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LIBERTY AND JUSTICE *for All*

ALSO IN THIS ISSUE

David Nammo,
Executive Director
and CEO

Freedom versus Tyranny

As I write this, I am looking at a reminder I have it posted on the upper corner of my computer monitor. It is the Arabic letter for "N" – standing for Nazarene. My father grew up a Christian in Iraq, a Chaldean, and he often told me that we as Christians are referred to as "Nazarenes" there. Now, the world watches as ISIS paints that letter on the houses of Christians, some of whom are my relatives, in my father's former homeland.

Needless to say, the Christian community in Iraq is nearly decimated. The persecution and killings have driven most of the Christians out of the country. The stories I have heard are too gruesome to recount. Those who have put their faith in Jesus Christ are being killed for it.

"Liberty and Justice for All" is the theme of this issue. The toughest part of that phrase may not actually be "liberty" or "justice," it may be "for all." It is "freedom" that gives "all" liberty and justice. And freedom is a tough pill to swallow if you cannot abide your neighbor's beliefs, practices, or ideals.

Proverbs reminds us that if we dig a pit, we will fall in it. And if we lay the foundation for freedom, we eventually will need to fall into that same net. But if we lay the groundwork for tyranny – protecting only one interest – we also will eventually fall into that as well, but it may not be the tyranny of our making.

A little over a decade ago, many Christians were critical of the religious liberty stance of CLS. Our Center for Law & Religious Freedom fights for the religious liberty rights of all Americans. I heard from many Christians and Christian lawyers who felt that we should protect Christian values, and that protecting non-Christian religions was foolish at best.

Perspectives have changed in America in just the past decade. The church is waking up to the importance of religious liberty. Christians now realize that our "freedom" is not just something written in an old Constitution, but something worth cherishing and fighting to keep alive – certainly for our children and our grandchildren.

Christians in America are increasingly fighting in many places to live out their faith in all walks of life – like the Christian photographer in New Mexico and the Christian baker in Colorado – both of whom lost their battles in court. Freedom is not free. But the ruin of religious liberty is religious intolerance. And as my family knows personally, the death of religious liberty eventually results in cultural tyranny, where everyone loses.

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Editor-in-Chief
David Nammo

Managing Editor
Philip Lewis

Editor
Greta Simpson

Design & Production
Perceptions Studio

Editorial E-Mail
memmin@clsnet.org

Advertising Office
Christian Legal Society
8001 Braddock Road, Suite 302
Springfield, Virginia 22151

For advertising inquiries, email memmin@clsnet.org.

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IN THIS ISSUE

LIBERTY AND JUSTICE *for All*

Religious Freedom vs. LGBT Rights? It's More Complicated

The legal context for what's happening at Gordon College, and how Christians can respond despite intense cultural backlash

BY JOHN D. INAZU

A private Christian school holds what it considers a biblical view of marriage. It welcomes all students, but insists that they adhere to certain beliefs and abstain from conduct that violates those beliefs. Few doubt the sincerity of those beliefs. The school's leaders are seen as strange and offensive to the world, but then again, they know that they will find themselves as aliens and strangers in the world.

This description fits a number of Christian schools confronted today with rapidly changing sexual norms. But the description also would have fit Bob Jones University, a school that barred interracial dating until 2000. And in 1983, that ban cost Bob Jones its tax exemption, in a decision upheld by the U.S. Supreme Court. Even for a relatively small school of a few thousand students, that meant losing millions of dollars. And the government's removal of tax-exempt status had a purpose: one Supreme Court justice described it as "elementary economics: when something becomes more expensive, less of it will be purchased."

The comparison between Bob Jones in 1983 and Christian schools today will strike some as unwarranted. Indeed, there are historical reasons to reject it. The discriminatory practices in *Bob Jones* were linked to the slavery of African Americans and the Jim Crow South. The 1983 Court decision came within a generation of *Brown v. Board of Education*, and its legal principles extended to private secondary schools (including "segregationist academies") that resisted racial integration.

There are also significant theological differences between Bob Jones's race-based arguments and arguments that underlie today's sexual conduct restrictions. Those differences are rooted in contested questions about identity, as well as longstanding Christian boundaries for sexual behavior. Gay and lesbian Christians committed to celibacy show that sexual identity and sexual conduct are not always one in the same. But these points are increasingly obscured outside of the church. We see this in the castigation of any opposition to same-sex liberties as bigoted. That kind of language has moved rapidly into mainstream culture. And it is difficult to envision how it would be undone or dialed back.

How should Christians respond to these circumstances? First, we must understand the history from which they emerge. Second, we must understand the legal, social, and political dimensions of the current landscape. Third, and finally, we must recognize that arguments that seem intuitive from within Christian communities will increasingly not make sense to the growing numbers of Americans who are outside the Christian tradition.

How We Got Here

Many of the questions today simply were not in play that long ago. For one, governmental regulations have a far wider reach than they did even 100 years ago. We work, play, worship, and live in spaces regulated by government. Just look around the next time you step foot in your local church. Some of the building was probably subsidized through state and federal tax exemptions. Any recent construction likely encountered local zoning ordinances. The certificate of occupancy, fire code compliance, and any food service permits all reflect government regulation. Today, the government, its money, and its laws are everywhere.

We can pin many of these changes on the New Deal, but just as influential were the civil rights era and the battle to end segregation. Civil rights laws extended to what had previously been seen as private spaces and transactions. The laws focused on commercially operated public accommodations, such as transportation, lodging, and restaurants. But they also extended to private schools, neighborhoods, and swimming pools. The reach of these laws was unprecedented—and rightly so. The pervasive impediments to equal citizenship for African Americans have not been seen in any other recent episode in U.S. history. Our country has harmed many people (including my grandparents, who were stripped of their possessions and imprisoned for four years during World War II solely because they were Japanese Americans). But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.

In less than three decades, the Supreme Court has moved from upholding the criminalizing of gay conduct to affirming gay marriage. The tone of the debates has also shifted.

The legal context surrounding LGBTQ rights has also changed swiftly. In less than three decades, the Supreme Court has moved from upholding the criminalizing of gay conduct to affirming gay marriage. The tone of the debates has also shifted. In 1996, an overwhelming majority of Congress passed the Defense of Marriage Act (DOMA), which was signed into law by President Clinton. Last year, a majority of the Supreme Court concluded that the Act reflected "a bare congressional desire to harm" and that its supporters were motivated by prejudice and spite. These developments are unfolding at breakneck speeds, and will likely affect the laws governing private spaces and transactions.

We also have seen shifts in the law pertaining to the free exercise of religion. The modern religious liberty story begins in 1990, in a case involving Native Americans who lost their jobs for using peyote (a hallucinogenic) for religious reasons. The law prohibiting peyote was generally applicable, meaning it applied to everyone and did not single out religious believers. You couldn't use peyote for either social or religious purposes. The Court decided that the First Amendment provided no special protection against such laws.

That reasoning has broad implications, because many if not most laws are generally applicable. For example, under current law, a religious believer will almost certainly lose a free exercise challenge to an antidiscrimination law that covers sexual orientation.

The public was outraged over the Court's decision in the peyote case. Congress responded with the Religious Freedom Restoration Act (RFRA). The legislation had strong support from across the political spectrum. It passed the Senate in 1993 by a vote of 97-3. Five years later, Congress tried to pass another version, but it died in committee.

The primary reason that the revised legislation failed is that between 1993 and 1998, people began to worry that strong protections for religious liberty could harm gays and lesbians. The bipartisan coalition that had supported the RFRA legislation fractured. Instead of reaffirming comprehensive protections for religious liberty, Congress enacted a more obscure law, largely confined to zoning and prisons.

This isn't the whole story. Two years ago, the Supreme Court recognized important protections for "churches" and "ministers" (though the definitions of both remain unspecified). In addition, part of the original RFRA remains intact—that's how Hobby Lobby recently prevailed in challenging contraception coverage under the Affordable Care Act. But as I not-

ed for CT, Hobby Lobby's narrow legal victory hinged on a statute, not a constitutional principle. In the weeks after *Hobby Lobby*, we have already seen calls to repeal RFRA and to remove religious exemptions from proposed antidiscrimination legislation at the federal level. And while many states have constitutional and statutory protections for religious liberty, efforts to strengthen those protections at the state level have encountered growing political resistance.

What Lies Ahead

What does the current legal and cultural landscape suggest? Here are three predictions.

Prediction #1: Only religious groups (by no means all of them) will impose restrictions based on sexual conduct. That is in stark contrast to the many groups that make gender-based distinctions: fraternities and sororities, women's colleges, single-sex private high schools, sports teams, fitness clubs, and strip clubs, to name a few. It is perhaps unsurprising in light of these observations that views on gender and sexual conduct have flip-flopped. Thirty years ago, many people were concerned about gender equality, but few had LGBTQ equality on their radar. Today, if you ask your average 20-year-old whether it is worse for a fraternity to exclude women or for a Christian group to ask gay and lesbian members to refrain from sexual conduct, the responses would be overwhelmingly in one direction. That trend will likely continue.

If you ask your average 20-year-old whether it is worse for a fraternity to exclude women or for a Christian group to ask gay and lesbian members to refrain from sexual conduct, the response would be overwhelmingly in one direction.

Prediction #2: Only religious groups will accept a distinction between "sexual conduct" and "sexual orientation," and those groups will almost certainly lose the legal effort to maintain that distinction. Most Christian membership limitations today are based on conduct rather than orientation: they allow a gay or lesbian person to join a group, but prohibit that person from engaging in conduct that falls outside the church's teachings on sexuality. These policies—like the one at Gordon College currently under fire—are not limited to gays or lesbians; all unmarried men and women are to refrain from sexual conduct. The distinction between status and conduct from which they derive is rooted in Christian tradition, and it is not limited to sexuality: one can be a sinner and abstain from a particular sin.

But many people reject the distinction between status and conduct. And in a 2010 decision, *Christian Legal Society v. Martinez*, the Supreme Court also rejected it, viewing distinctions based on homosexual conduct as equivalent to discrimination against gays and lesbians. I have argued in a recent book (*Liberty's Refuge: The Forgotten Freedom of Assembly*) that the Court's reasoning is troubling in the context of a private group's membership requirements. But it is the current state of the law.

> The pluralist argument is not clothed in the language of religious liberty, but it extends to religious groups and institutions.

Prediction #3: Fewer and fewer people will value religious freedom. Although some Christians will respond to looming challenges with appeals to religious liberty, their appeals will likely face indifference or even hostility from those who don't value it. The growing indifference is perhaps unsurprising because many past challenges to religious liberty are no longer active threats. We don't enforce blasphemy laws. We don't force people to make compelled statements of belief. We don't impose taxes to finance training ministers. These changes mean that in practice, many Americans no longer depend upon the free exercise right for their religious liberty. They are free to practice their religion without government constraints.

