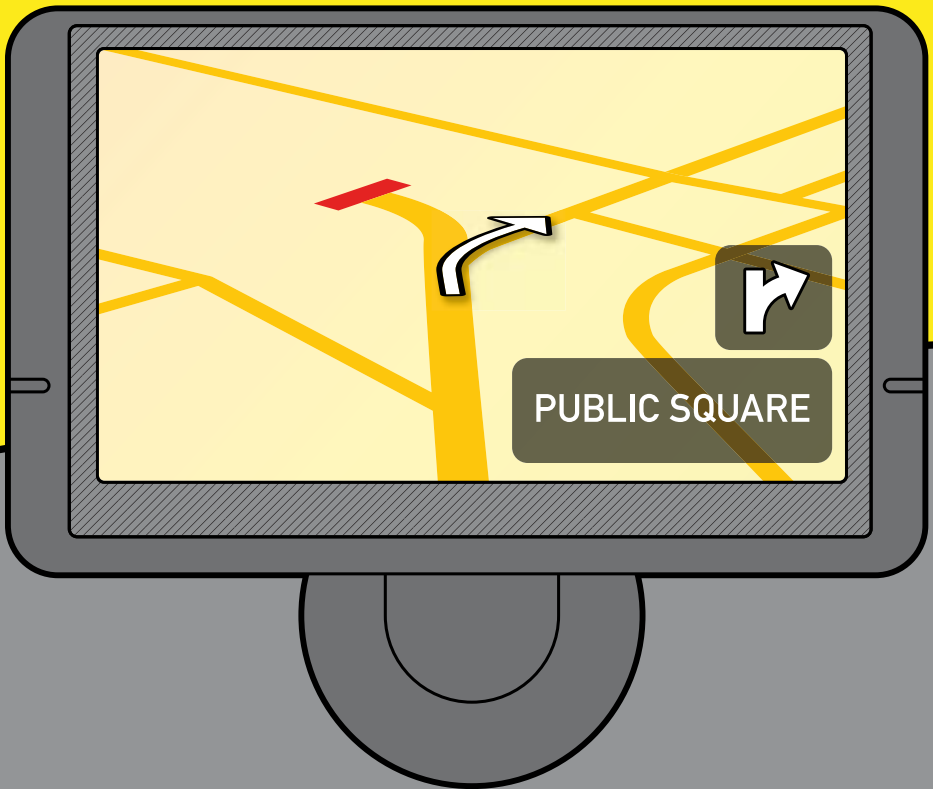


EXITING A DEAD END ROAD

A GPS for Christians in Public Discourse



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“The Holy Spirit does not descend into the City of Man in the form of a dove. He comes only in the endlessly energetic spirit of justice and love that dwells in the man of the City, the layman.”

John Courtney Murray

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From '48 to '68: The Decline of Universal Rights, and the Cultural Ascent of the Latex Left

By **Piero A. Tozzi**, Senior Legal Counsel, Alliance Defense Fund*

In the 1996 case *Romer v. Evans*, the United States Supreme Court struck down a Colorado state constitutional amendment that had prohibited municipalities and local governments within the state from enacting ordinances granting special treatment to “homosexual persons.”¹ The Court deemed the initiative to have been driven by “animus” toward an identifiable minority class, i.e., those characterized as having or engaging in “homosexual, lesbian, bisexual orientation, conduct, practices or relationships,” and thus ran afoul of the Equal Protection Clause found in the Fourteenth Amendment to the U.S. Constitution.

Accepting such a declaration at face value,² has such a doctrine been equally applied toward all minority groups who are the target of discernable “animus” visited upon them by legislators or fellow citizens? Or have favored “minorities” emerged? If so, why is that?

Acceptable Animus?

The U.S. historian Arthur Schlesinger, Sr., once remarked that anti-Catholicism was “the deepest held bias in the history of the American people.”³ How did such an ingrained bias manifest itself, and are there residual effects of such bias – or “animus” – in the laws and constitutions of the various states? If so, would not such enactments be subject to challenge under the holding in *Romer*?⁴

During the colonial period, English settlers, in particular Puritans, brought with them anti-Catholic views from the mother country.⁵ The looming presence of Catholic New France to the North until Britain’s decisive victory in 1763 fed

such fears, as did Spain's vast empire to the South.⁶

Colonial laws, other than in Maryland, banned Catholics from holding office or practicing their Faith freely. Even the freedom that had existed in Maryland, founded as a Catholic refuge in 1633 by Lord Baltimore (George Calvert), had been stripped following the Glorious Revolution of 1688 in the mother country.⁷

The commitment of one man – Charles Carroll of Maryland – to the revolutionary cause did have an outsized impact in ensuring that denominational tolerance would find its way into the federal constitution and be extended to his coreligionists.⁸ The only Catholic to sign the Declaration of Independence, Carroll also led a secret mission to French Canada to attempt (unsuccessfully) to induce his recently-subdued co-religionists to join in rebellion against the crown.⁹

Nevertheless, throughout the nineteenth century, a Protestant majority viewed immigrant Catholics as a despised minority, beholden to an alien, monarchical Church governed from Rome and thought to be never fully assimilatable into American society. Incited in part by salacious propaganda such as the “Diary of Maria Monk,” animus sometimes erupted into violence, such as with the burning of the Ursuline Convent in Charleston, Massachusetts in 1834.¹⁰ Anti-Catholicism spawned the Know-Nothing Party, so named for its members’ tendency to disclaim knowledge when outsiders pried too closely.

