

## KEYNOTE ADDRESS: BEYOND RIGHT OF CONSCIENCE TO FREEDOM TO LIVE FAITHFULLY†

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### INTRODUCTION

My thanks to the Regent University Law Review, the symposium team, and to Dean Jeffrey Brauch for the opportunity to reflect on this very important topic. And my thanks to each attendee for your concern about maintaining space in our society for people to live in accordance with their convictions, even when those convictions differ from our society's consensus.

This symposium on the right of conscience has two excellent panels to discuss the legal and constitutional dimensions of that right in commercial settings. My own approach will be different. I am a policy expert, not a lawyer. In fact, as my son brutally said to me after I had labored many years to finish my doctoral dissertation and finally received my Ph.D. degree: "Great, Dad, you are now a paper doctor!" So I cannot even cure real physical ills.

But I am hopeful that a policy perspective will be illuminating. I will call it a broad reconnaissance into maintaining the possibility in our society for people of faith to live faithful lives. I do not think this will be a mere flight of fancy—interesting but irrelevant. Rather, by setting the right of conscience in an institutional and even society-wide framework, I believe we can better understand what needs to be protected and how best to protect it.

I will begin by highlighting the need for a positive freedom to follow a way of life, not just the negative right to avoid participating in actions that we regard as morally-troubling. Then, I will make three related points. First, we should protect the right of institutions as well as individuals to be different. Second, conscience protections should extend to the commercial realm and not be limited only to nonprofits. Finally, to

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† This speech is adapted for publication and was originally presented as the keynote address at the Regent University Law Review Symposium, Protecting Conscience: Harmonizing Religious Liberties and the Offering of Commercial Services, November 4, 2011.

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adequately protect conscience, we must be guided by a social architecture and policy of pluralism, rather than restricting ourselves to the goal of securing narrow exemptions to uniform rules here and there.

## I. IN PRAISE OF THE RIGHT OF CONSCIENCE

### A. *The Right of Conscience Generally*

Before I say why I think the right of conscience, as commonly understood, is an insufficiently robust instrument to safeguard living by conviction, let me begin by affirming just how important a right it is. Generally, the right of conscience is regarded as the freedom of a person to refuse to fulfill a normally required duty, due to that person's conscientious objection to performing the duty.<sup>1</sup>

Seamus Hasson, founder of the Becket Fund for Religious Liberty, discussed the basic concept and its development in the American context in his book, *The Right to Be Wrong*.<sup>2</sup> It is a provocative idea: that the law in some circumstances should give a person permission to be wrong by refusing to act, even though everyone else thinks it is right to require the action. And the act that is refused may be weighty indeed. For example, Hasson discusses the long development of the status of conscientious objectors to military service—the gradual acceptance of the idea that a person with a deeply-rooted objection to taking part in war has the right

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<sup>1</sup> ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 1 (2010) (“[L]iberty of conscience [is] a legal protection that arises at the point of conflict between an individual’s deeply held moral or religious belief and state power.”). In the words of James Madison, “[A man] has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . . . Conscience is the most sacred of all property.” James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, at 174, reprinted in JAMES MADISON’S “ADVICE TO MY COUNTRY” 25, 83–84 (David B. Mattern ed., 1997). President George W. Bush passed a conscience regulation in December 2008, the purpose of which was to implement federal statutory provisions that “protect the rights of health care entities . . . both individuals and institutions, to *refuse to perform* health care services and research activities to which they may object for religious, moral, ethical, or other reasons.” Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices, 45 C.F.R. § 88.1 (2010) (emphasis added). The regulation, which was both celebrated and reviled, has since been repealed in large part by President Barack Obama. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88). Similarly, at the state level, the Illinois Health Care Right of Conscience Act is designed to implement the state’s declared public policy to protect “persons” and “entities,” who, for reasons of conscience, *refuse* to provide or pay for some health care services. 745 ILL. COMP. STAT. ANN. 70/2 (West 2010).

<sup>2</sup> KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA (2005).

not to answer the call to defend the nation, even in its hour of extreme peril.<sup>3</sup>

### *B. Right of Conscience in the Commercial Context*

Currently, claims for the right to refuse to act in some way are often less dramatic than conscientious objection to military service, but they are more numerous and significant in their own right. In the commercial context, three examples come to mind.

#### 1. Elane Photography

Elane Photography, a husband-and-wife business, received an e-mail request to take pictures at a same-sex commitment ceremony. One of the owners emailed back: “[W]e do not photograph same-sex weddings, but again, thanks for checking out our site!”<sup>4</sup> These small businesspersons tried to conduct their business in a way that they thought honored God’s values, but instead, Elane Photography was penalized with thousands of dollars in attorney’s fees and costs for violating New Mexico’s sexual-orientation nondiscrimination requirement.<sup>5</sup> Of course, this photography business, like every other one, turns down many other requests for its services without being hauled into court.

