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

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

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STATEMENT OF PURPOSE

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

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

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

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

EDITORIAL POLICY

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

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

To submit articles or suggestions for the Journal, send a query or suggestion to Mike Schutt at michsch@regent.edu.

DISCRIMINATION AND RELIGIOUS LIBERTY IN PUBLIC DISCOURSE

By Michael P. Schutt, Editor in Chief

Next year will mark the 30th anniversary of the publication of Neil Postman's important and prophetic social commentary, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*. It is a brilliant discussion of the rise of the television age and its detrimental effect on meaningful public discourse and reasoned argument. For me, the most enduring passage of the book, one that I have returned to over and over in the past two decades, is his short introduction, in which he contrasts the apocalyptic visions of George Orwell's *1984* and Aldous Huxley's *Brave New World*:

> Orwell warns that we will be overcome by an externally imposed oppression. But in Huxley's vision, no Big Brother is required to deprive people of their autonomy, maturity and history. As he saw it, people will come to love their oppression, to adore the technologies that undo their capacities to think.
>
> What Orwell feared were those who would ban books. What Huxley feared was that there would be no reason to ban a book, for there would be no one who wanted to read one. Orwell feared those who would deprive us of information. Huxley feared those who would give us so much that we would be reduced to passivity and egoism. Orwell feared that the truth would be concealed from us. Huxley feared the truth would be drowned in a sea of irrelevance. Orwell feared we would become a captive culture. Huxley feared we would be come a trivial culture, preoccupied with some equivalent of the feelies, the orgy porgy, and the centrifugal bumblepuppy.[1]

As the television age has become the Internet era and the Facebook age has spawned the Twitter era, we seem well on our way to becoming Huxley's preoccupied trivial culture, reduced to "passivity and egoism," while the truth drowns in a sea of irrelevance.

The preoccupied, trivial culture, reduced to passivity and egoism, is readily apparent in what passes for "discourse" these days on the topic of homosexual rights and the same-sex marriage movement. Ill-defined and intensely personal "identity" issues, based primarily in sexual pleasure-seeking, now dominate the field in public discussion of "rights" and "liberty" in this country. Homosexual activists pitch the language of equality, civil rights, and love, and the sound bite-conditioned masses jump on the bandwagon.

More important than freedom of association, freedom of speech, and the free exercise of religion, tolerance trumps all—unless one advocates for tolerance of religious practice.

Yet, contra Postman, Big Brother has played a role as well. In the courts, state civil rights commissions, and the legislatures, tolerance has ascended the policy ladder and emerged as the highest good. More important than freedom of association, freedom of speech, and the free exercise of religion, tolerance trumps all—unless one advocates for tolerance of religious practice. Lately, Big Brother simply doesn't abide practices that tread on the faddish preoccupation with homosexual orthodoxy. Don't want to serve as the official photographer at a homosexual wedding? You need sensitivity training. Don't want to bake their cake? Pay a fine, attend classes on gender identity, and keep a list of all the cake orders you accept or reject, and you may get to keep the bakery you've built, as long as you capitulate

[1] Neil Postman, Amusing Ourselves to Death: Public Discourse in an Age of Show Business vii (1985).

and bake the cake. Discourse? Agree or be crushed by the political machine.

The 2013 Christian Legal Scholars' Symposium, held at the CLS National Conference in Clearwater Beach last October, addressed "Discrimination, Pluralism, and Religious Freedom," hoping to advance a thoughtful discussion on these and related matters. Three luncheon keynotes kick-started the conversation around the question: "Is religious freedom essential for diversity and civil rights, or their opposite?"

We publish the three addresses here.

Mike Schutt is the director of the Christian Legal Society's Law Student Ministries and the Institute for Christian Legal Studies, a cooperative ministry of CLS and Trinity Law School in Santa Ana, California. He is Visiting Professor at Trinity, and served on the faculty of Regent University School of Law for 20 years. The Institute for Christian Legal Studies encourages students to seek and study biblical truth as it relates to law study and practice. Schutt is the author of Redeeming Law: Christian Calling and the Legal Profession (InterVarsity Press 2007). Schutt is an honors graduate of the University of Texas School of Law.

PRINCIPLED PLURALISM

By Stephanie Summers, CEO, Center for Public Justice

How do we live together in this nation given our deep differences? Can we do it without compromising our religious convictions? Can we do justice to diverse religions and points of view, while keeping the public square open to people and institutions of faith—and those who claim no faith?

I contend that we can, and in fact, that God calls Christians to just this kind of posture in our thoroughly diverse society. I contend that an approach to government and the laws and policies it enacts, called principled pluralism, is the way forward.

