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### "Christian Traditions, Culture, and Law": An Update and A Few Reflections

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# “Christian Traditions, Culture, and Law”: An Update and A Few Reflections

Robert F. Cochran, Jr.\*

## *Abstract*

*Using Richard Niebuhr’s description of Christian approaches to culture, this Article examines the way Christians approach law, focusing on developments over the last 20 years. During that time, synthesists have continued to develop natural law, seeking an understanding of law based on shared human goods and reason, an approach that can generate a common approach among people of all faiths and no faith. Conversionists, including those on both the political left and right, argue for changes in law that will reflect Christian understandings of the good. Separatists (including many former conversionists) argue that American culture and law have become so corrupt, materialistic, and hedonistic that Christians should withdraw from public life and focus on developing faithful communities that might be a witness to the world. Dualists argue that though influence in the world requires compromise, Christians*

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*should seek positions of leadership and do what they can for the common good. Culturalists have come to reflect the surrounding culture rather than witness to it. During this time, some cultural and political leaders have sought to push Christians from models that seek to influence culture (synthesist and conversionist) into models that do not (separatist, dualist, and culturalist).*

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## I. INTRODUCTION

The publication that has gotten the most attention in the law review festschrift of which this essay is a part is my 2001 essay *Christian Traditions, Culture, and Law*.<sup>1</sup> In it, I considered the ways various Christian traditions approach law, using the typology developed by H. Richard Niebuhr in his 1951 classic, *Christ and Culture*.<sup>2</sup> He identified five ways in which Christians approach culture: Synthesists seek to reconcile Christian teaching with culture; Conversionists seek to transform culture based on Christian teaching; Separatists remove themselves from the culture; Dualists hold Christian faith and culture in tension and play a role in each; and Culturalists adjust Christian teaching to conform to the culture.<sup>3</sup>

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1. Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 242 (Michael McConnell, Robert F. Cochran, Jr. & Angela Carmella, eds., 2001) [hereinafter Cochran, *Christian Traditions*]. The Niebuhr categories served as the organizing framework for the second section of the book in which that essay appeared, and that section included essays by authors from each of those traditions. I originally wrote a variation of my essay under a somewhat different title as the introduction to a symposium on Christian legal scholarship. Robert F. Cochran, Jr., *Introduction to Christian Perspectives on Law and Legal Scholarship*, 47 J. LEGAL EDUC. 1 (1997) [hereinafter Cochran, *Legal Scholarship*]. This earlier version addressed the ways a Christian’s religious tradition might affect his or her legal scholarship.

The *Christian Traditions* essay is discussed in the current festschrift in William Brewbaker, *Ecumenical Evangelical Legal Thought: The Contributions of Robert F. Cochran, Jr.*, 47 PEPP. L. REV. 231, 259–63 (2020); Stephen Bainbridge, *Bob Cochran on Law and Lawyering: A Catholic Perspective*, 47 PEPP. L. REV. 371, 374–76 (2020); and Steven Smith, *One Step Enough*, 47 PEPP. L. REV. 549, 558–61 (2020). The *Legal Scholarship* version of the essay, cited supra, is discussed in David Caudill, *The Dutch Effect: Kuyper and Neo-Calvinism in Professor Cochran’s Scholarship*, 47 PEPP. L. REV. 419, 421–24 (2020).

2. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951).

3. See generally *id.* (chapters two to six). Niebuhr’s categories have been criticized on the basis that actual, historical traditions do not fit comfortably into his models. See George Marsden, *Christianity and Cultures: Transforming Niebuhr’s Categories*, 115 INSIGHTS: FAC. J. AUSTIN SEMINARY 4 (1999), [https://www.austinseminary.edu/uploaded/about\\_us/pdf/insights/insights\\_1999\\_fall.pdf](https://www.austinseminary.edu/uploaded/about_us/pdf/insights/insights_1999_fall.pdf). Actual Christian groups are a mix. History is messy. *Id.* at 10–12 (arguing that scholars should translate Niebuhr’s categories into terms that are more historically accurate). Those defending Niebuhr have noted that Niebuhr identified “types” like the points of a star—theoretical extremes for the sake of exploration—and they acknowledge that actual Christian groups are likely to fall somewhere between these points. *Id.* at 12–14. In the fiftieth anniversary edition of *Christ and Culture*, the editors included an early essay by Niebuhr, in which he explained the value of types as a means of exploring a broad field of knowledge. See NIEBUHR, *supra* note 2, at xxxvi, xxxvii–lv.

George Marsden notes that most Christian traditions express all five motifs in some way. Marsden, *supra*, at 11. For example, church historian Martin Marty argues that Martin Luther was dualistic as to politics, but, “[h]e minimizes the dualism [as to architecture, the arts, and music] and sees possibilities in converting at least some aspects of the culture.” Martin E. Marty, *Foreword to*

It may be that my earlier essay is generating interest because cultural, social, legal, and political change in the United States today is happening at great speed. Many Christians are reconsidering the appropriate response to American culture.<sup>4</sup>

There has also been a new interest in how Christians should approach law in other parts of the world, as the spread of Christianity in the Global South is giving some Christians influence they have never had before, and persecution of Christians in other countries is driving Christians away from the prevailing culture.<sup>5</sup> It may be that Niebuhr’s categories will help Christians under very different circumstances think through their approaches to culture and law. In this Essay, I will update developments related to the Niebuhr categories and offer a few reflections on them.

I have taught the Niebuhr categories over the years in several countries to lawyer and law student audiences from a variety of religious traditions. Though I (and Niebuhr) have focused on Christian approaches to American law and culture, my sense is that people from almost all religious traditions and cultural backgrounds find the categories to be helpful as they seek to determine how they should approach law and culture in light of their beliefs.

As with much of my scholarship, both my original *Christian Traditions* essay and this Essay bear the fingerprints of my mentor Tom Shaffer.<sup>6</sup> In his book, *American Lawyers and Their Communities*, Shaffer famously envisions an intersection in the center of a small American town.<sup>7</sup> As in many such towns, on one corner is the courthouse and across from it is a church. Shaffer

*the Fiftieth Anniversary Edition* of NIEBUHR, *supra* note 2, at xiii, xviii. However, as Marsden notes, “[w]ith respect to particular cultural questions, we can usually identify one attitude as *dominant*.” Marsden, *supra* note 3, at 11. In the case of “the particular cultural question” of law, I think Christian traditions do generally fit into one or the other of the Niebuhr categories. So, for my purposes—an exploration of attitudes towards law—I find the Niebuhr categories helpful.

4. *See generally* MICHAEL FROST, *EXILES: LIVING MISSIONALLY IN A POST-CHRISTIAN CULTURE* (2010) (discussing how Christians are changing the way they live in response to a post-Christian culture).

5. *See generally* DYRON B. DAUGHRITY, *THE CHANGING WORLD OF CHRISTIANITY: THE GLOBAL HISTORY OF A BORDERLESS RELIGION* (2010) (discussing trends in Christianity around the globe).

6. As noted previously, Part Two of *Christian Perspectives on Legal Thought* was organized based on the Niebuhr categories. *See* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1 and accompanying text. It included an essay by Thomas Shaffer in the separatist category. *See* Thomas L. Shaffer, *The Radical Reformation and the Jurisprudence of Forgiveness*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 321.

7. *See generally* THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991).

notes that law school teaches students to stand on the steps of the courthouse—representing law—and look at the church—representing religion—often as a source of trouble.<sup>8</sup> Shaffer encourages lawyers and law students to “walk across the street and look at the courthouse from the church”<sup>9</sup>—that is, to critique the state from the perspective of religious faith.<sup>10</sup>

In Part II of this Essay, using the Niebuhr categories, I will update and comment on the views of the courthouse from the steps of various churches. In the last twenty years, there has been a lot of shifting around on those steps. In addition, I will occasionally discuss how those models might apply to Christians in the practice of law, though I will quickly add that the best treatment of how the Niebuhr categories might apply to the practice of law is Joseph Allegretti’s book, *The Lawyer’s Calling: Christian Faith and Legal Practice*.<sup>11</sup>

In Part III of this Essay, I walk across the street and explore shifts in the way law has come to view the church over the last twenty years. We will see that in many respects, law has sought to push Christians from positions in the Niebuhr typology that might bring Christian influence to culture and law (synthesists and conversionists) into those categories that do not (separatists, dualists, and culturalists).

## II. CHRISTIAN APPROACHES TO LAW: “THE VIEW OF THE COURTHOUSE FROM THE CHURCH”

In the following, I consider each of the Niebuhr categories and its approach to law.<sup>12</sup> I will identify—often following Niebuhr—a leading example of each tradition’s approach to culture and law. Then I will reflect on developments within that tradition’s view of law in recent years—the view of the courthouse from *that* church. Developments within each of these traditions

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8. *See id.* at 209–17 (discussing how law students “learn to look *at* the community of the faithful, rather than *from* it”).

9. *See id.* at 209–10, 214. As with most metaphors, Shaffer’s vision of the town square simplifies a complex matter. Not only are there many forms of religious congregations in America, but law is found in more than the courthouse—it is found in legislative halls, executive mansions, police stations, and law schools.

10. *See id.* at 210.

11. JOSEPH G. ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 7–23 (1996).

12. For a more developed treatment of each tradition’s view of law, see my original essay, Cochran, *Christian Traditions*, *supra* note 1.

merit a book-length treatment. I will highlight only a few developments in each to give the reader a sense of the direction things are going.