#### 2. North Coast Women’s Care Medical Group

A doctor in North Coast Women’s Care Medical Group refused to perform a particular reproductive procedure requested by her lesbian patient.<sup>6</sup> The doctor said she would not perform that procedure on any unmarried patient, due to her convictions about marriage.<sup>7</sup> The patient was referred to another clinic, which performed the procedure.<sup>8</sup> The North Coast clinic provided all other care before and after this refusal, but it was sued for violating California’s ban on sexual-orientation

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<sup>3</sup> *Id.* at 49–53.

<sup>4</sup> Opinion and Order, *Elane Photography, LLC v. Willock*, CV-2008-06632, ¶ 3 (N.M. 2d Jud. Dist. Ct. Dec. 11, 2009).

<sup>5</sup> The Human Rights Commission found that Elane Photography had violated the New Mexico Human Rights Act and ordered the company to pay Ms. Willock’s attorney’s fees and costs. *Id.* ¶ 5.

<sup>6</sup> *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 963 (Cal. 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 964.

discrimination.<sup>9</sup> The California Supreme Court ruled that the religious convictions of the doctor did not outweigh that prohibition.<sup>10</sup>

### 3. Pharmacists

The question of whether pharmacists may refuse to dispense particular drugs, such as the Plan B “morning-after” pill, due to their convictions about contraception and abortion, has been raised in a number of states. Some states provide a right of conscience for pharmacists—the right not to dispense those drugs—while other states do not.<sup>11</sup> Interestingly, in the legislative debates and in litigation against dissenting pharmacists, little or no evidence has been provided that any customer was unable to find the pills from another source.<sup>12</sup>

#### *C. Why the Right of Conscience?*

Clearly, conflicts of conscience are a notable feature of our contemporary society. Should our society and our laws respect the right of conscience—the right of some to refuse to act in certain ways, even though others are required to act in those ways and even though, due to the refusal of the objectors, other people are inconvenienced and may even suffer a loss of dignity? If so, why?

Hasson contends that the right of conscience is grounded in something we all know in our hearts: “The truth about man is that man

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 970 (holding that the defendant’s right to free speech and free exercise of religion did not exempt her from complying with the Unruh Civil Rights Act’s prohibition of sexual-orientation discrimination). See generally Sumeet Ajmani, North Coast Women’s Care: California’s Still-Undefined Standard for Protecting Religious Freedom, 97 CALIF. L. REV. 1867, 1867–71 (2009) (discussing the ambiguous standard for free exercise of religion under the California Constitution and California courts’ failure to resolve the ambiguity in conscientious objection cases); *Tensions Between Rights of Conscience and Civil Rights: Are Health Care Workers Obligated to Treat Gays and Lesbians?*, PEW FORUM ON RELIGION & PUB. LIFE (June 3, 2010), <http://www.pewforum.org/Church-State-Law/Tensions-Between-Rights-of-Conscience-and-Civil-Rights.aspx> (comparing conscience cases and discussing the merits of conscience clause exemptions); *Religious Liberty at Issue in Insemination Case Involving Unmarried Woman*, ALLIANCE DEF. FUND (Feb. 1, 2005), <http://www.adfmedia.org/News/PRDetail/1377?search=1>.

<sup>11</sup> See Kimberly D. Phillips, *Promulgating Conscience: Drafting Pharmacist Conscientious Objector Clauses That Balance a Pharmacist’s Moral Right to Refuse to Dispense Medication with Non-Beneficiaries’ Economic and Legal Rights*, 15 MICH. ST. U. J. MED. & L. 227, 244–45 (2011) (surveying current state provisions regarding conscientious objections of pharmacists); see also CAL. BUS. & PROF. CODE § 733(b)(3) (West Supp. 2012); COLO. REV. STAT. ANN. § 25-6-102(9) (West 2008 & Supp. 2009); FLA. STAT. ANN. § 381.0051(6) (West 2007); ME. REV. STAT. ANN. tit. 22, § 1903(4) (2004); TENN. CODE ANN. § 68-34-104(5) (West 2008); WASH. REV. CODE § 48.43.065(2)(a) (West 2008).

<sup>12</sup> Luke W. Goodrich, *The Health Care and Conscience Debate*, 12 ENGAGE 121, 122–23 (2011), [http://www.fed-soc.org/doclib/20110603\\_GoodrichEngage12.1.pdf](http://www.fed-soc.org/doclib/20110603_GoodrichEngage12.1.pdf).

is born to seek freely the truth about God.”<sup>13</sup> People disagree with one another about who God is and what He requires; thus, respect for that free search requires extending to each other the right to be wrong. That right should include the freedom not to perform acts otherwise required if our conscience tells us that doing those things is a grievous sin. So, our respect for each other requires a right of conscience—a right to refuse to act.

