Loyola University Chicago Law Journal

Volume 50
Issue 1 *Fall 2018*

Article 11

2018

From Common Good to Convivencia: Religious Liberty and the Cake Wars

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From Common Good to Convivencia: Religious Liberty and the Cake Wars

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This article explores what is at stake theologically in current cases where religious liberty is presumed at risk and interpretations of the common good are contested. While attention to the theological details are not explicitly of relevance to the courts, they should be considered in their complexity by religious entities that participate by filing amicus briefs and/or by adding to the rhetoric around highly charged neuralgic issues like same-sex marriage. The cases involving bakers and the Colorado Civil Rights Commission are worth considering, from a perspective that complicates the roles of communities of faith in terms of serving the common good.

INTRODUCTION

I come to these culture wars as a conscientious objector concerned about the collateral damage caused by what feels like endless battles that pit neighbor against neighbor in a zero-sum game. From the manipulation

of the papal visit to the United States in September 2015, to the daily chaos and conflict privileged by the current presidential administration,[1] the escalation of hostilities plays out in ways that make one wonder if religious liberty is a shared value or a weapon. From my place as a Latin@́ theologian[2] who looks to *lo cotidiano* or daily living as *locus theologicus*, I question what we even mean by the common good. From the perspectives of Dreamers, benefitted by Deferred Action for Childhood Arrivals (DACA), alternatively documented immigrants, and refugees seeking asylum, *common* implies exclusion, and the *good* appears relative. We live at a time when wedding cakes get more scrutiny than semiautomatic weapons, and the illusion of a post-racial society crumbles under the weight of microaggressions and the disproportionate influence of the minority alt-white. No matter one's political affiliation, for those of us who claim to be grounded in religious and faith traditions, there needs to be a reset—a time out—because many of the issues that are considered polarizing today are being contested by people of faith on all sides.

At times it seems we are subject to communal amnesia with many buying into the hyperbolic narrative of polarization to the point that we lose our ability to consider perspective critically. Fifty years ago, in 1968, war raged in Vietnam and in our streets. African American university students conducted sit-ins in administrative offices,[3] and Mexican American high school students walked out of their classes[4]—all for

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1. *See, e.g.*, Peter Baker, *As White House's Revolving Door Whirls, Chaos is the Only Constant*, N.Y. TIMES (Mar. 13, 2018), https://www.nytimes.com/2018/03/13/us/politics/white-house-turnover-tillerson.html (discussing the abrupt firing of former Secretary of State Rex Tillerson among other staff turnover in the White House); Rebecca Ballhaus, *Trump Defends West Wing Turnover: 'I Like Conflict*,*'* WALL STREET J. (Mar. 6, 2018, 5:35 PM), https://www.wsj.com/articles/trump-defends-west-wing-turnover-i-like-conflict-1520375738 (discussing President Trump's attempts to put a positive spin on "an unprecedented level of turnover" in the White House); Brooke Singman, *Trump on Turbulence in the West Wing: 'I Like Conflict*,*'* FOX NEWS (Mar. 6, 2018), http://www.foxnews.com/politics/2018/03/06/trump-on-west-wing-environment-like-conflict.html (discussing President Trump's comments on staff turnover in his first fourteen months in office).

2. Please note I use @́, an arroba with an acute accent, in place of a gendered ending, as a means of destabilizing gender polarities, signifying the fluidity of language, culture, and identity, and to emphasize the role of location and situatedness in theology done *latinamente*.

3. Rebecca Lindell, *The Black Student Sit-In of 1968*, WEINBERG MAG., Spring/Summer 2015, at 22, 22–23, https://www.weinberg.northwestern.edu/after-graduation/weinberg-magazine/spring-summer-2015/flip/mobile/#p=1; *They Demanded Courageously: The 1968 Northwestern Bursar's Office Takeover*, NW. UNIV., https://sites.northwestern.edu/bursars1968/ (last visited Nov. 26, 2018).

4. *See, e.g.*, F. ARTURO ROSALES, CHICANO! THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 184–94 (1996) (discussing a walkout that took place in a high school in East

equity in education. The assassinations of Rev. Dr. Martin Luther King Jr., and later Senator Robert Kennedy, spiraled into more violence. Our cities burned during Holy Week—Baltimore, Chicago, Detroit, New York, Kansas City, Louisville, Wilmington, Trenton, Pittsburgh, Cincinnati, and Washington, DC.[5] How quickly we forget!

