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2023

RELIGIOUS FREEDOM IN LIGHT OF MODERN
CONCEPTIONS OF SEXUALITY AND GENDER:
IRRECONCILABLE DIFFERENCES AND/OR
SPACES FOR CONVERSATIONS?

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We believe that religious liberty is a God-given right.

We believe that legislation and other governmental acts which unite church and state are contrary to the best interest of both institutions and are potentially prejudicial to human rights, and hold that religious liberty is best exercised where separation is maintained between church and state.

We believe that government is divinely ordained to support and protect citizens in their enjoyment of natural rights, and to rule in civil affairs; and that in so doing, government warrants respectful obedience and willing support.

We believe in the natural and inalienable right of freedom of conscience—to have or not have a religion; to adopt the religion or belief of one's choice; to change religious belief according to conscience; to manifest one's religion individually or in community with others in worship, observance, practice, promulgation, and teaching—subject only to respect for the equivalent rights of others.

We believe that religious liberty also includes the freedom to establish and operate appropriate charitable or educational institutions, to solicit or receive voluntary financial contributions, to observe days of rest and celebrate holidays in accordance with the precepts of one's religion, and to maintain communication with fellow believers at national and international levels.

We believe that religious liberty and the elimination of intolerance and discrimination based on religion or belief are essential to promote understanding, peace, and friendship among peoples. We believe that citizens should use lawful and honorable means to prevent the reduction of religious liberty.

We believe that the spirit of true religious liberty is epitomized in the Golden Rule: *Do unto others as you would have others do unto you.*

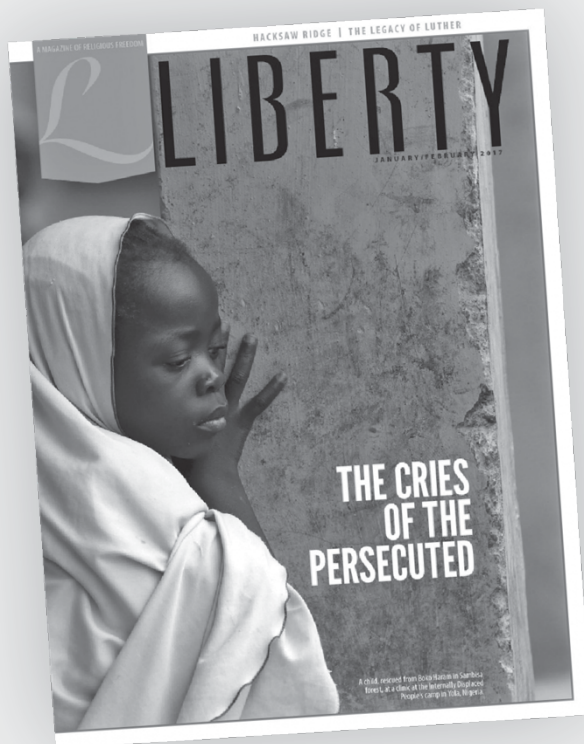
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The purposes of the International Religious Liberty Association are universal and nonsectarian. They include:

1. Dissemination of the principles of religious liberty throughout the world;
2. Defense and safeguarding of the civil right for all people to worship, to adopt a religion or belief of their choice, to manifest their religious convictions in observance, promulgation, and teaching, subject only to the respect for the equivalent rights of others;
3. Support for religious organizations to operate freely in every country through the establishment of charitable or educational institutions;
4. Organization of local, national, and regional chapters, in addition to holding seminars, symposiums, conferences and congresses around the world.

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INTRODUCTION FROM THE SECRETARY GENERAL

Freedom is probably one of the most popular words in our contemporary vocabulary, but its meaning has increasingly become opaque. In other words, its overuse has blurred its content. In fact, the very “being” of freedom has been debated in philosophy as problematic. Regardless of the difficulty in delineating its content, it has been said, “No matter what you advocate, you must sell it in the language of freedom.” That is how popular and practical slogan driven freedom has become.

Historian Robin D. G. Kelly recalls in *Freedom Dreams*, “freedom was the goal our people were trying to achieve; *free* was a verb, an act, a wish, a militant demand. ‘Free the land,’ ‘Free your mind,’ ‘Free South Africa,’ ‘Free Angola’ ‘Free Angela Davis’ ‘Free Huey,’ were slogans I remember best”—the right wing doubled down on its claim. In just a few brutal, neoliberal decades, the rallying cry of freedom as epitomized in the Freedom Summer, Freedom Schools, Freedom Riders, Women’s Liberation, and Gay Liberation was overtaken by the Likes of the American Freedom Party, *Capitalism and Freedom*, Operation enduring Freedom, the Religious Freedom Act, Alliance Defending Freedom, and so much more.”

Despite its popularity, we are witnessing what Wendy Brown has called a developing “crisis of freedom.” This “crisis of freedom” despite its multifaceted expressions concerns at its root what it means to be fully human. This overarching umbrella of what it means to be fully human includes our thematic this year. “Freedom of Religion or Belief and Gender Equality.”

At the onset, I would like to specify that this subject of gender equality is not an academic speculation about rights in the abstract. Women disproportionately suffer the tragedies of human existence. They are the prime targets of wars, genocides, human trafficking, domestic servitude, and slavery, all adding to the toll of insecurities prompted by the multifaceted reality of gender inequality. The expressions of injustices are nearly in all domains of women daily and lifelong experiences: Girls are denied education. Women make two thirds of the world’s illiterate. Wage discrimination against women is a global phenomenon. In the workplace women disproportionately earn less and are denied highest positions. It is a widespread feature that women in the home are denied decision-making. The plight millions of women experience in our contemporary world is simply put inhumane. It can no longer be classified as cultural inevitable distinctives. It is more serious than that. To move away from these discriminatory practices and lifestyles and heal from various transgenerational traumas as a result of multifaceted abuses of women have become a moral imperative.

As a further illustration to the predicament women face, we are reminded that a tragic reality has been occurring and re-occurring in our world. There are between 20 million to 40 million persons who are trafficked every year, 71 % of whom are women



and girls. This pandemic, for that's what it is, should not be classified as a societal dysfunction; it is part of a web of crimes against women and girls, crimes against humanity, crime against what it means to be human.

At some intersections, we hope that this year's edition of the meeting of experts will strengthen, broaden, and bring critical additional elements to affirm and expand the epoch defining resolutions of the Beijing + 25, arguably the most comprehensive blueprint for advancing women's rights, key among which is the right to equality.

The 12 critical areas of concern still function as barometers to assess the progress made, the challenges and hurdles to overcome.

1. Women and poverty
2. Education and training of women
3. Women and health
4. Violence against women
5. Women and armed conflict
6. Women and the economy
7. Women in power and decision-making
8. Institutional mechanisms
9. Human rights of women
10. Women and the media
11. Women and the environment:

12. The girl child: Specific forms of violence and harmful practices, including female genital mutilation (FGM) and cutting, breast ironing and child marriage affect girls. To add injury to wounds child sexual abuse continues unabated.

Looking at the contributions to be shared, at will come out of our presentations, deliberations, dialogues, and consultations promises to be relevant to an epoch-defining challenge and opportunity in reference to equality and more specifically in the context of this version of IRLA meeting of experts, gender equality as it intersects with freedom of religion or belief.

Articles published in this edition of *Fides & Libertas* add needed perspectives to our consultations, conversations, dialogues and building together for a space where people can be safe to live, flourish and show human solidarity to the whole human family so that all may live in peaceful coexistence in the dignity of difference without violence against people of different opinions. May the difficult work of peacemaking prevail without people sacrificing or compromising their deeply held convictions. It is, after all, an issue of the right to freedom of conscience.

The IRLA group of experts issued a statement called the "Lisbon Declaration," to contribute to a way forward for a human and humane relating to others in solidarity with our common humanity despite our differences. Our common humanity is a justification for working for our common good, and security.

In Gratitude,
Ganoune Diop, PhD
Secretary General, International Religious Liberty Association

FIDES ET LIBERTAS



RELIGIOUS FREEDOM IN LIGHT OF MODERN
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HUMAN SEXUALITY, RELIGIONS AND RELIGIOUS FREEDOM: AREAS OF CONTENTIONS & INTERSECTIONS

GANOUNE DIOP¹

Human sexuality, religions and religious freedoms intersect at the confluence of human identity. This is the reason why the issue we are considering is so complex. Human beings are irreducible to one or several aspects or even the sum of characteristics of their persons. Human beings are not just biological beings, there is always more to human beings than what can be measured. Human beings are mysteries, rich and profound. The value of everyone is infinite. This is connected to human dignity. There is always more to anyone.

Regarding human sexuality, in our contemporary world, the current debate in the international community tends to focus almost exclusively on issues related to the legitimacy or non-legitimacy of the LGBTIQ claims to their rights. The meeting of experts has addressed the larger issues of sexuality which include, not only women's sexuality from the angle of all harmful practices such as female genital mutilations for example, but also male sexuality, and the harmful alpha male culture which distorts male self-image and lead to the instrumentalization of women robbing them of their human dignity. The deep and irreconcilable differences of various understandings of biblical texts on human sexuality, and marriage, are here to stay.

An overview of the landscape of opinions regarding same-sex marriage shows not only the differences between religious peoples and their various faith-based traditions but also among non-religiously affiliated persons. Most of the religious world claiming monotheistic faiths prohibits same sex marriages (Roman Catholic Church, Ecumenical Patriarchate, Russian and all Orthodox autocephalous churches, Assemblies of God, Islam, Orthodox Jewish Movement, Lutheran Church-Missouri Synod, American Baptist Churches, National Baptist Convention, Southern Baptist Convention). Some religious and philosophical traditions do not have statements about a unified position. These are Hinduism and Buddhism among other Asian traditions.

¹ Ganoune Diop, PhD, is Secretary General of the International Religious Liberty Association and Director of Public Affairs and Religious Liberty for the Seventh-day Adventist Church's World Headquarters. He also serves as Secretary of the Conference of Secretaries of Christian World Communions.



Despite the differences of beliefs at the root of our understanding of what it means to be a human being, a critical consensus is needed to stop the violence against people who disagree with others' anthropology. The foundational issue is an anthropological one and whether this anthropology is informed by how one understands biblical revelation as related to God's absolute will regarding creation and those God created in God's image. The complexity of the issue of human sexuality is therefore a theological issue. How one views God and God's purpose for creation, is going to inform how one relates to other human beings. Our conviction and commitment to God will affect our relationships with other human beings.

Need this understanding of God's ultimate will lead to violence against people who hold opposing views? That is the incontrovertible question to address. My church tradition has unequivocal statements regarding human sexuality. It also has statements about the integrity of the human person. An integrity that needs to remain inviolable whether it be physical, mental, spiritual, or social-cultural. The impulse to subjugate people with different lifestyles is present in religious contexts, where some use languages to criminalize, and demonize LGBTIQ. From criminalization to physical violence, the gap is easily bridged. Furthermore, as is the case in some countries, even the capital punishment is not spared for people who do not fit in the endorsed biblical norm of human sexuality. This area of competence is not that of religious people. Separation of religion and state can function as a deterrent against religious leaders taking the initiative to criminalize, discriminate, persecute, or execute those who dissent from their religious norms.

When it comes to religious freedom, it may be useful to mention that "Freedom of religion or belief is a universal fundamental human right inscribed in the UDHR." It is central to all the other freedoms. It is a compound freedom which presupposes the freedom of thought, of conscience, of religion, of choice, of expression, of association and of assembly. It is the freedom to profess, to practice, to propagate one's faith, to pass it on to one's children without restriction from the state or threat from popular hostility. It is the freedom to wear symbols, and to own properties where one can freely assemble with like-minded persons, to worship to simply to celebrate what one values.

The intersection of freedom of religion or belief and human sexuality is worth exploring more carefully. Human sexuality is an area where untold human suffering has taken place. Excruciating pain and senseless violence have been perpetrated against human beings based on their sexual orientation or identity. Both religions and atheistic ideologies have contributed to marginalizing, persecuting, and even murdering sexual minorities.



Unacceptable suffering, discrimination, inflicted pain, and murders against those who identify themselves as LGBTIQ have punctuated the history of the world. The perception of homosexuality as harmful led the Emperor Theodosius I to command that all passive homosexuals to be burned at the stake. According to the code of Theodosius (Theodosius II, 438), the passive role associated with femininity was a threat to the empire.²

Homosexuals have been considered scapegoats responsible for the tragedies that afflict society. In Europe they have been accused of bringing the black death (1348-1350) which decimated one third of the European population. The last condemnation of a homosexual to death occurred on October 10, 1783. In the US the last execution of a homosexual for being a homosexual occurred in South Carolina in 1873.

Coercion and violence against people who believe differently about themselves, and human sexuality is never legitimately justified. The differences of opinions on human sexuality have been and still is a platform where unjustified and unwarranted violence is perpetrated against minorities in the name of mere stubborn refusal to others to choose or embrace the identity of their choosing, however they have come to their conviction.

Violence in all its forms, whether physical or verbal. Violence against anyone is a violation of not only physical integrity but also human dignity. No person should be violated, abused, and deprived of their right to safety, and security. All persons are entitled to their physical, emotional and mental integrity.

The world has come a long way from witch hunt, gay bashing in the public square to more contained attitudes towards gender issues and sexual identity. The debate in the past few years and the report among Anglicans is illustrative of where a Christian tradition is in its engagements with rights. Most so-called Western nations have moved from a debate on the rights of LGBTI. The issue is no longer at least in most parts of the world, whether LGBTI persons should live or not but the focus is rather on their civil rights such as the right to marry. Same sex marriage is taboo in most part of the world. Nonetheless, justifications for harming a person because of their sexual orientation or identity is rejected in most part of the world.

The revisiting and the careful rethinking about the interrelatedness and interdependency and indivisibility of human rights and their foundation, human dignity, which I venture to call a moral imperative, have become urgent in light of the deep differences of opinions in reference to human sexuality, both in secular society and in the religious world. An incontrovertible or inescapable question comes to the fore in the context of this reflection on human sexuality and gender identity. Can people of same sex orientations be denied the

² Daniel Borrillo, *L'homophobie. Que sais-je* (Paris: Presse universitaire de France, 2000), 41.



prerogatives intrinsic to their human dignity, the so-called daughters' rights of human dignity? Explicitly, the right to personality, the right to dignified human subsistence, the right to reputation, the right to family life, the right to equality, the right to freedom of expression, the right to freedom of conscience and religion, the right to freedom of movement, the right to education, the right to employment and the right to due process?³

There can be no turning back or rewinding of the clock of history. Unless the state proves a person's mental or illness, and the sickness of harming oneself and society in self-mutilation for example, freedom of conscience or belief is for all. To the state is given the responsibility to regulate the security of citizens from harm and danger, not to individual opinions. Christian communions or traditions will continue to wrestle with their internal differences of interpretations and opinions regarding norms for human sexuality. That is part of being a communion where no one is forced to stay; but where dialogue can take place because of a common core embraced by all.

Let the conversation then continue, especially at a platform such as this one, a meeting of experts or even in larger contexts such as the United Nations, or in national debates where a consensus on what is human and humane, what are the rights and what is right for all are sought to hold together the human family.

