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

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

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

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HEALING THE BREACH BETWEEN LAW AND VIRTUE

By Myron Steeves

With this issue of the *Journal of Christian Legal Thought*, we introduce an approach to analysis of law and public policy we refer to as Law and Virtue. Virtue has been a goal of law from the beginning of western society as demonstrated throughout history in the teaching and writings of, among many others: Moses[1], Aristotle[2], Jesus Christ[3], St. Paul[4], Justinian[5], William Blackstone[6], David Hoffman[7], and the liturgical tradition[8]. However, the worldview paradigm shifts that occurred during the 18th century Enlightenment created a fracture between law and moral reasoning.[9] This fracture became a chasm in 19th century legal academia, and finally led to a vast breach between law and morality in the thinking and practice of many 20th century lawmakers.[10] We believe that this historic split has been a failure. The impact of the Enlightenment took so long to be accepted in the practice of law, in part, because the inherent moral foundations of law were so deeply embedded in the culture that the forces allayed against those foundations took a long time to gain ground. By the late 20th century, however, the divide between law and morality had so reshaped the *zeitgeist* that those outside of the professional legal world assumed that the distinction between law and morality was obvious. Ideas that were once so apparent that they needed no additional justification were now assumed to be mere rhetorical tricks intended to make opinions sound more authoritative.

The Critical Legal Studies movement[11] appeared to mark the end of morality in jurisprudence. After positing that objectivity was impossible in an articulate and seemingly well-reasoned fashion, moral justifications for law seemed only to demonstrate the inherent biases of those who advanced them.[12] Critical Legal Studies persuaded much of the legal academy that no one had anything to say that wasn't limited to their own particular experience and that would, thus, become oppressive if advanced by law against a broader scope of society. This deconstructionist critique would seem to render conversations about morality and law useless. But the Critical Legal Studies movement did not end the dialogue. New approaches to critical analysis based on advancing the interests of particular oppressed groups of people have taken hold. While some of these submovements, such as Critical Race Theory and Critical Gender Theory, have said a great deal that has impacted the legal academy, the failure to provide a clear moral foundation for destroying oppressive institutions gave these views the appearance of a spent force after an initial flurry of publications.[13]

There was good reason for these views to say all that they had to offer in just a few years. The pronouncement that the established institutions of western

[1] *Exodus* 20:1-17.
[2] Aristotle, Nicomachean Ethics bks. III-V (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).
[3] *Matthew* 5-7.
[4] *Romans* 13:1-6.
[5] Justinian I, The Institutes of Justinian, *Book 1 Title 2*¸ http://www.thelatinlibrary.com/justinian/institutes1.shtml
[6] 2 William Blackstone, Commentaries *38-61.
[7] David Hoffman, A Course of Legal Study: Addressed to Students and the Profession Generally ch. 1 (2nd ed. 1846)
[8] Book of Common Prayer, 74 (U.S. 1928).
[9] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev.. 593, 601-602, n. 25 (1958).
[10] Oliver Wendell Holmes, Jr., *The Path of Law*, 10 Harv. L. Rev. 457, 461 (1897).
[11] George C. Christie & Patrick H. Martin, Jurisprudence Texts and Readings On the Philosophy of Law 1087-1120 (3rd ed. 2008).
[12] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32J. Legal Educ. 591 (1982).
[13] Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683 (1992). Stephen M. Feldman, *Whose Common Good? Racism In The Political Community*, 80 GEO. L.J. 1835, 1846 (1992).

culture were oppressive toward racial minorities and women resonated with the larger population. But it resonated not for the reasons advanced by the advocates of these views, but because the liberation of the oppressed was a morally infused idea that persuaded many readers. That is, oppression and unfair treatment are inherently offensive to the very moral sensibilities deconstructed by the critical studies movement. Since the advocates of Critical Race Theory and Critical Gender Theory were committed to rhetoric that was free of moral values,[14] readers of this literature could only go along with the advocates so far. At some point, the general public—and legal institutions—need to be satisfied that something good will result from all the change. That is, as long as there is evidence that a group of people are oppressed as defined by some objective standard around which there is some consensus, arguments for the oppressed resonate with observers who are committed to moral good. However, once the critical studies advocates advance arguments that are grounded in the mere fact that people can be defined by groups that have a heritage of oppression, the arguments lose persuasive moral force and are not well-received by those who are not dedicated to the critical studies project generally.

A recent exception is the current movement of Critical Gay Studies.[15] This movement offers a different approach to reasoning than other critical theories. It offers an epistemology that ultimately encompasses the objectives of race and gender studies, and as such, is having a significant impact on legal academia. Ultimately, Critical Gay Studies will likely increase its impact on jurisprudence, and will not be a spent force in a generation. The reason why that is likely the case is that Critical Gay Studies ultimately appeals to a moral argument (albeit a moral argument not rooted in the Christian tradition) for its foundation. The Critical Gay Studies movement advances an understanding of knowledge that is non-binary. Rather than seeking truth through a thesis/antithesis analysis, the movement locates knowledge along a sliding scale, where a variety of perspectives may be justifiably held, perspectives which are not readily understood by definitional terms that only mark the outer margins. Thus, for example, advocates of the Critical Gay Studies approach may reject male/female distinctions as artificial binary constructs in favor of a sexuality that consists of gradations rather than absolutes. This non-binary analysis of human gender and sexuality (notwithstanding human biology that is very much fixed in a binary paradigm[16]) takes on significant moral overtones. The emphasis shifts from eliminating laws that regulate homosexual activity (for those laws *have* been eliminated) to a new charged rhetoric of the Critical Gay Studies movement toward society-wide endorsement of homosexual activity. That is, it becomes an increasingly explicit *moral* cause.[17]

The Critical Studies movement has generally left room for acknowledging a strict binary analysis in at least one area, namely, that in which the Judeo-Christian religious tradition and its effects on western civilization are judged as entirely wrong.[18] The fact that this one subject is addressed in a rigidly binary manner is often accepted on the grounds that the traditionalists just do not know any better, and that perhaps they might be liberated through progressive re-education from the weight of their prejudices. No matter what the justification might be, the binary judgments leveled against orthodox Christians have taken on an unabashed moral tone.

Christians do not speak with one voice in reaction to these changes. Under the increasingly nebulous heading of "Christian" fall voices from those that are decidedly postmodern and united with the Critical Studies perspective,[19] to those for whom "hater"[20] is perhaps an apt description. The approach we seek to take in Law and Virtue by no means speaks to a consensus view in the

[14]Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. Call. Rev. 1699, 1705-11 (1990); Charles Lawrence III, *The ID, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 321-24, 381, 386-86 (1987).

[15]Judith Butler, *Imitation and Gender Insubordination*, in Abelove, Barale, & Halperin, EDS., The Lesbian and Gay Studies REader 307 (1993).

[16]See Butler, *supra* note 8 at 312.

[17]Michigan law professor, Paula Ettlebrick, argues, "Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so. It is an identity, a culture with many variations. It is a way of dealing with the world by diminishing the constraints of gender roles, which have for so long kept women and gay people oppressed and invisible. Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society… We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's view of family." Paula Ettlebrick, *Since When is Marriage a Path to Liberation?* , Lesbians, Gay Men, and the Law 402, 403, 405. (Wm. Rubenstein, ed., New Press, 1993).

[18]Chai Feldblum, *Moral Conflicts and Liberty: Gay Rights and Religion* , 72 Brook L. Rev. 61, 119 (2006).

[19]David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, in Christian Perspectives on Legal Thought 109 (Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, eds., 2001).

[20]Snyder v. Phelps, 131 S.Ct. 1207, 1213 (2011).

Christian Church. It may not even be the view of the majority. However, it is a view that would have been considered the consensus regarding the moral orientation of law, by both the deeply committed Christian as well as the non-Christian for most of Western History until the past century. It is our hope that in dialogue within the legal, public policy, and political theory disciplines in the Academy, those who seek to describe the views of traditionalists will cite the Law and Virtue perspective as a fair, reasoned, and challenging approach that must be engaged, rather than attacking the most extreme and least thought-out perspectives.

To that end, the movement addresses several key themes in the nexus between law and virtue. Within the contours of a Christian worldview these themes include the following:

1. God is the author of all good and thus the foundation of all law and virtue. While there is much disagreement on what constitutes 'the good,' there remains a remarkable consensus. The rudiments of right and wrong are not only true for all, but at some level knowable by all through our God-given capacities. This is why, although the moral law is presented most adequately in Scripture, it finds partial expression in other places as well—in the West, for example, in classical Greek philosophy, ancient Roman jurisprudence, and the diverse streams of the natural law tradition.
2. All law is fundamentally moral. Citizens would not tolerate the coercive nature of law if they did not have some confidence in a broad sense that the law was directed toward the good. However, law cannot prohibit every evil without harm to what is good. For this reason and others, there are meaningful boundaries around what may be prescribed or prohibited by the law.
3. The primary objective of government is to truly and impartially administer justice, punish vice, and maintain virtue. Thus, we can critique the law in terms of whether it advances virtue and suppresses vice, as these terms have generally been understood through history. Moreover, representative government cannot flourish without civic virtue. In turn, civic virtue cannot flourish unless God is honored and obeyed, not only in private but also in public life. The state should, therefore, accommodate the expression of devotion to God in public life. The dogma that publically acknowledging the goodness and providence of God is "offensive" is itself offensive.
4. A government concerned with civic virtue has obligations to its citizens in its administration of justice to shun oppression and to support individual liberties that should not be abrogated by human authority. Among these liberties are freedom of thought, freedom of conscience, freedom of worship, and freedom to propagate one's faith, subject only to narrow limitations. Citizens should likewise honor and obey civil authorities as part of God's design for the ordering of society. When required by the state to act in a manner that is not a violation of the citizen's obligations to God, the citizen should do so generously, with integrity, and with a personal commitment to virtue.
5. Considering their integral roles within our society, lawyers, legislators, judges, and law professors bear a unique responsibility to cultivate virtue both professionally and personally. This responsibility is amplified by the fact that sustainable and healthy legal institutions are contingent on a measure of trust from the public that the professionals who operate those institutions have the character required to uphold justice. This requires more than a professional code of conduct, where strict compliance is compatible with many forms of vice that injure public trust. A more robust virtue-focused approach not only to the law, but also to the legal profession itself can significantly raise the bar of integrity in our legal system.

We commend these themes to scholars of Law and Virtue for further critique, defense, and analysis as we seek a more robust understanding of Christian legal thought for the 21st century world.

Myron Steeves is the Dean of Trinity Law School in Santa Ana, California where he has served as a law professor since 1992. A graduate of Georgetown University Law Center, Dean Steeves has practiced law in the nonprofit area, particularly advising churches. Dean Steeves frequently speaks on issues including the integration of faith and law, legal careers as tools for Christian ministry, law and public policy, and law and theology.

BEYOND CAPES AND COWBELLS:

How a Christian Approach to Law and Virtue Transcends Both Autonomy and Authoritarianism

By Thaddeus Williams, Ph.D.

Law often functions as the proverbial executioner's sword to deter unlawful action. But can it also serve as a sculptor's chisel to help form a more virtuous public? A positive answer to that question has a long and diverse pedigree in Western culture. For Aristotle, a "chief concern of political science is to endue the citizens with certain qualities, namely virtue and the readiness to do fine deeds."[1] Aquinas spoke of "legal justice," which "commands the virtues … [and] draws them all into the service of the common good."[2] John Calvin viewed lawmakers as "the ordained guardians and vindicators of public innocence, modesty, honour, and tranquility" (which Calvin calls "virtues" in the very next breath).[3] For John Locke, "God [has] by an inseparable connexion joined virtue and public happiness together and made the practice [of virtue] necessary to the preservation of society."[4] Adam Smith envisioned the "civil magistrate" as "entrusted with the power not only of preserving the public peace by restraining injustice, but of promoting the prosperity of the commonwealth, by establishing good discipline, and by discouraging every sort of vice."[5] Examples could be multiplied of a strong and discernable stream flowing through Western jurisprudence in which law has some aretegenic force (arête = virtue; genic = creating or producing).[6]

THE NOMONEUTRALITY OBJECTION

While the legal minds above spell out significant limitations, pitfalls, and cautions with regard to law's virtue-producing force,[7] they would likely be perplexed by our contemporary *zeitgeist* in which public virtue considerations scarcely enter into matters of law and policy-making. What is the effect of legislation *x* not only on the kind of behaviors we engage in, but more deeply, on the kind of people we are becoming as a society? Does this or that law add further momentum to our internal vicious propensities, or redirect our hearts toward virtuous states like self-control, courage, and charity? Does that public policy contribute to a cultural atmosphere that is conducive or hostile to citizens' virtue formation? Such questions, which had a place in the Western legal tradition for the majority of its history, are seldom asked today. They have been eclipsed by other factors that we weigh more heavily in public discourse, be it economic calculus, political special interests, personal autonomy, or rights talk.

