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**REFLECTIONS ON *NOMOS*: PAIDEIC COMMUNITIES AND SAME  
SEX WEDDINGS**

*Marie A. Failing*\*

**ABSTRACT**

Robert Cover's *Nomos and Narrative* is an instructive tale for the constitutional battle over whether religious wedding vendors must be required to serve same-sex couples. He helps us see how contending communities' deep narratives of martyrdom and obedience to the values of their paideic communities can be silenced by the imperial community's insistence on choosing one community's story over another community's in adjudication. The wedding vendor cases call for an alternative to jurisprudential violence, for a constitutionally redemptive response that prizes a *nomos* of inclusion and respect for difference.

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**I. INTRODUCTION: ABOUT ROBERT COVER AND TEXT STUDY**

As long as I knew him, Robert Cover studied texts. Indeed, I was privileged to study texts with him at the Yale Law School in 1982. By that, I do not mean what law professors often mean by that, which is to extract ideas and arguments from articles, which we then applaud, criticize, extend, or apply to some new cases or circumstances. In my memory, whether it was a mythical narrative, a historical analysis, or a jurisprudential proposal, our teacher Robert Cover sat with texts as a student sits with a beloved teacher, waiting to be surprised, waiting for illumination. He did not scavenge through a text to find an idea he could take away and use; he listened to the text, to its resonances, respecting and awaiting the surprise of the word itself. While his entry into these texts was almost reverent, indeed sometimes childlike in its wonder, it was never idolatrous: turning the table to his teaching self, he probed us about meaning and about implication, about the word itself and about how the word lived for us in the worlds we inhabited as lawyers and as human beings.

It is not surprising that Robert Cover studied texts. That was the tradition in which he was raised, and, indeed, the tradition of the other faiths that grew from it, including Christianity and Islam. Unfortunately, in the modern American version of Christianity, at least, too often the tradition of text study has been confined to seminarians and those who give over their lives to the profession of teaching and practice of the faith. In Cover's tradition, text study seems more democratic; from the bar and bat mitzvah to Torah study in shul, the process of text study is observed, taught and mimicked from youth to old age.

In the conservative Lutheran faith tradition in which I grew up, that tradition was still observed—to be sure, most important were the narratives of our tradition, Bible stories themselves, as well as the yearly nod on Reformation Day to the stories of Martin and Katie Luther. But we also poured over individual passages from the Bible to illuminate their meaning for our lives. My confirmation in the church in the 1960s marked a crossroads in *paideia*; however—before that, the ritual was to examine confirmands on the texts themselves to assure our elders that we knew them well, including the meaning that had been passed down through the generations, before the laying on of hands that would signal that we had become full members of the church. But the world was changing in the early 1960s, and the

importance of our knowledge of the text receded in favor its personal importance for our singular lives—we had to stand up and declaim what the verses assigned as our faith verses meant to us individually. While that exercise was valuable, I came to wonder whether something important had been left behind with the turn to the personal instead of to the text.

Lawyers certainly do a version of text study when they interpret a statute or regulation or parse the implications of the way a sentence is written in a particularly important (usually Supreme Court) case. It is not so common for lawyers and law professors to do a text study of law review articles, selecting out individual passages for careful scrutiny of the meaning of individual words, and gauging the resonance of those words in the context of a dilemma that has to be resolved. Perhaps it is our haste to “get on with it,” to reach what we believe is the value of the article, the kernel of idea or argument that can be transported into our own jurisprudential essays and built upon. Perhaps it is the way we have been taught in law school to ignore the author of our texts in favor of their essence, to ignore our own experience of the text for just the right declarative sentences that summarize it.

Perhaps it is our attempt at conquest: I have chuckled more than once at the many Constitutional Law articles that begin by reciting the stripped-down argument of the eminent theorists who have come before, poking holes in each, and then proposing that this article offers a “new and improved” approach to the subject or problem. There is an almost masculine delight in theoretically besting the best, at pronouncing the new thing that no one has ever thought of, at solving an insoluble problem. Perhaps it is our need, taught to us and passed onto our students, that our insights about the law fit into a comprehensive, logically organized argument, our lawyers’ penchant for “a place for everything, and everything in its place.”

Regardless, there are good reasons to study the text of *Nomos and Narrative*.<sup>1</sup> For me, it has always defied extraction of ideas, the summarization of an essence, the reduction to a principle from its pages. It seems to force us to enter into its vast horizons of vision, prevents us from skipping ahead, insists that we linger over each sentence or paragraph, and makes us wonder what in God’s name that sentence or paragraph has to do with the next. There are some passages

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<sup>1</sup> ROBERT COVER ET AL., *Nomos and Narrative*, in *NARRATIVE, VIOLENCE & THE LAW: THE ESSAYS OF ROBERT COVER* 171 (1993).

that seem to chug along like a standard law review article but there are also bursts of vision like Fourth of July firecrackers, the words playing against each other like a symphony that cannot be reduced to a declarative statement, the paragraphs abruptly crashing against each other like a boat upon the swells. To take it all in and understand it as a whole is almost too taxing for the mind.

Thus, I do a sort of text study here of *Nomos and Narrative*, parsing the words in these paragraphs to try and figure out how they speak to a dilemma that we must resolve to go on with our common life. Of course, like any text study, that process requires some selections, for it is not possible (for me, at least) to write all that might be written about all of the sentences of this text. But we must begin somewhere. And perhaps if we make a start, it will inspire even more text study of this essay and our colleagues' work, rejoicing and respecting the complex depth and the song of those assays that venture into the difficult human dilemmas that we tell each other about.

