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The Institute for Christian Legal Studies (ICLS),
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and Christian Legal Society.

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

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STATEMENT OF PURPOSE

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

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

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

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

EDITORIAL POLICY

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

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

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



CHANGING THE WORLD THROUGH SCHOLARLY FAITHFULNESS

BY MICHAEL P. SCHUTT, JOURNAL EDITOR IN CHIEF

Professor Natt Gantt has been thinking about the moral formation of law students for a long time. Dean Gantt is a founding co-director of the Center for Ethical Formation and Legal Education Reform at Regent University School of Law. The mission of CEFLER is to produce lawyers who have “an understanding of the nature and purpose of the legal profession and are committed to the ethical practice of law.” Under Dean Gantt and his colleague Ben Madison, CEFLER has developed mentor programs, course offerings, and events that facilitate the ethical Christian character formation of their law students.

The work of CEFLER is, in part, a response to the 2007 landmark report of the Carnegie Foundation, *Educating Lawyers*,¹ which found that law schools need to place greater emphasis on cultivating students’ moral formation and understanding of what it means to practice law with professional and personal integrity. That mission is also at the heart of the mission of the *Journal of Christian Legal Thought*.

The gist of *Education Lawyers* is that American legal education has a problem concerning “professional identity.” Among other things, the study notes:

- Training in legal skills in American law schools “is not matched by similar training” in serving clients or “solid ethical grounding.”
- In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.
- Students do not address “how their moral concerns may be relevant to their work.” Not surprisingly, this leads to confusion and cynicism.

Dean Gantt has spent his career seeking to address these issues in the context of Christian legal education. I remember having a conversation with him more than a decade ago about the tendency of law students (and lawyers) to separate their perceived role as lawyers from their morality as human beings. He pointed me to an empirical study that found that most of the young lawyers surveyed resolved moral conflict in their law practices by ignoring the moral consequences of their lawyering and instead focusing on only their role as advocates addressing purely legal issues.²

In his own 2003 essay on lawyers’ “moral counseling” of clients,³ Gantt explored the connections between morality, integrity, and postmodernism. He suggested that lawyers “neglect” moral conversation with clients because they are *unable* to “integrate their moral concerns into their legal counseling.” His conclusion, borne out again and again in his own studies and those of others, is that there are “social and philosophical obstacles” inherent in modernity that make this sort of moral “integration” difficult.⁴

These obstacles come from fragmentation and dualism in the modern world: “work is divided from leisure, private life from public, and corporate from the personal.”⁵ This dualism is evident in the pervasive “compartmentalization of life” that we see across all professions. Christians of all faith backgrounds and in every mode of work struggle to find meaning in their jobs and to understand what real vocational stewardship looks like in every occupational context. But moral integration is simply irrelevant if a lawyer divorces private morality from public life and work. This compartmentalization and fragmentation can be exacerbated by the nature of law practice, so the fragmentation of

¹ WILLIAM M. SULLIVAN, ET AL, *EDUCATION LAWYERS: PREPARATION FOR THE PRACTICE OF LAW* (2007)

² Robert Granfield & Thomas Koenig, “It’s Hard to be a Human Being and Lawyer”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. Va. L. Rev. 495 (2003).

³ Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 Regent U. L. Rev. 233 (2003-2004).

⁴ *Id.* at 241, citing ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

⁵ *Id.*, at 241, citing MACINTYRE, *AFTER VIRTUE* 204.

modernity works against lawyers and law students in a number of ways.

In addition, the postmodern relegation of religion to the merely personal is a direct and diabolical invitation to lawyers to see their calling as one in which they are primarily a mouthpiece or “hired gun” for their clients, rather than autonomous moral beings in conversation with them.⁶

As Dean Gantt has pointed out, there are consequences of this displacement for the moral conversations we seek in law. There is no longer common moral ground or common source for a concept of the common good.

What is to be done?

Dean Gantt’s article in the pages that follow is an attempt to answer that question—or at least continue the dialogue. He tells us that it is possible to teach *agape* to law students as part of a law school curriculum in virtue. It is another step in an important conversation about legal education, morality, and integrity.

