Journal of Christian Legal Thought

VOL. 5, NO. 1
SUMMER 2015

Journal *of* Christian Legal Thought

VOL. 5, NO.1 | SUMMER 2015

PUBLISHED BY

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

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

EDITORIAL ADVISORY BOARD

STATEMENT OF PURPOSE

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

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

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

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

EDITORIAL POLICY

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

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

To submit articles or suggestions for the Journal, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.

A SHORT TRIBUTE TO DEAN JEFFREY A. BRAUCH

By Michael P. Schutt, Editor in Chief

In 1994, Jeff Brauch left his job as a commercial litigator at Quarles & Brady in Milwaukee to join the faculty at Regent University School of Law, a fairly new Christian law school in Virginia Beach. When my wife and I had lunch with Jeff and Becky during his interview, we recommended that they should not take the job unless it was "clearly God's idea."

Well, it turned out that it was indeed God's idea, and after five years on the faculty, Jeff Brauch was named interim and then permanent dean of the law school. This spring, during his sixteenth year as Regent Law Dean, he announced that he was stepping down as dean and moving back to the classroom full time.

In case you missed that number, Jeffrey A. Brauch served *sixteen years* as Dean of Regent Law School. That's roughly five times the tenure of the average law school dean.

But then, again, Dean Brauch was not your average law school dean.

Full disclosure: Dean Brauch is one of founding sponsors of this Journal and an animating force in the creation the Institute for Christian Legal Studies (the publisher of the Journal) fifteen years ago. The creativity and grace that helped him envision and sustain this longstanding partnership on behalf of Regent Law with the Christian Legal Society (working closely with three CLS executive directors), are the same traits that have endeared him to thousands of law students, a diverse gaggle of law professors, university donors, school administrators, and his staff.

By way of further disclosure, Dean Brauch's commitment to the Regent Law mission and his generosity in partnership have been a huge blessing to me personally and to the Christian Legal Society. When the University, at his recommendation, granted my sabbatical request for the 2000-01 academic year, it was based on a proposal that sought to answer a question that he and I had been mulling over together as junior faculty: "How can we use the rich resources and faculty we have at Regent to encourage Christian students and professors at other law schools?" When I connected with the Christian Legal Society during this sabbatical project, he was willing to share our resources, including me, with CLS. It was a natural fit, since CLS had student groups and we had substantive Christian legal scholarship to share, courtesy of my Regent colleagues. So much so, that at the conclusion of my sabbatical, Sam Casey, then the Executive Director of CLS, approached the Dean with a proposal for a two-year partnership, under which CLS could pick up a portion of my salary. After some prayer and discussion, the Institute for Christian Legal Studies was born. The two years turned into five, then ten, and then 13, before Regent passed its part of ICLS to Trinity Law School in 2013. ICLS celebrates its 15th anniversary this fall.

Jeff's vision for the broader kingdom influence of one small law school was the thing that made such a project possible. Here was a law school dean loaning a teaching faculty member to a non-profit organization with no promise of tangible financial benefit in return. Instead, Regent simply took the lead in encouraging and equipping thousands of Christian law students—who one way or another chose NOT to attend Regent law school—through ICLS materials and personal visits, and through CLS conferences, retreats, and mentors. Regent gained exposure for its programs and Christian mission, enhanced enrollment at its summer study programs, and built a reputation as a generous institution interested in serving others in the legal community. Not a bad trade-off, but not an obvious winner either, if you're thinking territorially or inside the law school box.

This was no public relations façade; it was the genuine vision of a law school dean who believed his role was to help others in the Christian legal community become better disciples of Jesus, regardless of their direct connection to the law school.

This was his way: quietly equipping those around him with creativity and open-handed grace. He empowered professors to teach and challenged them to do it in way that recognized biblical truth. He empowered students to lead on campus, consistent with Christian duty. He energized alumni to be proud of the institution in which they had invested so much. He let his leaders lead, his teachers teach, his staff innovate, and his students succeed.

Dean Brauch would be the first to admit that he did not do this alone. In fact, many faculty members and

associate deans have been on the Regent Law leadership team as long or longer than he has. Mike Hernandez, for example, who has been named the new dean, began teaching at Regent before Jeff did, and has had an immense hand in leading the law school through these years as well. (By the way, Mike's proven commitment to the mission and his evident servant leadership are great signs for Regent's future). I could name other faculty members who have been there longer and have taken on monumental leadership roles over the years. But that is part of the point: a host of talented leaders and teachers have flourished alongside the law school as they have grown and served together under Jeff's leadership.

He would also point out that he was building on a solid foundation, already set with a sound vision. Many faculty members from the founding of the law school, including the founding dean, Herbert W. Titus, were not around in person these past sixteen years to enjoy the ride, but they left an amazing legacy upon which others have built.

I know this sounds more like a personal reminiscence than a tribute, and perhaps it is, told from such a narrow, and now distant, vantage point. But I know Dean Brauch and his work, and I have seen enough to know that his commitment to the Christian mission of Regent University School of Law has made others better, strengthening Christian legal education across the country — at places like Pepperdine, Liberty, Trinity, and Campbell. And I know that his commitment to discipling young lawyers on campus has in turn strengthened other law-focused ministries — like the Christian Legal Society, ADF, and Advocates International. Finally, I know that all over the country, more than two thousand lawyers are quietly loving their clients and serving their communities by the power of the Holy Spirit, sent out from the law school under the commissioning and prayerful hand of the Dean.

Well done, Dean Brauch, and thank you!

Mike Schutt is director of the Christian Legal Society's Attorney Ministries and the Institute for Christian Legal Studies ("ICLS"), a cooperative ministry of CLS and Trinity Law School in Santa Ana, California, where he is a Visiting Professor. He has taught Professional Responsibility, Torts, and Christian Foundations of Law, among other courses.

Schutt also serves InterVarsity Christian Fellowship as National Coordinator of its Law School Ministry and directs Law Student Ministries for CLS. He is the author of Redeeming Law: Christian Calling and the Legal Profession *(IVP 2007). He taught on the Regent University full-time law faculty from 1993-2013 and currently teaches at Regent as an adjunct. He is an honors graduate of the University of Texas School of Law.*

He writes and travels from his home in Mount Pleasant, Texas, where he lives with his wife Lisa and their youngest son, Jack. He has two married children who, with their wonderful spouses, are saving to support their parents in their old age.

He is the Editor in Chief of the Journal.

A Note On This Issue: What motivates professors and deans to make the sacrifices they make for their students? I know that for Dean Brauch, law students were the central motivation for him as he walked out his calling. If you asked him what was best about his job, he always replied, "the students."

This issue of the Journal takes one step further, asking the "why" question of five Christian professors, all of whom teach and mentor law students. Why do you do what you do? As a Christ-follower, what do you hope to accomplish through your work on campus?

The answers that you will read here are wonderfully diverse, but collectively they speak to the essentials of living as the hands and feet of Jesus on campus. I am grateful to these thoughtful and accomplished professors for taking the time to reflect on their own callings in the academy, for our benefit.

THE POWER OF PRESENCE

By Virginia Harper Ho

One of the most influential professors I ever had as a law student was a professor I never took a class from and who never advised me in any academic role. Throughout his tenure at Harvard Law School, he was weakened by debilitating back pain and later by the cancer that took his life at only 52. His name was William Stuntz. I met Bill as a 2L soon after he joined the faculty when he became the advisor to the Law School Christian Fellowship. We probably had no more than a handful of conversations, yet the impression he made on me was profound. Why? Because he openly, thoughtfully, and humbly reflected the presence of Jesus in everything he did. As much as his faithful example, his presence on campus encouraged me that God was at work in Cambridge, in the academy, and in the work I might do after graduation.