We may add another reason for the right of conscience: Respect for God requires us to obey His commands even when His commands clash with our government’s requirements. Recall the words of Peter and the apostles in the Book of Acts when they were told by the religious authorities not to teach any more in the name of Jesus: “We must obey God rather than men.”<sup>14</sup>

We should additionally stress that in our system of constitutional, limited government, the government’s respect for its citizens requires it to avoid, where possible, forcing those citizens to act in ways they regard to be wrong.<sup>15</sup>

## II. FROM NEGATIVE TO POSITIVE FREEDOM

For such reasons, I am sure that our society ought to respect the right of conscience. Yet, I am also sure that adequately respecting a person’s freedom to follow God rather than man (to use the biblical phrasing) requires a concept, a freedom, broader than a right of refusal to participate in evil. We need also to acknowledge and secure a positive freedom for two reasons: the nature of our society and the character of our duty to God.

What do we owe to God? It is a long list, but we do have a summary: We should love God with all of our capabilities and passions—that is, we should follow His way and not some other way—and we should love our neighbors as ourselves.<sup>16</sup> Living in accordance with our consciences, considered in light of this summary, means not only *refraining* from doing things that dishonor God or harm our neighbors, but also actually *doing* things that please God and that are good for our neighbors. So, to fully respect conscience, there must be a positive freedom to act in

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<sup>13</sup> HASSON, *supra* note 2, at 145.

<sup>14</sup> *Acts* 5:29.

<sup>15</sup> For one probing discussion, see WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* (2002).

<sup>16</sup> *Matthew* 22:37–40. Because of my own Christian commitments, editorial convenience, and the Christian setting where this Article was first presented as a keynote address, I will throughout mainly refer to Christian convictions and institutions. For reasons both of principle and of Christian conviction, however, I am certain that religious freedom is a freedom that extends to all religions and also to deep, secular convictions.

certain ways, even when those ways go against our society's conception of what is good. It is not enough to have a right to refrain from taking part in certain actions that we regard as unacceptable.

That is a simple, even simplistic, point. Why, then, does the concept of the right of conscience stress the freedom to avoid objectionable action rather than a positive freedom to do what we believe is right? I suspect that the concept is grounded in the assumption that we already do enjoy a broad freedom to do what is right. How so? First, many actions are simply unregulated by government so that we are free to act as we choose. Second, while other actions are compelled by government, most of what our government compels us to do is not morally-troubling. It normally requires us to do things we can engage in without objection. Given these two circumstances, to honor conscience, we need only be concerned about a limited number of instances where some people object to some action required by government that everyone else considers proper.

Should I study the Bible? Our laws neither compel me to study nor forbid me from opening the Holy Book. I need no right of conscience if there is no law on the matter.<sup>17</sup> On the other hand, in time of war I might be ordered into military service, not free at all to make my own decision. And yet, for me and for most of us, that requirement to serve seems appropriate—at least in principle—so no right of conscience is needed. Only a few of our fellow citizens—those with the opposite conviction—need the right of conscience, the negative freedom to refuse to defend the country through military action. Therefore, we need only a narrow and negative right not to engage in certain actions if we are free most of the time to exercise our own judgment about what to do and if, when we are compelled by government to act, the government's demands fit well with what we believe to be right.

But to many Christians and other adherents of historic religious faiths, the happy circumstance I have just sketched seems to be increasingly unrepresentative of our actual society. We find instead a constant shrinking of our freedom to decide on our own what to do, untrammelled by government rules. At the same time, we find that the government's rules are increasingly at odds with our deep convictions. If

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<sup>17</sup> Of course, even this seemingly obvious point is not so simple in today's legal climate. Rightly or wrongly, Bible study might be forbidden in some instances, such as public school classrooms (unless the Bible is being treated as literature). *See, e.g.*, *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 205, 225 (1963). Similarly, home Bible studies have even been challenged in certain municipalities based on residential zoning laws. *E.g.*, *Nichols v. Planning & Zoning Comm'n*, 667 F. Supp. 72, 78 (D. Conn. 1987) (holding that an ordinance was unconstitutionally vague and problematic because it gave administrative officials the discretionary power to restrict the free exercise of religion).

both of these are the case, then we are in a less happy circumstance and need stronger, different protections. If the government is commanding more, and more of what it commands is morally suspect, I need a more vigorous protective instrument than only a limited right of conscience—more than a limited right not to participate—if I am to be free to follow my God.

Consider the right of conscience in the school context. Let us say it means that a high school teacher in Massachusetts has a right to opt out of teaching the unit on marriage that explains that all relationships regarded as legal marriages by the Commonwealth of Massachusetts are real marriages that foster the flourishing of the spouses and create a good place for children to be raised. And yet, surely that dissenting teacher would, from her heart, desire not just to *avoid* teaching the official view of marriage but rather to *positively teach* what she is convinced that the Bible and natural law say about marriage and children. She desires the freedom to teach what she is sure is the truth and not just the right to avoid telling the government's untruth. Yet the right of conscience does not itself create the opportunity for her to teach as she feels compelled.

