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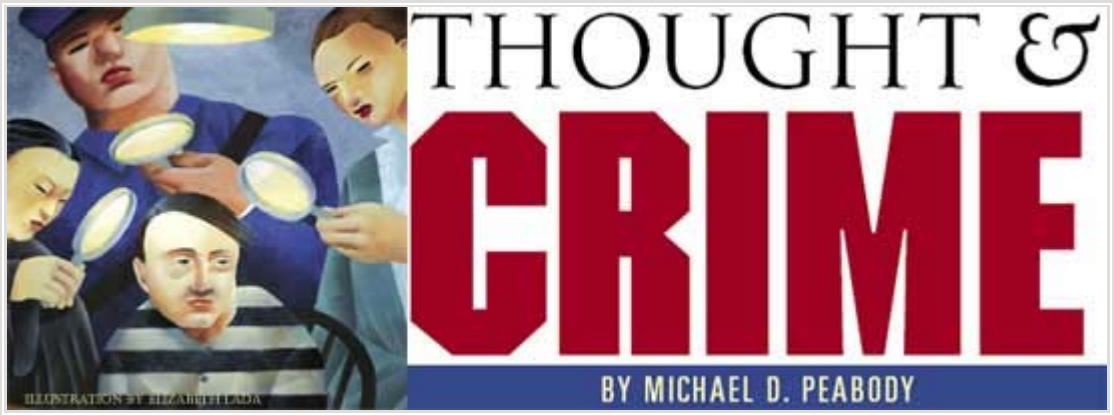
MARCH / APRIL 2008

Thought & Crime

BY: MICHAEL D. PEABODY



On July 1, 2007, Satendar Singh, a 26-year-old Sikh American was attacked by a group of six men while enjoying an early Independence Day picnic with friends at a park in Folsom, California. According to news reports, the attackers noticed that Singh was dancing with both men and women and did not appear to have a female date. The attackers began hurling racist and anti-gay invectives.

When Singh and his group attempted to leave, the attackers blocked Singh's path and one of them struck Singh in the head. Singh fell to the ground unconscious, his head bleeding profusely. On July 5 his life support was removed. Two men with alleged ties to an extremist "Christian" group are standing trial, and some believe that they were spurred on to an act of violence by the rhetoric of the group.

The U.S. Department of Justice defines a "hate crime" as "an offense motivated by hatred against a victim based on his or her race, religion, sexual orientation, handicap, ethnicity, or national origin." The definition may be simple, but it is difficult to determine whether the evidence of hatred is actually related to the crime or is instead a protected form of expression.

There is certainly nothing wrong with a tolerant, peaceful, and fair society, which hate crimes laws presumably bolster. But there is a dark side to this legislation that threatens to squelch free speech and freedom of conscience, particularly when evidence of one's beliefs and associations are sufficient to secure a criminal conviction.

Prior to the advent of state hate crimes legislation, which arose in the latter half of the 1900s and now exists in 46 states and is in the process of being ratified nationally, the mental state of the criminal, or *mens rea,* was only considered insofar as it would demonstrate that the defendant knew, or should have known, what types of action were available and chose to commit an act that violated the standards of the community.

Motive was used as a forensic factor to determine whether a particular defendant committed an act where there was only circumstantial physical evidence. For example, a wife might have taken out a million-dollar life insurance policy on her husband two days before his body was discovered in a lake. A jury would review this evidence along with other pieces of information and decide the wife's guilt or innocence.

Criminal law recognizes that the term *intention* is limited to the mental decision necessary to achieve a particular overt act. Murder, for instance, is defined as the "killing of one human being by another with malice aforethought." Even the intent to murder is limited to the specific intent to kill or do serious bodily injury, or willful and wanton life-threatening conduct. First-degree murder is differentiated from the lower forms, but the elements of premeditation and deliberation require that the defendant plan the crime with a "cool mind." In other words, the person, for however brief a time, planned to commit the act. Thus, a fit of passion ending in murder would not classically be considered a first-degree murder but would instead be considered voluntary manslaughter.

Of course, these elements differ from jurisdiction to jurisdiction, and the courts give prosecutors the discretion to determine how to file their charges.

Recently, legislators and the courts have begun to expand upon the concept of *mens rea* to enhance sentencing based not only on the "coolness" of mind, but on the content of thoughts. If the defendant has demonstrated a strong prejudice or bias against a protected group of people, based on things such as race or sexual orientation, then this could actually constitute a separate criminal element that would significantly increase punishment.

At its founding, the United States emerged from the polymorphic soup in which church and state were twisted together, and where thought and action were both criminally actionable, and recognized the imperative of freedom of conscience. This concept had eluded kings and prelates, and even the Protestant reformers had plunged their swords into dissidents and plundered the villages of those they considered damned. As America struggled to its feet following the Revolution, it established its strength not on tyranny or oppression, but rather in the freedom of conscience.

The idea that people can be tried for their thoughts and ideas is foreign to American sensibilities, but we should not forget that it is the norm in most of the rest of the world and has been for thousands of years. From Socrates' death sentence for "corrupting the youth of Athens" by speaking out against their militaristic policies, to the execution of Christ for offending the religious and political powers of the day, to the trial of Galileo for daring to express his view that the Earth traveled around the sun, Western society has been built on the deaths of those who dared think or express certain thoughts. Before those examples are buried with antiquarian dust, let us consider that much of the modern world, from the countries of the Middle East to dictatorships in Asia, still punishes thoughts. Dictators such as Adolf Hitler, Idi Amin, and Saddam Hussein and their tyrannical brethren have killed for a less than faithful glance or the mere critical wrinkle of a forehead.

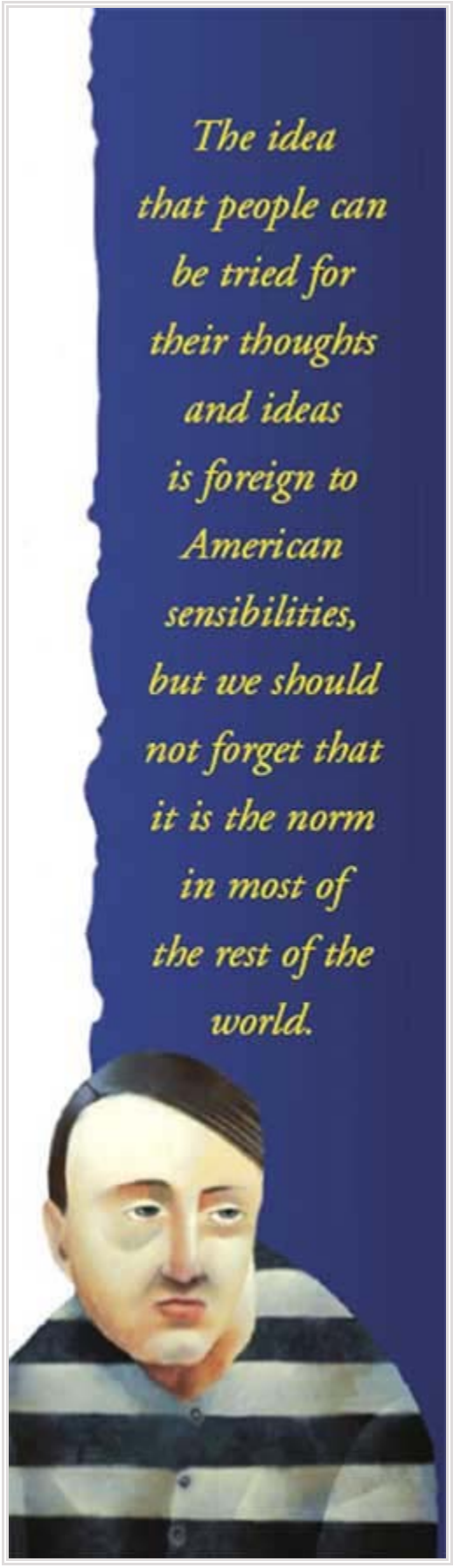
Today many Western nations punish unsympathetic groups such as neo-Nazis, racists, and anti-gay activists for their beliefs, which they are determined to have either through expression or association. Even our Canadian neighbors have taken the step of punishing thought that has wandered out of the mind in the form of expression.

In 2002, Rev. Stephen Boissoin, a Calgary youth pastor and former chairman of the Concerned Christian Coalition, wrote a letter to the *Red Deer Advocate,* a local newspaper. In the published letter the conservative Boissoin expressed his concerns that children were being taught acceptance of the homosexual lifestyle.

He wrote: "Children as young as five and six years are being subjected to psychologically and physiologically damaging pro-homosexual literature and guidance in the public school system; all under the fraudulent guise of equal rights."

When he read the letter, University of Calgary professor Darren Lund filed a complaint against Boissoin with the Alberta Human Rights *and Citizenship* Commission. During a July 20, 2007, hearing Lund told the court: "Declaring a holy war on homosexuals, backed by weapons of God and the moral majority, attacks the homosexual community in a way that is demeaning and humiliating."

In November 2007, the Human Rights Panel ruled against Boissoin, stating that his 2002 letter had exposed homosexuals to "hatred and contempt" and may have been indirectly responsible for the beating of a homosexual teenager two weeks after the letter was published.6 As a result, in Canada, marginally negative speech may be interpreted as hate speech, and any physical conduct of a third party, regardless of how remote, can be blamed on the "hate" speech.



The decision is pending, but if he loses, the letter could cost Boissoin up to a $10,000 fine. The Canadian Civil Liberties Union (CCLU)

has remained on the sidelines during this debate. The likelihood of a decision against Boissoin is not certain, but it does raise the specter of what could happen if the term "hate crime" is bifurcated, and hate, broadly interpreted to include religious beliefs, becomes a crime in and of itself. If that happens, then "don't ask, don't tell" will become the guideline for any beliefs that others might find offensive.

In the United States, the "Local Law Enforcement Hate Crimes Prevention Act of 2007" ("Kennedy-Smith Act")(S. 1105 / H.R. 1592) would expand upon the current hate crime provisions of 18 U.S.C., Section 245 ("Section 245"),which has existed for more than 40 years. Section 245 was passed in the wake of the civil rights movement and allows the federal government to help investigate and prosecute bias-motivated attacks based on race, color, national origin, and religion, and because the victim was attempting to exercise a federally protected right. Section 245 was originally designed to make it possible for the federal government to step in when state or local officials were unable or unwilling to prosecute hate crimes. Kennedy-Smith adds actual or perceived sexual orientation, gender, and gender identity to this list.

Under Section 245, an arsonist who burned a Pakistani restaurant in Salt Lake City on September 13, 2001, was sentenced to 51 months in federal prison after pleading guilty to a hate crime. However, the federal government could not intervene in a July 2005 Texas case in which four men brutally attacked a gay man with a vacuum cord and daggers, even when they told him they beat him because he was gay.