Professor Carl Esbeck has been thinking faithfully and writing prodigiously about religious liberty since before he joined the University of Missouri Law School faculty in 1981. As one of the foremost experts in the country on religious freedom, Professor Esbeck has been involved in all of the important conversations surrounding religious liberty and the relationship between church and state over the past four decades. While Esbeck directed CLS’ Center for Law & Religious Freedom, for example, he played an important role in the congressional advocacy behind “RLUIPA,” the Religious Land Use and Institutionalized Persons Act of 2000. He has written extensively in virtually every area touching Church and State.

His scholarly work has been only a part of his service to the national community of Christian lawyers. His role in advising, encouraging, and serving the staff and members of the Christian Legal Society is a thankless

one. Yet he has served quietly in various roles as an advisor, author, board member, confidant, encourager and friend to the staff and membership for more than 35 years. We at CLS are grateful for his generosity and service through his friendship, academic faithfulness, and integrity.

Professor Esbeck also played a central role in the creation and implementation of “Charitable Choice” in the Federal Welfare Reform Act of 1996, the “only bipartisan success in this century having to do with religious freedom of charitable groups,” so it is a privilege to have him step in to “speak of religious liberty” in this issue of the journal, helping us commemorate the 20th anniversary of Charitable Choice.

Mike Schutt is Editor-in-Chief of the Journal of Christian Legal Thought and Associate Professor of Law at Regent University. He directs the Institute for Christian Legal Studies, a cooperative ministry of the law school and the Christian Legal Society. Schutt also serves Christian Legal Society as Director of its Law Student Ministries. He serves on the faculty of Worldview Academy and on the boards of trustees of LeTourneau University, Worldview Academy, and Worldview at the Abbey.

He is the author of Redeeming Law: Christian Calling and the Legal Profession (2007). His other publications include numerous essays and articles as well as several law journal articles, including Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity in the Rutgers Law Journal. He is the editor-in-chief of the Journal of Christian Legal Thought.

Schutt is an honors graduate of the University of Texas School of Law. Before entering academia, he practiced law in Fort Worth, Texas with the firm Thompson & Knight, LLP. He is married to Lisa, and they have three grown children and four grandchildren. They live in Mount Pleasant, Texas.

⁶ This engagement with Dean Gantt’s work is recounted in MICHAEL P. SCHUTT, REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION (2007). See also Cross & Gavel Audio (Podcast), no. 62, *Professor Natt Gantt on Law School and the Ethical Formation of Lawyers*, <http://crossandgavel.libsyn.com/professor-natt-gantt-on-law-school-and-the-ethical-formation-of-lawyers>.



TEACHING AGAPE TO LAW STUDENTS

BY LARRY O. NATT GANTT, II

Scripture speaks boldly about the call of Christians to love. This Christian love is best captured in the principle of *agape*, the Greek word used by the gospel writers for “love” in Christ’s greatest commandment to “Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength” and “Love your neighbor as yourself.”¹ *Agape* is an other-centered orientation to love God and love others through service and selflessness.² It involves more than compassionate efforts to meet others’ material needs; as Professor Jeffrie Murphy writes, *agape* “is centrally concerned with promoting [the] moral and spiritual good” of others—“helping their souls or character to grow in *virtue*.”³

This biblical call to *agape* is clear, and in fulfilling our responsibility to *agapic* love, Christian legal educators should be concerned about the “moral and spiritual good” of their students and should see part of their job as helping their students “grow in virtue.”⁴ Teaching others to love, however, is far from easy; and given the often competitive nature of law school culture and the legal profession generally, teaching law students to love is particularly challenging. Yet the Christian call to love remains. Christian legal educators must therefore ask ourselves not just whether we are teaching our students legal doctrine, analysis, and skills; we must consider whether we are teaching love.