Additionally, a growing number of atheists and "nonreligious" Americans have little use for free exercise protections. Even though most Americans will continue to value religious liberty in a general sense, fewer will recognize the immediate and practical need for it to be protected by law.

This final prediction is deeply unsettling, because strong protections for religious liberty are core to our country's law and history. But those protections have been vulnerable since the Court's decision in the peyote case. And they will remain vulnerable unless the Court revisits its free exercise doctrine.

After Religious Exceptionalism

If I am correct about these three predictions, then arguments rooted in religious exceptionalism will see diminishing returns. There is, however, a different argument that appeals to a different set of values. It's the argument of pluralism: the idea that, in a society that lacks a shared vision of a deeply held

common good, we can and must live with deep difference among groups and their beliefs, values, and identities. The pluralist argument is not clothed in the language of religious liberty, but it extends to religious groups and institutions. And Christians who take it seriously can model it not only for their own interests but also on behalf of their friends and neighbors.

Pluralism rests on three interrelated aspirations: tolerance, humility, and patience. Tolerance means a willingness to accept genuine difference, including profound moral disagreement. In the pluralist context, tolerance does not *embrace* difference as good or right; its more limited aspiration is permitting differences to *coexist*.

The second aspiration, humility, recognizes that our own beliefs and intuitions rest upon tradition-bound values that can't be fully proven or justified by external forms of rationality. Notions of "equality" and "morality" emerge from within particular traditions whose basic premises are not endorsed by all. Humility holds open that there is right and wrong and good and evil, and that in the fullness of time the true meaning of equality and morality will emerge. But humility also opens the door to hearing others' beliefs about right and wrong, good and evil. Instead of making claims about what we can know or prove, we might point out that faith commitments underlie all beliefs (religious or otherwise) and stand ready to give the reason for the hope that we have (1 Pet. 3:15).

The third aspiration, patience, recognizes that contested moral questions are best resolved through persuasion rather than coercion, and that persuasion takes time. Most of us—whatever our beliefs—think we are right in a profound way. Most of us structure our lives around our deepest moral commitments. And we instinctively want our normative views to prevail on the rest of society. But patience reminds us that the best means to a better end is through persuasion and dialogue, not coercion and bullying.

In this age, the argument of pluralism is far likelier to resonate in the public square than arguments for religious exceptionalism.

Pluralism does not entail relativism. Living well in a pluralist world does not mean a never-ending openness to any possible claim. Every one of us holds deeply entrenched beliefs that others find unpersuasive, inconsistent, or downright loopy. More pointed, every one of us holds beliefs that others find morally reprehensible. Pluralism does not impose the fiction of assuming that all ideas are equally valid or morally benign. It does mean respecting people, aiming for fair discussion, and allowing for the right to differ about serious matters.

Pluralism and Witness

The argument for pluralism and the aspirations of tolerance, humility, and patience are fully consistent with a faithful Christian witness. And in this age, they are also far likelier to resonate than arguments for religious exceptionalism. The claim of religious exceptionalism is that only believers should benefit from special protections, and often at the cost of those who don't share their faith commitments. The claim of pluralism is that all members of society should benefit from its protections.

Christians have a long way to go in affirming the value of pluralism for all members of society. We might begin by recognizing its role for our gay and lesbian neighbors. When Uganda enacts a law that punishes homosexuality with death, U.S. Christians can speak out against such a law. Domestically, we need to think carefully about the kinds of legislation being pushed at the state level. Some proposed laws are undoubtedly important to protect religious institutions' right to live in accordance with their own beliefs and traditions; others are deeply problematic. Christians in states without any antidiscrimination protections for gays and lesbians might consider supporting those laws containing exemptions for religious groups, rather than simply advocating for religious freedom on its own.

Unkind words have emerged from almost every corner of the public discourse. Christians should not be bullied or silenced by careless language. But neither should they engage in it. Advocacy for Christian witness must itself demonstrate Christian witness. In this way, our present circumstances provide new opportunities to embody tolerance, humility, and patience. And, of course, we have at our disposal not only these aspirations but also the virtues that shape our lives: faith, hope, and love.

John Inazu is associate professor of law at Washington University School of Law, an expert on the First Amendment freedoms of speech, assembly, and religion, and the author of Liberty's Refuge: The Forgotten Freedom of Assembly (Yale University Press, 2012). He recently wrote for CT about Hobby Lobby.
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Prisons, Whiskers, and Religious Liberty: What's at Stake in Holt v. Hobbs

BY HEATHER RICE-MINUS AND JESSE WIESE

As a Christian attorney, you may have been following the *Hobby Lobby* case and celebrated the religious liberty victory it brought. We are blessed that America has a long history of strong religious liberty protections.

On November 8, 2014, the Supreme Court heard oral argument for *Holt v. Hobbs*. While not as publicized as *Hobby Lobby*, it may be the most significant religious liberty case before the United States Supreme Court this term.

The case was brought by Mr. Holt, a man incarcerated in an Arkansas prison, who wishes to grow a half-inch beard in accordance with his Muslim faith. The Arkansas Department of Corrections policy prohibits people incarcerated in the state from growing beards, citing security concerns such as the ability to hide contraband like drugs or razor blades or alter one's appearance upon escape by shaving. Mr. Holt challenged this prohibition under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Prison Fellowship Ministries was pleased to join an amicus brief with the Christian Legal Society in support of Mr. Holt because of our strong interest in the correct interpretation and application of the Religious Land Use and Institutionalized Persons Act.

Prison Fellowship Ministries is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded 38 years ago by the late Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, Prison Fellowship Ministries carries out a mission built on the fundamental tenet that no one is beyond redemption. Creating opportunities for men and women in prison to transform their worldview through an encounter with Christ can result in their personal transformation and restoration of communities affected by crime. Practices limiting the accommodation of sincerely held religious beliefs affect prisoners who are involved in Prison Fellowship programs and activities, as well as the ability of Prison Fellowship to conduct those programs and activities. Justice Fellowship, the advocacy arm of Prison Fellowship, supported the passage of RLUIPA and the predecessor legislation to RLUIPA, the Religious Liberty Protection Act, in order to protect religious liberty at the State and local levels.

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government can satisfy the rigorous and well-defined "strict scrutiny" standard. RLUIPA is structured as a package deal between State prison systems and the Federal Government. States that agree to comply with RLUIPA's voluntary requirements are granted additional federal funds. In exchange for those funds, those States have agreed that they will not restrict an individual's religious exercise unless the challenged government policy "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." Further, RLUIPA requires States to "demonstrate" the "compelling interest" and "least restrictive means" tests with facts, not mere hypothetical assertions. This is a high bar, but then again, religious liberty is a right that merits such protection.

In this case, Mr. Holt's ability to exercise his religion by growing a beard is being burdened by the Arkansas Department of Corrections' prohibition. It is undisputed that Arkansas accepted federal funds in exchange for submitting to the requirements under RLUIPA. The sincerity of Mr. Holt's religious beliefs is also not in question.

The courts generally give great deference to prison officials in determining security policies in their institutions. The Department argued it had a compelling security interest and the prohibition is the least restrictive method. However, forty-four other State departments of correction allow people in prison to grow beards, indicating the security concerns associated with beards are less in other states, or at least, less restrictive methods other than banning beards altogether have been safely implemented.

The Court harped on this point. In fact, Justice Alito asked counsel representing Arkansas prison officials why combing through the beard "to see if a SIM card — or a revolver — falls out" could not be a less restrictive alternative. We, along with others in the audience, could not help breaking into laughter at the ridiculous mental picture. As an attorney, you know it's usually not a good sign when the judge is cracking jokes about your argument.

Many are predicting Mr. Holt will get a 9-0 decision in his favor (the opinion is due by June 2015, but could be released much sooner). What is less certain, is whether the opinion will attempt to define where and how to draw the line between protecting religious liberty in prison and giving prison officials deference in determining conflicting security policies.

Supporting an incarnated man's right to grow a beard may seem trivial at first glance, but far more than whiskers are at stake. Prison Fellowship Ministries signed the amicus brief in *Holt v. Hobbs* because we believe freedom of religion is a God-given right, and that men and women made in God's image don't forfeit that right upon conviction of a crime. We should be encouraging men and women to reform their lives.

Prison Fellowship Ministries signed the amicus brief in *Holt v. Hobbs* because we believe freedom of religion is a God-given right, and that men and women made in God's image don't forfeit that right upon conviction of a crime.

Seeking to live as God would have us live not only benefits men and women in prison, it makes our prisons and our communities safer. Ninety-five percent of men and women currently in prison will eventually be released, and some 700,000 come back to live in our neighborhoods every year. We want to see men and women leave our prisons ready and committed to becoming productive members of our communities. Allowing these men and women to practice their Christian faith while behind bars simply provides them the opportunity to practice good citizenship—something that our culture should promote.

Our country has been able to flourish because of our ability to freely exercise our faith. The "strict scrutiny" standard provided under RLUIPA should not be watered down. Mr. Holt represents a religious minority in America and is asserting the right to exercise his faith in prison, a place where religious liberty is arguably at greatest risk due to the government's legal authority over individual liberty. By protecting the religious exercise of one of the most vulnerable Americans, we protect religious liberty for us all

By Heather Rice-Minus and Jesse Wiese, CLS members and policy staff at Justice Fellowship, the advocacy arm of Prison Fellowship Ministries.

Progressivism and Religious Liberty

BY THOMAS C. BERG*

Religious liberty in America faces serious challenges today, and increasingly they involve the liberty of those with socially conservative ("traditionalist") theological beliefs. Many cases are familiar by now: a wedding photographer forced to pay $6,600 for declining to photograph a same-sex commitment ceremony; pharmacists sanctioned for refusing to dispense emergency contraception that they fear may cause abortions of embryos; Catholic Charities adoption services threatened with de-licensure for declining to place children with same-sex couples; Hobby Lobby and other employers facing large fines under the Obama administration's mandate to cover contraception in health insurance.

These cases reflect intensifying clashes between traditionalist religious tenets and laws that promote what are commonly called "progressive" views on issues of sex and morality such as abortion, gay rights, and women's roles in society. Religious objections clash with laws forbidding discrimination or requiring the provision of employee benefits or professional services. The conflicts are so frequent and polarized that leading scholar Douglas Laycock suggests that many progressives have gone beyond opposing particular religious freedom claims, to "question the free exercise of religion in principle—suggesting that [it] may be a bad idea, or at least, a right to be minimized."

These conflicts lead some observers to conclude that religious liberty and political progressivism cannot coexist. But I believe it's vital to argue that they can—to develop arguments to incline those on the left, or at least the center-left, to support meaningful religious freedom even for traditionalist beliefs they oppose. Religious liberty will not remain vital if it becomes another partisan issue: if one of the sides of our political/cultural divide becomes skeptical of and seeks to minimize it.