#### A. *Synthesists*

The synthesist recognizes value in both culture and Christian teaching and seeks to reconcile them.<sup>13</sup> The dominant example of this motif is Thomas Aquinas.<sup>14</sup> His influence continues to be strong, especially within the Catholic Church.<sup>15</sup> As Niebuhr says of Aquinas: “In his system of thought he combined without confusing philosophy and theology, state and church, civic and Christian virtues, natural and divine laws, Christ and culture.”<sup>16</sup> In the legal realm, this motif is reflected in natural law, found in both Christian and secular sources.<sup>17</sup>

Natural law teaches that through reason, we can discern moral values and laws that will enable humans to live the fullest lives.<sup>18</sup> There are “goods”—things that humans universally value, such as life, knowledge, recreation, beauty, and friendship—and with the virtue of practical reason, legislators and judges can discern what sorts of laws will maximize those goods.<sup>19</sup> Most of the law of natural law is best understood as moral law, only some of which, natural law theorists argue,<sup>20</sup> should be incorporated in positive law. Natural law experienced a rebirth in influence in the legal academy beginning in the later part of the twentieth century, primarily through the influence of Oxford

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13. See Cochran, *Legal Scholarship*, *supra* note 1, at 5; Cochran, *Christian Traditions*, *supra* note 1, at 243.

14. See Cochran, *Legal Scholarship*, *supra* note 1, at 5; Cochran, *Christian Traditions*, *supra* note 1, at 243.

15. See Cochran, *Legal Scholarship*, *supra* note 1, at 5; Cochran, *Christian Traditions*, *supra* note 1, at 243.

16. See NIEBUHR, *supra* note 2, at 130.

17. See Cochran, *Legal Scholarship*, *supra* note 1, at 5; Cochran, *Christian Traditions*, *supra* note 1, at 243–44.

18. See Cochran, *Christian Traditions*, *supra* note 1, at 244.

19. See generally Gerard V. Bradley, *Natural Law*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 283–84 (Michael McConnell, Robert F. Cochran, Jr. & Angela Carmella, eds., 2001); Gerard V. Bradley, *Catholic Faith and Legal Scholarship*, 47 J. LEGAL EDUC. 47 (1997) (explaining that basic human goods are the same across cultures and reason will lead to common methods of attaining those goods).

20. See ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 290, I, Q.65, a.2 (Timothy McDermott ed., Christian Classics 1989) (1265–1274).



and Notre Dame philosopher and law professor John Finnis.<sup>21</sup>

Natural law, since it is grounded in reason, can be expressed and justified on a basis that is accessible to all.<sup>22</sup> In a pluralistic culture, it can serve as a common basis for law.<sup>23</sup> In my view, the attractiveness of natural law and the synthesist position is responsible for Catholics moving into significant leadership positions in the United States in recent decades.<sup>24</sup> The last two American Vice Presidents—Biden and Pence—are Catholic.<sup>25</sup> Five of the nine current Supreme Court Justices—Thomas, Roberts, Alito, Sotomayor, and Kavanaugh—are Catholic, and a sixth, Justice Gorsuch, has been greatly influenced by Catholic Justices Scalia (whom Gorsuch cites heavily in his book, *A Republic, If You Can Keep It*<sup>26</sup>) and Kennedy (for whom Gorsuch clerked), and Catholic scholar Professor John Finnis (under whom Gorsuch did his doctoral thesis at Oxford).<sup>27</sup> The dominance of Catholics on the Court is a relatively new phenomenon.<sup>28</sup> Seven Catholics were appointed to the Court in the last thirty years.<sup>29</sup> In the prior 200 years, only seven Catholics were appointed to the Court.<sup>30</sup> Note the ideological breadth of the Catholics in these positions

21. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). The summary of natural law in this text is based on Finnis’s description. For recent explorations of natural law and its implications for positive law, see ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (1999), RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* (2003), MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2009), JEAN PORTER, *MINISTERS OF THE LAW* (2010), and *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* (George Duke & Robert P. George eds., 2017).

22. See sources cited *supra* note 19.

23. See *id.*

24. See Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 298 (2006).

25. See Stephanie Dube Dwilson, *Joe Biden’s Religion: 5 Fast Facts You Need to Know*, HEAVY.COM, <https://heavy.com/news/2015/10/joe-biden-religion-faith-catholic-jewish-family-wife-children-beau-hallie-ashley-mass-church-president/> (last updated Oct. 15, 2019); Maureen Groppe, *Pence Shares Role of Catholic Upbringing*, USA TODAY (June 6, 2017, 12:28 PM), <https://www.usatoday.com/story/news/politics/2017/06/06/pence-shares-role-catholic-upbringing-says-catholics-have-ally-trump/102549294/>.

26. See generally NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* (2019).

27. See Sarah McCammon & Domenico Montanaro, *Religion, the Supreme Court, and Why It Matters*, NPR (July 7, 2018, 11:42 AM), <https://www.npr.org/626711777> (discussing the religious makeup of the Court).

28. Cochran, *supra* note 24, at 297.

29. See *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENT* 239–50 (Lee Epstein et al. eds., 2d ed. 1996) (listing all of the Supreme Court Justices and their religious faiths throughout history).

30. See *id.*

of legal authority. The two recent Catholic vice-presidents were Democrat (Biden) and Republican (Pence). Three of the most influential Supreme Court Justices over the last fifty years (Brennan, Scalia, and Kennedy)—possibly the most influential liberal, conservative, and moderate justices respectively—were Catholic.<sup>31</sup>

I am not saying that these Catholics would identify natural law and a synthesist framework as affecting their view of law. My argument is that people formed in a synthesist/Catholic tradition develop habits of thinking and speaking that make them attractive political and Supreme Court candidates. The synthesist approach to culture is in the air of the Catholic Church.<sup>32</sup> It is absorbed from various Catholic sources, from Sunday School lessons and sermons to bishops’ letters and papal encyclicals.<sup>33</sup>

Why such a growth in Catholics in positions of legal influence in the last few decades? It may be that as the United States has grown more diverse, those with a synthesist’s ability to understand and reconcile diverse viewpoints have emerged as leaders.<sup>34</sup> And—whether acknowledged or not—natural law provides one of the few bases available for common ground.<sup>35</sup> Natural law, discernible by human reason, can create a common legal agenda for those of various religious faiths.<sup>36</sup> This is not a matter of translating Catholic doctrine into law—as noted above, the Vice Presidents and Justices already mentioned come from the full range of ideological viewpoints. I believe it is the synthesist way of thinking that has made Catholic candidates attractive in the United States at this time.<sup>37</sup>

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31. See David Cole, Editorial, *Why Anthony Kennedy Was a Moderating Force on the Supreme Court*, NATION (July 3, 2018), <https://www.thenation.com/article/anthony-kennedy-moderating-force-supreme-court/>; Nina Totenberg, *Justice Brennan: A Liberal Icon Gets Another Look*, NPR (Nov. 26, 2010), <https://npr.org/131567727>; Anthony Zurcher, *Antonin Scalia, Conservative US Supreme Court Justice, Dies*, BBC (Feb. 14, 2016), <https://www.bbc.com/news/world-us-canada-35571868>.

32. See Cochran, *Legal Scholarship*, *supra* note 1, at 5, 11; Cochran, *Christian Traditions*, *supra* note 1, at 243.

33. See Cochran, *Legal Scholarship*, *supra* note 1, at 5.

34. See *id.* at 299.

35. See *id.* at 300–04 (discussing natural law in Catholic doctrine and American traditions).

36. See *id.* at 303 (stating that an advantage of natural law is that it can provide a basis for law that can be shared among people of different religions and of no religious faith).

37. For further development of these themes, see Cochran, *supra* note 24.

*B. Conversionists*

Conversionists seek to change the culture so that it will reflect Christian teaching.<sup>38</sup> As John Calvin put it, "The whole world is a theatre for the display of the divine goodness, wisdom, justice, and power . . . ."<sup>39</sup> The conversionist's means of "converting" culture might differ, depending on the cultural milieu and the issue, ranging from creating more attractive culture to attempts at persuasion to exerting the force of law.<sup>40</sup> For conversionists, law is only one means of converting culture, and issues that are discerned to be important enough to be controlled by law are likely to vary from person to person.

For Calvin, the goal of law was to reflect love of neighbor.<sup>41</sup> "[E]ach nation has been left at liberty to enact the laws which it judges to be beneficial, still these are always to be tested by the rule of charity, so that while they vary in form, they must proceed on the same principle."<sup>42</sup>

At times, the abuses of Constantinianism and Christendom have been used to criticize those on the conversionist side of Christianity. Certainly there were enormous abuses—religious wars, forced "conversions," the Inquisition, heresy trials, imprisonment and capital punishment administered to religious and political opponents. But, as noted above, conversionists do not merely use force to do their converting. Moreover, as Oliver O'Donovan has argued, there was good as well as evil in this history.<sup>43</sup> At times, the church held the emperor to a higher standard.<sup>44</sup> For example, in A.D. 390, Ambrose

38. See Cochran, *Legal Scholarship*, *supra* note 1; Cochran, *Christian Traditions*, *supra* note 1, at 244.

39. 5 JOHN CALVIN, COMMENTARY ON THE BOOK OF PSALMS 178 (James Anderson trans., 1849) (1557).

40. See Cochran, *Legal Scholarship*, *supra* note 1, at 7.

41. 2 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 664 (Henry Beveridge trans., T & T Clark 1863) (1536).

42. *Id.* For discussion of how love might play out as a basis for law, see Robert F. Cochran, Jr., *Jesus, Agape, and Law*, in AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW? 13, 13–37 (Robert F. Cochran, Jr. & Zachary R. Calo eds., 2017) [hereinafter *Jesus, Agape, and Law*].

43. See OLIVER O'DONOVAN, THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY (1996); see also PAUL G. DOERKSEN, BEYOND SUSPICION: POST-CHRISTENDOM PROTESTANT POLITICAL THEOLOGY IN JOHN HOWARD YODER AND OLIVER O'DONOVAN 140 (2009) ("O'Donovan seeks to establish an important point for the possibility of a positive reading of Christendom, since even if force is used within Christendom, such force is not simply violence, and at any rate is not constitutive of the legitimate state of which Christianity is an integral part.").

44. See, e.g., D.A. CARSON, CHRIST AND CULTURE REVISITED 182 (2008) (explaining that "the church after Constantine held Caesar accountable to higher standards").

excommunicated the Christian emperor Theodosius for the massacre he committed in Thessalonica.<sup>45</sup> American conversionists can point with pride to the work of those in their number who led the anti-slavery, child labor, industrial safety, and civil rights movements.