- The differences of opinion among the Christian churches is here to stay. People interpret their holy texts differently. Seven biblical texts unambiguously condemn same sex practices. Nevertheless, people reading the same scriptures find some statements opaque and ancient culture bound. They claim the right to read differently.
- The right to choose one's identity is an inalienable right without which the foundation for human experience of freedom collapses. If all human rights are interrelated, interdependent and indivisible, then depriving any minority and any segment of the human family of any right would ultimately consists in negating their right to self-determination and therefore a denial of the very foundations of their humanity. The freedom to choose to define one's own identity according to one's own conscience and convictions, should be secured as the prerogative of every human being. The state is obviously called to be vigilant so that rights may not be instrumentalized to drift into trivialized human dignity.

Moreover, the very foundations of the Christian faith based on the freedom to choose to enter a covenant would be eroded or implode if this right is not enjoyed by every human being. Self-ownership and self-determination

3 Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 288-301.



whether collectively or individually is a condition sine qua non if humankind is to assume its destiny and dignity. There are inevitable differences of opinions and of interpretations. But they need not lead to the devaluation of one's deeply held convictions or to violence towards those who believe differently about their sexual identity. Criminilization belongs to the political and judicial spheres. Therefore, sentencing and punishing are not part of the ecclesiastical responsibility. Separation of religion and state is a deterrent against crossing the boundaries of one's jurisdictions.

CONCLUSION

In contemporary pluralistic societies opinions vary about almost every issue. The subject of human sexuality is no exception to this general rule. Christian churches are part of this contemporary phenomenon. The staggering diversity of opinions among churches and in every single tradition itself is a sign for the need of a platform which promotes the protection of the people's right to embrace the identity of their choice without being discriminated, intimidated, harassed, persecuted, harmed or murdered. This can be done without endorsing peoples' opinions, choices, and lifestyles.

Social peace, however, is too serious to be left to the regulations of religious beliefs alone. The public space benefits from secular neutral framework that allows people of various opinions to co-exist in the respect of their differences. Dialogue in the dignity of difference is called for by the imperative of freedom of conscience. A normative consensus about the ban of violence against people of various sexual orientations or identities should be promoted and may become a key factor in helping the human family move forward beyond conflict and fighting, to building respect and solidarity within the human family. Freedom from fear, freedom from being harassed, humiliated, or harmed should be the prerogative of every human person.

An incontrovertible or inescapable question comes to the fore in the context of this meeting of experts. Can people of same sex orientations be denied the prerogatives intrinsic to their human dignity, the so-called daughters' rights of human dignity? Explicitly, the right to personality, the right to dignified human subsistence, the right to reputation, the right to family life, the right to equality, the right to freedom of expression, the right to freedom of conscience and religion, the right to freedom of movement, the right to education, the right to employment and the right to due process.⁴ Christian communions or traditions and world religions will continue to wrestle with their internal

4 Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 288-301.



differences of interpretations and opinions regarding norms for human sexuality. That is part of being a communion where no one is forced to stay; but where dialogue can take place because of a common core embraced by all. Compromising one's own beliefs would mean loss of one's identity. That need not be negotiable. But the value of respecting other peoples' humanity and choices without having to endorse their choices or lifestyle, is a moral imperative. Our common humanity calls for sharing the civil space in civility, and peaceful coexistence. This requires not compromise but negotiated accommodations.

Let the conversation then continue, especially at a platform such as the meeting of experts, and at other platforms where consensuses on what is human and humane, what are the rights and what is right for all are sought to hold together the human family in peaceful coexistence in the dignity of difference.

The human family can indeed choose the path of freedom, that is the solution to the dysfunction and disease of internalized dominance, the silly pride of thinking of oneself as superior to others based on belief on one's manifest destiny, exceptionalism, and election to privileges. The path to freedom would equally erode the foundations for social, cultural, economic matrixes of dominations. It would reconfigure the whole ecosystem of human experience from what is normative from what is fashionable and temporarily caught in the fleeting moments of one's arbitrary preferences. Freedom would also contribute to save us from the dreams of dominions which have even put people to burn at the stake. Michel Servette paid a price for opposing Calvin's vision of the city of God, a city upon the hill. The city is certainly not and maybe it can be said it will never be the kingdom of which Jesus said is not of this world.

All these words are based on the root "dom." Human dignity can function as a reminder and a deterrent which resists any attempt to being complicit to the practice of dominating human beings, reduced to domains to be domesticated, used, and disposed of. Humans after all are created in the image of God, it is believed. Let therefore God be honored in our showing solidarity, respect, and love of neighbors. Love is not predicated on agreeing or having the same opinions or beliefs, or votes. After all, as the Apostle Paul puts it, "while we were sinners, impious, enemies, God demonstrated God's love to us" (See Romans 5:6-11). The objects of God's love have infinite value, measured from the depth of God's love.

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WOMEN, RELIGION AND HUMAN RIGHTS: AN APPROACH FROM WESTERN LEGAL SYSTEMS

JAIME ROSSELL¹

The Roman saying "Ubi societas, ibi ius" (where there is society, there is law) has its origin in society's need to protect the interests of its citizens through the legal system, which orders and establishes the rules of coexistence in society. On occasions, the set of rights and duties of each citizen, their interests, clash with those of their neighbors, generating conflicts to which the legal system must find the fairest solution.

Nowadays, as a consequence of the religious diversity existing in society, there are conflicts related to belonging to a certain religion and the exercise of fundamental rights. In the case of women, although most of these conflicts are located in certain geographical areas, we must not forget that the position of women, in the vast majority of religions, has changed very little throughout history. A position which, as one author points out, has been used by men "to maintain spaces of power"².

Thus, religious diversity has incorporated certain customary religious or cultural practices, based on patriarchal models, which jeopardize the rights and freedoms won by women in Western society. And although in a secular and democratic State, respect, tolerance, and religious freedom of the individual and of the confessions must be guaranteed, the acceptance of these practices must have the dignity of women as a limit³, even though they may affect the secularizing process of the state or support the fundamentalist discourse of some religious leaders.

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² Parejo Guzmán, MJ., "¿Mujer, pluralismo religioso e igualdad de género?: desafío jurídico en el siglo XXI en España," *Revista de Derecho de la UNED*, no. 23 (2018): 154.

³ In Spain, a criminal court in Barcelona sentenced on 12 January 2004 an Imam who published the book "La mujer en el Islam" (Women in Islam). In this book, an excessively sexist interpretation of the Quran is made, justifying the physical violence against women if they are not able to dominate them in the family environment, considering the subjugation of the female figure as something natural. The court ruled that the Imam's right to religious freedom was limited by the right to the moral integrity of the woman who was the target of his speech.



There is a great majority of religions that, with the argument of a divine and superior order, have transmitted "gender stereotypes based on the superiority of men over women, typical of a patriarchal culture"⁴. But this vision, in many cases, is not based on the sacred texts of these confessions. It is the result of an interpretation of these texts by men that responds to the historical reality in which these religions were born and developed.

Nassira Sediri argues that "the underlying idea of the Koran is based on respect between all Muslims, whether men or women, although historical reality has led to the imposition of a unitary patriarchal vision"⁵. In fact, those who defend full equality between men and women and its compatibility with Islam, point out that the Shari'a represented an advance in the situation of women at the time of its promulgation. It is this Islamic spirit that must be defended, by contextualizing it in a new society that has already abandoned patriarchal patterns⁶.

The Quran establishes equal dignity between men and women⁷, although it maintains the primacy of the male in the family and society⁸. As Combalía points out, Islamic law "does not accept equality between men and women, but equity, which consists in giving each of them the rights and duties that correspond to them by virtue of the different roles they play in society... it is not possible to speak of equal rights and duties, but complementary ones"⁹. An idea that was taken up in article 6¹⁰ of the Declaration of Human Rights in Islam, drawn up in Cairo in 1990 by the Organization of the Islamic Conference, and which sets the Shari'a as its main source.

In Judaism, the role of women is also much more restricted than we might suppose and the Torah shows us the important role of women in the history of the Jewish people¹¹. Here too, the sacred texts present men and women as

⁴ Parejo Guzmán, "¿Mujer, pluralismo religioso e igualdad de género?" 180.

⁵ Ibid., 165.

⁶ Vid. Connors, J., "The Women's Convention in the Muslim World," en VV.AA. (Ed. M. Yamani), "Feminism and Islam. Legal and literary perspectives," (Berkshire: Ithaca Press, 1997), 364.

⁷ Aleyas 3,195 y 4,1.

⁸ Aleyas 2,228 y 4,34.

⁹ Combalía Solís, Z., "¿Igualdad o equidad?: el reconocimiento en Occidente de instituciones islámicas de inspiración patriarcal," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, IUSTEL, 20 (2009), 3.

¹⁰ "(a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.

(b) The husband is responsible for the maintenance and welfare of the family".

¹¹ "the Torah presents us with a myriad of female role models who excel in all areas in their own way. We have Deborah as a judge, who becomes the image of justice and wisdom...; Miriam as an image and example of leadership; the matriarchs as the perfect model of love and family; Esther as a symbol of dedication to the Jewish people, of the fullness of a reigning kingdom and of the tzniut to which men too are obligated; and Ruth as the pivot of love of Torah, the strength of conversion and the desire to seek God." Vid. Gleason, "A. La mujer en el judaísmo: cuatro formas de ver el género," *Enlace Judío*, 10 de marzo de 2021 (<https://www.enlacejudio.com>).



complementary, with different obligations and responsibilities. And although there are currents with different degrees of patriarchalism, there are also reformist movements in which women occupy a very different position. For some time now, there have been women who have held the role of rabbis.

Neither the Second Vatican Council nor the Code of Canon Law distinguishes between believers, men and women, on the basis of their dignity and freedom, or on the basis of their cooperation in the mission of the Church. In this case, "the radical equality of the faithful is a principle which inspires the entire juridical-canonical regulation... it is not a question of inequality in the order of personal juridical status... but exclusively in relation to certain functions"¹². This does not mean, however, that for some time now there has been a growing awareness that this discrimination between men and women is not legal but *de facto*¹³.

As one author has pointed out, it is not easy to find a religious community in which, applying the secular legal categories of equality and non-discrimination, there is complete equality between men and women. The position of men and women differs from one denomination to another. And it is usually more pronounced when we refer to the sphere of the family or to the responsibilities of government and administration of the denomination, as these functions are usually connected to that of leadership in doctrinal matters¹⁴.

"With all the necessary nuances, the path of the religious denominations - doctrinally, legally and politically - (has been) marked above all by men... as something deeply rooted in the very structure - constitutive and functional - of the denominations"¹⁵. One example is the Torah, which, written and interpreted by men, has been inaccessible to women until very recently because they did not have access to study and knowledge of it. In fact, women have never participated in the elaboration of the Halacha, which is the normative part of the sacred texts, not even to regulate those issues that affect them directly, although the rights of women in the field of marriage were recognized, which until the twentieth century were not recognized by the most advanced legislations¹⁶.

¹² Blanco, M., "La mujer en el ordenamiento jurídico canónico," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, IUSTEL, 20 (2009), 6.

¹³ This does not detract from the role that women have played in the Catholic Church over the centuries. One example are the abbesses, women who, as an integral part of their office, possessed important juridical and even political power within the Church. And there are also women - such as the Spanish Teresa of Jesus - who are very important from a doctrinal point of view. In this sense, women's religious congregations are the most obvious example of women's autonomy in a world in which they were predestined to be subordinate to men.

¹⁴ Martínez-Torrón, J., "La igualdad de sexos en el sistema acordado de relaciones entre el Estado español y confesiones religiosas," *Aequalitas: Revista jurídica de igualdad de oportunidades entre mujeres y hombres* (2012), 63-64.

¹⁵ *Ibid.*, p. 64.

¹⁶ Vid. Perales Agustí, M., "La mujer en el Derecho y el matrimonio judío," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 20, (2009).



And in the case of the Catholic Church, as one author points out, "despite the active and recognized role of women in its first centuries of existence, the Church was no stranger to the legal and theological institutionalization of discrimination against women, which stemmed from a masculinizing exegesis of biblical texts... and from a strictly paternal and manly idea of God"¹⁷.

This lack of women's participation in the interpretation of sacred texts has long led to the legitimization of practices that violated women's rights. They were prescribed by the sacred texts but were interpretations of them performed exclusively by men. Fortunately, this situation has been changing over time and has to do, in some cases, with the incorporation of women into the work of studying and interpreting the texts.

Two of the areas within religion in which there are often discriminatory situations between men and women refer to the family and to the position or role of women as leaders within the ecclesiastical organization.

From a gender perspective, evangelical and canonical marriage does not create problems. In Jewish and Islamic marriage, on the other hand, there is no legal equality between men and women. This has not prevented some Muslim countries, such as Morocco with the new Family Code (the *Mudawana*) of 2004, from making an effort to modernise and promote human rights in harmony with Islamic tradition and spirit by regulating the position of women and minors in family matters. However, it is clear that in this ongoing reform it is not possible to go against the provisions of the sacred texts, so that sometimes it is not possible to achieve real legal equality. This has led some European countries, which recognize the validity of religious marriages, to limit their civil effects only to the way in which they are celebrated.

The basic problem "is not so much that of the position of women, but the broader problem of the Shari'a's capacity to adapt, of its suitability to be interpreted in accordance with the evolution of society"¹⁸. The problem does not arise in those countries that recognize the validity and efficacy of Islamic family law, but when some of these institutions, such as polygamy or repudiation, are claimed as valid in countries where equality is at the heart of the system.

In these cases, in order to prevent the penetration of this type of institution that violates fundamental values, the legal recourse used by the legal system has been the public order exception. However, we must also be aware that, on occasions, a strict approach in the invocation of public order to prevent the

¹⁷ Vega Gutiérrez, A.Mª, *Diálogos de Teología de Almudí. Algunos acentos del pontificado del Papa Francisco* (2014).

¹⁸ Combalía Solís, Z., "¿Igualdad o equidad?: el reconocimiento en Occidente de instituciones islámicas de inspiración patriarcal," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, IUSTEL, 20 (2009): 16.



recognition of these institutions could, in practice, be detrimental to the rights of the women it is intended to protect.

For this reason, and as a consequence of the growing cultural and religious diversity of our societies, the application of this concept has begun to become more flexible. In Spain, for example, polygamous marriage is not recognized, although it can be recognized as a valid legal institution when it has inheritance effects or when the second wife claims maintenance or a pension. Also in Spain, "our courts continue to consider that repudiation violates public order because it violates the rights of women, because of its private nature..., and because of its revocable nature... but it is recognized if the woman requests it"¹⁹.

Another area in which discrimination against women has been recurrently pointed out has to do with their role in the organizational structure of religions, or as ministers of worship. In the case of Christian churches, the most obvious example is that of the Catholic Church. In 1994, Pope John Paul II, in his Apostolic Letter "Ordinatio sacerdotalis"²⁰, spoke out against women's access to the priesthood. Subsequently, and as a consequence of the ordination in 2002 of seven German Catholic women by an Argentinean bishop, Benedict XVI, then Prefect of the Congregation for the Doctrine of the Faith, issued a General Decree in 2007 condemning with excommunication "latae sententiae" those women who attempted to take holy orders and the bishops who ordained them.