In 1968, student unrest in Germany unsettled professor and future pope Josef Ratzinger of the University of Tubingen, and, according to biographer John Allen, "helped to stimulate his more conservative stance."[6] In that same year, Gustavo Gutiérrez, a university chaplain in Lima, Peru, delivered the address that became the basis for his groundbreaking book *Teología de la liberación/A Theology of Liberation*.[7] A few months later, el Consejo Episcopal Latinoamericano (CELAM), the Latin American Bishops Conference, met in Medellín, Colombia. Their deliberations set in motion what would become a pillar of Catholic Social Teaching—the preferential option for the poor.[8] Meanwhile in the United States, the National Conference of Catholic Bishops released *Human Life in Our Day*, their pastoral letter on the sanctity of life and conscience, remembered today only in excerpts for its passages on abortion and contraception[9] but not for its controversial call for selective conscientious objection, a position postulated as well by John Courtney Murray a year earlier.[10] The bishops remembered "the

Los Angeles that "ushered in the *movimiento* in Los Angeles, and to a great degree elsewhere").

5. For more on the Holy Week Uprising of 1968, see PETER B. LEVY, THE GREAT UPRISING: RACE RIOTS IN URBAN AMERICA DURING THE 1960S 153–88 (2018).

6. JOHN L. ALLEN, JR., POPE BENEDICT XVI: A BIOGRAPHY OF JOSEPH RATZINGER 49 (2000).

7. The 1968 address appears in translation in Gustavo Gutiérrez, Address at Conference in Chimbote, Peru: Toward a Theology of Liberation (July 1968), *in* LIBERATION THEOLOGY: A DOCUMENTARY HISTORY 62–76 (Alfred T. Hennelly ed. & trans. 1990). For the book that results from that address, see generally GUSTAVO GUTIÉRREZ, TEOLOGÍA DE LA LIBERACIÓN: PERSPECTIVAS (1971), *translated in* GUSTAVO GUTIÉRREZ, A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION (Caridad Inda & John Eagleson eds. & trans., Orbis Books, 1973) [hereinafter HISTORY, POLITICS, AND SALVATION].

8. The 1968 CELAM meeting in Medellín did not coin the expression "preferential option for the poor," which happened at the CELAM meeting in Puebla in 1979. The final document reflects that Medellín sets the stage by identifying the poor and poverty repeatedly and specifically as a priority for the church's attention. *See* CELAM, *Documentos finales de Medellín: Mensaje a los pueblos de América Latina* (Sept. 6, 1968), https://www.ensayistas.org/critica/liberacion/medellin/medellin1.htm. For an overview of the "preferential option for the poor" in its journey from the episcopal documents of CELAM to usage in the Catholic Church in the US, see Carmen Nanko-Fernández, *Justice Crosses the Border: The Preferential Option for the Poor in the United States*, *in* THEOLOGIZING EN ESPANGLISH: CONTEXT, COMMUNITY, AND MINISTRY 120, 120–52 (2010).

9. *Excerpts from Human Life in Our Day*, U.S. CONF. OF CATH. BISHOPS (Nov. 15, 1968), http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/excerpts-from-human-life-in-our-day.cfm. For the full text, see National Conference of Catholic Bishops, *Human Life in Our Day*, PRIESTS FOR LIFE (Nov. 15, 1968), http://www.priestsforlife.org/magisterium/bishops/68-11-15humanlifeinourdaynccb.htm [hereinafter *Human Life Full Text*].

10. John Courtney Murray, S.J., Address at Western Maryland College: Selective Conscientious

number of individuals who have suffered imprisonment or have left the country because they felt compelled to follow their conscience rather than the law."[11] In that same letter, the bishops included the need for a review of the draft system, and "asserted that the quest for 'nuclear superiority' had become irrelevant to genuine security and pleaded for openness in confronting youthful protest."[12] Polarization is contextual, as are the demands of the common good, which are also "dependent on the social conditions of each historical period."[13]

Professor Kathleen Brady invites us to take seriously the implications of considering religious liberty within the context of the common good, defined briefly at the Second Vatican Council in *Gaudium et Spes* as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment."[14] This understanding was not confined, rather it embraced ever widening networks of global interdependence and "consequently involves rights and duties with respect to the whole human race."[15] The section goes on to qualify what constitutes those conditions which allow social groups and individuals access to fulfillment.[16] The list is more expansive than some of our contemporary, narrow, and litigated concerns suggest. Note religious freedom does not stand alone:

> [T]here must be made available to all men everything necessary for leading a life truly human, such as food, clothing, and shelter; the right

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Objection (June 4, 1967), https://www.library.georgetown.edu/woodstock/murray/1967l.

11. Div. of World Justice & Peace, *Statement on the Catholic Conscientious Objector*, U.S. CONF. OF CATH. BISHOPS (Oct. 15, 1969), http://www.usccb.org/issues-and-action/human-life-and-dignity/war-and-peace/statement-on-the-catholic-conscientious-objector-division-of-world-justice-and-peace-1969-10-15.cfm. In this statement, the bishops affirm their recommendation in *Human Life in Our Day*:

> a modification of the Selective Service Act making it possible, although, not easy, for so-called selective conscientious objectors to refuse—without fear of imprisonment or loss of citizenship—to serve in wars which they consider unjust or in branches of service (e.g., the strategic nuclear forces) which would subject them to the performance of actions contrary to deeply held moral convictions about indiscriminate killing.