The situation is similar for many Christian doctors and nurses. They are grateful for the legal provisions that require federally-supported hospitals and medical schools to excuse them from having to perform or refer for abortions,<sup>18</sup> yet many of these same pro-life doctors and nurses believe that pleasing God in medicine requires more than refraining from killing unborn children. They are glad that normal medical practice is dedicated to healing, but they regard that practice also to be strongly influenced by commercial considerations, prestige, and a technological imperative. Those forces are not always favorable to the God-honoring medical practice that pro-life doctors and nurses seek.<sup>19</sup> They want to serve in a practice or hospital that takes the spiritual lives and concerns of its patients seriously. They want their place of work to contribute to the flourishing of the surrounding community, not only because it does not kill unborn children, but

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<sup>18</sup> *E.g.*, 42 U.S.C. § 238n(a) (2006) (preventing government discrimination against physicians who are trained or licensed by organizations that refuse to participate or train in abortion-related services); 42 U.S.C. § 300a-7(b)-(e) (2006) (prohibiting entities that receive federal grants from discriminating between grant recipients based on the recipients' moral or religious objections); 42 U.S.C.A. § 18023(b)(4) (West Supp. 2011) (prohibiting health plans offered through government exchanges from discriminating against any health care provider or facility because of its refusal to provide, pay for, provide coverage of, or refer for abortions).

<sup>19</sup> *See* CLARKE E. COCHRAN & DAVID CARROLL COCHRAN, *CATHOLICS, POLITICS, AND PUBLIC POLICY: BEYOND LEFT AND RIGHT* 65-67 (2003) (discussing rapidly advancing medical technologies and procedures, often conflicting with Catholic teaching).

because it offers excellent free clinical care to the needy. They may want to be part of a team in which not only the chaplain but also the other staff members are able to preach the Gospel, even “us[ing] words if necessary.”<sup>20</sup>

As the dominant values of our society increasingly diverge in important ways from Christian convictions, many of us will find it harder and harder to find places of work that respect our convictions. That search will be futile if the government imposes the dominant values of the society on every workplace rather than leaving a broad scope of freedom for private persons and private organizations to determine on their own how best to conduct their lives and work.

In these circumstances, the right of conscience will enable citizens who dissent from the dominant values of our age to avoid participating in the worst, but they will not be able to do the best. We will be able to avoid complicity in many things that we believe are wrong, but we will have little opportunity to pursue activities in which we can wholeheartedly rejoice.

In short, the right of conscience is a precious freedom, but when there is less and less private freedom because government regulates more and more, and when the demands that government imposes through that expanding net of regulations diverges more and more from what Christians (and others) believe is right and good, then to follow God rather than men requires that the current right of conscience be supplemented by more robust mechanisms. We need to enlarge the freedom to do right rather than only protecting the right to avoid doing wrong. If I am correct about this need for a positive freedom to supplement the right of conscience, then I believe my three other points can be easily developed.

#### *A. Beyond the Right of Conscience: Institutions and Not Only Individuals*

The right of conscience is typically understood as an individual right: the right of a doctor or nurse not to participate in abortions;<sup>21</sup> the right of a Quaker not to answer the call to arms;<sup>22</sup> or freedom for a

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<sup>20</sup> “Preach the gospel at all times. Use words if necessary.” This quote is often attributed to St. Francis of Assisi and, while it is unlikely that he spoke these exact words, he did encourage ministers to “preach by their example.” RANDY NEWMAN, BRINGING THE GOSPEL HOME 101 (2011).

<sup>21</sup> See *supra* note 18.

<sup>22</sup> See HASSON, *supra* note 2, at 49–52 (recounting the early history of the Quakers’ conscientious objection to compulsory military service in the United States). Courts later extended conscientious-objector protections to all sincerely held moral beliefs in *United States v. Seeger*, 380 U.S. 163, 186–88 (1965) (holding that a person’s moral objection to military service was sufficient to entitle him to a religious exemption).



justice of the peace to avoid registering a same-sex marriage.<sup>23</sup> Yet, as I mentioned above, the right of institutions to be different also needs to be protected.<sup>24</sup>

Most significant projects and occupations require us to work together with others in a structured way. Doctors need the support of nurses in order to carry out their mission of healing and care, not to mention people expert in the minutia and irrationality of health insurance plans. Teachers are normally employed by schools and count on those schools to be supportive of their vision of what to pass on and how best to do so. And the list goes on. To put into practice our varied conceptions of how best to obey God and serve our neighbor, we will usually need to band together with others who, because they share our view, will put their own talents to work with ours to achieve our common conception.

Of course, for any of those organizations—the school, the medical practice, the broadcast company, the charity—to be vehicles for bringing to life one or another distinctive vision, the organization must have the legal freedom to be distinctive. Our Massachusetts teacher who is committed to marriage as taught in the Bible needs to be able to find or create a school that dissents from the new Massachusetts orthodoxy about the equivalence of various sexual relationships. Her quest will be impossible if the government requires every school to teach that same-sex marriages are equivalent to traditional marriages and that they must be equally celebrated. Moreover, her commitment to teach about biblical marriage will be undermined if, although she is free to say what she believes about marriage, her private school is required by law not to “discriminate” on the bases of marital status and sexual orientation in its hiring and employee-benefits policies.