Indeed, if Aristotle, Aquinas, and company were to time travel and tour the 21st century law school circuit, their aretegenic perspectives on law would likely be met with puzzlement, suspicion, and perhaps even antipathy. Connecting law to virtue could be interpreted as a heretical deviation from a cherished, cardinal dogma that law must be morally neutral. It would obliterate the kind of freedom that those in Western societies hold dear; namely, the existential vision of freedom famously redefined by Justice Kennedy as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (*Planned Parenthood v. Casey*). Allowing the law to advance the cause of virtue would imperialistically encroach upon the individual's now sacred and sovereign freedom to define his or her own private moral universe. It would amount to what D.A.J. Richards calls a "brutal and callous impersonal manipulation by the state of intimate

[1]Aristotle, Nicomachean Ethics 21 (Penguin 2004).
[2]Aquinas, Summa Theologica, Q61, A5, p. 59 (Mortimer Adler ed., 1952).
[3]Calvin, Institutes of the Christian Religion 1496 (John McNeill ed., 1960). Calvin expounds, "For in the minds of many the love of equity and justice grows cold, if due honour be not paid to virtue, and the licentiousness of the wicked cannot be restrained, without strict discipline and the infliction of punishment" (Id. at 1496-1497).
[4]John Locke, Essay Concerning Human Understanding, bk. 1, ch. 3, sec. 6 (J. Yolton ed., 1977).
[5]Adam Smith, The Theory of Moral Sentiments, pt. 2, sec. 2, ch. 1. (Economic Classics 2013).
[6]In Greek, *arête* means "virtue," and *genic* means "creating, begetting, or producing."
[7]In the words of Adam Smith, "Of all the duties of a lawgiver, however, this, perhaps, is that which requires the greatest delicacy and reserve to execute with propriety and judgment. To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security, and justice" (supra note 5 at pt. 2, sec. 2, ch. 1)

personal life."[8] Let us call this "the nomoneutrality objection," which stems from the widespread conviction that law (*nomos*) should be neutral on moral matters in order to preserve the individual's freedom of moral self-definition. As Benjamin Wiker observes:

> [T]he liberal state does not define law in terms of the promotion of virtue and the prohibition of vice, but in terms of the protection and promotion of individual private pleasures, which—since all such pleasures are natural—are declared to be rights. Any limitation of these "rights" is considered unjust.[9]

How might we answer the nomoneutrality objection? The objection itself evokes important distinctions, helping us more meaningfully parse out ways in which law should and should not advance virtue goals. We will close with insights from a Christian view of human nature that hold significant promise for keeping law's aretegenic role from turning vicious. In short, a Christian anthropology offers a humanizing *tertium quid* between the severe fragmentation of moral self-definition on the one side and heavy-handed, moralistic legal agendas on the other.

THE LOGICAL IMPOSSIBILITY OF NOMONEUTRALITY

What are we to make of the objection that law must be morally neutral to preserve the individual's freedom to create his or her own moral values? This objection is not a philosophical abstraction from a fictional interlocutor. Ronald Dworkin has famously argued against morals legislation on the basis of nomoneutrality. For Dworkin, "political decisions must be, as far as possible, independent of any particular conception of the good life or of what gives life value."[10] He bases nomoneutrality, which he calls "the principle of equality," on the right to moral independence, which jointly entail that governments must treat competing moral visions with equal concern and respect.[11] Likewise, Richards defends "the fundamental liberal imperative of *moral neutrality with regard to the many disparate visions of the good life*."[12]

This appeal to nomoneutrality is by no means confined to the ivory towers. It represents one of the most popular and powerful law-shaping doctrines in American politics over the last four decades. Public opinion can often be galvanized against a policy simply by painting that policy in a moral light, portraying its supporters as moralistic zealots seeking to legalistically impose their personal morality at the expense of everyone else's liberty. This style of nomoneutral argument (often couched in legal terms as a violation of the "right to privacy") is, of course, anything but neutral. It gains popular traction only by making an appeal to a *moral* sense, not that the opposed piece of morals legislation is merely inconvenient, impractical, or distasteful, but *wrong*.

Critics of nomoneutrality have repeatedly exposed this problem empirically, citing a vast litany of cases in which the champions of neutrality violate their most precious, defining principle. As William Galston remarked, "every contemporary liberal theory that begins by promising to do without a substantive theory of the good ends by betraying that promise."[13] Can we demonstrate that nomoneutrality is not only violated in practice, but also, on a deeper level, that it violates fundamental laws of logic?

To develop such a logical case, picture the kind of morals legislation that nomoneutralists find so objectionable as follows:

Morals Legislation: A1 > A2

Morals legislation places a greater-than sign (>) between rival actions (A1 and A2). For the advocate of aretegenic law this greater-than symbol does not represent one action being more economically efficient than another, having more social utility, or comporting more with the moral legislator's own private whims. Rather, it expresses the law's slant toward one act over another on account of that act's superior *moral* value. For example, the law ought to reflect the fundamental moral superiority of minimizing the spread of pornography over the vicious results of allowing pornography to flow unimpeded through all levels of society. The greater-than sign, in this scenario, opens toward minimizing the spread of pornography.

Nomoneutrality, by contrast, places an equal sign between rival acts (i.e., Dworkin's "principle of equality"). The law, on this view, may prefer or deter acts based on their economic consequences, social palatability, or other factors, but not for *moral* reasons. The law must

[8]D.A.J. Richards, Toleration and the Constitution 272 (1986).
[9]Benjamin Wiker, Worshipping the State: How Liberalism Became Our State Religion 172 (2013).
[10]Ronald Dworkin, A Matter of Principle 350 (1985).
[11]For extended defense see Ronald Dworkin, Taking Rights Seriously (1978) and Sovereign Virtue: The Practice of Equality (2002).
[12]D.A.J. Richards, Sex, Drugs, Death, and the Law 9 (1982) (emphasis in original).
[13]William A. Galston, *Liberalism and Public Morality* in Alfonso J. Damico, ED, Liberals on Liberalism 143 (1986).

hang in judgment-free equipoise between rival actions in order to preserve the individuals' autonomy to create their own greater-than symbols when constructing their private moral universes (i.e., Dworkin's "right to moral independence"). And so we reach the following formula of nomoneutrality:

Nomoneutral Legislation: A1 = A2

It is easy to see how these distinct formulas are likely to generate very different results when inputting questions of pornography legislation.[14]

What happens, however, if we input the act of nomoneutral legislation itself on one hand and the act of morals legislation on the other? What symbol, we may ask, does the proponent of neutrality wish to place between these rival actions? To state the obvious, nomoneutralists place a greater-than sign between their own acts to realize greater nomoneutrality in law and the acts of the privacy invading, moralistic zealots they oppose.[15] Thus, nomoneutrality takes this form:

Nomoneutral Legislation > Morals Legislation

This iteration of nomoneutrality is, of course, just another case of our old morals legislation formula in which A1>A2. This greater-than symbol opens toward nomoneutral legislation not because morals legislation is considered economically inefficient or pragmatically undesirable, but because morals legislation is deemed *morally* inferior (i.e., a *wrongful* violation of liberty, privacy, autonomy, etc.). Yet as this greater-than sign opens up toward nomoneutral legislation it promptly chomps down and swallows neutrality whole. Why? Because that greater-than sign reveals that nomoneutrality *is itself a form of morals legislation*. Nomoneutrality entails that nomoneutral legislation is not *morally equal to* but *morally superior to* systems that posit moral superiority. It is a moral position seeking to enshrine itself as law, which states that no moral positions should be enshrined as law. As an attempt to legally enshrine a moral position, nomoneutrality slides to the other side of the greater-than symbol, making it morally inferior to itself:

Nomoneutral Legislation > Nomoneutral Legislation

What this reveals, on closer inspection, is that nomoneutrality does not and *cannot* exist and therefore, cannot stand as a meaningful objection to aretegenic law.

We may better appreciate the depth of this problem with help from the first law in the canons of logic, the law of identity. The law of identity states that A=A. Nothing that exists or could possibly exist can be greater than itself (i.e., given the law of identity, A>A represents an *a priori* logical impossibility). By claiming moral superiority to systems that claim moral superiority, nomoneutrality becomes even greater than itself, rendering its existence no more possible than that of a four-sided triangle. This observation becomes all the more problematic when we consider how vehemently many nomoneutralists object to any piece of morals legislation that they see as inspired by theism. From the perspective of such nomoneutralists, legislation should not be based on some non-existent entity. If the above analysis is on target then the nomoneutralist does precisely that, seeking to legislate on the basis of a fictional entity that not only *does not*, but logically *cannot*, exist.

Yet demonstrating that nomoneutrality cannot exist in a world where the fundamental laws of logic apply, of course, does not mean that such a principle cannot exist in the world of politics. In politics, nomoneutrality is frequently applied (albeit selectively) as it suits the inescapably morals-laden legislative agenda of the one appealing to nomoneutrality. Examples abound in which the rally cry, "Keep morality out of law!" becomes a political euphemism for "I want to keep *your* morality out of law, so I can get mine in!"[16] And so nomoneutrality finally reduces to this:

[14]For helpful analysis of D.A.J. Richards' liberal conclusions on pornography legislation see Robert George, Making Men Moral: Civil Liberties and Public Morality 142-147 (1992).

[15]A strictly logically consistent version of nomoneutrality would put an equal sign between nomoneutral and morals legislation. As Justin Buckley Dyer observes, "Without transcendent basis from which to judge the decency of competing civic ideals, there seems to be no reason (other than preference) to privilege liberal ideals over illiberal ideals" (Natural Law and the Antislavery Constitutional Tradition 28 [2012]). However, nomoneutralists do not argue that their efforts to realize greater nomoneutrality should be viewed as being in legal normative equality with the acts of morals legislation.

[16]Consider, as a case-in-point, the argument of Pennsylvania Representative, James Greenwood (the 1998 Biotechnology Industry Organization Legislator of the Year). During the 2001 floor debate on human cloning Greenwood stated, "I am not prepared as a politician to stand on the floor of the House and say, I have a philosophical reason, probably stemmed in my religion, that makes me say, you cannot go there, science, because it violates my religious belief. I think it violates the constitution to take that position" (Speech at the House of Representatives from *Congressional Record* (July, 31, 2001) in William Kristol & Eric Cohen, EDS., The Future Is Now: America Confronts the New Genetics 292 (2002). Greenwood then closes his argument: "It is a very legitimate and important and historic debate about how it is that we are able to use the DNA that God put into our own bodies, use the brain that God gave us to think creatively, and to employ this research to save the lives of men, women and children in this country and throughout the world and to rescue them from terribly debilitating and life-shortening diseases" ("Speech" at 294). Note well that a "philosophical reason, probably stemmed in my religion" represents a constitution-violating imposition of morality when that reason fosters warrant for a legal ban on cloning. However, such philosophical reasons stemmed in religion are fair game for Greenwood when marshaled in support of pro-cloning legislation.

My Morals Legislation > *Your* Morals Legislation

J. Budziszewski expounds:

> Liberals … came to insist that the laws of the state must be justified in a way that is independent not only of theology and ontology, but of "one's conception of the good." Because this is impossible, what happens in practice is that their own views of the good prevail without challenge, just by pretending that they aren't really views of the good.[17]

In short, nomoneutrality is a logically self-destructive fiction, albeit a useful fiction when trying to marginalize opponents as moral oppressors while painting your own morally charged agenda in innocuous colors to sway a pluralistic culture. It is a thinly veiled power play.