In order to demonstrate the necessity of adding language regarding sexual orientation and gender, proponents of the Kennedy-Smith Act also cite cases such as *United States v. Bledsoe,* [1]in which a convicted murderer argued against federal jurisdiction over the hate crime because he had killed a homosexual African-American man because he was a homosexual, not because of his race.

The American Civil Liberties Union (ACLU), which has long opposed hate crime legislation because they believe that it would ultimately punish a belief, not an act, has come out in favor of the bill. [2]The ACLU reasons that Kennedy-Smith is acceptable because it says that evidence of expression or association of the defendant may not be introduced as substantive evidence at trial unless the evidence specifically relates to that offense.

The ACLU was primarily concerned about the possibility that prosecutors might focus on "guilt by association" with hate groups and then assume that any crime against a person of the targeted protected group is automatically a hate crime.

The Kennedy-Smith bill would require that a defendant intentionally select the victim from a broader group, and would punish the act of discrimination, not bigotry. According to the ACLU's statement, this discrimination is an actual act whereas general bigotry is a thought.

Although freedom of association is guaranteed in the Constitution, the Kennedy-Smith Act raises concerns that the federal government could obtain a criminal conviction on the basis of evidence of speech, even in the absence of other evidence. In *United States v. Dunnaway* , *3* a federal court upheld the admissibility of a skinhead tattoo on the inside lip of a defendant, even though there was no evidence linking the racist group to the violent crime, because "[t]he crime in this case involved elements of racial hatred."

The Kennedy-Smith Act has met stiff opposition from neo-conservative activists in the religious right, including Charles Colson and Traditional Values Coalition chairman Lou Sheldon, among many others, who feel that this bill is about criminalizing Christian speech. In his May 3, 2007, syndicated newspaper column, Colson wrote: "This bill is not about hate. It's not even about crime.

It's about outlawing peaceful speech—speech that asserts that homosexual behavior is morally wrong." Colson then lists a number of currently protected activities that could be jeopardized, including preaching that homosexual behavior is a sin. Colson concludes with a warning, "[The Kennedy-Smith Act's] passage would strike at the very heart of our democracy." [4]

An accurate reading of the Kennedy-Smith Act, however, would demonstrate that religious speech itself will not be censored or criminalized. The bill also promises that evidence of expression or association of the defendant may not be introduced as substantive evidence at trial unless it specifically relates to the particular offense.

This provision is only marginally protective, however, as a mildly-creative prosecutor could easily find ways to admit evidence as to bias and relate it somehow to the actual crime. This would be particularly useful in politically charged, high-profile cases. Any crime involving perpetrators and victims of different race, ethnicity, gender, or sexual orientation could conceivably become a federal case, even though the states would normally handle it.

Although the proposed federal legislation purportedly protects the freedom of speech that does not lead to a crime, as more and more cases arise and society changes, the United States could follow the example of Canada and other nations in which hate speech is broadly defined and can be prosecuted whether or not it is accompanied by a physical act.

As Justice Benjamin Cardozo correctly observed in *Palko v. Connecticut,*[5] "[Freedom of thought] is the matrix, the indispensable

condition, of nearly every other form of freedom."

There is no question that violent criminals, acting against anybody, should be prosecuted to the full extent of the law. We must strive for a safe and secure society. However, in the midst of the fight for security, the freedom to think must be vigorously protected.

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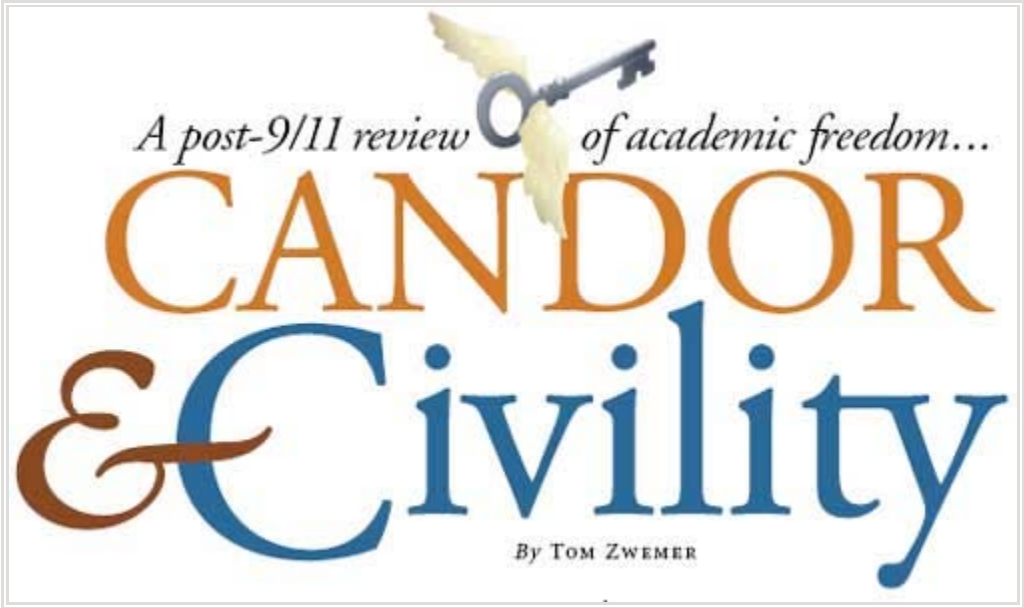
1 728 F.2d 1094 (8th Cir. 1984), cert. denied, 469 U.S. 838 (1994).
2 Caroline Fredrickson and Christopher Anders, "Letter to Senate Urging Affirmative Vote for Kennedy-Smith Hate Crimes Prevention Amendment" (July 13, 2007). Available online at www.aclu.org/lgbt/speech/30565leg20070713.html.
3 88 F.3d 617 (8th Cir. 1996).
4 Charles Colson, "The Thought Police: What the Hate Crimes Law Would Do," The Christian Post (May 3, 2007), available online at www.christianpost.com/article/20070503/27218_The_Thought_Police.htm.
5 302 U.S. 319 (1937).
6 The panel's decision is available online at http://www.albertahumanrights.ab.ca/legislation/Panel_Decisions/panel_decisLund.pdf

MARCH / APRIL 2003

Candor & Civility

BY: THOMAS J. ZWEMER



Academic freedom, as an idea and as a way of life, has entered its second century in a moment of political, economic, and military turmoil with distinct sectarian overtones. The "Melting Pot" has become a seething cauldron unlike anything America has seen before. We see dragons under every bed, witches behind every door, and a weapon in every handbag. It is as if all the hysterias of the past have been condensed into one pressure cooker with the burner set on high. Once again the academy is right in the thick of things from University of South Florida to Columbia University.

Paradoxically, nothing has shaped our ethos more than religion and learning. For centuries, the history of the church and the university have been on the same course—a seemingly endless stream of confrontations orchestrated by closed, vindictive, even murderous minds. Not even an ocean voyage could clear evil surmising from the minds of the "good church- and schoolmen of New England."

None other than the writings of Increase Mather, the first American-born president of Harvard, helped spawn the Salem Witchcraft Trials. In his 1684 paper An Essay for the Recording of *Illustrious Providences*,[1] Mather presents an extended defense of the Puritan belief in witches and apparitions. He blamed the lustful and sinful ways of the Colonials for everything from the Indian wars to the unusual weather patterns. His polemic against the devil and sin served as a misguided theological defense for the "players" fomenting the Salem hysteria. After their deeds were done, and his own wife rumored to be named a witch, he presented a second paper, *Case of Conscience* , in which he tempered his former radical position. [2] Seven years after being appointed president of Harvard, he chaired a committee of seven that calmed the hysteria over witchcraft, and the hunt was abated and his wife spared.

More than 100 years later, Thomas Jefferson, a student of the Enlightenment, founded the University of Virginia as a secular institution with the stated principle of *"illimitable freedom of the human mind."* [3] Although Jefferson championed limitless freedom for the human mind, he cautioned against unbridled tongues and pen. [4]

In keeping with Jefferson's vision, the University of Wisconsin-Madison, one of the first land-grant universities, set its mission to *"provide a learning environment in which faculty, staff, and students can discover, examine critically, preserve, and transmit the knowledge, wisdom, and values that will help ensure the survival of this and future generations and improve the quality of life for all."* [5]

The freedom of the mind and the proper discipline and courtesy of the tongue and pen remain the purpose of academic freedom. Candor with civility in the areas of one's competence and commission are dear to the hearts and minds of the academic.

The Morrill Act of 1862 [6] established the land-grant colleges and universities, thereby freeing secular institutions from ecclesiastical dogma. Nevertheless, freedom from ecclesiastical dogma did not free the academy from undue influence or political pressure. In the

mid-1920s Governor Clarence Morley, backed by the Ku Klux Klan, promised the president of the University of Colorado all the money he wanted, "provided the University would dismiss from its faculty and staff all the Roman Catholics and all of the Jews." The university's president, George Norlin, said he preferred to do without that kind of support, thank you! Because of this blatant interference, boards of regents were established to create a fire wall between the governor and legislatures on the one hand and the administration and faculty on the other.

It wasn't until 1957, in the immediate aftermath of the McCarthy era, that the United States Supreme Court issued its first opinion in support of academic freedom. 7 Sweezy v. New Hampshire:

"Paul Sweezy taught American economics with a socialist twist. He campaigned in New Hampshire for Henry Wallace's run for the presidency on the Progressive Party ticket. While in New Hampshire, he gave a lecture on Marxism at the University of New Hampshire. Attorney General Louis C. Wyman subpoenaed Sweezy, demanding he reveal his personal political view and political activities. Rather than "take" the Fifth Amendment, Sweezy refused to comply with the subpoena on the basis of the First Amendment. Of course, he was charged and convicted of contempt of court. It was finally resolved by the United States Supreme Court in favor of Sweezy."

It took another 10 years in the midst of the Vietnam era for the Court to reaffirm that right.

In the second of two landmark cases, *Keyishian v. Board of Regents* , [8]Justice Brennan in delivering the opinion of the Court wrote, "The classroom is peculiarly the 'marketplace of ideas.'" [9]

Keyishian was an instructor at the University of Buffalo when it became part of SUNY (State University of New York). As a state employee, he had to sign a loyalty oath. He failed to sign by the end of his annual term and was thus terminated. He took legal action. The case finally reached the United States Supreme Court. A major issue being addressed in the 1967 session was the use of loyalty oaths in faculty employment. Justice Brennan expanded the Court's opinion by writing: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws, that cast *a pall of orthodoxy* over the classroom" (italics added). [10]

Justice Brennan continued with a quote from *Sweezy v. New Hampshire* , 354 U. S. 234, 250 (1957): *'"No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.* . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" [11]

But these concepts did not spring full bloom from the pen of the associate justice. It took 40 years of development by the American Association of University Professors to capture the attention of the Court.