This instruction first is not simply communicating to students the content of what true *agapic* love means. Such an understanding is important, particularly how *agape* contrasts with other forms of love both in New Testament times and how we often view love today.⁵ What is more important, however, particularly as we properly construe legal education as a formative process, is that students are *transformed* such that they more robustly appropriate *agape* in their lives as law students and ultimately lawyers.⁶ With this goal in mind, four overarching principles are critical to achieving this transformation in our students.

1. STUDENTS MUST “BUY IN” TO THE BELIEF THAT AGAPE IS IMPORTANT

Since the publication in 2007 of two seminal reports on legal education, one by the Carnegie Institute for the Advancement of Teaching and Learning in *Educating Lawyers* (Carnegie Report),⁷ and the other by the Clinical Legal Education Association in *Best Practices for Legal Education* (Best Practices Report),⁸ much has been written on the need for law schools to help their students develop a “professional identity.”⁹ This focus on professional identity has represented a remarkable reorientation in legal education, which for years had focused on developing student professionalism. In contrast to professionalism, which concentrates on encouraging

¹ *Mark* 12:29-31 (NIV); see also *Matthew* 22:34-40; *Luke* 10:25-37 (providing the parable of the Good Samaritan to define the meaning of “neighbor” in the commandment itself).

² See MILLARD J. ERICKSON, *CHRISTIAN THEOLOGY* 319 (2d ed. 1998) (calling *agape* “unselfish”).

³ Jeffrie G. Murphy, *Christian Love and Criminal Punishment*, in *CHRISTIANITY AND THE LAW: AN INTRODUCTION* 219, 222-23 (John Witte Jr. and Frank S. Alexander eds., 2008) (emphasis in original).

⁴ See *id.* at 223.

⁵ For instance, it is important to contrast *agape* with *philia* (friendship love) and *eros* (erotic love). *Id.* at 219.

⁶ See *Romans* 12:2 (“Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God’s will is—his good, pleasing and perfect will.”) (NIV).

⁷ WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS* (2007) [hereinafter *EDUCATING LAWYERS* in notes and the Carnegie Report in text].

⁸ ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007) [hereinafter the Best Practices Report].

⁹ For instance, the 2015 follow-up book to the Best Practices Report included four articles under its section titled “Professional Identity Formation.” *BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* 253-301 (Deborah Maranville et al. eds., 2015).

professional conduct and behaviors, professional identity engages law students and lawyers at a deeper level by challenging them “to internalize principles and values such that their professional conduct flows naturally from their individual moral compass.”¹⁰ Incorporating “identity” into the concept is particularly powerful for Christian lawyers and law students because it underscores how our professional actions should flow from our identity as believers in Christ.

In the midst of this reorientation in legal education, however, law students need to understand why the reorientation is needed. The 2007 Reports’ dire call for change stemmed partly from studies showing how law schools have traditionally done a poor job of developing healthy intrinsic values in their students.¹¹ Much of the law school culture and the culture of the legal profession pushes students and lawyers to be externally motivated, that is, motivated by external rewards such as grades, competition successes, and litigation victories. Studies have shown, though, that individuals who primarily seek personal fulfillment through these external markers are often unfulfilled.¹² As Professor Larry Krieger writes:

All of the data provides empirical support for the concern that our legal training has precisely the opposite impact on students from that suggested by our rhetoric - it appears to undermine the values and motivation that promote professionalism as it markedly diminishes life satisfaction. All indications are that when students graduate and enter the profession they are significantly different people from those who arrived to begin law school: They are more depressed, less service-oriented, and more inclined toward undesirable, superficial goals and values.¹³

To promote an appreciation for agape, law students need to hear these hard facts from us as legal educators. Students must be sensitive to the “hidden curriculum” in law schools that subtly pushes them towards self-centeredness and away from the agape of the greatest commandment.¹⁴ Moreover, as educators, we may believe that staying true to internal values is more important than meeting external markers, but if the culture of the law school (and the legal profession) does not affirm that priority, students will not believe it. Law schools must therefore create programs and award structures that praise students not just for academic success, but for selflessness and service to others. One promising movement in this direction is the increasing efforts by law schools to encourage students to participate in community service and pro bono activities as a professional responsibility.¹⁵

Students also must hear that agape is relevant to their professional success. If we conceptualize agape broadly as care for others that leads to a service orientation, those qualities are attributes law firms and legal employers are seeking. Professor Neil Hamilton has done a tremendous amount of research in this area, and his surveys of legal employers and clients affirm that employers and clients do not just want lawyers who are smart or savvy in certain legal skills, they want lawyers who care.¹⁶ In sum, students need to hear that principles like agape are not unimportant idealistic goals; they are important to their personal fulfillment and their professional success.