Over the last twenty years, conversionists from a variety of political perspectives have sought to influence law through persuasion and political processes. From the Dutch Calvinist tradition, which received significant attention in my earlier essay, Nicholas Wolterstorff has produced two books on justice and agapic love, advocating, among other things, greater government support and protection for the powerless.<sup>46</sup> Gary Haugen, in books<sup>47</sup> as well as on the ground through his organization International Justice Mission,<sup>48</sup> has advocated on behalf of those subject to wage slavery, human trafficking, land grabbing, and violence around the world.

David Opderbeck says:

I argue that law matters to the *missio Dei*: that law is deeply embedded in the Biblical narrative and in the Christian tradition, that advocacy for legal change on behalf of the poor and oppressed is a way in which the church participates in God’s mission of liberation, and that the church appropriately advocates for laws that support its role in God’s mission, including for basic systems of government accountability, property protections, and religious freedom.<sup>49</sup>

One who has historically been quite critical of Christians exercising political power is Jim Wallis, founder and editor of *Sojourners* magazine. Though he historically eschewed giving political endorsements, in 2008 he came about as close as one could come to endorsing then-candidate Obama: “Barack Obama is virtually a public theologian and the most sophisticated political leader in many years in articulating the relationship between faith and politics. . . . Obama has turned the spiritual power of *hope* into a political vision

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45. *See id.*

46. NICHOLAS WOLTERSTORFF, *JUSTICE IN LOVE* (2011); NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (2008).

47. GARY A. HAUGEN, *GOOD NEWS ABOUT INJUSTICE: A WITNESS OF COURAGE IN A HURTING WORLD* (2d ed., 2009); GARY A. HAUGEN, *JUST COURAGE: GOD’S GREAT EXPEDITION FOR THE RESTLESS CHRISTIAN* (2008).

48. *See Our Work*, INT’L JUST. MISSION, <https://www.ijm.org/our-work> (last visited Nov. 4, 2019).

49. DAVID W. OPDERBECK, *LAW AND THEOLOGY: CLASSIC QUESTIONS AND CONTEMPORARY PERSPECTIVES* (2019).

that is inspiring a new generation.”<sup>50</sup>

But Wallis’s enchantment with President Obama was to be short-lived. In a short 2017 *Sojourners* article entitled “The Legacy of Barack Obama,” Wallis summarized Obama’s presidency.<sup>51</sup> The *only* positive thing he mentioned was that Obama was the United States’ first African-American president.<sup>52</sup> Shortly thereafter, Wallis identified himself as “politically homeless,” stating:

Elements of the Democrats’ richest donor base continue to enforce extreme positions on abortion, not allow serious moral discussions, and seem to want to close the party’s tent to pro-life Democrats. Similarly, the central importance of marriage, family, and parenting for the common good of society is not a central topic in Democratic Party language and policy. Many people of faith are turned away by Democrats’ perceived endorsement, whether intentional or by marked silence, of recreational sexuality over covenantal sexuality and an “anything goes” attitude when it comes to sex. Why is the discussion of family values—among every type of family—so absent from conversations on the left when we know it is a part of critical solutions to issues of poverty? Those voices on the left advocating for strengthening families are seldom heard.<sup>53</sup>

Many conversionist Christians on the right have a similar sense of political homelessness, as an unbiblical anti-immigrant stance seems to have become Republican Party dogma.<sup>54</sup> Some have decided to settle for less than a whole loaf, supporting Donald Trump based on his opposition to abortion and

50. Jim Wallis, *Political Earthquakes*, SOJOURNERS (Jan. 7, 2008), <https://sojo.net/articles/political-earthquakes>.

51. Jim Wallis, *The Legacy of Barack Obama*, 46 SOJOURNERS 7 (2017).

52. *See id.*

53. Jim Wallis, *Politically Homeless*, SOJOURNERS (Jan. 4, 2018), <https://sojo.net/articles/politically-homeless>. *But see* Tom Gjelten, *How Would Jesus Vote?*, NPR (Apr. 23, 2019), <https://www.npr.org/716258078> (reporting on Democratic presidential candidate, Pete Buttigieg, stating in interviews that voting based on Christian values would point the country in a “progressive direction”).

54. *See, e.g.*, Elizabeth Dias, ‘*God Is Going to Have to Forgive Me*’: *Young Evangelicals Speak Out*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/us/young-evangelicals-politics-midterms.html> [<https://nyti.ms/2yKRqgZ>] (reporting that many young evangelicals felt “a real struggle with an administration they see as hostile to immigrants, Muslims, L.G.B.T.Q. people, and the poor [believing it] reflects a loss of humanity, which conflicts with their spiritual call,” and that as a result, they felt “politically independent, or politically homeless”).

his support for religious freedom.<sup>55</sup> It may be that many on the right will feel a Wallis-like sense of betrayal when the final chapter is written on the Trump administration.

In recent months, a vigorous debate has broken out among Christian social conservatives over the extent to which they should support or comply with traditional Enlightenment liberal values such as liberty, pluralism, and freedom of speech.<sup>56</sup> Sorab Ahmari accuses David French of what he calls "Frenchism"—"a program for negotiating Christian retreat from the public square into a safe, private sphere that . . . totalizing, overweening, aggressive liberalism would have us retreat into."<sup>57</sup> (In Niebuhrian terms, Ahmari accuses French of moving toward "dualism" or "separatism".)

French responds that his position is far from retreat. On the contrary, he (as a constitutional lawyer) has fought, often successfully, for space in which Christians can make their arguments to the public under the First Amendment's doctrine of "viewpoint neutrality" which entitles both conservative Christians and aggressive secularists to make arguments in public spaces such as the public library. French argues that government and citizens have "reciprocal duties": "The Government protects liberty. The people exercise liberty."<sup>58</sup> He acknowledges, however, that "it won't work unless the people have a reciprocal commitment to exercise that liberty for virtuous ends."<sup>59</sup> French aspires to "be part of an energetic community that is remaking the culture from the ground up. If we change that and we try to remake culture from the top down, we will not only fail, we will further divide the country."<sup>60</sup>

For Amari, talk of remaking the culture is not enough. He scoffingly

55. *See id.* (reporting that many young evangelicals believe that Trump has "helped to achieve their biggest goals, like curbing abortion rights and advancing religious liberties").

56. Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism> [hereinafter *Against David French-ism*]; Sorab Ahmari *Debates David French*, AM. MIND (Sept. 5, 2019), <https://americanmind.org/video/sohrab-ahmari-debates-david-french-10-5-2019/> [hereinafter *Ahmari-French Debate*]; *Conservatism in the Age of Trump*, C-SPAN (Sept. 13, 2019), <https://www.c-span.org/video/?2464021-1/conservatism-debate-university-notre-dame&start=639> [hereinafter *Notre Dame Debate*]; and Benjamin Wallace-Wells, *David French, Sohrab Ahmari, and the Battle for the Future of Conservatism*, NEW YORKER (Sept. 12, 2019), <https://www.newyorker.com/news/the-political-scene/david-french-sohrab-ahmari-and-the-battle-for-the-future-of-conservatism> [hereinafter *Future of Conservatism*].

57. *Ahmari-French Debate*, *supra* note 56, at 7:54.

58. *Notre Dame Debate*, *supra* note 56, at 2:42.

59. *Id.*

60. *Id.*

suggests that French wants those who oppose conservative values to “voluntarily” place limits on themselves—“I wish him good luck.”<sup>61</sup> Ahmari argues that cultural conservatives should “fight the culture war with the aim of defeating the enemy and enjoying the spoils in the form of a public square re-ordered to the common good and ultimately the Highest Good.”<sup>62</sup>

From a Niebhurian perspective, both Ahmari and French are conversionists. At root, their argument is about what sources of influence to use in seeking to convert the culture. French seeks to change the culture through persuasion and wants to exercise restraint in using the leverage of law. He believes that all citizens should be free to live according to their values; he wants to persuade them to change those values. Ahmari argues that persuasion is not enough. Law should advance the common good.

As for law practice, Joseph Allegretti argues that lawyers should be conversionists.<sup>63</sup> They should speak prophetically both to clients and to the culture. They should challenge clients to do the right thing and should be willing to withdraw from representation if clients want them to do something they believe to be wrong.<sup>64</sup> They should represent needy clients and call for the legal system to treat them justly.<sup>65</sup>

### C. Separatists

For other Christians, on both the left and the right, the separatist option has become attractive.<sup>66</sup> Some look to the Reformation’s Anabaptists for guidance;<sup>67</sup> others to St. Benedict, the sixth century founder of Western monasticism.<sup>68</sup>

61. *Future of Conservatism*, *supra* note 56.

62. *Against French-ism*, *supra* note 56.

63. See Allegretti, *supra* note 11, at 20–23.

64. *Id.* at 51–57.

65. *Id.* at 57–63.

66. See generally STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* (1989) (calling for a new understanding of the Christian church, where Christians would come together and live a consistently Christian life in a devalued world).

67. See *id.* at 42.

68. See ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* 12–16 (2017) (recounting St. Benedict’s influence on Western monasteries). Dreher notes that Alasdair MacIntyre had expressed hope for the rise of a new Benedict in *After Virtue*, his 1981 critique of Western philosophy. *Id.* at 16–19 (citing ALASDAIR MACINTYRE, *AFTER VIRTUE* 263 (3d. ed. 2007)).

For neo-Anabaptists,<sup>69</sup> Jesus is the model in his refusal to exercise the worldly power that was at his disposal.<sup>70</sup> As for politics, neo-Anabaptists have little, if any, positive agenda.<sup>71</sup> “Jesus taught that his followers—or even the Son of God!—should not attempt to ‘run the world.’”<sup>72</sup> Shane Claiborne (possibly anticipating the disappointment that Jim Wallis experienced with the Obama administration) said he cringed when he saw posters with “hope” written under Barack Obama’s name<sup>73</sup>:

We are setting ourselves up for disappointment if our hope is built on anything less than Jesus.