Reacting to the nativist sentiment that greeted them, and viewing the public school system as a vehicle for converting immigrant Catholic children into Protestants, the Catholic hierarchy, led by men such as New York’s indefatigable Bishop John Hughes – known by the sobriquet “Dagger John” – created a shadow parochial school system.¹¹

Confronted by the spread of a parochial school system that provided an alternative (though assimilationist) narrative beyond that provided for by state-run schools, the politically dominant Protestant political class met Catholic pleas for an equitable distribution of state educational aid with hostility. Inspired by Sen-

ator James Blaine of Maine, who had proposed a federal constitutional amendment that would have prohibited aid to “sectarian” schools, states such as New York passed amendments to their state constitutions cutting off aid to parochial schools while continuing to subsidize Protestant education in public schools.¹²

Such hostility continued well into the twentieth century, up through the election of John F. Kennedy as President. There were even attempts to ban Catholic education entirely, rejected in the landmark parental-rights case *Pierce v. Society of Sisters*, with its oft-quoted phrase that a “child is not the mere creature of the state.”¹³

Thus if one were looking for evidence of legislated “animus” towards an identifiable minority group, and hence legislation or constitutional provisions that would be seemingly ripe for culling under the *Romer* standard, the Blaine amendments would be Exhibit A. Yet they continue to persist as part of the American constitutional landscape, and are even defended by large, well-entrenched individuals and organizations.

These defenders of the status quo are, however, no longer the antagonists of “papists” of generations ago, but rather “progressive” actors such as the American Civil Liberties Union who found the Colorado constitutional amendment at issue in *Romer* abhorrent.

Indeed, a funny thing had happened on the way to the Culture War, as evangelical Christians and Catholics found that they had much in common with each other, in particular when confronted by an aggressive secular liberalism whose cultural and political assertions often posed a direct challenge to the truth claims of Christians, regardless of denomination.¹⁴

It is the secular Left which now has come to embrace the Blaine Amendments, seeing them as a bulwark of that “wall of separation” between Church and State – an artifice of the Supreme Court hit upon in the middle-decades of the 20th century, rather than being an organic parcel of the Republic and constitutional jurisprudence.¹⁵ Yet breaches of any “wall” are more likely to be forays made by the State into the domain of the Church. Indeed in recent years in

the United States, we have encountered the phenomenon of legislation specifically directed at Catholic institutions which seeks to bring them into conformity with the cultural assumptions of the secular Left – witness the spread of “Contraception Mandate” legislation originating in California, the legislative history for which clearly indicates that the intent was to target Catholic institutions, forcing them either to abandon integral principles or to restrict their activities in the public square.¹⁶ Catholic adoption agencies, such as that of the Archdiocese of Boston, are likewise forced to cease their good work of finding homes for hard-to-place children due to their refusal to acquiesce in a social experiment that proclaims as a matter of dogma that “non-discrimination” requires placement of children in same-sex couple households and implicitly trumps the best interests of the child.¹⁷

It would appear that among a certain social segment, hostility toward Christianity – Catholicism in particular – remains a respectable, perhaps even necessary, “animus.”¹⁸ As those who defend once-shared cultural assumptions are enemies of Progress, they are to be contained at a minimum, or silenced where politically possible.¹⁹ Echoing Voltaire, the modern Enlightened would cleanse the public square of such ‘infamy.’²⁰

But how is that we have gotten here, with once shared cultural values viewed with disdain, and those defending such values seen as obstacles to Progress that must be contained if not destroyed? There are two very different moral narratives at work here, with one side defending institutions such as marriage and conscience rights that were once a given, and the other saying that such relics must give way, to be trumped by new-found rights based on one’s preferred sexual habits or access to abortion. And if such trends are pronounced in the United States whose people, as Alexis de Tocqueville noted, are notoriously religious,²¹ they are even more advanced in more secularized countries that were once considered part of the Christian West.

The Short-lived “Restoration” of ‘48

Writing shortly before his death, the British writer of historical fiction George MacDonald Fraser noted that:

No generation has seen their country so altered, so turned upside down, as children like me born in the 20 years between the two world wars. In our adult lives Britain’s entire national spirit, its philosophy, values and standards, have changed beyond belief. Probably no country on earth has experienced such a revolution in thought and outlook and behavior in so short a space ... I am deeply concerned for the United Kingdom and its future. I look at the old country as it was in my youth and as it is today and, to use a fine Scots word, I am scunnered ... My generation has seen the decay of ordinary morality, standards of decency, sportsmanship, politeness, respect for the law, family values, politics and education and religion, the very character of the British.²²

While in part the lament of an unreconstructed Tory, Fraser’s trenchant observations mark more than just the passage of time. Like many of his generation in Britain and elsewhere, Fraser fought in World War II, and he witnessed a tectonic shift in morals in the intervening decades.