My own commitments draw me to develop progressive-oriented arguments for religious freedom. I'm an advocate for (as well as a scholar of) religious freedom; I'm also a registered Democrat who has come to support same-sex civil marriage. But I believe my recommendation also makes pragmatic sense. Despite November 4's elections, long-term demographic changes and the increasing support for gay rights across the political spectrum make it very risky to tie the fortunes of religious freedom solely to those of political and social conservatism. We will have to reach both legislators and judges whose views are "blue," or at least purple. The challenges facing religious freedom are serious enough that we must use the full quiver of arguments to support it.

The tensions between political progressivism and religious freedom are indeed significant. I define progressivism by three features. The first—which does not inherently conflict with religious freedom and indeed might support it—is an emphasis on ensuring equal freedom for individuals and groups that have suffered unfair disadvantages or are particularly vulnerable to being harmed by government actions. This feature encompasses the progressive emphases on the poor and racial, religious, sexual, or other minorities. But progressivism has also come to embrace a set of views opposing traditional sexual morality on issues such as abortion, contraception, gay rights, and family structures. Laws reflecting such views generate most of the progressive clashes with religious liberty. Progressives tend to call opposition to gay rights simple bigotry; the debate over the HHS mandate was equally heated.

Still, even the conflicts over sexual roles and morality would not raise repeated religious liberty issues if not for a third tenet of progressivism: that private power often threatens liberty

* This article draws in part from the Kamm Lecture that he delivered at Wheaton College on April 11, 2013. The arguments here appear in expanded form, with citations, in Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Law & Contemporary Issues 279 (2013).

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and should be counteracted by government regulation. The early 20th-century Progressive movement held, in the words of historian Eric Foner, that "[o]nly energetic government could create the social conditions for freedom, [as] an alternative to control of Americans' lives by ... all-powerful corporations." HHS Secretary Kathleen Sebelius echoed this when she stated that the mandate to insure contraception promoted freedom by "put[ting] women and their doctors, not insurance companies or the government, in charge of health care decisions." The more that private institutions are suspect—and the more they are required to help facilitate the actions of their employees or customers—the greater will be the conflicts with religious freedom.

Progressives should value religious freedom highly, for it fits squarely within the commitment to equal freedom on important matters where people are vulnerable to harm by government.

Progressives will not drop their disagreement with traditionalist sexual morality, or the view that government intervention often promotes rather than restricts freedom. But certain arguments for religious freedom can resonate with (persuadable) progressives. The three arguments I offer primarily support freedom for faith based service organizations (FBSOs) such as social services, healthcare, and schools. Some of these arguments also support religious freedom for individuals running commercial businesses: the factory owner objecting to covering contraception, the photographer declining to shoot pictures for a same-sex wedding.

First, progressives should value religious freedom highly, for it fits squarely within the commitment to equal freedom on important matters where people are vulnerable to harm by government. Progressives have historically valued religious freedom: for example, liberal judges like Frank Murphy and William Brennan stood strongly for minority religious rights, and into the 1990s the ACLU supported religious freedom legislation. And religious freedom is as crucial to people as other rights progressives emphasize. Take, for example, the right to same-sex marriage. It rests on the argument that intimate relationships, aimed at permanence and often involving the raising of children, are central to a person's identity and that gays and lesbians should be able to live those relationships in a public, not just an insular private, way. But the same arguments apply to religious conscience. Religious believers and groups have a powerful drive to live consistently with their faith in all aspects of their lives, including their participation in service work, economic life, and other activities of civil society. As law professor Alan Brownstein, a gay-marriage supporter, argues, "Almost any other individual decision pales in comparison to the serious commitment to religious faith." People who are pressured to violate that commitment are vulnerable to serious harm.

Second, religious freedom should extend beyond individuals and churches to faith-based service organizations, because—as progressives especially should affirm--service to the needy lies at the core of religious faith. Progressive advocates often seek to confine religious freedom to churches and reject claims by FBSOs. The religious freedom protections in the HHS mandate were originally so limited, and first drafts of same-sex marriage laws often protect only churches and clergy. This is ironic, even perverse, for progressives, more than anyone, see service to the needy as the core of what is good in religion. President Obama himself once recounted how he concluded that "while I could sit in church and pray all I want, I wouldn't be fulfilling God's will unless I went out and did the Lord's work .... While [faith-based service organizations] are often made up of folks who've come together around a common faith, they're usually working to help people of all faiths or of no faith at all." But under original HHS mandate, this very act of reaching out beyond co-religionists became the ground for excluding FBSOs from the religious exemption (the administration did later extend them some protection). Indeed, certain proponents of the mandate cavalierly dismissed the religious nature of services helping the poor: the pro-choice group Emily's List labeled them "so-called 'religious'" organizations. That dismissal should disturb religious believers of all stripes.

Following religious belief and maintaining religious identity is important for religious organizations as well as individuals. Organizations can be seriously harmed when their participation in some aspect of life requires that they violate tenets that ground and motivate that participation in the first place. As World Vision general counsel Steven McFarland put it: "We

are not just another humanitarian organization, but a branch of the body of Christ…. The key to our effectiveness is our faith, not our size. If we would lose our birthright, if we ever would not be able to determine our team, we'd lose our vision."

A similar point emerged in the *Hobby Lobby* litigation. The contraception mandate's defenders argued that for-profit corporations could not assert religious objections because they have no conscience and their overriding goal is to make money. But this argument too was perverse for progressives to make, for they strongly support that idea that corporations can and should pursue social responsibility, not just profits. As leading corporate law scholars such as Lyman Johnson, Brett McDonnell, and David Skeel have emphasized, liberals should actually cheer *Hobby Lobby*'s affirmation that corporations can and often do pursue moral goals.

Finally, religious people and organizations make contributions to social justice that progressives should value even if they oppose some of the associated religious practices. President Obama commended religious groups "working to help people," that is, to help the needy and vulnerable. The best way to value FBSOs' work is to avoid unnecessarily coercing them to violate their tenets and identity.

Stephen Monsma, a leading empirical researcher on FBSOs, writes that if they were to "disappear overnight, a crisis of the first magnitude would exist in the nation's social safety net." He documents this fully in his book *Pluralism and Freedom*, which quotes one study estimating that FBSOs constitute (at a minimum) one fifth of the total organizations providing human services in the nation. Catholic Charities USA provides social services to more Americans than any entity except the federal government (10.2 million in 2010). Monsma also quotes the CEO of the National Council for Adoption that "[i]f [faith-based adoption and foster-care agencies] would disappear overnight, the whole system would collapse on itself."

The benefits of FBSOs are also distinctive. Monsma finds that FBSOs "often fill a niche that either government or large, secular social service agencies would have a hard time filling," because a religious grounding inspires greater personal transformation in beneficiaries and greater participation by volunteers and donors.

And religious organizations may exit their work if they are forced to compromise their identity. Catholic Charities arms in Massachusetts, Illinois, and the District of Columbia have stopped performing adoptions because of rules requiring

them to place children with same-sex couples. The states lost the benefit of the organizations' experience and contacts in placing children, especially hard-to-place children with special needs.

What are the prospects that such arguments can persuade progressives? First, the arguments seem more likely to appeal to religious than to secular progressives, because the former directly experience service as a core exercise of faith. In the case of the HHS mandate, the administration's move to accommodate FBSOs was probably triggered by harsh initial criticism from prominent liberal Catholics like Chris Matthews and E.J. Dionne. Religious progressives are a key audience for religious freedom arguments.

Even more, the progressives most likely to support freedom for traditional religion are those who are "pragmatic" in orientation: the center-left. Pragmatic progressives look for allies wherever they can find them. They are open to the argument that religious groups are crucial to America's safety net and should not be pressured in ways that might drive them from providing services. Pragmatic progressives also qualify their confidence in government: they see the need to limit government as well as private entities, because power must always be balanced against power. Certainly not all progressives have such a pragmatic attitude. But many do, and forging broad support for religious freedom requires arguments that reach them.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law. Berg has served as UST Law's Associate Dean for Academic Affairs and as co-director of the Murphy Institute for Catholic Thought, Law, and Public Policy. He has received the Religious Liberty Defender of the Year Award (1996) from the Christian Legal Society, the Alpha Sigma Nu Book Award (2004) from the Association of Jesuit Colleges and Universities, and the John Courtney Murray Award from DePaul University College of Law for contributions to church-state studies. He has written four books, nearly 60 scholarly articles and book chapters, and 40 appellate briefs, primarily on religious freedom issues. He also directs St. Thomas's Religious Liberty Appellate Clinic, which provides pro bono representation to CLS and other groups, primarily as amici curiae, in religious freedom cases.

Why Protect Religious Freedom?

BY MICHAEL W. MCCONNELL

Religious beliefs have always generated controversy. But religious freedom—the right of individuals and groups to form their own religious beliefs and to practice them to the extent consistent with the rights of others and with fundamental requirements of public order and the common good—has long been a bedrock value in the United States and other liberal nations. Recently, however, this consensus seems to be weakening—largely from fallout over culture-war issues such as abortion and the legal recognition of same-sex relationships. A new whiff of intolerance is in the air.

We see it everywhere: in the absurdly over-the-top reaction to the *Hobby Lobby* case, in the as-yet-unsuccessful attempts to ban circumcision or repeal religious tax exemptions, in the brazen argument by the Department of Justice that the Free Exercise Clause does not extend special protection to the free exercise of religion, and most of all in the academic world, where the idea that religious freedom should be treated as fundamental is increasingly passé. Typical of the latter is the recent book by University of Chicago law professor and legal philosopher Brian Leiter, entitled *Why Tolerate Religion?* His answer? Religion *as such* does not warrant any "special" legal solicitude such as that provided by the Religion Clauses of the First Amendment. Leiter argues, amazingly, that it would be consistent with "principled toleration" for the secular state to affirmatively discriminate against religious believers in access to public spaces, such as by barring student Bible clubs from meeting on public school property, even when every other form of student organization is free to meet. Unanimous Supreme Court decisions are to the contrary. At a few extraordinary moments in the book, it appears that the author might even opt for intolerance toward religion – use of the coercive power of the state to discourage or even "eradicate" religious belief, on the ground that religious beliefs do real harm to the body politic.

Leiter is not a crank, nor, within the academic world, is he out of the mainstream. It is vitally important to understand where and how this new movement of intolerance errs. He claims that "toleration," understood as putting up with beliefs that the dominant group disapproves of, is "reflected" in the First Amendment of the United States Constitution, and is the "paradigm of the liberal ideal." Secularists are dominant, he thinks, and religious Americans are consigned to a grudging toleration. But this is incorrect: by the time of the American founding, prevailing opinion had moved beyond toleration. When George Mason proposed in 1776 that the Virginia Declaration of Rights provide for "toleration" of religion, James Madison objected on the ground that "toleration" implies an act of legislative grace. He successfully moved to substitute the term "the full and free exercise of [religion.]" In a similar vein, George Washington wrote to the Hebrew Congregation of Newport, Rhode Island that "[i]t is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." It is not an accident that the United States Constitution contains a Free Exercise Clause, not a Toleration Clause.

