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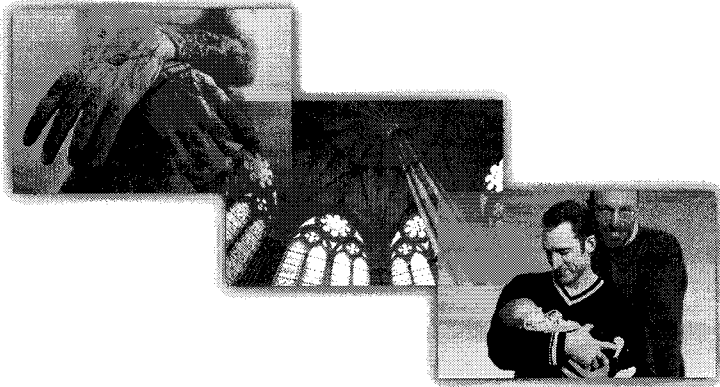


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INTRODUCTION: LAW AND CULTURAL CONFLICT

SARAH HARDING*

Four years ago a small group of faculty at Chicago-Kent decided that it was important to have a forum for discussion about the various relationships between the humanities and law. Out of that discussion emerged the Chicago-Kent Institute for Law and the Humanities. The purpose of the Institute was, and continues to be, to encourage interdisciplinary discussion of issues at the intersection of law and culture. At the same time as plans for the Institute took form, the idea for this symposium emerged. While the Institute has sponsored and cosponsored a variety of programs looking at issues as diverse as the culture of gun ownership and transgenic art, this symposium was from the very beginning a primary goal. But as with many such ideas, the symposium was delayed until the right people could put the requisite amount of time into planning. As time passed, expectations about the appropriate form and content changed. For some of those involved, 9/11 also brought about planning difficulties, for it signaled the possibility of a dramatic change in levels of tolerance. Would

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these changes find their way into legal discourse? Were signs of intolerance already there; had they always been there?

Despite differences in opinion, we pushed forward with the symposium and more or less let the carefully selected participants dictate the direction of discussion. The reason for dredging up this brief history is that it highlights the inevitable difficulty in dealing with the relationship between two things that, on the one hand, are supposed to be at arms length from each other, and on the other, are in fact intimately connected. Law is, as Robert Post so cogently states in his paper, “perennially implicated in cultural conflict.”¹ It does not, indeed it cannot, exist separate from the cultures that produce it. And yet to see it as merely an extension of culture would be a mistake. Law, with its deeply analytical structures and powers of affirmation, “constitut[es] the very culture in whose service it purports to act.”² Those of us involved in organizing the conference found that we in fact had different opinions about the depth and breadth of this relationship and the constitutive power of law. Furthermore, we turned to different kinds of scholarship to explore these issues. But in the end it is discussion about such differences that really has made the Institute and this symposium worthwhile.

Robert Post’s introduction or general overview is enormously helpful in setting out both the problems and the intrigue of exploring the role of law in regulating cultural tensions. It would be foolish of me to attempt to add to it. The only thing I would like to do in this brief introduction is say a few things about how his comments reflect some of the issues and tensions addressed in the other papers. Before I do so, it needs to be stated that I was not at the symposium. At the time of the conference, and indeed the time of writing this introduction, I was thousands of miles away. I have read all the papers with great interest but I was not able to participate in the give-and-take that must have occurred. This is clearly a disadvantage. And yet perhaps distance has its own benefits. Viewing laws and legal practices from the outside is always revealing—ideas and structures of analysis begin to take on a different light, no longer self-evident in their meaning. At the very least they become uniquely tied to the culture, in this case American legal culture, in which they are embedded. Whether one views this distance as an advantage or disadvantage, it is nonetheless the perspective I bring to these brief comments.

1. Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 494 (2003).

2. *Id.*

If there is one thing that is evident from all the papers and is most clearly stated in Robert Post's introduction, neutrality is illusory. Laws by their very nature and in all their various formulations, judicially or legislatively inspired, cannot be neutral. In mediating between competing cultural perspectives, legal determinations are never without cultural meaning—there are always winners and losers on issues mediated through law and in the public realm. As Post states, legal analysis entails “the responsibility of interpreting cultural values.”³ So neutrality seems to be the wrong entry point into questions about the legal regulation of cultural disagreements.