FROM COWBELLS TO CAPES (AND BACK AGAIN): NIETZSCHE'S LEGACY

Friedrich Nietzsche, whose philosophy represents a celebration of power, helps us to deepen this critique of nomoneutrality. He reveals how a rejection of traditional morality renders one not only *not* neutral with regard to moral *acts* (i.e., what we should *do*), but also an advocate for some deeper virtue agenda at the level of *agency* (i.e., who we should *become*). Nietzsche is perhaps most famous for taking the iconoclast's hammer to the concept of an objective moral structure in which human beings flourish. He deconstructed the classical, and particularly the *Christian* virtues. "What herd morality deems 'good' is not real virtue but merely a disguise for weakness."[18] Yet Nietzsche's philosophy does not end up floating in a void of moral neutrality. Rather, he created *ex nihilo* and inhabited his own moral universe, populated with both virtuous heroes (e.g., Wagner before his conversion to Christianity) and vicious villains (e.g., Wagner after his conversion to Christianity). Nietzsche calls us beyond the slave morality of a meek Christianity to embrace a strong-willed Master morality (*Herrenmoral*). His heroic Zarathustra declares that "herds, herdsman, and corpses [that is, those who follow traditional morality] hate most … him who breaketh up their table of values, the breaker, the lawbreaker … the creating ones who engrave new values on new tables."[19] Note well that Nietzsche's table-breakers are also table-makers. The demolition men who take a sledgehammer to the old system of virtue are subsequently architects who dream up an edifice of "new values." In Nietzsche's words, "The new, would the noble man create, and *a new virtue*."[20]

Elsewhere Nietzsche's Zarathustra clarifies the nature and origin of this "new virtue": "Power is it, this new virtue. … When ye are exalted above praise and blame, and your will would command all things, as a loving [of your own] will: there is the origin of your virtue."[21] It is telling that one of the most vitriolic critics of teleological views of human morality and flourishing champions his own moral teleology (even, at times, slipping back into the very virtues he sought to demolish[22]). Nietzsche speaks teleologically of the human "course between animal and Superman" and "the three metamorphoses of the spirit," how "the spirit became a camel, the camel, the lion, and the lion at last a child."[23] In this process of Nietzschean virtue formation we move from "camel"—man as "load-bearing spirit" burdened by the moral demands of humility, altruism, love for enemies, etc.—to "lion,"—man who devours those moral burdens to "give a holy Nay to duty"—and onward finally to the state of "child" who plays "the game of creating new values."[24]

It is striking how closely this teleology of Nietzsche's 19th century post-teleological man resembles 21st century liberal notions.[25] It is a hair's breadth between Nietzsche's call to "let the value of everything be determined anew by you!"[26] and Kennedy's popular notion of liberty as "the right to define one's own concept of

[17] J. Budziszewski, What We Can't Not Know: A Guide xiii (2011). Lon Fuller detected the same tactic a half century earlier, "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intention" (*Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harvard Law Review 630 [1958]).

[18] R.C. Sproul, The Consequences of Ideas 165-166 (2000).

[19] *Thus Spake Zarathustra* in The Philosophy of Nietzsche 18 (1954).

[20] *Id.* at 44 (emphasis added).

[21] *Id.* at 80.

[22] Sproul observes, "It is odd that Nietzsche complains about the 'dishonesty' of traditional morality. Apparently he thinks honesty is a transcendent virtue that is normative even for the master. … Even while attacking herd morality, Nietzsche retreats behind one of the virtues he is trying to overcome." (Sproul, supra note 18 at 166).

[23] *Thus Spake Zarathustra*, supra note 19 at 24-25.

[24] *Id.* at 23-25.

[25] One salient distinction between Nietzsche and contemporary liberalism is the latter's frequent appeal to Mill's "harm principle" which is intended to circumscribe the individual's expression of autonomy in ways that would not limit Nietzsche's superman.

[26] *Thus Spake Zarathustra,* supra note 19 at 81

existence." In *Beyond Good and Evil* (prophetically subtitled *Prelude to a Philosophy of the Future*), Nietzsche adds, "The noble type of man regards himself as the determiner of values … He knows that it is he himself who confers honour on things; he is the creator of values. He honours whatever he recognizes in himself: such morality is self-glorification."[27] Perhaps there are enough self-glorifying value-creating supermen in the 21st century to form the new herd. In Nietzsche's day it took a certain act of countercultural willpower to spurn all traditional moral expectations in order to do your own thing. Becoming a superman meant risking life in a fortress of solitude (as it certainly did for Nietzsche himself). In our day, by contrast, shunning traditional morality in order to create your own values is hardly risky or countercultural. You are given a warm welcome into the herd. The 19th century European superman must trade his cape for a cowbell if he continues to champion self-determined value in the 21st century. Conversely, resisting the herd's push toward self-definition and self-glorification requires the very kind of subversive feat of will that Nietzsche applauded. The 19th century cow becomes a 21st century superman.

THE INEVITABLE MORAL PEDAGOGY OF LAW

What the foregoing analysis clarifies for our original questions concerning aretegenic law is that even the boldest deconstructions of traditional morals do not leave us in a value-free wasteland. We construct new virtue concepts on the rubble. The force of law is then invoked to do much of the heavy lifting. Legislation may no longer serve as a guiderail to help encourage us along the often-arduous path toward character states likes altruism and a "readiness to do fine deeds" (Aristotle). Rather, legislation deregulates any autonomous lifestyle choice that might be deemed morally objectionable while coercively banning any detractors from acting in accordance with their moral objections. Examples abound, as the state enters bakeries, photo studios, public restrooms, and religious institutions. Make no mistake: such legislation is *aretegenic*. It aims beyond the level of action to the level of agency. It sends a clear message about who are the virtuous heroes and the vicious villains, a message that has the force of moral pedagogy on the public. Such aretegenic law seeks to morph us, to borrow Nietzsche's categories, from camels burdened by traditional moral duties, into lions with their "holy Nay to duty" and, finally, into children playing "the game of creating new values." Such law is every bit as virtue-seeking as traditional morals legislation, though with antithetical meanings poured into the term "virtue."

Over time, such Nietzschean aretegenic legislation, while pretending to diminish state intrusion and enlarge the scope of individual liberties, has precisely the opposite cumulative impact. In the short run, new legislation has the most immediate shrinking effect on the liberties of those who seek to live out their traditional moral convictions in public life. In Nietzsche's parlance, the superman seeks to "become master over all space and to extend its force (its will to power) and to thrust back all that resists its extension."[28] But in the long run, the state takes on an even more imperialistic aretegenic force, even against those who share its disdain for traditional morality. Like an oscillating universe, millions of people doing their own thing expand outward from one another in growing alienation and social entropy. As society turns colder and sparse, it eventually hits a critical point when the innate longing for something more meaningful and fulfilling than self-created subjective values kicks in. Society then begins rapidly collapsing back in on itself toward a point of singularity; that is, toward an all-absorbing state. The Big Bang of autonomy, sprawling outward in all directions, is followed by a Big Crunch toward a liberty-consuming centralized authority. As Dostoevsky's Shigalev observed in *The Possessed*, "Starting from unlimited freedom I arrive at unlimited despotism." The end result is that "One-tenth enjoys absolute liberty and unbounded power over the other nine-tenths. The others have to give up all individuality and become, so to speak, a herd."[29] Francis Schaeffer recognized and deepened Dostoyevsky's insight:

When freedoms are separated from the Christian base … t hey become a force of destruction leading to chaos. When this happens, as it has today, then, to quote Eric Hoffer, 'When freedom destroys order, the yearning for order will destroy freedom.' At that point the words left or right will make no difference. They are only two roads to the same end. There is no difference between an authoritarian government from the right or the left: the results are the same. An elite, an authoritarianism as such, will gradually force form on society so that it will not go on

[27]Nietzsche, Beyond Good and Evil in the Philosophy of Nietzsche 579 (Random House 1954).
[28]For such Nietzchean celebrations of power in contemporary jurisprudence see Robin Wright, *Three Positivisms* in Haymen, Levit, & Delgado, EDS., Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism 140-147 (2002).
[29]Fyodor Dostoevsky, The Possessed 365-366 (Wildside Press 2009).

to chaos. And most people will accept it—from the desire for personal peace and affluence, from apathy, and from the yearning for order … That is just what Rome did with Caesar Augustus.[30]

HOW ARETEGENIC LAW GOES WRONG

Retracing our steps, the west broke from a long tradition of virtue-aimed law. Legislative choices could no longer be informed by transcendent virtues, but on the basis of a fictional entity called nomoneutrality. Nomoneutral legislation then became aretegenic—though not in the old sense as a supportive structure cooperating *alongside* (rather than *against*) individuals, families, and mediating institutions to help people become more caring, courageous, honest, etc.[31] Rather, with a mix of deregulating traditional moral violations and regulating against dissent, law began to recommend in powerful ways a new ideal for human progress—the self-determining superman who "creates his own values" (Nietzsche) with his new judicially invented "right to define one's own concept of existence" (Kennedy). As the pedagogy of such law takes effect, the growing mass of self-glorifying supermen eventually reach the end of themselves, finding their own willpower to be an inadequate and ultimately unsatisfying object of worship. They finally return on all fours like a herd seeking a Great Shepherd. Enter the State, enlarged to meet an intense demand for transcendent meaning that it helped to create.

At this terminal stage, legislation no longer pretends to be nomoneutral and advances its aretegenic agenda more explicitly. Consider as historic examples the concepts of *pravovoe vospitanie*, or "legal nurturing," along with *pravovaia propaganda*, or "legal propaganda," which were quintessential to Soviet statecraft during the Communist era. As Harold Berman observes,

> The purpose of Soviet law itself is not only to make people behave, by threat of sanctions or promise of rewards, according to official rules. It is also, and more fundamentally, to educate offenders to change their attitudes and to reinforce among nonoffenders their belief in the basic goals of Soviet society. Thus law is intended to help create the "new Soviet person."[32]

Mark Chepel, who lived in Sevastopol under Communism's aretegenic laws for 12 years, explains the results of the State's attempt to use law as a chisel to sculpt the "new Soviet person." Says Chepel:

> Soviet virtues were not empowering. Your sole purpose was to fulfill the Party's goals. "The Party rules,'" we were told, and "Your destiny is in our hands." The message was clear: "If we want your car, you will give it to us; it is your contribution to a better world. No matter how unfair it may seem, it's for your own good and the benefit of Mother Russia. You may not think this is a good thing, but it's the best way to be human, and we know better."[33]

We can draw an important lesson from the failed Soviet experiment in aretegenic law. It is this: a policy aimed at human thriving will actually hurt people to the extent that it sprouts from an inadequate view of human nature. Skewed anthropology leads to false concepts of virtue, which, when backed by law, do not lead to human flourishing. Instead, as law works against the grain of human nature, vice and dehumanization become the net results of a virtue-seeking system. Before Soviet communism went wrong with law and policy it had already gone wrong on the deeper questions of human nature, viewing man reductively as *homo economicus*. It diagnosed man's deepest problem as an external socio-political-economic problem, which inspired an inflated soteriological emphasis on external socio-political-economic remedies. Meanwhile, the internal human propensity to pervert power went untreated.[34]

To further illustrate how inadequate anthropology leads to an abuse of law's aretegenic power, consider the

[30]Francis Schaeffer, How Shall We Then Live? The Rise and Decline of Western Thought and Culture 245 (1983).

[31]As Robin Wright observes, "Our desires have corrosive affects on our moral sense, and our moral sense is profoundly impacted by our legal norms" (Wright, supra note 28 at 146).

[32]Harold Berman, Faith and Order: The Reconciliation of Law and Religion 370 (1993). Soviet virtues included, according to Article 3 of the Fundamental Principles of Court Organization of the U.S.S.R., "devotion to the Motherland and the cause of communism ... care for socialist property, observance of labor discipline, and honorable attitude toward public and social duty."

[33]Personal interview with Mark Chepel in Las Flores, CA (July 5, 2014).

[34]According to Harry Schaffer, "Socialists and Communists of all shades and leanings believe in the perfectibility of all mankind. Man is basically good and capable of being master of his own destiny" (The Soviet System on Theory and Practice 30 [1965]). For theological analysis on this point see Thaddeus Williams, Love, Freedom, and Evil: Does Authentic Love Require Free Will? 77-81 (2011).

well-intended efforts to help northern spotted owls in the forests of the northwestern United States. Environmental legislation significantly restricted the lumber industry with the aim of preserving the owls' natural habitat. As lumberjacks struggled to cope with unemployment, the forests they once cut grew denser. By some accounts, the northern spotted owls, with an average wingspan of six feet, had an increasingly difficult time navigating the crowded trees to reach the forest floor, where wood rats, their primary food source, scurried freely. With less accessible sustenance, the spotted owls populations continued to dwindle in the very forests where they were intended to thrive.[35] How could legal efforts toward spotted owl thriving achieve such ironic results? The answer is: *an inadequate understanding of spotted owls*. Bad "owl-ology" leads to a false concept of owl flourishing, which in turn leads to bad policy, and, finally, the harm of the very animals that people seek to help. The lesson is clear as we seek to distinguish between virtue-aimed laws that actually promote the ethical flourishing of our species and those that morally damage the very people they seek to improve. True anthropology is a necessary condition of true aretegenic law.