2. AGAPE (AND CHARACTER DEVELOPMENT GENERALLY) CANNOT BE TAUGHT OVERNIGHT

If our goal as educators is students’ internalization of certain values, this goal cannot be achieved in one class session, by one professor, or in one extracurricular program. Character development *takes time*. As Aristotle

¹⁰ Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, but Does Anyone Really Care? How Law Schools are Failing to Develop Students’ Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339, 344-45 (2015).

¹¹ See, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002); Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (Spring 2005).

¹² See Krieger, *Inseparability*, *supra* note 11, at 429-30.

¹³ *Id.* at 434.

¹⁴ See EDUCATING LAWYERS, *supra* note 7, at 31-32 (describing how the “hidden curriculum” in law schools sends messages that undermine students’ development of ethical values).

¹⁵ See Directory of Law School Public Interest and Pro Bono Programs, available at https://www.americanbar.org/groups/pro-bono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/lawschool_directory_home.html (data compiled by the American Bar Association) (last visited May 12, 2017).

¹⁶ See, e.g., NEIL W. HAMILTON, ROADMAP: THE LAW STUDENTS’ GUIDE TO PREPARING AND IMPLEMENTING A SUCCESSFUL PLAN FOR MEANINGFUL EMPLOYMENT 7-38 (2015); Neil W. Hamilton, *The Qualities of the Professional Lawyer*, in ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER 1, 2-7 (Paul A. Haskins ed., 2013).

observed, virtue development can require habituation or, what Professor Murphy calls, “becoming by doing.”¹⁷ Therefore, if we want student transformation, we should commit to a pervasive program that underscores and affirms the importance of agape throughout the curriculum.¹⁸ Law schools might take, as discussed below, many specific curricular approaches to promote agape; but the main point is that it cannot be relegated, for instance, to the Professional Responsibility course, which students usually take in their second year. Students in their first year of study must be exposed to the importance of care for others, and that exposure must be affirmed by multiple voices throughout the curriculum.

Moreover, to best promote this internalization, students should be instructed in certain skills in a certain order. Cognitive psychologists like Lawrence Kohlberg speak of stages of moral development; and legal educators similarly should recognize how agape appreciation can develop in stages throughout the curriculum.¹⁹ For instance, students might first be exposed to the information noted above about the tendency towards moral atrophy in law school and to information about the content of certain professional values. They then might be exposed to instructional techniques designed to promote their self-awareness. They next might work through exercises and assignments to promote agape by developing their ethical sensitivity and empathy. They finally might work to apply agape in experiential real-life settings as a way to promote moral courage and moral passion.²⁰

3. TEACHING AGAPE MUST INVOLVE VARIED INSTRUCTIONAL METHODS

Values development is unlikely to happen simply by having a law professor preach to students from the front of the room. To promote agape, students must internalize

this virtue, and a key component to this internalization is helping students develop empathy. Empathy, or being able to put ourselves in another person’s shoes, is the trait psychologists have identified as essential to the ethical sensitivity required to make wise ethical decisions.²¹ From a Christian perspective, promoting empathy further reflects the virtue of seeing all those around us as created in God’s image.²²

Theorists have discussed various teaching methodologies that promote empathy, and because empathy and agape are related, those approaches are relevant here. Essentially, what we must do as educators is help our students develop the skill of being able to see a situation from another person’s perspective. On some level, legal education does a good job at this; we teach students, for instance, how to anticipate and counter the arguments on the other side of a position. But do we help students *feel* what it might be like to be in the other person’s shoes? Have we helped students develop their emotional intelligence? On this level, we do a poor job.