Last fall, I sat down with the student leaders of the Christian Legal Society (CLS) chapter at my institution to think about the secret behind Bill's powerful example — how does being a follower of Jesus matter to our work as students or as faculty at the law school? We were thinking not in terms of identity, diversity, or self-concept. Instead, we were focusing on the Apostle Paul's statement in II Corinthians: "We are … Christ's ambassadors, as though God were making His appeal through us."[1] What, exactly, did that mean? We noticed that means more than simply to represent Jesus, though that is what ambassadors do. It also means allowing Him to live and work — to be present — *in and through* us. One Christian author put it this way:

> What if, for one day, Jesus were to become you? … His priorities govern your actions. His passions drive your decisions. His love directs your behavior. …What would you be like? … Your coworkers — would they sense a difference? … And your friends? Would they detect more joy? … And what about you? … Would you still do what you are doing?[2]

But of course, this is what we believe Jesus is really doing each day when we go to work.

In thinking about this, I have been greatly helped by an incredible book, *Every Good Endeavor: Connecting Your Work to God's Work*.[3] In it, Timothy Keller, the pastor at Redeemer Presbyterian Church in New York City, looks at the question of how our perspective on our work, regardless of what it is, should be different as committed Christ-followers. Keller urges us to ask ourselves the following questions: "What opportunities are there in my profession for (a) serving individual people, (b) serving society at large, (c) serving my field of work, (d) modeling competence and excellence, and (e) witnessing for Christ?"[4]

What is wonderful about teaching is that in academia such opportunities are not hard to find. Indeed, once I approach all of my work, including teaching and research, as service in the Biblical sense, (a) through (d) fit quite easily into what the university expects all of its faculty to do. In the classroom, I can share with students my passion for thinking about how corporate and comparative law affect real people. I can work to rethink doctrine and practice to solve real world problems. I can challenge students to think about the limits of law and to consider what the source of stronger internal moral principles might be. I can seek to model excellence and professionalism in the classroom and as a scholar.

But what about witness? How can God "make His appeal through us" at a law school (or in a law firm)? Here professional and academic environments seem much less hospitable, and as a junior faculty member, I had wondered how such opportunities might arise.

It turns out I didn't need to seek them out. Before graduation one year, one of my students who was also a leader of our law school's LGBT student group stopped by to thank me and talk about future plans. In the course of our conversation, it turned out this student had somehow discovered that I was a believer before I'd ever consciously "outed" myself as a Christian professor. And the

[1] 2 *Corinthians* 5:18.
[2] Max Lucado, Just Like Jesus (2003).
[3] Timothy Keller, Every Good Endeavor: Connecting Your Work to God's Work (2012).
[4] *Id.* at 181.

students in CLS? One wrote on a survey card the first day of class that he had seen me at church. Another got assigned to my 1L advising group. Some introduced me to their classmates. Most often, just being willing to take the time to listen and to be available opened doors for me to encourage, to speak truth, to challenge students' thinking in ways that I believe Jesus would if they had come to my office to meet Him. So it turns out that if I just focus on how to serve my colleagues and students, use my work to serve society, the profession, and my field, and seek to model excellence, God will do His work.

The real question is, can I invest the time it takes to be available, to be present? Just last month, time I had blocked out for an urgent writing project was interrupted by a knock at the door that made me wonder how I could possibly meet my deadline. The situation was one that could not be rescheduled, so I decided God had other ideas, and I'd have to trust Him to provide the time and ideas I'd need to catch up. It is amazing how faithfully He provided both. As this lesson has been repeated, I have had the privilege of not only seeing God work in my students, but also learning that He can handle my needs at the same time. These situations force me to be dependent on God and remind me that I cannot steal the credit for the ideas, the gifts, the inspiration, the resources, and the time that He gives me to teach and write.

Of course, the fact that being present in the lives of students is a true calling, a vocation, does not mean that Christians have a corner on the market for excellence in teaching. I am privileged to work alongside many committed teachers and scholars, and our law school prides itself on the accessibility of its faculty. Many of my colleagues are not only effective educators, but also deeply committed mentors and role models whose example I can learn from. They too, I believe, see their work as a calling. What difference does it really make then, to be a Christian professor?

Here again, I am helped by Keller, who reminds us of the richness of God's "common grace," a term that refers not only to the grace that God offers all humanity to restore us to a relationship with Him, but also to the way that God pours out unique gifts and talents on all people, whether they ever turn to Him or not.[5] For believers, understanding common grace can free us as from the false pressure to out-nice, out-smart, out-perform, or out-give our highly effective colleagues in order to demonstrate Christ. They may well have greater abilities and resources than we have been given. But so long as we are using our own gifts to their fullest, the results, whether at the heights of achievement or something less, are God's business. Just being faithful to be present in the position God has given us is enough.

I may at times fail to reflect God's character, His joy, or His heart for my colleagues and my students. I am sure I miss opportunities He gives me to speak about "first things." But perhaps, the simple fact that Jesus is there, at our institutions, with our students, may in fact have a more profound effect on what they take from their time with us than anything else.

Virginia Harper Ho is an Associate Professor and Docking Faculty Scholar at the University of Kansas School of Law, where she teaches business organizations, corporate finance, and seminars on corporate social sustainability and Chinese law. She has written recently on shareholder activism, the governance of transnational corporations, and corporate social responsibility. She also writes on comparative corporate governance and comparative labor law, with a focus on legal reform and implementation in mainland China. Her work has been published in leading law journals and by the University of California-Berkeley's Institute for East Asian Studies. She previously practiced corporate and securities law, advising U.S. and foreign multinationals on cross-border transactions and related compliance matters. She also served as a law clerk for Chief Judge Robert Pratt of the U.S. District Court for the Southern District of Iowa. She received her J.D. cum laude *from Harvard Law School, where she served as editor-in-chief of the Harvard Asia Quarterly and an associate editor of the Harvard International Law Journal.*

[5] *Id.* at 183-197.

LIVING OUT MY CALLING

By Brad Jacob

I became a Christian when I was an undergraduate student at a major public university. My college years were a time of incredible spiritual growth as I was mentored by more mature believers through organized campus ministries as well as private interactions in the dorm — weekly Bible studies, nightly prayer meetings before bed, meals shared with other Christians — I may not remember all the courses that I took as a student, but I will never forget those exciting years of spiritual growth.

Then came law school, and the contrast could not have been more dramatic. I never found another Christian (at least not a serious Christian; there were a few nominal church members) among my fellow students at the University of Chicago. The same was true with the faculty: I knew that a couple of them were Roman Catholic, but I didn't know if they were serious about it. In the culture of that law school, it would have been highly inappropriate to attempt to discuss spiritual matters.

There were certainly no faculty evangelicals; no one known as the "Jesus professor." Although my law school, known for Professor Posner and economic analysis, was thought of as a "conservative" law school compared to places like Harvard and Berkeley, there was no Christian worldview to be found. If I ventured to the beautiful campus chapel on Sunday morning, I got lots of pipe organ and humanist drivel. No Bible teaching.

I visited general campus ministry meetings a couple of times, but I could not really make a connection. Law school was just too different. Serious Christians in other graduate and undergraduate schools shared my faith priorities, but they had no way to relate to what I was experiencing in law school.