The AAUP was founded in 1915 by John Dewey of Columbia, formerly of the University of Chicago, and Arthur Lovejoy of Johns Hopkins. The provocation was fourfold: (1) the dismissal of the noted economist Edward Ross of Stanford University simply because Mrs. Stanford didn't agree with his views on immigrant law and railroad monopolies; (2) the dismissal in 1915 of Edward Bemis from the University of Chicago for advocating the public ownership of railroads and utilities; (3) the dismissal of Scott Nearing from the University of Pennsylvania because he publicly agitated against child labor; and (4) the baseless retaliation against German- and Austrian-educated professors during the First World War. At least 23 professors lost their jobs simply because they held doctorates from German and Austrian universities. [12]

Because of the overreaction to German academics during the 1914-1918 hostilities, the American universities were particularly restrained in their criticism of German scholarship during the 1933-1945 Nazi perversion of scholarship.

To illustrate the changing academic/political environment, one need but follow the comments of Nicholas Murray Butler, Nobel Prize winner and president of Columbia University for the unprecedented tenure from 1901-1945.

In 1917 he wrote: "There is no room for any among us who are not with the whole heart and mind and strength committed to fight with us to make the world safe for democracy."
Dr. Butler followed these words with firing three German-trained faculty members.

However, by 1935, he wrote: "The world cannot do without [the intellectual leadership] of Germany, no matter how preposterous and reactionary may be its ruling policies and doctrines at the moment."

It is interesting to note that Dr. Butler's 1935 statement was made in spite of the letter to him from George Norlin, former president of the

University of Colorado, who stood in the door against a KKK governor. In 1935 Norlin was the Theodore Roosevelt professor of American History and Institutions at the University of Berlin when he wrote to Dr. Butler at Columbia:
"Truth was being made to order in Germany resulting in mental prostitution and a form of madness."

In contrast, Lawrence Lowell, president of Harvard and a contemporary of Dr. Butler's, when threatened with the loss of a $10 million bequest unless he fired a pro-German professor, said:

"If a university or college censor what its professors may say, if it restrains them from uttering something it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable. If the university is right in restraining its professors, it has a duty to do so, and it is responsible for whatever it permits. There is no middle ground. Either the university assumes full responsibility for permitting its professors to express certain opinions in public, or it assumes no responsibility whatever, and leaves them to be dealt with like other citizens by the public authorities according to the laws of the land."

Unfortunately, the courage of the American Association of University Professors in fighting senseless retaliation during the First World War was absent during the hyper-vigilance of the early Cold War years. Scores of faculty lost their jobs in that reign of terror with hardly a peep out of the AAUP. It wasn't until Senator Joe McCarthy of Wisconsin was discredited in June 1954 that the AAUP took of advocacy in the cases of *Sweezy* and *Keyishian.*

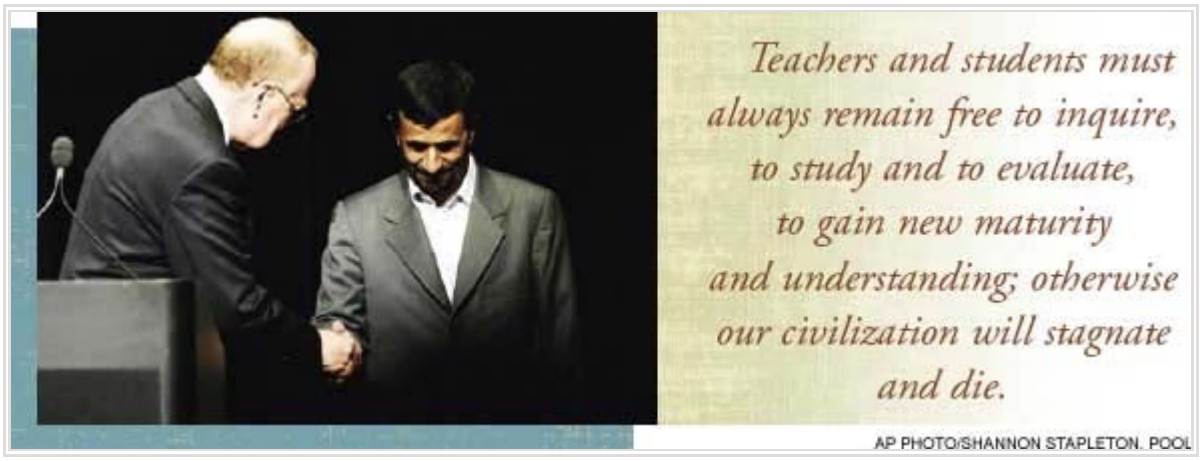
The burning issue before the academy remains: Can we, as Jefferson so desired, speak softly yet carry a big idea?

Since 9/11, we are again in times of tension and suspicion. Words, behavior, and associations are carefully monitored, and for good reason. Yet to prevent a fifth or sixth round of witch hunting, let us remind ourselves not only of our constitutional rights and duties, but as professionals "to do no harm!" We would do well to remind ourselves of the standards of freedom and civility that teachers have established in the spirit of Thomas Jefferson. Sections b. and c. of the American Association of University Professors Standards state:

"Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

"College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."

If academic freedom is to survive, it needs to be perceived as the champion of civil discourse in the pursuit of great ideas. Nevertheless, it is the crass affronts to civility that make the news and the courts. Unfortunately, issues of great pith and moment seldom find their way into federal courts.



In the time between the end of the Vietnam conflict and 9/11, the courts have been largely occupied by the peripheral, the trivial, the contentious, the venial, and the vulgar aspects of First Amendment issues. A prime example is *Urofsky v. Gilmore, U. S. Fourth Circuit Court of Appeals* : [13]
"Melvin Urofsky and five others employed by various public colleges and universities in Virginia brought suit against the governor of the state of Virginia challenging the constitutionality of the Virginia statute limiting or restricting state employees from accessing sexually

explicit material on state-owned or leased computers. The district court found in favor of the plaintiffs, agreeing that the statute infringed on the state employee's First Amendment rights. The Fourth Circuit Court reversed the finding of the district court, stating that the six professors were state employees not acting on a bona fide approved research project, nor were they acting on an issue of public concern. Therefore, the commonwealth as an employer could regulate their "speech" in this context without infringing upon any First Amendment protection."

Vulgarity was the issue at the turn of the century. John Bonnell lost his appeal to the Sixth Circuit Court for using gratuitous, repetitive vulgarities and obscenities in his English classes at Macomb Community College. [14] Kenneth E. Hardy won his case on appeal before the Sixth Circuit Court for using "trigger" ethnic words in one class period on interpersonal communication. [15]

Of course, the courts have limited ability to choose their litigants. Thus the courts, in recent academic freedom cases, have essentially established the lower reach of academic speech. Law can only establish a bottom line. It remains for the academy and its champions, and not the law, to demonstrate the higher reaches of self-expression.

Prior to 9/11, Dr. Anthony Diekema, president emeritus of Calvin College, pointed to four causes for the diversion of the academy from preparing a new generation to explore, to examine, to poke, to prod, to challenge, and to question issues of great pith and moment: "1. The ever present ideological enthusiasts who have plagued the academy since Mather, 2. The political correctness kick that is championed by single-issue special interests, 3. Postmodernism that rejects objective evidence and embraces power, and 4. The drift of the AAUP from the founding principles of John Dewey et al." [16]

The importance of the *Sweezy* and *Keyishian* decisions looms larger in the face of the hypervigilance of ideological enthusiasts in our post-9/11 environment. This "search and destroy mind-set" is once again threatening to place us under a "pall of orthodoxy."

Never in the history of the United States of America have self-discipline, civility, and objectivity been more essential than in a time when "terror stalks the land." Fear haunts the White House, the halls of Congress, city hall, and the schoolroom. Objective thinking is at a premium. We must remember that religious liberty is but a subset of civil liberty, which has as its substrate the kinship of all mankind. To berate other belief systems is to foment strife—even civil war! Some may call it a crusade, an intervention, even redemption, but at the point of a gun or a stockade?

The current international crisis poses serious academic problems. It pervades history, geography, energy, government, sociology, psychology, the graphic and the performing arts. Moreover, it has explicit religious components attended by outspoken Christian, Hebrew, and Islamic proponents who find bloodletting a divinely appointed mission.

We face the question: Can the Academy carry out its civic responsibilities by merely pledging allegiance to the flag? Surely not, but how far can it go in parsing out the parameters of the present conflict without trampling on the "civil rights" of those of contrary view? Let us hope we never arrive at a "Committee of Public Safety!"

When we have university presidents speaking provocatively toward invited guests, can tyranny be far behind?

Our problem is not the bombast of desert chiefs, the greed of captains of industry, or the forecast of every student of Schofield. Our problem is safeguarding civility and due process while under extreme duress. With a form of religion at the core of the problem, with the public classroom so restrained, with the press exuberant but easily led, and with the legislature in irons of its own making, can we reasonably expect the courts to withstand the tsunamis of civil cases flooding their doors?

The answer lies in the First Amendment. It is now time to act toward one another as if we were sharing the same foxhole. Close quarters require the maximum of civility and courtesy in order to survive. We did it without fanfare for ten days to two weeks after 9/11, until the ideologues threw their personal agendas into the cauldron.

"It's a small world after all!" Let us be neighbors in our conversation, in our work, in our play, in our worship, and certainly in our civic duties. After all, we each pledge allegiance to liberty and justice for all!

Thomas J. Zwemer is vice president emeritus for academic affairs at the Medical College of Georgia in Augusta, Georgia.

1 Robert Middlekauff, *The Mathers: Three Generations of Puritan Intellectuals, 1596-1728* (Berkeley, California: University of California Press, 1999).
2 "Increase Mather" www.law.umkc.edu/faculty/projects/ftrials/salem/asa_inc.htm
3 Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Grand Rapids, Michigan: Eerdmans Publishing Company, 1996).

4 University of Wisconsin-Madison *Almanac* , p. 3, 2003.
5 www.wisc.edu/about/history
6 Land-Grant Colleges and Universities www.nrcs.usda.gov/technical/land/meta/m2783.html
7 *Sweezy v. New Hampshire,* 354 U.S. 234 (1957).
8 *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).
9 *Ibid.,* 385 U.S. 589, 603 (1967).
10 *Ibid.*
11 *Ibid.*
12 AAUP Statement of Principles 1940/1970 www.aaup.org/com
13 *Urofsky v. Gilmore,* 216 F.3d 401 (4th Cir. 2000).
14 *Bonnell v. Lorenzo* et al., 241 F.3d 800 (6th Cir. 2001).
15 *Hardy v. Jefferson Community College* et al., 260 F.3d 671 (6th Cir. 2001).
16 Anthony J. Diekema, *Academic Freedom and Christian Scholarship* (Grand Rapids, Michigan: Eerdmans Publishing Company, 2000).