So when it comes to voting, I look at it not as a place to put our hope but a battle with the principalities and powers of this world. Voting is damage control. We try to decrease the amount of damage being done by those powers.<sup>74</sup>

Sociologist James Davison Hunter is critical of neo-Anabaptists, arguing that they have a “world-hating” theology.<sup>75</sup> He notes that it is rare

to find among any of its most prominent theologians or its popularizers, any affirmation of good in the social world and any acknowledgement of beauty in creation or truth shared in common with those outside of the church. . . . [They] have little to say to those outside of their own particular (and very small) community besides judgment.<sup>76</sup>

Many separatists—especially those who find inspiration in the Anabaptist tradition—reject any Christian involvement with the state because state power

69. See JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 150–166 (2010).

70. David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword*, 47 J. LEGAL EDUC. 28, 34 (explaining the Anabaptists’ belief that “since Jesus refused the sword and political power, and taught his disciples to do likewise, then all Christians must do likewise”).

71. *Id.* (explaining the Anabaptists’ rejection of any political agenda pursuant to Jesus’s teachings).

72. SHANE CLAIBORNE & CHRIS HAW, *JESUS FOR PRESIDENT: POLITICS FOR ORDINARY RADICALS* 167 (2008).

73. SHANE CLAIBORNE & TONY CAMPOLO, *RED LETTER REVOLUTION: WHAT IF JESUS REALLY MEANT WHAT HE SAID?* 185 (2012). “Red Letter Christians” focus primarily on the words of Jesus, which are printed in red in some Bibles. See *id.* at xi.

74. *Id.*

75. See HUNTER, *supra* note 69, at 251.

76. *Id.* at 174–75.



arises in significant measure from its use of coercion.<sup>77</sup> Anabaptists are “non-resistant”—refusing to use “the sword,” even to restrain evil.<sup>78</sup> Instead, they “turn the other cheek.”<sup>79</sup> God may use those in governmental positions, such as soldiers or policemen, to restrain and punish evil, but these are not positions that Christians can occupy.

A natural question flowing from this nonresistant theology is whether an Anabaptist Christian might become a lawyer. A lawyer’s assertion of any legal right is grounded ultimately in the threat of state power. Maybe an Anabaptist lawyer could use alternative means of dispute resolution, seeking agreement and reconciliation between adversaries, rather than litigation. Maybe an Anabaptist lawyer could be a criminal defense lawyer, seeking to protect clients from the coercion of the state, though such a role will often call on a lawyer to cast blame and the threat of prosecution on other people. When a group of Christian law students asked neo-Anabaptist Stanley Hauerwas if a faithful Christian could become a lawyer, he responded: “Possibly, but it would be like porcupines making love. It would have to be done very carefully.”<sup>80</sup>

The movement toward separatism in recent years has come, not only from the political left, but also from the political right. In his book, *The Benedict Option*, Rod Dreher, a senior editor of *The American Conservative*, describes the 2016 presidential election as a “harbinger” of dark political times, as in that election Christian Americans were forced to choose between an established Democrat who was deeply “hostile to core Christian values” and an outsider Republican with no particular religious commitment, who sold himself “as a strongman who would impose order by force of will.”<sup>81</sup>

Dreher sees parallels between modern twenty-first century America and Saint Benedict’s sixth century Roman civilization.<sup>82</sup> Benedict concluded that

77. *Id.* at 181 (discussing separatists’ concerns with strategies of action, such as violence and coercion).

78. Smolin, *supra* note 70, at 29 (“Anabaptists became nonresistant; they denied that a Christian could, as a soldier or ruler, take up the sword.”).

79. *Id.*

80. William H. Willimon, *Can Christians Be Patriots?*, in *GOD AND COUNTRY? DIVERSE PERSPECTIVES ON CHRISTIANITY AND PATRIOTISM* 99, 100 (Michael G. Long & Tracy Wenger Sadd eds., 2007). For a consideration of the challenges faced by an Anabaptist lawyer, see ALLEGRETTI, *supra* note 11, at 10–13.

81. See DREHER, *supra* note 68, at 89–90.

82. *Id.* at 4.

the beneficial aspects of his civilization were too far gone to be saved.<sup>83</sup> Dreher is critical of those on both the left and the right in American politics, viewing them as slaves to hedonism and the culture of death on one hand, and the extremes of capitalism and consumerism on the other:<sup>84</sup> “[I]f believers don’t come out of Babylon and be separate, sometimes metaphorically, sometimes literally, their faith will not survive for another generation or two in this culture of death.”<sup>85</sup>

One of the strongest institutional (or anti-institutional) manifestations of separatism has been the homeschooling movement. The number of home-schooled children more than doubled between 1999 and 2012, from 850,000 to 1.8 million or approximately three percent of the student population.<sup>86</sup>

Separatist Christians do not necessarily give up on having an influence on the broader culture. As Stanley Hauerwas and William H. Willimon argue, Richard Niebuhr was wrong to suggest that “Christians are in an all-or-nothing relationship to the culture[, and that they] must responsibly choose to be ‘all,’ or irresponsibly choose to be sectarian nothing.”<sup>87</sup> Both neo-Anabaptists and “Benedict Option” Christians hope to influence culture, but to do so by setting up faithful, separate communities that will be attractive to the broader community.<sup>88</sup> Dreher holds up the works of Czech political dissidents Václav Havel and Václav Benda during the anti-Communist movement as models of separatist engagement in politics.<sup>89</sup> They set up a “parallel polis”—a separate but porous society that existed alongside the official Communist regime.<sup>90</sup> This was not merely withdrawal from the world, but positive engagement with the world, seeking “the renewal of the national community.”<sup>91</sup>

83. *Id.* at 17–18.

84. *Id.* at 64.

85. *Id.* at 18.

86. Mike McShane, *Is Hybrid Homeschooling the Wave of the Future?*, FORBES (May 21, 2018, 8:46 AM), <https://www.forbes.com/sites/mikemcshane/2018/05/21/is-hybrid-homeschooling-the-wave-of-the-future/#5bf855d46bf7>.

87. HAUERWAS & WILLIMON, *supra* note 66, at 41.

88. DREHER, *supra* note 68, at 95–97 (proposing the formation of small, local, and organic “Benedict Option communities” that will influence the broader culture).

89. *Id.* at 93–94.

90. *Id.* at 93 (quoting Václav Benda et al., *Parallel Polis, or an Independent Society in Central and Eastern Europe: An Inquiry*, 55 SOC. RES. 211 (1988), <https://www.jstor.org/stable/40970497>).

91. DREHER, *supra* note 68, at 93. Niebuhr recognized the role that separatists had played in reform of culture, but he was skeptical of the notion that such was their intent. See NIEBUHR, *supra* note 2, at 66–67.

#### D. Dualists

Like the separatists, those in Niebuhr’s dualist category see an incompatibility between Christ and culture. However, the dualist sees a role for the Christian in each. Martin Luther asked:

May a Christian be a secular official and administer the office and work of a ruler or a judge? This would mean that the two persons or the two types of office are combined in one man. . . . To this we say: Yes, God himself has ordained and established this secular realm and its distinctions. . . .<sup>92</sup>

The Christian lives and operates in two kingdoms.<sup>93</sup> Luther is clear, however, that the world runs by its own rules and that within that realm, the Christian is to abide by those rules: “Do you want to know what your duty is as a prince or a judge or a lord or a lady, with people under you? You do not have to ask Christ about your duty. Ask the imperial or the territorial law.”<sup>94</sup>

John Stackhouse, in his 2008 book *Making the Best of It: Following Christ in the Real World*,<sup>95</sup> identifies himself as a dualist,<sup>96</sup> holding up Dietrich Bonhoeffer and Richard Niebuhr’s brother Reinhold Niebuhr as dualist models.<sup>97</sup> Bonhoeffer, the pacifist Lutheran pastor who joined in an attempt to assassinate Hitler, famously asked whether the church, when faced with madmen who drive a motorcar in a crowded street, is “not just to bandage the victims under the wheel, but to put a spoke in the wheel itself.”<sup>98</sup>

Though Richard Niebuhr’s *Christ and Culture* evidences a strong preference for the conversionist model and is dedicated “To Reinie,” Richard iden-

92. Martin Luther, *The Sermon on the Mount*, in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 598–99 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999).

93. NIEBUHR, *supra* note 2, at 171–72 (quoting Martin Luther, *An Open Letter on the Harsh Book Against the Peasants*, in 4 WORKS OF MARTIN LUTHER 265–66 (Philadelphia ed., 1915–1932) (1525)).

94. *Id.* at 599.

95. JOHN G. STACKHOUSE, JR., *MAKING THE BEST OF IT: FOLLOWING CHRIST IN THE REAL WORLD* (2008).

96. *Id.* at 27. Stackhouse identifies his book as “an attempt to recover and articulate a more plausible version of [the dualist] model.” *Id.* at 28 n.29.

97. *Id.* at 27.

98. Dietrich Bonhoeffer, *The Church and the Jewish Question*, in THE CAMBRIDGE COMPANION TO DIETRICH BONHOEFFER 127 (John W. de Gruchy ed., Cambridge Univ. Press 1999).

tifies his brother Reinhold’s book, *Moral Man and Immoral Society*, as dualist.<sup>99</sup> Reinhold advocated what he called “Christian Realism” and argued: “The responsible leader of a political community is forced to use coercion to gain his ends. . . . [I]t may be necessary at times to sacrifice a degree of moral purity for political effectiveness.”<sup>100</sup> Stackhouse summarizes Reinhold Niebuhr’s views on voting: Christians should choose “the ‘best of the real choices’ in elections, with ‘best’ being defined as the one who would most likely achieve the most according to the values of the Kingdom of God.”<sup>101</sup> This would exclude either not voting or voting for “the purest candidate, who would certainly lose.”<sup>102</sup>

Reinhold Niebuhr received a lot of attention in 2007 when then-Presidential candidate Barack Obama said of Niebuhr: “I love him. He’s one of my favorite philosophers.”<sup>103</sup> (It may be that President Obama’s dualist tendencies led to the disillusionment of conversionist Jim Wallis.<sup>104</sup>)

Law professor Alberto Coll holds up Niebuhr’s “Christian Realism” as a basis for his argument that Christian love has little place in the challenging realm of international politics, though it might motivate one to pursue justice.<sup>105</sup> Niebuhr “liked to remind [his] contemporaries of the stark differences between the realms of politics and personal morality.”<sup>106</sup>

David VanDrunen in *Politics after Christendom: Political Theology in a Fractured World*, and elsewhere, suggests a Two Kingdoms approach, arguing that God established the Noahic Covenant with Noah on behalf of all humanity, requiring retributive justice in the civil law, and that God established the covenant of grace with the church.<sup>107</sup> VanDrunen argues that under the

99. NIEBUHR, *supra* note 2, at 183 n.30.

100. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 244 (Westminster John Knox Press 2001) (1932).