Law school taught me that my faith in Jesus had no place in the world of law and lawyers. It did not drive me from Christianity — although not for lack of trying — but it encouraged me to adopt, without really thinking about it, a bifurcated mind. My Christian self and my law student self became increasingly distant.

This carried over to the practice of law. When I moved into the world of Biglaw, with serious Christianity similarly unwelcome, my lawyer person had very little to do with the Christian person who came out on Sunday mornings and Wednesday nights. I wasn't an evil or immoral lawyer, but there was no sense of calling and no role for my faith in what I was doing as an attorney.

I really had no idea that Jesus wanted to be Lord of my professional life.

The change for me began in October of 1987, when I heard that the Christian Legal Society was holding its national conference at Sandy Cove Conference Center in North East, Maryland. Sandy Cove was near our home in Baltimore, and my young bride and I loved this Christian place of retreat. So we signed up.

When J.J. and I got to the conference we met CLS Executive Director Sam Ericsson. Sam, who would become the most important mentor in my life, poured into us that week. I left that conference with a whole new vision of what it means to be a Christian lawyer. I had begun the journey to live for Jesus in every aspect of my life — professional as well as personal, turning "lawyerly" into devotional.

That was probably more personal background than anyone wants to read. But I think it is important. You can't really understand my passion for ministry to pre-law students, law students, and lawyers without knowing what my life was like before faith and career were integrated, and how I came to a place of recognizing the need for that integration.

Sam Ericsson hired me not too long after that 1987 national conference. After a year as a staff attorney in the Center for Law & Religious Freedom, I took over as Director of CLS' Student Ministries and Attorney Ministries in 1989. For more than a quarter century, my professional life — my calling — has centered around my passion for helping lawyers and lawyer wannabes find a focus of calling with Jesus on the throne of their whole lives.

Many years of ministry within this profession has taught me that thousands of Christian lawyers and law students live the way I used to. They haven't turned from their faith, and they may be very serious about quiet times, church involvement, prayer, and Christian service. But law school and the culture of the legal profession have taught them that faith must be checked at the door. So there may be a Bible on the bookshelf, but Jesus is largely absent from the classroom, the library, and the law office.

That explains my passion. I want others to find the joy of having Jesus at the center of every part of their lives — and I want them to find it earlier in the process than I did. The goal is a holistic life with all of its aspects focused on the person of Jesus. The goal is to have not just a job or even a career, but a *calling*.

For the past 27 years, I have gone to work every day knowing that I am where God wants me to be, doing what God made me to do, and sharing the journey with colleagues whom I love. Nothing in any other career path can begin to touch that joy, and I desire it for all of my students. Okay, perhaps the financial compensation of a career serving the Lord may not be great (I can't even imagine how much money I would have made over the years if I had stayed as a Biglaw partner!), but in the end, money doesn't really count for much.

I have the gift of teaching, and I love teaching law. My Dean lets me teach all the fun courses in the curriculum, and I have I passion for the Constitution. But the best part of my job is to be a mentor, a discipler, a counselor, and yes, a friend to my students — students who are getting a much earlier start than I did on the journey to live for Christ as lawyers.

It's always fun to have students come to my office with questions about RFRA or the commerce clause or original meaning textualism. But the best times — the times when, to quote Eric Liddell in *Chariots of Fire*, "I feel His pleasure" — are found when a student needs to talk about faith, family, Bible, life, and Jesus.

You see, my calling from God consists in large part of helping other people, generally younger people, find their own callings to serve the kingdom of Christ with the skills and training of a lawyer. Those callings are as diverse as Supreme Court advocacy, government service, Christian legal aid, law firm practice, and global justice ministry. I have the enormous privilege of helping some of them find God's path. By His grace, God uses a broken vessel like me to strengthen the faith and calling of some of these young people who come into my life.

It doesn't get any better than that.

Brad Jacob has been a professor at Regent University School of Law since 2001. His teaching expertise includes Constitutional Law, Christian Foundations of Law, and Nonprofit Tax-Exempt Organizations.

Before coming to Regent, Professor Jacob served as founding Provost and Dean of Patrick Henry College; as CLS Executive Director/CEO; as Director of CLS Attorney and Student Ministries; as a staff attorney in the Center for Law & Religious Freedom; and as Associate Dean of the proposed School of Law at Geneva College.

LAW TEACHING AS A CHRISTIAN EXPERIENCE

By Yoon-Ho Alex Lee

I have been asked to write about why I do what I do in light of my Christian faith. This question, of course, should present no novelty to most Christians. By virtue of our faith, those of us who are not in full-time ministry often find ourselves asking this question in our vocational life. At various stages of my life—whether as a government employee or as a law professor—I have searched for an answer. I have come to realize, however, that there isn't just one way to ask this question, but many. What's more, there are two versions of this question to which I can offer no satisfactory answers; but then there is one version I can answer with some confidence.

The most plain way to ask the question may be: *How does my being a law professor help make this world a better place?* This is a natural inquiry. We Christians believe that there is a cosmic purpose to our existence. We believe the universe was designed by a benevolent and intelligent being. We believe this world is fallen and is to be redeemed. Thus, we desire that somehow our work will contribute to the world in which we find ourselves.

Since beginning my teaching job three years ago, I have asked myself this question time and again. Unfortunately, my own answer has been somewhat discouraging. I do not doubt that some of us in legal academia may have found very satisfying answers. But for my part, although I could conjure up some reasonable answers, in my more honest moments, I have to admit that I am not at all sure that my being a law professor makes any particular difference. Let me be clear. I believe there is social value, even great social value, to teaching law as an enterprise. As long as we live in a fallen world, there will always be a need for lawyers, prosecutors, public defenders, and judges. It thus falls upon some of us to train such figures and teach them to uphold the rule

of law. But to conclude therefore that my involvement in this profession—rather than anyone else's—should directly contribute to a better world has been a difficult proposition to accept. Quite frankly, there are days when I feel that the opposite might be true. There is always that lecture I messed up, that sentence in a publication I wish I hadn't written, that presentation I could have delivered more persuasively, or that student with whom I could have been more patient. And although I cherish the precious relationships that come with my job, the fruits of my labor are, in general, neither obvious nor immediate. All the while, the world is eager to present us with more urgent and compelling problems, constantly challenging me to question the value of in-class lessons that are somewhat removed from the reality of this world (if not from the reality of the practice of law itself).

Nevertheless, I have come to accept that being a Christian does not require having a clear answer to this question. If my place in legal academia can indeed make this world a better place, it is not necessarily for me to know. God is not obliged to reveal it to me. The Bible makes no such promises. If some of us have this blessing, they are probably the exception, not the norm. For the rest of us, we are told only to remain faithful and finish our tasks with all that we are given, however much or little.

I next turned to a different question: *How does my being a law professor help advance the kingdom of God?* For Christians, this second question is arguably more important than the first. A desire to be used by God as His instrument is an inherent part of a Christian experience. After all, we look forward to not just a changed world here and now, but the divine accolade to be had in the kingdom of God. And yet it seems quite unlikely that I should be able to answer this question if I could not even answer the first one. If anything is truly mysterious, it is how God's kingdom advances in this dark world. This is not to say that I have no plausible answers. There are Christian students I counsel. I serve as a faculty advisor to the only Christian law student group at my school. I am open about my faith with my friends and colleagues. But whether anything I do truly advances the kingdom of God—outside the realm of my own heart—is beyond anyone's guess.

