

A DREAM DIALOGUE ON RELIGIOUS LIBERTY

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Suppose for a moment that you have been wrestling with the question of religious liberty in American history and contemporary life. You begin to see that it is a multi-layered concept, not easily captured in one attempt. Suppose further, then, that you could gather together in one place some of the people who have made a significant contribution to the discussion. Who would you invite to speak? How would they respond to each other? In light of what they said, how willing would you be to re-examine your own assumptions, your most cherished conclusions?

In a dream, anything can happen. The most unlikely people may find themselves in agreement, while longtime friends may find themselves at odds with one another. Our interlocutors might be acquainted with unfolding events beyond the boundaries of their historical careers, or they might confess that their knowledge is still limited to their own historical horizon . . .

Moderator: Who would like to begin this dialogue on religious freedom? Is there a brave volunteer?

Roger Williams: I don't mind being the first to speak up. Why? Because it's important for Christians to testify, to give witness to their faith. Magistrates must be made to understand that they will not be allowed to intrude on the Christian's conversation with God. What do I mean by "intrusion"? Requiring a loyalty oath to the state is one kind of intrusion. It's a form of idolatry and a violation of Jesus' teaching against oaths in *Matthew 5:33-37*.¹ Similarly, it's a terrible idea to fine a person for not attending church. It assumes that the government knows what is good for the soul, when clearly only God knows that. In all the towns where I've lived and worshipped, I've tried to persuade well-meaning officials that the government's ability to grasp religious truth is not just limited, but in fact, non-existent. So often they think they know

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1. All Biblical citations are taken from the King James Version.

which persons are “wheat” and which persons are “tares,” to use the images of *Matthew* 13. Yet Jesus says plainly in his parable that both wheat and tares must be allowed to grow up together.²

Moderator: Mr. Williams, would you also be opposed to “friendly” relationships between government and churches, such as the funding of social services through “faith-based initiatives”? This is President Bush’s term for government grants that would go to religious organizations for the purpose of helping the poor and the homeless, children of prisoners, and people who are fighting against drug addiction.³

Roger Williams: No church should ever rely on secular authorities or tax money to help them carry out The Great Commission. What kind of help or favor did Jesus and his disciples receive from Pilate or other Roman authorities? Jesus sent his followers out into the countryside, telling them to take no food, no money on their journey. They learned to depend upon God for what they needed, yet as the scripture says, it was these men who “turned the world upside down.”⁴

Raul Hilberg: I, too, am opposed to these alliances between church and state, but for reasons that are different from those identified by Mr. Williams. He seems to be most worried about his religious message being “diluted” by a church’s compromise with government or about an individual whose conscience or belief places him at odds with state policies, and these are important issues for religious liberty. However, the story I have been trying to tell through my writing is of state-sponsored persecution of religious minorities carried out on a much larger and more systemic scale. Not so long ago in “Christian” Europe, the Jews were forced to wear the yellow Star of David as a badge for all to see. This yellow star announced their religious faith in a public way, and it made them targets for the worst acts imaginable. Step by step, the Jews lost their jobs, their homes, their citizenship, and finally it was declared that they no longer had the right even to exist. Unfortunately,

2. Roger Williams, *The Bloody Tenent of Persecution, for the Cause of Conscience, Discussed in a Conference Between Truth and Peace* (Richard Groves ed., Mercer U. Press 2001). A good introduction to Williams’ thought, with excellent bibliography, is Edwin Gaustad, *Liberty of Conscience: Roger Williams in America* (Eerdmans 1991). See also Timothy Hall, *Separating Church and State: Roger Williams and Religious Liberty* (U. Ill. Press 1998).

3. For President Bush’s own account of these projects, see George W. Bush, Speech, *Remarks at the White House Faith-based and Community Initiatives Leadership Conference*, (D.C., Mar. 1, 2005), in 41 Weekly Compilation of Presidential Documents 332 (forthcoming 2007) (available at <http://www.gpoaccess.gov/wcomp/v41no09.html>). For a more critical view see Derek Davis, *President Bush’s Office of Faith-Based and Community Initiatives: Boon or Boondoggle?*, 43 J. Church & St. 411 (Summer 2001).

4. Acts 17:6.

there is more than one way for a person's world to be "turned upside down." This is the lens through which I view so many Christians in America who are eager to stand up for Jesus and proclaim that their views should become the law of the land. Who knows whether at some point the noise of their shouting might even drown out the voices of *shalom* and *hesed*? So, you can see why the Jewish community isn't as enthusiastic as Christian groups are about public expressions of faith.⁵

Moderator: Mr. Hilberg and Mr. Williams seem to be calling for a "naked public square" of the sort lamented by Richard John Neuhaus.⁶ The Supreme Court decisions of the 1960s that prohibited prayer and Bible reading in public schools figure prominently in Neuhaus' diagnosis of America's difficulties since that time. Mr. Neuhaus, how do you respond to these arguments from Mr. Williams and Mr. Hilberg calling for strict separation of church and state?

Richard John Neuhaus: The high watermark for those who agree with the separationist agenda is the infamous three-pronged "Lemon test":

(1) Does the law under consideration have a secular legislative intent?

(2) Is the principal or primary effect of this law one that neither advances nor inhibits religion?

(3) Does this statute foster excessive government entanglement with religion?⁷

But these are the wrong questions to be asking in a land that is deeply committed to freedom of religious expression. The whole of The First Amendment was conceived primarily as a way of protecting freedom of religious expression, and nonestablishment is only a means to that greater end. The framers meant to keep government from interfering with religion—they had no intention of protecting government from religious speech, or indeed of restricting religious speech at all. It would be better for us to acknowledge that in a pluralistic America, religious differences are the *most* compelling, the *most* interesting sign of our freedom. Americans ought to be talking about religion from a young age, and learning to navigate these differences—without backing down from the implications of their own

5. Raul Hilberg, *The Destruction of the European Jews* (rev. ed., Holmes & Meier 1985). See also David G. Dalin, *How High the Wall? American Jews and the Church-State Debate*, 49 *Conservative Judaism* 63 (1997). Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 *J.L. & Relig.* 591 (1995).

6. Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Eerdmans 1984).

7. *Lemon v. Kurtzman* 403 U.S. 602, 612-613 (1971).

faith, without feeling that they have to hide their light under a bushel.