MARCH / APRIL 2008

The Word Unchained

BY: GETAHN WARD

Screening books and other materials available to prison inmates on the basis of their potential to incite violence and for sexually explicit content has been the norm in prison systems nationwide. But when U.S. prison officials created a list of approved books and materials last spring and took the excluded non-Scripture prayer and hymnal books, tapes, CDs, and videos off the shelves of religious libraries in chapels at federal prisons nationwide, civil libertarians, prisoner rights advocates, and religious ministries saw that as violating religious freedom.

The outcry led to a change in the policy. It was a policy under which almost 330,000 books such as Rabbi Harold Kushner's classic *When Bad Things Happen to Good People* and Christian pastor Rick Warren's best seller *The Purpose Driven Life* were removed under a push officials said was aimed at shielding inmates from materials that could be used to radicalize them.

But should the government be deciding what are appropriate religious materials? That was among the questions raised in a lawsuit brought against the Federal Bureau of Prisons by an Orthodox Jewish and a Christian inmate housed at a federal prison in Otisville, New York.

The library revision had its roots in a 2004 Justice Department Inspector General report entitled *A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers.* It cited deficiencies in how the bureau selected and supervised Muslim chaplains and said several visited prisons lacked an inventory of books available to inmates. It noted that none of the collections had been rescreened since the terrorist attacks of September 11, 2001.

"We agree with trying to keep out of libraries radical books that advocate violence," said Pat Nolan, a vice president of Prison Fellowship Ministries of Lansdowne, Virginia, an outreach to prisoners, former prisoners, and their families. "The problem was they threw the baby out with the bathwater. They took out a lot of good books along with any that might have been bad."

Nolan interpreted the bureau's policy modification as moving from the position that no book would be placed in the religious libraries of prisons unless approved by the government to one where books would be eligible as long as they are religious in nature; don't jeopardize safety, security, or order; don't facilitate criminal activity; and can't be used to radicalize or incite inmates to violence.

For materials that don't meet the criteria, chaplains will be able to submit a form stating the reasons for their objection to a central office

to be reviewed separately, Nolan added.

Mike Truman, a bureau spokesman, said books other than those considered inappropriate will remain on shelves of libraries until an inventory of materials is completed in early 2008. "The BOP [Bureau of Prisons] has the authority to regulate materials entering our institutions and has the responsibility to ensure the ongoing safety and security of each facility," he said, suggesting that books that could be used to radicalize or incite inmates to violence will still be purged. Officials don't see the library revisions as a violation of constitutional rights, Truman said.

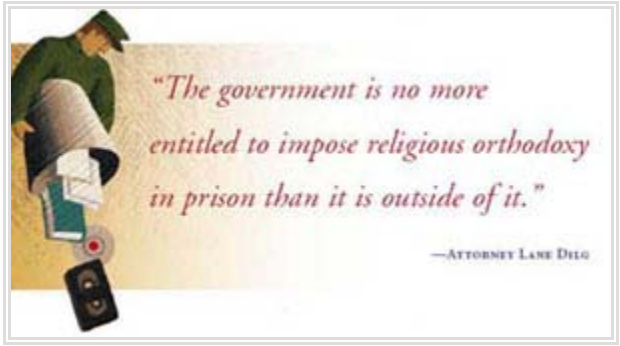
Although the Bureau has some funds for the purchase of religious books, the majority of the books and materials available to inmates in chapels are donated by religious ministries and others. Inmates also can individually receive books directly shipped from approved vendors such as mail order companies, bookstores, and publishers, or donated by various ministries. These can be books inmates ordered or that were purchased by family members and friends.

Only chapel and religious libraries—not leisure libraries in the federal prisons—were targeted under the bureau's so-called Standardized Chapel Library Project. Before removing the titles not on the newly created approved list, the Bureau said it consulted with experts representing many religions in its inmate population to certify the content of about 150 print, 150 audio, and 150 video holdings for inclusion on an initial standardized list of religious books and videos for each religious group. The plan was to continue to add to the more than 3,000 entries as materials were reviewed and approved, Truman said, adding that availability of basic worship resources like Bibles and Korans was never affected. "It should also be pointed out that no books, videos, or audiotapes were destroyed," he said.

However, Michele Deitch, who teaches criminal justice policy at the Lyndon B. Johnson School of Public Affairs at the University of Texas in Austin, was shocked that bureau officials considered their action constitutional. "There's always been an effort to take away controversial things, but religious materials had always been given a very different status."

Because of the volume of books involved, the bureau likely took the easier path of creating a smaller list of preapproved books to avoid having individually to decide which titles to screen and toss out, says Douglas Laycock, a University of Michigan Law School professor and expert on religious liberty and the separation of church and state. "The constitutional issue is whether that's a far more restrictive method than necessary and where the government gets authority to choose and approve religious books for different religions."

Lane Dilg, a staff attorney with the American Civil Liberties Union's program on Freedom of Religion and Beliefs in Washington, D.C., was concerned that some minority religions might have been excluded from the bureau's initial list of approved books and materials. "The government is no more entitled to impose religious orthodoxy in prison than it is outside of it," she said. "An approved book policy couldn't possibly meet the needs of all inmates."



Out of the nearly 190,000 federal prison inmates, almost 60 percent identified themselves as being of a faith linked to Christianity. About 8 percent, 15,508, identified themselves as either Muslims or members of the Nation of Islam, 15 percent didn't list a religion or said they were atheists, and the remaining 15 percent represented a range of other faiths including beliefs associated with American Indians and Buddhism, Hinduism, and Judaism.

The bureau listed nearly 150 books and other Islamic materials on an initial list of approved books and materials. But the lawsuit filed by the two inmates at the Federal Prison Camp in Otisville, New York, suggested that before all books were later returned, the Muslim portion of the chapel library had all but disappeared, with only the Koran and two other titles left.

Moses Silverman, the New York-based lawyer representing Moshe Milstein (who is now at a halfway house) and John J. Okon, said his clients won because the books were returned, but whether they will continue to pursue the case would depend on what happens next.

Over the years, inmates have brought many lawsuits that argue against denial of their First Amendment rights and violation by prison officials of laws, including the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The laws protect the religious exercise of an institutionalized person and set a stricter standard of scrutiny for actions that limit prisoner religious expressions, but law professor Laycock says provisions guaranteeing religious literature in prisons aren't as clear as they should be.

That may partly explain the varying directions in which courts have ruled on related cases.

In an opinion issued in 2003, New York federal judge Naomi Reice Buchwald ruled that Intelligent Tarref Allah, formerly Rashaad Marria, was entitled to copies of the central text, The 120 Degrees, and certain other materials associated with the Nation of Gods and Earths,

also known as the Five Percenters. She concluded that the Nation was a religion and not solely a gang, as it had been classified by New York corrections officials. She later agreed with prison officials that allowing one-on-one meetings with outside volunteers could pose a security threat because of prison staffing issues and members' past history of violence.

Erik Kriss, a spokesman for New York's Department of Correctional Services, said that since 9/11 the agency has been more vigilant in monitoring inmates, including whenever they gather, for security reasons and to keep its prisons safe. "We respect the First Amendment, but we have people inside the prison system who have committed crimes and caused violence," Kriss said. "We respect anybody's rights to practice as long as they're not using it to plot."

In another more recent ruling, a Michigan federal district judge adopted recommendations of a federal magistrate, holding that prison officials had qualified immunity from damage claims in connection with their seizure from the inmate plaintiff of religious materials from the Nation of Gods and Earths. However, the judge also concluded that the plaintiff was permitted to proceed with his claim for an injunction seeking removal of the "security threat" designation given the Nation and challenging the taking of his religious literature.

And last year a California federal court concluded in a case brought by Jesus Christ Prison Ministry and three state inmates that prisoners' rights were violated by the policy of a prison facility that prohibited unapproved vendors from sending free softbound Christian literature, compact discs, and tapes to prisoners who had requested those materials.

Bill Sessa, a spokesman for California's Department of Corrections and Rehabilitation, said that the agency corrected the problem by creating a master list of vendors. Instead of each prison having its own list, approved vendors can sell books to any inmate in any prison.

BREAKDOWN OF BUREAU OF PRISONS INMATE POPULATION BY RELIGION

Adventist	775	Nation of Islam	3,921
American Indian	6,307	None	28,204
Atheist	150	Nontraditional	146
Baha'i	4	Orthodox	482
Buddhist	1,614	Other	7,432
Catholic	50,238	Pagan	1,950
Church of Christ	3,027	Pentecost	626
Hindu	227	Protestant	53,013
Jehovah	1,196	Rasta	3,506
Jewish	3,137	Santeria	1,052
Messianic	474	Science	103
Moorish	2,194	Sikh	40
Mormon	539	Unknown	5,867
Muslim	11,587		

SOURCE: Bureau of Prisons

"There's no censorship of which religions can have materials in prison, only where books are coming from," he said. Inmates' backgrounds, gang ties, and divergent views are bigger influences on attitudes and propensity for violence than what they read in chapels, he said.

However, some civil libertarians and prisoner rights advocates take issue with restrictions on which publishers are allowed directly to sell materials to prison inmates. Gary Friedman, spokesman for the American Correctional Chaplains Association, said the Bureau of Prisons previously had a list of nine banned publishers, which included two Muslim publishers and mostly Christian distributors of materials that promote hate—such as White supremacist ideologies. It has now modified that policy to look at publications on an item-by-item basis, he said.

Friedman, chairman of Jewish Prisoner Services International, which provides religious services and materials to Jews in prison and their families, says that a lot of people in the Muslim community are apprehensive about participating in prison religious programs for fear of being suspected of radicalizing inmates.
"The Muslim chaplains I've worked with are phenomenal people who do an incredible job, don't teach terrorism or hatred, and contribute greatly to the orderly operation of prisons," says Friedman, also a Washington state chaplain. "In rural areas, where most prisons are located, it's always been hard enough to get minority clergy and volunteers. The current anti-Islamic climate in the U.S. is making it even more difficult for the Muslim community."

Mahdee Abu-Abdillah of Nashville, Tennessee, a Muslim handling outreach to area prisons, said he once heard about security concerns regarding hardback books but hasn't had problems getting educational materials to inmates. "I'm all for keeping that type of stuff out of the prisons and even the country in general," Abu-Abdillah said about books by extremists.

Ron Turner, director of religious services with the Tennessee Department of Corrections, said prisons have always screened for materials that could threaten safety and security, but legitimate religious materials have always been permitted and protected under the law.

"To do a wholesale removal of religious materials from the libraries of prisons appears to me to be a clear violation of RLUIPA," he said about the law. "One reason the BOP pulled back from their position, I think, is that they realized that they had gone too far—that in removing so much religious materials from libraries, they were probably violating RLUIPA."