Principled pluralism stands in stark contrast to approaches that seek government-backed privilege for one religion or ideology. Principled pluralism also stands in stark contrast to approaches that seek for government to establish a secular or "naked" public square, absent of religious points of view.

Principled pluralism stems from three basic convictions. First, we recognize that government is only one of many institutions in society. States are not churches or families, and they do not share the same purposes. These institutions, among others, are different—and they have different, and important, God-given callings.

When we look at the American political community, made up of government and citizens, we see that government is one part of a diverse social landscape that includes families, businesses, schools and colleges, social-service organizations, voluntary and membership associations like the Christian Legal Society, the Institutional Religious Freedom Alliance, and the American Bar Association.

The jurisdiction of American federal and state governments is (or should be) limited to the making, executing, and adjudicating just public laws for every person who lives under the jurisdiction of those governments. In making, executing, and adjudicating public laws, government must not ignore or displace other kinds of human responsibility God has given.

In my family, we develop rules for ordering our common life, based on biblical principle. One of these is an agreement between my husband and me as to the amount of money we can freely commit toward a gift of financial support without seeking the advice of the other person. My point here is that government is only one institution, among many in society, and that government does not ignore, nor should it displace, the ordering of the generosity of my family. Government is only one of many institutions in society, and its authority is not limitless.

Humans exist as family members, faith-community members, economically-organized employers and employees, communities organized for the purpose of developing professional practices and more.

Second, we recognize that government should not treat humans merely as individual citizens. Governments are duty-bound to protect and uphold the diverse organizations that structure civil society.

Far too frequently, American Christians have over-emphasized individuality and failed to see the rich tapestry of capacities and relationships we also inhabit. While our high view of the human person rooted in the *Imago Dei* requires us to give room for individual flourishing, just government should not treat humans merely as individual citizens—for our God-given capacities and relationships show we are more than this.

As a student in a classroom, you are part of an educational community that exists for the purpose of education—teachers, administrators, fellow students, and more. When your instructor arrives, her expectation is that you are committed to learn in the context of that community organized for the purpose of learning.

We are here today in the context of the shared professional affiliation of the Christian Legal Society, and you have, I believe, come here not for the purpose of revising the grocery list for my family. It is a simple example, but

God has given to humans the development of these capacities and institutional relationships to such an extent that you are *and are more than* a member of CLS or a student in a classroom. You are *and are more than* a citizen in a political community under law. Humans exist as family members, faith-community members, economically-organized employers and employees, communities organized for the purpose of developing professional practices and more.

Principled pluralism contends that government, as a matter of principle, is obligated to do justice to all of these non-governmental organizations and institutions that make up society because these institutions are more than the sum of the individuals who inhabit them. Principled pluralism is about the just relationship of government to the many kinds of institutional relationships in society.

Finally, principled pluralism contends that the government should give equal treatment to different communities of faith, and those who claim no faith—and that government should give equal public room to people of all faiths and those who profess none.

This means that there should be constitutional recognition and protection of religious life in society, stemming from a biblically-rooted conviction that governments have not been ordained by God for the purpose of separating believers from unbelievers. Governments have not been ordained by God for the purpose of giving privilege to Christians and the church, or serving the interests of one religion (or those who profess no religion) over others.

Governments—and the laws they legislate, execute, and adjudicate—should conform to the norm of justice.

One of our senior fellows, Gideon Strauss, likes to say: "Principled pluralism is not just about the stances we take in public life, it is about how we actually build our society."

I contend that we can, and in fact, that God calls Christians to just this kind of posture—principled pluralism—as the way forward.

Stephanie Summers is the CEO of the Center for Public Justice, an independent, non-partisan civic education and public policy organization based in Washington, D.C., and is the publisher of the online journals Capital Commentary and Shared Justice. Ms. Summers serves on the Board of Directors for the Institutional Religious Freedom Alliance and is a member of the advisory boards for the Institute for Public Service (IPS) at Pepperdine University and the Chicago-based Bright Promise Fund. She earned her master's degree in nonprofit management from Eastern University, where she holds an appointment to the Board of Fellows for the Ph.D. in Organizational Leadership. She currently chairs the board of The McIlvaine Fund, an alumni and parent group supporting CCO (Coalition for Christian Outreach) campus ministry at her undergraduate alma mater, Kenyon College. Ms. Summers has extensive experience in managing nonprofit organizations, building strategic partnerships, and working with volunteers to grow organizational capacity and impact. Prior to her appointment at the Center for Public Justice, she spent 12 years with the CCO, where her roles included Vice President for the Eastern Region and Vice President for Organizational Development. She began her career in nonprofit administration as executive director of The Open Door, a church-based youth center in Pittsburgh, Pa. Ms. Summers is a member of the Association of Fundraising Professionals. She and her husband, Jason E. Summers, are residents of the District of Columbia.