Leiter's misunderstanding about the role of 'toleration" in our constitutional tradition grows out of a deeper misunderstanding—one about the nature of religion itself. According to Leiter, religion is defined by essentially two criteria. The first is "categoricity," meaning roughly the demands of right and wrong, as opposed to self-interest, whim, habit, or compulsion. The second is that religious beliefs, "in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science." No religious believer would recognize this description. Religious believers do not think they are "insulating" themselves from all the relevant "evidence." They think they are considering evidence of a different, nonmaterial sort, *in addition* to the evidence of science, history, and the senses. Moreover, much religious thought is not "insulated" at all. Developments in biology, physics, linguistics, archeology, and other disciplines have had profound impact on Biblical hermeneutics and theology in mainstream Protestantism and Roman Catholicism, and "practical reason" has played a major role in natural law thinking since at least Thomas Aquinas. To be sure, some religious traditions are more insulated from scientific developments than others. The Navajo creation story, for example, is impervious to archeological and linguistic evidence that the tribe migrated to the Southwest from Canada only a few centuries before the arrival of Europeans, and fundamentalist Christian belief in the historicity of Noah's flood and the literal seven-day creation is much the same. But to say that "insulation from evidence" is a defining characteristic of "all" (or even most) religions is simply false.

Leiter's book closes with two legal arguments – both of them prevalent in academic culture and (I suspect) soon to make their way into legal and constitutional culture as well. First, he argues that singling out religious claims of conscience for exemptions from burdensome laws would be "unfair" in light of religion's objectionable character, although he quite consciously leaves room for exemptions that would not shift burdens onto others. The analysis of free exercise claims has always taken harm to third parties into account. Madison wrote that the free exercise of religion should prevail "in every case where it does not trespass on private rights or the public peace." There are, moreover, many easy cases. Leiter mentions that "the state need not tolerate . . . killing the infant children of the alleged heretics." No one will argue with that. But what about prisoners whose religious practices—for example, a kosher diet—increase the cost to the taxpayers? Is that "harm"? What about conscientious objection to the draft, which increases the statistical odds of others being sent to fight in war and perhaps to die? Questions of this sort will dominate free exercise litigation for the next decade or two. My sense is that that very few free exercise claims seek authorization to invade the private rights of third parties or to inflict harm upon them. Most, instead, resist the blanket enforcement of regulatory schemes that interfere with natural liberty in a way that, in some cases, also burdens conscience.

Leiter's misunderstanding about the role of 'toleration" in our constitutional tradition grows out of a deeper misunderstanding—one about the nature of religion itself.

Leiter's second legal argument involves the question of equal access to public facilities. Here Leiter argues that the government could use its prestige, power, and resources to support one vision of religious truth while still leaving dissenters free to dissent. In theory, this is an argument that an establishment of religion – like the colonial establishment of the Church of England – is permissible. Of course, Leiter has no interest in establishing religion. What he defends is the establishment of *secularism*, where we would use the public schools to inculcate ideologies of a nonreligious nature and prevent voluntary student groups from using the facilities on an equal basis for prayer or Bible study. So long as dissenters are permitted to express contrary views using their own resources, including wearing religious symbols or garb to school, and to attend alternative sectarian schools, he says this establishmentarian scenario is consistent with "principled toleration."

The establishment of religion may be consistent with mere toleration, but it is not consistent with the "full and free exercise of religion" that our founders adopted at the federal level in lieu of toleration. About half a dozen states pursued some form of tolerant establishment in the early years of the Republic, when the Religion Clauses did not apply to state governments, but all of them dismantled their establishments by 1833. No one, to my knowledge, mourns their passing. As Madison and others pointed out long ago, the establishment of religion is bad for religion, including the established faith, bad for dissenters, bad for government, and bad for freedom of religion.

The currently fashionable focus on "toleration" on all forms of "conscience" (religious or otherwise) brings us back, full circle, to where our Nation began. Toleration was a term associated with the religious establishment. As President Washington wrote to the Hebrew Congregation of Newport, "[i]t is now no more that toleration is spoken of." It turns out that many intellectuals want to return to the earlier regime, but with secularism rather than Anglicanism in charge. The rest of us – Christians, Jews, Muslims, Hindus, and members of other faiths – need to be on the alert.

Michael W. McConnell is the Richard and Frances Mallery Professor and director of the Constitutional Law Center at Stanford Law School, as well as Senior Fellow at the Hoover Institution. He is a leading authority on freedom of speech and religion, the relation of individual rights to government structure, originalism, and various other aspects of constitutional history and constitutional law.

Religious Freedom and LGBT Equality: Conflicting Currents in Washington, DC

BY STANLEY CARLSON-THIES

The Obama administration clearly is committed to advancing the LGBT equality agenda and there are good reasons to be concerned about its commitment to religious freedom. On the former, note, at a minimum, its many efforts to advance same-sex marriage. As to the latter, recall, for instance, its view in *Hosanna-Tabor v. EEOC* that there is no ministerial exception and that the church school could claim no more constitutional protection than some secular club; its persisting reluctance to fully respect religious freedom claims against the HHS contraceptives mandate; and the periodic substitution by its spokespersons of the narrow concept of "freedom of worship" for the robust notion of "freedom of religion."

And yet the administration has maintained a strong commitment to the faith-based initiative, to maintaining federal regulations and policies that enable religious organizations to participate in federal grant programs without having to suppress or shed their religious identity or voluntary religious practices. How do these different trends or tendencies fit together? How can knowledge of that intersection be used to protect the freedom of faith-based organizations to remain full of faith as they serve their neighbors?

An expanding federal notion of illegal discrimination

In November, 2013, the Senate passed the Employment Nondiscrimination Act (ENDA), which would ban sexual orientation and gender identity discrimination by all but small employers. Some 20 states ban the former or both forms of job discrimination, and yet, despite two decades of effort, Congress has not followed suit. Indeed, as soon as the Senate approved the bill, the House Republican leadership announced it would not take up the measure.

But the drama is not over. The Senate ENDA bill includes a religious organization exemption: any organization free, due to the religious exemption in Title VII of the 1964 Civil Rights Act, to consider religion in making staffing decisions, would be exempt from the new nondiscrimination requirements. The ACLU and others had pressed before the Senate vote for this exemption to be removed; instead, the Senate added to ENDA before adopting it a new provision banning government retaliation against religious organizations utilizing the exemption (e.g., no stripping of accreditation or grants) and a new purposes clause stating a congressional intention to protect religious freedom while ending wrongful job discrimination. However, after the US Supreme Court, in *Hobby Lobby v. Burwell*, extended religious freedom protections to at least some closely held businesses most LGBT rights organizations disavowed the Senate ENDA bill because of its religious organization exemption. Their cry was that religion should be no shield for job discrimination, either with respect to LGBT characteristics (ENDA) or easier access to contraceptives (the Hobby Lobby decision).

That was the view adopted by President Obama when he issued his long-awaited executive order banning LGBT job discrimination by federal contractors, subcontractors, and vendors. Executive Order 13672, signed on July 21, 2014, simply added sexual orientation and gender identity to the exist list of protected categories. The religious organization exemption requested by many religious leaders and organizations, including CLS and IRFA, was conspicuously missing. But also missing was any language like that urged by LGBT leaders to remove the religious staffing exemption (similar to the Title VII exemption) that President George W. Bush had added to the federal contracting rules. However, without the religious organization exemption, religious employers that receive federal contract funds are subject to legal uncertainty and risk. If they reject a job seeker who claims to hold the same convictions as the organization because he or she will not agree to the conservative sexual-conduct code, is that a (legal) exercise of the religious staffing freedom or an (illegal) violation of the new LGBT job protections?

Not so many faith-based organizations receive federal contract dollars (many more take in federal grant funds), although some do, for example, to provide spiritual services to the military (chaplains, directors of on-base youth programs) or certain refugee-resettlement or overseas development services. Yet the President's deliberate action to promote LGBT job

rights without providing full protection to religious employers set an important, and disheartening, federal precedent. This administration welcomes faith-based organizations as partners in delivering a wide range of services—and yet is willing to subject those organizations to legal risk or exclusion with respect to federal contracts. When, in October, the Department of Labor issued its draft final regulations to implement the executive order, this equivocal posture was underlined: the regulations do nothing to clarify the staffing rights of religious organizations that receive contract funds.

A similar equivocation is apparent in the administration's implementation in federal grant programs of its policy of "federal recognition of same-sex spouses/marriages." The Obama administration has maintained the "equal treatment" policies and regulations it inherited from the George W. Bush administration, which require that faith-based organizations be eligible for federal grants on the same basis as secular organizations, and that protect their religious identity and voluntary religious activities.[1] And yet it has shown little evidence that it understands, much less is seeking to avoid or mitigate, the problems its enthusiastic embrace of same-sex marriage may cause to its faith-based partners in its grant programs.

In its *Windsor* decision, the Supreme Court struck down the section of the Defense of Marriage Act that established the federal definition of marriage as one man-one woman. Instead, the federal government, in determining who is a "spouse" or what constitutes a "marriage," is required to look to states. For federal income tax purposes, for example, it accepts as "married" both heterosexual and same-sex legally married couples, wherever those marriages might have been entered into.[2] Gradually, in its many and diverse grant programs, the administration is applying to same logic to its grantees. Thus, in programs that determine eligibility based on the income of the applicant and the applicant's spouse, the grantee organization has to take into account the income of a same-sex spouse. The rule applies even when the program is being operated in a state that does not recognize same-sex marriages—except that in the many federal-state programs, such as Medicaid and Community Services Block Grants, the federal government so far is acknowledging that a state may utilize its own definition of marriage, rather than being required to accept as married a couple that the state's law or even its constitution declare not to be married.

In general, this federal response to the Supreme Court's decision creates few problems for faith-based grantees, even if they deeply wish that our courts and legislatures would acknowledge God's design for marriage. It is up to the government to decide who is eligible to receive services it pays for. And, whatever the organization thinks about marriage, if a person, whether in a classical marriage or same-sex marriage, needs emergency food or shelter, or is eligible for an education program, or has children who should be able to receive federally subsidized child care—the organization will want to help that "neighbor," that person in need.

Yet it takes little imagination to see that real and difficult conflicts are right at hand. The federal government pays for marriage-strengthening programs, and faith-based organizations are among the grantees. What happens when a same-sex couple shows up and is offended that the marriage curriculum contemplates only opposite-sex couples? Will the government require all grantees to teach marriage equality or will it allow diverse curricula, and leave it to the couples to find a compatible program? Will a faith-based shelter be required to open its family units to same-sex couples or will the government accept that diverse family types are best served by diverse providers of shelter services? Will federally-funded faith-based child care providers, while opening their doors to all children, be assured that they may maintain their use of Bible stories and talk of "your mommy and daddy," without being subjected to complaints from same-sex families?