Human Life Full Text, *supra* note 9, para. 152.

12. Editorial, Alan Geyer, '*Human Life in Our Day*,' 85 CHRISTIAN CENTURY 1495, 1495 (1968).

13. Pontifical Council for Justice & Peace, *Compendium of the Social Doctrine of the Church*, para. 166 (2004), http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html# [hereinafter *Social Doctrine of the Church*].

14. Pope Paul VI, *Gaudium et Spes*, Pastoral Constitution on the Church in the Modern World para. 26 (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [hereinafter *Gaudium et Spes*]; Kathleen Brady, *Religious Freedom and the Common Good*, 50 LOY. U. CHI. L.J. 137 (2018).

15. *Gaudium et Spes*, *supra* note 14, para. 26.

16. *Id.*

> to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the upright norm of one's own conscience, to protection of privacy and rightful freedom even in matters religious.[17]

At the heart of their concern are those conditions that disrespect the dignity of the human person, a list that is well worth heeding here because while it is often cited, rarely is it cited in its entirety. Instead, a truncated listing indicates a cafeteria approach that seems to suit the particularity of individual agendas.

In that section, the Council calls out the following as infamies that "poison human society" and "do more harm to those who practice them than those who suffer from the injury."[18] Identified as actions "opposed to life itself" are "any type of murder, genocide, abortion, euthanasia or willful self-destruction."[19] Considered violations of the "integrity of the human person" are "mutilation, torments inflicted on body or mind, attempts to coerce the will itself."[20] Insults to human dignity are named: "subhuman living conditions, arbitrary imprisonment, *deportation*, slavery, prostitution," trafficking of women and children, and disgraceful working conditions.[21] These actions are affronts to the sanctity of life and human dignity, therefore "they are supreme dishonor to the Creator."[22] The positioning of the text also suggests that these actions are contrary to the common good because they threaten life itself. The common good is not an abstraction. The 2004 *Compendium of the Social Doctrine of the Church* presents a more developed treatment of the common good yet acknowledges "it is a good that is very difficult to attain because it requires the constant ability and effort to seek the good of others as though it were one's own good."[23]

In light of this understanding of the common good, the following reflections explore briefly what is at stake *theologically*, not legally, in a current case where religious liberty is presumed at risk and interpretations of the common good are at variance.

I. CAKE WARS: A THEOLOGICAL TASTE

In part of her book *Consider Jesus*, theologian Elizabeth Johnson

17. *Id.*
18. *Id.* para. 27.
19. *Id.*
20. *Id.*
21. *Id.* (emphasis added).
22. *Id.*
23. *Social Doctrine of the Church*, *supra* note 13, para. 167.

traces the development of conciliar Christology from the second through seventh centuries.[24] She notes that as contentious debates raged over Jesus Christ's identity, "[o]ne bishop went out to buy a loaf of bread and wrote later that 'even the baker' wanted to discuss whether there were one or two natures in Christ!"[25] It seems that historically bakers have been just as invested in theology as carpenters, fishermen, tentmakers, and shepherds! Two cases in Colorado involve bakers and matters of theology and biblical interpretation in relation to customers and issues that impact LGBT people.

The Supreme Court heard *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* in December 2017; it ruled on it in June 2018. Jack Phillips, a baker and owner of Masterpiece Cakeshop, refused to make a wedding cake for a same-sex marriage celebration on the grounds that "you have the freedom to use your God-given creative talents only for projects that are consistent with your religious beliefs."[26] In an interview, Phillips contended:

> What's important is that I'm being obedient to Christ. He's given me this business and if he were here, he wouldn't make the cake. If he were my employee, I wouldn't force him to make the cake and participate in it because it doesn't honor God. The Bible calls it a sin.[27]

For Phillips, as a "cake artist," his creation would constitute an affirmation of, and participation in, a practice opposed to his constitutionally protected belief that marriage is the sacred union of a man and a woman. Such an interpretation raises some questions: How does a cake consumed at a post ceremony party constitute participation in the official sanctioning ritual? What exactly is the sin being addressed

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24. ELIZABETH A. JOHNSON, CONSIDER JESUS: WAVES OF RENEWAL IN CHRISTOLOGY 7–9 (1990).

25. *Id.* at 8. *See generally* Gregory of Nyssa, *De deitate Filii et Spiritus Sancti*, *in* 46 PATROLOGIAE CURSUS COMPLETUS 554, 557 (Jacques-Paul Migne ed., 1863), *cited in* PETER BROWN, POWER AND PERSUASION IN LATE ANTIQUITY: TOWARDS A CHRISTIAN EMPIRE 89–90 (1992).