IS RELIGIOUS FREEDOM ESSENTIAL FOR DIVERSITY AND CIVIL RIGHTS . . . OR THEIR OPPOSITE?

By Stanley Carlson-Thies

"Civil rights" include rights that are potentially at odds with one another. The term refers to not only the hard-won bans against racial subordination and gender-based and sexual orientation-based discrimination; it also safeguards the free exercise of religion.

–Martha Minow, Harvard Law School,
"Should Religious Groups Be Exempt from Civil Rights Laws?" [1]

Have you been called a bigot because of your conviction that faith is important for understanding the world? Or because of the kind of intimate relationships you are careful to cultivate? Or because organizations you admire—say, the Christian Legal Society—maintain and defend beliefs and conduct standards that are unpopular in today's world?

Do you feel overwhelmed, guilty of insufficiently supporting civil rights because you cling to historic Christian convictions and a biblically faithful way of life?

Yet a fundamental civil right is your right to freely exercise your convictions about the kind of world God made and the kind of life he calls us to, the kind of life that is flourishing.

And this civil right of religious exercise is a right not just for individuals—you and me—but also for faith-based organizations, like the Christian Legal Society, CLS student clubs, Catholic Charities, Bethany Christian Services, Jewish Community Services, and many more—organizations that we all count on in our society to educate, heal the sick, rescue the oppressed, aid the poor, counsel the addicted, and so much else.

Religious freedom is a fundamental right in our society, a basic building block for a society in which people can live according to their deepest convictions and make their best contributions to the society.

Religious freedom, the freedom to exercise our religion, should not be lightly subordinated to other civil rights—even when people and organizations of faith are active in ways that popular culture and governmental majorities are convinced are wrong.

In this lunch-time discussion and the extended discussion around tables just after lunch, we'll consider religion and civil rights as big questions. Specific cases and laws and regulations will be mentioned, but we intend to consider the very big picture—big questions about how far religious freedom should go, what religious freedom means for organizations, how different rights intersect and what to do about that intersection. We want to think together about how, in our diverse society with so many different fundamental sets of convictions, we can live together tolerably, even with mutual respect. We want to take seriously the fact that, these days, very fundamental matters have been thrown open to heated discussion: not just the rightness of particular laws, but the very concepts of justice and discrimination and fairness and equality.

Perhaps there is some kind of moral majority in our society, but is hard to imagine what it is, isn't it? Instead, we experience moral diversity—diverse and competing views of what is good and right, diverse and competing views of how best to live, how best to help the needy, how best to respect each other's dignity.

These differences—diverse views, differentiated actions—naturally lead to discrimination: choosing to do one thing rather than another, to value one way instead of the other, to praise some conduct while saying that other conduct is not the best.

Not all of these acts of discrimination are wrong—many of them may even be vital, praiseworthy. These different choices, different ways of acting, often reflect different frames, convictions, world views, religions—they express different convictions about life and respect and flourishing, often different religions.

The different views are not necessarily wrong, even when they are unpopular, behind the curve,

[1] http://papers.ssrn.com/so13/papers.cfm?abstract_id=1013417

old-fashioned. And they should not necessarily be suppressed by government, even when large majorities or powerful political figures or cultural forces are sure that the views are not acceptable, not progressive. As Notre Dame law professor Richard Garnett puts it: "It is not true that 'discrimination' is always or necessarily wrong. Nor is it the case that governments always or necessarily should or may regulate or discourage it."[2]

We have a system and tradition of limited government—limited exactly to preserve a large space for people and organizations to live according to their deep and voluntary convictions, even when those convictions are unpopular. Limited government allows for counter-cultural organizations and counter-cultural lifestyles.

That freedom is especially important in an age when biblical convictions have become unpopular and sometimes even are regarded as damaging and hateful.

So consider some complications to the easy narrative that religion and religious views and religious organizations are dark and negative; that religious freedom ought to be limited, suppressed, and curtailed so that civil rights can flourish and justice can be achieved.