Having thus failed to answer the two questions with any sense of conviction, I turned to the next logical question: *If I cannot answer these questions, why has God led me to teaching law?* At this point, it occurred to me that the reasons God may have for leading me into legal academia are not only more important, but far more important, than my own reasons for entering it. As for this question, I am (now) confident of my answer: I am convinced that God has brought me to legal academia because *being a law professor forces me to be a better Christian.*

Here is what I believe. Each of us comes with a unique set of gifts and passions in this life. In my case, God has designed me to be passionate about teaching and research. It is not just that I like these activities — although that is clearly part of the equation. Rather, I feel that I can sense God's presence and pleasure the most when I engage in these activities. Learning and acquiring knowledge remind me that there are always deeper truths to be found in God. Teaching reminds me that there are communions to be had in sharing truths (as well as the Truth) with others. For me, these joys are not merely a salutary aspect of my job, but a particular form of God-given gift, which, I believe, I shall continue to enjoy in the next life. As C.S. Lewis wrote, "Joy is the serious business of Heaven."[1] I therefore see it as my duty to take these joys seriously and without any flippancy.

There is also the other side of Christian experience. Being a law professor has made me painfully aware of my own inadequacies, more so than any other jobs. I see all too plainly how far I come short of what I could be doing and what God expects me to be doing in this line of work. Whether in teaching or in conducting research, there are countless tasks beyond my natural skill sets and questions beyond my inspirations. Consequently, being a law professor has forced me to rely on God's grace more desperately and far more often than ever before.

It is for these reasons that I believe law teaching may be my appointed activity — and perhaps the most efficacious vocational activity — through which to sense His presence, to get a foretaste of that heavenly joy, and to be humbled everyday in this life. The older I get, the more I get the sense that God is less interested in what He can do through me (at least, insofar as He would choose to reveal to me) but far more interested and invested in what He can do to me and in me. Sure, I had my own lofty reasons for entering legal academia. But I now have different reasons for desiring to do my job well.

Alex Lee teaches Securities Regulation, Administrative Law and Regulatory Policy, and Regulated Industries at the University of Southern California Gould School of Law. His interests include law and economics, securities regulation, administrative law, corporations, consumer protection law, antitrust, and litigation and settlements. Before joining USC Law in 2012, Professor Lee served as senior counsel and a financial economist in the Division of Risk,

[1] C.S. Lewis, Letters to Malcolm 93 (1964).

Strategy, and Financial Innovation on the U.S. Securities and Exchange Commission. From 2006 to 2007, Professor Lee clerked for the Honorable Thomas B. Griffith. Professor Lee received his B.A. in Mathematics from Harvard College and his M.A. in Mathematics from Cambridge University. He received his J.D. from Yale Law School and his Ph.D. in Economics from Yale Graduate School. Professor Lee is affiliated with the New York Bar, American Law and Economics Association, American Economic Association, Korean Economic Association, Editorial Board, Korean Economic Review, and the Presbyterian Church in America.

MENTORING IS LEARNING

By Richard Leiter

One of the most rewarding things about growing old is the wisdom that comes with it. Individually, we may deny that as we grow older we automatically or necessarily become wiser. In fact most of us, if we are honest with ourselves, will deny this, but I'm convinced that this is merely humility. As we grow older, we become more aware of our foibles and the knowledge that everyone is flawed and falls short of the glory of God. This kind of self-awareness is the source of our humility: understood appropriately, it is also the source of our wisdom.

Many of us who are called to teaching also find a deep concern and love for youth, which we express in the form of what I can only call caring nurturing. Teaching upcoming lawyers about the nature and nuance of our work is the way that wisdom is passed along from generation to generation. As corny as it sounds, it is the cycle of life; it is how the next generation builds upon the experience of the previous one and grows stronger, deeper, and more solid. This process helps us build upon the wisdom of the past to develop stronger, more competent lawyers.

As we grow in experience and learning, we develop wisdom as we face new situations that either support our ideas, plans or actions, or challenge them. Passing along such wisdom to law students and young lawyers either equips them to avoid the pitfalls that we encounter or encourages them to grow stronger and try new ways to defeat or overcome them. Over the years, as an advisor to our local CLS chapter, I've found that there is a strong need among law students for a safe haven where they can learn these lessons and develop their confidence as minority members of a the learning community of law schools. CLS provides this sort of safe haven where students can discuss the challenges that they encounter

Many times throughout their law school careers, law students of faith are challenged about their beliefs, and sometimes those challenges are strong enough that they may doubt or question their presuppositions about the law and what it means to be a Christian lawyer. The most meaningful thing to me about CLS is the opportunity it provides me to meet students in a safe place, whether it's a weekly Bible study at school, a social gathering at my home, or a lunchtime program open to the entire law school community featuring a special speaker. These are opportunities for students to exercise their faith without fear of threat, attack, or most likely, veiled condescension. It is important for students to have a safe space where they can say things that might be contrary to the prevailing wisdom or seen as "fanatical" or, worse, faith-based (read: "unreasonable"). Many students have no safe place, other than their own homes, where they are free to be who they are as Christians without feeling like an odd man — or woman — out. It is a privilege for me to be a part of that safe place

Each year I tell my student officers of CLS that perhaps the most important aspect of the student chapter of CLS happens at the beginning of the year at the BBQ that I host. If nothing else, the students get familiar with the faces of other Christians among the student body, they know that they are not alone at law school. When they pass each other in the halls they will recognize other Christians and know that they are not alone.

As the faculty advisor of CLS, I enjoy interacting with the students in any setting. I like being with younger people and hearing about their desires, their ambitions, their idealism, and their perspective on today's increasingly secular world. I have generally found that CLS members are more eager to give me the benefit of the doubt and even appear eager to get the perspective of the "elder" in their midst. It is at this nexus that the magic happens. I find that sometimes, when I weigh in on a topic, while I'm given some deference, I'm also called out when my ideas have become old-fashioned.

CLS chapter functions, as distinguished from classes or office meetings, provide a setting where we are all on a common level; we are all Christians, on the same journey of discerning how to live as Christians in an increasingly secular and hostile world. I am learning to learn from the students and learning when to teach and guide them.

Presuppositions long held or taken for granted in the Christian community are being fundamentally challenged, and not only by secular governmental or judicial action, but by members of our own communities. What were once solidly held political or legal or biblical beliefs are now questioned by the younger generations. As I engage my students about issues such as homosexuality or marriage, I'm finding myself on the defensive, having to justify positions that I once had taken for granted.

In these cases, I find it refreshing to be challenged by younger brothers and sisters who are committed to the same God that I am, but who, having grown up in different decades than me, have developed different ideas. It makes me wonder sometimes about my own beliefs and whether my background has led me into presuppositions that are not as true as I have grown to believe. After all, in my own youth, there were adults who were claiming that rock 'n' roll was leading youth directly to hell! Might some of my current beliefs be equivalent to those of the older generation of my day?

Why do I love teaching and working with my student chapters of the Christian Legal Society? I love mentoring the younger generation, and I love being mentored by them, too.