26. *God Calls Us to do Everything for His Glory (1 Cor. 10:31)*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/createfreely (last visited Nov. 26, 2018). Jack Phillips, the baker, was represented by Alliance Defending Freedom (ADF), whose lawyers argued the case before the Supreme Court on Phillips's behalf. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig (last visited Nov. 27, 2018). ADF is a self-described "alliance-building legal organization that advocates for the right of people to freely live out their faith. We specifically focus on cases involving religious liberty issues, the sanctity of human life, and marriage and family." *We're Defending You: Request Legal Help*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/request-legal-help (last visited Nov. 27, 2018).

27. Ken McIntyre, *24 Questions for Jack Phillips, the Baker Who Gave Up Wedding Cakes for God*, THE DAILY SIGNAL (Aug. 19, 2015), http://dailysignal.com/2015/08/19/24-questions-for-jack-phillips-the-baker-who-gave-up-wedding-cakes-for-god/.

by the refusal since "same-sex marriage" would be biblically anachronistic, and the baker freely offered to "make you a birthday cake, shower cake, I'll sell you cookies and brownies, I just don't do cakes for same-sex weddings."[28] Consistency with an attribution of sinfulness in accord with the biblical injunction that a man should not lie with a man as with a woman found in Leviticus 18:22 would probably have required a *no cookie, cake, or pie of any kind* policy. Is this the only sin that the baker directly addresses? What about heterosexual couples who cohabitated before marriage? What about adulterers or pedophiles? Allegedly, Phillips has refused to make other types of cakes: "In the past, Jack has also declined to make cakes celebrating divorce, Halloween cakes, anti-American cakes, and cakes that disparage others."[29] Some of these refusals do not have clear religious biases at stake, for example anti-American cakes. Would the ruling on First Amendment protections have applied equally to expressions of free speech on a cake?

In *Jack v. Azucar Bakery*, the Colorado Civil Rights Commission ruled there was no discrimination toward a potential client by a baker who refused to put an explicit message and image on a cake reflecting, in William Jack's own words, a position that same-sex marriage was "un-Biblical and inappropriate."[30] Jack, a self-identified Christian, requested of baker Marjorie Silva two bible-shaped cakes, one with a red "X" over two grooms and another with the specific text: "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22."[31] Silva replied that she would bake the cakes but refused to write derogatory speech.[32] Instead she offered Jack the necessary decorating tools to inscribe his own cakes.[33] Jack claimed that the bakery violated his religious liberty as a Christian.[34] Silva, a Catholic, responded by saying that the bakery would not accept orders for cakes that discriminated against Christians and accordingly would not make one that

28. *Id.*

29. Maureen Collins, *3 Myths About the Masterpiece Cakeshop Ruling Debunked*, ALLIANCE DEFENDING FREEDOM (June 15, 2018), https://adflegal.org/detailspages/blog-details/allianceedge/2018/06/15/3-myths-about-the-masterpiece-cakeshop-ruling-debunked.

30. Jack v. Azucar Bakery, No. P20140069X, at 4 (Colo. Civil Rights Div., Mar. 24, 2015), http://www.adfmedia.org/files/AzucarDecision.pdf. Note that Jack tried this action with three bakeries, including Azucar, and filed complaints against all of them. *See* Jack v. Gateaux, Ltd., No. P20140071X (Colo. Civil Rights Div., Mar. 24, 2015), http://www.adfmedia.org/files/GateauxDecision.pdf; Jack v. Le Bakery Sensual, Inc., No. P20140070X (Colo. Civil Rights Div., Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf.

31. *Azucar Bakery*, No. P20140069X, at 2.

32. *Id.* at 3.

33. *Id.*

34. *Id.* at 1.

discriminated against gays.[35] There was ample evidence to show that the bakery indeed made and sold all types of religious event oriented Christian cakes, and employed six Christians, three of whom were Catholic.[36] The Division concluded that there was no discrimination on the basis of creed.[37]

Jack's biblical illiteracy would have imposed on Silva his belief that "homosexuality is a detestable sin," which is contrary to Catholic stances that separate the sin of sexual activity from homosexuality as orientation: "Consequently, the Church does not teach that the experience of homosexual attraction is in itself sinful."[38] A question of textual accuracy and interpretation arises as well. The Leviticus text is about activity and not orientation.[39] Jack's rendering of the verse as "homosexuality is a detestable sin" is inaccurate and is in effect an interpretation of Leviticus 18:22. It is not clear which translation of the bible he is drawing on because that particular phrasing appears not to exist in an English translation.[40] Jack takes liberties with Psalm 45 as well.[41] The context of

35. *Id.* at 3, 4.

36. *Id.* at 3.

37. *Id.* at 4. The Colorado Civil Rights Division investigates discrimination charges made by the public. The Colorado Civil Rights Commission considers the Division's investigations to determine whether to bring a formal hearing. Brief for Respondent Colorado Civil Rights Commission at 7–8, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

38. United States Conference of Catholic Bishops, Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care 5 (Nov. 14, 2006), *available at* http://www.usccb.org/about/doctrine/publications/upload/ministry-to-persons-of-homosexual-iInclination.pdf.