What does it take for an organization to be faith-shaped—to be a vehicle or instrument to put into practice a wholehearted commitment to some particular vision of the good, some specific understanding of how best to love God and neighbor? If we reflect on mission organizations we know—Regent University, Catholic Charities, the Salvation Army, a

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<sup>23</sup> See Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 321–22 (2010) (arguing that in certain circumstances states should grant conscience exemptions for government employees with religious objections to facilitating same-sex marriages).

<sup>24</sup> There are many helpful resources detailing the “institutional” dimension of honoring conscience. See generally STEPHEN V. MONSMA, *PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY* (2012) (discussing the importance of recognizing an institutional right of conscience in light of increasing challenges that religious institutions are facing in the United States); VISCHER, *supra* note 1 (examining the role and importance of conscience in various institutional settings including associations, schools, healthcare, corporations, and education).

Gospel rescue mission, or others—we can identify three expressions of that mission or commitment to a particular conception of the good. The organization's *faith-shaped identity* will be evident perhaps in its name, in the symbols on its walls, in the membership of its board of directors, or in its mission statement. The organization also has a distinctive inner-life that features, for example, *faith-shaped standards* for employment, a particular schedule of employee benefits, certain staff practices, or spiritual formation retreats. The organization also has a *faith-influenced set of services*: it offers spiritual counseling as well as psychological counseling; it will not perform abortions but will refer for adoption; it will not turn away those who cannot pay or who do not have proper immigration documentation.

But will government allow an organization to be distinctive in these ways? Federal, state, municipal, and county rules affect institutions at every turn: the imperatives of employment law, the requirements of licensing for the organization and for its professional staff, rules about how clients must be treated and who must be counted as a client, restrictions attached to government funding, standards that must be met to obtain tax-exempt status, and much more.<sup>25</sup>

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<sup>25</sup> For the many ways that rules enforcing the equality of same-sex marriages may impinge on the freedom of faith-based organizations, see the eye-opening essay by Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1–57 (Douglas Laycock et al. eds., 2008). For a more general discussion of the clash between non-discrimination requirements and the religious freedom of faith-based organizations, see Gregory S. Baylor & Timothy J. Tracey, *Nondiscrimination Rules and Religious Associational Freedom*, 8 ENGAGE 138, 138–45 (2007), [http://www.fed-soc.org/doelib/20080613\\_Engage.8.3.pdf](http://www.fed-soc.org/doelib/20080613_Engage.8.3.pdf). Most recently, in January 2012, the Supreme Court announced a landmark decision in favor of the institutional rights of religious organizations in unanimously holding that a minister of a religious organization (a specially commissioned teacher) could not bring an employment discrimination suit against her employer institution (a church-operated school) without violating core principles of the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

Since the Clinton administration, the federal government has adopted rules for recipients of its funds that explicitly protect a faith-based identity, many faith-shaped standards, and sometimes faith-influenced sets of services. See Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, 32 HARV. J.L. & PUB. POL'Y 931, 936 (2009); see also Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010) (establishing “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations”). The Obama administration, however, recently struck a blow to faith-based institutions’ collective consciences by mandating that, with very narrow exceptions, faith-based employers, just as their secular counterparts, must provide health-care coverage of contraceptives. News Release, U.S. Dep’t of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), available at <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>. In an attempt to “compromise” with Catholic and other religious leaders who protested the requirement, the

For the organization to be able to exemplify—to testify to and to put into practice—its mission and its vision, even though that vision differs from what much of society thinks is best, the government must not compel it to follow the society’s vision instead of its own. There must be a robust institutional freedom of conscience, freedom for the organization to depart from what is otherwise required of other organizations at work in the same area of service.

For example, if a faith-based adoption or foster-care agency is to be free to operate in accordance with the conviction that children are best raised by a mother and father who are married to each other, there must be an institutional right of conscience and not only an individual right. The private agency must be able to recruit families holding the same convictions and be able to turn away or refer other types of households to other agencies. In deciding whether a family is ready to accept a child, the agency must be able to assess the quality of the commitment of the man and woman to each other, and possibly disqualify the couple if marital infidelity is evident. It should be able to tell people who have decided they must give up a child that if that child is brought to this agency, the child will be placed with a married mother and father, perhaps even a mother and father who are committed to the same religion as the birth parents. In short, for that conviction about like-minded families to come to expression in adoption and foster-care practice, the law must allow the private agency to maintain those distinctive practices, even though the law enforces as a general rule a prohibition on discrimination based on sexual orientation and marital status.