The debate, therefore, seems closed, although it is true that Pope Francis, through the *Motu Proprio Spiritus Domini* of 2021, has recognized the possibility of women exercising the ministry of lector and acolyte. Meanwhile, for some time now he has been encouraging a greater role for women in the governance of the church, incorporating them into the places where important ecclesiastical decisions are made, which is serving as an example in many dioceses.

Protestant churches, on the other hand, have been much more flexible in incorporating women into the priesthood and its governing bodies. They have been incorporated since the mid-1970s and since the 1980s into the episcopate. Similarly, since the 1980s, there have also been women rabbis in Reform Judaism.

For this reason, one author has pointed out that "the struggle for the recognition of women's rights is, in itself, a struggle against the patriarchal culture that dominates most of our societies and world religions"²¹.

¹⁹ Ibid., 26.

²⁰ "Wherefore, in order that all doubt may be removed regarding a matter of great importance, a matter which pertains to the Church's divine constitution itself, in virtue of my ministry of confirming the brethren (cf. Lk 22:32) I declare that the Church has no authority whatsoever to confer priestly ordination on women and that this judgment is to be definitively held by all the Church's faithful".

²¹ Parejo Guzmán, ¿Mujer, pluralismo religioso e igualdad de género?..., cit. p. 155.



When there are conflicts related to equality between men and women within religion, international law, through different legal documents, has been very clear in defending the rights of women and guaranteeing their non-discrimination. But, except in cases of violence against women, I believe that we should reject approaches that advocate that the solution to these conflicts should always be the same, as we could be denying the normative value of respect for religious diversity.

Some of the conflicts that exist within religions are generated as a consequence of the rights or duties acquired by the believer, or the exercise of certain practices that are different according to gender. In some of these cases, we must not forget that sometimes it is the woman who voluntarily places herself in a certain position by belonging to or practicing a religion.

The question is whether Western legal systems should apply the principle of equality and non-discrimination interpreted in strictly secular or civil terms, to challenge the internal rules of religious denominations, in which women are subjected to differential or inferior treatment.

In my opinion, the answer must be negative. Otherwise, it would conflict with the right to autonomy and self-organization of the churches, an essential element of the content of the fundamental right to religious freedom. A right which, as the European Court of Human Rights has frequently affirmed, is indispensable for the existence of pluralism in a democratic society²².

As Martínez-Torrón points out, "a state that would seek to apply a secular notion of equality to the internal sphere of the confessions would be ignoring the fact that they are not obliged to organize themselves in the manner of a liberal democracy. Their approaches and the justification for their existence are different... and although many of these denominations have undemocratic hierarchical structures, the European Court of Human Rights (ECtHR) has pointed out on several occasions that the religious freedom of the citizen within the denomination itself, and therefore its legal position, is sufficiently guaranteed from the moment that the citizen has the right to freely leave the denomination at any time..."²³.

Churches have the right to set limits on the exercise of religious freedom by their members. They may impose a uniform religious doctrine and, consequently, also impose corresponding sanctions on members who deviate from it, including expulsion from the religious denomination²⁴.

²² Vid. ECtHR *Serif vs Grecia* de 14 de diciembre de 1999; *Hasan y Chaush vs Bulgaria* de 26 de octubre de 2000; *Iglesia metropolitana de Besaravia vs Moldavia* de 13 de diciembre de 2001 y *Mirolubous y otros vs Letonia* de 15 de septiembre de 2009.

²³ La igualdad de sexos en el sistema acordado..., cit., p. 64

²⁴ Vid. Martínez-Torrón, J., "Los límites a la libertad de religión y creencias en el Convenio de Derechos Humanos," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, IUSTEL, no. 2 (2003): 35.



In case of conflict, Article 9 of the European Convention on Human Rights does not protect any right of dissenters to challenge an ecclesiastical decision before civil courts, because only religious authorities are competent to settle their internal disputes. Limiting or restricting the right to internal autonomy of denominations cannot be done in a discretionary basis, but only in cases where there is a "compelling social need"²⁵. As the ECtHR has pointed out on several occasions, the State cannot legitimately interfere in a purely religious matter that has been settled by the religious community concerned, even where there is a strong division of opinion within that community on the matter. This does not mean that some cultural and religious practices that continue to justify discrimination against women must disappear. We must continue to seek instruments that ensure that religion is not used in civil life as an instrument of male superiority over women or to justify discrimination against women, but without imposing on religious models contrary to their doctrine.

Several international texts have pronounced themselves in this regard. Article 4 of the 1993 Declaration on the Elimination of Violence against Women prohibits states from invoking custom, tradition or religious considerations to avoid the obligation to prevent, investigate and punish acts of violence against women. Art. 5(a) of the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) notes the need for States to intervene to eliminate prejudices and customary practices that reflect a stereotyped role for women but does not call for intervention on religions per se or for changing people's religious beliefs²⁶.

The European Parliament, in its Resolution 2000/2174 on women and fundamentalism, establishes the need to ensure that religion and religious freedom are not used as a tool or excuse to discriminate against women. However, the aim of this document is not to modify the internal regime of religious communities, but to ensure that religious or supposedly religious rules or customs cannot be used as an instrument of discrimination against women, in a secular society that aims to make the principle of equality a reality and effective.

When Asma Jahangir, UN Special Rapporteur on religious freedom, noted in 2010 that "it cannot be considered taboo to demand that women's rights take precedence over intolerant beliefs that are used to justify gender discrimination"²⁷, she meant that women's rights naturally take precedence over religions and beliefs, which are not rights-holders, as women's rights cannot be

²⁵ Vid. ECtHR *Serif vs Grecia* de 14 de diciembre de 1999.

²⁶ Vid. Relaño Pastor, E., "Derechos de las mujeres y libertad religiosa: ¿irreconciliables?" *Cuestiones de pluralismo*, vol 1, nº 1 (1er semestre 2021), *Revista del Observatorio del Pluralismo religioso en España* (https://www.observatorioreligion.es/revista/volumen_1/numero_1/index.html).

²⁷ A/65/207, párr. 69.



limited, violated, or undermined in the name of religion. But without imposing civil rules on these religions that modify their autonomy or doctrine.

Religions themselves must adapt to the new social contexts through an interpretation of religious texts adjusted to the social reality in which they operate. Progress towards greater equality and non-discrimination of women within religious confessions requires: a) an effort on the part of religious leaders to adapt the application of texts and norms of sacred origin to current contexts; b) promoting reforms in the internal organization of the denominations that allow women access to positions of responsibility; c) promoting women's rights within the religious communities themselves.

A formidable tool to work in this direction could be education:

- to allow women access to the study of sacred texts and theological studies
- recognizing the possibility for women to become educators of future ministers of worship and religious leaders.

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A BRIEF HISTORY OF CHRISTIAN VIEWS ON SEX AND GENDER AND THEIR IMPACT ON EVANGELICAL LEGAL VIEWS

NICHOLAS P. MILLER¹

1. INTRODUCTION: RELIGIOUS VIEWS ON GENDER, SEX AND RACE: HOW COMPARABLE ARE THEY?

U.S. Supreme Court Justice Sonia Sotomayor issued a somewhat surprising stay in a lawsuit against Yeshiva University, an Orthodox Jewish college in New York, which had been ordered by a state court to recognize and support an LGBTQ+ student group on its campus. Justice Sotomayor is known as part of the liberal wing of the Court, which generally is very supportive of LGBTQ+ rights, and her stay was somewhat out of ideological character. Perhaps it was merely a matter of courtesy to the majority of the Court, which is conservative. Indeed several days later, Sotomayor joined her two liberal colleagues, as well as two of the conservatives, Justices Roberts and Kavanaugh, in dissolving the stay.²

Despite dissolving the stay, the high Court made it clear that it did so because there were other emergency avenues that could be pursued at the state level to gain relief from the order. Once these had been pursued, the Court said, and if they were ineffective, “they may return to this Court.”³ It seems that there will be at least the four votes to hear the case on appeal, should Yeshiva lose again below, and that is enough to receive a full review by the Court. While it is hard to determine the motives of Justice Sotomayor in initially granting the stay, it is worth noting that she is one of the six Catholic justices on the Court. Though she has described herself as being a “lapsed Catholic,” and despite being politically liberal and generally supportive of LGBT rights, Sotomayor must be aware of the position of the church to which she belongs, and the

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²<https://www.reuters.com/legal/us-supreme-courts-sotomayor-lets-yeshiva-university-prohibit-lgbt-student-club-2022-09-09/>; <https://www.jta.org/2022/09/14/ny/supreme-court-returns-yus-case-against-gay-pride-club-to-lower-courts-but-signals-its-interest-in-the-issue?mpweb=1161-48431-19681>.

³ <http://religionclause.blogspot.com/2022/09/supreme-court-vacates-stay-of.html>.



significance of the case for its institutions. She has certainly shown herself sympathetic to the protections of religious institutions in other areas, such as the ministerial exemption. Whatever her long term view of the outcome in the Yeshiva case, even a committed liberal may well pause before doing damage to the religious freedom of institutions to which they identify.⁴

The same is even more true of legal conservatives, of course, who will likely rule in favor of Yeshiva, many Court experts think. But what has made religious conservatives so strong on issues of sexuality and gender? Is this something that could change over time, like issues of race have done in certain religious groups? The Mormons famously switched their doctrinal position on race in 1978 based on new “revelation” from their prophet, allowing black men entry to the priesthood. Other Christian groups have also shifted on positions of race and segregation. Could this serve as a template for a way forward on issues of biological sex and gender? Could traditional religious groups be persuaded, through both carrot and stick social and legal measures, to accept and even embrace modern secular views of sex and gender identity?

The answer is, probably not, because of the very different history, and historical and theological roots of sex and race. Christian dalliance with views of racial hierarchy and biblically-rooted discrimination are relatively recent, emerging in the early modern west with the rise of African slavery. Arguments about the biblical basis of slavery, and the so-called “curse of Ham,” being somehow related to skin color really only became widespread in the United States after the rise of an aggressive Christian abolition movement in the early 1800s. It was only then that “Christian” slaveholders felt compelled to more fully develop biblical arguments and justifications for slavery.

These justifications, while attaining a position of influence in some circles, never defined the views of all or most Christians and Christian churches. They always contended with competing views of humanity and race based on creation of humanity in the image of God; as well as with the gospel message that in Christ, “there is neither Jew nor Greek, there is neither slave nor free, . . .” (Gal. 3:28). In contrast, the history of sex and gender identities and differences in Christian thought, shows a much greater rootedness in theological concepts, and a much greater consistency over time, than that of race. Once this history and theology is understood, it is hard to see how traditional religions, at least those rooted in the Hebrew and Christian Scriptures, could accommodate to modern secular notions of the potential fluidity and subjectivity of modern secular

⁴ <https://www.catholicculture.org/news/headlines/index.cfm?storyid=16760>.

<https://www.brookings.edu/opinions/god-in-government-judge-sotomayors-church-state-record/> (viewed on 9/19/2022).



concepts of sex and gender. What follows is a brief look at this theology and history. It is focused on Christian views and experiences, but much of what I present will also apply to the Jewish and Muslim communities.

2. THE THEOLOGICAL AND HISTORICAL BACKGROUNDS OF TRADITIONAL CHRISTIANS VIEWS OF SEX AND GENDER

The separation of sex (one's biological sexual identity at birth) from gender (the way one presents one's sexual identity) may seem to many to be a modern phenomenon. But the idea of a disconnect between one's biological sex and gender expression has deep roots in the ancient world. The Greco/Roman world was familiar with the idea of men who feminized themselves, and presented themselves as women. Even earlier, the Hebrew Scriptures also contain instructions that reveal the existence of very early pagan practices of people identifying with the opposite gender. An overview of how Christians dealt with this phenomenon in the past can provide insight into how conservative Christians think about modern manifestations of these same issues.

2.1. OLD TESTAMENT BACKGROUNDS: GENDER AND THE IMAGE OF GOD

Christian thought on the topic of sex and gender is guided, even today, by the Biblical teaching that all persons, men and women, are created in the image of God.⁵ The following biblical observations were taken from contemporary reflections on the topic by a variety of evangelical Christian groups. The Bible teaches that the image of God is itself expressed in this sexual dualism. As Genesis 1:27 puts it, “so God created man in His own image, in the image of God created he him; male and female created He them.” The parallelism between “image of God” and “male and female” is unmistakable. Whatever else God's image consists of, it is seen most fully in the diverse identities of the two genders.

Scripture also teaches that God is the author of our sexual identity, asserting in both Old and New Testaments that God “created” all humans “male and female.” (Gn. 1:27; 5:2; Mt. 19:4; Mk. 10:6.) For the Bible, the assumption is that biological sex is the foundation or basis of one's gender identity, whether in appearance, identity, or sexual behavior.

⁵ The discussion of Scriptural backgrounds has drawn from the Biblical Research Institute's Ethics Committee statements on Transgenderism, released in October of 2014, and found at https://www.adventistbiblicalresearch.org/sites/default/files/pdf/BRI_Ethics_Committee_Releases_State_ments_on_Transgenderism.pdf, as well as Don Horrocks, Ed., *Transsexuality: A Report of the Evangelical Alliance Policy Commission* (London, UK: Cox & Wyman, Ltd., 2000), 45-54.



The logic of the biblical connection between biological sex and gender identity is seen in the anthropology of Scripture, how the Bible views the nature of the human person. The Bible teaches that the human being is a psychosomatic unity of mind, body, and spirit (Gen. 2:7; Mk. 12:30). The soul or whole person cannot be reduced to any one of these elements. Rather, the person exists as a holistic expression of the combination of these elements. (Gen. 1:27; 5:1-2; Mark 10:6; Ps. 139:13-14). In light of this holistic view of the human person, it is problematic to hold that sexual or gender identity can be separate from one's body, or that the brain itself can truly be pitted against the body in terms of its sexual identity.

This is not to say that the mind's subjective thought processes might not experience confusion or disjunction regarding sexual identity. Indeed, in a fallen world characterized by physical and mental disease, such confusion is to be expected. The Bible recognizes that the mind and psyche of each person is part of the creation that is corrupted by sin. (Rom. 3:9; 7:17; 8:20-23; Jer. 17:9; Gal. 5:17). As such, the mind and psyche must be renewed and re-created by God. (Rom. 12:2; 2 Cor. 5:17). Human emotions, feelings, and perceptions are not fully reliable indicators of God's designs, ideals, and truth (Prov. 14:12; 16:25). We must have guidance from God, through Scripture and nature, to determine what is in our best interest. (2 Tim. 3:16).

The Scripture reveals this connection between biological sex and gender identity in a number of different instructions. One such injunction is the prohibition against one sex wearing the clothing of the opposite sex. "A woman shall not wear man's clothing, nor shall a man put on a woman's clothing; for whoever does these things is an abomination to the Lord your God." (Dt. 22:5). Another relevant instruction is the prohibition against same-sex sexual behavior, "Thou shalt not lie with mankind, as with womankind: it is abomination." (Lev. 18:22) This instruction against same-sex relations assumes that there is some essential and static quality to sexual identity, or one could subvert the regulation by simply claiming the identity of the opposite sex or gender. The importance of preserving one's biological sex identity can also be seen in the prohibition against mutilation or removal of the genitalia, for those who wish to enter the assembly of the Lord. (Deut. 23:1).