For example, suppressing through city ordinances what some consider to be a hateful view about sexual orientation may seem to be an easy gain for justice and freedom and dignity—but maybe there is more to consider:

> The civil rights movement succeeded for many reasons. This book isolates and magnifies one reason that has received insufficient attention: black southern activists got strength from old-time religion, and white supremacists failed, at the same moment, to muster the cultural strength that conservatives traditionally get from religion. Who succeeded in the great cultural battle over race and rights in the 1950s and early 1960s? Those who could use religion to inspire solidarity and self-sacrificial devotion to their cause. Who did not have such religious power? Two groups: those who failed—the segregationists—and those who succeeded only by attaching themselves to the religious protesters—the liberals.[3]

Religious power is powerful and although sometimes it has been used to crush legitimate civil rights, in our own history it was the engine of the civil rights movement—the source of the grit, the legitimizing concepts, the staying power, the connecting force. There is no good excuse to simply play off civil rights against religion and to say that religion must give way so that people's rights, their dignity, can be elevated. Religion may be essential for social justice, for mutual respect, for movements of change.

For example, the San Antonio Human Rights Coalition upholds as a human right the freedom of religious and other norm-shaped organizations to choose employees and shape their services based on the organizations' respective missions—in the face of an effort to greatly expand the municipal nondiscrimination rules. Their website states a goal of "Supporting fundamental human rights—conscience, speech, association—in the face of unjust discrimination." This is a different kind of Human Rights Coalition—not one that pits civil rights against religion but one that regards religious freedom to be a fundamental human right.

What about the religious exercise rights, the religious freedom, of faith-based organizations?

Other rights—the desire of secular people to avoid religion, gay rights of various kinds, the pro-choice movement—are very commonly pitted against the freedom of faith-based organizations to operate and serve in the ways they are sure God has called them to do.

By faith-based organizations here I mean not churches but parachurch organizations—religious but not constructed to promote worship. And some companies—for-profit organizations—fall into the same category: I call them companies of conviction.

So we are talking here mainly of Gospel rescue missions, Catholic hospitals and health clinics, Jewish workforce development organizations, Teen Challenge drug treatment facilities, Southern Baptist daycare centers, Muslim, Hindu, Sikh neighborhood charities, denominational retirement homes, religious higher education, religious K-12 schools, and much more. In various ways these are all counter-cultural. And too often people who don't like those counter cultural practices want to enlist government to suppress the practices, calling them discriminatory.

These faith-based organizations want religion to be significant in how they appear and what they do. And yet at least one Gospel rescue mission was hauled into court by someone who wanted to participate in its no-cost drug treatment program—but only after all of the Jesus

[2]Richard Garnett, *Religious Freedom and the Nondiscrimination Norm*, in Austin Sarat, ed., Legal Responses to Religious Practices in the United States: Accomodation and Its Limits 194-227 (2012).

[3]David L. Chappel, A Stone of Hope 8 (2007).

talk was first forced out of the program. Fortunately, the government said it would not connive with this effort to suppress voluntary religion.

These organizations often have religion-based conduct standards for their employees. The organizations say they stand for particular convictions about intimate relationships, particular views about what a God-honoring marriage is. They don't necessarily want the government to impose those views on all of the rest of society, but they do want to live by those convictions themselves—to model what they say they believe. But to some powerful groups in our society, this is just discrimination and it should not be allowed. The organizations ought to be required to drop these conduct requirements, forced to hire people without regard to their sexual conduct or kind of marriage.

Or these organizations may be pro-life and want to be consistently pro-life: not just to say they believe it but to put those views into practice in the actions of the organization. So if it is a Catholic hospital, it declines to perform or assist in elective abortions. If a crisis pregnancy clinic or pregnancy resource center, it can't understand why, although it tells its clients to choose life, not abortions, the health care regulations require its health insurance to include emergency contraceptives that the clinic believes kill nascent life. Yet some think the government ought to require Plan B coverage and, in the case of the hospital, that it be banned from getting Medicaid funds or even be denied the certificate it requires in order to open its doors and to offer its services. It's as if the government ought to use its laws and regulations to slice off those practices and ways of serving that don't fit the currently popular consensus.

But cutting off the countercultural practices will give us a flattened society, less diverse, less reflecting of the actual convictions of people, permitting less freedom, less free exercise of religion and conscience—there will be more conformity, less opportunity for us to be counter cultural, to obey God even when the society is running after other gods.

Building on everything up to now, I'd like to make just three simple points.

1. Religious exercise requires organizations.

Even worship needs organizations unless it is just personal or family worship. To develop the riches of the faith, train leaders, pass on convictions to the next generation, to be able to regularly come together—for these and other vital reasons, even worship needs an organizational home.

And that is even more the case when it comes to the other religious duty we have—one duty is to love God with all of our strength and being; the other duty, the second commandment, is to love our neighbors as we love ourselves (Matt. 22:37-39).