TOWARD A MORE HUMANIZING ARETEGENIC LAW

It is here that a Christian worldview has volumes to speak into the public discourse on law, with tremendous potential to protect and uplift even those who may unapologetically reject Christianity. I offer five connections between Christian anthropology and aretegenic law, in hopes of inspiring further reflection and scholarship in this direction:

1. *People are not designed to be supreme authorities over the hearts of other men, and are, therefore, seriously limited in their capacity to legislatively inculcate virtue.*[36] Because God is sovereign, the merely human government is not. Given His unique authority and access to the human heart, God can "cause [us] to increase and abound in love" (1 Thes. 2:13); His Spirit can produce the fruits of love, joy, peace, patience, kindness, etc. (Gal. 5); and "mortify the deeds of the flesh" (Rom. 8:13) in ways that human law cannot. State-enforced legislation is no substitute for divinely affected heart transformation.[37]
2. *People are designed as meaningful choice-makers, and can, therefore, be constructively encouraged but not coercively engineered to virtue.*[38] We are more than the sum of our biological and economic particulars. This means that any aretegenic law that treats people less as choice-makers and more like Pavlovian canines who can be socially engineered will have vicious results. Virtues like generosity and charity are what Robert George calls "reflexive," meaning that they must be chosen voluntarily and not by human coercion to retain their moral value. (This insight helps us understand why many economic policies of mass-scale forced redistribution tend to deliver so little on their promises of a more generous and charitable society).
3. *People are designed to thrive when the diverse, finite, and divinely delegated spheres of authority are left intact.* Martin Luther famously quipped that his marriage served as a far more rigorous school for character than the monastery. God has created diverse spheres and He imbued them each with mutually complementary (but not mutually cancelling) powers to realize His good vision for His creatures' flourishing. Governments are ordained with a delegated authority "for our good," as "the servant of God, an avenger who carries out God's wrath on the wrongdoer" (Rom. 13:4). Yet this divinely delegated aretegenic duty of government does not

[35]Jeffrey D. King, dir., Blue (Broken Hints Media, 2014) at 24-29:30. My purpose in this article is not to enter into the ecological debates regarding the effects of the logging industry or environmental legislation with regard to the northern spotted own. My point is illustrative to approach the deeper anthropological point that legislation that fails to adequately understand the nature of those it is intended to help will achieve ironic results.

[36]Aquinas clarifies that the supernatural virtues of faith, hope, and love "cannot be acquired by human acts, but are infused by God … Only the infused virtues are perfect and deserve to be called virtues absolutely … The other virtues, those, namely, that are acquired, are virtues in a restricted sense" (Aquinas, supra note 2 at Q65, A1-3, 862-863).

[37]Mortimer Adler adds, "The Christian philosopher goes further than the moral philosopher in developing the theory of virtue. Considering man's limitations and his fallen nature, he holds that more than all the natural virtues (i.e., the virtues which men can attain by their own effort) is required for salvation—for the supernatural end of eternal happiness. Faith, hope, and charity … [are] gifts of God's grace (2 The Great Ideas: A Syntopicon of Great Books of the Western World 976 (Adler and Gorman eds., 1980).

[38]For further analysis of meaningful choice-making power, with points of contact between Calvinist and Arminian theologians that justify significant unity on the point above, see Thaddeus Williams, Love, Freedom, and Evil: Does Authentic Love Require Free Will? (2011).

replace or repress the unique (and far more personal) duties of the church to disciple communities toward Christlike virtues, or the unique duties of parents to raise up children in "the way of the Lord." This means that virtue-seeking legal systems that suppress or swallow up these far more intimate aretegenic institutions violate human nature and will turn vicious.

4. *People are morally fallen to such a radical extent that any attempt at aretegenic law (including our own) should be met with a realistic caution that reckons seriously with our enormous capacity for corruption.* This anthropological insight protects us from the naïve optimism of certain aretegenic systems that champion the inherent goodness of man and tend to turn utopian dreams into dystopian nightmares. The depth of human evil also reminds us that legislative solutions cannot resolve the most rudimentary spiritual problems within our nature.
5. *People need grace to realize their most ultimate meaning and fulfillment.* Aretegenic legislation is no substitute for the gospel. The chief end of man, as the Westminster theologians recognized, is the glorification and enjoyment of God. We cannot reach this chief end through any earthly courtroom; we reach it only through the courtroom of heaven where Jesus intercedes as our defense attorney, seeking our "not guilty" verdict with the irrefutable case of His own shed blood (1 John 2:1-2).

From these insights we may conclude that virtue-seeking law properly informed by a true anthropology offers a hopeful alternative to both destructive autonomy and a dehumanizing authoritarianism. It may point us beyond the constricting shed of enslaved cows and the lonesome sky of self-glorifying supermen, into a public atmosphere where humans can better flourish.

Thaddeus Williams began serving the Trinity Law School community in 2013, where his Jurisprudence courses challenge students to integrate their study of law with the distinctives of a biblical worldview. He earned his Ph.D. in Theology with highest honors at the Vrije Universiteit of Amsterdam and an M.A. in Philosophy of Religion from Talbot School of Theology. Professor Williams also serves as a lecturer for the Blackstone Legal Fellowship and a Senior Fellow of the TruthXChange Thinktank. He has taught internationally, including Francis Schaeffer's L'Abri Fellowships in Holland and Switzerland, and currently teaches Systematic Theology at Biola University. Prior publications include Love, Freedom, and Evil: Does Authentic Love Require Free Will? (Rodopi 2011). Dr. Williams served as Editor of this inaugural Law & Virtue issue.

VIRTUE, VICE, AND RELIGIOUS LIBERTY

By Douglas Groothius, Ph.D.

Liberty cannot be established without morality, nor morality without faith.

–Alexis de Tocqueville, *Democracy in America*

Religious liberty is rare and contested in the history of the world. It is certainly not the natural state for mortals east of Eden and under the sun. On the contrary, the conflating of nation and religion, the oppression of religious minorities, and the power of the state over the church (or the church over the state) have been far more common in the stormy story of humankind. The lament of the Preacher surely addresses these woes: "Again I looked and saw all the oppression that was taking place under the sun: I saw the tears of the oppressed—and they have no comforter; power was on the side of their oppressors—and they have no comforter" (Ecclesiastes 4:1).

America serves as an exceptional counterexample to history concerning freedom from religious oppression.[1] "We shall be as a city upon a hill, the eyes of all people are upon us," as the Puritan pastor John Winthrop put it in 1630, citing the Sermon on the Mount. There is hope for religious liberty despite the grim facts of oppression; it is a rational hope based on first principles endemic to America. In 1862, one month before he signed The Emancipation Proclamation, Abraham Lincoln sent a message to the Congress that contained this immortal line: "We shall nobly save, or meanly lose, the last best hope of earth." For Lincoln, America was the "almost chosen nation," a nation not exempt from divine scrutiny or judgment, but uniquely favored by God, and, as such, uniquely responsible for its gifts and opportunities. Today, we face a similar crisis. We may "nobly save, or meanly lose" our Republic. The forces intent on its dissolution—under the banner of "revolutionizing" America—are many; they are in high places and in the ascendency. There is hope if, and only if, America regains it virtue, purges its vices, and reestablishes religious liberty for all. The Declaration of Independence holds the key, along with The First Amendment to the Constitution.

RELIGIOUS LIBERTY IN OUR CORNERSTONE CREEDS

The American colonies claimed in The Declaration of Independence that the King of England had overstepped his moral limits in manifold ways. Before listing all of these political and moral violations, it reads: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world." Perhaps most famously, the King had violated his office by "imposing Taxes on us without our consent" (i.e., taxation without representation). However, the tyranny of the King imposed on the colonies was a relatively minor hindrance compared to the taxes, laws, and governmental agencies that impose themselves on contemporary Americans, often for the restriction of liberty under law.

The Declaration of Independence is openly theistic and provides the rationale for "the American experiment," as Abraham Lincoln later put it. We need to read it again, or, perhaps, for the first time:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

[1]See Charles Murray, American Exceptionalism: An Experiment in History (AEI Press 2013); OS Guinness, A Free People's Suicide: Sustainable Freedom and the American Future (InterVarsity Press 2012).

Few, if any, nobler statements have been written as the creed for a new nation. In fact, America stands alone as a nation founded by intellectuals who were united on fundamental principles of divinity, law, and morality.[2] This document was, moreover, a kind of theological apologetic, not a statement of secular revolution such as *The Communist Manifesto*. America was under a higher authority and should act accordingly. But however noble the Declaration may be, it is not sufficient to ensure the perpetuity of "liberty and justice for all," as The Pledge of Allegiance puts it. Martin Luther King, Jr. was passionate about liberty and justice. He was not only a stirring orator. He was also deeply American and committed to the deepest American principles. In his iconic, "I Have a Dream Speech," he declared:

> In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness.... America has given the Negro people a bad check, a check which has come back marked "insufficient funds."

The First Amendment to the American Constitution (1787) was the fruit of a long and bitterly contested cultural and political movement from British tyranny to liberty for a new nation. The Revolutionary War had thrown off the oppression of the British and renounced its monarchial system, while the new nation retained the best of the English law tradition, which had previously informed its civil governance. This included the separation of the three powers of civil government and an elected national assembly. The very idea of a Constitution means that a nation rests on a fixed (and not evolving or living) document that specifies its principles of governance. Therefore, appeals to the Constitution must be based on Originalism, the philosophy that reads the document in terms of its original (that is, its authors') meaning.[3]

The First Amendment took a major leap forward by affirming five freedoms for all Americans. In 1789, it stated:

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

Sadly, most American citizens today cannot name even one or two of these historic affirmations by memory, but they often have prodigious memories for entertainment trivia—a problem we address below.[4] The First Amendment stipulates what Congress may *not* do; that is, it is a negative document. Congress shall *not* establish a state church (as Britain had done in the colonies with Anglicanism); and it shall *not* abridge the five freedoms. Here we find that one shining idea—freedom of conscience with respect to religion—was enshrined in a great nation's founding document. America would not prescribe religion by establishing a state religion, as with many European nations. Nor would America proscribe or inhibit religion as state religions had done with Protestantism, Catholicism, or (in a very different way) Islam. Neither yet was America conceived as a secular nation, as some revisionists claim. No, the First Amendment protects the church from the state's intrusions.[5]

This negative approach to rights is highly significant for at least two reasons. First, the First Amendment assumes a natural law approach to rights.[6] This natural law

[2]However many of the founders were deists, they agreed with the Christians that God was the source of the moral law and the Judge of the earth. Thomas Jefferson, often identified as a Deist, believed that his nation was in the hands of a just God. He feared God, even though he denied orthodox theology concerning the Trinity and the Incarnation. On the views of the founders, see Francis Schaeffer, *Foundations for Faith and Freedom*, A Christian Manifesto (Crossway 1981); John W. Whitehead, The Separation Illusion (Mott Media 1977).

[3]On this, see Keith E. Whittington, *How to Read the Constitution: Self-Government and the Jurisprudence of Originalism,* First Principles Series Report #5 (May 1, 2006).

[4]For two astute and telling treatments of the Constitution and its rejection by modern secularists, see Mark Levin, Liberty or Tyranny (Threshold Editions 2010); and John W. Whitehead, The Second American Revolution (Crossway Books 1982).

[5]For an adept explanation of the misunderstandings of the notion of "the separation of church and state," see Daniel Dreisbach, *Origins and Dangers of "The Wall of Separation between Church and State*, vol. 35, no. 10 Imprimis, October 2006.

[6]On the basics of natural law, see Scott Rae, Moral Choices 51-58 (3rd ed. 2009); C. S. Lewis, The Abolition of Man, particularly chapters 1-2 and the appendix; and J. Budziszewski, Written on the Heart: The Case for Natural Law (InterVarsity 1997). For biblical sources on the notion of natural law, see especially Romans 1:18-32; 2:14-15.

approach affirms that basic moral truths transcend any human convention and are not reducible to such contingencies. They are "natural" in the sense that they are objective and knowable. They are not "natural" in the sense of being reducible to biology, chemistry, and physics (the hard sciences) or to the vagaries of human society (psychology, anthropology, and sociology). Therefore, the authority of the state is limited by the demands of the natural law, which possesses an unimpeachable moral authority. This means that the state does not *create* any rights; it rather *recognizes* the freedom of conscience as expressed in religion, speech, press, assembly, and petition. As such, it refuses to violate these standing rights, which are due for its citizens. Second, the natural law tradition thus rightly emphasizes negative rights, not positive rights. Negative rights protect someone or something from undue harm. For example, people possess the right not to be murdered and to not have their possessions stolen. (See the Sixth and Eighth Commandments in Exodus 20:1-17.)[7] We do not have a right to everything we want, however beneficial this may be. Nor do I have a responsibility to provide you with something to which you have no right.