Comfortable assumptions that there was moral order to the universe had been shaken to the core by the Second World War and Nazism²³ – a reemergence of primal, pagan barbarism that arose from the fetid, amoral swamp of Weimar Germany, stoked by revanchist policies imposed following the century’s first global conflagration. Post-World War II, there was an attempt at restoration, to reaffirm and reassert the truth claim that a universe governed by objective moral norms truly exists. It is impossible to understand the impetus for both the Nuremburg trials – which held the Nazi leadership accountable for crimes against humanity, even though they were “just following orders” or acting in accordance with positive law – and the Universal Declaration of Human Rights (UDHR) without understanding the desire for restoring firm ground: a universe whose rules were governed by a natural law.

Nuremberg exposed and rejected the amoral, relativistic basis of legal positivism.²⁴ It reasserted the primacy of a higher law, against which the actions of men “just following orders” would be judged. The Universal Declaration of Human Rights of 1948 was a most noble attempt to codify universal rights possessed by all, based upon the objective bedrock of natural law.²⁵

This revulsion at the barbarism of the Nazis also extended to policies they favored, such as eugenics, euthanasia and abortion.²⁶ The irony is that now the inversion of values is complete, with proponents of new “rights” agitating for policies often identical to what the Nazis put into practice.²⁷ New “rights” – such as the “right” to abortion or “rights” based upon polymorphously perverse practices – are pitted against rights that are truly fundamental, in particular the right to life, but also the right to conscience, free exercise and free expression.²⁸

Two forces were at work to undermine the moral cohesion and shared cultural consensus formed by the post-war Restoration of '48 – a philosophy of radical moral autonomy and that of cultural Marxism, that is to say, a Marxism concerned less with political and economic class struggle and more with the dialectics of social relations, such as those based upon “gender.”

The Latex Left and the Spirit of '68

Liberal theories of radical autonomy²⁹ and cultural Marxism appear on the surface opposed, yet it is the amalgamation of these two world views that has given rise to what James Kalb has termed the “tyranny of Liberalism”: politically correct intolerance which condemns those who seek to defend a Burkean social order as purveyors of an “animus” which must be extirpated, elevating in its place a nihilistic philosophy destructive of the common good and ultimately incapable of replacing the civilization it is in the process of dismantling. It is the Spirit of 1968 unloosed upon the world – the student radicals who once demonstrated against the Establishment, cheered Ho Chi Minh and spat upon soldiers returning from Viet Nam whilst fornicating to the music of Jefferson Air-

plane, have now become the Establishment: Joschka Fischer has put away the tie dye and put on a tie.

To speak of a Common Good – that is, “that Good which is common to all,” as opposed to the greatest “good” of the majority or the minority “good” of an oligarchy – presupposes a common vision of an objective moral order, similar to what the framers of the UDHR of 1948 envisioned. That one might not apprehend the Good for oneself – such as one in the grips of vice – does not mean that a Good to which the individual should adhere his conduct to does not exist, regardless of what a relativist might believe or say (“well, that might be right for you but a liberated free thinker such as me yadda yadda...”).³⁰

The worldview of '48 saw certain things as intrinsically violative of the Common Good: abortion was recognized as the taking of human life, and though there were outlier nations such as Sweden, the civilized world beyond the Soviet bloc upheld this consensus. Homosexual conduct was recognized as deviant behavior which degraded not only society as a whole, but more importantly those individuals who engaged in it. Marriage and sexual behavior was understood to be ordered toward the sustaining of civilization and the thriving of future generations: per the Supreme Court of the United States, “Marriage and procreation are fundamental to the very existence and survival of the race.”³¹

Yet this common consensus began to erode in the 50s, soon after the restoration had taken place. “Morals legislation” was attacked, most famously in the Wolfenden Report of 1957, with H.L.A. Hart taking up the cause of eliminating penalties for consensual acts done in private – though as his chief antagonist, Lord Patrick Devlin, pointed out, acts done in private can have public consequences.³² In the United States in the 1950s, the American Law Institute proposed a Model Penal Code that called for the decriminalization of abortion. Development of the Pill in the early 1960s opened up a Pandora’s box of promiscuity. As a cult of the autonomous individual developed, and a caste of priests such as Ronald Dworkin sought to create a framework to justify the moral selfishness of the “me generation,” with its libertine ethos.³³