These texts may have had special application, as some argue, in the context of the sacrificial/purity system of ancient Israel. But rather than simply isolated texts that had some unique application in the Jewish cultic framework, these instructions can be seen as consistent manifestations of an underlying biblical commitment to the sacred duality of the sexes. As Dr. Richard Davidson, expert on the Bible and sexuality, asserts regarding the clothing passage, "cross-dressing is morally/culturally repugnant to God not only because of its



association with homosexuality and the fertility cult rituals but also—and primarily—because it mixes/blurs the basic distinctions of gender duality (male and female) set forth in creation.” In a conclusion that applies equally to the passages regarding sexual behavior and genitals, Davidson states that “it may be concluded that the intent was for this legislation to be permanent (transtemporal) and universal (transcultural) in its application.”⁶

Davidson’s conclusion, generally supported by Christian evangelical groups, regarding the universal application of these teachings is supported by the fact that they are repeated in the New Testament. (Rom. 1:26-28; 1 Cor. 6:9) (Christ softens the teaching regarding the eunuch, the significance of which we will discuss below.) These instructions reflect a larger, over-arching biblical theology about the role of gender distinction, and the two sexes, in reflecting the fullness of the image of God in family and society. (Gen. 1:27; 2:21-25.)

2.2. SCRIPTURE, THE GRECO-ROMAN WORLD, AND GENDER

The Scriptural testimony regarding the dual nature of humanity, with both sexes made in the image of God, has stood in contrast to various surrounding cultures. The Greco-Roman world largely embraced a spiritual/material dualism, as articulated by Plato and promoted by various gnostic groups. This dualism tended to view sex and sexual relations as part of the material world, as inferior or even evil. It assigned the male sex to the realm of reason, and the female to the inferior world of passion and emotion.⁷ Aristotle also taught a soul/body versus mind dualism. He believed that women were essentially mutilated men, shown to be such by their weaker reason and stronger passions. Women, eunuchs, and hermaphrodites were “‘lesser men,’ because their inferior bodies were interpreted as evidence of inferior souls.”⁸

Christ’s assertion that “from the beginning” God made humanity “male and female,” and a part of a “good” creation, contradicted both Greek material/spiritual dualism and gender hierarchy. (Mt. 19:4; Mk. 10:6) Further, Christ underscored the importance of all humanity, regardless of sexual function, when he embraced the eunuch—whether “born,” “made,” or “chosen,”—as part of the community of faith. (Mat. 19:12).

Some have viewed Christ’s affirmation of the eunuch as the embracing of a third gender, or as some category beyond, or other, than male or female.⁹ But

⁶ Richard Davidson, *Flame of Yahweh: Sexuality in the Old Testament* (Peabody, MA: Hendrickson Publishers, Inc., 2007), 172.

⁷ Megan K. DeFranza, *Sex Differences in Christian Theology: Male, Female, and Intersex in the Image of God* (Grand Rapids, MI: Eerdmans Publishing, 2015), 108-125.

⁸ *Ibid.*, 117.

⁹ DeFranza, *Sex Differences in Christian Theology*, 102-106.



this proposal is to distort Christ's meaning. The context of the passage is about marriage, and the importance of ongoing faithfulness within it. When the disciples expressed disbelief at this high standard, Christ suggested that marriage is not for all. He then listed the three categories of those that may not marry, including those born without sexual function. (Mt. 19:12)

Gender, however, is much more than sexual function. There is no indication in the Bible that eunuchs were considered without gender. To the contrary, in the story of Philip and the Ethiopian eunuch, the eunuch is explicitly called a "man" (aner), and is referred to by masculine pronouns. ("And they went down both into the water, both Philip and the eunuch; and he baptized *him* [auton].") (Ac. 8:27, 38.)

Thus, accepting the eunuch into the community of faith did not contradict the teaching that men should not assume feminine personas or identities. Paul spoke against the role of "effeminate" (malakoi) men. (1 Cor. 6:9.) The argument that the condition of persistent gender mis-identity or dysphoria is only understood in the modern world is contradicted by evidence from classical history. The Greeks were very aware of men who persistently feminized themselves. Indeed, the word they used to describe this condition—malakoi—is the very word used by Paul in 1st Corinthians.¹⁰

Some point to Paul's statement that "in Christ" there is neither male nor female," as ending gender distinctions in the community of faith. (Gal. 3:28.) But many theologians recognize this passage as a statement of equality related to salvation, and not a doing away of particular gender roles in the home, church, or society. Paul was equally emphatic in other places that such roles continued, and should be respected by Christians. (1 Tim. 2:11-14; 1 Cor. 14:34-36; 1 Cor. 11:7-14.)

2.3. CHRISTIAN HISTORY, GENDER, AND SEXUALITY

As the church developed, it unfortunately was impacted by both the dualism and the male-centered view of the Greco-Roman world. Plato's identification of the material with evil influenced the church to develop a celibate clergy. Aristotle's teaching of women as incomplete men led to a subjugation of women as both social and spiritual beings. The inferiority of both marriage and women was an implicit and explicit feature of the medieval west until the time of the Protestant reformation.¹¹

¹⁰ Gagnon, Robert, "The Scriptural Case for a Male-Female Prerequisite for Sexual Relations: The New Testament Perspective," in *Homosexuality, Marriage, and the Church*, eds., Gane, Roy, Miller, Nicholas, Swanson, Peter (Berrien Springs, MI: Andrews University Press, 2012), 82-85.

¹¹ DeFranza, *Sex Differences in Christian Theology*, 117-125.



In the 16th century, Luther and Calvin restored marriage as a positive good both for the kingdom of God and man, both setting examples by taking wives for themselves. Still, the notion of gender distinctiveness and separation, for purposes of modesty, chastity, and protection of the female, were upheld by Protestant teaching. Of course, notions of gender inferiority did not disappear overnight, and the Protestant world is still wrestling with the question of what it means to be both “equal” and “different.”¹²

The central strands of Protestantism, whether Calvinist, Lutheran, Anglican, or the Anabaptists, generally took the doctrine of total depravity seriously. This meant that all parts of the human were impacted by sin, including physical and mental elements of sexuality and gender. Both Scripture and nature were perceived to teach that deviations from physical gender identity and an appropriate (opposite sex) sexual orientation were results of the fall that needed to be modified, curbed, and resisted.¹³

2.4. MODERN DEVELOPMENTS: CHRISTIANS AND GENDER TODAY

In the post-Freudian, materialist, post-modern, twentieth century, the subjective sense of self and desire moved closer and closer to the center of society’s determination of reality and value. Nature, its design, and its purposes, was largely abandoned as a guide to the normative and the good, at least in public life. Belief in a fallen human nature, which possesses inappropriate desires, also waned.¹⁴

This de-linking of the physical from the normative and moral, and the prioritizing of human desire, has caused many in the secular scientific and medical community to view deviations of sexual orientation and gender identity as minority experiences on a spectrum of normalcy, rather than a deviation into the abnormal. For example, the new phrase for gender confusion, gender dysphoria, implies that identification with the gender of the opposite sex is only a “problem” if it causes distress or suffering.¹⁵

It is viewed by many evangelical scholars and theologians, however, that this change represents much more of an ideological and philosophical shift, rather than the natural progress of scientific discovery. Revisions in philosophy

¹² Witte, John, Jr., “Sex and Marriage in the Protestant Tradition, 1500-1900,” in *The Oxford Handbook of Theology, Sexuality, and Gender*, Thatcher, Adrian, ed. (New York, NY: Oxford University Press, 2015), 304-318.

¹³ See DeFranza, *Sex Differences in Christian Theology*, 125-128.

¹⁴ Witte, “Sex and Marriage,” 318; Daly, T.W., “Gender Dysphoria and the Ethics of Transsexual (i.e., Gender Reassignment) Surgery,” *Ethics and Medicine*, Vol. 32:1 Spring 2016, 41.

¹⁵ Mark Yarhouse, *Understanding Gender Dysphoria: Navigating Transgender Issues in a Changing Culture* (Downers Grove, IL: Intervarsity Press, 2015), 14-15.



and politics related to gender and sexuality, they point out, preceded by many decades these alterations in scientific and medical outlook. The release of sexual desires, behavior, and identity from traditional constraints, whether Scriptural or natural, was part of an explicit political and legal agenda of certain 20th century advocacy groups, especially the American Civil Liberties Union beginning in the 1920s.¹⁶

Christians surveying these developments have argued that allowing a person's subjective sense of gender to override all objective physical evidence is a "surrender to a form of *gnosticism*" and a re-embrace of Greek material/spiritual dualism.¹⁷ In such an environment, Christians must make a special effort to stay true to biblical principles of reality. In applying these principles today, it is generally acknowledged, one needs to distinguish between issues of intersex and transgender. Intersex involves the actual and apparent biological ambiguity in regards to sex.¹⁸ Transgenderism, on the other hand, involves a clear biological sex that is at odds with a person's subjective sense of gender. The vast majority of those termed transgender are not intersex.¹⁹

Given the biological basis of their condition, it would seem that intersex persons need room to work out their biological identity puzzle—involving chromosomes, gonads, other primary as well as secondary sexual characters, as well as self-perceived identity—in consultation with parents, physicians, counselors, and pastors. Once their biological sexual identity is understood, then they should be given the tools to live with a gender consistent with it.

In relation to those struggling with a purely subjective sense of transgender, there must be Christian care, concern, and compassion. Some Christians with a dualistic anthropology, where the spirit/mind of the person is separate or distinct from the body, are showing some willingness to accept and

¹⁶ "Long before they founded the ACLU, [its leaders] and others who shaped the ACLU's first policies on matters related to sexuality participated in the sexual experimentation that characterized Greenwich Village's bohemian culture in the early twentieth century." Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York, NY: Oxford University Press, 2013), 12.

¹⁷ *Transsexuality: A Report*, 60-61.

¹⁸ Not long ago an international gathering of gender experts proposed that the term "intersex" be replaced with the phrase "disorders of sex development (DSDs)," as this more accurately describes the condition, and does not imply that there is somehow a third gender between the genders. Peter A. Lee, Christopher P. Houk, S. Faisal Ahmed, Leuan A. Hughes, "Consensus Statement on Management of Intersex Disorders," *Pediatrics*, August 2006, Vol. 118, Iss. 2. The Intersex Society of North America, an advocacy group for intersex persons, has employed the new DSD terminology, as it is consistent with their view that all children should be assigned a male or female gender identity at birth. The Society rejects the idea that intersex is a separate gender category, but believes that non-emergency gender-related surgeries should largely be postponed until developmental conditions can more clearly reveal the underlying gender. <http://www.isna.org/faq/patient-centered> (viewed on 12/1/2016).

¹⁹ Yarhouse, *Understanding Gender Dysphoria*, 16-22.



accommodate the expression of transgender impulses.²⁰ But those Christians with a more holistic anthropology of mind, body, and spirit of gendered persons, it is difficult, if not impossible, to speak of a gender identity that is completely separate or opposite that of the body.²¹

Given our belief in the total impact of sin on the person, mind, body, and spirit, it is unsurprising, it is argued, that there is at times confusion regarding reality. Psychologists know that there are mental states and delusions that cause people to reject the reality of their bodies—such is the case of anorexics, (whose body image is opposite reality) the transabled (those who think they are or should be disabled, sometimes termed Bodily Integrity Identity Disorder), or those suffering from species dysphoria (the belief they are actually an animal).²²

Most experts agree that these conditions are treated best as psychiatric/psychological conditions, where the mind is helped to embrace the reality of the body. The alternative is to damage the body, by allowing for unhealthy thinness, the amputation or destruction of perfectly good body parts, or the artificial reshaping of the body into non-human forms. For many Christians, this would be to participate in the marring of the image of God.

This Christian concern is even more strongly implicated when it comes to that element of humanity, sexual identity, that the Bible teaches has a special connection to the image of God.²³ To vary this image is to ultimately distort the person created by God. As one Christian study team has put it: to recommend gender reassignment surgery as ‘the solution’ may consequently be viewed as unhelpful encouragement to submit to the distorted image of self. It is a solution that allows the deep psychological confusion and hurt suffered by transsexual people to go untreated, thereby increasing the prospect of future emotional damage. Rather than allowing this to occur, the Church should be able to offer fuller hope. A Christian response that emphasizes both psychological and physical wholeness, rather than concentrating exclusively on artificial and cosmetic physical changes in the hope that they will themselves produce the desired psychosomatic unity, more truly reflects a biblical view of holistic health.²⁴

Given a biblical and nature affirming worldview, it would seem that purely subjective notions of transgender fall into the category of psychological confusion, and should be dealt with mentally and psychologically. This conclusion is supported by both historic and recent systematic studies of those who have gone sex-reassignment surgery. An early study carried out in 1979

²⁰ *Ibid.*, 101-124; Looy, Heather, Bouma, Hessel, “The Nature of Gender: Gender Identity in Persons Who are Intersexed or Transgendered,” *Journal of Psychology and Theology*, 2005, Vol. 33, No. 3, 174-176.

²¹ See, BRI Ethics Committee statements on Transgenderism, released in October of 2014.

²² Daly, “Gender Dysphoria,” 41-42.

²³ *Ibid.*, 46-48.

²⁴ *Transsexuality: A Report*, 26-27.



showed that while transsexual surgery patients reported some level of subjective satisfaction and happiness with their change, objective measures of underlying mental health, including depression, anxiety, and basic life-coping were unchanged. The results of this study caused John Hopkins University to discontinue sex-change surgery.²⁵

More recent studies have had mixed results, but none have fundamentally altered the conclusion that sex-change is at best an ambiguous intervention, one that has its own costs and burdens. As some Johns Hopkins researchers recently put it, “the scientific evidence summarized suggests we take a skeptical view toward the claim that sex-reassignment procedures provide the hoped for benefits or resolve the underlying issues that contribute to elevated mental health risks among the transgender population.”²⁶

Ultimately, nature has the last word. No-one can truly change their sex. A complete sex “change” operation consists of destroying usually functioning genitalia and reproductive systems, and replacing them with mere facsimiles and physical representations that can no longer function reproductively. The underlying sex identity of the body does not change, the chromosomes, DNA, and web of other sex-related features are the same. This persistence of underlying sexual identity is evidenced by the body’s constant effort to return to its natural state. Thus, there is a need by “change” patients to receive hormone therapy for the rest of their lives to repulse these bodily efforts. Such life-long drug regimens come with side-effects and health risks of their own, such as thrombosis and cardiac arrest, which requires patients to be continuously monitored and supervised by medical professionals.²⁷

Apart from the health concerns for the individual, there are also very disturbing public policy and public safety implications of allowing persons to decide their genders based entirely on subjective perceptions. Separating unmarried men and women, and boys and girls, when it comes to bathrooms, changing rooms, and housing quarters, protects modesty and sexual purity, values for both church and society.

Just as importantly, and even more basically, it also protects women from male predators, whose greater strength and aggressiveness make women particularly vulnerable if society and its institutions are degenderized. This concern is not based on a belief that transgender persons are somehow more

²⁵ This study and its impact is discussed in Mayer, Lawrence, McHugh, Paul, “Special Report: Sexuality and Gender – Findings from the Biological, Psychological, and Social Sciences,” *The New Atlantis: A Journal of Technology & Society*, Number 50, Fall (2016), 110.

²⁶ *Ibid.*, 112.