The consequence of accepting the burdensome tests of *Lemon* is that we now have a “naked public square,” when instead we ought to have a national life in which religion is flourishing.⁸ Proposals for faith-based social services and school vouchers that could be used at church-affiliated schools would go a long way toward restoring the priority of free religious expression over “non-establishment.” We have a tremendous right in the First Amendment, and it calls for a government that accommodates religious expression, rather than policies that ignore religion or are hostile to free expression.⁹

Robert Bellah: If we look carefully, we’ll see that Roger Williams embraces a view that is much more expansive in scope than mere toleration of dissenting groups—he has a vision of religious *freedom*—not just for a Protestant majority, but for Jews, Muslims, Catholics, and even atheists. For the moment, however, I’d like to make a different point about the legacy of Roger Williams. It’s one thing for a Christian to exercise freedom of religion and to demand respect for the sanctity of individual conscience. It’s quite another for a Christian to forsake covenant-making altogether. This wasn’t Roger William’s intention, but his approach to faith has become something of a cautionary tale where contentiousness and division are concerned. We are always finding Mr. Williams on the move, going to smaller and smaller congregations, until finally, he seems to end up almost alone in his own private chapel. “Just Jesus and Me”—and this is not an attitude that is encouraged by the New Testament. John Winthrop’s *A Model of Christian Charity*¹⁰ offers a better hope for building a covenanted Christian community than Williams’ brand of individualism.¹¹

John Locke: Whoever has lived through disastrous civil wars, such as those I have witnessed first-hand in England will nonetheless listen attentively to what Mr. Williams has to say about the inviolability of an individual’s conscience. One day we can find ourselves governed by a Catholic monarch, and the next day our country might be ruled by a

8. See *Comm. For Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J. dissenting) (describing the majority’s interpretation of *Lemon* as a “Sisyphean task.”).

9. Neuhaus, *supra* n. 6. Neuhaus has a continuing column in the journal *First Things* which tracks many of these themes as they emerge in new ways in American society.

10. John Winthrop, *A Model of Christian Charity*, 1 *The Annals of America 1493-1754*, at 109-115 (Mortimer Adler ed., Ency. Britannica 1968).

11. Robert Bellah, *Flaws in the Protestant Code: Some Religious Sources of America’s Troubles*, 7 *Ethical Persp.* 288 (2000). But see James Calvin Davis, *A Return to Civility: Roger Williams and Public Discourse in America*, 43 *J. Church & St.* 689, 702-703 (2001). See generally Frances Bremer, *John Winthrop: America’s Forgotten Founding Father* (Oxford U. Press 2003).

Protestant king instead. Each regime has armed men ready to coerce our outward obedience, if not our inward assent. Nearly as bad, they have legal machinery at their disposal to prevent our progress in education and business if we register the slightest dissent. So we ought all to agree that the magistrate has no right to forbid the preaching or professing of any church. If a Roman Catholic believes the communion bread is really the Body of Christ, how does that harm his Protestant neighbor? If a Jew does not believe the New Testament to be the Word of God, what boundary does he trespass in the realm of civil life? If a heathen rejects both Testaments, what right has the government to punish him as an unworthy citizen?

Traveling abroad sometimes makes a vivid impression on one's thinking about these matters. On a diplomatic mission to Brandenburg in 1665, I remember how astonished I was to find Catholics, Calvinists, and Lutherans tolerating each other, learning to live together without bloodshed. Each permitted the other to choose his way to heaven, and I observed no quarrels or animosities amongst them on account of religion.¹²

Moderator: I want to give Pierre Jurieu the opportunity to speak next, since he is likely to have different views from those of John Locke when it comes to the public presence of "true religion." Pastor Jurieu is not widely known in America, but he served the French Reformed Church as a teacher until he was forced to flee from France by Catholic authorities in 1681. Pastor Jurieu then resumed his teaching duties in exile in the Netherlands. There he encouraged the religious and political aspirations of his fellow Huguenots, speaking often of their eventual return to France, as the Hebrews longed return to Jerusalem in Psalm 126:6: "He that goeth forth and weepeth, bearing precious seed, shall doubtless come again with rejoicing, bringing his sheaves with him."

Pierre Jurieu: Yes, Catholics would grind their teeth when they heard us singing the Psalms of David! Nevertheless, what alarms me about the tranquil public life John Locke desires is that it is utterly without a Christian foundation. There would be no social conflict in such a country because all faith would be reduced to *convictions* that are held privately. Religious indifference will come to reign in such a

12. John Locke's *Letter Concerning Toleration* was first published in 1689. For useful critical essays, see John Locke, *A Letter Concerning Toleration*, In *Focus* (John Morton & Susan Mendus eds., Routledge 1991). Compare Richard Mouw, *John Locke's Christian Individualism*, 8 Faith & Phil. 448 (1991); David Little, *Conscience, Theology, and the First Amendment*, 72 Soundings 357 (1989); with John Perry, *Locke's Accidental Church: The Letter Concerning Toleration and the Church's Witness to the State*, 47 J. Church & St. 269 (2005).

nation, and “the obedience of faith” that Paul spoke of in *Romans* 1:5 will flee altogether. Then the Protestant martyrs of St. Bartholomew’s Day will have died for nothing! As I have counseled so many Huguenot refugees—we must eventually return to our country because God wants a Protestant *state* in France, not merely atomistic Protestants bouncing around freely in an undefined national space.

I should also like to unmask another version of tranquility that the Catholic rulers of France have sometimes call “concord.” Calvinists first heard calls for “concord” at the Colloquy of Poissy (1561), but these were little more than a stalling tactic. As we learned later from captured Catholic pamphlets, their intention all along was to “conquer the Protestants” and “lead them back.” Their edicts of “toleration” merely gave them respite from battle for a while. They used the interval to rebuild their momentum and to whittle away at the freedoms that had been purchased with Reformed blood. This was true even of the most famous edict, the Edict of Nantes, which was signed in 1598 and then “unsigned” in 1685.¹³

Moderator: Pastor Jurieu’s assessment of the Edict of Nantes may be the most critical our assembly is likely to encounter. The Edict has been traditionally recognized as an important landmark in the history of religious liberty. Recent scholarship does not reject altogether this view of The Edict of Nantes as a major landmark, but most historians today would hesitate to call it an utterly unique document with a timeless vision of the right to religious freedom. They are more likely to see it as one document in a series of attempts to negotiate a peace between a powerful established church and a sizeable religious minority.¹⁴ Nevertheless, The Edict was a positive development insofar as it granted Protestants in France the right to exist, the right to defend themselves in

13. Guy Howard, *The Political Theory of the Huguenots of the Dispersion, With Special Reference to the Thought and Influence of Pierre Jurieu* (Colum. U. Press 1947). Mario Turchetti, *Religious Concord and Political Tolerance in Sixteenth and Seventeenth Century France*, 22 *Sixteenth Cen. J.* 15-25 (1991).

14. An excellent historical introduction to this period in France is Mack Holt, *The French Wars of Religion, 1562-1629* (Cambridge U. Press 1995). For the view shared by many historians today, that the Edict is but one in a series of attempts to reach a settlement both Protestant and Catholic could live with, and so “console a troubled France,” see Hubert Bost, *L’Edit de Nantes, Lectures d’hier et d’aujourd’hui*, 73, no. 3 *Theologiques et Religieuses* 371-390 (1998). Other important works include Elisabeth Israels Perry, *From Theology to History: French Religious Controversy and the Revocation of the Edict of Nantes* (Martinus Nijhoff 1973); Charles Johnston, *Elie Benoist, Historian of the Edict of Nantes*, 55 *Church History* 468 (1986); Elizabeth K. Hudson, *The Protestant Struggle for Survival in Early Bourbon France: The Case of the Huguenot Schools*, 76 *Archiv fur Reformationsgeschichte* 271 (1985); Diane Margolf, *Adjudicating Memory: Law and Religious Difference in Early Seventeenth-Century France*, 27 *Sixteenth Cent. J.* 399 (1996).

court, and the right to set up Protestant schools. Roughly a century after the Edict was revoked; however, both Catholics and Protestants would find themselves profoundly disappointed by the emergence of a radically secular government in the French Revolution. I wonder if Archbishop William Temple would offer a brief description of England's established church for the sake of comparison?