As the framework for the deconstruction of sexual morality of the West and its replacement with an ethos of radical moral autonomy was being laid there was a concurrent development of cultural Marxism. Building upon the thought of the Frankfurt School, which applied Marxism beyond its traditional emphasis upon politics and economics, cultural Marxism focuses upon social, familial and sexual relations.³⁴ Marxism views the world through the prism of dialecticism, with opposing forces of thesis and antithesis, oppressor and oppressed. Applying principles of class struggle beyond its traditional boundaries, all fundamental social relations are viewed as inherently in conflict. Writing in the 1950s, Simone de Beauvoir and other feminist theorists projected a worldview that is inherently dialectical: men are the oppressors, and women are the oppressed, and the two sexes exist in irreconcilable tension.³⁵ This then is extended to groups such as homosexuals, who are oppressed by the heteronormative majority, and indeed, by constraints imposed by biology itself; while de Beauvoir still speaks of women as a *second* “sex” – the second of two sexes, presumably – queer theorists speak instead of “gender” as a malleable social construct which is inherently fluid, and capable of morphing beyond two sexes into a variety of gender identities.³⁶ Indeed, that concept – “gender” as a social construct – is implicit in de Beauvoir’s dictum that “One is not born a woman, one becomes one,” even though her choice of the word “sex” bespeaks a vocabulary rooted in a more convention-bound era. To those enthralled to such an ideology, family and marriage, as well as legitimizing institutions such as the Church, are seen as inherently oppressive institutions which must be abolished.

The American novelist Herve Allen once noted that “each new generation is a fresh invasion of savages,” and with the rise of the baby boom generation, the barbarians swarmed the ramparts.³⁷ 1968 was an *annus horribilis*: students revolted in universities throughout the Western world, and the Beatles released the White Album. Capitulating college deans turned the keys to the citadel over to the barbarians, and set the stage for what Gramsci termed the “march through the institutions” over the decades that followed. Their preoccupations

were political: ending social injustice, the war in Viet Nam, racism, etc. They were also sexual, in keeping with the promiscuity of the era. The protest phrase “Make Love, Not War,” captures the twin concerns.

These twin concerns of the generation of '68, politics and sex, were given theoretical coherence by Cultural Marxists. This lesson has implicitly been absorbed by even the Supreme Court of the United States, with the concern for “sexual minorities” evident in the *Romer* decision.³⁸ Such theorists also provided justification for “animus” directed at those who are seen as enemies of progress and sexual liberation, such as the Church.

In his 1965 essay “Repressive Tolerance,” Herbert Marcuse spoke of the necessity of a one-sided “tolerance” that is inherently illiberal and inequitable: “Liberating tolerance, then, would mean intolerance against movements from the Right and toleration of movements from the Left.” The use of “undemocratic means” against oppressive classes was justified: “Withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security [and] medical care...” While the polemics here is discernibly Marxist, his identification of those who are oppressed, i.e. victims of racial and religious discrimination, is somewhat conventional.³⁹

However, by the time Marcuse penned “An Essay on Liberation” – a work he dedicated to the student radicals of 1968 – Marcuse had become more socially subversive, seeing the radical potential of aligning his program for revolution with the values of the emerging Latex Left. The moral order, as reflected in concepts such as “obscenity” is to be undermined: “Obscenity is a moral concept in the verbal arsenal of the establishment, which abuses the term by applying it, not to expressions of its own morality, but to these of another.”⁴⁰ Those who identify with the emerging sexual counterculture can be recruited to the revolutionary cause: “[T]he new political consciousness of the vital need for radical change emerges among social groups which ... are (relatively) free from the in-

tegrating, conservative interests and aspirations, free for the radical transvaluation of values.”⁴¹ Accordingly, per Marcuse, “Political radicalism thus implies moral radicalism: the emergence of a morality which might precondition man for freedom.”⁴² Freedom here is that of the morally autonomous actor, whose world view is now married to a Cultural Marxism to form a hybrid ideological consciousness, that of the “Latex” Left.

The Demise of Universal Rights, and the Rise of Acceptable Animus

Under such a world view, members of “oppressed” classes, be they women, racial minorities or homosexuals, are cast as inherently virtuous and can never do any wrong. Conversely, animus towards oppressors is justified as part of the class struggle and necessary in the Progressive march towards Liberation.

From such a perspective, one cannot truly speak any longer of universal rights, nor of harmony, be it harmony within the family or solidarity among social classes or generational cohorts. “Rights” become balkanized – witness the trend among recent United Nations treaties addressing the rights of Women, Children and the Disabled, as opposed to universal themes. In the hands of politicized advocates, “rights” become a weapon to attack the oppressor, and to destroy “oppressive” institutions such as the family.⁴³

Look for example at the Convention on the Rights of the Child (CRC), and how rights under the convention have been interpreted in certain circles. While it goes without saying that children have rights by virtue of membership of the human family, and while the CRC in certain places affirms the family as the social unit most capable of sustaining the best interests of the child,⁴⁴ the CRC is also a sloppily-drafted treaty that, while acknowledging that “the child, by reason of his physical and mental immaturity, needs special safeguards and care,”⁴⁵ elsewhere (a) treats the child as a morally-autonomous bearer of rights as if born fully formed as Athena from the head of Zeus,⁴⁶ and (b) pits the rights of

the child against those of his parents, who are no longer treated as his natural guardians best able to protect the child's best interests, but rather as (dialectical) oppressors. The Committee on the Rights of the Child, which is tasked with receiving reports from states under the treaty, has used its position press for access to abortion by minors,⁴⁷ limit the ability of parents to withdraw their children from public school sex ed courses,⁴⁸ and to have the State intervene to ensure parents were respecting children's right to privacy.⁴⁹ Activists (such as those on the Committee) purport to vindicate the rights of children against their parents, with the state assuming the role of guarantor of the child's rights.