Richard Leiter is the law library director and professor of law at the University of Nebraska College of Law. He's been at Nebraska for around fifteen years. Prior to moving to the heartland, he spent six years in a similar position at Howard University School of Law and three years at Regent University School of Law. Prior to becoming a director, Richard worked at the Univeristy of Texas Tarlton Law Library and several law firms on the west coast. He is originally from Northern California where he spent his youth listening to and collecting what is now considered classic rock 'n' roll and surfing in the frigid water around Santa Cruz. Richard is married and has three adult daughters and two (and a half) grandchildren. His undergraduate degree is from UC Santa Cruz, law degree from Southwestern University Law School and his MLIS is from the Univeristy of Texas School of Information Science.

RESTORING SOULS

By Barbara Armacost

In mentoring students at the University of Virginia School of Law, I've employed two main strategies: one aimed at my first-year torts students and the other at Christian students nearing graduation. For the latter, I offer a series of weekly theological discussions to stretch their imaginations about the vocation of law: how they can act within their profession as stewards of creation and redemption.[1]

With my first-year students, I deliver a lecture called "Thinking Like a Lawyer" roughly mid-way through the term. I do so to help my students "regain their souls," because many feel that through their initiation into the American adversarial system, they have lost them.

We tell students that we are teaching them to "think like lawyers," and several years ago I decided to find out what they *think* we mean. So I asked them. Their responses weren't surprising given our use of the case method of instruction to prepare them for our judicial system: we teach them to see things from a range of perspectives and to entertain the claims arising from each.[2] They said thinking like a lawyer means "finding a balance," "using facts to tell a story," "realizing there is no right answer," "being skeptical," and "being able to argue any position." Our pedagogy trains them to describe each side of a dispute in the most attractive light, increasing their capacity for "sympathetic understanding" and "moral imagination."[3] Students learn to look with a "friendly eye" even

---

[1] For a short account of why I offer this series, see http://www.studycenter.net/resources/media-resources/finish/5/200/0.html.

[2] *See generally* Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 113 (1993).

[3] *Id.*

at positions they find morally distasteful and to "identify the strengths and weaknesses of whatever claim is presented to them."[4]

Under our case-method tutelage, students can absorb a limited view of lawyering that has been called the "standard conception,"[5] which views the lawyer as merely a "specialized tool" for making arguments on one side or the other.[6] Under this vision, the lawyer supplies the "means" to accomplish "ends" that are predetermined by the client.[7] Thus the lawyer is not morally responsible for the substance of the outcomes that her arguments may (or may not) bring about. Outcomes are the job of judges who decide cases, legislators who make laws based on lawyers' arguments, and executive officials who act on lawyers' legal pronouncements. Thomas Shaffer has called this view, which treats the lawyer as a "neutral partisan" of her client's goals, "the principle of suspended conscience."[8]

"Suspended conscience" is indeed an apt description of the way many of my students experience their legal education. Their new skill of sympathetic understanding for every point of view requires them to maintain a position of "critical detachment" from prior commitments, leading to a sense of "being unmoored with no secure convictions."[9] Students feel as if their prior moral and ethical commitments have no place in the practice of law. No wonder some worry they are losing their souls.

By learning only the *means* of lawyering (technical skills) and not considering the *ends* to which those skills should be applied, my students were grasping only part of what it is to "think like a lawyer."

With this in mind, I began using one class session to challenge the "standard conception."[10] Taking my students beyond the game-like lawyering we try out in the torts classroom, I encourage them to recognize that the arguments they make actually change things. Thinking like a lawyer, I tell them, means taking responsibility for the ends their arguments make possible.

To emphasize this I tell them three stories that together illustrate both the craft of lawyering and the powerful ends their skills can engender.

The first story tells of Clarence Earl Gideon, who was convicted for burglary in a felony trial in which he represented himself — and lost. But his case went all the way to the Supreme Court, where he was given a new trial with appointed counsel, and was acquitted. We view clips of the two trials from the movie *Gideon's Trumpet*, pausing after the first to discuss the damning facts that led to Gideon's conviction and identifying the gaps a good lawyer would explore. After the second clip, we analyze how the lawyer discovered new facts that undermined the guilty story and offered a plausible account of Gideon's innocence. This exercise introduces the idea that thinking like a lawyer involves a very powerful kind of storytelling that gives voice to those who cannot speak for themselves. Gideon did not know how to collect and marshal the facts necessary to tell the story of his innocence. The class is always divided about whether Gideon was innocent or guilty, but we agree there is a powerful story in his favor that, without a lawyer, would have remained undiscovered and untold.

The second story concerns a trip some law students and I took with the International Justice Mission (IJM), a faith-based human rights organization, to investigate suspected cases of illegal bonded labor in Tamil Nadu, India.[11] We traveled to several remote areas, met secretly

[4] *Id.*

[5] The term "standard conception of the lawyers' role" originated in Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.L. Rev. 63, 73 (1980) (cited in Deborah L. Rhode & David Luban, Legal Ethics 138 (5th ed. 2009)).

[6] Kronman, *supra note* 2, at 123.

[7] *Id.* at 123. Professor W. Bradley Wendel describes three principles of the Standard Conception: (1) "Partisanship" (requirement that lawyer serve as advocate of client up to limits of law), (2) "Neutrality" (not taking into account interests of non-clients or the public interest), and (3) "Nonaccountability" (lawyers not subject to moral criticism for (1) and (2)). W. Bradley Wendel, Ethics and Law: An Introduction 189 (2014).

[8] Thomas L. Shaffer, On Being a Christian and a Lawyer 7 (1981).

[9] Kronman, *supra note* 2, at 14-15.

[10] I count myself in good company. Although the standard conception is still the majority view, and the primary way of reading the Model Rules of Professional Responsibility, it is contested. A prominent legal ethics casebook expressly declines to call it the standard conception, calling it the "Neutral Partisanship" view and expressly discussing alternatives. *See* Deborah L. Rhode and David Luban, Legal Ethics 138 (5th ed. 2009). *See also* Shaffer, *supra note* 8. For a nuanced discussion of the strengths and weaknesses of the standard conception and its critics, *see generally* Wendel, *supra note* 7.

[11] Bonded labor is a form of modern day slavery that is ubiquitous in India and many third world countries. Bonded laborers live in brutal conditions and suffer untold deprivation and abuse working in rock quarries, brick kilns, garment factories, fishing operations, and many other industries around the world. Workers are starved, beaten, sexually abused, and worked sometimes to the point of death.

with bonded laborers, and carefully documented the facts that made their enslavement illegal under the laws of India. As a result of our labors, the continued work of IJM officials, and the efforts of Indian officials who took the cases, many of these workers were freed and their slave-masters prosecuted.[12] This story illustrates the second aspect of what I believe it means to think like a lawyer: to take facts and organize them to satisfy the elements of a legal claim. In India, bonded labor is illegal, but someone needed to do the work of formulating legal cases for enslaved workers.

The final story illustrates the third aspect of the lawyer's craft: the ability to get the legal case in front of someone who has the power to do something about it. Here I emphasize to my students that their legal education and vocational position will afford them credibility, networks, and entrée to influential authorities.

The story is about IJM client Osner Fevry, an American-educated civil rights lawyer who was thrown into prison in Haiti in the late 1990s by ruling government leaders who didn't like his message. Never charged or prosecuted, Fevry was simply rotting in jail. Although three Haitian courts issued five different release orders, government officials blithely ignored them. IJM lawyers investigated Fevry's case and, finding his detention illegal under Haitian law, they took it to Haiti's Minister of Justice. Discovering that he was not interested in following the law, IJM lawyers asked themselves what he *was* interested in. It turned out that the Minister was very interested in staying in the good graces of the U.S. State Department so that he could access money available from the Department's Human Rights and Democracy Fund. When the State Department was unwilling to put pressure on this Minister, IJM went "up the chain" to the Chairman of the Congressional subcommittee responsible for funding the State Department. The Chairman wrote a letter to State Department officials and eventually a strong message got back to the Minister of Justice of Haiti. Mr. Fevry, and 11 other illegal detainees, were released.