For now, civil libertarians, religious groups, and prisoner rights advocates see the change in how the bureau is implementing the library revision plan as a victory. "I'd say this is what our civic teachers taught us that government should work like," said Prison Fellowship's Nolan. "We were able to protest, they listened to our concerns, and. . . changed their policy."

Getahn Ward is a Nashville, Tennessee-based freelance writer who focuses on business and religion issues.

MARCH / APRIL 2008

The Man On The White Horse!

BY: LINCOLN E. STEED

Time for the cavalry? Since 9/11 it seems we've been living out a darker model of action. Sort of like the ill-famed charge of the Light Brigade in the Crimean War. If you've read the famous poem of that event you'll appreciate the brave stupidity of Lord Raglan's order for the brigade to charge several miles up a narrow defile into the mouths of Russian cannons. That too was an ill-defined war, far from home and hearth, on issues that even now bemuse historians.

Nearly seven years after 9/11, we are still trotting toward the cannon in hopes of defeating terrorism. Hundreds of billions of dollars in national treasure and thousands of lives litter the way...to what? Donald Rumsfeld spoke a truism when he opined that the effort would last our lifetimes. But few have really paused to adequately contextualize our position.

Of late, the stock market has trembled and slipped. The prospect of national financial collapse keeps investors selling and the Fed chairman busy adjusting expectations. I have read much analysis of the phenomenon, but have never read anyone willing to connect it in any way to lost treasure. True, there is some debate about the effectiveness of giving a cash payment to taxpayers in order to stimulate the economy, but only the "unlearned" on talkback radio call-ins wonder aloud how even more public debt can save us.

Perhaps in academia they are discussing the historical analogs to our position. I hope so, because the pre-election maneuvering and primary hype is surely setting us up for something historic..

We are rapidly approaching the moment and place where only a man on a white horse can save us.

Of course, during a presidential election, that is exactly the expectation that seizes the voters and drives public discourse. Other nations may have greater voter turnout than the United States, but few can equal the unbridled enthusiasm that is applied to the process here. Few respond as innocently to the convenient promises and easy solutions offered.

What is interesting this time around is that there is even less emphasis on hard facts than usual. Party affiliation counts for much, of course, even as most voters seem oblivious to the real policies that undergird each party. It has devolved pretty much into a character test. And the first bona fide requirement was religion.

Far be it from me to suggest that religion is unimportant. It is the elephant in the room whenever we talk about terrorism. And there is no party pun intended here! We are indeed in a period of militant religion worldwide. It explains things from Darfur to Baghdad, from the Indian-Pakistani tensions to the rise of a Christian America agenda here.

Christians have every reason to feel reassured that a particular candidate is a fellow Christian. But the country as a whole has every reason to avoid making it a requirement. After all, the Constitution says succinctly: "No religious test shall ever be required" for public office. Unfortunately, we are ignoring the Constitution and effectively requiring a religious loyalty test.

Perhaps the saddest example has been the early treatment of Mitt Romney. Nominally a Christian, but of an affiliation easily characterized by other Christian sects as pseudo-Christian, Mitt responded in a way that made me cringe. While his, or any candidates', religious affiliation is doubtless an important part of the mix that goes into each voter making up their mind, it is illegal and certainly dangerous in a post-9/11 world for it to be determinative.

To his credit, Romney tackled the issue early and showed no shame in the fact of his personal faith. Top marks there. But in a pivotal speech to address the religion concern, he seemed to try to downplay his religious differences with mainstream Christianity and reinvent his Mormon identity as something akin to fundamentalist evangelicalism. The inference was that this is the acceptable American religious identity. That was unfortunate.

This magazine deplores efforts to redefine the United States as a Christian republic. It is historically unsupportable. A Christian society it might have been and might yet become again in the best sense if we Christians can differentiate piety from religiosity, but Americans of all faiths should recoil from a state-enjoined religious identity. After all, the religious dictatorship in England under Oliver Cromwell was a republic, too.

One of the more telling religious gaffes of the primary season came from Mike Huckabee at a time when his numbers were up and it appeared that the conservative base had latched on to him. Newsweek quoted him as saying, "I believe it's a lot easier to change the Constitution than it would be to change the Word of the living God (January 28, 2008, page 21)." This, according to the magazine, was uttered as he was "calling for two new constitutional amendments banning abortion and same-sex marriage in order to bring U.S. law in line with 'God's standards'" (Ibid.,). Now, Mike Huckabee in the past has said all the right things about separation of church and state and has written a very fine article for this magazine on the correct relationship between religious instruction and state education. Why would he seem to go so far off the reservation and endorse this extremist religious agenda?
I think an answer to that question and the overall issue of the obligatory issue of religion for this stable of candidates is that we are indeed looking at a transformative moment in church and state. In some ways people are looking to find a moral answer as much as a political direction.

To be sure, the process has moved on, and by the time you read this there will have been much of the usual political war in moving toward the confrontation between the final party picks. But religion has been established as major criteria by both parties, precisely at a moment when religious/moral issues are consuming much of the nation and the whole world.

I am sure we will hear much more of this when the pope of Rome addresses the United Nations. Already an expectation has been created that this will be a significant address. One cannot fault the Roman pontiff for putting forth whatever spiritual vision he is moved to. But the fact of a somewhat (remember John Paul II) charismatic religious leader speaking as a political leader at the United Nations is problematic and certainly allows for insertion of a particular religious agenda into world civil affairs.

Of course, it is now quite a few months since the president of Iran addressed the United Nations and riffed on about his spiritual agenda. The secular press hardly understood him as he elaborated on the nearness of the coming of the 12th imam—an event and appearance not dissimilar to the Christian expectation of the second coming of Christ. Of course, the imam is not to be Christ, but the conditions of chaos that precede his coming are similar to biblical predictions.

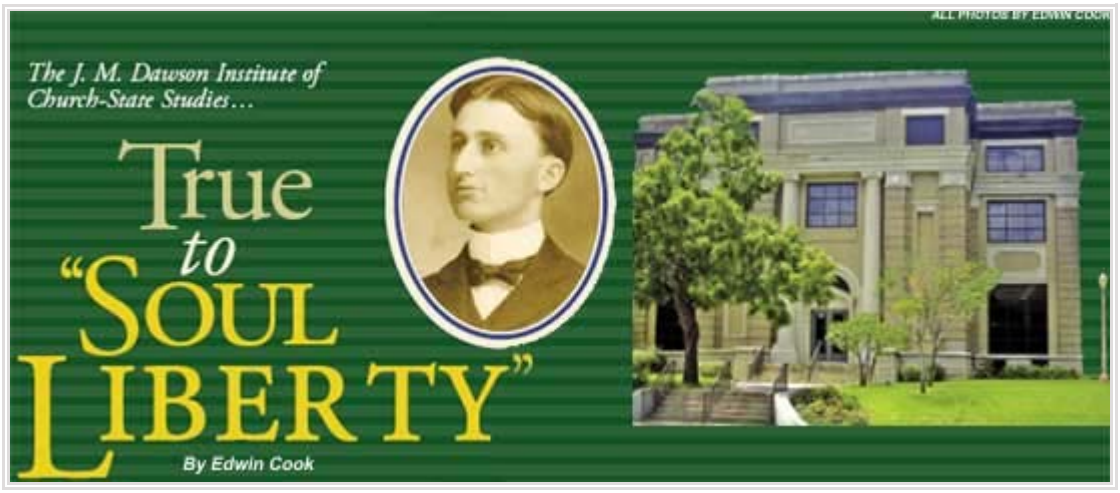
The Bible does say much about the appearance of the Man on the white horse. In the Apocalypse of John He is presented as going forth "conquering, and to conquer" (Revelation 6:2). That Man on the white horse is clearly Jesus Christ. It is an exciting image of Christian victory. It provides a clear way through the chaos of the days outlined for us in biblical prophecy.

However, in these times of distress we need to be clear about how we relate to the coming of a savior figure. I eagerly anticipate the coming of Jesus Christ. Someone's vision of a coming imam puts me more to mind of interreligious war. And voting in any political leader with an expectation that they can function as savior of national morality puts me to mind more of the horrible lessons of history—a tale of Caesars and persecution.

Lincoln E. Steed
Editor,
Liberty Magazine

MARCH / APRIL 2008

True To Soul Liberty



For over two centuries, our nation has enjoyed the liberties envisioned by such Founding Fathers as Madison, Jefferson, Adams, and Franklin. Our liberties have not come easy—political and legal struggles, bloodshed in wars, and even personal sacrifice by liberty advocates mark the price tags of our freedoms.

While many individuals can be credited with defending our freedoms, and many institutions can be recognized for sustaining them, this year marks the 50th anniversary of one institution that has impacted the realm of religious liberty through such venues as academia, advocacy, literary works, and education. The J. M. Dawson Institute of Church-State Studies at Baylor University has long been recognized for its work in the field of church-state studies.

Recently the Keston Institute, which formerly served a role at Oxford University, England, similar to the role that the Dawson Institute serves at Baylor, opted to donate all of its archival material to the Dawson Institute. While the majority of Keston's work dealt with the satellite countries of the former U.S.S.R., its archival material still makes an invaluable contribution to research in the field of church-state relations in those countries.

History and Founding of the Dawson Institute[1]

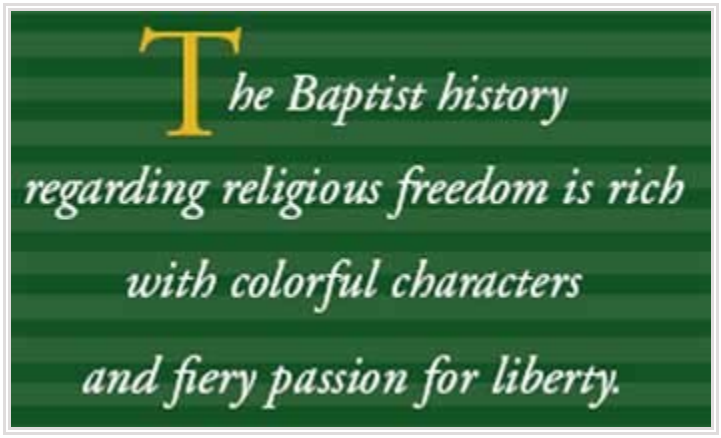
Founded in 1957 at Baylor University, the Dawson Institute was named after a distinguished alumnus, J. M. Dawson. Dawson had been the pastor of the First Baptist Church of Waco for over 30 years, serving from 1915-1946. He reflected the ideals that came to be embodied in the Dawson Institute program. In 1945, as an ardent defender of religious freedom for the individual, he made a global impact for full religious liberty for the individual by presenting to the United Nations Organization over 100,000 signatures from Baptists asking that an article guaranteeing full religious liberty be included in the Universal Declaration of Human Rights (UDHR), which was later formulated in 1948. [2]