When one adapts a dialectical framework, certain seeming double standards instead appear justified. The selective enforcement of the Voting Rights Act by the Obama Administration's Department of Justice under Attorney General Eric Holder, whereby a case against members of the Black Panther Party who had engaged in clear race-based intimidation of voters was dropped, can be rationalized where one assumes that only whites as the traditional oppressor class can be racists, whereas racial minorities cannot, no matter how objectively racist the behavior they engage in.⁵⁰

Likewise, "hate crimes" – a pernicious innovation that undermines the principle of equal treatment under the law by treating similarly-situated classes of victims differently – are only "hate crimes" if committed against a traditionally-oppressed group, such as homosexuals. A religion such as Islam falls within the oppressed-victim narrative, but there is an apparent disinterest if not outright dismissal if the target is the Catholic Church, with a silent underlying assumption being that it had what was coming to it. Philip Jenkins notes as an example the assault upon Montreal's Catholic Cathedral in 2000 by anarcho-feminists who "sprayed atheist and anarchist graffiti on the altar," tried to overturn the tabernacle, threw condoms around the sanctuary and "destroyed or removed hundreds of hymnbooks or missals." They received scant coverage in the media.⁵¹ Voltaire would have rejoiced: "*Écrasez l'infâme!*"

Moreover, traditionally-recognized fundamental rights are diminished, and

must give way to new “rights,” such as “reproductive rights” and “rights” based on sexual orientation and gender identity – rights that are the (illegitimate) heirs of a fusion between the sex-obsessed ideology of the atomized individual and cultural Marxism. Thus the very right to life is sacrificed to “reproductive rights” of the abortion-minded feminist, as are fundamental rights of conscience.⁵² Free expression must give way to hate speech codes, as the case of Pastor Åke Green in Sweden and numerous cases from Canada illustrate.⁵³ Indeed, President Obama’s appointee to the United States Equal Employment Opportunity Commission, Chai Feldblum, a self-identified lesbian, has said “There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win because that’s the only way that the dignity of gay people can be affirmed in any realistic manner. I’m having a hard time coming up with any case in which religious liberty should win.”⁵⁴

Ultimately, such “rights” are not grounded in any objective norms, but rather, are subjective and depend upon an assertion of political will – most pointedly in the case of abortion, that of the powerful over the powerless. Contemplating the effect this has on the human rights project of ’48, the philosopher Nicholas Wolterstorff has posited that the project is unsustainable given the loss of a notion of a transcendent Deity in whose image man is created and reliance instead upon power to assert “rights.”⁵⁵

Of course any system of thought that holds out as its highest aspiration principles of extreme autonomy in matters sexual and reproductive – contraception, abortion, sodomy, homosexual “marriage,” euthanasia – in combination with one that seeks to overcome the oppressive structures of family and “patriarchy,” must contend with a reality imposed by biology, and consequences that flow from an apparent unwillingness to reproduce. Again, to cite what was at one time a generally accepted truism, “Marriage and procreation are fundamental to the very existence and survival of the race.”⁵⁶ Europe at present is being hollowed out demographically, as it has embraced a Culture of Death while extolling the oxymoronic virtue of “reproductive rights” – or the “right” to end re-

production and reject fertility essential to the perpetuation of the race. Such are the values of a “Latex” Left, which combines the libertine culture of the condom with the dialectical world view of feminists and kindred “queer theorists” who see “gender” relations as one of perpetual conflict as opposed to complimentary harmony.

This is not without precedent, as the sociologist Carle Zimmermann noted in his great work “Family and Civilization.”⁵⁷ Societies pass through a period where the family declines in its central importance and where the contribution of the family is devalued. Such societies are marked by the rise of the autonomous individual, and a fraying of sexual mores. Such societies also are subject to displacement by more vigorous societies with strict tribal codes that govern family and sexual matters. This may be where Europe stands today, with a vibrant Muslim sub-population poised to replace the decadent and tired post-’68 generation.

GPS: Where to From Here?

Though it is (very) late in the day, one must recall that universal rights – what was bequeathed by the generation of ’48 – is our patrimony, and as such, our patrimony must be reclaimed. Further balkanization of rights must be resisted, and any new iteration of rights must be read in harmony with, and not in dialectical opposition to, universal and fundamental human rights, starting with the most basic right, the right to life. Thus, for example, a treaty such as the Convention on the Rights of the Child – as flawed as it is, lending itself to mischief – should be interpreted as consistent with universal rights.⁵⁸ Rights talk and human rights mechanisms can be reclaimed, but one must be willing to participate in the debate and not cede the field to those who would devour fundamental rights in the name of newly-fabricated “rights.”