39. Imposing the concept of sexual orientation onto Leviticus is anachronistic. Such a contemporary understanding did not exist in biblical times. The Leviticus text is referencing a sexual act that is not procreative, male with male.

40. Most translations reference a male lying with a male as with a woman and declare it an "abomination" (for example American Standard Version, King James Version, 1599 Geneva Bible, New American Bible, and New Revised Standard Version). Others describe the same action as "detestable" (for example Christian Standard Bible, Common English Bible, International Standard Version, World English Bible). Very few translate it in terms of "sin" (for example New Century Version, International Children's Bible, New Life Version). Even rarer is the use of the word "homosexuality" (New Living Translation and Living Bible). The closest to Jack's translation is found in the New Living Translation (NLV), but even there, homosexuality is modified as a practice of a man having sex with a man as with a woman, not an orientation. Jack possibly offers his own redaction of the NLV text.

41. The context of the psalm is a love poem for the Davidic king's marriage to a foreign princess. The referent (you) is not God but the king: "you love righteousness and hate wickedness. Therefore God, your God, has anointed you with the oil of gladness beyond your companions" (New Revised Standard Version); "You love righteousness and hate wickedness; therefore God, your God, has set you above your companions by anointing you with the oil of joy" *Psalm* 45:7 (New International Version); "Thou lovest righteousness, and hatest wickedness: therefore God, thy God, hath anointed thee with the oil of gladness above thy fellows" *Psalm* 45:7 (King James Version); "You love justice and hate evil. Therefore God, your God, has anointed you, pouring out the oil of joy on you more than on anyone else" *Psalm* 45:7 (New Living Translation). The verse

Psalm 45 is a love poem for the Davidic king's marriage to a foreign princess. It is the king who is being praised for loving justice and hating wrongdoing, not God.

In no translation used by Protestants or Catholics does Psalm 45 say what Jack claims: "God hates sin." In this case, theologically speaking, Silva is not refusing to inscribe a recognizable biblical text.

II. FRIENDS OF THE COURT?

Theological discrepancies and biblical interpretations are not the concern of the courts, as the Supreme Court articulated in 1871 in *Watson v. Jones*:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.[42]

Attention to the theological details is necessary, however, on the part of our churches and religious entities who participate in these cases by filing amicus briefs and/or by adding to the rhetoric around highly charged neuralgic and contested issues like same-sex marriage. Three of these amici curiae are worth considering, not for the legal issues they raise, but from a perspective that complicates their role in terms of serving the common good.

A. William Jack and the National Center for Law and Policy in Support of Petitioners

The *Jack* cases were influential in *Masterpiece* through an amicus brief that Jack and the National Center for Law and Policy filed.[43] The National Center for Law and Policy, a Christian, nonprofit law firm, is connected on multiple intersecting levels with the Alliance Defending Freedom (ADF), which represented Phillips, the baker in *Masterpiece*.[44]

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in the aforementioned translations appear as Psalm 45:7, however for Catholics who use the New American Bible Revised Edition (NABRE) in liturgy the line appears in verse 8.

42. Watson v. Jones, 80 U.S. 679, 728 (1871).

43. Brief of Amici Curiae, William Jack and the National Center for Law and Policy in Support of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

44. Among the connections, Dean Broyles, the president of the National Center for Law and Policy (NCLP), was trained by ADF and is an "ADF affiliate attorney and member of ADF's honor guard." *About Us*, NAT'L CTR. FOR L. & POL'Y, http://www.nclplaw.org/about-us/. The NCLP appears as an ally entity on the ADF webpage, *Allies*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/about-us/allies, with a link to its own subpage, *National Center for Law & Policy*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/detailspages/organization-

The majority opinion in favor of the baker, concurring opinions, and dissenting opinions all cited the *Jack* cases.[45] At least one writer in the media suggested that Jack's cases provided an out for the Court—a risk averse way to support Phillips without "opening the door to religious justifications for all sorts of discrimination."[46]

> Seizing on Jack's story, it managed to avoid ruling on Phillips' behavior and instead focus on the Colorado Civil Rights Commission. The commission, the court's majority found, had treated Phillips unfairly simply because he objected to same-sex marriage on religious grounds. By doing so, the court said, the commission had violated his rights under the Free Exercise Clause of the Constitution.[47]

The majority opinion distinguished between the Colorado Civil Rights Commission's decision about the *Masterpiece* baker's refusal to make a cake for a gay marriage, and decisions in three separate cases involving bakeries which refused to make anti-gay cakes for William Jack. The Court opined,

> The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. . . . The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.[48]

B. Christian Legal Society, Center for Public Justice, Church of Jesus Christ of Latter-Day Saints, Lutheran Church—Missouri Synod, National Association of Evangelicals, Queens Federation of Churches, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America in Support of Petitioners

The example of William Jack is mentioned (without naming him) in the amicus brief filed in support of Phillips by various interreligious and ecumenical entities.[49] These religious organizations "accept that same-sex civil marriage is the law of the land" but "cannot in good conscience

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details/national-center-for-law-policy.