William Temple: The English model works something like this: If a bridge needs to be built, the Church of England brings this need to the attention of the "engineer," but we do not feel entitled or qualified to tell the engineer whether in fact his design for the bridge meets the requirement. In much the same way, we offer up to Parliament a broad vision of the norms which ought to shape the policies of a Christian nation. We hope this vision can then be translated into "middle axioms." That is, we expect that they will be used to embody a certain kind of Christian wisdom in the political arena by being somewhat less divisive than the more demanding teachings of scripture, and by not specifying exactly how laws should be written. So, when it comes to policy decisions, the Church of England has a strong public voice, but we don't wander into the thicket of ideological argument or legislative detail.¹⁵

Thomas Helwys, an early Baptist: The Baptists know England's cathedrals well enough, with their stained glass windows and ancient plainchant. But I would put a question to you: Why does no one come to Anglican services anymore? The answer is clear to a non-conformist like myself: Your churches are more like national museums than temples of the living God, because your message has become indistinguishable from society. That is why in recent years there has been this foolish debate in England about the possibility of "believing without belonging." Such a question could only arise in a country where belief is so attenuated that "Christians" don't want to be bothered with joining a local church. How can this have anything to do with Jesus' command in *Mark* 8:34 to "Take up your cross and follow me"? Better to opt for disestablishment if you want true religion to flourish. I challenge you, just as I challenged your predecessor, Archbishop Laud: Return the government's money. Sell your church lands. Let your ministers add souls to God's kingdom through the power of their preaching and teaching rather than relying on the vague hope of making Christians through "osmosis." But Laud had no intention of allowing the people of

15. William Temple, *Christianity and Social Order* 47 (SCM Press 1942); James Torke, *The English Religious Establishment*, 12 *J.L. & Relig.* 399 (1996).

England to worship freely, nor would he let them buy or sell unless they conformed to his version of Christianity. So I say to you, too, the faith of an established church will always decline until it resembles the lukewarm church of Laodicea in *Revelation* 3:16, the very one that The Lord says he will spew from his mouth.¹⁶

Moderator: Michael Sattler (1490-1527), is an advocate of “separation” at an even deeper level than Mr. Helwys contemplates. For the Anabaptists and the Mennonites, it is not enough for the church to be separate from the state—indeed, the church must be separate from the *world*. Brother Sattler’s spirituality was shaped first by the Benedictine order, but as the Protestant Reformation gained momentum he left the monastery and began to preach near Zurich and Strasbourg. He is the author of *The Schleithem Confession*, the document that summarizes the Anabaptist approach to the teachings of Jesus.¹⁷ I hope Brother Sattler will set before us some of the basic teachings of the Anabaptists.

Michael Sattler: Among the Anabaptists, we teach that the Lord is calling us to follow him, and this call must claim our full attention and obedience. We do not vote in elections, because the Kingdom that Christ speaks of in the Gospel of John is not of this world. Nor do we “serve” in the military. This is because Christ himself refused to take up the sword when the soldiers came for him in Gethsemane. Moreover, we do not see how a follower of Christ can in good conscience take orders from anyone but Him, and His command is: Turn the other cheek when wronged, and do not kill or seek revenge. We also find in the New Testament that the brethren are taught to practice the unselfish economics of God’s kingdom rather than an economics based on acquisitiveness, which is what human governments seem to be primarily about. And while we do pay taxes, you will not find us sitting on juries in your courts, because Jesus teaches us not to sit in judgment of others.¹⁸

16. Thomas Helwys (1560-1616), an early Baptist, was a Separatist who emigrated from England to Amsterdam in 1608. Thomas Helwys, *A Short Declaration of The Mystery of Iniquity* (Richard Groves ed., Mercer U. Press 1998) (defending the separation of church and state). William R. Estep, Jr., *Thomas Helwys: Bold Architect of Baptist Policy on Church-State Relations*, 20, no. 3 Baptist History & Heritage 24 (July 1985). The “foolish debate” about the decline of established Christianity in England has in fact been a spirited and valuable discussion among sociologists of religion. See Grace Davie, *Religion in England since 1945: Believing Without Belonging* (Blackwell 1994).

17. *The Schleithem Confession, 1527*, in *2 Creeds and Confessions of Faith in the Christian Tradition* 696-703 (Jaroslav Pelikan & Valerie Hotchkiss eds., Yale U. Press 2003).

18. Sattler was arrested and executed for his “radical” views in 1527. See generally *The Legacy of Michael Sattler* (John Howard Yoder ed. & trans., Herald Press 1973); Sean Winter, *Michael Sattler and the Schleithem Articles: A Study in the Background to the First Anabaptist Confession of Faith*, 34 Baptist Q. 52 (1991); Gerald Biesecker-Mast, *Anabaptist Separation and*

Moderator: I believe we can count on Chief Justice Ellsworth for a lively response to Brother Sattler. I remind the assembly that Mr. Ellsworth served as Chief Justice of the United States Supreme Court from 1796-1800. His degree from Princeton was in theology, but soon after graduating, he turned to law. Brother Sattler and other Anabaptists have often had much to fear from legal proceedings. Throughout the last five centuries many Anabaptists have suffered persecution and been forced out of many lands. Justice Ellsworth, can you help us understand what it is in the American constitutional tradition that makes the United States one of the less dangerous places for Mennonites and Anabaptists to live?

Oliver Ellsworth: We are almost the only people in the world who have a full enjoyment of religious freedom. In our country, every man has a right to worship God in the way most agreeable to his conscience. Anyone who is a good and peaceable person, as I believe the Mennonites are, will be liable to no penalties or incapacities on account of his religious faith. We have made a point of doing away with any religious test, that is, an act to be done, or a profession to be made, (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief in certain doctrines) for the purpose of determining whether he is admissible to a public office. Our intention is that no favor should be shown to Congregationalists, Presbyterians, Episcopalians, Baptists, or Quakers.

But to come to the true principle by which such questions ought to be determined: The business of a civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare. Civil government has no business meddling with the private opinions of the people. If such had been the universal sentiments of mankind, and they had acted accordingly, persecution, the bane of truth and nurse of error, with her bloody axe and flaming hand, would never have turned so great a part of the world into a field of blood. But I am very sorry to hear that the Anabaptists have surrendered the right to vote, and I wonder who they will count on to defend them from the violent enemies of the country in which they have found a safe haven?¹⁹

Arguments against the Sword in the Schleithem Brotherly Union, 74 Mennonite Q. Rev. 381 (2000).

19. Referred to as *Landholder VII*, Oliver Ellsworth wrote against religious tests in 1787. Oliver Ellsworth, *Art. 6, Cl. 3, Doc. 14*, in *The Founders' Constitution* Vol. 4, 639 (Philip B. Kurkland & Ralph Lerner eds., U. Chi. Press 1987). See generally William Casto, *Oliver Ellsworth's Calvinism: A Biographical Essay on Religion and Political Psychology in the Early Republic*, 36 J. Church & St. 507 (1994).