There is much we can do to love our neighbors in a very personal way, but much love of neighbor needs an organization—so that it can persist and improve over time, so that many can be drawn together, each with his or her own special gifts, to serve together, so that it is possible to offer solutions that are sufficiently large to make a significant contribution to solving injustices.

Giving cups of cold water, visiting prisoners, helping the fatherless, assisting an overseas community to achieve sustainable development, educating the young, offering health care—all these and many other acts of religious service require organizations, often very sophisticated organizations. This is how a passion to serve becomes an initiative that can make a big impact over time.

Think of it: World Vision, the Christian Legal Society, the International Justice Mission, Notre Dame and Villanova, countless examples of believers responding to the second commandment to love our neighbors as ourselves—they all need organizations.

These acts of mercy and justice and education and healing—they need more than a Meet Up group, or a list-serve, or a flash mob.

2. Non-discrimination rules that flatten organizations undermine religious freedom.

Yet these organizations that have been built to express, to put into practice, a particular, faith-shaped vision of how to help our neighbors—they will lose their effectiveness, the trust people have in them, their attractiveness to certain employees, their ability to serve neighbors in their distinctive ways—if their countercultural practices are deemed illegal by government and forbidden.

If the organization is designed to offer holistic health care that includes close attention to the spiritual dimension, it will not long flourish, or even exist, if it is forbidden to consider religion when hiring its staff.

If the religious college tells its students that a certain kind of marriage is what God designed us for and cohabiting, same-sex marriage, and easy divorce do not fit that standard for flourishing—and yet the government's rules forbid marital status discrimination, then students will soon see the deep divide between what is said and what is done.

If the organization claims that the biblical injunction to care for foreigners and strangers means that it must not inquire into the immigration status of those who turn to it, desperate for help—and yet the government requires, in this program in which it helps to fund services, that no services be offered to undocumented people—isn't this, too, a wrongful limit on the organization's service,

and a way of undermining its long-term prospects and its effectiveness?

3. The "public" and the "common good" are diverse, not uniform.

Listen carefully when you hear people condemn a faith-based organization for, as they say, "discriminating" against certain job applicants, or for being hateful in teaching that marriage is one thing and not another, or for being bigoted in not performing abortions or euthanasia. They say: here's a secular person or a gay person or a pro-choice person who can't get hired—that's just discrimination! Here's someone who can't get the services they want from this crazy religious organization—that kind of discrimination shouldn't be allowed! Strip away government money! Remove the accreditation or the licensing. Take away that tax-deduction for contributions made to these bigoted groups. Remove their tax-exempt status—how dare they say they are serving the public when they are so selective, such discriminators!

But society, of course, is not made up of people with only secular, or pro-LGBT, or pro-choice convictions.

Just think: A faith-based organization that hires according to religion can only continue to exist because there are workers who are willing to work in such an environment—in fact, because there are workers who share the convictions and the vision of the organization and desire to work in just such an organization, not a different one with different values and a different corporate culture.

PETA would quickly collapse if no employable adults had a deep and PETA-like love for animals, just as World Vision would collapse, or become something different, if there were no employable adults who wanted to work in an all-Christian environment.

Further, no faith-based service organization could exist for very long if there is no one out there in the public—no customers—who regard its services to be good, to be especially effective and appropriate. If the faith-based organization was in fact just bigoted and discriminatory, who would actually turn to it for help? There are plenty of alternatives.

Some significant part of the public—often people of the same faith, but also people of other convictions—values this organization because of how it serves: what it does and doesn't do.

For every pro-choice person who wants to insist that every hospital should offer elective abortions, there is a pro-life person who hopes to find a medical practice and a hospital that is pro-life, top to bottom.

For every gay person who wants to find an adoption agency that is gay-friendly, there is another person and even many people, who only trust an adoption agency that searches for faithfully religious mother-father, long-term married, stable families.

Our society is diverse. It has diverse civil society organizations—and those diverse civil society organizations provide places of employment for like-impassioned employees and provide trusted services to patients and clients and students who love faith-shaped services and have little confidence in service providers who think the Bible is hateful and wrong.

Our society is diverse. There is no moral monopoly in America. We are diverse in deep convictions and in valued practices. The common good is not uniform but, rather, diverse.

Faith-based organizations, and secular ones, too, ought to be free to make their uncommon contributions to the common good—to make their distinctive offerings to their neighbors—who, after all, are free to reject those offerings and to turn to others for help and employment.

Religious freedom is necessary so that faith-based organizations can make their *uncommon* contributions to the common good.