TWO CONTEMPORARY VICES THAT ENDANGER RELIGIOUS LIBERTY

For the religious liberty protected by the Declaration and The First Amendment to be sustained in the 21st century, virtue must be conserved and fortified while vice is identified and restrained. After all, restraint is the price of civilization. Today religious liberty is threatened by two main forces. First, it is endangered by the vice of apathy among citizens who do not know or care about the nation's charter of freedom. Second, it is imperiled by the rapaciousness of the modern state (statism), which brooks no rival sphere of power or authority.

First, we turn to apathy. Apathy is the vice of caring little for what matters most—in this case fundamental human rights. It is called *acedia* in moral philosophy and the theological ethics of Thomas Aquinas, and is ranked among the seven deadly sins. The Apostle Paul warned against such apathy when he urged his readers: "Let us not become weary in doing good, for at the proper time we will reap a harvest if we do not give up" (Galatians 6:9). Similarly, the writer of Hebrews said, "Consider him [Christ] who endured such opposition from sinners, so that you will not grow weary and lose heart" (Hebrews 12:3). For the biblical tradition, indifference or despair regarding the good is deemed as sin against God. Such apathy has many causes, but it is rooted in a lack of knowledge and a lack of courage. Those who are apathetic are beyond caring about truth and falsity, virtue and vice, beauty and ugliness. They find knowledge too difficult to acquire and, if found, too demanding to adhere to consistently. One writer recently advocated a new religious stance, "apatheism," which eschews all matters of ultimate significance in favor of terminal indifference.[8] This is summarized in one often-heard word, "Whatever."

The apathy that threatens religious liberty in the 21st century can be counteracted by two activities: (1) becoming knowledgeable about the founding principles of the United State, found essentially in the Declaration and Constitution[9] and (2) by understanding the present cultural and political situation *in light of the founding ideals and the religious principles that animated them*. As de Tocqueville said, "As the past has ceased to throw its light upon the future, the mind of man wanders in obscurity."[10] This demands that citizens avoid the consumption of trivia—video games, films, fashion preoccupations, and anything by which they "amuse themselves to death"[11]—and redirect their intellectual energies to matters of state. These include the intrusion of the federal government into areas forbidden by the Constitution, the staggering national debt, and the state's infringement on religious liberty.

In addition to apathy, religious liberty is endangered by the rapaciousness of the modern state (statism). Rapaciousness is the vice of greed with respect to power. It can be understood as a form of covetousness, which is prohibited in the Tenth Commandment and throughout the Bible. When amplified on a governmental scale, this greed proceeds on false premises to do what ought not to be done. A classic case of this is found in the judgment

[7]Eight of the Ten Commandments are negative in formulation. These negations allow for the great freedom of the law as Jesus expressed it, "You shall love the Lord your God with all your heart, soul, and mind" (Matthew 22:37). That is, what is not forbidden is allowed, if it is done in real love (1 Corinthians 13:4-8).

[8]Jonathan Rauch, *Let it Be*, The Atlantic Monthly, May 2003 at 34.

[9]A superb start is found in OS Guinness, The Great Experiment: Faith and Freedom in America (NavPress 2001); see also, OS Guinness, The American Hour: A Time of Reckoning and the Once and Future Role of Faith (Free Press 1993).

[10]Alexis De Tocqueville, Democracy in America, Book Four, Chapter VIII (1840).

[11]See Neil Postman, Amusing Ourselves to Death (Viking 1985); DOUGLAS GROOTHUIS, *Television: Agent of Truth Decay*, Truth Decay: Defending Christianity Against the Challenge of Postmodernism (InterVarsity Press 2000).

placed on ancient Israel after they clamored for a king just like the nations around them. The Old Testament prophet Samuel declared:

> This is what the king who will reign over you will claim as his rights: He will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your male and female servants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves (1 Samuel 8:11-17; see also Psalm 2; Ezekiel 28:1-10; Revelation 13).

The abuses of civil government are, of course, not limited to ancient Israel. When the vice of political covetousness trumps liberty, it betrays America's founding ideal of a limited state that protects the negative rights of its citizens.

THE KEY VIRTUE FOR THE FUTURE OF RELIGIOUS LIBERTY

What strategy may counteract the liberty-consuming vice of political covetousness? The key virtue required for the restoration of religious freedom and all the freedoms of the First Amendment is the virtue of a theologically-shaped prudence, the first of the four classical virtues. For the Founders, the virtue of prudence was not that of self-interest alone but of self-government and self-restraint. Each citizen has the responsibility to order his own affairs justly under God. He is not to expect the state to be his caretaker. Rather, citizens are supported primarily by their own industry and the care of their families, churches, and other voluntary organizations. As Alexis de Tocqueville wrote:

> Despotism may govern without faith, but liberty cannot. How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed? And what can be done with a people who are their own masters if they are not submissive to the Deity?[12]

Prudence requires that citizens govern themselves wisely, not autonomously, but in submission to God's governance. Daniel L. Dreisbach explains, "There was a consensus among the founders that religion was indispensable to a system of republican self-government. The challenge the founders confronted was how to nurture personal responsibility and social order in a system of self-government."[13]

Self-government requires adherence to principles that are internalized, lest citizens be merely threatened or cajoled by political power. "The larger the state, the smaller the citizen," as Denis Prager states it on this radio program. But liberty, religious or otherwise, requires both a small state and a large citizen, one whose conscience keeps him in step with "the God of nature and nature's God," as The Declaration has it. Such moral knowledge and moral conduct involves what John Fletcher Moulton memorably described as the "the domain of obedience to the unenforceable." This is the area of life standing between law and mere personal preference. In this domain, Moulton said, "Obedience is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself."[14] John Silber comments, "This domain between law and free choice [Moulton] called that of 'manners.' While it may include moral duty, social responsibility, and proper behavior, it extends beyond them to cover all cases of doing right where there is no one to make you do it but yourself."[15] Moulton continues, "The real greatness of a nation, its true civilization, is measured by the extent of this land of obedience to the unenforceable. It measures the extent to which the nation trusts its citizens, and its area testifies to the way they behave in response to that trust."[16] Nothing better informs and impels such obedience than the audience of One, God himself. As King David cried out,

> The Lord is in his holy temple; the Lord is on his heavenly throne. He observes everyone on earth; his eyes examine them. The Lord

[12]Tocqueville, supra note 10 at ch. XVII.
[13] Dreisbach, supra note 5.
[14]John Silber, *Obedience to the Unenforceable*, The New Criterion (June, 1995), http://www.newcriterion.com/articles.cfm/Obedience-to-the-unenforcable-4378.
[15]Id.
[16]Id.

> examines the righteous, but the wicked, those who love violence, he hates with a passion. On the wicked he will rain fiery coals and burning sulfur; a scorching wind will be their lot. For the Lord is righteous, he loves justice; the upright will see his face (Psalm 11:4-7; cf. Eccl. 12:13-14).

Perhaps no one stated the tight association of religion, virtue, and liberty more forcefully or winsomely than George Washington. In his Farewell Address in 1796, Washington made the case that religion was the only sure foundation for virtue and that virtue was essential for the Republic to stand. The wisdom of his words should be quoted at length:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle… It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?[17]

In the end, religious liberty is a rare commodity among men and nations. It is difficult to win and far more difficult to keep. The society that sponsors and sustains it must avoid the apathy of small citizens and the greed of big government. And it must embrace the prudence of self-government under God's sovereign government. If not, religious liberty will end—not in word, but in reality. Let us remember the words of Abraham Lincoln at the Gettysburg address, when he hoped that, "This nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth."

Douglas R. Groothuis serves as Professor of Philosophy at Denver Seminary in Denver, Colorado. He earned his Ph.D in Philosophy at the University of Oregon. His articles have been published in professional journals such as Religious Studies, Sophia, Theory and Research in Education, Philosophia Christi, Themelios, Christian Scholar's Review, Inquiry, *and* Journal of the Evangelical Theological Society. *Dr. Groothuis' books include* Christian Apologetics *(InterVarsity, 2011),* In Defense of Natural Theology *(coeditor, InterVarsity, 2005),* Jesus in an Age of Controversy *(Wipf and Stock, 2002),* Truth Decay *(InterVarsity, 2000), and* The Soul in Cyberspace *(Wipf and Stock, 1999).*

[17]George Washington, *Farewell Address* (1796).

THE VIRTUOUS LAWYER

By Michael P. Schutt, Editor in Chief

Recall that it was a lawyer who tried to test Jesus: "Teacher, which is the great commandment in the Law?"

> And he said to him, "You shall love the Lord your God with all your heart and with all your soul and with all your mind. This is the great and first commandment. And a second is like it: You shall love your neighbor as yourself. On these two commandments depend all the Law and the Prophets."[1]

Our calling—as human beings and lawyers—is lived out in response to the two great commandments. In the words of Os Guinness,

> *Our primary calling as followers of Christ is by him, to him, and for him.* First and foremost we are called to Someone (God), not to something. . .
> *Our secondary calling, considering who God is as sovereign, is that everyone, everywhere, and in everything should think, speak, live, and act entirely for him.* We can therefore properly say as a matter of secondary calling that we are called to homemaking or the practice of law or to art history.[2]

We might say that our primary calling—the call to Him—is the center of the "great and first commandment." Our secondary calling—to the practice of law or art history—involves our response to the second great commandment. In short, our ordinary work is one of the primary vehicles through which God loves our neighbors. As Gene Veith points out, "God does not need our works, but our neighbor does."[3]

There are numerous and varied "secondary" callings. Some are called by God to be a wife or a husband, a son or daughter, citizen, employer, or employee. And most of us are also called to particular "good works" through our ordinary work, like law practice.

This all makes sense in light of what Scripture teaches about gifts and talents. In one of the clearest passages on the subject, Peter tells us that God gives us gifts for the benefit of others:

> As each has received a gift, use it to serve one another, as good stewards of God's varied grace: whoever speaks, as one who speaks oracles of God; whoever serves, as one who serves by the strength that God supplies—in order that in everything God may be glorified through Jesus Christ.

This passage applies not only to gifts we might consider "spiritual," but also to our law-related gifts and talents. The lawyer's calling—from God—is to love our neighbors in and the through the law with our law-related talents. The vision for law and virtue, for the lawyer of virtue, begins and ends with love of neighbor.

STEWARDS OF GOD'S GRACE

Peter's admonition to use our gifts to serve others as "as stewards of God's varied grace" is a great place to start thinking about what it might look like to love neighbors with legal gifts. If we are stewards of His gifts, and those gifts are conduits of God's "varied" grace administered to the world around us, what might his grace-filled work be *in and through the law*?

Surely, God's grace is at work in the world to vindicate the rights of victims and free the oppressed. In addition, God gracefully uses the arm of the state to do justice—to punish evildoers. By the same token, God is most certainly a grace-ful advocate of those accused by the state of doing evil. And His grace is no less in operation as he shepherds his bounty given as family assets in order for it to be used for good in the world. Or to assist parents in leaving an inheritance for their children. And reconciling those who are at odds.

In these and many other ways, prosecutors, criminal defense lawyers, civil litigators, transactional lawyers,

[1]Matthew 22:35-40 (ESV).
[2]Os Guinness, The Call: Finding and Fulfilling the Central Purpose of Your Life 31 (1998).
[3]Gene Edward Veith, God at Work: Your Christian Vocation in All of Life 38 (2002) (quoting Gustav Wingren).
[4]1 Peter 4:10-12 (ESV).

estate planners, mediators, and other lawyers are stewards, in a real and concrete sense, of God's grace in action in the world. Notice that in all of this, we are like the "one who speaks" in the First Peter passage quoted above—who Peter admonishes to "speak oracles of God." In other words, our calling as lawyers is not so much wrapped up in what we do, but in what God does through us. "We are God's workmanship," says Veith, "which means that God is at work in us to do the works He intends."[5]

It really is that simple. As we realize that our legal talents are gifts from God in the first place, held for the good of others at His pleasure and not our own, our view of law practice is transformed.

This is a freeing perspective, yet it is a relatively radical one. As a result, it is sometimes tough to cultivate in the midst of busy law practice. To borrow Paul's image from Romans 12, we are "squeezed into" the mold of the world around us—the bench and bar—by habit and practice, and therefore require a renewed perspective[6] on the nature of work, the source of law, and our identity as lawyers.

We must remind ourselves that law practice is not merely something we do in order to support the work of the "real" spiritual workers in the congregation and mission fields. All work, whether in court or in the pulpit, has dignity and spiritual value. The work we do with the gifts God gives reflects God's image in us, and the creation we steward and the neighbors we love are given by God into our care.[7] There is no distinction between secular and sacred work, and integrity compels us to complete our work in faith, in service to God and for love of neighbor. This is virtue.

We don't have to revolutionize the civil law or spend our days fighting for religious liberty in order to have a vision for ordinary law practice that embraces human law—even in a fallen world—as a means of real grace and real justice in the real world.