45. *Masterpiece Cakeshop*, 138 S. Ct. at 1728–32; *id.* at 1732–33 (Kagan, J., concurring); *id.* at 1734–40 (Gorsuch, J., concurring); *id.* at 1749–51 (Ginsburg, J., dissenting).

46. *See, e.g.*, Stephanie Mencimer, *Did the Supreme Court Fall for a Stunt?*, MOTHER JONES, (June 7, 2018, 6:00 AM), https://www.motherjones.com/politics/2018/06/did-the-supreme-court-fall-for-a-stunt/.

47. *Id.*

48. *Masterpiece Cakeshop*, 138 S. Ct. at 1730.

49. Brief of Christian Legal Society et al. as Amici Curiae in Support of Petitioners at 3–4, 18–19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

assist with same-sex weddings" and seek to "protect the religious liberty of these conscientious objectors."[50] The brief asserted that Colorado's Anti-Discrimination Act, as applied in the cases of all four Colorado bakers, violated the Free Exercise Clause because it was inconsistent: "Colorado protected bakers who cannot in conscience create cakes that denounce same-sex relationships. But Colorado denied protection to petitioner, who cannot in conscience create a cake that celebrates a same-sex wedding."[51] Intriguing in this brief, as well as in other deployments of Jack's complaints, is who is identified as the religious party. In his complaints and amicus brief, Jack is portrayed as acting out of religious motivations, and therefore his First Amendment rights are sacrificed for the bakers. Yet, the brief did not find significant that at least three bakery employees at Azucar were Catholic and the other three were also Christian. Thus, it did not consider that the bakers' refusals in conscience to bake offensive cakes may also have been informed by religious beliefs. The same applies in *Masterpiece*. Sin language only references the object of resistance by the aggrieved who is against same-sex marriage.

There is an assumption that same-sex couples who seek marriage are not in a religious community that sanctions their union and/or that their desires for such unions are not informed by religious impulse. This supposition, too, is evident in the language of the brief, though the amici do not disparage LGBT people or their right to marry. My concern is that the language used fosters sacred versus secular argumentation whereby those who do not accept same-sex marriages are identified as religious believers. In this sacred versus secular argumentation, then, LGBT people who seek marriage, and others who do not oppose it, are motivated by factors *other* than religious beliefs. This bias ignores the reality that a growing number of religious entities sanction gay marriage, that attitudes within the United States are changing, and that some LGBT people seek marriage for religious reasons.[52] LGBT people can also be religious believers. The language deployed in the amicus brief establishes a dichotomy between same-sex couples and religious believers (who are

50. *Id.* at 1.

51. *Id.* at 3–4.

52. *See, e.g.*, David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/; *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, PEW RES. CTR. (June 26, 2017), http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/; Jana Riess, *Same-Sex Marriage Garners Support Among Most American Religious Groups, Study Shows*, RELIGION NEWS SERV. (May 1, 2018), https://religionnews.com/2018/05/01/same-sex-marriage-has-support-among-most-american-religious-groups-study-shows/.

also referenced as religious dissenters) that unintentionally implies married LGBT couples are not religious. While framed benevolently and in terms of competing goods, the brief still reflects the bias.

> Where same-sex couples see loving commitments of mutual care and support, many religious believers see disordered conduct that violates natural law and scriptural command. And where those religious believers see obedience to a loving God who undoubtedly knows best when he lays down rules for human conduct, many supporters of gay rights see intolerance, bigotry, and hate.[53]

C. United States Conference of Catholic Bishops, Colorado Catholic Conference, Catholic Bar Association, Catholic Medical Association, National Association of Catholic Nurses-USA, and National Catholic Bioethics Center in Support of Reversal

The amicus brief filed by a collection of Catholic entities, including the United States Conference of Catholic Bishops (USCCB), indicates in a footnote that, "[i]t is legally irrelevant—and therefore unnecessary to address—whether Phillips' views align with the religious views of his local church, its broader denomination, [or] our own Catholic Church . . . ."[54] Perhaps that is true for legal purposes, but what about the process of discernment that leads a religious entity to even file an amicus brief? By giving support to theological positions that do not accurately reflect the denomination's own teachings, how is that not perceived as tacit affirmation? At the same time, the preparation of amicus briefs can be costly, and, as the mandatory first footnote in these briefs indicate, the costs must be borne by the amici: "Pursuant to Supreme Court Rule 37.6 . . . no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief."[55] When USCCB or regional Conferences of Catholic Bishops are among the amici, questions necessarily arise about the causes the church funds. Why this particular issue? How has the cost been assessed in relation to the short- and long-term value of the church's involvement? How does this investment contribute to the common good? Currently, the USCCB webpage reveals that a disproportionate number of the cases supported by amicus briefs relate to marriage, directly or indirectly, with particular attention to same-sex situations even in cases identified under religious liberty.[56]

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53. Brief of Christian Legal Society et al., *supra* note 49, at 11. For further examples of the language of religious believer/dissenter versus same-sex couples, see *id.* at 2–3, 9–10.