Stanley Carlson-Thies is the founder and president of the Institutional Religious Freedom Alliance, an organization that "safeguards the religious identity and faith-shaped standards and services of faith-based organizations, enabling them to make their distinctive and best contributions to the common good." In 2001-02 he served with the White House Office of Faith-Based & Community Initiatives. He helped write "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs," a report released by the White House in August 2001, and "Rallying the Armies of Compassion," the initial blueprint for President George W. Bush's faith and community agenda. Carlson-Thies currently serves on a task force of the President's Advisory Council on Faith-Based and Neighborhood Partnerships and is a senior fellow with Cardus, a Canadian faith-based think tank. He is also on the advisory committee for the Faith & Organizations project. He was named as one of 12 advocates who are "reinterpreting God and country" by the National Journal in May 2004. He received the William Bentley Ball Life and Religious Liberty Defense Award from the Center for Law and Religious Freedom and the Christian Legal Society in October 2004. He holds a doctorate in political science from the University of Toronto.

RELIGIOUS FREEDOM AND DISCRIMINATION

By Michael P. Moreland, Vice Dean and Professor of Law, Villanova University

I want to say something about how I got interested in these issues from a personal standpoint. After law school, I clerked and then I practiced at a law firm in Washington, Williams and Connelly, which is primarily a litigation firm, and has for many years represented a variety of First Amendment clients including the Washington Post and a number of church organizations. In 2003 to 2004, in our capacity representing the U.S. conference of Catholic Bishops, one of the partners became involved in a case and asked me to join him in working on it. The case involved a challenge that Catholic Charities of Sacramento had brought to a contraceptive mandate that had been imposed by the state of California. California required—of course this is now familiar hat at the federal level—but California had enacted a requirement that any prescription drug insurance policy in the state had to include contraceptives as a part of it. This was objected to by Catholic Universities. There is now a religious exemption that is word for word the religious exemption in the HHS mandate under the Affordable Care Act. And so it excluded a variety of Catholic institutions, universities, schools, social service agencies, and hospital systems. Catholic Charities of Sacramento had filed suit and had lost in the California Supreme Court, and then came to us to handle the petition for certiorari which was unfortunately unsuccessful, but it caused me to start thinking hard about these issues that a decade or so later would become so pressing, I think, in our national consciousness.

And, as Stanley mentions in the way he frames the topic, it really is about how norms of anti-discrimination on the part of the state intersect and interplay with religious liberty and the liberty of religious institutions with regard to those anti-discrimination norms. The first thing to say (and it has been said very ably by the quote from Rick Garnet of Notre Dame that Stanley used) is that discrimination itself is a loaded question-begging term, it is a value-laden term. Of course we have a very tragic, sad history of invidious discrimination, most especially on the basis of race, in our country, and as a result of that, the word has this value-laden character; but at the same time, it is essential that people who advocate for religious liberty, people who understand the importance of religion in people's lives and forms of religious life push back against this effort to impose a logic of congruence upon all forms of social life. And I borrow that term "logic of congruence" from the introduction of a collection of essays on civil society that was edited by Robert Post, now the Dean of Yale law school, and Nancy Rosenblum, a political theorist at Harvard.[1] What Rosenblum and Post are pointing out in this language of "the logic of congruence" is the way in which the state and the arm of the government comes, by majoritarian rule and legislation, to have a certain view about, say, anti-discrimination and sexual morality and things like that. And, then, at the same time, seeks to sort of squeeze out private ordering and to impose that understanding that the state has arrived at on all subsidiary institutions. Post and Rosenblum put it this way:

> Advocates of congruence fear that the multiplication of intermediate institutions does not mediate but balkanizes public life. They're apprehensive that plural associations and groups amplify self-interest, encourage errant interest-group politics, exaggerate cultural egocentrism and defy government. What is needed in their view is a strong assertion of public values and policies designed to loosen the hold of particular affiliations so that members will be empowered to look beyond their groups and identify themselves as members of the larger political community. The "logic of congruence" envisions civil society as reflecting common values and practices "all the way down."[2]

[1] Nancy L. Rosenblum and Robert C. Post, eds., Civil Society and Government (2001).

[2] Id. at 13.

And so I think that this disagreement, this debate about antidiscrimination and religious liberty, can be reframed by thinking about it in terms of this logic of congruence—about whether or not all these subsidiary institutions of civil society should have a uniform set of views about contested moral and political matters, or whether there should be appreciation and recognition for the importance of subsidiary institutions having spheres of private ordering that allow them to organically, as it were, to come to their own conclusions about those contested matters. The constellation of issues around which this is most pronounced (and I don't think I'm telling anyone anything new here) is sexuality.