Thus one must resist encroachment upon fundamental rights, not just for our sake but for that of society as a whole. Witness the Manhattan Declaration,

which draws distinct lines in the sand:

Because we honor justice and the common good, we will not comply with any edict that purports to compel our institutions to participate in abortions, embryo-destructive research, assisted suicide and euthanasia, or any other anti-life act, nor will we bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriage or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar's. But under no circumstances will we render to Caesar what is God's.⁵⁹

When we speak the Truth, it must be done in and with Charity. Timidity is not the proper Christian response when met with accusations of fostering "animus" or engaging in "hate speech" and "intolerance." True Charity does not enable those who engage in self-destructive behavior by silence, but rather fraternally speaks the truth and seeks to correct. As with Saint Peter, we must never be afraid to give an account for the Hope that resides within us, yet we must do so with gentleness.⁶⁰

Above all, one must take to heart the virtue of Hope. The Generation of '68 will pass (as must we all), and, having embraced sterility, the day will come when there is no one left to follow them. The act of raising children, and passing on the Faith, is the most singular act of resistance, and an act of Hope.

In that regard, certain passages of Scripture resonate particularly with each generation. For ours, it is the words of Deuteronomy: "You have a choice before you between life and death, the blessing and the curse. Choose life, so that you – and your descendants – may live."⁶¹

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- * The author would like to particularly thank Gudrun Kugler for posing the questions that provoked this article. The author is indebted to the friends and colleagues whose insights over the course of many discussions over the years have germinated in this essay, in particular Dennis Saffran, Eamon Moynihan, and Gerald Russello.
- 1 517 U.S. 620 (1996).
 - 2 Justice Antonin Scalia dissented vigorously, noting that any such “animus” amounted to “moral disapproval of homosexual conduct,” akin to disapproval the law gives to polygamy, cruelty to animals, and indeed, under Supreme Court jurisprudence existing at the time of the decision, acts of sodomy. 517 U.S. at 644 (*Scalia, J., dissenting*).
 - 3 *Quoted* in Philip Jenkins: *The New Anti-Catholicism: The Last Acceptable Prejudice* 23 (Oxford 2003). Not to be outdone, John Hingham described anti-Catholicism as “the most luxuriant, tenacious tradition of paranoiac agitation in American history” *Id.*
 - 4 The U.S. Supreme Court has sidestepped the issue. *See Locke v. Davey*, 540 U.S. 712 (2004) (upholding denial of a state college scholarship to a theology student while noting in passing Blaine Amendments were “linked” to anti-Catholicism).
 - 5 *See generally* Kevin Phillips, *The Cousins’ Wars: Religion, Politics, Civil Warfare, and the Triumph of Anglo-America* 11-13, 68-69 (Basic Books 1999); *see also* Michael Barone, *Our First Revolution: The Remarkable British Upheaval That Inspired America’s Founding Fathers* 25-27 (2007) (recounting English anti-Catholicism, with its bonfires on Guy Fawkes Day and stories drawn from Foxes’ *Book of Martyrs*).
 - 6 *See* Fred Anderson, *Crucible of War: The Seven Years War and the Fate of Empire in North America, 1754-1766* (Knopf 2000).
 - 7 *See* Thomas O’Brien Hanley, SJ, *Their Rights and Liberties: The Beginnings of Religious and Political Freedom in Maryland* (1959).
 - 8 “Congress shall make no law respecting the establishment of religion, nor restricting the free exercise thereof.” U.S. Const. amend. 1. This restriction on the federal congress allowed states to maintain state established churches, with Connecticut not abolishing its state church until 1818, and Massachusetts continuing to subsidize the Congregational Church until 1833. *See generally* Philip Hamburger, *Separation of Church and State* (2002).
 - 9 For a recent, acclaimed biography of Carroll, see Bradley J. Birzer, *American Cicero: The Life of Charles Carroll* (2010).
 - 10 *Recounted* in Jeanne Hamilton, O.S.U., *The Nunnery as Menace: The Burning of the Charleston Convent, 1834*, available at <http://www.ewtn.com/library/HUMANITY/BURNING.TXT>.
 - 11 *See* William J. Stern, “How Dagger John Saved New York’s Irish,” *City Journal*, Sept. 1997.
 - 12 Blaine, a man many thought destined to become President, received his electoral comeuppance in the election of 1884, when Dr. Samuel Burchard, an overly-enthusiastic Protestant minister, exhorted the Republican National Committee to stand for Blaine and against “rum, Romanism and rebellion.” This antagonized the New York Irish, driving them out to vote for Blaine’s Democratic rival, Grover Cleveland, thereby (barely) providing Cleveland with a victory in the State and ensuring victory in

the electoral college.