²⁷ Weinand, J, Safer, J, “Hormone Therapy in Transgender Adults is Safe with Provider Supervision: A review of hormone therapy sequelae for transgender individuals,” *Journal of Clinical & Translational Endocrinology*, Feb. 2015, 58-59.



violent or predatory than others. Rather, it is the fact that once the rules are changed, it will be next to impossible to police against heterosexual, non-transgender men who merely claim to be transgender, but want to gain access to women's restrooms and changing rooms for their own nefarious purposes. Once gender identity is based purely on a subjective sense of self, authorities must accept one's claim to be the opposite gender at face value, no matter what the appearance.

It is well documented that one of the single best ways of keeping women and girls safe in refugee camps and centers is to provide well-secured, single gender bathrooms.²⁸ That we would consider reversing these common-sense bathroom rules here in America, at a time when sexual assault in public institutions, such as the military, is hitting new highs, is seen by some as a sign of the extreme nature of our modern philosophical confusion.²⁹

CONCLUSION

The Bible is an ancient book, and so it is probably surprising to some that the concerns it outlines regarding sexual difference and the need for safeguarding of the modesty and safety of the sexes are seen by many religious people as speaking so directly to many of our modern problems. But if one believes, as evangelicals and some other traditional religious groups do, that Scripture contains fundamental and even divine insights about the nature of the human, and the origin and importance of gender difference, then such a result is not unexpected. From its earliest chapters, through the experiences of the nation of Israel, and into the teachings of Christ and the New Testament, we see a concern both for the importance of the value and characteristics of both sexes, and a concern that they not be muddled or inappropriately intermixed.

The Christian church has at times not appreciated the equality of the sexes as it ought to have. But until recently it was always clear on the importance of the distinction between the sexes, and the need to safeguard that distinction and to protect the appropriate boundaries between them. The evangelical church appears to be resisting the temptation to over-correct from its failure of providing full equality, thus falling into the ditch of sexual and gender sameness.

²⁸ See Amnesty International Report, viewed on June 5, 2017, at www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/.

²⁹ NBC News, "Sexual Assault Reports in U.S. Military Reach Record High: Pentagon," by Reuters, May 1, 2017 (viewed on June 5, 2017 at www.nbcnews.com/news/us-news/amp/sexual-assault-reports-u-s-military-reach-record-high-pentagon-n753566).



They are largely seeing that this would not be a corrective, but a lurch into an opposite problem that will have its own dire consequences.

Thus, we can expect that evangelical Christian groups, as well as other religions with biblically-rooted conceptions of sexuality and gender, will very likely mount vigorous legal defenses of their ability to teach and operate on traditional views of sexuality and gender. The response of Yeshiva University to the recent dissolution of the protective stay was to temporarily ban all student clubs, until it can resolve this issue. This may seem like an extreme response to some, but it is the kind of response that can be anticipated from many religious communities in seeking to protect their fundamental religious beliefs regarding anthropology and sexuality. Some have compared this reaction to the closing of public swimming pools in the south once the federal courts ordered them integrated. But this is to confuse a superficial, localized and transitory—if invidious, destructive, and repugnant—situational bias with a millenias’ old religious teaching about human nature, identity and family relations that lies at the core of the world’s largest and oldest religions.

Traditional religions have shown themselves to have important theological and historical resources in favor of gender equality, and indeed the history of women’s rights in the United States shows both religious impetus and leadership at their roots. But the crude imposition of gender sameness threatens to erase the gains made on the gender equality front, as traditional religious groups perhaps over-react and inappropriately recoil away from more equitable gender practices allowed by their traditions, because of fear of an influx of more extreme positions. Ironically, the betterment of gender equality and fairness in religious groups may be more possible as genuine gender distinctions and distinctiveness are recognized and safeguarded.

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QUANDARIES FROM THE QUAD: REFLECTIONS FROM THE CANADIAN FRONT DURING THE CULTURE WARS

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IN MEMORIAM

It is rarely my custom to dedicate a book chapter, but in September of 2022, one of Canada's leading parliamentarians and a minister of The United Church of Canada died prematurely following a long struggle with renal cell carcinoma. The Honorable Reverend Doctor William (Bill) Alexander Blaikie served for several decades in the House of Commons in Ottawa, and then in the legislature of the province of Manitoba. From the mid 1980s through the 1990s and into the early years of the 21st century, Bill found himself in the front lines of the Culture Wars at the intersection of Christian theology and parliamentary politics. Bill embodied the struggle for a more inclusive, progressive, and balanced society in Canada from coast to coast to coast. As our Jewish friends and colleagues would say, “may his memory be for a blessing.” Bill’s life certainly was.

THE WESLEYAN QUADRILATERAL

Culture wars have been a continuous phenomenon plaguing the Canadian mosaic from its earliest days. By the dawn of the 20 century, it had become quite clear that within the many expressions of the Christian Church in Canada there were two significant and divergent streams. The first was a more conservative, and to a large tent evangelical movement, which called upon their adherents to employ as an ethical basis for living their lives, the hypothetical question of what Jesus would do in any given situation. The second was a stream that emerged concurrently with the work of the great Walter Rauschenbusch in Rochester in the state of New York. This stream continues to be characterized as the Social Gospel. In many ways, that is a misnomer. The Gospel is inevitably social in its implications, whether or not one is of a more conservative persuasion or a more

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liberal progressive persuasion. Within the latter, The United Church of Canada is a relatively new denomination, but with historical roots that go back to the Protestant Reformation. As the new denomination adapted superficially discordant theological, doctrinal and ethical stances and methodologies, a decision-making template or model Church Councils adopted the Wesleyan Quadrilateral, attributed to the founder of Methodism, John Wesley.

The United Church of Canada was born of a union of the Methodist Church from coast to coast to coast the Congregationist Church, and roughly 2/3 of the Presbyterian Church in Canada. The balance of the Presbyterian community still referred to as the continuing Presbyterian Church in Canada.

With Methodism as a principal pillar of the new denomination, it was inevitable that the Wesleyan Quadrilateral would serve as a principal model for ethical practice in this uniquely Canadian denominational tradition – and the first “Union” Church in the world. The quadrilateral itself is intended to approach every challenge that the church might face from 4 foundational perspectives. Those perspectives are scripture, history, experience, and reason.

Scripture is designated the first and principal cornerstone of the four. What has scripture to say about the challenges and social circumstances the Christian is obliged to address? History, the second cornerstone, calls us to examine not only the history of our immediate context, but the history of the entire experience of the Christian Church, from the 1st century to the present. The third cornerstone is a variation on history and speaks to our denominational and personal experience of life within the church. This disciplined focus may provide guidance from past case studies of ethical dilemmas addressed in the past. And lastly, we must employ our gift of reason in order to understand new contexts in which we are being asked to consider what may be a long standing question, framed in an entirely new environment.

As one might expect given the proclivities of John Wesley, scripture is given a slight edge, a little more weight, a wider dimension, than the other three stones in the foundation. To cite one example, in 1988 The United Church of Canada was embroiled in a heated national debate on the nature of human sexuality: particularly sexual orientation in the life and ministry of the Christian Church. The scriptural record is mixed. Parenthetically it is important to note that the Bible has relatively little to say about sex. On the other hand, it has much to say about economics. It became swiftly apparent that what became known as the great debate of 88 would revolve around the reading of scripture.

READING BETWEEN THE LINES

In the earliest days of his tenure as Dean of the Faculty of Religious Studies at McGill University in Montreal, Rabbi the Reverend Dr. Barry Levine articulated



4 principles critical to informed and intelligent reading of holy text. Rabbi Lavigne was the first non-Christian Dean of the Faculty, and was referring in the first instance to the Tanach. But his prescribed steps in studying sacred texts are applicable to any religious tradition in which holy writ is foundational.

According to Rabbi Levine, the careful reader of holy texts must begin by reading the text simpliciter, yet in a focused and intentional manner. That is to say, the reader must treat the text as though reading it for the first time, carefully noting the impact of the text. Next, the serious reader must take into account the texture of the selected passage. What does the passage in question sound like, feel like, even taste like? Does it sound like history? Or perhaps it has the flavor of poetry. Is it an epistolary narrative? Is it a passage which is meant to inspire or to persuade? Third, there is the question of the context in which the text was originally written, and the context in which it is being read today. Lastly, what is the pretext for which the text is being employed: is the text being appropriated to deal with contemporary ethical issues; political or economic circumstances; or religious contention among denominations in one faith tradition, or between and among contrasting faith traditions? Is the reader genuinely open to the text, or is it being employed as a proof text to bolster well established prejudice?

Even this fairly straightforward approach is vulnerable to complication layered upon complication. For example, within the Christian tradition, notably my own, a close reading of texts indicates that in the 67 books of the Protestant Bible, both Tanach commonly referred to as the Old Testament, and in the New Testament, the Bible itself may be viewed as self-referent and self-editing. A compelling case might be made that the entirety of what Christians define as the New Testament is actually a commentary, or midrash, on the Tanach.

THREE EXAMPLES FOR CONSIDERATION

In the Second Book of Kings, renovations are being undertaken in the Temple. As the contractors and plasterers are opening up walls to refurbish and rearrange rooms, they discover, hidden in the walls like newspaper for insulation, a scroll. Scholars have argued that the scroll was a late iteration of the book of Deuteronomy. In the 22nd chapter of second kings, the workmen, convinced that they had uncovered something of real value, take the scroll to the wisest person in the community: Hulda, a prophetess. Hulda recognizes the scroll, correctly identifying it as a copy of the Book of Deuteronomy. She orders that it be taken to the king, and the king urges to read the scroll, and to take it very seriously else doom and gloom follow.

Turning to the New Testament, we read in Mark Chapter 7, that after Jesus sojourned in and around the Decapolis, the 10 Hellenized cities lying in the



north of Judea. On one notable occasion, Jesus is confronted by a Syro-Phoenician woman whose daughter is desperately ill. She is gripped by an unidentified malaise, as untreatable as it is unidentifiable by the medical practice of the time. We can only assume that Jesus was particularly weary and stretched beyond measure as so often he must have been. When she approached him, the story recounts that Jesus rebuked her. The record suggests that he indicated to her that his mission was to the children of Israel, and what could possibly justify him redirecting his attention to the problems of this gentile woman. He noted that one does not take the food intended for the children and throw it to the dogs. The woman agreed with him, but noted that even the dogs were permitted to lick up the crumbs from under the children's table. For Jesus, this was an epiphany. Nowhere in Israel had he encountered such faith, and a wit to counter his own. The text continues, noting that he spoke a word, and the girl was healed. In this passage the author or authors of the text challenge existing traditions, pushing the envelope of the cultural constraints of Judaism.

In the 10th chapter of the Book of Acts, hard on the heels of that powerful and inconceivable experience Christians identify as the Resurrection, the Apostle Peter finds himself in the city of Jaffa, residing in the House of Simon the Tanner. In the heat of the day, Peter takes himself to the rooftop terrace to rest. He dozes off, and during his nap, he dreams. In the dream, a great cloth like a sheet is lowered from the heavens. In the cloth are all manner of creatures forbidden as forbidden by the rules of Kashrut. Peter hears a voice from heaven commanding him to rise, to kill, and to eat. Peter demurs, refusing to consume anything that is forbidden by the laws of his people. The voice repeats the command, and Peter again refuses to obey. The voice points out in terms unmistakable that nothing created by the divine is to be considered unclean. Peter awakes, and arises to his continued mission, not only to the Jewish world but to the world of the Gentiles; one might say, a mission to the entire creation.

GOD AND CAESAR

And so, we return to the arena of the Culture Wars: an arena dominated more by power and politics than by piety. Despite the attempts by pundits to limit and diminish the role of religion in the public square, it is evident that the presence and power of religious vision and thinking remain paramount in the human psyche planet wide. How could it be otherwise, when polls past and present continue to confirm that 82% of the world's people self-declare as people of faith? It behooves faith leaders of all traditions to recognize that one clear outcome of the so-called Culture Wars of the last quarter of a century has served not faith but politics: the Culture Wars have been a distraction, a snare and a delusion, diverting the world's religions from their principal task of declaring



and witnessing the supremacy of the divine throughout the cosmos. But nation states are relatively new creations. They emerged late in the human story, some arguing that they are creations as recent in Europe as the 14th century. As they are new so, they are likely to be both malleable and transient. But whatever the political structures by which humanity chooses to govern itself, it seems self-evident that a secular state, committed to the principle of a societal level playing field, with adequate legal provisions to ensure both individual and communal civil and religious rights, may prove to be the best friend of the world's great faith and spiritual traditions.

SOME THOUGHTS GOING FORWARD

Culture Wars, wherever and whenever they occur, are inevitably time wasting and ultimately destructive to the missions of all religious and spiritual communities. Permit me to suggest 5 insights which have emerged during the transition from the 20th to the 21st century, a generation dominated by the Culture Wars that have dominated a multitude of societies and cultures for the past generation.

1. Culture Wars are unwinnable.
2. Culture Wars are unseemly and discreditable. They diminish religion faith and spirituality not only in the eyes of civil authority, but in the eyes of the general population, and even of religious and spiritual adherents.
3. Culture Wars are distractions: snares and delusions.
4. Culture wars, for the Christian, indicate a failure to recall that Christians are commanded not to argue with one another, but to love one another.
5. A more hopeful and harmonious world requires the establishment of a safe table for all religions, faiths, and spiritual traditions. This applies both to individuals and to communities. The best example extant, may be found at the intersection of the Universal Declaration of Human Rights, and the United Nations Declaration on the Rights of Indigenous Peoples. The former, marking its 75th anniversary in 2023, delineates what an individual should be able to expect in every context in the wide world. The latter provides the same basis for healthy relationships for communities. It applies not only in the particular to indigenous communities, but to every community or society that seeks continual steps forward in Tikkun Olam: the mending of the world.

Perhaps people of faith worldwide might adopt the ancient rabbinic dictum: that is to care for other people's bodies, and our own souls.



THE CONSULTATIVE COMMISSION ON UNALIENABLE RIGHTS UNDER THE US SECRETARY OF STATE AND THE GENEVA DECLARATION (2018-2020): WHEN RELIGIOUS FREEDOM IS BALANCED AGAINST SEXUAL AND REPRODUCTIVE RIGHTS, THEN FORGOTTEN

BLANDINE CHELINI-PONT¹

In 2019, an Advisory Commission was established within the US State Department. It was announced in the context and milieu of the religious freedom international defence. The members who constituted this Commission were for the most part recognized specialists in religious freedom field and/or at the same time religious leaders. However, this Commission had, as its assigned goal, to reframe the definition of what means “unalienable human rights”, by seeking to “*bring them back*” to their origin.

To this first 'anomaly', was added a second one, namely a contradiction in intentions. The declared and laudable intention, repeated several times and somehow detectable in the final report of the Commission, was to denounce the weakness of the human rights meaning, at the international level, their voluntary or biased misinterpretation by States, which in fact did not respect them. However, it became clear by the choice of the members, by the words and comments of some and others, especially the Secretary of State Mike Pompeo, and finally through the critics expressed about this Commission’s existence and aims, that the obvious intention of it, was not to reinforce the human rights defence against all revisionist states and their misinterpretation, but to demonstrate the evanescence of sexual, reproductive and gender rights, in the corpus of the universal human rights, and to claim it at the international level.