This is not an abstract matter, of course. In 2006, Catholic Charities of Boston was forced out of its long-standing adoption services because the Commonwealth prohibited discrimination based on sexual

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administration then said it would promulgate a new rule requiring the insurers, not objecting faith-based employers, to pay for the contraceptive services and to offer them to the employees. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147). The U.S. Conference of Catholic Bishops and others still oppose the measure, noting that it would not help those organizations that are self-insured, and that even with a third-party provider, the regulation still mandates coverage for contraceptives, which would in practice be paid for by the organization in its health plan with the provider. *See* Janet Adamy, *Contraceptive Plan Still Draws Heat*, WALL ST. J., Feb. 13, 2012, at A4; Cathy Lynn Grossman & Richard Wolf, *Bishops, Obama in Church-State Faceoff*, USA TODAY, Feb. 13, 2012, at 5A.

orientation in selecting adoptive families and placing children.<sup>26</sup> Similarly, Catholic Charities of Washington, D.C. had to abandon its adoption services when the city redefined marriage to include same-sex couples.<sup>27</sup> Even more recently, both Catholic and evangelical foster-care agencies in Illinois have been stripped of their state contracts because of the state's civil union law and its prohibition of sexual-orientation discrimination.<sup>28</sup>

In summary, when most organizations of a society have adopted a view of serving neighbors that falls short of God's pattern, believers will want to develop alternative service organizations. But if the government's rules are pervasive and the standards it enforces are those of the societal consensus, believers will be able to put into practice their convictions about good service only if there is an institutional right of conscience—an organizational freedom to be different—rather than only an individual right not to participate in some objectionable practice.

*B. Beyond the Right of Conscience: Religious Businesses and Not Only Religious Nonprofits*

The institutional right to be different should extend to commercial religious enterprises and not be limited to churches and para-church organizations. Our society does, in important ways, respect an institutional right of conscience. For example, as a general rule, faith-based schools and charities are free to consider religion when they decide which applicants to hire, even though it is illegal for secular organizations to discriminate on the basis of religion when they select new employees.<sup>29</sup> Yet there is a strong bias in the American sense of justice, which shows up in court decisions and in policy-making, that this so-called “right to discriminate” in hiring should be allowed only to

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<sup>26</sup> Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, CHILD. LEGAL RTS. J., Fall 2007, at 1, 13.

<sup>27</sup> Julia Duin, *D.C. Gay-Marriage Law Spurs Archdiocese to End Foster Care*, WASH. TIMES, Feb. 18, 2010, at A1.

<sup>28</sup> Manya A. Brachear, *Final Faith Foe of Civil Unions Exits Foster Care*, CHI. TRIB., Nov. 16, 2011, at 5.

<sup>29</sup> 42 U.S.C. § 2000e-1(a) (2006) (“This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities.”); see also CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* 9 (2004).

nonprofit religious organizations and not to religious organizations that are making money, that is, religious businesses.<sup>30</sup>

But that limitation, it seems to me, is unjustifiable. As I began to consider this presentation, three items appeared in the newspapers that bear on this question. First, there was a story about a new coffee business opening its doors in the Washington, D.C. area.<sup>31</sup> The business is called “Blessed Coffee” to testify to its Ethiopian inspiration to foster, as the *Washington Post* reported, both “community and a spiritual connection to our world.”<sup>32</sup> Moreover, Blessed Coffee is one of the first so-called “benefit corporations” that Maryland has begun chartering. Benefit corporations like Blessed Coffee are commercial enterprises that must make a positive social contribution and not only economic profits; they must have a social mission and not only try to make money.<sup>33</sup>

Similarly, an article in the *Wall Street Journal* discussed the challenges and successes experienced by the small network of kosher Subway shops.<sup>34</sup> These are not the usual Subway sandwich stores. All of the products, ingredients, and processes must meet kosher standards, and that means more than not serving ham and cheese sandwiches. Just a page later in the *Journal*, the Aflac insurance company had placed a half-page advertisement announcing that it had been selected by the Ethisphere organization as one of the world’s most ethical companies. Aflac announced, “We’re proud of all our employees and agents who strive to do the right thing every day. And we thank our clients and shareholders for their trust and belief that companies can succeed and prosper without having to compromise.”<sup>35</sup>

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<sup>30</sup> For instance, in *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011) (per curiam), the Ninth Circuit upheld the freedom of World Vision to consider religion in its hiring and firing decisions. *Id.* at 724. The case turned on whether World Vision is a religious organization and thus, unlike secular organizations, is permitted to use religion as a criterion in making employment decisions. *Id.* at 725 (O’Scannlain, J., concurring). The panel of appellate judges agreed, two-to-one, that World Vision is a religious organization. *Id.* at 724 (per curiam). One of the judges in the majority, however, signaled his view in concurrence that an organization is more likely to be authentically a religious organization if it “does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.” *Id.* at 748 (Kleinfeld, J., concurring).

<sup>31</sup> Jeremy Borden, *Takoma Park Coffee Firm Holds ‘Blessed’ Event*, WASH. POST, Sept. 17, 2011, at B1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see generally J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 1–22 (2011) (discussing the legal challenges faced by nonprofits, corporations, and LLCs operating with a social mission).

<sup>34</sup> Julie Jargon, *Kosher Subways Don’t Cut It*, WALL ST. J., Sept. 28, 2011, at B1.

<sup>35</sup> The main text of the advertisement reads, “Here’s to another year of doing the right thing.” Aflac, WALL ST. J., Sept. 28, 2011, at B3.