When CLS, IRFA, and other faith-based advocates asked the White House Office of Faith-Based and Neighborhood Partnerships and various federal program and legal officials about such likely conflicts, we were told: "These are important and interesting issues—which we have not at all considered. We did not realize that our new policy might create conflicts like these for some faith-based grantees. We thought we were simply applying a technical change of definitions as required by the Supreme Court." To say the least, their reaction amazed and deeply disappointed us. How can these Administration officials be so oblivious to the practices and concerns of the many faith-based organizations that daily partner with federal programs?

Federal respect for faith-based organizations

Yet these policies that would restrict the religious freedom of religious organizations by expanding the federal prohibitions of discrimination are not the whole story. As noted, the Ad-

ministration has maintained the rules and policies of the faith-based initiative. Indeed, despite constant pressure, the President has maintained, except for the recent changes in federal contracting, the existing federal rules that do not restrict religious staffing by faith-based organizations that receive federal dollars.

That support for religious staffing extends to the Administration keeping in force an Office of Legal Counsel (OLC) opinion from 2007 that interprets the Religious Freedom Restoration Act (RFRA) as permitting religious organizations that engage in religious staffing to participate in federal programs that expressly prohibit religious job discrimination.[3] And even more: after Congress, in reauthorizing the Violence Against Women Act (VAWA) in 2013, added to the Act a broad prohibition on discrimination, including job discrimination, the Administration issued an FAQ memo referencing RFRA and the OLC memo and providing a certification process by which a faith-based organization that staffs by religion can nonetheless receive VAWA funds.[4]

Also very important are two Administration policy statements from a few years ago. The Administration on Children and Families of the Department of Health and Human Services praised the services provided by faith-based organizations, acknowledged that some of them, while well-qualified to partner with the government, may have religious objections to providing certain services intended to be part of a package of services, and then outlined several ways those organizations could nonetheless work with the government. For example, the religious group might participate as a sub grantee under another organization that is glad to provide the missing services. The ACF statement even proposed that the organization might simply notify federal officials of its inability to provide certain services, placing the burden on the government to craft an alternative way to ensure access to those services.[5] Similar flexibility has been detailed for the large USAID program that offers prevention and treatment services overseas against HIV/AIDS, tuberculosis, and malaria, a program initiated by President George W. Bush. Many domestic and foreign faith-based organizations are involved, and some object to supplying condoms or have other conscience concerns. The "conscience clause" policy statement explicitly provides that such religious organizations can be grant recipients, not rejected because they will not offer every required service, and puts the burden on the government to find another way to deliver the missing services.[6]

Don't Ignore the Positive Possibilities

It is troubling to see that the Administration's positive engagement with faith-based service organizations is undercut by federal action to expand nondiscrimination requirements in ways that do not adequately protect institutional religious freedom. But that positive engagement and the positive rules should not be ignored. When a faith-based organization encounters objections from federal officials who are sure that "church-state separation" requires its exclusion or the muzzling of its religious identity, these positive provisions should be lifted up. And as the Department of Labor sets about implementing the President's executive order for federal contractors, CLS, IRFA, and others will be reminding the Administration that it will gravely undermine its commitment to faith-based participation unless it interprets the religious staffing freedom robustly, not narrowly.

Stanley Carlson-Thies is Director of the Institutional Religious Freedom Alliance, a division of the Center for Public Justice. He is also a Senior Fellow at CPJ and at the Canadian think tank Cardus. He convenes the Coalition to Preserve Religious Freedom, a multi-faith alliance of social-service, education, and religious freedom organizations that advocates for the religious freedom of faith-based organizations to Congress and the federal government.

ENDNOTES

1 See President Obama's Executive Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations (Nov. 17, 2010).

2 Memorandum to the President from A.G. Eric Holder on "Implementation of United States v. Windsor," June 20, 2014. http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf

3 "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," June 29, 2007.

4 Office on Violence Against Women, Department of Justice, "Frequently Asked Questions, April 9, 2014: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013." http://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf

5 "ACF Policy on Grants to Faith-Based Organizations," ca. 2012. http://www.acf.hhs.gov/acf-policy-on-grants-to-faith-based-organizations

6 USAID, AAPD 12-04 (Feb. 15, 2012). ww.usaid.gov/sites/default/files/documents/1868/aapd12_04.pdf

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Who is My "Neighbor"?

BY KEN LIU

An expert in the law stood up to test Jesus, saying "Teacher, what must I do to inherit eternal life?"

> "What is written in the Law?" Jesus replied. "How do you read it?"
>
> He answered, "'Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself.'"
>
> "You have answered correctly," Jesus replied. "Do this and you will live."
>
> But he wanted to justify himself, so he asked Jesus, "And who is my neighbor?"

The expert in the law who tried to test Jesus made a mistake that every litigator knows not to do – when cross-examining someone, never ask a question to which you don't the answer! I recently looked up the definition of "neighbor." The first two definitions were what I had expected: (a) *a person who lives near another;* (b) *a person or thing that is near another*. But I found the third definition to be quite surprising: (c) *one's fellow human being.*

It's easy to be a good neighbor as Christ calls us to do if our definition of a neighbor is limited to the people who are most near us – the people in our own communities, our churches, or our co-workers. But it's not so easy to be a good neighbor if the definition of a neighbor includes all of our fellow human beings. Does that mean my neighbor includes the drunken homeless guy who lives under the highway overpass? The prostitutes who hang out near the theater downtown? All of the poor, "dirty" immigrants on the other side of the tracks?

There is an old Peanuts cartoon in which Linus, holding his cherished security blanket says: *"I love mankind. It's people that I can't stand!"*

It's easy to love people in the abstract. No one enjoys seeing other people in need. But it's not so easy to love people in the trenches, getting down and dirty into individual people's messy lives -- people like Jesse, a poor African American woman with two toddlers and a minimum wage job who was arrested because she didn't have money to pay her two speeding tickets and was too afraid to go to traffic court. Who couldn't afford bail so she spent a week in jail away from her kids and lost her job because she didn't show up for work, then lost her driver's license and was unable to get a new job.

At the CLS national conference in October, Andy Crouch, a Christianity Today editor and author of "Playing God: Redeeming the Gift of Power," spoke about his one experience in the court system. He had made a court appearance for just a simple motion related to his and his wife's last name, and yet he had been terrified of being in front of the judge. If someone as smart and confident as him, a Harvard-educated leading Christian thinker, could have been so fearful of a perfunctory court appearance, imagine what it would be like for the thousands of people out there who have no college degree, no money, and limited English, to be served with a document called a "Notice of Default" or a "Warrant in Debt"?

Who is going to be a neighbor to them? Who is going to be their advocate?

Because of this little rule in the 50 states called "unauthorized practice of law," there is only one type of person who can be both a neighbor and an advocate – we lawyers. Christian legal aid gives us the opportunity to be a neighbor and an advocate to those who are powerless and vulnerable.

> In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he was attacked by robbers. They stripped him of his clothes, beat him and went away, leaving him half dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he traveled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine.

Legal aid is not easy. Just like the Samaritan who had to stop his journey, get off of his donkey and get down alongside a dirty and bloody man, legal aid involves us stopping and taking time out of our busy careers, getting out of our comfort zones, and sacrificing ourselves to help a perfect stranger.

But it is immensely rewarding. Remember those dreams you had in law school of becoming the next Atticus Finch, making a difference in people's lives (the dream that perhaps got pushed aside as you realized how much law school debt you had and spent ten years in the big firm to pay it off)? Christian Legal aid gives you that chance to make a difference in people's lives. It is a *ministry*, a chance to be a neighbor by sharing the love of Christ.

> Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two denarii and gave them to the innkeeper. 'Look after him,' he said, 'and when I return, I will reimburse you for any extra expense you may have.'
>
> "Which of these three do you think was a neighbor to the man who fell into the hands of robbers?"
>
> The expert in the law replied, "The one who had mercy on him."

Within just a few weeks after I started my new role as CLS Director of Legal Aid Ministries, I received dozens of calls and emails from people around the country desperately looking for attorneys to help them with dire circumstances. Sadly, I've had to tell most of them that we could not help because there simply are no legal aid programs in their area.

My dream is that one day CLS will be able to direct any person needing help from anywhere in the country to a Christian legal aid attorney. CLS' Legal Aid Ministries seeks to reach this goal by:

1. Helping to inspire and recruit attorneys and other volunteers to start and join Christian legal aid programs.
2. Providing resources and support to make it as easy as possible to start, operate, and grow Christian legal aid programs.
3. Creating not just a network, but a *community* of Christian legal aid programs to share best practices, resources, and camaraderie.

To do this, we need your help. Please consider finding a Christian legal aid program near you to serve with. If there is no Christian legal aid program near you, please consider starting one and CLS will be here to help you. If you can't serve in Christian legal aid because of other commitments, then please consider supporting CLS financially so we can support other attorneys in serving our neighbors in need.

Thank you for loving our neighbors in need.

> Then Jesus told him, "Go and do likewise."

Ken Liu joined CLS staff as Director of Legal Aid Ministries in September 2014. This essay is based on the Christian Legal Aid update he presented at the October 2014 CLS Conference.

SUING A BROTHER

BY LOUIS BELLANDE

No one, including Christians, wants to be taken advantage of. We all want justice, at least when we think that justice is on our side. But should Christians be suing other Christians? As a lawyer, I have had believing clients who wanted to sue other Christians and even had a pastor tell me he wanted me to represent his church and sue another nearby church of the same denomination. I told him he was nuts. I tell all believers who want to sue other believers that in my experience the only winners are usually the lawyers.

First of all, I want to confess it is easier to discuss this topic when it is not your bank account that is at risk. A friend, who is the head of the evangelism department at a Christian college, says that it is difficult for believers to hear accurately from God when romance or money is at stake. It is then when we need to seek counsel from mature believers who may have a more objective perspective. I should also mention that this article assumes the potential adversaries are both real believers. Determining if a potential party is a true believer takes discernment and is beyond the scope of this discussion.

When it comes to suing a brother, the bible is not silent on this issue. In I Corinthians 6, Paul tells us that believers should not go to law before the unrighteous.[1] He argues that since we will judge the world and even the angels, we are more than competent to try earthly cases involving believers, which are trivial by comparison. He said, "To have law suits at all with one another is already a defeat for you. Why not rather suffer wrong? Why not rather be defrauded?" It is not a coincidence that this passage is sandwiched between two references to greed. In I Corinthians 5:11, the readers are instructed not to associate with a greedy brother and in I Corinthians 6:10, Paul lists those who will not inherit the kingdom of God, including the sexually immoral, idolaters, thieves, and the greedy.