In 1953 Dawson also authored *America's Way in Church, State, and Society,* in which he corrected misperceptions about church-state interaction prevalent during the 1950s. At that time, the Roman Catholic Church was arguing for nonpreferential aid, or multiple aid, to all religious groups as the best way to ensure freedom of religion. Dawson clearly drew upon historical information that refuted such notions, showing that Founding Fathers like Madison and Jefferson did not interpret freedom of religion to mean government aid to all religions. [3]

While Dawson did not endorse government aid to religion, neither did he defend government intrusion of religion. While he did not espouse government and religion entanglement, neither did he adopt an "otherworldly" isolationist approach to church-state relations. Recognizing some areas of overlap between government and religion, Dawson sought to reflect the same ideals that the Founding Fathers had formulated in the First Amendment: government allowing each religious group to either flourish or flounder of its own accord, nonintrusion of government into affairs of religion, and governmental protection of all religious groups, especially those in minority status. [4]

The Baptist Vision of Religious Liberty—"Soul Freedom"

With such a beginning, the Dawson Institute has reflected the traditional Baptist position of church-state separation. What has been that position? The Baptist history regarding religious freedom is rich with colorful characters and fiery passion for liberty. Their story of



religious liberty in America begins with Roger Williams, who had to flee persecution in the penetrating cold of winter. He founded Rhode Island as a refuge for those being persecuted. [5]

Other notable Baptists include legendary individuals like Isaac Backus (eighteenth century) and John Leland, 30 years younger than Backus. Both were Baptist ministers who preached extensively in various locations and faced persecution. One may say that Baptists' intense struggle for religious liberty is what has caused them to hold this cause dear to their hearts—so dear as to lead them to proclaim:

"Baptists have been recorded in history as champions of religious liberty, with a courageous and consistent proclamation of the truth that a man must be absolutely free in his soul's relationship to God—so free that if he chooses, he may not deal with God. Baptists have insisted that there be nothing to hinder a man's free access to God or his willful rejection of God." [6]

The theological term Baptists use to describe such a broad platform for religious liberty is soul freedom, which is reflected in the Manifesto on Religious Freedom formulated in 1947. The concept of *soul freedom* has two associated corollaries: religious liberty and separation of church and state.

Soul freedom[7] is the theological concept at the very epicenter of Baptist views on freedom of religion. It is formulated from the concept of Genesis 1:27 that man is made in the image of God. It is inherent, then, to every human being by virtue of God's creative act. Since God alone creates man's soul, then the individual is accountable to God alone. Because man is held responsible for the life he lives, it implies that he is able to respond to God—either by accepting Him or rejecting Him. Either implies a moral choice. Thus, Scripture gives the invitation: *"Whosoever will,* let him take the water of life freely" (Rev. 22:17; italics added).

Religious liberty[8] follows as a natural corollary of soul freedom and is considered the social component in the schema of religious liberty. Since man was made to respond to God through moral choice, then he must be free from coercion, which only makes hypocrites. Religious liberty is a necessary component to missionary work. Individuals must be allowed the freedom to hear the gospel, weigh the evidence for themselves, and exercise the moral power of choice. For every Baptist who enjoys religious freedom comes the corresponding obligation to seek that same religious freedom for others, thus fulfilling the golden rule.

Separation of church and state[9] follows in sequence after religious liberty. It is the political component in the Baptist schema built upon the concept of soul freedom. The Founding Fathers, such as Jefferson and Madison, were influenced by Baptists in the development of the Bill of Rights. [10] Madison especially adopted the cause of persecuted Baptists in Virginia to argue on political grounds for separation of church and state. [11]


Professon Barry Hankins of the J.M. Dawson Institute

Thus, the J. M. Dawson Institute, during the 50 years of its existence, has sought to hold high the Baptist banner of religious liberty, otherwise known as soul freedom. Through the efforts of each successive director of the Dawson Institute, Baptists have sought to offer the unique Baptist position of church-state separation to their students and to society. The Dawson Institute directors, who all have served in the long historical line of those holding high the torch of freedom, include Dr. Paul Geren (1957-1959), Dr. James E. Wood, Jr. (1959-1973 and 1980-1994), [12] Dr. James L. Garret (1973-1980), [13] Dr. Derek Davis (1994-2006),14 and the current interim director, Dr. Christopher Marsh.

Breadth and Influence of the Dawson Institute

Through lectures, conferences, and symposia, the Dawson Institute has provided opportunities for scholars to interact with one another on current issues spanning a wide range of disciplines. Such figures as Justice Antonin Scalia, George Huntston Williams, Dr. Brian Tierney, Dr. Corwin Schmidt, and Senate chaplain Barry Black have given lectures to the institute at Baylor. Not only are students given the opportunity to attend presentations by leading scholars, but they are also encouraged to present their own scholarship at various conferences during the academic year.

At the governmental level, the Dawson Institute has left an indelible mark, as well. The expertise of the institute's faculty is made available to national and international political leaders who have consulted with them on public policy issues. Additionally, faculty members engage in weekend public seminars to better inform citizens about religious liberty issues. Graduates from the Dawson Institute have also been consultants regarding the formulation of legal documents and national constitutions in the areas of freedom of

religion and government interaction with religion.

Not

Staffers in front of various books about the institute and produced by professors there.

only by means of the public forum, but also through the literary medium, has the Dawson Institute impacted the church-state arena. The institute publishes its quarterly organ, *Journal of Church and State* , which includes scholarly articles addressing church-state issues from around the world, book reviews, abstracts of recent dissertations, and announcements of upcoming church-state events. The *Journal* is distributed to subscribers throughout all 50 states and more than 70 countries. [15]

Educational Opportunities

Education is another significant area that the Dawson Institute has impacted through the advanced degree program it offers. Students can pursue either an M.A. or Ph.D. in Church-State Studies, as well as an alternate Ph.D. in Religion, Politics, and Society. Upon completion of graduate coursework, Dawson Institute scholars have entered into religious liberty advocacy work, accepted posts with governmental agencies addressing human rights issues, been employed by religious bodies as liaisons with governmental institutions, and been tenured as university professors.

Designed to encompass the breadth of religious liberty issues, some of the courses offered through the institute include "The History of Church-State in the West," "Church-State in the Reformation Era," "Church and State in the United States," "American Civil Religion," "Religion and Politics in America," "Liberation Theology," "Eastern Perspectives on Church and State," and "Church and State in the Modern World." All courses are designed to offer students a cutting-edge perspective on the development of current church-state issues. For example, "Islam and Democracy" provides students with a balanced and comprehensive understanding of political and religious factors that intersect in the modern world, especially in the aftermath of 9/11.

A further contribution toward recent developments in church-state issues offered by the institute is in the area of sociology of religion. In classes taught by Dr. Christopher Marsh, the institute's current interim director, students are introduced to the seminal thoughts of such renowned sociologists as Peter Berger, Max Weber, and Emile Durkheim regarding the sociological factors that influence religious experience. The sociological dimension attempts to offer an unbiased, objective approach to explaining the phenomena of religious experience, which can be useful in establishing a governmental approach of "benevolent neutrality" toward religion. It also provides the framework for studying the interaction of government and religion from a statistical perspective that seeks to provide a non-prejudicial viewpoint while substantiating conclusions with empirical evidence.

In recognition of the Dawson Institute's 50th anniversary, Baylor president Dr. John M. Lilley commented:
"It is an honor to recognize the 50th anniversary of one of Baylor's most well-established and respected research centers, the J.M. Dawson Institute of Church-State Studies. J.M. Dawson was passionate in his commitment to religious liberty for all people and his insistence that all governments should endeavor to protect this fundamental freedom, which serves as the foundation of human rights. Dawson's influence on church-state relations in America and around the world continues today, with Baylor faculty and graduate students focusing on the historical, religious, political, philosophical, and sociological dimensions in this critical area of study."

1 I am indebted for much of the information in this section to James M. Dunn, "J. M. Dawson: Shaper of Public Affairs and Religious Liberty," a pamphlet in a series entitled "Shapers of Southern Baptist Heritage," published by the Historical Commission of the Southern Baptist Convention (Nashville, Tenn., 1987).
2 In the UDHR, the right to religious freedom is found in Article 18. The Baptist World Alliance "Manifesto on Religious Freedom,"

adopted one year before the UDHR on August 3, 1947, reflects the Baptist position of full religious liberty for the individual (Tad Stahnke and J. Paul Martin, eds., Religion and Human Rights: Basic Documents [New York, N.Y.: Center for the Study of Human Rights, Columbia University, 1998], pp. 205, 206).

3 J. M. Dawson, America's Way in Church, State, and Society (New York: MacMillan Company, 1953), p. 9.

4 Wallace Daniel, "Editorial: The Journal and the Tradition of Religious Liberty," Journal of Church and State, 48:2 (Spring, 2006): pp. 266, 267.

5 Brent Walker, "Religious Liberty: A Continuing Struggle," in Proclaiming the Baptist Vision: Religious Liberty, Walter B. Shurden, ed. (Macon, Ga.: Smyth and Helwys Publishing, Inc., 1997), p. 103.

6 Report of Special Committee on Church-State Relations to the Executive Board of the Baptist General Convention of Texas (June 6, 1961), 2. Obtained from W. R. Poage Legislative Library, Baylor University, Jack Hightower Files, Group 2 (Personal), Baptist and Baptist General Convention of Texas, folder entitled "Church-State Relations."

7 James M. Dunn, "The Baptist Vision of Religious Liberty," in Proclaiming the Baptist Vision: Religious Liberty, Walter B. Shurden, ed. (Macon, Ga.: Smyth and Helwys Publishing, Inc., 1997), pp. 31-33.

8 Ibid., pp. 33-35.

9 Ibid., pp. 35-37.

10 E. Glenn Hinson, Religious Liberty: The Christian Roots of Our Fundamental Freedoms (Louisville, Ky.: Glad River Publications, 1991), p. 138; Shurden, p. 35.

11 Ellis Sandoz, "Religious Liberty and Religion in the American Founding Revisited" in Religious Liberty in Western Thought, Noel B. Reynolds and W. Cole Durham, Jr., eds. (Atlanta, Ga.: Scholars Press, 1996), pp. 266-269.

12 Daniel, pp. 268, 269.

13 Ibid., p. 271

14 Ibid., pp. 272, 273.

15 Pamphlet #03049GRD 10.04 published by the Graduate School for the Church-State Studies Program, Baylor University, p. 5.

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No Pictures, Please

BY: ELFRIEDE VOLK

Legislation requiring photo identification of all drivers, passed in 2003 by the Alberta government, may soon see the demise of a small agrarian sector of this prairie province of Canada. After all, the ability to drive is necessary in a farming operation, for the farmer has to be able to get supplies and feed for his cattle, as well as take his crops to market. Yet some German-speaking Hutterites, who fled Russia at the end of the nineteenth century to find religious freedom in Canada, believe that having their picture taken voluntarily is a sin, contravening their understanding of the second commandment.