101. STACKHOUSE, *supra* note 95, at 101.

102. *Id.*

103. David Brooks, *Obama, Gospel and Verse*, N.Y. TIMES (Apr. 26, 2007), <https://www.nytimes.com/2007/04/26/opinion/26brooks.html> [<https://nyti.ms/2jXKYtn>].

104. See *supra* text accompanying notes 51–52.

105. Alberto R. Coll, “*That Vast External Realm*”: *The Limits of Love and Law in International Politics*, in *AGAPE, JUSTICE, AND LAW*, *supra* note 42, at 291, 307–13.

106. *Id.* at 312.

107. See DAVID VANDRUNEN, *POLITICS AFTER CHRISTENDOM: POLITICAL THEOLOGY IN A FRACTURED WORLD*, 80–115, 153–62 (forthcoming 2020); Randy Beck & David VanDrunen, *The Biblical Foundations of Law: Creation, Fall and the Patriarchs*, in *LAW AND THE BIBLE: JUSTICE, MERCY, AND LEGAL INSTITUTIONS* 23, 37–42 (Robert F. Cochran, Jr. & David VanDrunen eds., 2013) [hereinafter *LAW AND THE BIBLE*].

covenant of grace, Jesus’s demanding kingdom ethics (e.g., “turn the other cheek”) apply only within the church, whereas under the Noahic covenant, the *lex talionis* (“an eye for an eye”) is the standard of justice for the state. Under this view, Christians manifest forgiving and reconciling love within the church and in their personal interactions, but they support the state’s imposition of proportionate retributive justice.<sup>108</sup>

VanDrunen’s Two Kingdoms framework has been criticized by those from a conversionist perspective as maintaining an undue “separation” in the unified work of God,<sup>109</sup> failing to account for “the genuine unity of [God’s] kingship”,<sup>110</sup> and proposing “a profoundly disturbing dichotomy.”<sup>111</sup> Dallas Willard and I have argued that VanDrunen’s “institutional division of Christian standards into *agape* love for the church and retributive justice for the state”

too neatly avoids the difficult work of determining the implications for the state of Jesus’ teaching on love. There is no basis for such a division of authority in Jesus’ teaching. Indeed, he taught that love is the framework on which law hangs. Love is the standard by which law, including the *lex talionis*, should be judged. Moreover, Jesus’ kingdom is primarily about a change in the heart, not about the application of rules. That change of heart, and its accompanying Christian virtues, should affect all of life. Are Christians involved in government leadership to have one heart for the home and the church and another heart for the office and the courtroom? This is not to say that it will be easy to determine the implications of Jesus’ teachings for law. We see that as the challenge that Jesus presents to his followers who are concerned with law.<sup>112</sup>

As for lawyers, both Thomas Shaffer and Joseph Allegretti identify the

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108. See generally David VanDrunen, *Bearing Sword in the State, Turning Cheek in the Church: A Reformed Two-Kingdoms Interpretation of Matthew 5:38–42*, 34 THEMELIOS 322 (2009).

109. JONATHAN LEEMAN, *POLITICAL CHURCH: THE LOCAL ASSEMBLY AS EMBASSY OF CHRIST’S RULE* 176–80 (2016).

110. JAMES SKILLEN, *THE GOOD OF POLITICS: A BIBLICAL, HISTORICAL, AND CONTEMPORARY INTRODUCTION* 200 n.2 (2014).

111. WILLIAM EDGAR, *CREATED AND CREATING: A BIBLICAL THEOLOGY OF CULTURE* 97 (2017). VanDrunen apologizes “for the emotional stress I have caused [Edgar].” VanDrunen, *supra* note 107, at 78 n.34; see *id.* (citing the sources quoted in the text accompanying this and the prior two footnotes).

112. Robert F. Cochran, Jr. & Dallas Willard, *The Kingdom of God, Law, and the Heart: Jesus and the Civil Law*, in *LAW AND THE BIBLE*, *supra* note 107, at 151, 173.

legal profession's adversary ethic with Luther's "Two Kingdom" theology and Reinhold Niebuhr's "Christian Realism."<sup>113</sup> Under that ethic, lawyers are responsible for making arguments on behalf of their clients and are not responsible for the consequences. Allegretti and Shaffer argue that the adversary ethic divides the person—lawyers play different roles in private life and public life.<sup>114</sup> Allegretti labels this "moral schizophrenia" and challenges Christian lawyers to follow a conversionist model.<sup>115</sup> Shaffer calls for a unified ethic, preferring the practice of an earlier generation's "gentlemen lawyers" and *To Kill a Mockingbird's* Atticus Finch, who said, "I can't live one way in town and another way at home."<sup>116</sup>

### E. Culturalists

Culturalists are those who merely take the surrounding culture and call it Christian. An example, cited by Niebuhr, is Thomas Jefferson, who took a copy of the New Testament (in fact, four copies of the New Testament—Greek, Latin, French, and English) and, with a pen knife, cut out those portions that he perceived as "contrary to reason," separating the "diamonds" of wisdom from the "dunghill."<sup>117</sup> What emerged is the Christ of Enlightenment liberal culture.<sup>118</sup>

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113. See THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 167–231 (1985); ALLEGRETTI, *supra* note 11, at 17–18.

114. See SHAFFER, *supra* note 113, at 173–76; ALLEGRETTI, *supra* note 11, at 18–20.

115. ALLEGRETTI, *supra* note 11, at 18, 20–23, 51–63; see *supra* text accompanying notes 63–65.

116. SHAFFER, *supra* note 113, at 169.

117. Harry R. Rubenstein & Barbara Clark Smith, *History of the Jefferson Bible*, in THOMAS JEFFERSON, *THE JEFFERSON BIBLE* 11, 11 (Smithsonian Books 2011) (1895).

118. See NIEBUHR, *supra* note 2, at 91–92. While preparing this Essay, I read through *The Jefferson Bible*. A couple of points were especially striking. In the story of the crucifixion, Jesus was hanged on a cross between two thieves. One of them mocked Jesus: "'If thou be Christ, save thyself and us.' But the other, answering, rebuked him, saying, 'Dost not thou fear God, seeing thou art in the same condemnation? And we indeed justly; for we receive the due reward of our deeds; but this man hath done nothing amiss.'" *Luke* 23:39–41 (King James). In *The Jefferson Bible*, that is the end of the story. Jefferson leaves both thieves to pay "the due reward of [their] deeds." *Luke* 23:40 (Jefferson Bible). In the full biblical version, the second thief's repentance and faith yield forgiveness: "And he [the second thief] said unto Jesus, 'Lord, remember me when thou comest into thy kingdom.' And Jesus said unto him, 'Verily I say unto thee, Today shalt thou be with me in paradise.'" *Luke* 23:42–43 (King James).

The other striking deletion comes at the end of the crucifixion story, which is the end of *The Jefferson Bible*. "Now in the place where he was crucified there was a garden; and in the garden a new sepulchre, wherein was never man yet laid. There laid they Jesus, and rolled a great stone to the door of the sepulchre, and departed." *John* 19:42 and *Matthew* 27:60, in *THE JEFFERSON BIBLE*, *supra*

There is a danger in each generation that Christians will come to reflect the surrounding culture. I fear that we see this manifested in several ways in twenty-first century America. Some who speak of “Christian America” do so with the hope of calling America to greater virtue, but others appear to, at best, overlook its shortcomings or, at worst, credit the Christian faith with the wrong it does. There is a danger that those around the world who hear such talk will come to see Jesus as merely the political and military hero of the United States. Some churches in the United States seek to share the Christian faith by expressing it in contemporary language and music, by softening Jesus’ challenging demand—“Follow me”<sup>119</sup>—or by holding out the promise of financial prosperity. But the danger is that they will compromise the Christian message for the sake of greater numbers. In addition, there is a danger that Christians who want to gain political power will merely adopt the methods of the surrounding culture and compromise the Christian message to the point where it harms the name of Christ. As I said in my earlier essay, “All Christians are probably guilty, to some extent, of letting ‘the world around [us] squeeze [us] into its own mold.’ . . . Christians need humility, clarity of vision, courage, and each other if we are to remain true to Christ.”<sup>120</sup>

In the foreword to the book in which my original *Christian Traditions, Culture, and Law* essay appeared,<sup>121</sup> Harold Berman gives a defense of some manifestations of the culturalist approach (and takes me and the other editors to task for not giving more attention to it):

Can we not say that God has revealed Himself in existing legal institutions, and that he continues to reveal Himself in the development of those institutions, insofar as they reflect justice and mercy and good faith? Is there not a Christian dimension of existing laws, which, like the Ten Commandments, prohibit stealing, murder, adultery, defamation, lying? As I said in my 1993 book *Faith and Order*, from a Christian perspective, the purpose of our existing body of

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note 117, at 83. Period. End of the book. Jefferson leaves the disciples (and the rest of humanity) without the Christian hope of the resurrection. At least Jefferson had the courage of his convictions. But what he presents is a Jesus who looks a lot more like the Enlightenment liberal Jefferson than the Jesus who is presented by those who followed Jesus (and were willing to die for giving their report of his resurrection).