To avoid the "horrible" possibility of incurring a financial loss, I know two men, a very bright, money-conscious Christian lawyer and an extremely frugal Christian minister, both found a way out of the dilemma of not being able to sue a brother by embracing the friend of all lawyers, a loophole and, even better, a biblical loophole. I know two men, one a very bright, money-conscious Christian lawyer and the other an extremely frugal Christian minister who, in order to avoid the "horrible" possibility of incurring a financial loss, found a loophole—and even better, a biblical loophole—in Paul's commandment not to sue a brother.

In Matthew 18, Jesus tells us that if a brother sins against you, engage in a three-step process: speak privately to him, then speak to him with witnesses present, and then tell it to the church. "And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector." My two friends reason that if the offending brother will not submit to the finding of the church, you can treat him as a non-brother, sue him for all he is worth, and take him to the cleaners.

In law school, I learned that one of the canons of statutory construction is that the specific governs (overrules) the general. I Corinthians 6 is very specific. Matthew 18 is very general and does not go into detail. It does not mention law suits. It does not render an uncooperative sinner a "non-brother" but actually designates him as a "brother." So we must be very careful before we are to conclude that in this instance the general overrides the specific. Does Matthew 18 imply that the wrongdoer can be sued or is the passage open to another interpretation?

First of all, we should see how Jesus, who is our example, treated those in the listed classifications, i.e., gentiles and tax collectors. He healed the demon-possessed daughter of the Canaanite woman seeking the crumbs falling from Jesus' table (Mark 7:28) and delivered the possessed gentile man from Gerasene from his legion of demons. And we can't forget that he actually prayed for God to forgive the Romans who crucified him. Tax collectors even fared better. He told Levi to follow him

(Luke 5:27), told Zacchaeus to entertain him (Luke 19), and made Matthew his disciple and author of one of the Gospels. So treating a sinful brother as a Gentile or tax collector, may not be the trigger to treat him harshly.

Next, we should try to discern the reason behind the injunction not to sue a brother. We know that Jesus was and is concerned with how we present ourselves to unbelievers. "By this all people will know that you are my disciples, if you have love for one another." (John 13:35). And, of course, we are not only to love our brothers but also our enemies. When Paul questions the wisdom of going to law against a brother before unbelievers, he says, "To have lawsuits at all with one another is already a defeat for you. Why not suffer wrong? Why not rather be defrauded?" Could it be that Jesus is more concerned with our witness and testimony among the worldly than with our getting restitution from a brother? "Before unbelievers" is not mere surplusage. In fact, the reference to a secular judge is repeated three times. If presenting a unified and loving front to unbelievers is the underlying reason for this injunction, we should question the applicability of the Matthew 18 "loophole" to lawsuits because adversarial lawsuits would certainly not reflect well on the state of the Church.

Finally, there may be exceptions. In a personal injury case where an insurance company is the real party in interest, suing a brother who is only a named defendant but has no financial stake in the outcome may be an exception. After all, the reason why the brother had insurance is to cover such an instance and the reason the insurance company is in existence is to be a source of funds for the person injured by the insured. Insurance, as far as I know, was not available when the bible was written. And if the reason behind the injunction against suing a brother in a secular court is to avoid the fallout from battling Christians, that risk may be non-existent if the defendant's assets are not at risk. In fact, the nominal defendant and plaintiff may glorify God by their cordiality with one another.

But isn't God concerned with justice and making sure we get what is coming to us? Maybe it is not such a high priority for Him as it is with us. When a disenfranchised man came to Jesus to have his brother share the inheritance with him, Jesus declined to play the judge and warned "against all kinds of greed…" (Luke 12: 15) Since God promises to meet all of our needs, why should we worry when we are cheated? During the reign of Amaziah (II Chron. 25) the king hired 100,000 men from Israel to help fight against Seir. When the prophet told him to get rid of the Israelite soldiers and send them back to Ephraim, Amaziah complained that he had paid them 100 talents of silver. (Having a present value of over $2.3M today). The prophet replied, "The Lord is able to give you much more than this." In Hebrews 10, the author commended those who joyfully accepted the plundering of their property. In Mark, Jesus tells us that if we give up property for His sake and for the gospel, we will receive a hundredfold now in this time (in the present age) plus persecutions and in the age to come eternal life. And when it comes to lawsuits, Jesus said, "…if anyone would sue you and take your tunic, let him have your cloak as well."

So what is meant by the Matthew 18 passage? The goal of God's discipline is always restoration and wholeness. That too should be the goal of church discipline, which, I believe, is the concern of Matthew 18. In II Thessalonians 3: 14, Paul says, "If anyone does not obey what we say in this letter, take note of that person, and have nothing to do with him, that he may be ashamed. Do not regard him as an enemy, but warn him as a brother." That too, I believe, is the meaning of Matthew 18, shun him so he will be ashamed and repent. But treat him as a brother, not an enemy.

Of course, to relinquish the right to sue another believer is an act of obedience and faith. No one should ever try to impose such a duty on another. It has to be willfully embraced.

Louis E. Bellande received his law degree from DePaul University in 1967 and is a partner in Bellande, & Sargis Law Group, LLP, a firm with an estate and business practice located in Chicago's loop. He has served on the boards of insurance companies, not-for-profit corporations and businesses. He has presented seminars on various Christian and secular topics for CLS and various other groups, including professional athletic teams.

ENDNOTES

1 In verses 1-6, the ESV refers to the "unrighteous,", "those who have no standing in the church" and "unbelievers."

The NIV refers to "the ungodly," 'those whose way of life is scorned in the church," and "unbelievers."

The King James refers to the "unjust," those who "are least esteemed in the church," and "unbelievers."

The NAS refers to "the unrighteous," "judges who are of no account in the church," and "unbelievers."

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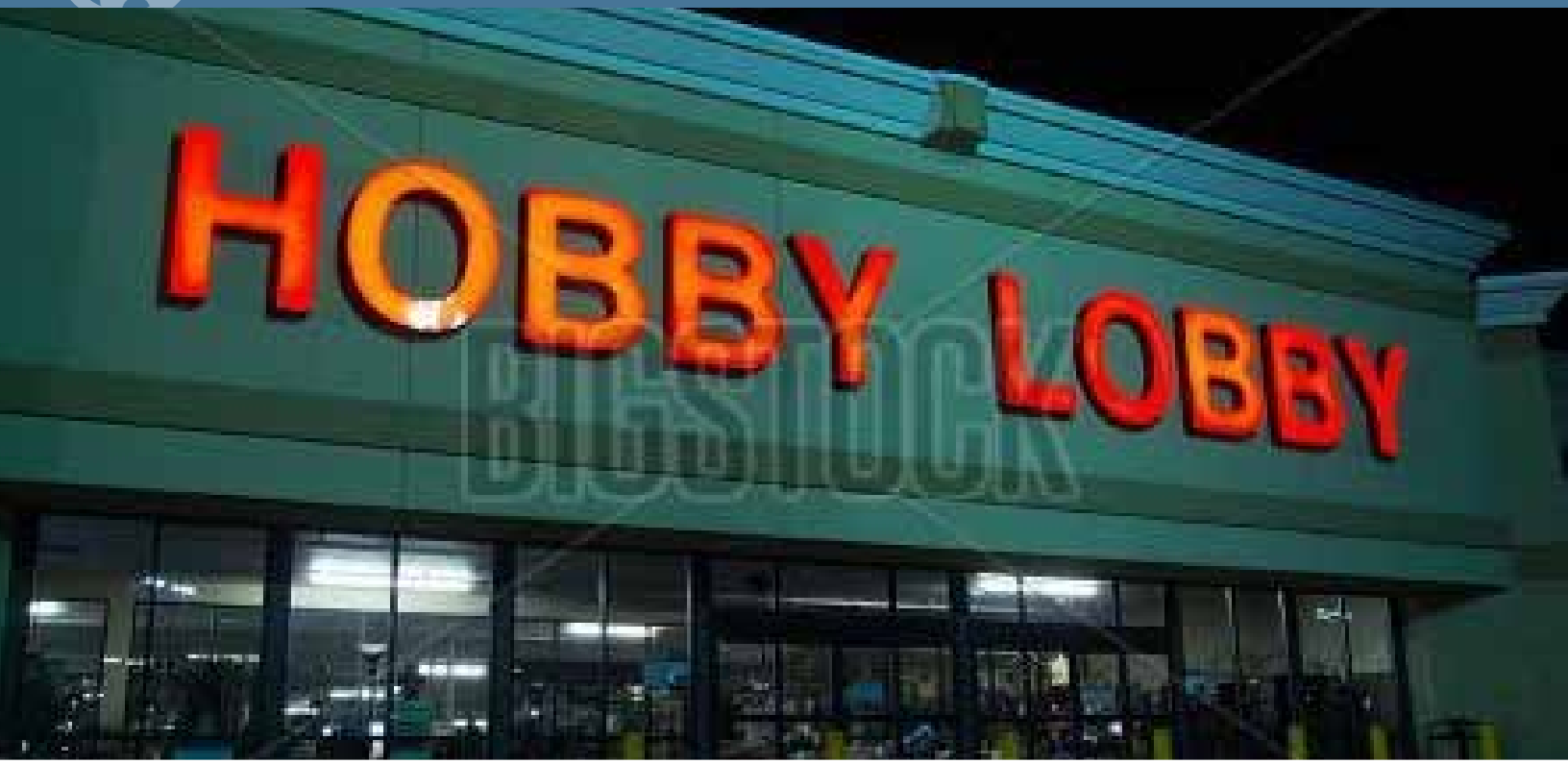

AFTER HOBBY LOBBY

BY KIM COLBY

The Hobby Lobby decision is a tremendous victory for religious liberty, and there is much to celebrate in Justice Alito's masterful opinion. I will note several aspects of the Hobby Lobby decision that deserve to be celebrated. But I also want to address why the Hobby Lobby celebration has been muted, even somber. Why no victory dances -- or even the hint of an end zone celebration -- after the win?

Hobby Lobby was the third time that the Religious Freedom Restoration Act, or "RFRA," had been before the Supreme Court. RFRA was enacted in 1993 in response to the Court's 1990 decision in *Employment Division v. Smith*, which dealt a serious setback to religious liberty. *Smith* held that if a law was neutral and generally applicable, the government no longer had to show a compelling justification to override a citizen's religious convictions, but instead could simply require the citizen to violate those convictions no matter how easily the government could accommodate religious conscience.

In response to *Smith*, a coalition of 68 diverse religious and civil rights organizations urged Congress to restore substantive protection for religious liberty. Senator Kennedy and Senator Hatch led the bipartisan effort to pass RFRA in the Senate by a vote of 97-3. RFRA passed the House by unanimous voice vote. And President Clinton signed RFRA into law on November 16, 1993.