Three newspaper items do not prove anything, but they are suggestive. They indicate that the law and scholarly opinion are off-track in assuming that a bright line or clear division exists between nonprofits and for-profits when it comes to key issues such as whether an organization has a distinctive identity, whether it should be able to have a staff with shared convictions and standards of conduct, and whether it will serve society in a distinctive way.<sup>36</sup>

Is it actually an incoherent idea that a commercial enterprise might be dedicated to serving God by serving neighbors in a particular way? Should not an orthodox Jewish grocery store, even though it makes a profit, be able to hire staff and conduct its internal activities in a way that reflects its religious commitments, even if the Safeway supermarket down the street must follow other rules? The law permits the Christian Legal Society, a nonprofit organization, to employ only Christian lawyers, paralegals, and support staff. What is the sufficiently weighty reason to say that a for-profit law firm that intends to follow biblical concepts of justice should not be free to make the same religion-based employment decisions? That firm, too, wants its discussions of the law and the interactions of its staff to reflect Gospel convictions. It, too, wants its legal services to reflect Gospel values and not only assessments of profitability, prestige, and legal novelty.

I think that commercial entities, and not only nonprofits, ought to be able to have a distinctive profile in how they operate internally and how they serve externally. A pharmacist employed by CVS or some other business should be able to refuse to dispense certain drugs for reasons of conscience. That is an instance of the individual right of conscience. The small drugstore operated internally by a Catholic hospital should not be required to stock Plan B pills, even though the pills are approved by the government. That freedom would reflect an institutional right of conscience for a nonprofit organization.

What, then, about the for-profit pharmacy that seeks to be life-affirming in every way possible, to the glory of God and the well-being of its neighbors? Why should it be required to stock every legal pill and medical device and not be able to rely on an institutional right to be different? Surely it should not be denied an institutional right of conscience simply because it is commercial, because it is a market participant. After all, it is the very essence of the free market that its

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<sup>36</sup> There is significant literature on the social, missional, and religious aspects of businesses. For an interesting early study, see IAN I. MITROFF & ELIZABETH A. DENTON, *A SPIRITUAL AUDIT OF CORPORATE AMERICA: A HARD LOOK AT SPIRITUALITY, RELIGION, AND VALUES IN THE WORKPLACE* (1999).

participants will profile themselves by doing things differently, such that customers can distinguish each participant from its competitors.

I readily admit that there are weighty questions about who must be served and who can be turned away, and about what services must be offered and which can be left out. But I do not see how answers to those questions depend fundamentally on whether the organization tries to make money.

*C. Beyond the Right of Conscience: Pluralism and Not Just Exceptions*

Perhaps it is obvious by now what I intend with this third and final point. We should use pluralism as the structuring principle for protecting conscience rather than accepting only a few narrow exceptions to sweeping uniformity enforced by government.<sup>37</sup>

I begin with a reminder. It is not only service professionals such as pharmacists and teachers who are determined to live in accordance with their convictions, even when some of those convictions are unpopular. And it is not only service organizations such as health clinics and adoption agencies that desire the freedom to follow God rather than man when it comes to particular services and practices.

To the contrary, there are also different moral communities of service recipients: customers, clients, and patients. Some doctors and hospitals insist they will not perform abortions, and, equally, some patients desire exactly such pro-life medical care. These patients do not fully trust doctors and nurses whose actions ignore the Scriptures and the original Hippocratic Oath.<sup>38</sup> Just as some adoption agencies are convinced that children are best raised by a married mother and father who together attempt to be faithful to God, some single mothers who have to give up a child for adoption are looking for a family with exactly those convictions as the new home for their child.

In short, when considering the call of conscience, we ought to have in mind not only heroic professionals with deep but unconventional views about how best to serve, or dissenting organizations intent on operating differently than other providers of the same type of services.

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<sup>37</sup> Helpful treatments of pluralism for public policy include Stanley W. Carlson-Thies, *Why Should Washington, DC, Listen to Rome and Geneva About Public Policy for Civil Society?*, in *CHRISTIANITY AND CIVIL SOCIETY: CATHOLIC AND NEO-CALVINIST PERSPECTIVES* 165 (Jeanne Heffernan Schindler ed., 2008); JONATHAN CHAPLIN, HERMAN DOOYEWEERD: *CHRISTIAN PHILOSOPHER OF STATE AND CIVIL SOCIETY* (2011); *EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY* (Stephen V. Monsma & J. Christopher Soper eds., 1998); GALSTON, *supra* note 15; MONSMA, *supra* note 24.

<sup>38</sup> See, e.g., Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html> (reflecting on the medical profession's evolving views toward, and changes to, the Hippocratic Oath).

We should also have clearly in mind recipients of services—in biblical terms, those “neighbors” who need our love.<sup>39</sup> If we consider professionals, organizations, and patients, I am certain we have to admit that our society is comprised of more than one way of life, and each of those different ways of life embodies the deep convictions of one group of patients but not other patients; this set of professionals but not others; this group of organizations but not the others. We are not a *moral monoculture* with just a few isolated and disconnected oddballs, such that protecting conscience requires crafting only a few narrow exceptions for this doctor or that parochial school.