Although driver's licenses issued since the mid-1970s have included a photograph of the driver, an exception was made for those with sincere religious objections. In 2003, however, the Alberta government decided to make photo ID on licenses mandatory in order to prevent identity theft and boost security against possible terrorist attacks. Peace-loving Hutterites from the Wilson Colony near Coaldale felt it was against their religious convictions to have their pictures taken, and as a result licensed drivers in the colony declined by attrition from 37 to 15 as expiring licenses were not renewed.

Taking their case to court, the Wilson Hutterites recently won a victory, as Justice Sal LoVecchio of the Alberta Court of Queen's Bench ruled in their favor. However, the decision of the jurors was not unanimous. Some felt that, with the availability of trucking services, the Hutterites could still continue their farming operations even if no one in the colony had a valid driver's license.

The Alberta government appealed the case to the Supreme Court of Canada.

Hutterites themselves are also split on the issue and LoVecchio's decision. Mark Waldner, from another colony, says that "some Hutterites, including myself, contend that. . . as long as we don't make an idol out of those 'images' we aren't trespassing the commandment." When my family visited a colony near Ponoka 30 years ago, we found the young ladies eager to have their picture taken with us, and they gave us their names and addresses so that we could send them the prints when they were developed.

Hutterites believe that having their picture taken voluntarily is a sin

So what is the problem? Why do some strenuously object to having their pictures taken while others welcomed the opportunity? Is having a driver's license a right? Is it necessary for the survival of a farming community? Hutterites believe in the greater good for more people. Would having picture identification on their licenses ensure security and public safety for more people? Canada's top judges will have to wrestle with a fair way to apply the rights of this very private group.

It is informative for an outside observer to look closely at how the Hutterites arrived at their objection of faith.

Although the Hutterites learn English in school, they still converse among themselves and have their services in Low German. At the end of the nineteenth century, when the Hutterites came to Canada, Luther's translation of the Bible was the one used almost exclusively. Here the second commandment contains a prohibition against making a *Bildnis. Bild* is the German word for "picture," so one can see how some obtained their belief that having picture identification would be a sin. But we must also remember that Luther worked on his translation alone and may have missed some of the nuances of the Hebrew language.

Since then, in 1909, the Elberfeld translation was issued by R. Brockhaus. In this translation the prohibition is against making a *geschnitztes Bild* , or "carved picture" or image. This is more in line with the original *pesel,* which means "graven, cut, or hewn image." Reading the rest of the commandment makes it clear that it concerns making and worshipping these things, as Waldner realized.

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MARCH / APRIL 2008

A Church-State Judgement Call

BY: MARCI A. HAMILTON

On Monday, October 1, 2007, six Supreme Court justices attended the 54th Annual "Red Mass" at the Cathedral of St. Matthew, and there is reason to feel some unease with respect to their presence at the event.

No political candidate or judge gives up their First Amendment protections simply by election or appointment. Public officials continue to have a right in their private capacity to believe what they choose, to practice the religion of their choice, and to speak as they wish. The reasonable requirements of their jobs, however, can place restrictions on their ability to use their office to further their religion or beliefs, or to speak against their office or the best interests of the country. In this arena, at least, the difference between public and private makes quite a difference.

There is no good reason to criticize the Roman Catholic Church for attempting to communicate its views to as many in Washington as possible—that is its right in an open republican democracy. However, there is good reason to question the judgment of the justices who attended: Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito, who are Catholic, and Justice Breyer, who is Jewish. Attending the Red Mass is a legislative, executive, and Court tradition, but it is hardly a mandatory event, as the absence of Justices Stevens, Ginsburg, and Souter attests.

A Homily Expressing an Opposition to Church-State Separation

The homily, or sermon, was delivered by Archbishop Timothy Dolan of Milwaukee. Archbishop Dolan characterized the event as an opportunity "to rejoice in a mutually enriching alliance between religion, morality, and democracy." But what he meant, of course, was that we should rejoice in an alliance between a particular religious denomination, Catholicism, and the government. This was no celebration of religion as a general matter.

The Washington Times reported that Archbishop Dolan alluded to such issues as abortion, euthanasia, cloning, and human sexuality in his homily and asked the Holy Spirit to descend upon U.S. judicial leaders. He was obviously using this public moment to remind those in power of the church's position on hot-button issues. I have no criticism of him for doing so—only criticism for those jurists who would attend and bring their impartiality into question.

There Is Much the Justices Should Have Learned in the Aftermath of *Gonzales v. Carhart*

University of Chicago Law School professor Geoffrey Stone has been pilloried for pointing out that all five of the justices deciding *Gonzales v. Carhart,* which upheld a late-term abortion ban with no exception for the health of the mother, thus essentially overruling prior precedent, were Catholic. However, Stone's detractors doth protest too much; considering the justices' religion on this particular issue and suggesting it might have had relevance to their analysis was absolutely reasonable. The archbishop's persistent veiled references to the Catholic Church's stance against abortion reinforces the fact that in our public consciousness the institution is linked

inextricably to the issue.

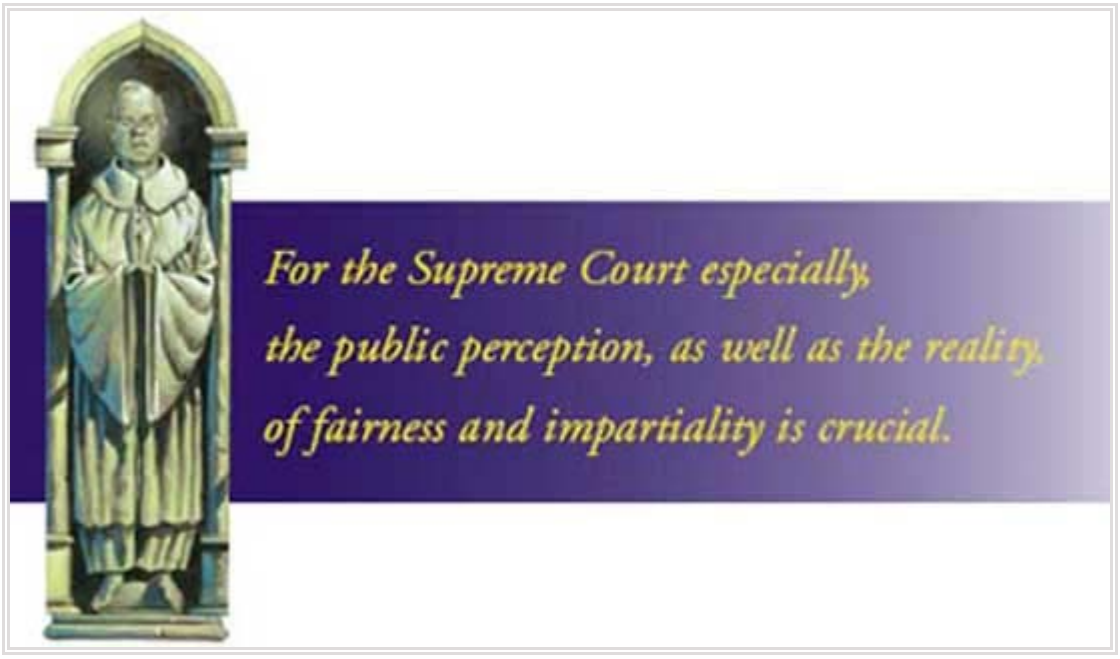
Granted, having five Catholics on the Supreme Court does not necessarily add up to a voting bloc, because in the United States most Catholics are "cafeteria Catholics" who choose their beliefs individually and not by adhering solely to institutional instruction. Still, the tone and tenor of the majority opinion in *Gonzales* had to make any clear-minded individual pause. It is hard to identify another recent opinion where the justices went further out of their way to defer to highly suspect, and probably erroneous, legislative conclusions on factual issues in order to overturn prior precedent. Moreover, the opinion set a new low in its embrace of paternalistic reasoning. The decision may have been defensible on some ground, but the way the opinion was written does open the majority to attack along the very lines Stone outlined.

I have no interest in reliving the Stone- *Gonzales* brouhaha, and only raise it to note that it should have put the justices on notice to tread carefully when it comes to religiously freighted issues that they have the duty to resolve from a secular, law-based point of view.The five Catholic justices have to be aware, after the fallout from *Gonzales,* that questions have been raised about their ability to separate their judicial judgment from their religious belief. After all, Stone is hardly the only person to raise such concerns. They were triggered earlier when Justice Alito's mother declared that he would do what the church required on abortion, and when various commentators noted that a majority of the Court now belong to a single faith.

Federal Jurists Must Avoid Not Only Impropriety, but Also Its Appearance

Importantly, the burden rests on the justices to avoid the appearance of impropriety, not just impropriety itself. Ethical canons carefully note that jurists must take both into account, and for the Supreme Court especially, the public perception, as well as the reality, of fairness and impartiality is crucial.

Thus, even if not one of the attending justices took to heart the pointed reminders in the archbishop's homily regarding church doctrine on matters that might well appear before them, their presence at the Mass and its content still should raise questions for any number of Americans. After all, President Kennedy did not ignore the concerns that were raised over his faith, and in particular the question whether allegiance to the pope would interfere with his service as the president of the United States. Rather, he made clear to all that, consonant with his duty to uphold the Constitution and particularly its establishment clause, he simply would not take marching orders from Rome.



This is not a free exercise question, of course; the justices, like all of us, have the right to worship as they choose. However, the Red Mass, it is important to note, has a prominent and intentional political component. Indeed, no part of Archbishop Dolan's homily was very far removed from the church's public political positions. He told the congregation that "participation in the Red Mass is a humble prayer for the red-hot fire of the Holy Spirit, bringing the jurists, legislators, and executives of our government the wisdom to recognize that we are indeed made in God' image. . . and then to give them the courage to judge, legislate, and administer based on the consequences of this conviction: the innate dignity and inviolability of every human life, and the cultivation of a society of virtue to support that belief." This choice of language plainly, if implicitly, referenced church positions on topics such as abortion and euthanasia that have and will continue to come before the justices.

Once again, this is no criticism of Archbishop Dolan's right to preach his church's beliefs, but it does raise the question of the propriety of the five Catholic justices attending the Red Mass, and attending it en masse. (I don't know what to make of Justice Breyer's attendance, except that perhaps he believed that a Red Mass is a generic affair, given the intended audience is all three branches of government; or perhaps he simply chose to express respect for his brethren by attending.) The Red Mass is a public affair intended to reinforce the ties between government and the church. It is one thing for elected representatives, who are inherently accountable to their constituents and the larger public good, to attend; it's quite a different matter when the independent judiciary does so.