Together these stories show students that good lawyering changes people's lives. The "standard conception" is correct that a lawyer is a very powerful and specialized tool for making arguments but it is incorrect in asserting that lawyering is only about means and not ends. It's true that we practice making all possible arguments. It's also true that in our adversary system, all parties deserve to have their interests represented. But we must ensure that our students don't think being a lawyer is only about being willing and able to make *any* argument for *any* position. I use the IJM stories to remind my students that sometimes there is one position that is right and another that is wrong. I urge them not to become so accustomed to arguing any position that they lose the ability to *recognize* when there is, in fact, a right answer — and to have the *courage* to say so. Sometimes lawyering is very simply about addressing injustice in its most basic sense: it's about confronting those who have used their position and strength to take away from others what is rightfully theirs. Sometimes the claims of justice point in only one direction.

I also try to help them see that good lawyers realize they bear responsibility for the results of the positions they take. In the movie *Reversal of Fortune*, Alan Dershowitz (playing himself) converses with a group of students assisting him in the defense of British socialite Claus von Bulow for allegedly attempting to murder his wife. It's clear that the students believe von Bulow is guilty, and Dershowitz reassures them with the typical response: every defendant–guilty or innocent–deserves to be represented (a view I endorse). But when one student objects that the planned defense seems to promote a picture of events they all know is false, another pipes up: "Yes, we all know he's guilty. But that's the fun of it. That's the challenge." In other words, lawyering is just a game.

It's critical we teach our students that making legal arguments is *not* a game. The American system is one in which lawyers have an enormous effect on what our society and culture end up looking like. Over time, the arguments that lawyers make change things. Arguments lawyers make in statutory cases determine how statutes will ultimately be interpreted. Legal arguments can result in the recognition of new rights or in the denial of those rights. The content of law is determined by how issues are litigated, what interests are represented, which facts are emphasized, and how clients are counseled. *The bottom line is that through their legal practice, our students will be changing the world — in ways that promote human flourishing or inhibit it.* They need to consider what kind of world they are creating through the cumulative effect of the cases they take and the positions they argue.

Readers may recall that the Justice Department lawyer who wrote the so-called "torture memorandum" tried to distance himself from the disputed interrogation policies it sanctioned. He explained:

[12] For more about IJM's bonded labor work, see https://www.ijm.org/casework/forced-labor-slavery.

> "What the law forbids and what policy makers choose to do are entirely different things, and [the job of the Justice Department is simply to say what the law is]."[13]

I read my students this passage and point out that it suggests lawyers are engaged in some "neutral" exercise of analyzing the law–of saying what the law *is*, not what policy should come *out of it*. It suggests lawyers cannot be held responsible for what others might choose to do with their legal interpretations. To the contrary, I tell my students, while there is a distinction between law and policy, there is no neutral legal analysis: legal reasoning is always in the service of some concrete problem or question. Of course, lawyers are constrained in their choice of arguments by statutory language and precedent, but that leaves plenty of wiggle room. Lawyers always choose *which* arguments to make. Choices about legal arguments, in turn, make some policy choices more or less viable. Lawyers cannot disclaim responsibility for the options that are made possible by their arguments.

Though delivering this lecture in a secular classroom, I am offering a Christian message. It is implicitly shaped by the eternal story of creation, fall, redemption, and consummation. Lawyers and legal institutions are part of God's good creation, designed for his purposes of justice and shalom. Like all human institutions, though, legal systems are fallen and corrupted by sin. But God — through the life, death and resurrection of Jesus — is in the business of redeeming broken people and institutions, perfecting them for life in the new heavens and new earth. In the time between redemption and consummation, God's Holy Spirit is at work, both through his followers and all men and women of good will who seek justice. As Christian law professors, our pedagogy should encourage all of our students to renounce corrupted legal practices while embracing those that promote the shalom God designed them to advance.

I close my lecture by saying to my students: At the end of your legal career you'll want to be able to say that the cases in which you applied your legal skills — and the arguments you made in those cases — made the world a better place, not a worse one. And instead of complaining to me that I've preached at them, for ten years their responses have been consistent. "Thank you," they tell me in so many words, "for restoring my soul."

Barbara Armacost is Professor of Law at the University of Virginia School of Law, where she has taught since 1992. She teaches criminal investigation, torts, First Amendment (religion clauses), and legislation. Her research interests include law and religion, law of the police, and constitutional remedies with a focus on the real-world consequences of legal regulation.

Armacost is a graduate of the University of Virginia School of Nursing and the University of Virginia School of Law. She also received a Master's Degree in Theological Studies from Regent College at the University of British Columbia, Canada. During law school, Armacost served as notes editor of the Virginia Law Review and received numerous awards, including the Thomas Marshall Miller Prize, the Mary Claiborne and Roy H. Ritter Prize and election to the Order of the Coif.

After graduating from law school, Armacost clerked for Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit. Prior to joining the faculty at the University of Virginia, Armacost served as attorney adviser in the Office of Legal Counsel at the U.S. Department of Justice.

[13] John Yoo, War By Other Means: An Insider's Account of the War on Terror 172 (2006).

Book Review

PAUL B. COLEMAN, *CENSORED: HOW EUROPEAN "HATE SPEECH" LAWS ARE THREATENING FREEDOM OF SPEECH*

Wien, Austria: Kairos Publications. 2012, 161 pp.

By Christopher A. Kall

At the end of World War II, Europe was still reeling from the horrors committed by tyrannical regimes driven by discrimination and hatred. As the international community began the post-war effort of forming the United Nations and drafting agreements that would govern future conduct, a fear of unrestrained speech still permeated much of Europe. After all, ideas formed words, and words raised armies, and armies inflicted unfathomable harm upon a continent. Within this context, the internationalization of "hate speech" took root to prevent certain words from germinating into hateful words and deeds.

The freedom of expression has been described as the "cornerstone of democratic rights and freedoms." The freedom of expression is a fundamental human right guaranteed in the Universal Declaration of Human Rights, the Charter of the European Union, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. However, the prohibition of certain "hate speech" will have a direct impact on the freedom of expression.

In *Censored: How European "Hate Speech" Laws Are Threatening Freedom of Speech*, Paul Coleman confronts Europe's "hate speech" laws and articulates the "clear and present danger" they pose to the freedom of speech. The book is divided into two parts. Part One provides an overview of the development of hate speech laws in Europe, a discussion of the current (and future) scope and application of such laws, and a proposed amendment to the definition of "hate speech." *Part Two* contains excerpts of hate speech prohibitions contained in international treaties, regional provisions, and the domestic laws of the 27 member states of the European Union.

Coleman wastes no time staking out his position on the issue of hate speech laws. The first sentence of the book states, "Hate speech laws are illiberal and dangerous." However, rather than advocating that hate speech laws be abolished, Coleman builds the case that hate speech laws needlessly infringe upon the freedom of speech, have been distorted to achieve political aims, and should be amended so that they are clearly defined and narrowly tailored to achieve their specific purpose.

