby* but was missing in *Holt*, even Justice Ginsburg and Justice Sotomayor joined the Court's opinion.

Both *Hobby Lobby* and *Holt* flesh out the "substantial burden" prong of the RFRA/RLUIPA standard by making clear that the religious exercise at issue must be sincerely held but need not be central or compelled by the religious claimant's faith. A substantial burden exists when the claimant is put to a choice between violating his sincere religious beliefs and being punished in some way by the government. A government policy may substantially burden religious exercise even if the government allows alternative religious exercises. That is, the fact that prison officials allowed Mr. *Holt* to own a prayer rug or maintain a religious diet did not mitigate their refusal to let him grow a beard.

Holt also reaffirmed a key holding in *Hobby Lobby*. The Court ruled that both RFRA and RLUIPA stand on their own legs and are not chained to pre-*Smith* decisions interpreting – and often limiting — the degree of protection afforded by the First Amendment's free exercise clause. In other words, RLUIPA and RFRA intentionally provide greater protection for free exercise than the First Amendment provided even before 1990 and the *Smith* decision. The relatively clean slate created by *Holt* and *Hobby Lobby* renews hope that religious liberty can again be vigorously protected.

As in *Hobby Lobby*, the Court in *Holt* sidestepped a close examination of the actual strength of the government's claimed "compelling interest" in prison security. Instead, the Court drilled into the issue of whether the government had a true "less restrictive means" of achieving that interest. The Court has now repeatedly instructed that both RLUIPA and RFRA require a focused inquiry that examines whether the government has demonstrated that application of the challenged policy *to the particular claimant's religious exercise* is necessary to achieve the government's compelling interest. The Court made clear that this searching inquiry is a function of judicial restraint because the courts are "obliged" – the Court's own word – to implement the "test set forth by Congress."

Of course, Arkansas prison officials strenuously argued that the Court should defer to prison officials' expertise in security issues. RLUIPA's own legislative history anticipated some level of deference. The Court acknowledged that the courts should respect prison officials' expertise – but not to the extent of unquestioningly accepting a prison policy. Nonetheless, the Court agreed that, when applying RLUIPA, courts should be cognizant of the prison context. Courts should examine

a prisoner's sincerity when prison officials suspect him of insincerity. Even if sincere, a prisoner may forfeit an accommodation if he abuses the exemption in a manner that undermines the government's compelling interest.

As in *Hobby Lobby*, the Court emphasized that the least restrictive means standard is "exceptionally demanding" and requires the government to use a less restrictive means if it is available. Here the Court closely examined the fit between prison officials' denial of Mr. *Holt*'s request to grow a beard for religious reasons and their interest in preventing contraband and disguise. The Court noted that any contraband hidden in a half-inch beard could be easily hidden in longer hair on top of the head and could readily be found by running a comb through the beard. Photos taken of the prisoner with and without a beard would allow for identification of an escaped prisoner.

Whether courts must consider other prison systems' practices in RLUIPA cases had been an issue in the lower courts. The Court answered that question by its willingness to consider other prison systems' practices – specifically, the fact that 43 other states and the federal government allow prisoners to grow beards for religious reasons – in assessing the existence of a less restrictive means.

But perhaps the enduring lesson of *Holt* is one already glimpsed in *Hobby Lobby*, when RLUIPA precedents laced *Hobby Lobby*'s RFRA arguments. By working for RLUIPA's passage to protect religious liberty for "the least of these," CLS and its allies unwittingly – but fittingly – protected religious liberty for all Americans. Not surprisingly, the Golden Rule holds true yet again.

Kim Colby has worked for Christian Legal Society's Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in several appellate cases, including two cases heard by the United States Supreme Court. She has filed numerous amicus briefs in federal and state courts. In 1984, she assisted in congressional passage of the Equal Access Act, 20 U.S.C. § 4071, et seq., which protects the right of secondary school students to meet for prayer and Bible study on campus. Ms. Colby has prepared several CLS publications addressing issues about religious expression in public schools, including released time programs, implementation of the Equal Access Act, and teachers' religious expression.

Ms. Colby graduated summa cum laude from the University of Illinois with a major in American History and a particular interest in slavery in colonial North America.

Generous support for
The Journal of Christian Legal Thought
is provided by

TERRENCE J. MURPHY INSTITUTE
for Catholic Thought, Law, and Public Policy

PEPPERDINE UNIVERSITY
School of Law
Herbert & Elinor Nootbaar Institute
on Law, Religion, and Ethics

REGENT UNIVERSITY
SCHOOL OF LAW

HANDONG
INTERNATIONAL
LAW SCHOOL

the Chuck
Colson Center
for Christian Worldview

The *Journal of Christian Legal Thought* is a publication of the
Institute for Christian Legal Studies, a cooperative ministry of the
Christian Legal Society and Trinity Law School.

CHRISTIAN
LEGAL SOCIETY

TRINITY
LAW SCHOOL