(There is also the question of the wisdom of having Archbishop Dolan deliver a homily at a Red Mass, because he has not been the most ardent defender of the rule of law. In cases involving the Milwaukee archdiocese's culpability for clergy abuse, he has argued that the federal and state constitutions should protect the archdiocese against any liability, and played hardball with child sex-abuse survivors by moving to have their names made public in a case involving a particularly ugly predator, Father Siegfried Widera.)

The justices of the Supreme Court have a solemn duty to approach their docket with the dispassion and fairness of Lady Justice, who holds the scales of justice with her blindfold on. As Judge Roy Moore (who purchased a large granite rendition of the Ten Commandments and then placed them in the lobby of the Alabama Supreme Court) learned, no judge has the right to proselytize in a courthouse. Public officials, in other words, may not use the weight of their office to push their religious ideas or agendas on their constituents or litigants. Not only is this a First Amendment principle, but also a canon of ethics.

At the same time, they can certainly worship in their private capacity, attend church (or synagogue or mosque), and support their chosen religious organization. The five Catholic justices of the Supreme Court came perilously close to the line between their private beliefs and their public actions when they attended the annual Red Mass immediately preceding the start of their year's term.

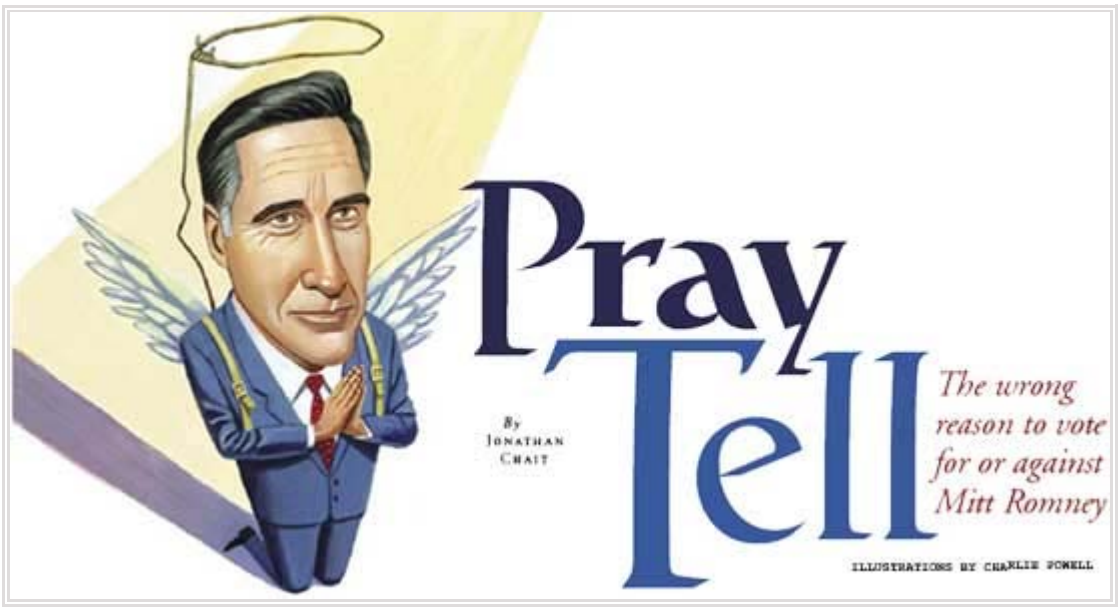
No one is asking the justices to abandon their faith—least of all myself. Nor am I asking the justices to be anywhere near as publicly open and candid about the relationship between their faith and their job as was President Kennedy, though it might be illuminating if they were. What I am asking them to do is provide the public with greater reassurance that they view their judicial obligations as distinct from their religious obligations. Taking a pass on the Red Mass might well have done just that.

Marci A. Hamilton is a visiting professor of public affairs and the Kathleen and Martin Crane senior research fellow at the Program in Law and Public Affairs at Princeton University. Professor Hamilton's most recent work is God vs. the Gavel: Religion and the Rule of Law (Cambridge University Press, 2005), now available in paperback. Professor Hamilton's forthcoming book, which will be published this spring, is titled, Justice Denied: What America Must Do to Protect Its Children (Cambridge, 2008). First shared on Findlaw.com, this article has been enlarged and adapted by Marci Hamilton for our use.

MARCH / APRIL 2008

Pray Tell

BY: JONATHAN CHAIT



If it were possible for a politician to sue voters for religious discrimination, Mitt Romney would have an open-and-shut case against the Republican electorate. Here is a man possessing all the known qualifications for the job of GOP presidential nominee—strong communication skills, a successful governorship, total agreement on every issue, Reaganesque hair—and yet he may well be denied it on account of his faith. In a poll released in June, 30 percent of Republicans said they'd be less likely to vote for a Mormon. One conservative televangelist dispensed with the subtlety and warned his flock, "If you vote for Mitt Romney, you are voting for Satan!" These attacks have nothing to do with how Romney would conduct himself as president; they're purely theological. Romney's critics are declaring they couldn't support Romney on the sole basis that they consider Mormonism unchristian.

Unless you yearn for a Romney presidency—which I don't, particularly—the real significance here is that nobody is challenging the premise of faith-based politics. Romney could argue that his religion is unrelated to how he would conduct himself in office, as John F. Kennedy famously did in 1960, but he hasn't done so, and, by all accounts, he won't. Instead, he is defending himself on theological grounds, trying to persuade social conservatives that Mormonism is more compatible with evangelical Protestantism than they think.

The assumption today, unlike during most of the postwar years, is that a candidate's religion must be an integral component of his political persona. It's not just Republicans, either. For the past few years, Democrats have been frantically attesting to their own religiosity. Mississippi Democratic gubernatorial candidate John Eaves, Jr., declared himself to be "on Jesus' side." Political secularism—the notion that elections should not be contested on the basis of candidates' religiosity—is at a modern nadir.

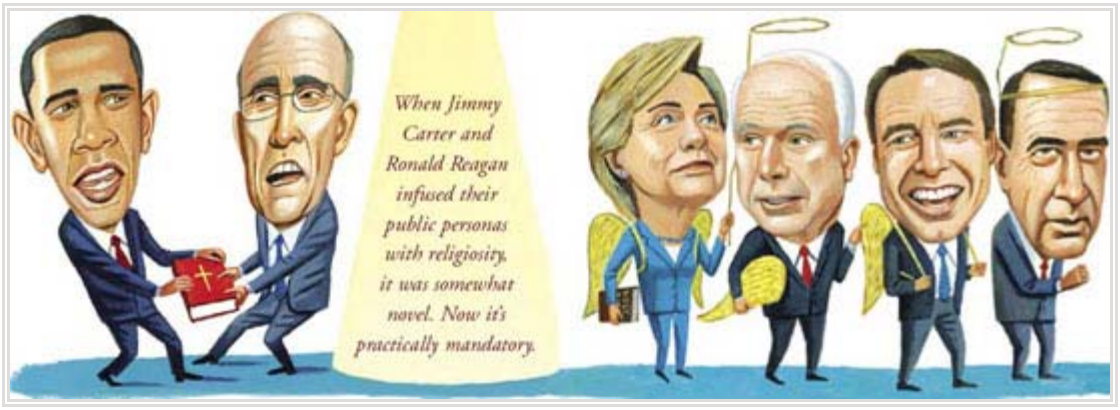
In a country where most Americans say they would never vote for an atheist, the political logic of faith-based politics is undeniable. The moral logic, however, remains unpersuasive. Advocates of faith-based politics take as their premise the inverted assumption that secularism is an assault upon faith. "Secularists are wrong when they ask believers to leave their religion at the door before entering into the public square," admonished Barack Obama last summer. The brilliant social conservative Ross Douthat has argued in *First Things* that the rise of the Religious Right is merely "the Republican reaction against the Democrats' decision to become the first major party in American history to pander to a sizeable bloc of aggressively secular voters."

"Aggressive" is a strange adjective here, given that secularists are not known for door-to-door proselytizing or massacring members of opposing religious groups. Secular political discourse does not place religious voters or candidates at a disadvantage. It merely denies them an advantage. A religious candidate can campaign on the war in Iraq or health care or gay marriage just as easily as a secular candidate can. But a secular candidate can't run on his faith in the way a religious candidate can. ("Secular," of course, means a lack of *political* religiosity, rather than a lack of religious belief.) Religion-infused politics places a massive handicap on candidates and voters who are secular or subscribe to minority religions.

The most common accusation against secularism is that it ignores the deeply religious nature of the American public. "As a prudential matter, the case for public reason makes a great deal of sense," argues Douthat. "But one searches American history in vain—from abolitionist polemics down to Martin Luther King, Jr.'s Scripture-saturated speeches—for any evidence of this supposedly ironclad rule being rigorously applied, or applied at all."

When Jimmy Carter and Ronald Reagan infused their public personas with religiosity, it was somewhat novel. Now it's practically mandatory. It is true that the secular nature of postwar U.S. politics was not the historical rule. It was progress: The America of the nineteenth and early twentieth centuries was a less hospitable place for religious minorities. The temperance crusaders and the populists, for instance, were religiously steeped mass movements with more than a whiff of, respectively, anti-Catholicism and anti-Semitism. The secularism that has generally prevailed since World War II is precisely what has allowed a Catholic to be elected president and a Jew to be nominated as vice president, among other ways that religious tolerance has expanded.

Then we have the civil rights movement. This has become the Social Right's favorite example—a cuddly historical mascot for anti-secular politics. The argument is that if you support Martin Luther King—and who doesn't these days?—you shouldn't have a problem with other kinds of faith-based politics.



It's certainly true that the civil rights movement was rooted in Black churches and the language of religious liberation. But this was an artifact of a unique situation. Slavery, Jim Crow, and the one-party White supremacist character of Southern politics had destroyed every other possible outlet for African-American politics other than the church. Civil rights activism took the form of preaching because that was the only form Black politics could take.

The depth of American religiosity is precisely why secularism is so important. Since religion is premised on faith, theological disputes cannot be settled through public reason. Even the most vicious public policy disputes get settled over time. (Americans now agree on slavery and greenback currency.) But we're no closer to consensus on the divinity of Jesus than we were 200 years ago.

Not long ago, John McCain declared that "since this nation was founded primarily on Christian principles. . . personally, I prefer someone who I know has a solid grounding in my faith." GOP representatives Virgil Goode, Jr., and Bill Sali, and conservative talk show host Dennis Prager, have railed against Muslims and Hindus offering their own prayers in Congress. I'm sure most advocates of faith-based politics would abhor this sort of discrimination. But it's really just the natural conclusion from the premise of faith-based politics: If it makes sense to support public figures because they share our religious beliefs, then it also makes sense to oppose public figures who don't. *

Jonathan Chait is a contributing senior editor for The New Republic, a biweekly magazine. This article first appeared in its November 19, 2007, issue, a few weeks before Mitt Romney gave a well-publicized speech on why his religion should be no impediment to his being elected U.S. president. See the editorial on page 30 for a comment on that speech.