John Knox: Yes, I must say, Sattler and the Anabaptists astound me, the way they discard the Old Testament—as if the sword wielded by Israel’s monarchy and the struggle of the prophets against idolatry held no significant lesson for the Church! Have they not read how Elijah confronted the prophets of Baal on Mt. Carmel? Jeremiah, too, announces the judgment of The Lord God on nations who allow evil to abide in their midst and do nothing to stop it. Professor Bellah was kind enough to introduce the theme of covenant into our discussion, but I doubt whether the two of us understand it in the same way. The *Book of Deuteronomy* is the bedrock of Israel’s covenant with God. If England is to be regarded as a covenanted nation, it is mainly by virtue of *The Thirty-Nine Articles*.²⁰ Perhaps Scotland provides a better example, thanks to its *Book of Discipline*²¹ and *The Westminster Confession of Faith*.²² But so much depends on a faithful and strong sovereign! If a ruler should depart from the Protestant faith, the people are obliged to revolt and to replace this idolater with a more worthy person, as I have argued in *The Appellation to the Nobility and Estates of Scotland*.²³ So contrary to your view, Mr. Ellsworth, I pray that Scotland will *always* have a “test for office,” since, as *Acts 5:29* says, “We ought to obey God rather than men!”²⁴

William Penn: John Knox, you have a prophet’s certainty, and your knowledge of the Old Testament is impressive, some might even say, *inescapable*. But for my part, there is something I find more persuasive than creeds and catechisms, and it is this: the inner light of conscience, which testifies to Christ’s teaching in the New Testament. This inner light is found in all human beings if we look deeply enough and with enough empathy. To take an example with which John Knox will be familiar: Mary Queen of Scots should have been able to worship in her private chapel in the way that seemed best to her, just as Daniel should not have been penalized by the Medes and Persians for praying in his home. But Reformed leaders would not extend this freedom to her.

20. *The Thirty-Nine Articles, 1571*, in *supra*, n. 17, at 526-540.

21. John Knox, *The Buke of Discipline*, in 2 *The Works of John Knox* 183-260 (David Laing ed., AMS Press Inc. 1966).

22. *The Westminster Confession of Faith, 1647*, in *supra* n. 17, at 601-649.

23. John Knox, *The Appellation to the Nobility and Estates of Scotland, 1558*, in 4 *The Works of John Knox* 467-520 (David Laing ed., AMS Press Inc. 1966).

24. Richard Kyle, *John Knox: A Man of the Old Testament*, 54 *Westminster Theological J.* 65 (1992) (describing Knox’s approach to the Hebrew scriptures); see also Richard L. Greaves, *John Knox and the Covenant Tradition*, 24 *J. Ecclesiastical History* 23 (1973). See generally W. Stanford Reid, *John Knox’s Theology of Political Government*, 19 *Sixteenth Cent. J.* 529 (1988); Richard Kyle, *The Christian Commonwealth: John Knox’s Vision for Scotland*, 16 *J. Religious History* 247 (1991).

In our tradition, moreover, the Lord's inner light inspires "even women." It was Margaret Fell Fox who wrote *Women's Speaking Justified*,²⁵ while Knox's Reformed churches continued to circumscribe the role of women through works such as *The First Blast of the Trumpet Against The Monstrous Regiment of Women*.²⁶ Often this inner light leads us to protest against entrenched, unjust laws. I think of John Woolman as an example of this kind of protest, insofar as he criticized slavery in America long before abolitionism was embraced by other Christians.²⁷ And I would like to express my hope that the Friends will also continue to oppose war and violence, along with the legal structures that support it—I can imagine no better way of responding to the inner light of the Lord's peace. "True godliness doesn't turn men out of the world, but enables them to live better in it, not hide their candle under a bushel, but set it upon a table in a candlestick."²⁸

Pope John-Paul II: The Church is delighted to hear William Penn say that he would extend to Mary Queen of Scots the freedom to participate in the mass. There is hope for you yet, my friend! Maybe there's a quiet bit of land left for you in Maryland, if you ever think of leaving Pennsylvania. Perhaps, after all, God is not averse to playing a little joke on us as we discuss these matters!²⁹

But as befits the gravity of our subject, I want to mention briefly two documents from Vatican II. First, in *Dignitatis Humanae*, Pope Paul VI makes an affirmation that is in some ways similar to the claim made by William Penn: freedom of religion is linked to reason and natural law.³⁰ And secondly, in *Pacem in Terris*, Pope John XXIII

25. Margaret Fell Fox, *Womens Speaking Justified* (William Andrews Clark Meml. Lib., U. Cal. 1979) (originally published 1667).

26. John Knox, *The First Blast of the Trumpet Against The Monstrous Regiment of Women*, in *supra* n. 23, at 349-422.

27. John Woolman, *Considerations on Slavery*, in *The Journal of John Woolman* 25-42 (Janet Whitney ed., Henry Regnery 1950).

28. See William Penn, *No Cross, No Crown: A Discourse Showing the Nature and Discipline of the Holy Cross of Christ*, in *The Papers of William Penn* 295-296 (Richard S. Dunn, Mary Maples Dunn et al. eds., U. Penn. Press 1981); see also Bonnelyn Young Kunze, *Religious Authority and Social Status in Seventeenth-Century England: The Friendship of Margaret Fell, George Fox, and William Penn*, 57 *Church History* 170 (1988); Charles J. Emmerich & Arlin Adams, *William Penn and the American Heritage of Religious Liberty*, 8 *J.L. & Relig.* 57 (1990); Hugh Barbour, *William Penn, Model of Protestant Liberalism*, 48 *Church History* 156 (1979).

29. Isaac Bashevis Singer, *Gimpel the Fool*, in *The Collected Short Stories of Isaac Bashevis Singer* 3 (Saul Bellow trans., Farrar, Straus & Giroux 1982) (suggesting that God might play jokes of this sort on us).

30. *Dignitatis Humanae*, in *The Gospel of Peace and Justice: Catholic Social Teaching since Pope John* ¶ 2, 339 (Joseph Gremillion ed., Orbis 1976) (footnote omitted). Paragraph 2 states:

This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of

desired that another important connection should be brought to the world's attention: the connection between freedom of religion and peace.³¹ I won't go further in those directions right now, because there is a more pressing matter I want to focus on, one that the Church has been praying urgently about since 1973.

Yes, I want to speak about the life of the unborn child and about creating a culture of life that welcomes every child. I would like also to say a few words about World War II and the land I grew up in, as a way of illustrating why we are not in favor of a complete separation of Church and state. Captured German documents from that time reveal that in Poland the Nazis intended to:

- (1) Reduce the churches to the level of a voluntary association;
- (2) Force the churches to sever their ties with international bodies;
- (2) Make it illegal for people of different nationalities to worship together;
- (4) Liquidate all monasteries; and
- (5) Put an end to all church-sponsored social services.