One important teaching methodology to help with this development is the use of role plays. Medical schools have utilized this approach by having medical students play the role of patient and “feel” what it must be like to have a medical condition or a frustrating hospital experience.²³ Like the hospitalized medical students, law students could be taught directly that compassion not only for clients but also for judges and others in the legal system is a perspective they need to develop. Putting law students in the position of assuming the role of a client discussing his or her case with a lawyer could provide valuable insights that many lawyers miss.²⁴

Another relevant methodology is reflective journaling, and studies have confirmed that such journaling improves medical students’ patient empathy.²⁵ To promote

¹⁷ Murphy, *supra* note 3 at 224-25.

¹⁸ The Carnegie Report advocates that law schools similarly should take a “pervasive” approach throughout their curriculum to foster students’ professional identity formation. EDUCATING LAWYERS, *supra* note 7, at 151-52.

¹⁹ See Madison & Gantt, *supra* note 10, at 370-71 (discussing the Kohlberg model of moral reasoning development and how it applies to educating law students).

²⁰ See *id.* at 382-90 (outlining the incremental skills law students need to develop their professional identity).

²¹ *Id.* at 386-90.

²² Genesis 1:27.

²³ See, e.g., Michael Wilkes et al., *Towards More Empathic Medical Students: A Medical Student Hospitalization Experience*, 36 MED. EDUC. 528 (2002).

²⁴ See Larry O. Natt Gantt, II & Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* 253, 264-65 (Deborah Maranville et al. eds, 2015).

²⁵ Isabel Chen & Connor Forbes, *Reflective Writing and Its Impact on Empathy in Medical Education: Systematic Review*, 11 J. EDUC. EVAL. HEALTH PROF. 20 (2014); see also Jenny B. Schuessler et al., *Reflective Journaling and Development of Cultural Humility in Students*, 33 NURSING EDUC. PERSPECTIVES 96 (2012) (describing study in which nursing students developed their empathic humility towards their patients through reflective journaling).

agape, reflective journaling in law schools should not only ask students to reflect on how the students feel about a client interaction. Rather, reflective journaling should also ask the students to put themselves in their client's shoes. In medical schools, for instance, students have been tasked with journaling reflectively on illnesses they or those close to them have faced as a way promote student empathy.²⁶ In legal education, we similarly could ask our students to write about how they would feel facing a certain legal problem, such as sitting in an attorney's office if they just had lost one of their children in a tragic car accident and were considering a wrongful death suit. What would *they* want the lawyer to tell them? How would *they* want the lawyer to show agape?

Further relevant teaching methodologies include Appreciative Inquiry, a technique from communication theory to promote active listening and perspective-taking,²⁷ and experiential education, such as clinical courses, externships, and internships in which students work with professional supervisors and real clients. The variety of the above instructional techniques highlights the research finding that practicing empathy increases the capacity for empathic reaction.²⁸ Such empathic reaction, in turn, can foster Christian agape.

4. TEACHING AGAPE MUST OCCUR IN MORE SETTINGS THAN JUST THE CLASSROOM

Educational experts underscore how students glean important lessons about character development from a school's culture, independent of what happens in the classroom or in curricular programs. As Professor Richard Morrill wrote as early as 1980, "To reach its full potential, values education will have to encompass the total life of the campus."²⁹ Thus, as legal educators, we cannot just talk about agape in the classroom and even assign exercises on the topic, we must live it and promote it throughout our entire school culture. It should

affect how we interact with our co-workers, clients, and students and how we conduct all our programs. To model agape that helps our students "grow in virtue,"³⁰ we cannot simply discuss it in class; we must act on it in tangible ways that demonstrate our concern for the moral development of our students.