54. Brief of Amici Curiae United States Conference of Catholic Bishops et al. at 18 n.16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

55. *Id.* at 1 n.1.

56. *Amicus Briefs*, U.S. CONF. OF CATH. BISHOPS, http://www.usccb.org/about/general-

Our denominations and faith communities are on all sides of these issues. Are we using the courts to engage in ecumenical and interreligious debates that belong in another sector of the public square? Why are the bakers and vendors who refuse services to same-sex couples the only ones considered acting out of religious motivations? Are the vendor cases exploiting religious liberty in service to particular social agendas? For example, the Alliance for the Defense of Freedom (ADF) that represented Phillips is also connected to at least two of the aforementioned three amicus briefs. The counsel of record in the USCCB brief is identified as one of their allied lawyers, and the National Center for Law and Policy, that filed a brief with Jack, is an allied organization. For the bishops, this should certainly raise concerns because the ADF seems to require its employees and alliances to adhere to a statement of faith that at significant points is inconsistent with Catholic teaching.[57] The requirement of affirming a statement of faith by lawyers who are defending the right of others to exercise their conscience with respect to speech and faith appears oxymoronic. Does accepting pro bono legal services come with a price tag?

If, as some have speculated, the Supreme Court ruling on *Masterpiece* leaves open the possibility of increased numbers of vendor cases, how, in good faith, will the common good be served as we navigate competing claims on conscience? In their 1968 pastoral letter, the United States Bishops noted: "Threats to life are most effectively confronted by an appeal to Christian conscience."[58] Are we capable of recognizing that some convictions on all sides may well be motivated by appeals to Christian conscience? As the majority opinion concluded:

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counsel/amicus-briefs/index.cfm. It is not clear from this webpage if these are highlighted cases or an exhaustive list.

57. *See* Sarah Posner, *The Christian Legal Army Behind 'Masterpiece Cakeshop*,*'* NATION (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/. The article includes a screenshot indicating that allied lawyers need to affirm their agreement with the statement of faith at: *Equip. Empower. Unite.*, ALLIANCE DEFENDING FREEDOM, https://www.documentcloud.org/documents/4312313-Screencapture-Adflegal-Org-for-Attorneys.html. S*ee Statement of Faith*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/about-us/careers/statement-of-faith. Among the points which are incompatible with Catholic teaching: "We believe that all those who die in God's grace through faith are assured eternal salvation; those who die in a state of sin and unbelief suffer the punishment of Hell." John J. Bursch, the counsel of record for the USCCB amicus brief, is identified as an ADF affiliated lawyer in *Michigan Farmer to Court: Stop City's Religious Discrimination, Let Me Sell Food to Everyone*, ALLIANCE DEFENDING FREEDOM (Sept. 12, 2017), https://www.adflegal.org/detailspages/press-release-details/michigan-farmer-to-court-stop-city-s-religious-discrimination-let-me-sell-food-to-everyone. "Former Michigan Solicitor General John Bursch of Bursch Law PLLC in Caledonia, one of nearly 3,200 attorneys allied with ADF, is serving as local counsel in the case for Tennes and Country Mill Farms." *Id.*

58. *Human Life Full Text*, *supra* note 9, para. 9.

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[59]

III. NEGOTIATING THE PEACE

The amicus brief filed by the Catholic parties frame their participation as necessary because "[i]t is about the freedom to live according to one's religious beliefs in daily life and, in so doing, advance the common good."[60] How can Catholics determine what constitutes the common good in an era when Pope Francis insists on a culture of encounter?[61] Are we, as a church, obsessing over legally sanctioned same-sex marriage in ways that limit our ecclesial voice on other significant issues that threaten life? For example, was it beneficial to the common good for the USCCB to put a condition on comprehensive immigration reform that opposed inclusion of the Uniting American Families Act because it allocated spousal immigration benefits to same-sex couples?[62] Do we have other models for engagement in the public square on controversial issues?