In short, the Nazis wanted the Church to disappear from public view, so that faith would become entirely private and altogether separated from the state, the better to carry out their plans for murder.³²

And this also indicates why the Church must not limit in any way its message about the sanctity of human life. The Church must never accept the view that decisions about the life of the unborn child are a private matter beyond the interest of the law. As you know, this view is now defended by the Supreme Court of the United States and by many others. We can only regard this as the gravest of errors and the sign of a profoundly disordered liberty. Women who have had abortions have often been heard to say, "It's my body" When speaking to his

individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.

The Synod further declares that the right to religious freedom has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. Thus it is to become a civil right.

31. *Pacem in Terris*, in *id.* at ¶ 14, 204. "Every human has the right to honor God according to the dictates of an upright conscience, and the right to profess his religion privately and publicly."

32. For a summary of these measures, see Franklin Littell, *The Significance of the Declaration on Religious Liberty*, 5, no. 2 *J. Ecumenical Stud.* 326 (Spring 1968).

disciples at the Last Supper, Jesus used similar words as he pointed to the Cross that awaited Him, but with a much different meaning, “This is my body . . .”³³

This is the same Lord who said “Suffer the little children to come unto me.”³⁴ The Church makes no apology for trying to defend the life of the unborn child by trying to change the law in America. And it was to this effect that in *Evangelium Vitae*, I recalled the words of St. Thomas Aquinas:

[H]uman law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence.³⁵

Democracy has been allowed to become a Culture of Death. The Church calls on you now: Repent and commit yourselves instead to the task of building a Culture of Life!³⁶

Moderator: We seem to have reached a difficult point in our discussion. I wonder if anyone now would be willing to strike out in a somewhat different direction?

James Madison: It is hard, even for a former President, to follow a Pope, but I am willing to try. Perhaps His Holiness will forgive me if I refrain from commenting directly on the right to life as he has so eloquently defended it. In my public career, we could not foresee every development in the future of American law. Consequently, I am frequently puzzled when I hear Americans say, “The Founding Fathers intended . . .” or “According to the Framers . . .” When could the Founding Fathers agree on *any* issue with unanimity?³⁷

33. Luke 22:19.

34. Mark 10:14.

35. Pope John Paul II, *Evangelium Vitae*, ch. III, ¶ 72 (1995), in *The Encyclicals of John Paul II* at 738 (J. Michael Miller ed., Our Sunday Visitor 2001); see Thomas Aquinas, *Summa Theologiae* I-II, q. 93, a. 3, ad 2.

36. Pope John Paul II, *Evangelium Vitae*, ch. IV, ¶ 78 (1995), in *id.* at 742-761. (“For a New Culture of Human Life” is the name of this chapter in EV, “We are a people of life” appears on page 742.) See also the discussions of this encyclical in *Choosing Life: A Dialogue on Evangelium Vitae* (Kevin Wildes & Alan Mitchell eds., Geo. U. Press, 1997); J. Budziszewski, *What We Can't Not Know*, 22 *Human Life Rev.* 85 (1996).

37. Justice John Paul Stevens made this point in a rather emphatic way in a speech to the American Bar Association in 1985:

The term “founding generation” [as used by Attorney General Meese] describes a rather broad and diverse class. It includes apostles of intolerance as well as tolerance, advocates of different points of view in religion as well as politics, and great minds in Virginia and Pennsylvania as well as Massachusetts. I am not at all sure that men like James Madison, Thomas Jefferson, Benjamin Franklin or the pamphleteer, Thomas Paine, would have regarded strict neutrality on the part of the Government between religion and irreligion as “bizarre.”

But in any case, I would like to point to one of the most vital dimensions of American society, and one at the same time one that is too often taken for granted: mediating institutions. Churches, schools, fraternal organizations, professional associations, and even clubs—are important for a free society. What we call “the right of free association” points to this in only the most cursory fashion. These associations serve many purposes.³⁸ They help us fulfill the desires we have for community, they are effective in developing personal virtues in ways that government cannot, they are important bulwarks against tyranny, and even in their more self-interested forms, such as trade unions and business associations, they help bring important issues to a focus for public debate. National Right to Life, an example with which John Paul II will be familiar, thrives in this social framework. As a form of negative testimony, it is worth noting that totalitarian governments, by and large, harbor suspicions about mediating institutions, and often spend a good deal of time trying to undermine them.³⁹

It is vitally important, nonetheless, for these mediating institutions to be free of government entanglements, and in my view, this principle applies also to recent proposals concerning faith-based initiatives. In the historical record, you will find that as President, on February 21, 1811, I vetoed a bill passed by Congress that would have authorized government payments to a church in Washington, D.C.—they had drawn up a plan for helping the poor. Yet, caring for the poor should to some extent be considered a public and civic duty, a function of government; and it must not become an opening through which churches can reach and seize political power, or get their hands on the taxpayer’s purse. Funding a church to provide for the poor would establish such a church as a “legal agency” of the government. One feature of the “framework

John Paul Stevens, *The Great Debate: Interpreting Our Written Constitution* 27 (Federalist Socy. for L. & Public Policy Stud. 1986).

38. See James Smylie, *Madison and Witherspoon: Theological Roots of American Political Thought*, 73 *Am. Presbyterians* 153 (1995) (offering an interpretation of Madison’s thinking about the necessity of factions, especially Madison’s hope that competing factions would prevent power from being overly concentrated in one group or another). Alexis de Tocqueville’s somewhat more optimistic observations about associations are also relevant to this discussion. See Alexis de Tocqueville, *Democracy in America*, Bk. II, § 2, Ch. V, *Of the Use Which the Americans Make of Public Associations in Civil Life*. For an influential contemporary account, see Peter Berger & Richard John Neuhaus, *To Empower People: From State to Civil Society* (Am. Enter. Inst. for Pub. Policy Research 1977).

39. John S. Conway, *The ‘Stasi’ and the Churches: Between Coercion and Compromise in East German Protestantism, 1949-1989*, 36 *J. Church & St.* 725 (1994) (describing methods the East German state police used in infiltrating Christian communities for the purposes of surveillance and sowing distrust among them). See also Richard E. Koenig, *The Churches and the STASI*, 109 *Christian Cent.* 396 (1992).

of associations” that I have been describing is that religious groups in America are allowed to “compete” for those who would follow their teachings, but this “friendly competition” between faiths is skewed unnaturally when they begin to compete for *government* favor.⁴⁰

Moderator: James Madison is too modest to remind us of his role in introducing The First Amendment into American life. We therefore owe him a terrific debt, one that we should appreciate much more than we do. That Madison and Thomas Jefferson could work together as they did, Madison more oriented to Calvin’s theology, while Jefferson was more a person of the Enlightenment, that is something of a miracle. But there is another point I would like to hear discussed in this gathering. In comparison to Madison’s contribution—the First Amendment—Jefferson’s most memorable contribution to the discussion of religious freedom, the image of a “wall of separation,” has an air of informality about it.