The book begins with an overview of the drafting history of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This sets the stage for the conflict between freedom of speech and hate speech, and the political influences that shaped the debate. Coleman recounts that during the drafting of these documents, there was little dispute about whether there should be some form of hate speech prohibition. Instead, the point of contention was (and remains) the definition of "hate speech." The issue boiled down to whether "hate speech" would only prohibit speech that constitutes an incitement to imminent violence (the narrower definition advocated by "predominately Western nations" who viewed freedom of speech as foundational), or whether it would prohibit speech that merely manifests hate, irrespective of whether or not it actually leads to violence (a broader definition advocated by mostly "Communist nations" who placed greater value on the freedom from discrimination). Ultimately, the fear of discrimination resulted in language in both the ICCPR and the ICERD prohibiting speech that merely manifested hate, whether or not it constituted a threat of imminent violence. To Coleman, this was a turning point. Once the language became part of these international treaties, it metastasized throughout Europe due to the treaties' requirement that member states take "positive steps" to implement hate speech laws into their domestic legislation. Therefore, countries who may have initially opposed such language ultimately included it in their own domestic laws.

According to Coleman, the fundamental problem with hate speech laws in Europe is that there is no

universal definition of what constitutes "hate speech." The European Court of Human Rights (the court vested with the jurisdiction to adjudicate all violations of the European Convention on Human Rights) is quoted as stating "hate speech" is difficult "because this kind of speech does not necessarily manifest itself through the expression of hatred or emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal." The European Union Agency for Fundamental Rights (an agency created to protect the fundamental rights of people living in the EU) is quoted as stating that "hate speech" may involve the "incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic," but can also simply be "disrespectful public discourse" or "expression of negative opinions." Coleman argues that the lack of a universal definition creates confusion about the boundaries of hate speech laws and such ambiguity is aberrational when it encroaches on a fundamental right. Lacking a universal definition, Coleman identifies seven "defining features" of hate speech laws in Europe. Hate speech laws: (1) are vaguely worded; (2) contain a large subjective element; (3) do not necessarily require falsehood; (4) rarely require a specific victim; (5) often only protect certain people; (6) are arbitrarily enforced; and (7) are often criminal in nature.

In order to illustrate the threat posed by hate speech laws, Coleman provides summaries of 31 actual cases where hate speech laws have been applied in Europe. Three significant observations are made about these cases. (1) Few cases result in convictions, suggesting that the process itself serves as a punishment, irrespective of the result. Speech can be chilled solely through the threat of prosecution or the stigma that attaches to hate speech prosecution. (2) Unlike defamation suits where truth is relevant to the defense, hate speech laws often rest on a subjective insult or offense. (3) Inconsistent rulings in the European Court of Human Rights create legal uncertainty and uncertainty chills conduct.

Coleman predicts that the scope of hate speech legislation will continue to increase in Europe, particularly involving social issues. He expresses concern that hate speech language will eventually creep into "broadcasting codes, workplace rules, university campuses," ultimately resulting in a "you can't say that" culture. The activities of government agencies created to monitor and regulate speech will increase, as will criminal and civil litigation related to alleged violations. Ultimately, hate speech laws will be further internationalized as more and more cases come before the European Court of Human Rights and the domestic laws supporting a "right not to be offended" will be upheld.

Despite the forward momentum in favor of hate speech laws, Coleman points to recent "hate speech" reforms in the United Kingdom as a sign of hope. Such reforms not only buttress the sovereign power of nations to protect the freedom of speech, but also reinforce the subordinate nature of "recommendations" that are issued from international monitoring agencies. In an effort to slow this forward momentum, Coleman calls for a re-examination of international law. Unfortunately, the nature and scope of such a re-examination, or the mechanism by which it is to occur, is not discussed in the book.

Coleman also calls for Europe to adopt a clear and more restrictive definition of "hate speech." Recalling the original "hate speech" debates, Coleman argues that only speech that involves "incitement to imminent violence" should be prohibited. Rather than banning speech that may lead to violence, Coleman focuses on speech that actually incites imminent violence. Therefore, offensive speech, insulting speech, and speech that hurts people's feelings would be unrestrained unless it constitutes "incitement to imminent violence." Unfortunately, the book does not discuss the means of achieving this result. Considering the fact that this definition was rejected in the original drafting debate, current hate speech laws possess overwhelming support in Europe, and there have been decades of progressively expansive "hate speech" legislation, this subject would be worthy of a second volume to the book.

For readers who want to delve deeper into this issue, this book provides relevant excerpts of the international treaties and regional provisions containing hate speech prohibition, as well as the hate speech laws of each member state of the European Union. The ability to have access to the translated text of these laws is a unique and welcome resource. In addition a well-proportioned Bibliography of related books and articles provides the reader with a number of "next step" resources for furthering one's knowledge on this subject.

In *Censored*, Paul Coleman sounds the alarm on the danger of "hate speech" laws in Europe. It is well-researched and provides a vigorous challenge to the "hate speech" movement in Europe. The book is a timely and useful resource for any lawyer, professor, or lay person who is interested in learning the essentials of the current hate speech debate.

Chris Kall is a practicing lawyer in Southern California. Until 2013 he served as Associate Dean and Director of the Center for Human Rights at Trinity Law School.

Speaking of Religious Freedom

WILL RELIGIOUS INSTITUTIONS' TAX EXEMPTION SURVIVE SAME-SEX MARRIAGE?

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

On April 28, 2015, the notion that religious institutions might be forced to choose between their tax-exempt status and their religious teachings about sexual conduct morphed from an outlier prediction of a church-state conflict in the distant future to a genuine threat in the near future. The possibility that tax exemption will be denied to religious institutions that hold to orthodox Christian teachings on marriage must be taken seriously when the messenger is none other than the United States Government's top legal advocate in the Supreme Court, Solicitor General Verrilli.

In response to a question posed by Justice Alito about tax-exemption for religious colleges that hold orthodox Christian beliefs on issues involving sexual conduct, General Verrilli's answer was deeply troubling: "[I]t's going to be an issue."

Justice Alito posed the question during oral argument in four cases challenging the marriage laws of Ohio, Michigan, Kentucky, and Tennessee. By June 30, the Supreme Court will announce whether the federal Constitution prohibits the States from defining marriage as only existing between one man and one woman.

In total, three questions were asked during the oral argument regarding the implications for religious liberty if the Court requires all fifty States to redefine marriage to include same-sex couples. Two of the questions were directed to General Verrilli, who responded with three pre-planned points, none of which were reassuring. The other lawyer arguing for same-sex marriage, Ms. Mary Bonauto, also fielded a question about religious liberty.

The sobering takeaway was that religious colleges likely will face challenges to housing policies that implement orthodox Christian beliefs about marriage and sexual conduct. Religious institutions also are likely to face challenges to their tax exempt status if they hold to orthodox Christian beliefs regarding marriage and sexual conduct.

Question #1: Will clergy who refuse to perform same-sex marriages be denied a license by the State to perform legally valid marriages?

Justice Scalia was the first justice to ask about the implications for religious liberty if the Court were to rule that the federal Constitution requires same-sex marriage. He questioned Ms. Bonauto, a long-time leading LGBT advocate, whether a State could condition a minister's license to perform legally valid marriages on his or her willingness to perform same-sex marriages. (Oral Arg. Tr. 23-27).