- 13 268 U.S. 510 (1925).
- 14 See generally Richard John Neuhaus, *The Naked Public Square* (1986); see also *Evangelicals and Catholics Together: The Christian Mission in the Third Millennium*, First Things, May 1994.
- 15 See Philip Hamburger, *Separation of Church and State* (2004). Originating with a phrase contained in a letter from Thomas Jefferson to the Baptist congregation of Danbury, Connecticut, modern separationist jurisprudence begins with *Everson v. Board of Education*, 360 U.S. 1 (1947).
- 16 Contraception mandate legislation forces ostensibly Catholic institutions to either provide contraceptives, use of which Catholic teaching defines as intrinsically immoral, or not provide any prescription drug coverage at all to employees. See Piero A. Tozzi, *When Conscience Clashes With State Law and Policy: Catholic Institutions: A Response to Susan Stabile*, 46 J. of Catholic Leg. Studies 161 (2007) In addition to its selective appreciation of “animus” as a motivating factor, the Supreme Court has been inconsistent in reviewing legislation that, while ostensibly of general application, selectively targets disfavored religions – Catholicism in the case of the contraception mandate legislation. *Compare Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) with *Catholic Charities of the Diocese of Sacramento Inc. v. Superior Court*, 85 P3d 67 (Cal.), cert. denied sub nom. *Catholic Charities of Sacramento, Inc. v. California*, 543 U.S. 816 (2004).
- 17 Piero A. Tozzi, *Whither Free Exercise: Employment Division v. Smith and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?*, 48 J. of Catholic Leg. Studies 269 (2009)(discussing background and studies indicating that same-sex parenting is contrary to a best-interests of the child).
- 18 As Peter Viereck once quipped, *pace* Schlesinger, “Catholic-baiting is the anti-Semitism of the liberals.” Peter Viereck, *Shame and Glory of the Intellectuals* 45 (1953).
- 19 See James Kalb, *The Tyranny of Liberalism: Understanding and Overcoming Administered Freedom, Inquisitorial Tolerance, and Equality by Command* (2006). Progressive intolerance is often directed against those who defend the natural definition of marriage, as some homosexual activists called for them to be “fined, fired and even jailed until they relent.” David Benkoff, *Why California Gays Shouldn’t Celebrate State Court Ruling*, Seattle Post-Intelligencer, May 21, 2008, at B1.
- 20 The quote “*Écrasez l’infâme!*”, or more fully, “*Quoi que vous fassiez, écrasez l’infâme, et aimez qui vous aime,*” is attributed to Voltaire – the “infamous thing” understood as being the Church.
- 21 Alexis de Toqueville, *Democracy in America* 208 (Henry Reeve trans., Colonial Press 1990)(1835) (noting that religion accounts for the vitality of the young nation’s democratic republicanism).
- 22 George MacDonald Fraser, *The Last Testament of Flashman’s Creator: How Britain Destroyed Itself*, Daily Mail, Jan. 5, 2008, available at <http://www.dailymail.co.uk/news/article-506219/The-testament-Flashmans-creator-How-Britain-destroyed-itself.html>. George MacDonald Fraser was the re-creator of the saucy fictional character Harry Flashman, who first appeared as the bully expelled from the Rugby School in Thomas Hughes’ mid-Victorian era novel *Tom Brown’s School Days*. Granted, there is an embedded irony in setting up Fraser as the spokesman for a moral code since gone: his literary recreation is the quintessential rake, striding Victoria’s vast empire as if it were his personal seraglio.
- 23 See, for example, the writings (and death) of Primo Levi, especially *Se Questo è Un*

- Uomo* (1947).
- 24 For a critique of positivism and a defense of natural law by an opponent of Nazism, see Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Liberty 1998)(1936).
 - 25 See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002); Jacques Maritain, *The Rights of Man and Natural Law* (Doris C. Anson trans., 1951); *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Habib C. Malik ed., 2000). The influence of natural law thinking can be seen clearly in provisions concerning the family, which is recognized to be a prepolitical institution: “The family is the natural and fundamental group unit of society and entitled to protection by the state and society.” UDHR art. 16(3); “Parents have a prior right to choose the kind of education that shall be given to their children.” UDHR art. 26. Cf. Aristotle, *The Ethics of Aristotle: The Nicomachean Ethics* 251 (J.A.K. Thomson ed., 1953 (n.d.)) (“The love between husband and wife is evidently a natural feeling, for Nature has made man even more of a pairing than a political animal in so far as the family is an older and more fundamental thing than the state....”).
 - 26 See Rita Joseph, *Human Rights and the Unborn Child at 10* (2009) (“[T]he Nazi record of decriminalizing abortion in Poland and the Eastern Territories was singled out at the Nuremberg Trials for severe censure. Instructions by Nazi authorities issuing directives to decriminalize abortion were furnished as evidence for the count of crimes against humanity.”).
 - 27 The population control philosophy of the International Planned Parenthood Federation, for example, is firmly rooted in pre-war eugenic theory. See Matthew Connelly, *Fatal Misconception: The Struggle to Control World Population* (2008).
 - 28 This theme is developed in two fine essays by Jakob Cornides: *Human Rights Pitted Against Man*, 12 *Int’l J. Hum. Rts.* 107 (2008) and *Natural Law and Un-Natural Law*, *International Organizations Law Group Legal Studies Series No. 2* (2010).
 - 29 Such a vision of radical moral autonomy can be seen in the language of the United States Supreme Court in *Planned Parenthood v. Casey*, or the poem “Invictus.” *Compare Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)(“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”) with William Ernest Henley, “Invictus” in *The Oxford Book of English Verse* (1900)(“Out of the night that covers me/Black as the pit from pole to pole/I thank whatever gods may be/For my unconquerable soul....It matters not how strait the gate/How charged with punishments the scroll/I am the master of my fate/I am the captain of my soul.”).
 - 30 See Robert George, *Making Men Moral* 71-73 (1995).
 - 31 *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
 - 32 Lord Patrick Devlin, *The Enforcement of Morals* (1959). Acts of sodomy, for example, do have public health consequences; roughly 2 percent of the male population engages in homosexual sodomy, yet accounts for over half of HIV/AIDS cases. See John O.G. Billy et al., *The Sexual Behavior of Men in the United States, Family Planning Perspectives*, Alan Guttmacher Institute (March/April 1993)(roughly 2.3% of men over past 10 years prior to the study had engaged in homosexual conduct) and Center for Disease Control, *Basic Statistics*, Division of HIV/AIDS Prevention, www.cdc.gov/hiv/stats.htm (men in this category account for over half of AIDS cases).
 - 33 See, e.g., Ronald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Vintage Books 1994).