Thomas Jefferson: The image of the “wall of separation” comes from a letter I wrote to the Danbury Baptist Association in 1802 in response to their question about my refusal to proclaim national days of fasting and thanksgiving, even though Washington and Adams had set a precedent for this practice. More recently I have been approached by several lawyers from Colorado who are not content with recent interpretations of the “Danbury Letter.”⁴¹ They put an argument to me as follows: That whatever my feelings about historic Christianity (no one will accuse me of having been a Trinitarian!), the thrust of the “Danbury Letter” has more to do with limiting Federal power, and less to do with *total* separation. In 1803, one year after the Danbury letter, said these lawyers, I approved a treaty with the Kaskaskia Indians, pledging money to build for them a Roman Catholic Church and to support their priests with federal funds (yet, no one ever mistook me for a Catholic!).⁴² Then later, as they reminded me, I approved three extensions of an act that granted free land to the Society of the United

40. Leo Pfeffer looks at “friendly competition” in Leo Pfeffer, *Creeds in Competition* (Greenwood Press 1978). Robert Bellah and others remind us that “religious competition” in America can be unfriendly, however, *Uncivil Religion: Interreligious Hostility in America* (Robert N. Bellah & Frederick E. Greenspahn eds., Crossroad 1987). See especially Barbara Welter, *From Maria Monk to Paul Blanshard: A Century of Protestant Anti-Catholicism*, in *Uncivil Religion: Interreligious Hostility in America* 43-71 (Robert N. Bellah & Frederick E. Greenspahn eds., Crossroad 1987).

41. Rotherberger, Johnson, & Lyons LLP, *Jefferson to the Danbury Baptists, 1802* (available at http://www.churchstatelaw.com/historicalmaterials/8_8_5.asp (accessed Aug. 9, 2005)).

42. *Treaty with the Kaskaskia, Aug. 13, 1803*, 7 Stat. 78, in *Indian Treaties, 1778-1883*, at 67-68 (Charles J. Kappler ed., Interland Publ. Inc. 1972). See also Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-263 (Lambeth Press 1982).

Brethren, knowing they would send out missionaries to preach among the Indians (and no one has ever called me a missionary, either!).⁴³

I have no desire to argue with their historical account, except to say that they draw the wrong conclusions about my views. They try to craft a broad policy in favor of establishing the Christian religion by focusing on actions in which religion was not the decisive issue. These actions involved treaty negotiations with an Indian nation. America's traditions wisely allow a president some latitude to negotiate treaties, without being altogether subject to the narrowest restrictions of constitutional law. And as for the three "extensions" I signed involving the United Brethren, a president has to consider carefully the mischief he may create by overturning policies he has inherited from previous administrations. The agreement with the Brethren was in place before I came into office, and that was the decisive issue for me. So, I would encourage these lawyers to take a broader approach to the historical context of these few decisions, and to make a more careful reading of what I wrote over the course of my career.

At any rate, the drift of these lawyers' argument is that in 1947, when the Supreme Court looked closely at my letters—they were then deciding the *Everson* case—their claim is that Justice Hugo Black took much too seriously my image of the "wall of separation."⁴⁴ Perhaps, but the "wall" image points to the more substantive constitutional principle regarding "no establishment of religion," and beyond that, to the American ideal of a truly democratic education. The policies of our public schools should be rooted in respect for the beliefs of others that we find in a pluralistic society. This is exactly what I had in mind when I wrote in 1817: "No religious reading, instruction or exercise, shall be prescribed or practiced, inconsistent with the tenets of any religious sect or denomination."⁴⁵

43. "An Act granting further time for locating military land warrants, and for other purposes" *The Public Statutes at Large of the United States of America* Edited by Richard Peters, Esq. Vol. II, "Acts of the Eighth Congress" Session I, Chapter 26, p. 271-272 (Charles C. Little & James Brown eds. 1845). The extensions are also collected and discussed in a polemical way by Robert Cord, *supra* n. 42, at 44-45, 263-270.

44. *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947). See *Wallace v. Jaffree*, 472 U.S. 38, 92, 106-107 (1985) (Rehnquist, C.J. dissenting) (critiquing the "wall" metaphor). But see Leo Pfeffer, *The Establishment Clause: An Absolutist's Defense*, 4 Notre Dame J.L. Ethics & Pub. Policy 699 (1990) (critiquing Rehnquist's argument). See generally Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* 94-97 (Prometheus Books 1991) (providing a brief discussion of Rehnquist's criticism of the "wall" metaphor).

45. Thomas Jefferson, *Elementary School Act, 1817*, in *The Writings of Thomas Jefferson* vol. 17, 425 (meml. ed., Lipscomb & Berg 1907). For a sketch of Jefferson's perspective on the eve of the Revolution, shaped by the decline of the Anglican Church in Virginia, see Merrill D.

Moderator: Many in this assembly will know the work of Leo Pfeffer. In his role as lawyer for the American Jewish Congress, he filed a series of *amicus curiae* briefs in religious freedom cases as they came before the Supreme Court. Mr. Pfeffer, how has your work been guided by Jefferson's "wall of separation"?

Leo Pfeffer: From roughly 1946 to 1968, I worked on cases involving religious minorities or those who claimed to have no faith. For the most part, they were seeking the simple right not to be forced to listen to the prayers and scriptures of a Protestant majority. This was made more poignant for me by the fact that they were usually school children, children who might otherwise feel pressured to choose between the views of their families and the views they were being forced to hear in school. Jefferson said elsewhere,

Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history.⁴⁶

From 1968 to 1988, the terrain in these cases shifted, and then it was more often a matter of whether private schools should be allowed to benefit from public funds. The principle I have tried to argue in these cases is: If we weaken our commitment to public education, we weaken our commitment to democracy, and when we commit public funds to private schools, that is exactly the outcome, whether we intend it or not.⁴⁷

Richard John Neuhaus: For many years now, I have been trying to ring an alarm bell as loudly as I can: The Supreme Court's interpretation of the First Amendment suffers from a "Pfefferian Inversion!"⁴⁸ Leo's arguments always ask us to break the First Amendment into two parts, and then to give priority to what is actually the subsidiary part. Pfeffer

Peterson, *Jefferson, Madison, and Church-State Separation*, in *Conceived in Conscience* 34, 38-39 (Richard Rutyna & John W. Kuehl eds., Donning 1983).

46. Thomas Jefferson, *Notes on Virginia*, in *The Writings of Thomas Jefferson* vol. 8, 388 (meml. ed., Lipscomb & Berg 1907).

47. Cf. *Religion and the State: Essays in Honor of Leo Pfeffer* (James Wood ed., Baylor U. Press 1985); e.g., Leo Pfeffer, *Autobiographical Sketch*, in *Religion and the State: Essays in Honor of Leo Pfeffer*, supra n. 33, at 487. See also J. David Holcomb, *The Nexus of Freedom of Religion and Separation of Church and State in the Thought of Leo Pfeffer* (Ph.D. thesis, Baylor U., Waco, TX, 1997) (reprod. available through U. Mich., Ann Arbor, at <http://wwwlib.umi.com/dxweb/search>); Joseph R. Preville, *Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism*, 33 J. Church & St. 37 (1991).

48. Richard John Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J.L. & Relig. 115-129 (1990).

believes “no established religion” is more important than the “free expression of religion,” and when Americans accept this, they trade away their most important freedom. The First Amendment ought to lead us to many forms of religious speech, not a “frictionless” or “gagged” public arena of the sort Pfeffer envisions. The message his inversion sends is that religion is so *unimportant* that it need never come up for discussion at all!