The frantic life at the bar tells us that we are simply too busy to systematically and prayerfully consider how our legal gifts may best be marshaled in love of neighbor. But if this is my calling from God, I must resist the spiritual apathy—and peer pressure—that keeps me from pursuing law practice as a means to love my neighbors. I cannot let my trial schedule or my laziness keep me from intentionally and willfully contemplating the theological implications of my daily work.[8]

It is within our power to resist the prevailing pattern of the contemporary legal world to embrace our calling as lovers of neighbors with our legal talents. We cannot do it alone, of course, so let us consider how we might spur one another on to love and good deeds as we seek to love our neighbors in and through the law to the glory of God, as we submit to the Lordship of Christ over our labors.

Mike Schutt is Editor in Chief of the Journal of Christian Legal Thought *and Visiting Professor at Trinity Law School. He directs Attorney Ministries, Law Student Ministries, and the Institute for Christian Legal Studies for the Christian Legal Society. Before joining Trinity Law School, he taught on the faculty of Regent University School of Law for twenty years and practiced law in Fort Worth, Texas. He is the author of* Redeeming Law: Christian Calling and the Legal Profession *(InterVarsity 2007) and is an honors graduate of the University of Texas School of Law.*

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[5] Veith, God at Work, at 38 (citing Ephesians 2:10).

[6] "Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God's will is—his good, pleasing and perfect will." Romans 12:2 (NIV).

[7] See, e.g., Timothy Keller with Kathryn Leary Alsdorf, Every Good Endeavor: Connecting Your Work to God's Work 51-52 (2012).

[8] Consider the implications here on the importance of Sabbath and leisure as well.

JURISPRUDENTIAL WORLDVIEWS AND ATTORNEY CONDUCT

How Christian Virtue Informs the Practice of Law

By William Wagner

Professing concern for preserving the integrity of legal institutions, bar authorities closely regulate the profession, promulgating and re-promulgating codes of professional conduct. Institutional integrity, though, cannot exist without some underlying concept of moral virtue. Our hope for institutional integrity depends less on adopting codes of professional conduct, than on whether moral virtue exists in the hearts of lawyers subject to these codes.

Moral virtue, however, does not arise in a worldview vacuum. Two competing jurisprudential worldviews exist in the United States today (though there are diverse nuances and iterations of each[1]) and they are not equally conducive to the concept of virtue. Broadly speaking, a Christian jurisprudential worldview sees God as the source of law and rights—where ageless moral absolutes provide a fixed and transcendent measure above human law. In the words of Sir Edwin Coke,

> God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law… And by this law, written with the finger of God in the heart of man… before any laws written and before any judicial or municipal laws.[2]

Sir William Blackstone adds: "God, when he created man… laid down certain immutable laws of human nature… and gave him also the faculty of reason to discover the purport of those laws."[3] The tasks of a government are, according to this worldview tradition, premised on a morality that predates and transcends that government itself. For example, Blackstone observed that when judges erroneously opine about law and later correct the error, the erroneous original opinion was never an authentic law in the first place.[4] Herb Titus observes, "Blackstone could never have arrived at that position, if he had not relied upon the revelation of God as the standard outside of man used to measure whether a certain opinion is law."[5]

This long-standing tradition in western jurisprudence makes it possible to connect codes of attorney conduct with a meaningful concept of 'the good.' Yet this tradition has been challenged by a competing worldview that interprets morality as a "temporally and spatially conditioned phenomenon" that is "subject to historical change" as desired.[6] This view begins not with the divine Creator but with the human creature seeing man as the ever-evolving measure—and measurer—of all things.[7] This enables authorities, on either the political left or right, to approach lawyer regulation as a subjective human creation.[8] Authorities are then free to re-define, transfer, take away, or evolve regulations without regard to fixed moral considerations. Professional codes of conduct may slowly become less of an expression of ethical "right" and more an expression of political

[1]See D Beyveld and R Brownsward, Law As Moral Obligation (Sheffield Academic Press 2005); John Finnis, Natural Law and Natural Rights (Oxford University Press 2005); Robert P. George, Natural Law Theory (Oxford University Press 1994)

[2]*Calvin's Case* 7 Coke Rep 13 (a), 77 Eng. Rep. 392 (1608

[3]Blackstone, Of the Nature of Laws in General, in Commentaries on the Laws of England, Vol I, 29–30 (Macmillian, 1979)

[4]Id. 70–71

[5]Id.

[6]Augusto Zimmermann, *Evolutionary Legal Theories—the Impact of Darwinism on Western Conception of Law* 24(2) Journal of Creation 106 (2010), citing and quoting Hans Kelsen, *The Pure Theory of Law—Part 1*, Law Quarterly Review 517 (II: 50) (1934).

[7]Zimmermann, supra note 7 at 103; See Dan Crone, *Assisted Suicide… A Philosophical Examination*, 31 USF L. Rev. 399, 422 (1997); see also Michael McConnell, *The Right to Die and the Jurisprudence of Tradition*, Utah L. Rev. 665, 667–669 (1997) and Charles E Rice, *Rights and the Need for Objective Moral Limits*, 3 Ave Maria L. Rev. 259 (2005).

[8]For analysis of similar phenomena in the international context, see Jakob Cornides, *Natural and Un-Natural Law*, Legal Studies Series, (2009).

"might." Followed through consistently, this worldview requires that attorney ethics codes must, ironically, be neutralized from any concept of "the good." As Ezekiel Emanuel argues:

> [I]nvoking a conception of the good… is not possible within the framework of a liberal political philosophy.… To justify laws by appealing to the good would violate the principle of neutrality and be coercive, imposing one conception of the good on citizens who do not necessarily affirm that conception of the good.[9]

Dick Keyes offers critique:

> [T]he cutting edge of relativism's critique is to say that all ultimate religious and philosophical beliefs are properly understood not as possible sources of true knowledge about God or ultimate truth, but as only products of their culture's groping to name the unnameable. But at the same time relativism claims for itself immunity from the force of its own critique. We are meant to believe that it alone is not just a product of the relativizing factors in its own (modern, Western, academic, tenure-seeking) culture, but that it is in some mysterious sense, objectively, timelessly true. It comes to us through an epistemological immaculate perception, whereby it miraculously escapes the acid bath of relativizing analysis.[10]

When ABA Model Rules and state codes of conduct are approached through the lenses of such a relativistic worldview, lawyers are led into precarious uncertainties. The current standards may say to go right, but when the lawyer follows this course he may discover that "right" is no longer "right." Worse, he may justify immoral conduct, defending his actions on the grounds that such conduct falls within the scope of his professional code. When these codes are enforced within a cultural context of widespread moral relativism, significant room remains for morally vicious behavior to progress unchecked within our legal institutions.

My observations over the years in the classroom, in practice, and from the bench, all reinforce the inadequacy of relativistic strategies to solve the serious ethical quandaries posed by concrete legal practice.[11] Consider a few examples from the ABA and selected state ethics rules governing the conduct of lawyers. The ABA's Model Rule defining disciplinable misconduct includes criminal acts that reflect adversely on an attorney's conduct, involving "honesty, trustworthiness or fitness as a lawyer," as well as non-criminal conduct involving dishonesty.[12] Nonetheless, it is conceivable under this rule that engaging in adultery, running a brothel, and distributing obscene pornography, all fall *outside* the defined parameters of disciplinable misconduct.[13] By comparison, various state bar rules place prohibitions on lawyers with deeply held religious beliefs from expressing their conscience in many facets of their professional roles. Such regulations (e.g., prohibiting and punishing a lawyer's speech) often seek, by force of law, to compel acceptance of behaviors expressly prohibited by God.[14] ABA rules also grant that lawyers may ethically disclose their client's confidential information in order to collect unpaid fees.[15] On the other hand, under some state codes and the ABA rules, lawyers may ethically withhold confidential information about a client's prior conduct—even if disclosure can prevent an impending death or catastrophic financial harm.[16] The lesson learned from such examples is that immoral conduct does not become moral simply because lawyers create a rule that renders it 'ethical' in a narrow legal sense. Conduct codes, particularly when interpreted and applied within a relativistic worldview context, lack the persuasive force to inspire and sustain moral integrity within our legal systems.

Perhaps it is time for a jurisprudential approach in which more robust standards of virtue become integral to a lawyer's personal and professional character. What does this mean for the way we practice law as Christian attorneys? It means that we must honestly reckon with

[9]Ezekiel J. Emanuel, *Where Civic Republicanism and Deliberative Democracy Meet*, 26 Hastings Center Rep. 12, 13 (1996).
[10]Dick Keyes, Pluralism, Relativism, and Tolerance, *A Series of L'Abri Lectures*, No.2, L'Abri Fellowship, Southborough.
Despite increased emphasis on ethics and professionalism in legal education, increasing numbers of law students cheat and treat their fellow students with disrespect. Likewise, increasing numbers of lawyers misrepresent matters to the court, and treat their colleagues with aggressive enmity.
[11]See ABA Model Rule 8.4 and comment.
[12]Id
[13]See e.g., Missouri Rule 4-8.4(g) and commentary; California Code of Professional Conduct Rule 2-400 (B) and commentary.
[14]Id
[15]Id.
[16]Id.

some potentially uncomfortable questions as Christians: Do people get a richer sense of Jesus and His character in the way that we practice law? Do the doctrines we believe, such as the reality of a triune God of love, make their way from abstraction into the kind of relational atmosphere that we maintain in our offices? Does the Christian worldview appear compelling to those who do not share it, not merely by argumentation in public media forums, but, more intimately, in the way we live our lives during and after office hours? Do we contradict our most sacred beliefs about God's truthfulness, grace, and sufficiency by bending the truth, obscuring facts, disrespecting opposing counsel, overestimating billed hours, indulging our pride, misrepresenting those who disagree with our worldview, acting with greedy intent, etc., even when such conduct may not technically qualify as misconduct by the standards of our professional codes?

As we seek to answer these questions, we must recognize that the void generated by the pervasive relativism of our day provides Christian lawyers with a unique and historic opportunity to impact our profession. To do so, however, we must let those in our professional spheres of influence see something objectively true and good about Jesus in the way that we practice law. In doing so, not by our own self-powered moral efforts but by yielding to the virtue-producing work of the Holy Spirit in our lives, we may raise the level of integrity throughout the broader legal system. Even those who may aggressively reject our worldview might see how the virtues it cultivates foster better client relations and reduce grievances.

This call to virtue in our legal practice, which cannot be inspired by either our culture's relativism or our profession's conduct codes, serves a broader public purpose as well. For the legal system to serve its function, the public must have some measure of faith that this system is made up of individuals who have the character required to administer justice. Unlike the military power of an executive branch, or the tax and spending power of a legislature, the only thing the judiciary receives from the people to assist it in carrying out its role is their trust in the institution's legitimacy to resolve disputes fairly under the rule of law. This trust is faltering in our day. Each time a lawyer behaves badly (whether inside or outside authorized ethics rules), the lawyer's action chips away at the public trust that underlies our essential legal institutions. If people continue to lose confidence in legal system's ability to resolve disputes fairly with integrity, they may, as in other parts of the world, resort to violence to resolve their disputes.

God's standards of virtue, which transcend the human-crafted standards of professional ethics, move us down a narrow road toward greater professional integrity, and, therefore, more public credibility in our legal institutions. With the help of our forgiving God who wrote the Law above our laws, may we commit to journey down that road together.

After an academic career as a tenured Professor of Law at a secular institution, Professor William Wagner joined the full-time teaching faculty at Trinity Law School. Professor Wagner has served with distinction in all three branches of the Federal government, including as United States Magistrate Judge for the Northern District of Florida, Senior Assistant United States Attorney in the Department of Justice, and Legal Counsel in the United States Senate. *The author wishes to thank Steven Kallman and Joe Townsend of the Great Lakes Justice Institute for their research assistance in the preparation of this article. Dr. Williams served as Editor of this Law & Virtue issue.*

THE CADAVER OF VIRTUE

Reviving Virtuous Practice in the Legal Service of Neighbor

By Andrew R. DeLoach

In a 1934 speech to the French Academy, Paul Valéry observed: "Virtue, gentlemen, the word virtue is dead, or at least, dying.... We have arrived at a point where the words virtue and virtuous can only be found in catechisms, in jokes, in the Academy, and in light opera."[1] In Valéry's estimation, virtue was alive only in theory—in the abstract and artistic discussion of it—but in practice and even ordinary conversation had very nearly drawn its last breath. And though we are now 80 years on from that speech, it is difficult to argue that Valéry's judgment does not still apply today. I sincerely hope that this very journal does not, paradoxically, provide evidence of our society's continuing failure to bring the word out of the "high-toned settings"[2] and resuscitate it in practice. Yet one needs only look to the states of contemporary psychology and ethics, where any ordinary human activity[3] —and even those classically characterized as vices[4]—can be transplanted into the cadaver of virtue.