The first time RFRA was before the Court, in 1997, in *City of Boerne v. Flores*, the Court held that Congress lacked the authority to apply RFRA's compelling interest standard to state and local governments.

But RFRA's second trip to the Court was a unanimous victory. In 2006, the Court heard *Gonzales v. O Centro*, in which a small religious sect invoked RFRA to protect its right to drink tea made from hoasca plant leaves, a drug prohibited under federal drug laws. The Court held that the federal government may not substantially burden a citizen's religious practice unless it demonstrates that an exemption for that *particular individual* citizen would actually prevent the government from achieving its compelling interest.

For anyone reading the hoasca leaves of *O Centro*, the Court's broad interpretation of RFRA in its third case, *Hobby Lobby*, was entirely predictable. In *O Centro*, the Court had acknowledged that the uniform enforcement of the Nation's drug laws was certainly a compelling interest. But the government failed to show that allowing an exemption for the sacramental use of hoasca tea would prevent uniform enforcement.

Hobby Lobby, of course, involved a different set of drugs and a different set of claimed compelling interests. But the analysis in *O Centro* when applied to the *Hobby Lobby* facts made the outcome inevitable. In *Hobby Lobby*, the government might have a compelling interest in providing all women with cost-free access to all FDA-approved contraceptives, but the government failed to demonstrate that it could not achieve this interest if a relatively few closely held businesses did not provide contraceptive coverage that violated their religious consciences.

While there are many noteworthy aspects of the *Hobby Lobby* decision, I will quickly touch on four:

1. **First**, the Court held that for-profit corporations are included within RFRA's protections. In reaching that conclusion, and this is very significant, the Court ruled that its interpretation of RFRA is not cabined by the Court's constitutional jurisprudence for the free exercise clause. RFRA stands on its own two feet to provide comprehensive religious liberty protection.

2. **Second**, the Court rejected the government's "attenuation" argument that Hobby Lobby and its owners were not complicit in providing drugs that violated their religious convictions because the employees decided to purchase the drugs. In language that will become a classic quote, the Court responded, "Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed." This rejection of the attenuation argument will be most helpful to the religious nonprofits' challenges to the Mandate that are beginning to work their way through the courts of appeals, as we have already seen in Judge Pryor's concurrence in the Eleventh Circuit's grant of an injunction pending appeal to the Eternal Word Television Network.

3. **Third**, the Court correctly moved consideration of any third party burden from the substantial burden analysis to the compelling interest/least restrictive means analysis.

4. **Fourth**, the Court found that the government had failed the least restrictive means analysis because the government had created an alternative mechanism for the religious nonprofits in the so-called accommodation. The Court did not rule whether the accommodation would satisfy RFRA but simply ruled that it demonstrated that less restrictive means of achieving the government's interest exist. The Court also noted that another less restrictive means exists: the government could assume the cost of providing the drugs for any women unable to obtain them due to their employers' religious objections. Again, the Court's reasoning on this point should help religious nonprofits in the courts below because the government has given a complete exemption from the Mandate to some religious nonprofits, that is, houses of worship, while withholding the exemption from other religious nonprofits with the same religious objections.

   Finally, at oral argument in March, Justice Kennedy posed a critical question to the Solicitor General (and I am paraphrasing): what stopped HHS from mandating that for-profit businesses include abortions in their insurance coverage? The Solicitor General had no satisfactory response. In August, California mandated coverage of surgical abortions in all insurance plans with no religious or conscience exemption; the Washington State House passed a law requiring such coverage, although it died in the Senate; and the District of Columbia seems likely to vote for such a requirement next week. Justice Kennedy's question was prophetic.

So *why* have religious liberty supporters been so somber after such a significant win? Because throughout 2014 we have watched the attacks on RFRA and on religious liberty itself gain new intensity. In the spring, state RFRAs were vilified in Arizona, Georgia, and Mississippi. In all three states, for the first time, we saw opposition to state RFRAs coming from big business, a particularly troubling development.

At the federal level, immediately after *Hobby Lobby*, Senator Murray introduced a bill to overturn the decision. The "Protect Women's Health from Corporate Interference Act of 2014," would require all employers to cover any drug or service mandated by federal statute or regulation. In the findings section, the bill asserts that it is intended to carry out RFRA's intent. But two paragraphs later, in the operative section, it specifies that Public Law 103-141 is inapplicable. Public Law 103-141 is RFRA.

On July 17, the bill failed on a cloture vote of 56-43. Because Senator Reid voted in the minority for procedural reasons, the vote really was 57 Senators against religious liberty and 42 Senators in favor of religious liberty. True the bill would never pass the House, but for 57 Senators to vote to limit RFRA's protections shows the erosion of bipartisan support for religious liberty that is perhaps the severest current threat.

For two decades, RFRA has stood as *the* preeminent federal safeguard of all Americans' religious liberty. RFRA ensures a level playing field for Americans of all faiths, by placing "minority" faiths on an equal footing with "majority" faiths. Without RFRA, a faith would need to seek a religious exemption every time Congress considered a law that might unintentionally infringe on its religious practices. And, as we've seen with the HHS Mandate itself, RFRA protects against administrative abuses of delegated rulemaking authority. As Chief Justice Roberts wrote in *O Centro*, RFRA rebuffs the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."

RFRA maximizes social stability in a religiously diverse society and minimizes the likelihood of political divisions along religious lines. RFRA embodies the pluralistic belief that we best protect our own religious liberty by protecting everyone's religious liberty.

Essentially, RFRA makes religious liberty the default position in any conflict between religious conscience and federal regulation. And that is as it should be for a country founded on religious liberty.

Kim Colby is the Director of the Center for Law & Religious Freedom. She is a graduate of Harvard Law School.

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CLS NATIONAL CONFERENCE: ONE STUDENT'S REFLECTIONS

BY SARAH MURRAY

As I trudged through my first year of law school I began to question my career path. The Socratic Method, the Rule Against Perpetuities, and general lack of sleep left me exhausted and unmotivated. My law school's Christian Legal Society chapter became my safe haven amidst the challenges of law school. Our weekly meetings offered fellowship and encouragement. My involvement in my law school Chapter led me to attend the CLS National Conference. At the national conference my purpose became clear, and I realized that I was right where I was supposed to be.

My Experience at CLS Conference

My initial decision to attend the CLS conference was sparked by my law school chapter's leadership team who attended the conference the previous year. They returned from conference with a renewed sense of commitment in their calling to become Christian lawyers. As a first year law student, I was intrigued by the passion and excitement in their eyes. My first round of law school exams was approaching, and I was suddenly questioning whether law school was indeed my calling. I knew that I needed what my chapter leaders had found at CLS Conference if I was to continue in my law school journey.

The following year I joined four of my classmates in attending the CLS conference in Colorado Springs. We were all first-year attendees and excited about connecting with other like-minded law students and attorneys. Initially, the gorgeous setting blew us away. Over the next several days, we realized that the beautiful location was only a very small piece of why the conference would mean so much to us.

The conference has so much to offer to law a student. One of the most meaningful things for me was the ability to develop relationships with other Christian law students.

The small group discussions with other law students opened my eyes to the similarity of struggles law students around the country were dealing with. But they also showed me that we could help one another—even from across the country. We swapped stories of successes our CLS chapters were having on campus. We shared how our chapters were struggling and offered suggestions to one another. But more importantly, we spent time in prayer together.

I was blown away by the willingness of attorneys to connect with law students at the conference. My law school experience taught me that most attorneys were far too busy to spend

time with law students. But at CLS conference, this was not the case. Not only did attorneys take time to introduce themselves to law students, I found that they also sincerely wanted to get to know us. Several attorneys attended the Law Student Convention events and spent time talking with us about our law school triumphs and struggles and praying with us.

What Does the CLS Conference Offer?

The Christian Legal Society Conference offers Christian attorneys the ability to combine workshops, CLE credits, worship, and fellowship with other believers in a four-day conference. Most legal professionals attend conferences fairly frequently throughout their careers. But the CLS Conference is unique in that it gives legal professionals the opportunity to come together with fellow believers. For four days in October, lawyers, law students, professors, judges, and friends meet to discuss and reflect on what it means to be Christian legal professionals. The Christian Legal Society recognizes the importance of fellowshipping with other believers who understand the pressures unique to the legal profession.

Each year, the conference brings together prominent speakers from around the United States. The speakers include professors, authors, ministers, legal professionals, and more. The speakers share with attendees on topics particularly relevant to Christian legal professionals, but the learning does not end with listening to the wisdom the speakers impart each evening. Small group discussions are held at breakfast each morning, where attendees are able to delve into the material in a meaningful way.

Workshops are also offered throughout the conference on topics ranging from religious liberty to ethics to practice-specific issues and are led by attorneys and scholars at the top of their respective fields. The workshops are dynamic and engaging opportunities to explore many areas of the law as well as the intersection of faith and practice.

The CLS Conference also includes the Christian Legal Aid Summit, the National Law Student Convention, corporate worship, and times for prayer and reflection. Although the conference is filled with opportunities to engage and participate, CLS recognizes the importance of rest and refreshment. Thus, participants are encouraged to explore the conference host city and to make time to relax.

Why Do I Go Back?

I have now attended three CLS conferences, and I am already signed up to attend next year's conference. Why do I return to the national conference each year?

At the conference, I am presented with the rare opportunity to grow both professionally and in my faith. The Christian Legal Society organization is dedicated to connecting legal professionals who are committed to serving Jesus Christ through the practice of law. Each year, the conference gives CLS members the opportunity to cultivate and nurture their faith and their practice. The national conference is a life-altering event that has opened my eyes to the mighty ways God is moving in the legal profession.

The number one reason I attend the CLS conference is for the relationships. Each year the conference offers me the opportunity to grow my network of Christian attorneys and law students from around the country. This is important to me because I am able to connect with individuals in my profession, no matter their practice area, who share my faith and are committed to living their lives as Christian attorneys. As an attorney, I am now able to attend the conference and pour into the lives of law students just as so many attorneys poured into mine when I was a law student.

Over the past several years, I have kept in touch with friends from the conference throughout the year. Sometimes this has been just a short email from an attorney I met at conference who wanted to check to see how I was doing. Other times it has been a phone call to a conference friend to pray for one another. In either case, the CLS conference has been so much more to me than four days in October¬–it has been a lifeline to keep me connected year-round to legal professionals who share my faith. Each year I leave the CLS Conference with so much more than new Facebook friends and business cards in my pocket. I depart with a network of friends and colleagues around the country who are rooting for me, praying for me, and who are always just a phone call away.

Sarah Murray received her J.D. from Campbell Law School in Raleigh, NC. She is a Clinical Contracts Specialist for Premier Research in Research Triangle Park, North Carolina.

H. Robert Showers Jr.
President

What is Worth Fighting For These Days?