Moderator: We also have in our midst Michael McConnell, who asserts that the arguments in Father Neuhaus’ book *The Naked Public Square* have for twenty years been gathering momentum, and that accommodation is a policy whose time has come.⁴⁹ In 1995 Mr. McConnell argued one of the cases that helped shift the balance of Supreme Court decisions away from the *Lemon* test.⁵⁰ How would you summarize the issues, Mr. McConnell?

Michael McConnell: The University of Virginia was offering financial assistance to a broad range of student organizations interested in promoting their programs through on-campus publications. When an evangelical group asked for the same kind of financial support, university officials used *Lemon*-style criteria to deny their request. The Court eventually held that this was a form of discrimination against their free speech rights. In *Good News Club v. Milford Central School* the Court looked at the constitutionality of religious groups using public school classrooms after hours. The Court decided that if the rooms were offered to other groups on the basis of providing a “free-speech forum,” religious groups should also be allowed to use them for their meetings.⁵¹ So in the first case the Court focused on equal funding as the crucial issue, while in the second, it was more a question of equal access to public space.

Critics of these decisions object to the Court’s willingness to “reduce” religious speech to the same level as other forms of speech. Their rhetorical question is: If all religion cases are to be decided as Free Speech cases, why should we have a Religion Clause at all?⁵² In *Lee v. Weisman* and *Sante Fe v. Doe*, however, the Court ruled that prayers at graduations and school football games are generally considered an

49. Michael McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1; Michael McConnell, *Why “Separation” Is Not the Key to Church-State Relation* 106-2 *Christian Cent.* 43 (1989). Richard John Neuhaus, *The Naked Public Square* 130 (W.B. Eerdmans Publ. Co. 1984).

50. *Rosenberger v. U. Va.*, 515 U.S. 819, 822 (1995).

51. 533 U.S. 98, 120 (2001).

52. Winnifred Fallers Sullivan, *The Difference Religion Makes: Reflections on Rosenberger*, 113 *Christian Cent.* 292 (1996).

unconstitutional form of establishment.⁵³ So in these types of decisions, the justices show that they still recognize a difference between religious speech and free speech.

School vouchers are another area in which accommodationists can find reason for encouragement. So long as *Lemon* was the standard and vouchers were forbidden, poor families who wanted to send their children to church-related schools suffered an unnecessary burden. In *Zelman v. Simmons-Harris*, the Court upheld a plan in Cleveland in which public funds could be used to attend religious schools—if secular schools were also on the list of possibilities⁵⁴; if government involvement is minimal; and if, thanks to the plan, individual choice is maximized.⁵⁵

Mark Tushnet: I am less convinced than Mr. McConnell about the benevolence of accommodation, however, and I feel compelled to raise certain questions about it. The principle of accommodation puts the government, primarily the legislature but also the courts, in the position of granting “favoring tributes” to religion. Today, I would like to call our attention to three types of problems these “tributes” to religion present.

1. *The Problem of Strings*: Money can be seductive. Aid that helps children attend religiously affiliated schools may come with an explicit condition that forces the school to compromise a distinctive part of its faith, such as requiring the teaching of biological evolution, or requiring that teachers meet state licensing requirements. It would not be surprising to find that some institutions had changed their beliefs in order to make it easier for them to qualify for the funding and to live with the attached strings. The dynamics of such decisions would be roughly akin to those that led The Latter Day Saints to compromise their beliefs about polygamy in the nineteenth century.

2. *The Problem of Religious Discrimination in the Guise of Accommodation*: When Wisconsin was ordered to accommodate Old Order Amish in the area of education, this put government in the role creating a host of other “unaccommodated” religions. The basic question is: If this accommodation is granted to one group, why not also to many others? Aren’t these other faiths being denied an exemption on the basis of *their* religion? A somewhat different difficulty will soon come before the courts in the form of Christian groups who take public

53. *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Sante Fe v. Doe* 530 U.S. 290, 303 (2000).

54. 536 U.S. 639, 662-663 (2002).

55. Douglas Laycock, *Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 156 (2004).

funds from universities (thanks to *Rosenberger*⁵⁶), yet seek to bar homosexuals from their meetings (an exclusion which may violate the Fourteenth Amendment guarantee regarding equal protection).⁵⁷

3. *The Problem of Disappointment*: Perhaps not every accommodation that is requested will be granted, and these denials may have the appearance of being arbitrary. In *United States v. Aguilar*, the government was opposed to the actions of the Sanctuary Movement, in which Presbyterian and Lutheran groups actively sheltered refugees fleeing from political violence in Central America.⁵⁸ Critics of the government's immigration policies believed that the law was being cruelly distorted in order to fall into line with broader foreign policy objectives, instead of being decided on the merits of the cases themselves. Governments may be unlikely to offer religious accommodation, then, when these kinds of ideological differences are also at stake. Have we not circled back around to the objection made by Jefferson, namely, that weighing the opinions of religious persons is not the business of government?⁵⁹

Moderator: After we've seen more accommodation policies in action, we'll try to revisit these questions and ask you to make further judgments about their effects. I wonder now if we can make a transition in our discussion and go a little deeper into the philosophical question about whether religious freedom is best understood as a human right. Leo Pfeffer and Roger Williams serve as "sentinels"; they worry chiefly about a boundary between religion and the state that should not be crossed. In their view, too close a relationship between government and religion will lead to a loss of vitality in religion and eventually to the disappearance of the right to religious freedom. The arguments presented by Michael McConnell and Richard Neuhaus reassert or reclaim a right to religious expression that they say is endangered by those who favor separation. But for the faithful person who worships, prays, confesses, sings, reads the scriptures and tries to follow their

56. *Supra* n. 35.

57. Burton Bollag, *Choosing Their Flock*, 51 *Chron. Higher Educ.* A33, 33-34 (Jan. 28, 2005).

58. 883 F2d 662 (1989).

59. Mark Tushnet, *Questioning the Value of Accommodating Religion*, in *Law and Religion: A Critical Anthology* 245, 250-254 (Stephen M. Feldman ed., N.Y.U. Press 2000); Hilary Cunningham, *Sanctuary and Sovereignty: Church and State Along the U.S.-Mexico Border*, 40 *J. Church & St.* 371 (1998). See generally John Elliott, *The Church as a Counterculture: A Home for the Homeless and a Sanctuary for Refugees*, 25 *Currents in Theology & Mission* 176 (1998) (making an explicitly Biblical justification for the Sanctuary Movement); Dana W. Wilbanks, *The Sanctuary Movement and U.S. Refugee Policy: A Paradigm for Christian Public Ethics*, 6, no. 1 *Theology & Pub. Policy* 4 (Summer 1994).

teachings, there is a sense in which faith is rooted much deeper than rights. No matter that governments may deny certain rights, or indeed all human rights, genuine faith is tenacious and persists. Yet, at the same time, religious groups know from historical experience that their faith has a better chance of flourishing when their “rights” are protected. We need religious freedom as a guaranteed right, but no one believes that such rights exhaust the full meaning of religious faith or plumb its depths. I know that several people in our assembly have been thinking deeply about this ambiguity, and I am eager for us to hear from them.