Perhaps a better entry point, one upon which so many of the papers turn, is toleration. How much tolerance is embedded in our liberal-minded legal system and Constitution? The answer to this will necessarily turn on the nature of the rights in question, as Post points out, as well as how wedded we are to the cultural norms at stake. Nancy Bentley's and Sarah Gordon's papers focus on family matters that pushed tolerance beyond what mid to late-nineteenth-century culture could bear—to the point of mocking the very notion of tolerance. Bentley and Gordon show how contemporary novels reveal that miscegenation and polygamy were not just alternative ways of family life; they subverted the very nature of family life and intimacy. Freedom to subvert was beyond the pale.

The outside limits of toleration, so evident in the papers focusing on the legal regulation of the family, are also integral to the papers on religion. Steven Smith and Mark Rosen make the case that this is one area where law and government action quite clearly emanate from a specific cultural, religious perspective—in Smith's words the “no orthodoxy” position is untenable. But they have very different ways of dealing with this reality. Tolerance for Smith requires little more than protection from coercion—the commitment of the Constitution is to avoid “coercing citizens to accept beliefs to which they do not assent,”⁴ not to avoid the expression and affirmation of beliefs per se.

Rosen argues for a more intriguing solution. Focusing on the “expressive harm” associated with the assumed neutrality of the dominant liberal orthodoxy, he argues that tolerance requires providing more room specifically at the local level for religious practices that seek to challenge the liberal expectation of the separation of

3. *Id.* at 498.

4. Steven D. Smith, Barnette's *Big Blunder*, 78 CHI.-KENT L. REV. 625, 667 (2003).

church and state. In keeping with his other scholarship, Rosen argues that liberalism itself requires avoidance of expressive harms by accommodating illiberal practices, provided there are certain safeguards in place, most predominantly the option of exit. Here, as with the family-related papers, we see the possibility of toleration being pushed to the point at which we begin to worry about subverting the culture of toleration itself. Is Rosen's argument "too tolerant?"⁵

The expression papers are the most difficult precisely because, as Post recognizes, this is one area where the Constitution seems to provide the greatest latitude, the greatest measure of tolerance: "First Amendment speech rights . . . aim to promote norms that affirmatively embrace the value of cultural heterogeneity."⁶ But there are two sides to this. Freedom of expression looks to both "instantiate positive cultural values" while preventing the legal regulation or enforcement of such values.⁷ The tricky question then is the balance between these two purposes. Robert Nagel's paper suggests that while an open balancing of competing First Amendment purposes based on extant political culture may have appeal, an approach most recently displayed in the decisions of Justice Stevens, it is no better at establishing the terms for resolving our "most bitter disputes." Implicit in this is the idea that the terms and frameworks for resolving our conflicts are themselves integral to establishing the limits of toleration.

Steven Heyman's paper steers us back to the substance of freedom of expression, but then pushes us to think beyond its doctrinal parameters. The general formulation of First Amendment speech rights, he argues, was meant to entail a larger balancing of rights and interests. The limits of tolerance in freedom of expression cannot be found within the First Amendment's general directive, but rather are necessarily those defined by other rights embedded in the Constitution, most fundamentally equality rights.

The papers in this symposium cover a large spectrum of ideas, but no one seems to think that neutrality is an attainable or even desirable goal. Cultural norms are always either directly or indirectly implicated in legal discourse and so the question is how tolerant are those norms. Is toleration simply a matter of guarding against

5. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 722 (2003).

6. Post, *supra* note 1, at 502.

7. *Id.* at 504.

coercive practices or ensuring effective exit strategies? Do we need to pursue perfectionist policies that encourage a more thoroughgoing tolerant society; and if so, how best do we pursue such policies? There must be limits to toleration, limits that are no doubt both contingent on and constitutive of American culture broadly speaking; but the advantage of viewing the legal regulation of cultural conflicts through this notion is that, like all the papers, it inherently recognizes an internal, culturally driven perspective, continually straining under the demands of alternative cultural norms.