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59. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

60. Brief of Amici Curiae United States Conference of Catholic Bishops et al., *supra* note 54, at 6.

61. Francis frequently uses the language of encounter in various venues, including but not limited to audiences, homilies, meditations, apostolic visits, messages, and social media. He references encounter particularly in terms of cultivating solidarity, inclusion, and dialogue. *See, e.g.*, Pope Francis, Meeting with the Academic and Cultural World, Pastoral Visit with the Pontifical Theological Faculty of Sardinia, Cagliari (Sept. 22, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/september/documents/papa-francesco_20130922_cultura-cagliari.html; Pope Francis, *Evangelii Gaudium*: Apostolic Exhoration (Nov. 24, 2013), https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html; Pope Francis, Message for the 48th World Communications Day, Communication at the Service of an Authentic Culture of Encounter (June 1, 2014), https://fwdioc.org/pope-francis-world-communications-day-6-1-14.pdf; Pope Francis, Video Message on the Occasion of the Opening of the 2014 World Cup In Brazil (June 12, 2014), https://w2.vatican.va/content/francesco/en/messages/pont-messages/2014/documents/papa-francesco_20140612_videomessaggio-mondiale-calcio-2014-brasile.html; Pope Francis, Address to Students, Apostolic Journey to Cuba, the USA, and Visit to the United Nations, Havana (Sept. 20, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150920_cuba-giovani.html; Pope Francis, Homily, Apostolic Journey to Cuba, the USA, and Visit to the United Nations, Madison Square Garden, New York (Sept. 25, 2015), http://w2.vatican.va/content/francesco/en/homilies/2015/documents/papa-francesco_20150925_usa-omelia-nyc.html; Pope Francis (@Pontifex), TWITTER (Oct. 26, 2017, 4:30 AM), https://twitter.com/Pontifex/status/923512035291234305.

62. Testimony of Most Reverend José H. Gomez, Archbishop of Los Angeles, Chairman, U.S. Conference of Catholic Bishops, Before the Senate Judiciary Committee on Comprehensive Immigration Reform, 11 (Feb. 12, 2013), http://www.usccb.org/about/migration-policy/upload/CIR-Testimony.pdf.

Perhaps it is time to reconsider John Courtney Murray's advice to Cardinal Richard Cushing of Boston regarding a Catholic response to a proposed Massachusetts law that would have decriminalized the sale of contraceptives.[63] Following Murray's recommendation, Cushing opted not to endorse or oppose the proposal on the basis that Catholics did not need civil law to instruct their fidelity nor did the Church need to impose its moral views on others.[64]

Reconsider as well the 1997 "San Francisco Solution" enacted by then Archbishop William Levada.[65] He chose to avoid what could have been a protracted and expensive legal battle by opting for a solution, "where employers can expand health care benefits, while not being forced to recognize that marriage and domestic partnership are equivalent."[66] In this way, the common good was served without the Catholic Church compromising its moral teaching. The plan allowed an employee "to designate another member of the household to receive benefits."[67] The identity of the person or their relationship to the employee was irrelevant.[68] This solution expanded care for all employees and their households without regard to the circumstances of their habitation, and it did not jeopardize the mutual relationship necessary for church and civil authorities to serve the greater community.

Are there ways to de-escalate tensions and to attend to the connection between religious liberty and the common good? What will it take to move toward *convivencia*, which at best is a just, negotiated, and peaceful living together located at the intersection of our differences? Pope Francis calls us to cultivate *una cultura de encuentro*, but this requires an admission that conflicts cannot be "ignored or concealed."[69] Nor can they be permitted to ensnare us in ways that project onto institutions our own confusion and dissatisfaction as impediments to unity.[70] Francis calls for solidarity:

> [A] way of making history in a life setting where conflicts, tensions and oppositions can achieve a diversified and life-giving unity. This is not to opt for a kind of syncretism, or for the absorption of one into the

63. Memorandum from John Courtney Murray, S.J. to Cardinal Cushing on Contraception Legislation (1965), https://www.library.georgetown.edu/woodstock/murray/1965f.

64. BARRY HUDOCK, STRUGGLE, CONDEMNATION, VINDICATION: JOHN COURTNEY MURRAY'S JOURNEY TOWARD VATICAN II 163 (2015).

65. William J. Levada, *The San Francisco Solution*, FIRST THINGS (Aug. 1997), https://www.firstthings.com/article/1997/08/003-the-san-francisco-solution.

66. *Id.*

67. *Id.*

68. *Id.*

69. Pope Francis, *Evangelii Gaudium*, *supra* note 61, para. 226.

70. *Id.* para. 227.

> other, but rather for a resolution which takes place on a higher plane and preserves what is valid and useful on both sides.[71]

In order to do so, we might entertain the sentiment of Gustavo Gutiérrez, reflecting twenty years after that 1968 lecture that launched his theology of liberation.[72] When asked to consider the influence of the book born from that address, Gutiérrez responded, "My book is a love letter to God, to the church, and to the people to which I belong. Love remains alive, but it grows deeper and changes its manner of expression."[73] For those of us who see our labors committed in faith—as lawyers, scholars, theologians, as people of good will—are our labors love letters to God and to the people to which we belong? Do our efforts encourage our people to seek the good of others as though it were their own good?

71. *Id.* para. 228.
72. HISTORY, POLITICS, AND SALVATION, *supra* note 7.
73. *Id.* at xlvi.