Most commentators have downplayed the possibility that clergy could be forced to perform same-sex marriages. When states have adopted same-sex marriage through legislation, they have often exempted pastors from being coerced to marry same-sex couples and protected them from penalties for refusing to do so. But in the large number of states where same-sex marriage has been imposed through judicial decree, the courts have not, and could not, "legislate" exemptions for clergy.

Also consider what happened last year after the Ninth Circuit struck down Idaho's marriage laws. An Idaho town threatened to find two Christian ministers who operated a wedding chapel in violation of the town's nondiscrimination laws if they refused to marry same-sex couples. When the ministers threatened a lawsuit, the town backed down. But it's possible the town changed course only because it realized that it was bad timing to force Christian ministers to marry same-sex couples at the same time that the Supreme Court was weighing whether to impose same-sex marriage in all fifty States.

Returning to Justice Scalia's inquiry, Ms. Bonauto declared that the First Amendment protected clergy from being compelled to perform marriages that they did not wish to perform. But Justice Scalia clarified that he had asked a slightly different question: could the State condition a license to perform state-recognized marriages on the clergy member's willingness to perform same-sex marriages? (Tr. 24).

When Justice Sotomayor interjected that state nondiscrimination laws had not been used in such a way (Tr. 24), Justice Scalia responded that a constitutional prohibition would not allow religious liberty protections to be written into the law as typically States had done when same-sex marriage was created by statute. Justice Kagan countered that States had not refused to license rabbis who refused to perform interfaith marriages, despite the fact that "we have a constitutional prohibition against religious discrimination." (Tr. 26).

Eventually, Justice Scalia secured Ms. Bonauto's assurance that "ministers will not have to conduct same-sex marriages," (Tr. 27), although she distinguished "a government individual, a clerk, a judge, who's empowered to authorize marriage" as "a different matter that they are going to have to follow through, unless, again, a State decides to make some exceptions." (Tr. 25). In Arizona and Washington, state judges have already been told that they must marry same-sex couples if they marry opposite-sex couples.

Question #2: "Would a religious school that has married housing be required to afford such housing to same-sex couples?"

When Chief Justice Roberts asked his question, Solicitor General Verrilli responded that he would "like to make three points about that." (Tr. 36). In other words, his answers were pre-planned responses to questions that had been anticipated. They were not off-the-cuff reactions.

General Verrilli's first response was that the Court's ruling would "address[] what the States must do under the Fourteenth Amendment." He then plunged into his second point, which was that the answer was "going to depend on how States work out the balance between their civil rights laws, whether they decide that there's going to be civil rights enforcement of discrimination based on sexual orientation or not, and how they decide what kinds of accommodations they are going to allow under State law." (Id.) General Verrilli offered that "different states could strike different balances." (Tr. 37).

But the Chief Justice was not letting him off so easily because "it's a Federal question if we make it a matter of constitutional law." (Tr. 37). General Verrilli again tried to avoid an answer because "there is no Federal law generally banning discrimination based on sexual orientation, and that's where those issues are going to have to be worked out." (Id.)

The accuracy of General Verrilli's response turns on the word "generally." It is true that the Employment Nondiscrimination Act (ENDA), which had been perennially introduced in each Congress since 1995, passed the Senate in November 2013 only to die in the House.

But ENDA provides a disconcerting lesson about the willingness of same-sex marriage supporters to protect religious liberty. The Senate-passed version of ENDA included solid religious liberty protections. But in June 2014, the LGBT lobby announced that those religious protections had been too generous and would not be included in future LGBT nondiscrimination legislation. A scant eight months after a Democratic-controlled Senate adopted strong religious liberty protections in ENDA, President Obama refused to incorporate the exact same religious protections into Executive Order 13672, issue July 21, 2014, which prohibits discrimination on the basis of sexual orientation and gender identity by federal contractors, including their subcontractors and vendors.

General Verrilli's technically accurate response that "there is no Federal law generally banning discrimination based on sexual orientation" ignores not only Executive Order 13672, but numerous regulations, guidance letters, and administrative rulings issued recently by federal agencies. For example, Executive Order 13672, which took effect on April 8, 2015, prohibits such discrimination for approximately 24,000 federal contractors, their subcontractors and vendors, which employ about one-fifth of the American workforce.

As another example, federal agencies, particularly the Departments of Justice, Labor, and Health and Human Services, have promulgated numerous federal regulations that prohibit discrimination on the basis of sexual orientation or gender identity in various federal programs that they administer. Since the 2013 Supreme Court decision that struck down the federal Defense of Marriage Act's definition of marriage as existing only between a man and a woman, several agencies have issued regulations or guidance materials that incorporate same-sex couples into laws involving marriage. Finally, the EEOC and the Department of Justice have issued recent rulings that re-interpret Title VII's prohibition on sex discrimination to include sexual orientation and gender identity.

General Verrilli's third point was "that these issues are going to arise no matter which way you decide this case, because these questions of accommodation are going to arise in situations in States where there is no same-sex marriage." General Verrilli was referring to States that had recognized same-sex civil commitment ceremonies that were not officially marriages. He specifically pointed to the Elane Photography case in New Mexico, in which a photographer objected on religious grounds to contracting to photograph a same-sex commitment ceremony even though New Mexico at the time did not recognize same-sex marriages.

Question #3: What about tax-exempt status?

Finally, Justice Alito asked: "Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?"

General Verrilli: "You know, I – I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I — I don't deny that. I don't deny that, Justice Alito. It is — it is going to be an issue."

In *Bob Jones University v. United States*, the Supreme Court held that the IRS had the authority to withdraw a religious college's tax-exempt status because the college prohibited students from interracial dating and interracial marriage, claiming that its prohibition was a sincerely held religious belief. Few would quarrel with the denial of tax exemption to racially discriminatory schools, particularly in the context of the 1970s, when some religious schools were founded, not for religious purposes, but to avoid the racial integration being implemented in the public schools.

While the Bob Jones result is laudable, the Bob Jones rationale embedded a ticking time bomb in First Amendment law. The Court held that the IRS had the authority to withdraw a nonprofit organization's tax-exempt status if the IRS determined that the organization was acting contrary to "public policy," as determined by the IRS. Many commentators have voiced concerns that the Bob Jones rationale might be used to withdraw tax-exempt status from religious schools that prohibit students from engaging in same-sex conduct, including same-sex marriage. This fear has grown as the LGBT movement has increasingly insisted that there is no difference between racial discrimination and "discrimination" based on religious teachings regarding sexual conduct.

Moreover, the federal government is not the only government that taxes. Last year, the California General Assembly came close to withdrawing some state tax-exemptions from the Boy Scouts of America because of that organization's restrictions on homosexual persons serving as Boy Scout leaders. The measure passed the House but died in the Senate.

When the Solicitor General of the United States confirms that a hypothetical nightmare may become the new reality, it's time to wake up.

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

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

Generous support for
The Journal of Christian Legal Thought
is provided by

TERRENCE J. MURPHY INSTITUTE
for Catholic Thought, Law, and Public Policy

PEPPERDINE UNIVERSITY
School of Law
Herbert & Elinor Nootbaar Institute
on Law, Religion, and Ethics

REGENT UNIVERSITY
SCHOOL OF LAW

HANDONG
INTERNATIONAL
LAW SCHOOL

the Chuck
Colson Center
for Christian Worldview

The *Journal of Christian Legal Thought* is a publication of the
Institute for Christian Legal Studies, a cooperative ministry of the
Christian Legal Society and Trinity Law School.

CHRISTIAN
LEGAL SOCIETY

TRINITY
LAW SCHOOL