119. See *Matthew* 4:19, 16:24; *Luke* 5:27; *John* 1:43, 21:19.

120. Cochran, *Christian Traditions*, *supra* note 1, at 249.

121. CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES].

property law, criminal law, family law, tort law, and other branches of law is to create conditions in which sacrificial love of God and of neighbor, the kind of love personified by Jesus Christ, can take root in society and grow.<sup>122</sup>

Whereas Richard Niebuhr in *Christ and Culture* and I in my first essay focused on negative cultural influences on Christianity and law (e.g., materialism and racism) and ambiguous influences (e.g., rationalism and individualism), Berman identifies positive cultural influences (e.g., prohibitions of stealing, murder, adultery, defamation, lying) which arose independent of Christianity and then influenced Christian legal thought.

As Professor Berman documents elsewhere, the heavily Christian Canon Law of the Middle Ages was rooted in both Roman Law, as well as in Christian Scripture and theology.<sup>123</sup> Many aspects of law that are today embraced as aspects of Christian legal thought, for example free exercise of religion, emerged initially, in part, through the influence of culture not directly tied to Christianity. From a Christian perspective, these insights which might not be directly rooted in the Christian faith, do not arise independent of God, but are rooted in what might variously be described as creation, natural law, and common grace. Nevertheless, their influence on Christian thought has often been through the medium of secular culture. Whatever the source of law, Christians can only rejoice when law, in Professor Berman’s words, “create[s] conditions in which sacrificial love of God and of neighbor, the kind of love personified by Jesus Christ, can take root in society and grow.”<sup>124</sup>

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122. Harold J. Berman, *Foreword to CHRISTIAN PERSPECTIVES*, *supra* note 121, at xiii, *referencing* HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 313–18 (1993) (“I would contend that law, understood in a Christian perspective, is a process of creating conditions in which sacrificial love, the kind of love personified by Jesus Christ, can take root in society and grow.”).

123. See HAROLD J. BERMAN, *FAITH AND ORDER* 35–53 (1993); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 199–225 (1983) (both tracing the influence of Roman Law on Canon Law).

124. For full quote in context, *see supra* text accompanying note 122.



### F. Faithful Presence

For the last 30 years, sociologist James Davison Hunter has been one of the most insightful commentators on American culture.<sup>125</sup> His 1991 book, *Culture Wars: The Struggle to Define America*, brought attention to the cultural conflict that plagued the United States.<sup>126</sup> In the intervening decades, the battle lines have become even more hardened and the attacks even more vicious.<sup>127</sup> He noted that from a religious perspective, much of the battle is not between religious faiths, but within religious faiths.<sup>128</sup> Theologically orthodox Christians and Jews have more in common politically with each other than with their progressive co-religionists.<sup>129</sup> Hunter did not address the Niebuhr categories in that book, but from a Niebuhrian perspective, the battles Hunter described are being fought not just between Christians on the right and left, but between *conversionist* Christians on the right and left (with similar battles being fought between what might be called “conversionist” Jews).<sup>130</sup> Those engage in these battles want to convert America—they just have very different visions of what America should be.

Hunter’s 2010 book, *To Change the World: The Irony, Tragedy, and Possibility of Christianity in the Late Modern World*, examines American Christian approaches to culture.<sup>131</sup> Though he does use the same terms as Niebuhr’s *Christ and Culture* (which Hunter refers to as a “masterwork”<sup>132</sup>), Hunter provides harsh critiques of American conservative conversionists (those who are “defensive against” culture), liberal conversionists (seeking “relevance to”

125. See James Davison Hunter, INST. FOR ADVANCED STUD. CULTURE, <https://ias-culture.org/scholars/profiles/james-davison-hunter> (last visited Nov. 4, 2019).

126. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). Hunter has been credited for coining the term “culture wars” to define the modern American cultural conflict, where divides cut across established moral and religious communities. See Jason Willick, *The Man Who Discovered ‘Culture Wars,’* WALL STREET J. (May 25, 2017, 6:07 PM), <https://www.wsj.com/articles/the-man-who-discovered-culture-wars-1527286035>.

127. See Michael Kazin, Opinion, *America’s Never-Ending Culture War*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/opinion/sunday/chicago-protests-1968-culturewar.html> [https://nyti.ms/2o3NoKy].

128. See HUNTER, *supra* note 126, at 119–26.

129. See *id.* at 131–32.

130. See *id.* at 119–26 (describing the differences between how Orthodox Jews and secular Jews view the idea of moral authority).

131. HUNTER, *supra* note 75.

132. *Id.* at 214.

culture), and separatists (seeking “purity from” culture).<sup>133</sup>

Hunter argues that, in fact, Christians have very limited possibilities of affecting the culture—culture is just too complex and Christians generally are far from the centers of cultural influence.<sup>134</sup> In addition, American Christians do not have much to say to the culture—in most respects, we merely reflect the culture.<sup>135</sup> Moreover, Christians have placed most of their culture-converting efforts into politics, to the exclusion of other very important areas of culture.<sup>136</sup> And finally, Christian political action has been either so vicious or so conformist that it has been a poor witness and unlikely to influence anyone.<sup>137</sup> Christian conversionists on both left and right too comfortably legitimate the existing dominant secular political ideologies.<sup>138</sup>

Unlike Anabaptist separatist Christians, Hunter does not reject the use of power.<sup>139</sup> He notes that power is a part of almost all relationships and can be used well.<sup>140</sup> Nevertheless, he acknowledges the dangers of power:

[P]ower tends to become an end in itself. There are many reasons why power grows and why people want to keep it but mostly it is because of the material, social, and symbolic advantages that accompany it. Studies have shown that even voluntary organizations protect their organizational interests against the interests and needs of the very members they are supposed to serve.<sup>141</sup>

Hunter proposes an approach to American culture, which he refers to as “faithful presence,” that does not fit easily into any of the Niebuhr categories.<sup>142</sup> He argues that Christians should seek to be involved in culture generally.<sup>143</sup> Faithful presence might include leadership and the exercise of power within various cultural institutions, but it requires that one act consistently with Christian teaching. However, Christians should have no illusions about

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133. *Id.* at 214–19.

134. *See id.* at 217.

135. *See id.* at 91.

136. *See id.* at 126–27.

137. *See id.* at 91, 193.

138. *See id.* at 223.

139. *See id.* at 176–93 (“rethinking” power).

140. *See id.* at 177–78.

141. *See id.* at 179.

142. *See id.* at 237–47, 241.

143. *See id.* at 247.

their ability to bring about some great transformation of the culture.<sup>144</sup> Hunter points to Jeremiah’s call for the Israelites to “seek the welfare of their captors” while they were in exile in Babylon, as “a word for our time.”<sup>145</sup>

Hunter provides substantial discussion of what faithful presence might mean in business, commerce, visual arts, literature, music, architecture, urban planning, news media, and academia.<sup>146</sup> At one point, he says, “Policy pursued and law practiced in light of the justice of God is a witness to the right ordering of human affairs,”<sup>147</sup> but his general thrust is against Christian involvement (at least for now) in political affairs:

It is not likely to happen, but *it may be that the healthiest course of action for Christians, on this count, is to be silent for a season and learn how to enact their faith in public through acts of shalom rather than to try again to represent it publicly through law, policy, and political mobilization.*<sup>148</sup>

Moreover, Hunter argues that Christians should void conversionist language such as “redeeming the culture,” “transforming the world,” and “reforming the culture,” on the basis that such language “carries too much weight [and] implies conquest, take-over, or dominion, which in my view is precisely what God does not call us to pursue.”<sup>149</sup>

Hunter argues that Christian withdrawal from politics will have little cultural impact.<sup>150</sup> “At best, politics can make life in this world a little more just and thus a little more bearable.”<sup>151</sup> As I will argue in the conclusion to this Essay, the problem is that politics—or the lack of attention to politics—can also make the world a lot less just and a lot less bearable, especially for those who have little power.<sup>152</sup> I am concerned, to use Hunter’s terms, that much of the Christian *presence* in politics in recent decades has not been *faithful*, but in my view, it is important that Christians be politically active—that they

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144. *See id.* at 253–54.

145. *See id.* at 277, 278.

146. *See id.* at 256–66.

147. *See id.* at 254.

148. *See id.* at 281 (emphasis in original).

149. *See id.* at 280.

150. *See id.* at 186.

151. *See id.* at 186.

152. *See infra* Part IV.

bring their values to and exercise faithful presence and leadership in the political as well as the other realms of culture.

### III. LAW’S RESPONSES TO CHRISTIANITY: “THE VIEW OF THE CHURCH FROM THE COURTHOUSE”

Having considered the approaches Christians have taken toward culture over the last two decades, I now turn to the ways the culture has treated these approaches. Using Tom Shaffer’s image, we walk across the street and consider how the legal culture has viewed various manifestations of the church.<sup>153</sup> As we have seen, there has been some movement within Christian circles to withdraw from culture—to choose the “Benedict option”—or at least to withdraw from political engagement—the “faithful presence” option.<sup>154</sup> Some parts of the political and legal culture have sought to encourage this trend—to show Christians the door, if not to push them out. In this section, we will see areas where the culture has pressured Christians away from approaches that seek to influence the culture (synthesist and conversionist) and toward approaches that do not (dualist, separatist, and culturalist). As James Davison Hunter has noted, Christians in “the higher echelons of culture, politics, business, and finance are under great pressure to carefully ‘manage their identities.’ . . . The temptation to be deceptive or dishonest about one’s faith in these circles is enormous.”<sup>155</sup>

*Synthesists*—A blatant attempt to exclude a synthesist from public life came during the U.S. Senate confirmation hearings of Notre Dame Law Professor (now Judge) Amy Coney Barrett.<sup>156</sup> Professor Barrett was an exemplar of the synthesist. For example, as a law student, she was co-author, with her professor (now Catholic University President) John Garvey, of a law review article, *Catholic Judges in Capital Cases*.<sup>157</sup> It thoughtfully addressed, on both theological and philosophical grounds, the challenges posed to a Catholic judge who is assigned a death penalty case.<sup>158</sup> The article was a master work

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153. See SHAFFER, *supra* note 7 and accompanying text.