- 34 Marx does, however, state as “self-evident” that the “abolition of individual economy” and the setting up of a communal economy is something that is “inseparable from abolition of the family.” Karl Marx, “The German Ideology,” in *The Marx-Engels Reader* at 157 n.3 (2d ed. Robert C. Tucker ed. 1978) (1845).
- 35 Simone de Beauvoir, *The Second Sex* (1952)(1989).
- 36 See *The Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Mar. 2007).
- 37 Hervey Allen, Anthony Adverse (1933).
- 38 Following *Romer’s* recognition of practitioners of homosexual acts as a distinct minority, it was only a question of time before of a majority of the Supreme Court would overturn its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld the constitutionality of anti-sodomy laws of the States. See *Lawrence v. Texas*, 539 U.S. 558 (2003). Traditionally, courts had not considered those who engage in certain acts and adopt a particular lifestyle to be a distinct minority group on par with a racial or ethnic minority, reflecting the traditional cultural consensus. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (“Homosexuality is not an immutable characteristic; it is behavioral and fundamentally different from traits such as race, gender or alienage.”).
- 39 Herbert Marcuse, *Repressive Tolerance* (1965).
- 40 Herbert Marcuse, *An Essay on Liberation* 8 (1969).
- 41 *Id.* at 54.
- 42 *Id.* at 10.
- 43 *Compare* Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, General Recommendation 19 (“Violence Against Women”), Commentary on Article 16 (and article 5) para. 23, adopted during the 11th Session (1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (“Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies.”) with UDHR art. 16(3) (“The family is the natural and fundamental group unit of society”).
- 44 See, e.g., CRC art. 9.1 (“States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with the applicable law and procedures, that such separation is necessary for the best interests of the child.”).
- 45 CRC preamble.
- 46 See e.g., CRC art. 13 (concerning freedom of expression and the ability for the child to access “information and ideas of all kinds” – a dangerous “right” when internet predators prowl chatrooms).
- 47 CRC, “Adolescent Health and Development, General Comments No. 4 (2003) at para. 31.
- 48 Concluding Observations: United Kingdom of Great Britain and Northern Ireland, 18th Session (1995) at para. 14.
- 49 Concluding Observations: Japan, 18th Session (1998), at para. 36.
- 50 See “Voting Rights Official Calls Dismissal of Black Panther Case a “Travesty of Justice,” FoxNews.com, September 24, 2010, available at <http://www.foxnews.com/politics/2010/09/24/voting-rights-official-calls-black-panther-dismissal-travesty-justice/>
- 51 Philip Jenkins: *The New Anti-Catholicism: The Last Acceptable Prejudice* 3 (2003).
- 52 See *discussion* in Cornides, *Human Rights Pitted Against Man, supra*.
- 53 These examples are summarized in Mats Tunehag’s excellent contribution to this volume, to which the reader is kindly referred.

- 54 Kathleen Gilbert, Obama Appoints Lesbian Activist to EEOC Board, LifeSiteNews, Mar. 29, 2010, available at <http://www.lifesitenews.com/ldn/2010/mar/10032914.html>; *see also* Chai R. Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, Becket Fund for Religious Liberty Symposium, *available at* <http://www.becketfund.org/files/4bce5.pdf>.
- 55 Nicholas Wolterstorff, Justice: Rights and Wrongs (2008).
- 56 *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
- 57 Carle C. Zimmerman, Family and Civilization (1947)(abridged ed. 2008).
- 58 *See, e.g.*, the reservation of the Holy See concerning the CRC: “[The Holy See] interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents.”
- 59 www.manhattandeclaration.org
- 60 1 Peter 3:15.
- 61 Deuteronomy 30:19.