1. ANNOUNCEMENT AND FIRST REACTIONS

In July 2018, the State Department hosted its first annual Ministerial to Advance Religious Freedom, a gathering of hundreds of state leaders, “to discuss the

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challenges facing religious freedom, identify means to address religious persecution and discrimination worldwide, and promote greater respect and preservation of religious liberty for all". On July, 16-18, 2019, the second Ministerial, hosted by Secretary of State Mike Pompeo, was even bigger and better than the first. These events were widely viewed as a successful effort to encourage world leaders to promote religious freedom and provided opportunities to brainstorm effective ways to do that. But, in-between the first and the second Ministerial, on May 30, 2019, the State Department announced its intention to create a Commission on Unalienable Rights as well.

The announcement was published in the *Federal Register* and stated that the Commission's purpose was to "provide the Secretary of State advice and recommendations concerning international human rights matters" along with "fresh thinking about human rights discourse, where such discourse has departed from our nation's founding principles of natural law and natural rights." On June 12, 2019, several senior members of the Senate Foreign Relations Committee, Senators Bob Menendez (D-N.J.), Patrick Leahy (D-Vt.), Dick Durbin (D-Ill.), Jeanne Shaheen (D-N.H.), and Chris Coons (D-Del.) wrote to Secretary of State Mike Pompeo to "express (their) deep concern with the process and intent behind the Department of State's recently announced Commission on Unalienable Rights...With deep reservations about the Commission, (they) request that (he) not take any further action regarding its membership or proposed operations without first consulting with Congressional oversight and appropriations committees."²

On June 13, 2019, the U.S. House debated an *en bloc* amendment, which included a provision to defund the Commission. On June 18, 2019, the U.S. House voted 231–187 in favor of the *en bloc* amendment. On June 28, 2019, it was reported that Robbie George, co-founder of the National Organization for Marriage, was involved with the planning of the Commission, just before the second Ministerial to Advance Religious Freedom. On July 7, 2019, Secretary of State Mike Pompeo published an op-ed in *The Wall Street Journal* explaining the Commission's intended focus. He said that "universal," "unalienable" rights must be distinguished from "*ad hoc*" rights granted by governments." Modern references to "new categories of rights", per Pompeo, aim at "rewarding interest groups and dividing humanity into subgroups." He warned that "loose talk of 'rights' unmoors us from the principles of liberal democracy." The Commission was expected to generate debate over philosophical questions such as: "What are our fundamental freedoms? Why do we have them? Who or what grants these rights? How do we know if a claim of human rights is true? What happens

² July 13, 2019. <https://www.foreign.senate.gov/imo/media/doc/06-12-19%20Unalienable%20rights%20commission%20letter%20signed.pdf>.



when rights conflict? Should certain categories of rights be inextricably 'linked' to other rights?". "Today the language of human rights has become the common vernacular for discussions of human freedom and dignity all around the world ... but words like 'rights' can be used for good or evil," Pompeo said: "We must therefore be vigilant that human rights discourse be not corrupted or hijacked or used for dubious or malignant purpose."

The Commission's creation was announced on July 8, 2019. Its purpose was to "advice on human rights grounded in (the American) nation's founding principles and the principles of the 1948 Universal Declaration of Human Rights"³. So expressed, the purpose was to "return" to the supposed American founding principles for enlightening again the international universal rights, in a virtuous process where the US are the best interpreters of human rights.

The following day, State Department spokesperson, Morgan Ortagus, gave a press briefing in which she explained that "authoritarian regimes [are] subverting this human rights context" and claimed that the U.N. Human Rights Commission had become "a laughingstock", what was not completely false... She added that the new Commission would not be "partisan" and did not intend to "create new policy on human rights." But was it the case?

As initially announced on July 8, 2019, the Commission had 12 members, including eight men and four women, as a panel examining human rights through a "natural law lens" according to Mike Pompeo. The panel, which included experts of "varied backgrounds and beliefs," will help, guide American foreign policy commitments by determining what the U.S. considers a human right, particularly when human rights claims seem to be in conflict. The chairperson was Mary Ann Glendon, a former U.S. ambassador to the Vatican under George W. Bush who teaches at Harvard Law School, a very prominent Catholic voice known for her opposition to same-sex marriage and for her efforts to impede abortion as an international human right at the 1995 U.N. Women's conference. The rapporteur was F. Cartwright Weiland, who worked at that time at the State Department. The other members were Peter Berkowitz (Hoover Institution), Russell Berman (Stanford, Hoover Institution), Paolo Carozza (Notre Dame Political Science and Law), Hamza Yusuf Hanson (Zaytuna College), Jacqueline Rivers (Seymour Institut), Rabbi Meir Soloveichik (Congregation Shearith Israel), Katrina Lantos Swett (Lantos Foundation), Christopher Tollefsen (University of South Carolina) and David Tse-Chien Pan (UC Irvine).

³ Laurretta Brown, "Pompeo Launches New 'Commission on Unalienable Rights'", *National Catholic Register*, July 13, 2019.



1.1. RELIGIOUS FREEDOM MILIEU REACTIONS

Several religious freedom bodies, including the Congressional USCIRF, applauded the new Commission, expecting from it ever more improvement of the religious freedom international standards. USCIRF Vice-Chair Gayle Manchin said that “its ability to underscore the importance of religious freedom as a human right will lead to higher impact negotiations on behalf of the more than 70% of the world’s population that is currently suffering persecution or abuse.” She said the new panel would ensure that the protection of religious liberty is “a core element of strategic policy discussions.”

Aaron Rhodes, respected president of the Forum for Religious Freedom-Europe, linked the current disrespect for the religious freedom with a general failure of the human rights understanding and he agreed with the Commission’s purpose. Former executive director of the International Helsinki Federation for Human Rights, Rhodes wrote in the *Wall Street Journal* that “Secretary of State Mike Pompeo deserves praise for proposing an Unalienable Rights Commission to help guide American human-rights policy”. The State Department was accurate in naming natural law and natural rights as “the core foundational principles of human rights”.⁴ Rhodes praised the panel and said that international human rights institutions were infected with “toxic hypocrisy.”⁵ Then he told the National Catholic Register (July 13, 2019) that the Commission was “a response to the politicization of human rights by groups like Amnesty International, whose rhetoric is nothing if not political, resembling Occupy Wall Street-type slogans.” “Human rights obviously have political impact — they liberate people from oppression,” he noted. “But human rights, properly understood, can’t be partisan, can’t be tied to a political agenda. True human rights are politically neutral; they protect political freedoms, freedoms that can be used to pursue specific partisan objectives. This is not easy for politically agitated people, and for authoritarian rulers, to understand.”

Aaron repeated that international human rights institutions became partisan like the United Nations Human Rights Council, where “many member states have laws that, for example, impose the death penalty for changing one’s religion, and which is in fact dominated by authoritarian states that do not believe in universal, individual rights.” Then he pointed out The European Court of Human Rights, “which (was) supposed to defend individual freedom but upholds ‘hate speech’ convictions, for citing facts about Islam,⁶ and upholds bans in wearing Islamic clothing, bans that European countries are embracing”. He said: “Unalienable rights means rights that cannot be taken away by law, but

⁴ Aaron Rhodes, “Pompeo Tries to Rescue the Idea of Human Rights”. *The Wall Street Journal*, June 10, 2019.

⁵ *Ibidem*.

⁶ Simon Cottee, The ECHR’s Flawed Ruling on Blasphemy, *The Atlantic*, October 31, 2018.



today human rights are more and more restricted by laws, and international human rights law, which is very weak anyway, is going in the wrong direction. The United States should firmly challenge these tendencies, making sure its own legislation does not make similar mistakes.”

As for the backlash over the State Department’s use of the terms “natural law and natural rights,” Rhodes explained, as an American, the way the Founders likely saw the term. “Our Founders saw liberty as an innate right based on their rational understanding of broad tendencies in nature, that is, on laws of nature that apply to humans, laws that govern our common human nature,” he said. “They observed that human beings flourish in freedom and that despotism corrupts the human spirit.” He argued that “the idea that there is such a thing as ‘human nature,’ however, has become deeply controversial, under the influence of Marxism, Progressivism, Fascism, Postmodernism, and other political ideologies that assert the primacy of social class, or nationality, or other sources of identity, and that can’t deal with the fact of individual moral agency and responsibility.” He concluded. “It is sad, and depressing, that the mere invocation of these ideas sets off paranoid and ill-informed reactions by media figures, social activists and ideological intellectuals, but such reactions do not necessarily reflect the society as a whole.”

In the same time, *The Center for Family and Human Rights*, a conservative Catholic think tank, said in an email to its supporters,⁷ affirming that the Commission would “aim an intellectual dagger at the heart of the radical expansion of rights that are not rights, that the hard left promotes at the UN; the ‘right’ to abortion, the ‘right’ to sodomy, the ‘right’ to gender expression.” The Center’s president, Austin Ruse, wrote: “Among the myriad of problems with these new rights, immorality for one, is that these new rights that are not rights have the inevitable tendency to undermine fundamental rights, like the right to religious freedom, the right to speech, and much else”. “We view this new Commission kind of like the cavalry coming to the aid of settlers under siege by savages”.

At the contrary, a letter sent to Pompeo was signed by 125 Catholic theologians and activists – including Miguel Diaz, a former U.S. ambassador to the Vatican under President Obama (2009-2012) and currently a Professor at Loyola University Chicago – called for the immediate abolition of the Commission.⁸ The letter was the result of conversations among Diaz, Dignity USA Executive Director, Marianne Duddy-Burke, feminist theologian Mary E. Hunt, and Fordham University ethicist Father Bryan Massingale. The four

⁷<https://email.opusfidelis.com/t/ViewEmail/j/D06B88B021F872B12540EF23F30FEDED/34A1EB8166AF5B7B46778398EADC2510>.

⁸ “Catholic Leaders Call for State Department Commission to be Dismantled”. 22 juillet 2019 *DignityUSA*.



recently participated together in *DignityUSA's 50th anniversary commemoration, focusing on LGBT concerns*. Their public petition expressed concern, among other things, that “the Commission's composition indicated that it was poised to lead to policies that will harm people who are already vulnerable, especially poor women, children, LGBTI people, immigrants, refugees, and those in need of reproductive health services”. The petitioners believe the Commission could violate Catholic concerns: “Our faith and our commitment to the principles of democracy require us to view every person on earth as a full human being. We staunchly support the fundamental human rights of all people and proudly carry on the long tradition in our country of advocating for expanding human rights around the world,” they write. “Our concern is that this Commission will undermine these goals by promoting a vision of humanity that is conditional, limiting, and based on a very narrow religious perspective that is inconsistent with the beliefs and practices of billions in this country and around the world.”

Diaz said in a statement after the letter's release: “The defense of fundamental human rights has been enshrined in our country's most cherished documents. As Catholics we also draw from the recognition and commitment to a broad range of human rights due to all persons expressed in Catholic Social Teaching”. “All human beings have been created in God's image and all have been endowed by their Creator with the fundamental right to Life, Liberty, and the pursuit of Happiness. No person speaking in the name of government or in the name of God can do so to undermine or deny this right,” he said.

Muslim activists have also called on Sheikh Hamza Yusuf, a prominent Sunni scholar who had become a Muslim member of the Commission, to step down and to not collaborate ‘with the most Islamophobic administration in American history’. The debate over Yusuf's role on that Commission among Muslims, seemed focused less on the international human rights implications than on the collaboration with the Trump administration, mirroring perennial debates, over the value of participating in White House iftar events. Yusuf's participation in the Commission was “disappointing and disturbing,” said Shabana Mir, an associate professor of anthropology at the American Islamic College. “His alliance with dictatorial Arab states and monarchs is also disturbing, and this is of a piece with that”, she added.⁹ Several Muslim activists told Religion News Service that they feared Yusuf's social conservatism would colour his foreign policy recommendations on the Commission. Critics pointed

⁹ Yusuf has long drawn criticism for his work advising the Bush administration post-9/11, as well as for his work as vice president of the Forum for Promoting Peace in Muslim Societies, an institution sponsored by the United Arab Emirates. Though Yusuf was once seen as a firebrand imam who railed against Arab autocracies, his involvement in the Forum for Promoting Peace in Muslim Societies has softened his political stances almost beyond recognition. Cf Uzaama Al Azami, “The conflicting legacy of Hamza Yusuf”, TRTWorld, 2019.



to Yusuf's history of dismissing the Black Lives Matter movement¹⁰; his previous comments on homosexuality, which he once called "pathogenic"¹¹, and his comments calling Muslim minority sects disbelievers "outside the fold of Islam."

1.2. HUMAN RIGHTS MILIEU REACTIONS

From their side, some experts in the field of human rights began raising alarms immediately after Pompeo named the members of the commission. Further specifics on the scope of the Commission have not been revealed, although many critics have focused on the language of "*natural law*" and the early involvement of Princeton Professor Robert George, a prominent Catholic defender of traditional marriage, and pro-life advocate. Critics including the *Center for Inquiry* questioned the implications of the Commission's work being framed in terms of "natural law" and religious lens, suggesting that the panel could be used to further a conservative political agenda by denying LGBT rights and reproductive rights worldwide.

Echoing this remark, GLAAD, an LGBTQ rights organization, found that seven members of the Commission had made anti-LGBTQ remarks in the past (9 juillet 2019). The head of the *Council for Global Equality*, an LGBT foreign policy advocacy group, told *The New Yorker* that he worried the State Department planned to create a hierarchy of human rights, with religious freedom sitting at the top¹². Joanne Lin, national director of advocacy and government affairs at the human rights organization *Amnesty International USA*, says that this Commission "appears to be an attempt to further hateful policies aimed at women and LGBTQ people." (July 12, 2019). Roger Pilon, chair of Constitutional Studies for the *Cato Institute*, wrote that, "the distinction between natural law, especially if theologically based, and natural rights to liberty looms large" (July 12, 2019).

On July 30, 2019, a coalition of 220 Human Rights, civil rights, foreign policy and faith organizations leaders and scholars, submitted a letter to Secretary of State Mike Pompeo, urging him once again to dismantle his

¹⁰ Emma Green, "Muslim Americans are United by Trump but Divided by Race", *The Atlantic*, March 11, 2017.

¹¹ Rollo Roming, "When Islam Meets America", *The New Yorker*, May 20, 2013. Cf also Omar Sarwar, "American Muslim Community Must Search Its Soul after Orlando Massacre", *Religious Dispatches*, June 21, 2016.

¹² Masha Gessen, *Mike-pompeos-faith-based-attempt-to-narrowly-redefine-human-rights*, *The New Yorker*, July 10, 2019.



department's new Commission on Unalienable Rights. Organized by *Human Rights First*, the letter's signatories include 21 American religious leaders and dozens of faith-based organizations, as the Presbyterian Church (USA), *American Jewish World Service*, T'ruah, Reconstructing Judaism, the *Anti-Defamation League*, the National Council of Churches, *Muslims for Progressive Values* and *Catholics for Choice*, as well as secularist groups like *American Atheists* and the *Freedom From Religion Foundation*. "(W)e view with great misgiving a body established by the U.S. government aimed expressly at circumscribing rights through an artificial sorting of those that are 'unalienable' and those to be now deemed 'ad hoc' " the letter reads. "These terms simply have no place in human rights discourse."¹³

Senior Vice-President of *Human Rights First*, Ron Berschinski,¹⁴ told in an interview by *Religion News Service*, that, while the commissioners comprised a diverse group of eminent scholars and prominent clergy, their backgrounds largely centred on religious liberty issues and "shared an overwhelming interest in limiting the rights of LGBT people and reproductive rights". Several commissioners' public statements in the past, against contraception and same-sex marriage, and in support of dictatorial regimes "clearly go against the grain" of current human rights discourse, he concluded.