154. See *supra* notes 81–91; 125–151 and accompanying text.

155. HUNTER, *supra* note 75, at 259.

156. See Laurie Goodstein, *Some Worry About Judicial Nominee’s Ties to a Religious Group*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/amy-coney-barrett-nominee-religion.html> [<https://nyti.ms/2yuVSOa>].

157. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

158. *Id.*

of synthesis, considering the moral teachings of the Catholic church on the death penalty and those situations where such teaching would allow Catholic judges to follow the law or require them to recuse themselves.

Professor Garvey’s and Barrett’s article became an issue during her 2017 Senate confirmation hearings, after her appointment to the U.S. Court of Appeals for the Seventh Circuit.<sup>159</sup> During her questioning, Senator Dianne Feinstein argued:

Dogma and law are two different things and I think whatever a religion is, it has its dogma. The law is totally different. . . . [T]he dogma lives loudly within you, and that’s of concern when you come to big issues that large numbers of people have fought for . . . years in this country.<sup>160</sup>

Of course, Senator Feinstein was not attacking Professor Barrett merely because she was a Catholic; she was attacking her because she was a synthesist Catholic, one who took seriously her faith’s call for her to reconcile that faith with the culture around her. Had Barrett been a dualist or culturalist, who saw no connection between her faith and law, one presumes she would have passed muster with the Senator. Ultimately, Judge Barrett’s nomination was confirmed by the Senate.<sup>161</sup>

*Conversionists*—Conversionists have also been subject to legal challenge. An example at the federal level was the Health and Human Services (HHS) mandate under the Patient Protection and Affordable Care Act of 2010 (commonly known as Obamacare) that employers provide types of medical coverage which some employers believed violated their religious beliefs concerning abortion and the sanctity of life. The HHS mandate provided no religious exemption.<sup>162</sup>

159. See Mark Tushnet, *Is It Anti-Catholic to Ask a Supreme Court Nominee How Her Religion Affects Her Decisions?*, VOX (July 6, 2018), <https://www.vox.com/the-big-idea/2018/7/5/17536344/amy-coney-barrett-supreme-court-short-list-kennedy-trump-replacement-catholic-dogma>.

160. *Nomination Hearing*, SENATE COMMITTEE ON JUDICIARY, at 2:44:40 (Sept. 6, 2017), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations>. Senator Feinstein’s questioning takes place from the 58:36 to 1:04:28 and 2:43:40 to 2:47:10 minute marks. Such questioning violates the spirit, if not the letter, of Article VI, Clause Three of the U.S. Constitution, which provides, “[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.” U.S. CONST. art. VI, cl. 3.

161. *Presidential Nomination 369—Amy Coney Barrett*, U.S. CONG., <https://www.congress.gov/nomination/115th-congress/369> (last visited Nov. 4, 2019).

162. 42 U.S.C. § 300gg (2017).

The United States Supreme Court addressed this issue in *Burwell v. Hobby Lobby Stores, Inc.*<sup>163</sup> The members of the David and Barbara Green family, owners of Hobby Lobby craft supplies stores, were examples of conversionists entering the business field, and they put their money where their mouths were. As the Court noted:

Hobby Lobby’s statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.” . . . In accordance with those commitments, Hobby Lobby . . . stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so.<sup>164</sup>

The Supreme Court held that the Religious Freedom Restoration Act (RFRA), which recognizes religious freedom at the federal level, protected Hobby Lobby from HHS’s “contraceptive mandate.”<sup>165</sup> The Court found that the mandate substantially burdened the Greens’ exercise of religion and would require the Greens to engage in conduct that violated their sincere religious belief that life begins at conception.<sup>166</sup> The Court avoided the question whether providing such coverage was a compelling governmental interest because even if such an interest was compelling, the government could meet that need by a less restrictive method—the government could pay for the coverage itself.<sup>167</sup> The Court held that RFRA protected the religious liberty of for profit corporations, securing the right of conversionist religious persons to enter the business arena, incorporate, and practice their business in accordance with their religious faith.<sup>168</sup>

Under *Hobby Lobby*, RFRA protects the religious liberty rights of businesses from actions of the *federal* government, but that left open the possibility that *states* might act in ways that limit religious freedom. The United States Constitution provides some religious freedom protection from states’ actions, but there is a broad range of states’ actions to which it does not apply. Generally, the Free Exercise Clause does not apply to state laws of general

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163. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682 (2014).

164. *Id.* at 703.

165. *Id.* at 723.

166. *Id.*

167. *Id.* at 730–31.

168. *Id.* at 736.

applicability; it only applies to laws that target religious actors.<sup>169</sup>

A second Supreme Court case involving businesspersons who want to operate their businesses in accordance with their religious faith, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, raised the question of the United States Constitution’s protection of conversionists from *state* officials’ actions.<sup>170</sup> In *Masterpiece*, it was the Colorado Civil Rights Commission (the “Commission”) that sought to limit the businessperson’s ability to bring his faith into the business arena.<sup>171</sup> The Supreme Court held that the Commission’s “consideration of this case was inconsistent with the State’s obligation of religious neutrality.”<sup>172</sup>

Jack Phillips was the owner of the bakery, Masterpiece Cakeshop.<sup>173</sup> He served gay and lesbian customers generally, but he refused to prepare a cake that would celebrate a same-sex wedding.<sup>174</sup> The Commission held that Phillips had violated Colorado’s anti-discrimination law.<sup>175</sup> The Court found that the Commission showed hostility toward Phillips’ religious beliefs,<sup>176</sup> noting the Commission’s criticism of Phillips for trying to bring his religious values into the “public” and “commercial” sphere:

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection [to same-sex marriage].

That hostility surfaced at the Commission’s formal, public hearings, as shown by the record. On May 30, 2014, the seven-member

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169. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

170. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018) (holding that the Commission failed to maintain the neutrality toward religion required of the government under the Free Exercise Clause).

171. *Id.*

172. *Id.*

173. *Id.* at 1724.

174. *Id.*

175. *Id.* at 1723.

176. As evidence of hostility, the Court noted that (1) the Commission compared Phillips’ position to religious arguments made in previous generations for slavery and the holocaust; (2) the Commission implied that his religious arguments were a ruse; and (3) the Commission protected the rights of other bakers to refuse to make cakes with messages with which the bakers disagreed. *See id.* at 1729–30.

Commission convened publicly to consider Phillips’ case. At several points during its meeting, commissioners endorsed the view that *religious beliefs cannot legitimately be carried into the public sphere or commercial domain*, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that *Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.”* A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the . . . law’s impacting *his personal belief system*, he needs to look at being able to compromise.”<sup>177</sup>

In Niebuhrian terms, the Court found that the Commission members criticized Phillips for being a conversionist—for carrying his “religious beliefs” and “his personal belief system”<sup>178</sup> into “the public sphere or commercial domain.”<sup>179</sup> Apparently, it would have been fine had Phillips been a dualist or a separatist—had he kept his “religious” and “private” beliefs in the private sphere.<sup>180</sup> The Court left open the possibility that a state might balance the rights of religious actors and same-sex couples in favor of the same-sex couple if it did so without showing hostility to the religious actors, but the Court (by a six to three vote) identified governmental criticism of a conversionist approach to public and commercial life as unconstitutional hostility to religion.<sup>181</sup>

Government action against those who seek to bring their religious faith into the public sphere can arise from the political right, as well as the political left. Indeed, the Trump administration’s anti-illegal immigrant positions may generate more free exercise claims than the Obama era HHS contraceptive mandate or state anti-discrimination actions combined. In 2018 alone, the

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177. *Id.* at 1729 (emphasis added) (citations omitted).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1732.



United States charged more than 4,500 people with assisting illegal immigrants.<sup>182</sup> Some defendants have raised RFRA defenses.<sup>183</sup>

In *United States v. Hoffman*, the defendants, volunteers with "No More Deaths/*No Mas Muertes*," a "ministry of the Unitarian Universalist Church of Tucson," left food and bottled water in a desert wilderness area of the Cabeza Prieta National Wildlife Refuge where illegal immigrants frequently died of dehydration and exposure.<sup>184</sup> They were charged with entering the Wildlife Refuge without a permit and abandoning property.<sup>185</sup> They admitted the allegations, but raised an RFRA defense, arguing that they acted based on their religious convictions. "Reverend John Fife, a retired Presbyterian minister and 'founding volunteer' of No More Deaths, testified that the 'life of faith is not simply a matter of belief or creed.'" <sup>186</sup> One of the defendants, Oona Holcomb, stated that there was for her "a deep spiritual need and a calling to do work based on what I believe in the world."<sup>187</sup> Citing *Hobby Lobby*, the District Court reversed a magistrate judge conviction,<sup>188</sup> rejecting "the Government's bright-line distinction between 'political' and 'religious' motivations,"<sup>189</sup> and its argument that the Defendants "merely 'recited' religious

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182. Lorne Matalon, *Extending 'Zero Tolerance' to People Who Help Migrants Along the Border*, NPR (May 28, 2019, 4:22 PM), <https://www.npr.org/725716169> ("Figures confirmed to NPS by TRAC, the Transactional Records Access Clearinghouse at Syracuse University, show that in fiscal year 2018 there were more than 4,500 people federally charged for bringing in and harboring migrants.")

183. See, e.g., *United States v. Warren*, No. CR 18-00223-TUC-RCC (BPV), slip op., 2018 WL 6729483 (D. Ariz. Aug. 7, 2018) (charging defendant with helping illegal immigrants avoid an immigration checkpoint; RFRA issue avoided when hung jury led to mistrial; Kelsey Dallas, *How Giving Water to Migrants Became a Religious Freedom Issue*, DESERET NEWS (June 12, 2019, 10:00 PM), <https://www.deseret.com/2019/6/13/20675536>; *United States v. Hoffman*, No. CR-19-000693-001-TUC-RM, slip op., <https://www.documentcloud.org/documents/6763128-2020-02-03-Hoffman-DE22-Order-Reversing.html> (D. Ariz. Feb 3, 2020) (discussing the RFRA defense of volunteers of a religious organization who left food and water for migrants in the desert). In the *Warren* case, defendant's RFRA defense was supported by a law professors' amicus brief. Defendant's Motion to Dismiss Counts 2 and 3, *United States v. Warren*, No. CR 18-00223-TUC-RCC (BPV) (D. Ariz. filed Mar. 30, 2018), WL 4057307.