In this vein, much has been written about teachers as models and mentors, and this relevance cannot be overlooked. The millennial generation of many of the law students of today especially draws meaning from the narrative and from relationships in professional settings,³¹ so relationships with faculty and with other professional mentors must be seen as fundamental to their professional development. At Regent University School of Law, we conduct a program in which all students are paired with faculty mentors who provide curricular guidance and career planning coaching to students, as well as a program in which incoming students can be partnered with judges and practicing attorneys who will mentor them throughout their time as students. Other law schools also have mentoring programs for students.³² As Morrill notes, such modeling and mentoring involves a relationship that promotes "common commitments, promises, and values."³³ Through such mentoring, Christian educators, lawyers, and judges can model agape to students.

In sum, teaching agape is not as easy as teaching the blackletter law; most of us are not trained as legal educators to teach love. But as the Carnegie Report stresses, legal education, whether we recognize it or not, "forms minds and shapes identities."³⁴ As legal educators, we therefore have a wonderful opportunity to shape our students' identities in a way that cultivates in them agapic love as a positive, motivating force leading them to serve God and serve others.

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²⁶ Sayantani DasGupta & Rita Charon, *Personal Illness Narratives: Using Reflective Writing to Teach Empathy*, 79 *ACADEMIC MEDICINE* 351 (2004).

²⁷ See Gantt & Madison *supra* note 24, at 265 (describing an instructional model employing appreciative inquiry).

²⁸ For an example of such research on empathy, see Lian T. Rameson et al., *The Neural Correlates of Empathy: Experiences, Automaticity & Prosocial Behavior*, 24 *J. COGNITIVE NEUROSCIENCE* 235 (2012).

²⁹ RICHARD L. MORRILL, *TEACHING VALUES IN COLLEGE: FACILITATING DEVELOPMENT OF ETHICAL, MORAL, AND VALUE AWARENESS IN STUDENTS* 110 (1980).

³⁰ Murphy, *supra* note 3, at 223.

³¹ See E. Ng, S. Lyons & L. Schweitzer, *New Generation, Great Expectations*, 25 *J. BUS. PSYCH.* 281, 283 (2010).

³² See Madison & Gantt, *supra* note 9, at 364-65 (describing results from law school survey in which 23 schools indicated having formal mentor programs for students).

³³ MORRILL, *supra* note 29, at 114-15.

³⁴ *EDUCATING LAWYERS*, *supra* note 7, at 2.

serves as co-director of Regent's Center for Ethical Formation and Legal Education Reform. Professor Gantt received his A.B. in psychology and political science, *summa cum laude*, from Duke University; his Juris Doctor, *cum laude*, from Harvard Law School; and his Master of Divinity, *summa cum laude*, from Gordon-Conwell Theological Seminary.

Before joining Regent Law in 2000, he served as a law clerk to the late Honorable Donald S. Russell of the United States Court of Appeals for the Fourth Circuit; as an associate at Wiley, Rein & Fielding in Washington, D.C.;

and as a proxy analyst at Fidelity Investments in Boston, Massachusetts. Professor Gantt has taught Professional Responsibility, Civil Procedure, Sales, and Contracts.

He has written extensively on topics related to legal ethics and legal education and has spoken in various venues related to those topics, ranging from speaking at the 2015 African Christian Legal Education Summit to serving from 2010 to 2013 as a faculty member for the Virginia State Bar Harry L. Carrico Professionalism Course.



AN INTRODUCTION TO CHARITABLE CHOICE AND THE FAITH-BASED INITIATIVE

BY CARL ESBECK

Organized charitable activity in the United States is provided through a variety of non-profit entities formed under the corporation law of a state of the charity's own selection, usually the jurisdiction where the charity has its headquarters or principal place of business. A charity's exemption from federal income taxation is a matter addressed by the Internal Revenue Code § 501(c)(3), with exemption from state income taxation usually pegged to the federal exemption. A qualifying charity is not only exempt from federal income taxes but able to receive contributions that are tax deductible by the donor. The latter is made possible by IRC § 170(c), permitting a donor to claim a deduction on the donor's federal income tax return. It is the latter—being qualified to receive tax-deductible contributions—that is most prized by charitable nonprofits.