Several months later, in March 2020, some major human rights organizations filed suit over Pompeo's 'unalienable rights' Commission, as the fact that the initiative was an effort to roll back protections for women, LGBTQ groups and minorities¹⁵. *Democracy Forward* filed the lawsuit in the Southern District of New York on behalf of the *Robert F. Kennedy Center for Human Rights*, the *Center for Health and Gender Equity*, the *Council for Global Equality*, and the *Global Justice Center*. They targeted Secretary of State Pompeo, the State Department and the department's director of policy planning staff, Peter Berkowitz. The group alleged that the Commission was created and operated in violation of the Federal Advisory Committee Act, the 1972 statute, that establishes guidelines that such committees must adhere to. In a joint press release, they pointed out that the Commission "stacked with members who have staked out positions hostile to LGBTQ and reproductive rights". It was "holding closed door meetings to conduct significant Commission business outside of the public's view and scrutiny, including efforts to redefine human rights terminology and commitments",

¹³ <https://humanrightsfirst.org/library/coalition-letter-rejects-report-issued-by-state-departments-commission-on-unalienable-rights/>.

¹⁴ Berschinski is currently (since 2021) the Special Assistant to the President Biden, and National Security Council Senior Director for Democracy and Human Rights.

¹⁵ Jennifer Hansler, "Human rights organizations file suit over Pompeo's 'unalienable rights' commission | CNN Politics", CNN, March 6, 2020.



and was “failing to provide adequate notice of meetings and to release key documents to the public.”

In May 2020, 167 rights advocates and organizations from 28 different countries put out a statement expressing "grave concern" about the direction of the Commission and urged it to "reject the prioritization of freedom of religion as a cloak to permit violations of the human rights of women, girls, and lesbian, gay, bisexual and transgender (LGBT) people".¹⁶

2. THE REPORT AND THE FOLLOWING GENEVA DECLARATION

Nevertheless, the Commission continued its work. It released a first draft report on July 16, 2020, and one final report on August 26, 2020, arguing for a narrower and more selective approach to human rights¹⁷.

In the first speech releasing the report, Secretary of State Mike Pompeo managed to ignore the report's complexities, and reduce it to Trumpian campaign slogans, about property and religious freedom 's prioritization¹⁸. Moreover, the document's understanding of property rights may be the most contentious, exhibiting a flawed libertarian sensibility.¹⁹ But the report received a lot of good comments.

As The *Center for American Progress* drafted a statement signed by a who of liberal religious leaders expressing "grave concerns" about the report, *The Wall Street Journal* issued an editorial in support²⁰. It was said that the report was fair and historically accurate. It "discusses at length the way the U.S. failed to live up to its founding promise of unalienable rights—most significantly with slavery and the Jim Crow era—and emphasizes that U.S. credibility in promoting human rights abroad depends on America's example at home." The board added that "Mr. Pompeo's initiative (was) not the coded theocratic or authoritarian document of his critics' partisan imaginations", but instead "a sensible effort to put American human-rights diplomacy on more sustainable footing."²¹

Historian of the US foreign policy and founder of a centre-left think tank called *New America*, Walter Russell Mead wrote in the same journal that the report was "a thoughtful and carefully reasoned document that may serve as an

¹⁶ "Groups Express Grave Concern about the Commission on Unalienable Rights". Human Rights Watch. May 1st 2020.

¹⁷ <https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf>.

¹⁸ Pranshu Verma, "Pompeo Says Human Rights Policy Must Prioritize Property Rights and Religion", New York Times, July 16, 2020.

¹⁹ None of this accords with Catholic social teaching, which acknowledges a right to private property as a condescension to the effects of original sin and insists that all property has a social mortgage upon it.

²⁰ On July 16, 2020.

²¹ Ibid.



important landmark in future debates". He added that the Commission's approach "offers more opportunity for constructive diplomacy" than approach sought by "many contemporary activists".²²

Michael Sean Winters, a famous editorialist of the *New Catholic Reporter*, a journal considered as left-Catholic, found the report good, in many aspects ²³. There were interesting, compelling issues -he wrote- not least its frequent recognition of how often the Americans do not live up to their founding ideals. For example, when the report discusses Franklin Roosevelt's 1944 State of the Union address, with its articulation of what the President termed "a second Bill of Rights" focused on economic rights such as "the right of every family to a decent home". The report states: "Even as FDR was introducing new rights — or drawing out the latent implications of unalienable ones — the United States continued to deprive African Americans of theirs." The report does seek to clarify some basic philosophic and historical points that might be a tad controversial at the margins but not in essence. For example, it states that "unalienable rights are universal and non-transferable. They are pre-political in the sense that they are not created by persons or society but rather set standards for politics. ... In contrast, positive rights are created by, and can only exist in civil society. Positive rights owe their existence to custom, tradition, and to positive law, which is the law created by human beings. Because custom, tradition, and positive law vary from country to country, so too do positive rights".

It was true, according to Michael Sean Winters, as the report stated, that not "all government forbearance or intervention that benefits some or even all citizens is for that reason a right, and not every right that democratic majorities choose to enact is therefore unalienable." But it was also true that the adage — the rich man and the poor alike are free to forage in the dumpster for their dinner — speaks to the fact that formal rights, if not concretized, invite derision and worse. No one, however, should sneer at the idea of unalienable rights, nor fear defending them and helping them to grow. Winters concluded that, in the long catalogue of human criminality that is history, the emergence of liberal ideas about unalienable rights was "one of the bright spots, and there remains plenty of work to be done to secure and promote those rights".

On the contrary, other comments were less positive. Former U.S. Deputy Assistant Secretary for Senate Affairs under Obama Administration, Rori Kramer, criticized the Commission in an interview with *The Guardian*, saying that "from day one when Pompeo announced this, the intention was always to

²² Walter Russell Mead. "Pompeo Takes on the Politicization of Human Rights" *The Wall Street Journal*, July 16, 2020.

²³ Michael Sean Winters, "Unalienable Rights Are Still Unassailable Despite Pompeo," *NCR*, July 22, 2020.



change the actual working policy of the Department to fit his narrow religious views in a way that really upends the normal working order of the Department”²⁴. In addition, the Commission's report saw opposition from many human rights advocates and scholars. Notable ones include Kenneth Roth, the executive director of *Human Rights Watch*, who described the Commission's report as "a frontal assault on international human rights law." He said that, during a debate On September 17, 2020, organized by the *Human Rights Program of Harvard University* which hosted experts to discuss the report and its implications for U.S. human rights policy and the international human rights system. HRP was joined by Martha Minow, Professor and former Dean of Harvard Law School, Gerald Neuman, J. Sinclair Armstrong, Professor of International, Foreign, and Comparative Law²⁵ and Co-Director of the *Human Rights Program at Harvard Law School*, Mathias Risse, Professor in Human Rights Policy, Global Affairs and Philosophy, Director of the *Carr Center for Human Rights Policy*, Lucius N. Littauer, Professor of Philosophy and Public Administration at Harvard University, Katharine Young, Professor of Law at Boston College Law School. The event was moderated by Sushma Raman, Executive Director of the *Carr Center for Human Rights Policy*, and it was captioned²⁶. This panel was deeply concerned that the report presented a narrower and more selective vision of human rights, calling for rights hierarchies and the dismissal of certain rights as divisive.

Finally, for what extend was this report done? The Commission was dissolved after it, and its conclusions were given to the Secretary of State, head of a department that could use it inside the Bureau of Democracy, Human Rights and Labor or the Bureau of International Religious Freedom, under the supervision of the Under Secretary for Civilian Security, Democracy and Human Rights. It seems that it was not given to them as new guideline. It was not dispatched in the international circle of human rights or religious freedom organizations, as it was previewed for international purposes. Secretary of State Pompeo presented it officially as the new American contribution for the defence of the international human rights at the UN General Assembly in September 2020²⁷. But his sole and apparent intention was to present it as a “prove” in the

²⁴ “US reframing of human rights harms women and LGBT people, advocates say” The Guardian, September 17, 2020.

²⁵ Gerald L. Neuman, Director of the Human Rights Program at Harvard Law School is a former member of the United Nations Human Rights Committee, and had previously submitted formal comments to the Commission outlining its defects: "Gerald Neuman submits comments to State Department's "Commission on Unalienable Rights"". Human Rights @ Harvard Law. March 23, 2020.

²⁶ <https://hrp.law.harvard.edu/events-calendar/watch-pompeos-commission-on-unalienable-rights-shrinking-u-s-human-rights-policy/>

²⁷ Carol Morello, “Pompeo urges other countries to join alternative US views on human rights”, The Washington Post, September 23, 2020.



last move he wanted to manifest, before the American voters, of his devoted “American foreign policy”, in the last days of the Presidential campaign. Having intended to gather friendly countries on the margins of the 2020 World Health Assembly in Geneva, this last move was impeached because of the COVID pandemic. The big Declaration previewed at that time, was finally signed by correspondence on October 22, and the US representative to the United Nations, Kelly Kraft, sent it to the Secretary-General on December 7, 2020, when the world’s attention was occupied by Donald Trump’s denial of his defeat. The *Geneva Consensus Declaration on Promoting Women's Health, and Strengthening the Family*, signed by 34 countries, went unnoticed. The document was not related to the United Nations' Geneva Consensus Foundation or to other Geneva-based institutions and was not legally binding. The signatories declared to have the same main objectives: "(a) to secure meaningful health and development gains for women; (b) to protect life at all stages; (c) to declare the sovereign right of every nation to make its own laws protecting life, absent external pressure; and (d) to defend the family as foundational to any healthy society". Described as "Pompeo's project", the Declaration was submitted by American Ambassador Kelly Craft to the UN General Assembly under agenda item 131 for December 2020. The US position was that there was no "international right to abortion", and that the United Nations should therefore respect national laws and policies on the matter.²⁸ Egyptian NGO Nazra described the declaration as "an international attack on women, gender, and sexuality", and Amnesty International USA said the signatories were "willingly endangering people's health and lives". Critics have accused the signatories of being motivated by the desire to undermine established international institutions. The text didn’t pass into some UN final resolution. On January 28, 2021, US President Joe Biden removed his country from the Geneva Declaration and this declaration is not more available on the website of the US Mission to the UN, but still on the UN website.

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The signatories “reaffirm that there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion, consistent with the long-standing international consensus that each nation has the sovereign right to implement programs and activities consistent with their laws and policies.”



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CAN WE TALK ABOUT IT? THE DIFFICULTY OF DISCUSSING TRANSGENDERISM

ALEXIS ARTAUD DE LA FERRIÈRE¹

INTRODUCTION

When pressing and controversial societal questions arise, open discussion offers an opportunity to exchange opposing views, to ask one's interlocutor to justify their position, and to be at liberty to question that position's premises, underlying evidence, or the internal consistency of their argument. This view of discussion reflects much that is held dear in liberal philosophy; but even the most historically influential theorists of liberalism and advocates of free speech have recognised the importance of setting boundaries (legal and/or social) to what can and should legitimately be said. Thus, JS Mill argued that "all that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law".² The establishment of such boundaries is often referred to as the "harm principle" following Mill's view that the only justification for the curtailment of liberty is to prevent harm to others. For those who subscribe to the harm principle, the questions of what constitutes harm, what is a fit subject for the operation of law (rather than informal social censure), and how this balance should be policed, are much debated – whilst others hold that the harm principle itself is overly-restrictive when applied to speech, and others still find the harm principle insufficiently restrictive, appealing to alternative notions such as offence.³

Today, the most prominent debate where these considerations apply is that surrounding transgender identity. In the context of this debate, it is an increasingly widely held view in Western Europe and North America that manifestations of beliefs critical of transgenderism are in themselves harmful and

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² John Stuart Mill, *On Liberty*, (Indianapolis: Hackett Publishing, 1978), 5.

³ Feinberg, J., *Harm to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984).



not worthy of legal protection. Indeed, a stronger version of this view has also gained prominence, which holds that so-called “gender-critical” *beliefs in themselves* should not be protected on the basis that such beliefs would *necessarily* lead to external conduct that would violate the dignity and conflict with the fundamental rights of others; this was notably the view propounded by the UK employment tribunals in two recent decisions: *Forstater v CGD Europe* and *Mackereeth v DWP*.⁴ This sort of reasoning raises questions about the validity of a distinction between an absolute forum internum and a qualified forum externum in the architecture of the right to freedom of belief or religion: can clear lines be drawn between the holding of a belief, its manifestation, and the conditions of its manifestation?⁵ For the purposes of the present discussion, I will largely leave this level of analysis aside and focus on what these two cases can tell us about the seeming intractability of disagreement between advocates of transgender rights and advocates of the right to freedom of religion and belief today. My view is this: the debate over transgenderism is not only (or even primarily) about competing definitions of what it means to be a man or a woman. To a large extent, the vitriol surrounding this debate must be understood on a meta-conceptual. What separates opponents is their differing views on what can legitimately be discussed in a pluralistic society, when speech constitutes a harm, and whether certain beliefs in themselves are tolerable if such beliefs undermine certain persons’ self-understandings.

BELIEFS NOT WORTHY OF RESPECT?

In both *Forstater v CGD Europe* and *Mackereeth v DWP*, claims were brought to the Employment tribunal under the Equality Act 2010 (EqA), which prohibits four basic forms of discrimination (direct, indirect, harassment and victimisation) on the basis of nine protected characteristics (Age, disability, gender reassignment, marriage or civil partnership [in employment only], pregnancy and maternity, race, religion or belief, sex, sexual orientation) in contexts which include employment and the provision of goods and services.

In the case of *Mackereeth v DWP*, the claimant was a doctor who, as a Christian, held the following beliefs or lack of belief:

⁴ *Hurford v Farmor’s School* is also a relevant case here, but I leave it aside for the purposes of my present discussion.

⁵ On this question, Rebecca Roberts argues that, in the content of the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR), the forum internum and forum externum aspects of art. 9 are interrelated and should be understood on a conceptual continuum ranging from the forum internum to the forum externum because the former is always relevant, to some degree, in Article 9 complaints. See: Roberts, C. K., 2020. *Reconceptualising the Place of the Forum Internum and Forum Externum in Article 9 of the European Convention on Human Rights*, 2020. PhD thesis, University of Bristol.