Michael Perry, in one of your recent essays, you remind us that there were no international laws protecting human rights prior to World War II. Prior to that time, international law did not attempt to interfere with the practices of sovereign rulers who were monstrous in the treatment of their own subjects.⁶⁰ This observation is especially useful insofar as it helps us recognize the covenantal character of the international agreements that were signed by many countries following World War II, especially *The Universal Declaration of Human Rights* (1948). The normative problem with the United Nations tradition of human rights, however, is that all *The Universal Declaration* does is list rights one after the other. It does not tell us anything about how or why people “have” rights at a deep level. Why are you interested in this “deeper foundation” for human rights?

Michael Perry: In *The Idea of Human Rights: Four Inquiries*, I defend the view that human rights are grounded in the sacred.⁶¹ In his book, *The Ten Commandments and Human Rights*, Walter Harrelson reminds us of an ancient claim that human beings have been created in the image of God and that there is a Biblical foundation for human rights.⁶² Max Stackhouse constructs a similar argument, though he is somewhat more guided by the Reformed Tradition and its emphasis on the effacement of this divine image due to human sinfulness.⁶³ What our three accounts have in common is a sense that our relationship to God, whether we acknowledge it or not, is the ontological ground of human rights, and that modern discourse about rights is impoverished because it

60. Michael J. Perry, *The Foundations of Law: The Morality of Human Rights: A Nonreligious Ground?*, 54 *Emory L.J.* 97, 100 (2005). See also Tom J. Farer & Felice Gaer, *The UN and Human Rights: At the End of the Beginning*, in *United Nations, Divided World: The UN's Roles in International Relations* 240 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

61. Michael Perry, *Is the Idea of Human Rights Ineliminably Religious?*, in *The Idea of Human Rights: Four Inquiries* 11-41 (Oxford U. Press 2000).

62. Walter Harrelson, *The Ten Commandments and Human Rights* 173-193 (Fortress 1980).

63. Max L. Stackhouse, *Creeds, Society, and Human Rights* 26-50 (Eerdmans 1984).

has rejected this religious foundation. Richard Rorty,⁶⁴ John Rawls,⁶⁵ and Ronald Dworkin⁶⁶ are among those who either do not want this religious foundation to come into view or deny its existence outright. It is not so much that they agree on *why* this religious foundation should be excluded from public discussion, indeed, they introduce very different reasons for their respective views, but on balance, they are advocates of a secular account of rights. As a consequence, the “anthropology” they end up with is generally a solitary person who is little more than a “centerless web of beliefs” without any ordering principle—a shadow of a person, we might say, who has no loyalties outside the self.⁶⁷

Vigen Guroian: Michael Perry is on to something important. As talk of rights increases, the religious foundation on which rights rest seems to be slipping away. An Eastern Orthodox perspective may help shed some light on this. I’ve had an ongoing debate for many years with David Little, who works with the U.S. Peace Institute in the field of international human rights. It’s important work and I’m not opposed to it, but as I’ve told David and others, I have some serious misgivings about its underlying foundations, because it encourages a view of justice and the moral life that is extremely thin. The first appeal to “rights” as they exist on paper has been easily swept aside time and again by deeply-rooted forces of racism, sexism, and the will-to-power, especially in countries that do not have a long tradition of reflection on these rights. Second, most appeals to “human rights” bracket out religious questions from the start. It doesn’t seem to matter that we first learned about human dignity and freedom from Christian sources. These concepts are now regarded as features of a more or less Kantian form of autonomy. There seems to be no need for a Decalogue, no acknowledgment of a divine Law-giver, and no interest in the narratives or rituals that describe

64. “[T]here is nothing deep down inside us except what we have put there ourselves.” Richard Rorty, *Consequences of Pragmatism* xlii-xliii (U. Minn. Press 1982).

65. For Rawls’s view concerning the exclusion of religious views from public discourse, see John Rawls, *Justice As Fairness: Political not Metaphysical*, in *Collected Papers* 388-414 (Samuel Freeman ed., Harv. U. Press 1999).

66.

Some readers . . . will take particular exception to the term “sacred” because it will suggest to them that the conviction I have in mind is necessarily a theistic one. I shall try to explain why it is not, and how it may be, and commonly is, interpreted in a secular as well as in a conventionally religious way.

Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 25 (Knopf 1993).

67. The phrase “a centerless web of beliefs” is from Rudi Visker, *The Core of My Opposition to Levinas: A Clarification for Richard Rorty*, 4 *Ethical Perspectives* 154, PIN (1997) (responding to a talk given by Rorty in Richard Rorty, *Justice as a Larger Loyalty*, 4 *Ethical Perspectives* 139 (1997)).

the kind of repentance He requires of us when we have done wrong. And these are the very resources that might save us and keep us from violating the rights of others.⁶⁸

Charles Villa-Vicencio: I would like to make a different point about Christianity and human rights. The arguments presented by Perry and Guroian highlight the lack of an ultimate ground in secular views of human rights, but they tend to let the historical church have a moral “free ride” because of their belief that rights have a better grounding in faith than in the United Nations *Universal Declaration*. In the context of the South African struggle to end apartheid, *some* church leaders did speak out against unjust laws favoring whites, but by far the majority of the churches were for many years against human rights for black South Africans. Gregory Baum speaks about “the ambiguity of religion,” by which he means that religion can be oppressive or religion can be emancipative, depending on which of its vast resources are brought to the forefront by historical actors and by the transforming power of The Holy Spirit. In the case of South Africa, a secular view of human rights was very effective in bringing a powerful critique to bear on a conservatively religious society. To be sure, Archbishop Desmond Tutu, Trevor Huddleston, and Beyers Naude were powerful voices for a Christian vision of human rights, as well. In this case, secular and religious visions of rights worked together to bring about justice. It would be more to the point, then, to say that in some situations, these two traditions—sacred and secular rights—can offer mutual support and correction to each other.⁶⁹

Moderator: Considering the hour, and the unending questions that we could go on pursuing, I think we should let these reflections on religion and human rights bring our discussion to a close for today. I know this won't be our last meeting. Perhaps other “scribes” or “dreamers” will summon us together again soon. If our interlocutors do meet on another occasion, we shouldn't be too surprised if the questions and answers take on a much different shape . . .

68. See Vigen Guroian, *Human Rights and Christian Ethics: An Orthodox Critique*, 17 Annual Socy. Christian Ethics 301 (1997). Guroian gratefully acknowledges a debt to Alexander Solzhenitsyn's account of repentance in Alexander Solzheitsyn, *Repentance and Self-Limitation in the Life of Nations*, in *From Under the Rubble* 105-143 (A.M. Brock, et al. trans., Collins & Harvill Press 1975). For an earlier assessment of human rights from an Orthodox perspective, and one that is somewhat more hopeful than Guroian's view, see Stanley S. Harakas, *Human Rights: An Eastern Orthodox Perspective*, 19 J. Ecumenical Stud. 13 (1982).

69. Charles Villa-Vicencio, *Christianity and Human Rights*, 14 J.L. & Relig. 579, 579, 591-593, 598-601 (2000). Gregory Baum, *Religion and Alienation: A Theological Reading of Sociology* (Paulist Press 1975).

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