The United States government has extensive funding programs to assist people with health care and so-

cial welfare needs.¹ Religious as well as nonreligious private-sector charities seek these monies via competitive grant applications and contracts. Religious social service providers come in an amazing variety, size, and effectiveness: from community development projects, to world disaster relief organizations, to drug addict rehabilitation centers, to those working to rescue women and children being trafficked, to refugee settlement, to church-affiliated shelters for victims of domestic violence, to maternity homes, to placement of children in foster homes, to programs to ease the reentry of prison inmates back into the population.

There has been a galactic shift in the U.S. constitutional law concerning government funding of religious organizations.² This shift lagged by a few years a comprehensive reform in U.S. charitable funding. In August 1996, under the rubric of "charitable choice" Congress passed and President Bill Clinton signed 42 U.S.C. § 604a, requiring that billions in welfare grant mon-

¹ The U.S. government lists more than 1,500 active social service programs. See Executive Office of the President of the United States, Office of Management and Budget, *Catalog of Federal Domestic Assistance* (Government Printing Office, 2016), <https://www.cfda.gov>. Add to that number the Affordable Care Act, Medicaid, and the Veterans Administration. Counting state and local governments, along with private-sector charities, further increases the number.

² Throughout the 1970s to the early 1990s, the conventional wisdom was that direct government funding of faith-based social service organizations was prohibited by the Establishment Clause. That began to breakdown with the decisions in *Bowen v. Kendrick*, 487 U.S. 589 (1988) (allowing direct federal aid to adolescent counseling centers, including religious centers), and *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing direct federal funding of special education teachers that went to religious school campuses to provide services). The sea change was confirmed by *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (allowing direct federal aid to primary and secondary schools, including religious schools), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (allowing school vouchers for parents to select their child's school, including religious school).

ies, known as temporary assistance for needy families (“TANF”), were to be made available to competing social service providers selected without regard to religion. Grant awards were now to go to the most capable providers. No longer was the question for faith-based grant applicants “Who are you?” but “Can you do the job?” If a faith-based provider can deliver the specified services to the poor or needy, then it may compete for a grant on a level playing field with secular providers.

Charitable choice was expanded to three additional welfare programs during the remaining Clinton years. By executive order issued December 2002, President George W. Bush expanded charitable choice rules to cover all federal social service grants and cooperative agreements.³ Recently, during the presidency of Barack Obama, Bush-era equal-treatment regulations were revised to add greater detail to the rights of beneficiaries.⁴

Charitable choice (or the “faith-based initiative”) implemented three principles with respect to federal social service programs: (1) there will be no discrimination in the award of grants on account of the religious character of the provider; (2) when receiving a grant, faith-based providers do not forfeit their religious integrity or autonomy, including their ability to staff on a religious basis; and (3) the people who ultimately are to benefit from the programs of aid must be served without religious discrimination, while at the same time these beneficiaries are vested with a right to object to being served by a religious provider and referred to another provider (the “choice” in charitable choice).⁵

With respect to the second principle, when the grant funding goes directly to the provider then the Establishment Clause of the First Amendment requires that no

federal money go for explicitly religious programming such as worship or proselytizing. In this instance, any explicitly religious activities would have to be privately paid for and separated in time or location from the government-aided program. On the other hand, when the federal aid is indirect, such as by a voucher or scholarship, full compliance with the Establishment Clause is accomplished by the choice initially exercised by the beneficiary in his or her selection of the provider (religious or secular). Hence, in the case of indirect funding there is no requirement that faith-based providers separate their explicitly religious programming.⁶

With charitable choice, the institutional autonomy of faith-based providers is guaranteed in concrete ways so that providers retain their religious character: (1) religious providers do not have to alter their polity or form of internal governance, thus permitted to retain requirements such as board members subscribing to a religious creed;

(2) religious providers do not have to remove religious art or icons from their place of business, or eliminate religious words from their name; (3) religious providers do not waive their exemption from employment non-discrimination laws; and (4) while subject to government financial audit as to federal grant monies, religious providers can limit the scope of that audit by keeping separate accounts of their federal monies and private-source funds.⁷ The result has been a richness of highly motivated providers that are diverse institutions motivated by a variety of particular faiths but open to serving all in need.