“(a) in the truth of Genesis 1:27, that a person cannot change their sex/gender at will and attempting to do so is pointless, self-destructive and sinful;

(b) a lack of belief in “Transgenderism” and “gender fluidity”, such that he does not believe (i) a person can change sex/gender, (ii) that “impersonating” the opposite sex may be beneficial for a person’s welfare, or (iii) that society should accommodate/encourage such “impersonation”;

(c) a belief that it would be irresponsible and dishonest for a health professional to accommodate/encourage a patient’s “impersonation” of the opposite sex.”⁶

The Claimant, Dr. Mackereth, held that because of these beliefs he would not be able to address transgender service users by their chosen pronouns, a position contrary to his employer’s policy. Dr. Mackereth’s claim to the tribunal was that he had suffered less favourable treatment and discrimination because of his beliefs, in that pressure had been put on him to renounce his beliefs, he had been suspended from work, and he had been summarily dismissed. The tribunal found against the claimant, notably on the basis that his particular beliefs regarding transgenderism were incompatible with human dignity and were in conflict with the fundamental rights of transgender individuals, and thus did not meet all of the so-called *Grainger* criteria.⁷ Grainger holds that in order to qualify as a “philosophical belief” under section 10 EqA a belief must (i) be genuinely held; (ii) be a belief and not an opinion or viewpoint based on the present state of information available; (iii) be a belief as to a weighty and substantial aspect of human life and behaviour; (iv) attain a certain level of cogency, seriousness, cohesion and importance; and (v) be worthy of respect in a democratic society, not be incompatible with human dignity, and not conflict with the fundamental rights of others. More specifically, the tribunal held that Dr. Mackereth’s lack of belief in “Transgenderism” and “gender fluidity”, such that he did not believe that “impersonating” the opposite sex may be beneficial for a person’s welfare (b.ii) and that society should accommodate/encourage such “impersonation (b.iii) did not meet Grainger ii, iii, and iv; and that none of his beliefs satisfied Grainger (v). The claimant’s views were not, therefore, protected as religious or philosophical beliefs under the Equality Act.

Importantly, the tribunal’s judgment was not limited to a consideration of Dr. Mackereth’s actions but considered his *beliefs in themselves* to be “likely to cause offence and have the effect of violating a transgender person’s dignity or

⁶ REF

⁷ *Grainger plc v Nicholson* [2010] ICR 360, para 24. These criteria have been adopted in the ECHR Code of Practice for employment at paragraph 2.59. Whilst tribunals are required to take the code of practice into account, they are not bound by it. According to *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, EAT, para 34: The threshold for establishing the Grainger criteria should not be set “too high”.



creating a proscribed environment, or subjecting a transgender person to less favourable treatment. They [the beliefs] may also have breached the GDA [sic. GRA (Gender Recognition Act 2004)].”⁸

The case of *Forstater v CGD Europe* presents a similar slippage between belief and action on behalf of the tribunal. Ms Forstater was employed as a consultant for CGD Europe, a development think tank. During the time of her employment, she had written several messages on her private Twitter account reflecting her view that:

(a) “sex” is a material reality which should not be conflated with “gender” or “gender identity”;

(b) being female is an immutable biological fact, not a feeling or an identity;

(c) that sex matters and that it is important to be able to talk about and take action against the discrimination, violence and oppression that still affect women and girls because they were born female.

After receiving complaints from colleagues, who considered that she was expressing transphobic opinions, Ms. Forstater’s employer conducted an investigation and later decided not to renew her contract. In this case, the claimant alleged discrimination on the basis of her gender critical philosophical beliefs when her contract was not renewed. Again, the tribunal found against the claimant on the basis that Ms. Forstater’s beliefs were not protected under the Equality Act 2010 as her views were “absolutist in nature, incompatible with human dignity and fundamental rights of others [and thus] not worthy of respect in a democratic society”.⁹ Importantly, in terms more explicit than in the Mackereth case, the judge in *Forstater* motivated his decision on the basis of the following consideration:

“I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief, rather than something separate, and will be relevant to determining whether the belief is a protected philosophical belief. While the Claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others.”¹⁰

We may assume that the judge’s appeal to action here is intended to serve as a standard for determining whether Ms. Forstater’s belief falls foul of the *Grainger* (v) threshold. Admittedly, it is not obvious how this determination

⁸ Mackereth ET 198.

⁹ Forstater, 84.

¹⁰ Forstater, 88, my emphasis.



should be made.¹¹ James Hurford has argued that Grainger (v) is badly worded as it conflates the notion of respect with that of toleration – the former implying too high a bar given that the state is meant to act as a neutral arbiter¹². Russell Sandberg has also criticised the Grainger criteria on the basis that their inconsistent application has contributed to a growing confusion as to the definitional boundaries of a belief: “Employment Tribunals have considered the tests to be met in cases concerning beliefs in spiritualism and psychic powers, anti-fox hunting beliefs, beliefs in the virtue of public service broadcasting, and Humanist beliefs. In contrast, other Employment Tribunals have concluded that the tests have not been met in cases concerning Marxist/Trotskyite beliefs held by trade union members, beliefs in conspiracy theories regarding 9/11, and a belief that belief that a Poppy should be worn during the week prior to Remembrance Sunday”.¹³

Further to these more general points, two ambiguous moves are made in the tribunal’s statement regarding Forstater. First, in terms similar to, but more explicit than in the Mackereth case, the tribunal acknowledges a distinction between holding and manifesting a belief - whilst at the same time collapsing the efficacy of that distinction by qualifying the right to hold a belief on the hypothesis that such a belief is associated, through a form of necessary causation, with a corollary action (even if no specific instance of such action has been demonstrated to occur). Second, the tribunal states that even if the claimant does modify her external behavior regarding the use of pronouns, she remains at fault because she will not *accept* that a trans woman is a woman. To use preferred pronouns out of courtesy is not sufficient; the action must be supported by proper belief. But how is such a belief to be verified given that the external manifestation is itself insufficient? Andrew Hambler has described this reasoning as “an approach fraught with danger. The implication is that a belief, before it is even expressed, is beyond the pale owing to its capacity to ‘violate the dignity of others’ (that is, cause offense). Indeed, the judge seems to go so

¹¹ Sandberg 2018: Following Grainger the five requirements have taken on an elevated importance. Employment Tribunal Chairs have subsequently applied these requirements as if they were a statutory test and have forgotten the warning in Williamson that these should be ‘minimum’ and ‘modest’ requirements.⁶¹ They have interpreted the tests in different ways to reach inconsistent and arbitrary decisions. Employment Tribunals have considered the tests to be met in cases concerning beliefs in spiritualism and psychic powers,⁶² anti-fox hunting beliefs,⁶³ beliefs in the virtue of public service broadcasting,⁶⁴ and Humanist beliefs.⁶⁵ In contrast, other Employment Tribunals have concluded that the tests have not been met in cases concerning Marxist / Trotskyite beliefs held by trade union members,⁶⁶ beliefs in conspiracy theories regarding 9/11,⁶⁷ and a belief that belief that a Poppy should be worn during the week prior to Remembrance Sunday.⁶⁸ Drawing any points of principle out of this case law is difficult, to say the least.⁶⁹

¹² Hurford, J. E., “Worthy of Respect in a Democratic Society”? Forstater and the Expression of Controversial Beliefs,” *Judicial Review* 26, no. 4. (2021): 277-290.

¹³ Sandberg, R., “Clarifying the definition of religion under English law: The need for a universal definition,” *Ecclesiastical Law Journal*, 20, no. 2, (2018): 132-157.



far as to suggest that because dignity *will be* violated then that fact in itself operates to demonstrate that a belief rather than ‘an action based on belief’ is in play.”¹⁴ Robert Wintemute advances a similar argument.¹⁵ However, Cowan and Morris disagree with this critique on the basis that “the Tribunal took the view that there was unequivocal evidence, from Ms. Forstater herself, of previous conduct arising from her beliefs, and an intention to act on these beliefs in the same way going forward. Having considered all the factual evidence, the Tribunal concluded that Ms. Forstater’s beliefs *necessarily* led to conduct that violated dignity, in conflict with the fundamental rights of others, and which was not worthy of respect in a democratic society. Therefore, it found those views not worthy of protection under the EqA”.¹⁶ Yet, it is still the case that this is an inductive leap in the tribunal’s logic, from previous conduct to necessary future conduct. 1 As Hambler points out, in Mackereth, the judge added a confusing postscript which stated that the tribunal had no doubt of the claimant’s ‘entitlement to hold [his] beliefs’ but that what the case concerned was ‘whether he was entitled to manifest those beliefs in the circumstances that applied’: “How this postscript can be reconciled with the earlier part of the judgment which declared the claimant’s actual beliefs to be incompatible with human dignity and the rights of others is unclear”.¹⁷

Subsequent to these first instance decisions, the Employment Appeal Tribunal overturned the determination in Ms. Forester’s case, finding that her views were indeed worthy of respect in a democratic society and that she had been unfairly discriminated against. Dr. Mackereth also lodged an appeal; in this instance the tribunal dismissed the appeal, although, citing Forstater, the EAT recognised that the ET had erred in its approach to defining religion and belief as a protected characteristic (and specifically in its application of the Grainger criteria).¹⁸

THE ABSENCE OF COMMON GROUND

Confusions in the judges’ written rulings aside, the logic hinted at in these two cases is indicative of at least one key reason why the societal debate concerning transgenderism is so brittle. For those skeptical of the notion that gender is a

¹⁴ Hambler, A., “Beliefs Unworthy of Respect in a Democratic Society: A View from the Employment Tribunal,” *Ecclesiastical Law Journal* 22, no. 2, (2020): 234-241. My emphasis.

¹⁵ Wintemute, R., “Belief vs. action in Ladele, Ngole and Forstater,” *Industrial Law Journal* 50, no.1, (2021): 104-117.

¹⁶ Cowan, S., & Morris, S., “Should ‘Gender Critical’ Views about Trans People Be Protected as Philosophical Beliefs in the Workplace? Lessons for the Future from Forstater, Mackereth and Higgs,” *Industrial Law Journal* 51, no. 1, (2022): 1-37.

¹⁷ Hambler, op. cit.

¹⁸ Appeal, 58.



matter for autonomous self-identification (neither determined by biological sex nor tied to sexual orientation), the freedom to hold and manifest their beliefs is both conceived of as a matter of conscience and as a useful deliberative practice necessary to assess the truthfulness of claims which carry grave social and political consequence. Inherent to their position is the idea that the meaning of the claim “to be trans-gender” is not settled, that such a proposition may refer to an objective reality other than that which a self-identified trans-gender person attributes to it, and that the belief in transgenderism may not only be empirically false (a “fiction” to use Kathleen Stock’s term), but that the legal recognition of this belief as true may cause harm to persons, notably biologically-born women and girls. For example, *Transgender Trend*, a UK organisation calling for evidence-based treatment of children with gender dysphoria and the end to teaching the concept of ‘gender identity’ as fact in schools, has raised concerns that the recent increase of girls who develop gender dysphoria at or after puberty is attributable to poor body image and that transgender affirmation only reinforces this problem.¹⁹ In sum, those of this disposition hold that to debate what it means to be trans is a legitimate line of inquiry; further, they hold that it is a morally necessary line of inquiry.

On the other hand, many proponents of transgenderism hold that the very belief in the biological model of sex difference is harmful on the basis that it threatens “the existence and validity of transgender and nonbinary people, and the right of trans and nonbinary people to identify their own genders and sexualities. [As such, transgenderism falls] within the range of [...] indisputable topics.”²⁰ Although the extent and verifiability of such harms may be disputed, proponents of transgenderism insist that a situated perspective is necessary to appreciate their depth of force: “What seems mundane to people who aren’t trans can mean everything to the person being impacted. A mere moment may constitute that final layer of injustice for a trans person who finds themselves no longer able to resist.”²¹ For people of this disposition, it is both intellectually illegitimate and morally harmful to debate what it means to be trans.

These two positions point to a meta-disagreement regarding the legitimacy of having a debate about transgenderism, which cannot be resolved as this would require mobilizing substantive concepts from within the debate, which one party or another dismisses axiomatically. In his examination of the nature of modern moral disagreement in *After Virtue*, Alisdair MacInyre made precisely this observation, that “the most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and that the

¹⁹ Written evidence submitted by Transgender Trend to Parliament (MISS0046).

²⁰ Joint Statement of Minorities and Philosophy and Minorities and Philosophy International, 2019.

²¹ Mermaids UK. <https://mermaidsuk.org.uk/news/trans-rights-are-not-up-for-debate/>.



most striking feature of the debates in which these disagreements are expressed in their interminable character. [Not just that they go on and on] but also that they apparently can find no terminus”.²² Intractable debates, on MacIntyre’s account, have three salient characteristics, which each apply to the transgender debate: the conceptual incommensurability of the rival arguments; the impersonal mode of such arguments which severs the link between the context of utterance and the force of the reason-giving: rival claims are to be evaluated independently of the preferences and attitudes of speaker and hearer; and the historical decontextualisation of rival arguments which hides how wide and heterogenous the variety of moral sources is from which we have inherited our beliefs.

The transgender debate in its current form is intractable not because of empirical or moral disagreements between opponents. Indeed, if this were the case, we could resolve the debate through scientific inquiry or moral deliberation - or at least identify the conditions under which such a resolution would obtain. Rather, what prevents the transgender debate from being conducted through a civil exchange of ideas progressing towards more well-defined concepts and a narrower mutual understanding of the terms of disagreement is that there is “no rational way of securing moral agreement” between the two sides.

Is there way out of this intractable debate? A modest hopefulness might be found in the distinction we can make between ‘talking together’ and ‘living together’. Like much modern moral disagreement, the debate over transgenderism happens in an amorphous space between groups who share little or no common life together. Thus, for both sides, the importance of abstract ideas is elevated (either to be sanctified or reviled) but the actual lived humanity of persons who hold ideals, make moral commitments, have a sense of self-identity, is often lost. This phenomenon is accentuated on digital platforms where one’s interlocutors can appear as totally disembodied and where all one might “see” of the other person is the narrow set of beliefs or opinions with which one disagrees. The fact that a person also lives in a certain place to which they contribute through their daily work, has friends and family to whom they are committed, feels joy, fear, and suffering just as oneself does – these crucial details which make a person are far too easy to forget or ignore when we do not live alongside one another on a daily basis and share in both the happy and painful minutiae of life. MacIntyre’s focus on personalisation and community points to the preeminence of shared living over the Cartesian/Liberal focus on the depersonalised exchange of ideas.

The way in which we tend to think about the conduct of politics incites us to consider large-scale, public debates to be more important and more worthy

²² MacIntyre, A., *After virtue*. (A&C Black, 2013). 7.



than local discussions and parochial concerns. We want to speak or publish on platforms that will reach across the world, with little consideration for whether our immediate neighbors will ever hear or be interested in what we have to say; local public offices are seen as stepping-stones for national ambitions. And so often we are frustrated because the scope of our works does not reach these lofty goals – without ever considering whether they were worthy goals to begin with. Perhaps this hubristic, depersonalised approach to politics is also to blame for our incapacity to have a genuine and fruitful exchange of ideas with those whose views we contest. An alternative vision holds that a deep and prolonged experience of living together as a community is a necessary prior condition to a meaningful dialogue on difficult questions. Investing oneself in one's local community through service, getting to know those with whom we work and those near to whom we live, listening to and sharing stories rather than opinions, waiting for empathy to grow organically through time spent together: all these modest (yet demanding) acts are good in themselves, but also instrumentally good because they gradually ease us into a state of mutual recognition where we can engage in a discussion of ideas on divisive questions; a discussion which we have not because of the ideas themselves, but because of a common commitment to each other and to the lives which we share in a real and tangible way.

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