184. The Pima County Medical Examiner reported that 32 sets of human remains were recovered from the Wildlife Refuge in 2017. *Hoffman*, slip op. at 3.

185. *Id.* at 2.

186. *Id.* at 8–9.

187. *Id.* at 9.

188. *Id.* at 4.

189. *Id.* at 12.

beliefs ‘for the purpose of draping religious garb over their political activity.’”<sup>190</sup>

*Separatists*—In general, Christians in the United States have been allowed to practice their faith within their churches and homes. For example, what is known as the “clergy exception”—drawn from both the Free Exercise and Non-establishment clauses of the First Amendment—protects religious congregations from state regulation of their employment relationships with ministers. The United States Supreme Court unanimously held that such protection extends to churches in their relations with teachers who perform religious functions at church schools.<sup>191</sup>

The major source of government attempts to limit separatist exercise of religious faith has been regulation of parents who homeschool their children. In general, such attempts have been unsuccessful.<sup>192</sup>

#### IV. CONCLUSION

In summary, over the last 20 years, there have been significant groups of Christians who have practiced all of the approaches to law and culture that were identified by Richard Niebuhr in 1951—synthesists, conversionists, separatists, dualists, and culturalists. Though there are examples of each, there has been significant movement within Christian circles away from the conversionist position. Conflicts between American culture and Christian faith have led some Christians to advocate withdrawing from the culture into separate communities where they can live a life more consistent with their faith, though with the hope that such communities will ultimately be able to influence the broader culture. Others, while encouraging involvement with the

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190. *Id.*

191. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (holding that the Americans with Disabilities Act did not apply to teacher who had religious duties at a church school).

192. *See, e.g.,* People v. DeJonge, 501 N.W.2d 127 (Mich. 1993) (holding that a teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors; the United States Constitution’s Free Exercise clause coupled with the right of parents to direct the education of their children requires the application of strict scrutiny); *see also* Dave Dentel, *Illinois, Iowa, New York—Disturbing Trends*, HSLDA (Feb. 27, 2019), <https://hsllda.org/content/hs/state/il/20190227-illinois-iowa-new-york--disturbing-trends.aspx> (website of the Home School Legal Defense Association, identifying proposed legislation regulating home schooling); Scott Woodruff, *Maryland’s “Observe Instruction” Rule Overthrown at Last*, HSLDA (July 23, 2019), <https://hsllda.org/content/hs/state/md/20190723-maryland-observe-instruction-rule-overthrown-at-last.aspx>.

culture generally, have encouraged Christians to hold back from involvement with law and politics in light of the failure of Christians to engage thoughtfully in that arena. Some government officials have sought to keep religious influences out of the public sphere—in Niebuhrian terms, seeking to push Christians from synthesist and conversionist positions, into dualist, separatist, or culturalist positions.

In the conclusion to my 2001 essay, I noted that there are biblical examples of Jews and Christians who faithfully lived out all of the models identified by Niebuhr.<sup>193</sup> I do not think there is one model that is the ideal for all Christians at all times. I suggested that the models might be reconciled by:

1. Balance—there are things Christians can learn from each model;
2. Calling—God may call Christians to play different roles in the same historical situation; or
3. Reading the times—God may call Christians to do different things depending on the historical situation.<sup>194</sup>

I asked:

What of the Christian in America today? I am confident that we do not live in Christian America and that the proper response is not to comfortably label what we have Christian. But who should be the model for Christians in modern America? David, leading Israel to reform; Amos, calling Israel to reform? Joseph, serving in the courts of Pharaoh’s Egypt? Or the early Christians building their own communities in the catacombs of Nero’s Rome? It may depend on whether we live in Israel, Egypt, or Rome. I must confess that I move in my thinking between the options suggested above. It may be that we live in a time of transition, when no one knows in what direction our culture will go or what response a Christian should make.<sup>195</sup>

I think we still live in a time of transition, but my sense is that—using the

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193. Cochran, *Christian Traditions*, *supra* note 1, at 251 (identifying Moses and Solomon as synthesists, Hebrew kings and prophets as conversionists, early Christians as separatists, and Joseph in Egypt and Daniel in Babylon as dualists; “God called David to be king and he called his prophet Nathan to challenge David’s abuse of power.”).

194. *Id.* at 150-152.

195. *Id.* at 151.

analogies above—the United States has moved toward Joseph’s Egypt, a place where Christians might serve the good purposes of the state, but must be careful not to get caught up in its evil purposes. To the extent Joseph was faithful (administering the program to collect grain to feed people during the famine<sup>196</sup>), he is a good role model; to the extent he was not faithful (having the people of Egypt sell themselves to Pharaoh for grain<sup>197</sup>), he is a bad role model (and we can learn from bad role models). Hopefully, in our case, Joseph’s Egypt will not become Moses’s Egypt.<sup>198</sup>

For many years, I presented the Niebuhr options with a bit of distance, not choosing between them, but pointing out the pros and cons of each. I noted the attractiveness of the separatist option—avoiding the violence and coercion that is an inevitable part of governing. Indeed, I love the “turn the other cheek” ethic and the gentle Mennonite people I have known. But a trip to Rwanda as a part of Pepperdine’s Global Justice Program changed my assessment of the Anabaptist rejection of state power.

In Rwanda, I visited the Ntarama church into which 5,000 Tutsis had fled seeking refuge during the 1994 genocide. It did not help. They were all slaughtered.<sup>199</sup> When the bodies were removed, their blood-stained clothing was piled high in the aisles of the church.<sup>200</sup> Glass enclosed cases displayed the skulls of many, including children, who had been killed in the slaughter, many skulls bearing deep machete scars.<sup>201</sup> These were representative of the 800,000 to a million Tutsis who were slaughtered.<sup>202</sup> Then-President Clinton has said that his failure to send troops to Rwanda was the biggest mistake of his presidency, and that if the United States had sent in a minimal force, a third of the deaths could have been prevented.<sup>203</sup> I had a head knowledge of such tragedies, but the emotional impact of the visit to Ntarama church led me

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196. See *Genesis* 41.

197. See *Genesis* 47:13–26.

198. See *Exodus* 1.

199. See Peter Gwin, *Revisiting the Rwandan Genocide: How Churches Became Death Traps*, NAT’L GEOGRAPHIC (Apr. 2, 2014), <https://www.nationalgeographic.com/photography/proof/2014/04/02/revisiting-the-rwandan-genocide-how-churches-became-death-traps> (describing the events of the massacre at Ntarama church).

200. See *id.*

201. See *id.*

202. *Id.*

203. Dana Hughes, *Rwanda, and What Bill Clinton Left Out When He Criticized Obama on Syria*, ABC NEWS (June 13, 2013), <https://abcnews.go.com/blogs/politics/2013/06/rwanda-and-what-bill-clinton-left-out-of-criticism-of-obama-on-syria>.

to conclude that those who reject all state violence are irresponsible. I came to believe that the responsible exercise of power by those in political offices is part of being faithful to Christ. Of course, all wrongs are not genocide, but I believe the same principles apply to all manner of injustice. The depths of sin and the depths of the fall are so great that humans need the restraint of government. Though there are risks of abuse, power must be limited by power, and to do so is a Godly office.

Augustine, who was mindful of the danger of the abuse of power, argued: “[The rule of Christians] is beneficial, not so much for themselves as for their subjects.”<sup>204</sup> I wish that had been the world’s lived experience. The record of Jesus’s followers exercising political power is mixed, to say the least. Power corrupts. Christian leaders have been guilty of triumphalism, pragmatic power grabs, unnecessary violence, and unjust war that often has been no different from that of others who have exercised political power. They often have done exactly what Jesus accused the Gentile rulers of doing in his day—lording it over those under their control and giving special favors to their friends and family members.<sup>205</sup>

Nevertheless, my prayer is that God will raise up leaders who will rule as servants, in the way that Jesus taught,<sup>206</sup> and that law will come to reflect the central Christian moral teaching—love of neighbor.<sup>207</sup> Christian involvement in politics and law is especially important for the sake of the powerless. On many issues, from slavery to child labor to factory conditions to civil rights, Christians (with others) have led the law in a compassionate direction. And some of history’s greatest evils arose because Christians failed to bring their faith to the public square. In Nazi Germany and the Jim Crow South and today’s refugee crises, the great fault of many Christians has been their failure to act on the basis of their religious values. If law is to be humane, it may need divine guidance. As much as I dislike what politics has become in the United States, as much as I feel “homeless” with the current political options, and as much as I would like to take a break from paying attention to American

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204. SAINT AUGUSTINE, *THE CITY OF GOD, BOOKS I–VII* (THE FATHERS OF THE CHURCH, VOL. 8) 194 (Demetrius B. Zema & Gerald G. Walsh trans., Catholic Univ. Am. Press 1950).

205. *Matthew* 20:25–27 and 17:24–26.

206. *Matthew* 20:20–28; *Mark* 35–45 (New International Version) (“[W]henever wishes to be great among you must be your servant.”); see Cochran, *Jesus, Agape, and Law*, *supra* note 42, at 28–34 (exploring Jesus’s notion of leadership as servanthood).

207. *Mark* 12:31 (“Love your neighbor as yourself.”); see Cochran, *Jesus, Agape, and Law*, *supra* note 42, at 13–37 (exploring the relationship between agapic love and law in Jesus’s teaching).

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law and politics, I think it is important for Christians of all political stripes, to remain engaged in it and to bring Christ’s values to bear on it.

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