The faith-based initiative is the only bipartisan success in this century having to do with religious freedom of charitable groups.⁸ The equal-treatment regulations,

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³ Executive Order 13279, “Equal Protection of the Laws for Faith-Based and Community Organizations,” 67 Fed. Reg. 77,141 (December 12, 2002), as amended by Executive Order 13672, 79 Fed. Reg. 42,971 (July 20, 2014).

⁴ See “Final Regulations Implementing Executive Order 13559, Fundamental Principles and Policy Making Criteria for Partnerships with Faith-Based and other Neighborhood Organizations,” 81 Fed. Reg. 19,353 (April 4, 2016).

⁵ 42 U.S.C. § 604a(e) (2012).

⁶ This funding arrangement was upheld as consistent with the Establishment Clause in *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (indirect funding to religious drug treatment center) and *Columbia Union College v. Oliver*, 254 F.3d 496, 508 (4th Cir. 2001) (direct funding to religious college).

⁷ 42 U.S.C. § 604a(b), (d)(B), (f), and (h) (2012).

⁸ See Carl H. Esbeck and Stanley Carlson-Thies, “Two Decades of Bipartisan Cooperation on Government Funding and Religion . . . This Can’t Possibly Be about the U.S.,” *Cornerstone* (blog), August 22, 2016, <http://www.religiousfreedominstitute.org/cornerstone/2016/8/22/two-decades-of-bipartisan-cooperation-on-government-funding-and-religion-this-cant-possibly-be-about-the-us>.

however, do not address the staffing rights of religious organizations. As to grants, employment rights are governed by Title VII of the Civil Rights Act of 1964, which has two exemptions for religious employers that use religious criteria in managing employees,⁹ and by the Religious Freedom Restoration Act.¹⁰ As to contracts, an employer's staffing rights are governed by Executive Order 11246. President Bush amended EO 11246 by adding an exemption for religious employers that mirrors that in Title VII.¹¹ President Obama amended the EO by extending nondiscrimination protection to sexual orientation and gender identity, but left intact the Bush staffing exemption.¹² The meaning of these collective moves remains in contention.¹³

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Professor Esbeck has published widely in the area of religious liberty and church-state relations. Professor Esbeck is recognized as the progenitor of "Charitable Choice," an integral part of the 1996 Federal Welfare Reform Act, later made a part of three additional federal welfare programs. And he has taken the lead in recognizing that the modern Supreme Court has applied the establishment clause not as a right, but as a structural limit on the government's authority in specifically religious matters. While on leave from 1999 to 2002, Professor Esbeck directed the Center for Law & Religious Freedom (CLRF) and then served as Senior Counsel to the Deputy Attorney General at the U.S. Department of Justice. While directing the CLRF, Professor Esbeck was a central part of the congressional advocacy behind the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). While at the Department of Justice one of his duties was to direct a task force to remove barriers to the equal-treatment of faith-based organizations applying for social service grants.

Professor Esbeck teaches Civil Procedure, Constitutional Law, Religious Liberty, Civil Rights, and a Seminar on the Foundations of the American Constitution.

⁹ Sections 702(a) and 703(e)(2) of Title VII, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2012), exempt religious employers from employment discrimination claims when using religious criteria in their employment practices.

¹⁰ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012). The U.S. Department of Justice has determined that an employer's RFRA claims override in cases of religious staffing by a federal grantee. See Office of Legal Counsel, Opinion of June 31, 2007, http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worldvision_0.pdf.

¹¹ Executive Order 13279 – Equal Protection of the Laws for Faith-based and Community Organizations § 204(c) (December 12, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021212-6.html>.

¹² Executive Order 13672 – Further Amendments to Executive Order 11487, Equal Employment in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employem>.

¹³ See Carl H. Esbeck, "Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?" *Oxford Journal of Law and Religion* 4, no. 3 (2015): 368–97 (discussing the case law and those issues that remain contested).

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