I gave a talk a few months ago in which I was talking about the issues regarding freedom of the church. And I said I think it's under appreciated the extent to which the debates about the freedom of the church as a constitutional and legal concept of freedom of religion, are really debates now about sex. And I think that because I see the distorting effect on the debate that's produced as a result. There was a time, thirty or forty years ago when debates about religious freedom say in the late 1960's or early 70's (And I'm unfortunately a little too young to remember this but some people in the audience might not be) were primarily debates about whether one could avoid military service. And that was one of the driving religious freedom issues—certainly the way in which the number of religious freedom cases were teed up before the Supreme Court in that period. But now, they are overwhelmingly matters of sexuality. Consider, for example, the succession of cases involving freedom of association and religious associational freedom more generally and not just religious freedom of the last thirty or forty years: *Roberts vs. Jaycees* involving gender discrimination by the Jaycees; *Hurley vs. Irish American Gay Lesbian and Bisexual Group of Boston* about whether south Boston parade organizers had to include a gay/lesbian group in the parade; *Boy Scouts vs. Dale* about whether the Boy Scouts could expel a gay scout master; *Christian Legal Society vs. Martinez*, involving this very organization and their fight with the public law school at the University of California Hastings. And even though the recent ministerial exception case, *Hosanna-Tabor vs. EEOC*, was a case in which the alleged discrimination involved disability discrimination, most ministerial exception cases (or certainly the large number of them) have involved forms of sexual orientation or gender discrimination. So I do think it's underappreciated the extent to which this issue of antidiscrimination and religious freedom revolves around issues of sexuality. And as I said, I think it has a distorting effect.

I think this focus on sexuality distorts the debate about freedom of the church because those interminable debates about sexuality and issues related to reproduction, sexual orientation, and the like are already such a prominent feature of public life. We just move the site of disagreement to a debate about religious freedom, and so the debate becomes a distraction of a kind, I think, and the church has come to be understood both by those internal to them and external to them as little more than an advocacy organization that does other things, as it happens, besides engage in advocacy on sexual matters. So the Catholic church comes to be seen as little more than a pro-life advocacy organization that just happens to operate large institutions such as hospitals, universities, and social service agencies, just as if the National Rifle Association just happened by historical accident to operate a chain of restaurants.

I think this focus on sexuality distorts the debate about freedom of the church because those interminable debates about sexuality and issues related to reproduction, sexual orientation, and the like are already such a prominent feature of public life.

And so, these disagreements come to distort the idea of the freedom of the church, I think, in at least two ways. First, because both sides are sometimes at pains not to address the substantive moral questions at play, the discussion about religious freedom comes to be an important substitute to those questions. My hypothesis comes to this: participants in these debates really disagree about these moral questions, but flee to seemingly safer and more abstract disagreements about the First Amendment as a way of evading the moral question, perhaps because they seem so intractable.

Second, and this consideration cuts in the other direction, sexual teachings, particularly moral teachings more generally but specially on sexuality, come to take on a misplaced priority in the life of the churches themselves and distorts for believers and non-believers alike the very idea of what church or religion is for. The order of intelligibility of religious belief, in Christianity, is that one receives revelation from God in and through

His son Jesus Christ, and through that comes to be part of a community that worships him and engages him in the form of that community based around that worship. Then, as a tertiary matter one comes to articulate a set of views about sexuality. But the way this debate gets framed is as if sexuality were the most important consideration or moral teaching more generally especially on sex and that everything else about Christianity, well that's just something else that believers just happen to engage in worship on Sunday, run schools and hospitals, and things like that.

In short, I think this is a very difficult time for religious freedom for the reasons you are familiar with and that we've been talking about this weekend. In these brief remarks, what I mean to suggest is that it is important to have a more complex and nuanced understanding of what discrimination is in the first place. And, secondly, on a whole range of issues including same sex marriage, most notably those issues of abortion, contraception, and the like to be attentive to the ways in which debates about sexuality are driving and informing, but more often distorting, the debate we have about religious freedom in this country.