If you ask people if they are pro-life, some will say yes and some will say no. Similarly, if you ask people whether they support same-sex marriage, you will find people, including Christians, on both sides. However if you ask someone whether they support religious liberty, almost nobody will say no —except perhaps until recently, particularly if you phrase the question in context of homosexual rights. As I read the recent decisions regarding the Defense of Marriage Act, Hobby Lobby, and Martinez and other Christian groups excluded on college campus cases, the obvious common denominator appears to be that the homosexual agenda wants equal rights, whether in defining marriage with its governmental and societal benefits or wanting to join the leadership and membership without having to adhere to religious tenets that condemn homosexual behavior as a "sin." However, I think what is lurking underneath these public relations' proclamations of the homosexual lobby is an imminent threat to **religious liberty**, for churches, para-church organizations or businesses run by Christians based on overtly Christian values, and individuals of all faiths.

Religious liberty, announced in the First Amendment of the US Bill of Rights as one of the fundamental liberties for which the Revolutionary War was fought, is arguably one of America's most significant contributions to the history of democratic government. The unique power and appeal of the American doctrine of religious freedom stems from its protection for everyone's religious beliefs and practices, no matter how unpopular or unfashionable they may be at any given time in history. America's robust religious liberties allow us to hold very different religious worldviews but still live peacefully together, thus minimizing religious strife that exists throughout the world and is divided into political communities along religious lines. This could all change, however, if the homosexual lobby succeeds in placing popular ideology, including the concepts of absolute tolerance and acceptance, as higher values than religious liberty. (see legal articles by Professors Doug Laycock, Michael McConnell, Mike Paulsen, John Inazu and Tom Berg, who issue ominous warnings about the future of religious liberty).Thus, while we should take a stand for such Biblical foundations as marriage, **we cannot lose sight of what appears to be the real target in jeopardy from the rhetoric-loss or minimization of religious liberty in America.** For further clarity, let's review some recent legal rulings and their underlying impact for or against religious liberty.

Recently, the US Supreme Court delivered a decisive, though limited, victory for religious liberty in its recent decision in *Burwell v. Hobby Lobby Stores, Inc*. In a 5-4 decision, the Supreme Court held that the HHS contraceptive mandate violates the Religious Freedom Restoration Act (RFRA), a statute passed with overwhelming bipartisan support in Congress in 1993. Under RFRA, the federal government is prohibited from imposing a substantial burden on the religious exercise of any person, unless it is the least restrictive means of serving a compelling government interest. First, the Court determined that the mandate indeed burdened the corporations' sincere Christian beliefs about the sanctity of life by requiring them to provide healthcare coverage for contraceptives that are known abortifacients. It was clear that the corporations held sincere religious beliefs, as their Christian character was clearly defined in their vision statements, mission statements, business practices, and corporate culture. Second, the Court found that the government imposed a substantial burden on these beliefs by requiring the corporations to either provide the coverage or to pay heavy penalties for refusing to provide coverage.

Second, despite numerous rulings for same sex marriage, a Sixth Circuit Federal Court of Appeals in November 2014, by a 2-1 vote, upheld the marriage laws of Michigan, Ohio, Kentucky, and Tennessee stating that they do not violate the federal Constitution. In short, the Sixth Circuit held that the Supreme Court's summary ruling in *Baker v. Nelson* (1972) binds federal courts of appeals to hold that state laws that define marriage as the union of a man and a woman are constitutional. It further stated that the Supreme Court's ruling last year in *Windsor v. United States* doesn't overrule *Baker*, nor does it clash with it. This battle over same sex marriage will ultimately be decided in the US Supreme Court but what will be at stake is more than a civil or societal set of benefits but whether religious entities like the church and parachurch organizations will be forced to violate their religious tenets.

Third, there have been many lawsuits and actions against college religious groups that want to exclude them from college campuses and its benefits solely because they require their leaders to agree with its religious beliefs. Colleges have used nondiscrimination policies, particularly on sexual orientation, to exclude religious student groups from being registered and meeting on campus, thereby losing the ability to use college meeting space, communicate with other students and use student activity funding available to all student groups. While nondiscrimination polices were intended to protect religious students, like other student liberties such as freedom of speech and association, they are being misinterpreted and misused to exclude religious persons from the public square, which is at the heart of pluralism for any free society. Apparently the college sexual orientation nondiscrimination policies are being used to override the First Amendment free speech, association and religious liberties. **In sum, this cleverly disguised effort at tolerance for sexual orientation becomes intolerant suppression of 1st amendment protected religious beliefs and free speech, which in turn destroys the very pluralism undergirding a free and robust democratic society, which relies on the First Amendment to protect everyone's freedom of speech, association, and religion.**

Finally, in New York City, the federal courts are engaged in an 18 year old battle to deny religious congregations the same equal access that other community groups enjoy to public buildings (*Bronx Household*) despite the fact that numerous Supreme Court cases have protected equal access for religious community groups to the public forum (*Lamb's Chapel* (1993) and *Good News Club* (2001)). New York City claims that it fears that the Establishment Clause is violated if it does not exclude religious worship services in public buildings even though the City agrees that it must allow religious groups equal access for "religious speech" and "religious worship" under prevailing Supreme Court precedent.

What does this line of cases and legal actions have in common? The juxtaposition of sexual orientation rights (same sex marriage and homosexual rights) and religious liberties create a tension that *can* be resolved without trampling religious freedoms. While people may differ on pro- life, same sex marriages or sexual orientation rights, no American should have to sacrifice his/her freedoms of speech, association and religion which support a free and democratic society where people of all faiths and beliefs can live peacefully together. Please keep in mind during the coming year that what is really at stake is whether homosexual rights and same sex marriage issues, which reasonable people may differ, will trump a healthy religious freedom for all Americans, whether Muslim, Buddhist, Hindu, Jewish, Christian or other faiths, which undergirds the now fragile American pluralistic society supported by its teetering fundamental freedoms.

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ARIZONA

Phoenix
CLS Phoenix
Chris Charles
ccharles@tbl-law.com

Tucson
CLS Tucson
Jim Richardson
james.richardson@azbar.org

CALIFORNIA

Los Angeles
CLS Los Angeles
Bill Reichert
reichert@wellsfargo.com

Orange County
CLS Orange County
Steve Meline
melinelaw2@yahoo.com

Inland Empire
CLS Inland Empire
Maureen Muratore
mmlawyer@peoplepc.com

Sacramento
CLS Sacramento
Steve Burlingham
steveb@gtblaw.com

San Diego
CLS San Diego
David Hallett
dhallett@buhalaw.com

San Fernando Valley
CLS San Fernando Valley
Ben Jesudasson
ben@bjslawfirm.com

San Francisco
CLS San Francisco
Brian Barner
bbarner@asu.edu

*San Joaquin Valley***
CLS San Joaquin Valley
Matt Dildine
mdildine@daklaw.com

*San Jose***
Phillip Maroc
phillipmaroc@gmail.com

West Los Angeles
CLS West L.A.
Sarah Olney
sarah.olney@yahoo.com

COLORADO

Colorado Springs
CLS Colorado Springs
Synthia Morris
synthiamorrisatty@gmail.com

Denver
CLS Metro Denver
Shaun Pearman
shaun@pearmanlawfirm.com

DISTRICT OF COLUMBIA

CLS DC Metro
Paul Daebeler
pfdaebeler@verizon.net

FLORIDA

Jacksonville
CLS Jacksonville
Hollyn Foster
hjfoster@sbnjax.com

Orlando
CLS Orlando
Joshua Grosshans
jgrosshans@mateerharbert.com

Tampa
CLS Tampa
Joe Pippen
joe@attypip.com

West Palm Beach
CLS West Palm Beach
Laura Mall
lmall@cdhanley.com

HAWAII

Honolulu
CLS Hawaii
Mark Beatty
info@tbadk.com

ILLINOIS

Chicago
CLS Northern Illinois
Sally Wagenmaker
swagenmaker@mosherlaw.com

KANSAS

Wichita
CLS of Wichita
Richard Stevens
rcstevens@martinpringle.com

LOUISIANA

New Orleans
CLS New Orleans
Frank Bruno
frank@fabruno.com

MARYLAND

Baltimore
CLS Baltimore
Matt Paavola
matt@myworkerscomplawfirm.com

MASSACHUSETTS

*Boston***
CLS Boston
Brian Tobin
btobin@tobin.pro

MINNESOTA

Minneapolis
CLS of Minnesota
Ted Landwehr
tland@landwehrlaw.com

MISSISSIPPI

Jackson
Stephen Griffin
sgriffin@danielcoker.com

MISSOURI

Kansas City
CLS Kansas City
Jesse Camacho
jcamacho@shb.com

St. Louis
CLS St. Louis
Gary Drag
GaryDrag@sbcglobal.net

NEBRASKA

Lincoln
Jefferson Downing
jd@keatinglaw.com

NEVADA

*Las Vegas***
David Ortiz
davidortizlaw@yahoo.com

NEW YORK

New York City
Melissa Salsone
msalson@yahoo.com

Syracuse
CLS Central New York
Ray Dague
rjdague@daguelaw.com

NORTH CAROLINA

Charlotte
CLS of Charlotte
David Redding
dredding@tisonreddinglaw.com

OHIO

Columbus
CLS of Central Ohio
Charlie Oellermann
coellermann@jonesday.com

Central Ohio
Dino Tsibouris
dino@tsibouris.com

Northeast Ohio
Robert L. Moore, Esq.
rob@robertlmooreesq.com

OKLAHOMA

Oklahoma City
CLS Oklahoma City
Mike Tinney
okkidsdad@cox.net

OREGON

Salem
CLS of Oregon
Warren Foote
warren.foote@comcast.net

PENNSYLVANIA

Philadelphia/Delaware Valley
Ted Hoppe
thoppe@thoppelaw.com

Pittsburgh
CLS Western Pennsylvania
Delia Bianchin
delia_bianchin@pennunited.com

TENNESSEE

Chattanooga
CLS Chattanooga
Todd McCain
tmccain@ctandg.com

TEXAS

Austin
CLS Austin
Steve Campos
scampos@thefowlerlawfirm.com

Dallas
CLS Dallas
Tim O'Hare
tim@oharelawfirm.com

Houston
CLS Houston
Stephen Moll
smoll@gardere.com

San Antonio
CLS San Antonio
Chad Olsen
chad@braychappell.com

VIRGINIA

Leesburg
CLS Northern Virginia
Rob Showers
hrshowers@simmsshowerslaw.com

Leesburg
Mark Crowley
markvincentcrowley@earthlink.net

Richmond
CLS Richmond
Brian Fraser
brian.r.fraser@gmail.com

WASHINGTON

Seattle
CLS Seattle
Tom Rodda
trodda@elmlaw.com

***Chapters in the process of forming*

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