Without defending that statement about our society’s moral heterogeneity, I will make just one suggestion about public policy. If we have become a society with multiple ways of life, then the appropriate policy for government is not to impose uniform laws with a few exceptions. Instead, the appropriate policy will look more like the accreditation system for higher education institutions.<sup>40</sup>

In higher education, government acknowledges that multiple, different visions of education are represented in a wide variety of colleges and universities. There is no uniform secular model of higher education accompanied by a few eccentric colleges that have tacked on some strange religious practices. Rather, even the secular institutions follow a variety of ideas about how best to educate and form young men and women. And the religious institutions are even more diverse in what they do and how they do it.

These institutions are not all forced by government into a single pattern with merely a conscience provision for a few exceptions. Instead, the government accepts the need for multiple accrediting agencies—in other words, the need for varied sets of standards. In fact, excellent education is defined differently from one accrediting agency to another, and the Higher Education Act recognizes these varied ways to educate beyond high school. The law actually requires accrediting agencies to respect diverse missions, including the varied religious missions, of the colleges and universities they supervise.<sup>41</sup>

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<sup>39</sup> See *Luke* 10:25–37 (recounting Jesus’ parable of the Good Samaritan).

<sup>40</sup> Accrediting agencies are private bodies, but the government backs up their decisions by authorizing their operations and by accepting their decisions as definitive when it decides, for example, at which colleges or universities students may use their federal scholarship aid. See 20 U.S.C. § 1001(a)(5), (c) (2006) (requiring that institutions of higher education be accredited by a recognized accreditation agency, and requiring the Education Secretary to publish a list of recognized accreditation agencies).

<sup>41</sup> The Higher Education Act requires accrediting agencies to “respect the stated mission of the institution of higher education, including religious missions,” when assessing institutions. 20 U.S.C. § 1099b(a)(4)(A) (Supp. IV 2010). It bears emphasis that



To adequately promote the public good in a society with multiple ways of life, government policy should be more like our higher education accrediting policy, and less an effort to force uniformity while grudgingly allowing a few exceptions.

### III. THE FREEDOM TO MAKE AN UNCOMMON CONTRIBUTION TO THE COMMON GOOD

I have stressed both difference and protecting difference—protecting in law the freedom for individuals and organizations to depart from society’s consensus and to conduct their affairs and to offer their services in ways not approved by the majority.

It is not my view, however, that Christians (or other religious people and organizations) are the only ones pursuing good in our society. Knowledge of God’s ways certainly is communicated to people outside the Christian community. Indeed, Christians would have to be very dishonest not to admit that often believers in other gods or in no god have taught us what it means to accurately understand God’s world and how we can genuinely contribute to the flourishing of our neighbors.<sup>42</sup> It is not the case that non-Christian doctors, pharmacists, or charities do everything in such unacceptable ways that Christians must necessarily separate and do things on their own.

Nor is it my intent that Christians will withdraw from society, asking for freedom from the government’s rules so that we can construct our own subculture in which we can live pure lives untouched by the world around us. Far from it. I seek government policies that robustly protect the freedom of organizations and individuals to obey God precisely so that Christians can be a clear witness about God to the world and a great blessing to our neighbors.

Like every citizen, we are called to contribute to the common good. And yet, as believers in Christ, we have some distinct convictions about what is good and about how best to help others. We need a robust

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this requirement of respect for religious missions was added to the act only against strong pressure by the ACLU, Americans United for Separation of Church and State, and others, who wanted the law instead to require accreditors to enforce secular standards. See Press Release, Am. United for Separation of Church & State, Congress Should Block Backdoor Move to Endorse Discrimination by Colleges, Says Americans United (June 20, 2007), <http://www.au.org/media/press-releases/congress-should-block-backdoor-move-to-endorse-discrimination-by-colleges-says>.

<sup>42</sup> Miroslav Volf rightly stresses, “Christians have received wisdom from others in the past and . . . continue to do so.” MIROSLAV VOLF, *A PUBLIC FAITH: HOW FOLLOWERS OF CHRIST SHOULD SERVE THE COMMON GOOD* 111 (2011).

institutional as well as individual *freedom to be different* exactly so that we can make our best *uncommon* contribution to the common good.<sup>43</sup>

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<sup>43</sup> Volf similarly remarks that, while Christians have much to learn from others, we also have our own “wisdom” to share with the broader society. *Id.* at 100–01. A proper pluralism gives voice and space to diverse wisdoms, removing government from attempting to enforce a single view. This idea of making an uncommon contribution to the common good is, to my mind, characteristic of the public philosophy and theology of Abraham Kuyper, the Reformed “Renaissance man” of the late 19th and early 20th century Netherlands. For a very accessible introduction, see RICHARD J. MOUW, ABRAHAM KUYPER: A SHORT AND PERSONAL INTRODUCTION (2011). The same approach was carried forth by Herman Dooyeweerd. *See* CHAPLIN, *supra* note 37.