Michael Moreland is Vice Dean and Professor of Law at Villanova University School of Law. As Vice Dean, Dean Moreland oversees academic affairs, admissions and financial aid, career strategy, administration, and faculty research. Dean Moreland received his B.A. in philosophy from the University of Notre Dame, his M.A. and Ph.D. in theological ethics from Boston College, and his J.D. from the University of Michigan Law School. Following law school, Dean Moreland clerked for the Honorable Paul J. Kelly, Jr., of the United States Court of Appeals for the Tenth Circuit and was an associate at Williams & Connolly in Washington, D.C., where he represented clients in First Amendment, professional liability, and products liability matters. Before coming to Villanova, he served as Associate Director for Domestic Policy at the White House under President George W. Bush, where he worked on a range of legal policy issues, including criminal justice, immigration, civil rights, and liability reform. During academic year 2010-11, Dean Moreland was the Forbes Visiting Fellow in the James Madison Program at Princeton University. He is currently the project leader for The Libertas Project, a program at Villanova sponsored by a grant from the John Templeton Foundation exploring religious and economic freedom in the context of law and religion in American public life.

THE 20TH ANNIVERSARY OF THE RELIGIOUS FREEDOM RESTORATION ACT

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

The Religious Freedom Restoration Act ("RFRA") remains a singular achievement in this Nation's long history of religious freedom. When Congress enacted RFRA in 1993 by overwhelming bipartisan majorities, it re-dedicated the Nation to religious liberty for all Americans.

RFRA's Bipartisan Passage: President Clinton signed RFRA into law on November 16, 1993. Republican Senator Orrin Hatch and Democratic Senator Ted Kennedy together led the effort to pass RFRA in the Senate. The Senate passed RFRA by a vote of 97-3 on October 27, 1993, followed by a unanimous voice vote in the House on November 3.

Why RFRA was Necessary: RFRA was an urgent response to the Supreme Court's decision in 1990 in *Employment Division v. Smith*, 494 U.S. 872 (1990). The *Smith* decision, authored by Justice Antonin Scalia, dealt a serious setback to religious liberty. Before *Smith*, the Supreme Court's free exercise test had prohibited the government from burdening a person's religious exercise unless the government demonstrated that it had a compelling interest, not achievable by other means, that justified trumping the person's religious practice. The *Smith* decision reversed this traditional presumption: the government no longer had to show an important reason for overriding a person's religious convictions, but instead could simply require a citizen to violate her religious convictions no matter how easy it would be for the government to accommodate her religious exercise.

RFRA restored the "compelling interest" test by once again placing the burden on the government to demonstrate that a law is compelling and unachievable by less restrictive means.

The RFRA Coalition: In response to the *Smith* decision, a 68-member coalition of diverse religious and civil rights organizations (led by the Christian Legal Society, the Baptist Joint Committee for Religious Liberty, the National Association of Evangelicals, the American Jewish Congress, the Religious Action Center of Reformed Judaism, and the American Civil Liberties Union, among other groups) coalesced to encourage Congress to restore substantive protection for religious liberty. RFRA restored the "compelling interest" test by once again placing the burden on the government to demonstrate that a law is compelling and unachievable by less restrictive means. Even though the "compelling interest" test is a high bar, the government has won many cases–perhaps even the majority of cases–brought under RFRA. RFRA's critical role is that it requires the government to demonstrate that it actually has a compelling interest before it can force a citizen to choose between obeying his God or his government.

RFRA in the Supreme Court: In *Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court excluded state and local laws from RFRA's scope. But RFRA remains applicable to federal laws and regulations and, therefore, covers a great deal of the legal landscape under the modern regulatory state. Critically, in 2006, the Supreme Court made clear that RFRA provides potent protection for religious liberty at the federal level. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court unanimously held that RFRA requires the federal government to demonstrate a truly compelling interest, unachievable by less restrictive means, before it restricts any citizen's religious practices. Moreover, the government must show that granting the *specific individual citizen* an exemption would undermine its ability to achieve its compelling state interest.

RFRA in the States: Although RFRA no longer applies to state and local governmental actions after the *Boerne* decision, eighteen states have enacted state RFRAs, modeled on the federal RFRA, that do require state and local governments to meet the "compelling interest" standard. Those states are: Alabama, Arizona,

Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Michigan, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia.

RFRA's Remarkable Footprint: RFRA is a remarkable law because it reinforces three foundational commitments of American constitutionalism: a commitment to limited government, pluralism, and religious liberty. First, RFRA is the rare reminder that America's government is a government of limited powers–a government that defers to its citizens' religious liberty except in compelling circumstances. Second, by evenhandedly protecting religious freedom for all citizens, RFRA embodies American pluralism.

Finally, through its passage of RFRA, Congress re-dedicated the Nation to religious liberty for all Americans. Congress re-committed the Nation to the foundational principle that American citizens have the God-given right to live peaceably and undisturbed according to their religious beliefs. In RFRA, a Nation begun by immigrants seeking religious liberty renewed its pledge to be a perpetual sanctuary for all faiths.

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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.

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