Now if virtue is indeed dead, and if it is also true that virtue is "the utmost best a person can be"[5] and "the realization of the human capacity for being,"[6] then we must admit that no one is attaining to that utmost. We are a race of unrealized beings. I suspect this is partly so because, over the course of time, we have come—perhaps without much resistance—to think wrongly about virtue and really do not want to be brought back to those principles "we are all so anxious not to see."[7] Yet if we, as Christians and as legal professionals, are ever to realize our full capacity as human beings, we must be reacquainted with virtue and "constructively encouraged" (as Dr. Williams has said) to aim for the good in our daily lives.

ARE VALUES THE SAME AS VIRTUES?

But before I go on to this greater point, there are two important distinctions that must be made. The first thing to understand is that virtue is not to be found—in any complete and intended sense—in the legal rules of professional conduct. It may be quite praiseworthy that the American Bar Association "continues to pursue its goal of assuring the highest standards of professional competence and ethical conduct."[8] Many of us will recall a professor of Professional Responsibility instructing students that merely "being moral" is not enough to meet the standards of legal ethics. But surely the opposite is also true: understanding legal ethics does not make a person sufficiently moral. This, too, is recognized by the ABA: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."[9]

And this leads to the second distinction. Today it is common to hear people speaking of "values." They talk of "American values," or "feminine values," or "family values," and nearly always they are using the word interchangeably with "virtues." But this is a serious mistake.

[1]Paul Valéry, *Report on the Prizes of Virtue* (1934), Académie Française, http://www.academie-francaise.fr/rapport-sur-les-prix-de-vertu-1934 (last visited Oct. 21 2014).

[2]Josef Pieper, The Concept of Sin 1 (St. Augustine's 2001), Pieper here cleverly adapted Valéry's speech to discuss the death of the word "sin," and this book is a great resource in the present discussion. For further reading on the importance of the protection and stewardship of words, see C.S. Lewis, Studies in Words (Cambridge University Press 2013) and Marilyn Chandler Mcentyre, Caring for Words in a Culture of Lies (2009).

[3]See, e.g., Jonah Lehrer, *The Virtues of Daydreaming*, The New Yorker, Jun. 5, 2012, http://www.newyorker.com/tech/frontal-cortex/the-virtues-of-daydreaming. Here the word "virtue" appears only in the title, and its meaning within the article amounts to "usefulness."

[4]See, e.g., Ayn Rand, The Virtue of Selfishness (New American Library 1964).

[5]Josef Pieper, Josef Pieper: An Anthology 3 (Ignatius 1989).

[6]Josef Pieper, A Brief Reader on the Virtues of the Human Heart 9 (Ignatius 1991).

[7]C. S. Lewis, Mere Christianity 82 (HarperCollins 2001).

[8]Model Rules of Prof'l Conduct, Preface (2013).

[9]Id. Preamble and Scope.

The original sense of the word "value," in its uses both as a noun and a verb, is *worth or merit*—most frequently the monetary worth of some thing. Thus we speak of the value of our homes and our cars and so forth, and also of the value of a good upbringing or education. But when we come to the plural noun "values," we encounter a more dangerous sense. Though this form did not appear in the *Oxford English Dictionary* until 1989, there is no difficulty in suggesting that the word arrived at this now common usage through the influence of Friedrich Nietzsche.[10] As Gertrude Himmelfarb explains,

> It was in the 1880s that Friedrich Nietzsche began to speak of "values" in its present sense—not as a verb, meaning to value or to esteem something; not as singular noun, meaning the measure of a thing (the economic value of money, labor or property); but in the plural, connoting the moral beliefs and attitudes of a society.[11]

For Nietzsche really intended this act of verbicide, the murder of a word, to bring an end to morality and truth. "There would be no good and evil, no virtue and vice. There would be only 'values.'"[12] Consequently, these values would be purged of any objective moral sense, so that they would be nothing more than "neutral" attitudes, feelings, or preferences.[13] We are now faced with the ramification that this popular substitution of values for virtues actually "obscures moral discourse" to the point that "we no longer have any confidence that there are any shared purposes for human life."[14] And more pertinent still, this conflation of words inhibits a right understanding—and practice—of virtue. Where virtue has historically been understood as "excellence"—the perfection of character to which a person, created in the image of God, is called—we see that virtues "cannot be replaced by alternative attitudes and dispositions. To believe that they are negotiable is to make them into mere opinions and part of the relativism of the supermarket of possibilities for human action."[15] As soon as we grasp this, we recognize that a proper knowledge of virtue must be restored if we are to move beyond bare scholarship into practice—particularly where the practice of virtue intersects with the practice of law.

HOW DO WE "DO" VIRTUE?

Now we have said that virtue is the utmost of what a person can be, and that we ought to see that we are not attaining to that utmost. But we must understand that our failure to become "what man was made for" is due largely to the fact that this excellence—this moral perfection—is an ideal that we are unable to attain.[16] Thus every one of us is faced with a life "disposed toward his ultimate potential but not necessarily reaching it…."[17] How then can we expect to advance virtue in our individual lives, our profession, and our society? I believe the answer to this is that virtue comes through the practice—the *doing*, so to speak—of the virtues.

According to Aristotle, "nature gives the capacity for acquiring [the virtues], and this is developed by training"—so that by doing virtuous acts we actually become virtuous.[18] Though Aristotle defined human life apart from its Creator, we may nonetheless benefit from his description of virtuous human behavior,[19] as in his instruction that "[i]t is by our conduct in our intercourse with other men" that we become virtuous.[20] From this it is obvious that "[t]here is a difference between doing some particular just or temperate action and *being* a just or temperate man."[21] This is an important distinction, because we—as Christians and as legal professionals—desire right action for right reasons. Indeed, virtue does not consist in "being 'nice' and 'proper' in an isolated act or omission." Rather, the life of virtue grows over and over through practicing—doing—the virtues.[22] And

[10]Peter Toon, *Are Values the Same as Virtues?*, Touchstone, Summer 1996, available at http://www.touchstonemag.com/archives/article.php?id=09-03-013-v.
[11]Gertrude Himmelfarb, The Demoralization of Society: From Victorian Virtues to Modern Values 10 (1994).
[12]Id.
[13]Toon, supra note 10.
[14]Iain T. Benson, *Values and Virtues: A Modern Confusion*, Catholic Education Resource Center http://catholiceducation.org/articles/religion/re0328.html. (last visited Oct. 21, 2014).
[15]Toon, supra note 10.
[16]Lewis, supra note 2 at 69–70,.
[17]Pieper, supra note 5 at 3.
[18]Aristotle, Nicomachean Ethics 23–24 (Barnes & Noble 2004).
[19]Robert Kolb, Luther and the Stories of God: Biblical Narratives as a Foundation for Christian Living 127, 160 (2012).
[20]Aristotle, supra note 18 at 24 (emphasis added).
[21]Lewis, supra note 2 at 79–80.
[22]Pieper, supra note 6 at 18.

with that we can see that this is "how the virtuous man 'is': by the innermost tendency of his being he realizes the good by doing it."[23]

This inevitably drives us to the question: what does this "doing" look like? Unless we are to confine ourselves to simply thinking on the virtuous life of decency and integrity and so on—and in the process contribute to the seeming validity of M. Valéry's diagnosis of virtue—we must know how the practice of virtues manifests in the daily life of the individual. Thankfully, the answer is not a mystery; in fact, it is precisely in the ordinary that we find guidance. For the soundness of the virtues "lies in the fact that they are appropriate to objective reality…."[24] That is, the virtues touch on and conform to the reality of our existence, and this surely includes the reality of our roles in the legal profession. And so the Christian lawyer is "not to retreat from the realm of the ordinary and the everyday," pursuing religious high-mindedness and mystical experience while disregarding the real world of legal practice.[25] On the contrary, we neglect this reality when we go in search of a "distinctly Christian way" to be a lawyer; in fact, we must acknowledge that Christian and non-Christian lawyers "do pretty much the same thing."[26]

But here I must stop and explain one important difference between them, at least in the way they comprehend the pursuit of virtue in the legal profession. For Christians have a distinct view of calling that we call "vocation." In popular usage the word means simply one's job. But despite this weakened meaning of the term, there is a rich historical—and theological—sense of the word signifying "a comprehensive doctrine of the Christian life" that instructs Christian behavior and influence in society.[27] And this is exactly where the difference lies: for though non-Christian lawyers also have a vocation, Christian lawyers have a *particular* understanding of vocation as God's calling them into the world and God's action (His *doing*) through them in the service of their neighbor.[28] As a result of our creation by God and His entirely free gift of redemption, "our purpose in life is to do good works, which God Himself 'prepared' for us to do."[29]

And that, I believe, is the key. In order to realize our "capacity for being" (in other words, to fulfill our purpose) and truly become virtuous, we must have this particular understanding of vocation as God working through the Christian lawyer in the service of neighbor. Veith explains:

> In vocation, we are not doing good works for God—we are doing good works for our neighbor. This locates moral action in the real, messy world of everyday life, in the conflicts and responsibilities of the world—not in inner attitudes or abstract ideals, but in concrete interactions with other people.[30]

For just as we lawyers are looking for the answer to our virtue problem, this idea of vocation is nothing but Jesus' answer to the lawyer of his day: "You shall love your neighbor as yourself" (Matt. 22:39). This means that for Christian lawyers, "their whole efforts in [law] should be directed to putting 'Do as you would be done by' into action."[31] In this task, we do well to recognize that Christ is hidden in our neighbors, particularly those in need: "as you did it to one of the least of these my brothers, you did it to me" (Matt. 25:40).[32] And because our neighbor is anyone in need, the Christian lawyer who is neighbor to the needy is the one who shows mercy (Luke 10:37).[33]

Indeed, we know that love and service of our neighbor includes the "terrible duty," as Lewis calls it, to likewise love and serve our enemy.[34] Some may despair at that duty. But the Christian must appreciate that "your work will improve their lives so that they will praise God both for himself and in you."[35] In other words, God is praised by working through us for the betterment of others.[36] Of course, love of enemy does not require that the Christian lawyer betray his legal duty to his client by

[23]Pieper, supra note 5 at 5.
[24]Pieper, supra note 6 at 11.
[25]Gene Edward Veith, Jr., God at Work: Your Christian Vocation in All of Life 68 (Crossway 2002).
[26]Id.
[27]Id. at 17.
[28]Id. at 23, 67.
[29]Id. at 38.
[30]Id. at 39.
[31]Lewis, supra note 2 at 83.
[32]Veith, supra note 25 at 45.
[33]Timothy Keller, Generous Justice: How God's Grace Makes Us Just 76 (Dutton 2010).
[34]Lewis, supra note 2 at 115.
[35]Martin Luther, Treatise on Good Works 46 (Fortress Press 2012).
[36]Id.

helping his opponent; this would be a sin against vocation. But "enemy" as well as "neighbor" includes anyone in need, and "[n]o heart that loves Christ *can* be cold to the vulnerable and the needy."[37] Thus, the Christian lawyer becomes virtuous by living a life "prepared for self-sacrifice and service, with the love demonstrated by Christ, who had come to serve rather than to be served" (Mark 10:45).[38] Because God is gracious, the Christian lawyer will tend to his calling by practicing justice and goodness toward others, even to the point of setting aside his own rights.[39]

It is precisely on this notion of justice that the Christian lawyer ought to focus when seeking to advance virtue. There are several individual virtues, and one should be concerned to practice all of them. Yet justice, one of the four "cardinal" (or pivotal) virtues, is the one seemingly most suitable to the practice of law. [40] For where the other cardinal virtues are directed at the self, justice is directed toward the other—the neighbor.[41] "Justice says that there is the other who is not like me but who nevertheless is entitled to what is his. The just person is therefore just in that he…assists him toward that which belongs to him."[42] And there is a further point: the more we realize that we are the recipients of God's gifts, we become ready to give what we do not owe—we "will decide to give something to the other that no one can force [us] to give."[43] God's justice toward us "always presupposes the work of mercy"—and thus our justice toward neighbor must be founded on mercy as well.[44] Because our society is dominated by injustice—by persistent human want and need—the Christian lawyer must be willing to serve clients beyond mere legal obligation, for "justice without mercy is cruelty."[45]

Now I think every Christian lawyer can imagine an assortment of illustrations (and perhaps even specific cases) for what this virtuous doing may look like in the daily practice of law. But we ought briefly to consider Scripture's exhortation to practice justice as a foundation for the vocation of lawyer. For repeatedly we see there that justice means "taking up the care and cause of widows, orphans, immigrants, and the poor,"[46] as in Zechariah 7:9–10: "Render true judgments, show kindness and mercy to one another, do not oppress the widow, the fatherless, the sojourner, or the poor…." As Keller explains about Job's example, it would be "a violation of God's justice" to think of one's own goods—and here we may add time, resources, skills, etc.—as belonging to himself alone; rather, as Job had done, we ought to turn our neighbor's life "into a delight."[47] This means that Christian lawyers will work and give beyond the neighbor's need, by always being "ready to use what they possess to help and serve others."[48]

SHOULD WE BOTHER BECOMING VIRTUOUS?

Of course, after all of this one may ask: Why should we be virtuous? Why ought we do justice? In other words, we must face up to the question of motivation. For though great teachers and scholars have over the centuries made many appeals to virtue—including "our virtue," justice—these appeals have arguably failed to properly motivate human beings to be virtuous, or even to give them any sufficient reason why they should be virtuous.[49] Yet I believe there are two facts—realities—that provide a sure and satisfying motivation for the practice of virtue. The first fact is that God creates human beings in His image, and this image brings with it worth and dignity. Thus, the image of God "is the first great motivation for living lives of generous justice, serving the needs and guarding the rights of those around us. It brings humility before the greatness of each human being made and loved by

[37]Keller, supra note 33 at 53 (emphasis in original).
[38]Kolb, supra note 19 at 160.
[39]Id. at 144. See also Pieper, supra note 6 at 20, where he says in a similar fashion that it is impossible to practice virtue "without the constant readiness for disregarding oneself."
[40]For an excellent introduction to the cardinal and theological virtues, see "Book Three—Christian Behavior" in Lewis, supra note 2 at 67–150. For further discussion of the cardinal virtues, though from a uniquely Thomist perspective, one may also consult Josef Pieper, The Four Cardinal Virtues (University of Notre Dame Press 1966).
[41]Id. at 54.
[42]Pieper, supra note 6 at 22–23.
[43]Id. at 24.
[44]Pieper, supra note 40 at 105.
[45]Id. Likewise, in Micah 6:8 we are instructed (in Keller's paraphrase) "to do justice, out of merciful love." Keller, supra note 33 at 3.
[46]Keller, supra note 33 at 4.
[47]Keller, supra note 33 at 13.
[48]Kolb, supra note 19 at 121.
[49]Keller, supra note 33 at 79.

God."[50] More specifically, what motivates Christian lawyers to serve their neighbors is to see Christ in them. When the lawyer aids the helpless and advocates for the victim, he is really aiding and advocating for Christ. And "He accepts what we do for others as if we had done it for Him."[51]

The second reality, and the greater motivation for practicing virtue, is the grace freely given to us in God's redemption. According to Keller: "If a person has grasped the meaning of God's grace in his heart, he will do justice.... Grace should make you just."[52] Paul taught that because we receive God's acceptance and blessing as a free gift through Jesus Christ, we can and will gladly live as we ought. As "Jesus came and stood in our place," so we Christian lawyers stand in the place of others, those neighbors in need; because of this free gift of Christ, we do not simply wish them well but actually render our works to them beyond their barest need (James 2:15–16).[53] This life, in Keller's words, "poured out in deeds of service to the poor is the inevitable sign of any real, true, justifying, gospel faith. Grace makes you just."[54] And this, finally, is how we bring virtue back to life in the practice of law and in our daily lives: because God has been extravagantly gracious and merciful to us in Christ, we can joyfully love and serve our neighbors.

Andrew DeLoach is a graduate of California Western School of Law, and practices in estate planning and probate law. He is an adjunct professor at Trinity Law School, where he teaches courses in Wills, Trusts & Estates; Legal Research and Writing; and Jurisprudence; as well as Concordia University Wisconsin where he teaches an online graduate course in Bioethics and the Law. He also serves as Professor-in-Residence for Trinity Law School's summer International Human Rights program in Strasbourg, France, where he is a Fellow of the International Academy of Apologetics, Evangelism & Human Rights.

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[50]Keller, supra note 33 at 87.
[51]Veith, supra note 25 at 45.
[52]Keller, supra note 33 at 93–94.
[53]Keller, supra note 33 at,99.
[54]Keller, supra note 33 at 99.

TOWN OF GREECE, BRONX HOUSEHOLD, AND GOVERNMENTAL REVIEW OF RELIGIOUS SPEECH

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

Overshadowed by the vitally important Supreme Court decision in *Burwell v. Hobby Lobby*,[1] in which the Court upheld the Religious Freedom Restoration Act's protection of the free exercise of religion, the Court's other major religious liberty decision last Term, *Town of Greece v. Galloway*,[2] also has important, if much narrower, implications for future religious liberty jurisprudence. In *Town of Greece*, the Court upheld a town council's practice of opening its monthly meetings with prayer. The decision is the latest installment in a long line of Supreme Court cases that prohibit government officials from parsing religious speech.

TOWN OF GREECE BUILT ON *MARSH*

Thirty years ago, in *Marsh v. Chambers*,[3] the Supreme Court upheld Nebraska's practice of paying a chaplain to open its legislative sessions with prayer. For sixteen years, the same Presbyterian minister had offered the legislative invocations. By a 6-3 vote, the Court upheld the practice, relying on the fact that the First Congress had written the First Amendment and sent it off to the States for ratification nearly simultaneously with its vote to approve hiring chaplains for the House and Senate. "In light of the unambiguous and unbroken history of more than 200 years," the *Marsh* Court concluded that "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[4] The three dissenting justices (Justices Brennan, Marshall, and Stevens) would have found that legislative prayers violated the Establishment Clause.

Since *Marsh*, challenges to prayer by local government bodies, and occasionally to prayer by state legislatures, have been common in the lower courts. In particular, pressure to cabin Marsh increased significantly after the Court in *County of Allegheny v. American Civil Liberties Union*[5] characterized *Marsh* as applying only to nonsectarian prayers. Relying on *Allegheny*, some courts – but by no means all– ruled that legislative prayers must be nonsectarian to pass constitutional muster.

As appellate court decisions created a patchwork jurisprudence regarding legislative prayers' constitutionality, the Supreme Court repeatedly refused to grant certiorari. Its decision to review the Second Circuit's ruling in *Town of Greece* caught most court watchers by surprise.

Since 1999, Greece, New York, had an unwritten policy that allowed any citizen to volunteer to give the prayer at the beginning of the monthly town council meetings. Christian prayers dominated the invocations, although Jewish, Wiccan, and Baha'i prayers were also permitted – at least, after the plaintiffs' initial threats of litigation. Despite agreeing that the town council's prayer practice met the *Marsh* criteria, the Second Circuit applied an "endorsement" analysis and found the practice unconstitutional. Relying on Allegheny and largely based on "the steady drumbeat of often specifically sectarian Christian prayers," the Second Circuit found that "on the totality of the circumstances presented the town's prayer practice identified the town with Christianity in violation of the Establishment Clause."[6]

Somewhat surprisingly, in *Town of Greece*, both the majority (Justice Kennedy writing for Chief Justice Roberts and Justices Scalia, Thomas, and Alito) and the dissenters (Justice Kagan writing for Justices Ginsburg, Breyer, and Sotomayor) unanimously agreed that *Marsh*

[1]134 S. Ct. 2751 (2014). For a concise analysis of *Hobby Lobby* decision and its immediate aftermath, see Kim Colby, "After Hobby Lobby," *The Christian Lawyer*, Vol. 10, No. 2.
[2]134 S. Ct. 1811 (2014).
[3]463 U.S. 783 (1983).
[4]*Id.* at 792.
[5]492 U.S. 573, 603 (1989) ("The legislative prayers involved in Marsh did not violate this principle because the particular chaplain had 'removed all references to Christ.'") (quoting *Marsh*, 463 U.S. at 793 n.14).
[6]*Galloway v. Town of Greece*, 681 F.3d 20, 32 (2d Cir. 2012).

was correctly decided. After thirty years of being characterized as *sui generis* and marginalized by numerous lower courts, the *Marsh* decision gained renewed legitimacy in *Town of Greece*. In a remarkable recovery, a 6-3 vote in 1983 became a 9-0 reaffirmance in 2014. The *Town of Greece* decision makes it difficult, if not nearly impossible, for opponents of legislative prayer, as well as other traditional government acknowledgements of religion, such as the national motto or inaugural prayers, to marginalize the *Town of Greece* decision to the degree that *Marsh* had been over the past three decades.

Concluding that the town's prayer practice was consistent with *Marsh*, the majority held that "[t]he town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents."[7] The Court rejected "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard" as "not consistent with the tradition of legislative prayer."[8] Nor does the fact "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines . . . remove it from that tradition."[9] However, the Court warned that "the practice over time is not [to be] 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'"[10]

THE COURT PASSES ON PARSING RELIGIOUS SPEECH

Because of the Second Circuit's rationale for its decision, the issue before the Supreme Court was *not* whether all prayers at municipal meetings violated the Establishment Clause, but only whether *sectarian* prayers were unconstitutional. The challengers' narrow win below made it more difficult to win in the Supreme Court. Given the Court's past practice of denying review in cases challenging legislative prayer, the Second Circuit panel probably did not anticipate further review. A frontal challenge to all municipal prayers might well have been easier to represent at oral argument. Such a direct challenge might have had a better chance of success than one that asked the Court to approve a standard that required government officials to determine whether prayers were sectarian or nonsectarian. Both at oral argument and in the decision itself, the Court divided sharply on the question whether government officials could constitutionally determine whether a prayer was nonsectarian (and therefore permissible) or too sectarian (and therefore impermissible).

Choosing a well-travelled path, the majority rejected the idea that the Establishment Clause required, let alone permitted, government officials to decide whether a prayer was sectarian or nonsectarian. The Court refused to ask legislatures "to act as supervisors and censors of religious speech," which "would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact."[11] Candor requires the observation that the Court's opinion seems to necessitate some minimal oversight of the content of the prayers, in light of Justice Kennedy's warning against "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose."[12] Nonetheless, the Court's overriding message condemns parsing religious speech.

This "anti-parsing" rationale places *Town of Greece* squarely within the Court's frequent rejection of government officials' parsing of religious speech. Beginning with *Cantwell v. Connecticut*,[13] the Court frequently has held that government officials may not determine whether citizens' speech is or is not religious. Government officials may not decide whether a citizen's speech is an "address" or a "sermon."[14] Government officials may not decide whether religious speech is "worship" or "instruction" – or just "religious speech."[15]

Because of this long line of cases, the Supreme Court should review another recent, wrongly decided Second Circuit decision, *Bronx Household of Faith v. Board of Education of New York City*,[16] an opinion also joined by Judge Calabresi, the author of the *Town of Greece* decision in the Second Circuit. Despite a strong

[7] 134 S. Ct. at 1828.
[8] *Id.* at 1820.
[9] *Id.* at 1823.
[10] *Id.*, quoting *Marsh*, 463 U.S. at 794-95.
[11] *Id.* at 1822.
[12] *Id.* at 1824.
[13] 310 U.S. 296 (1940).
[14] *Fowler v. Rhode Island*, 345 U.S. 67 (1953).
[15] *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 272 n.11 (1981). See also, B*oard of Education v. Mergens*, 496 U.S. 226, 248 (1990).
[16] 750 F.3d 184 (2d Cir. 2014), *cert. pet. filed*, No. 14-354 (Sept. 27, 2014).
[18] 876 F.Supp.2d 419 (S.D.N.Y. 2012).

district court opinion in favor of the religious community group,[17] and a well-reasoned dissent by Judge Walker, in *Bronx Household*, a Second Circuit panel upheld the New York City Board of Education's discriminatory policy that grants expansive access to community groups to rent empty school facilities on weekends and evenings for a broad variety of activities. The Board, however, adamantly refuses to rent facilities to religious community groups for "religious worship services," even though the Board acknowledges that it cannot refuse to rent to groups wishing to engage in religious speech, even including speech that is "religious worship." But according to the Board, the Constitution permits, and may even require, it to deny access to community groups that would use facilities for "religious worship *services*."

Representing associations that encompass thousands of Christian and Jewish congregations in New York City and nationwide, the Christian Legal Society filed a friend-of-the-court brief. The brief urges the Court to remedy this unconstitutional discrimination, based in part on the Court's traditional rejection of government officials' examining and sorting citizens' religious speech.[18] The Court should announce in January whether it will review the Second Circuit's decision.

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

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

[17] 750 F.3d 184 (2d Cir. 2014), *cert. pet. filed*, No. 14-354 (Sept. 27, 2014).
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