## II. THE PROBLEM IS WEDDINGS; THE LAW IS STORIES

Lawyers apply their knowledge and judgment to seemingly insoluble problems, and come up with solutions, by which they mean decision-points for the human conflicts and dilemmas that arise in everyday life. We have such a problem in American life: millions of U.S. citizens and their religious (Cover would call them “paideic”) communities believe that it violates the command of God and their own consciences to give assent to the weddings of other citizens who marry persons of their own biological gender. The blessing of, or participation in, such marriages, they believe, is inimical to God's plan for marriage and family,<sup>2</sup> a position underscored by the Vatican's recent pronouncement that Catholic priests may not bless same-sex weddings.<sup>3</sup>

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<sup>2</sup> See, e.g., Brief of Amicus Curiae Ethics & Religious Liberty Commission of the S. Baptist Convention in Support of Appellants at \*2-5, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (No. 91615-2), 2016 WL 3552841.

<sup>3</sup> Nicole Winfield, *Vatican Bars Gay Union Blessing, Says God 'Can't Bless Sin'*, AP NEWS (Mar. 15, 2021), <https://apnews.com/article/vatican-decree-same-sex-unions-cannot-bless-sin-077944750c975313ad253328e4cf7443> (noting that the Vatican's statement explained that priests cannot bless same-sex unions or weddings because God cannot bless sin, following previous Vatican pronouncements that sex between same-gender individuals is “intrinsicly disordered” and that marriage between a man and woman is part of God's plan, intended to create new life).

In the wake of the Supreme Court's decision in *Obergefell v. Hodges*<sup>4</sup> that same-sex partners have the constitutional right to marry,<sup>5</sup> the United States Supreme Court is pondering—some argue it is avoiding resolution of<sup>6</sup>—cases involving conscientiously objecting wedding vendors in the last few years. However, the Court is stuck on the horns of the dilemma caused by Justice Kennedy's twin pronouncements in *Obergefell* that: “[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”<sup>7</sup> And that:

[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.<sup>8</sup>

The case of *Masterpiece Cakeshop v. the Colorado Human Rights Commission*<sup>9</sup> has been the highest profile case to come before the Court. In that case, Masterpiece Cakeshop's owner Jack Phillips refused to design a wedding cake for Charlie Craig and Dave Mullins who were planning a Colorado wedding reception after they legally married in Massachusetts in the summer of 2012.<sup>10</sup> After Phillips told Craig, Mullins, and Craig's mother that he did not create wedding cakes for same-sex weddings, he said, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.”<sup>11</sup> Craig's mother was not satisfied, so she

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<sup>4</sup> 576 U.S. 644 (2015).

<sup>5</sup> *Id.* at 647.

<sup>6</sup> One might argue, as Cover noted, discussing Bob Jones University, that these attempts to duck the problem of which right prevails are an example of the state using its authority without expressing a commitment of principle, and simply “throwing the claim of insularity to the mercy of public policy.” See COVER, *supra* note 1; see also Perry Dane, *The Pub., the Priv. & the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15, 20 (1996).

<sup>7</sup> *Obergefell*, 576 U.S. at 647.

<sup>8</sup> *Id.* at 679-80.

<sup>9</sup> 138 S. Ct. 1719 (2018).

<sup>10</sup> *Id.* at 1723.

<sup>11</sup> *Id.* at 1724.

called Phillips the next day to ask why he turned them away. Phillips said that he was religiously opposed to same-sex marriage.<sup>12</sup> Phillips later explained that “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.”<sup>13</sup>

In *Masterpiece*, Justice Kennedy repeated his recognition of the rights of both parties, adding a nod to Free Exercise precedent by noting that neutral and generally applicable public accommodations laws must usually be obeyed.<sup>14</sup> However, he dodged his own *Obergefell* bullet by avoiding a judgment on which right—the right to non-discrimination or the right to religious freedom and conscience—prevailed under the Constitution, and simply focused on “hostile” words spoken by a member of the Colorado Human Rights Commission.<sup>15</sup>

Next up before the Court was the case of *State v. Arlene’s Flowers*,<sup>16</sup> described later in this section.<sup>17</sup> The Court once again dodged the issue by denying certiorari on the appeal of florist Barronelle Stutzman, who told her long-time customer and friend that

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<sup>12</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

<sup>13</sup> *Obergefell*, 576 U.S. at 1724.

<sup>14</sup> *Id.* at 1728.

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights . . . . At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, . . . [t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.’ Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations laws.

*Id.* at 1727.

<sup>15</sup> *Id.* at 1732.

<sup>16</sup> No. 13-200871-5, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015), *aff’d*, 389 P.3d 543 (Wash. 2017), *cert. granted and vacated*, 138 S. Ct. 2671 (2018), *remanded to and aff’d*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021).

<sup>17</sup> See *infra* notes 34–35 and accompanying text.

she could not in good conscience design floral arrangements for his same-sex wedding.<sup>18</sup>

Meanwhile, the federal and state courts have contended with similar wedding cases from refusals to rent wedding venues to same-sex couples to conflicts over invitations and other wedding services.<sup>19</sup> Among them:

**a.** Joanna Duka and Breanna Koski, owners of Brush & Nib Studios, won their suit to declare that they could advertise that their elaborate contract absolved them from refusing to design custom wedding invitations violating their conscience, such as for same-sex weddings.<sup>20</sup>

**b.** Elaine Huguenin refused to take a video of a commitment ceremony between Vanessa Willock and Misti Collingsworth; the New Mexico Supreme Court held for the couple under the Human Rights Act and the federal constitution.<sup>21</sup>

**c.** Carl and Angel Larsen finally won their bid for injunctive relief on appeal to the Eighth Circuit.<sup>22</sup> They had unsuccessfully asked that the Minnesota federal district court declare that when they expanded their videography business to take wedding videos, they would not be required to serve same-sex couples seeking wedding video services.<sup>23</sup>

**d.** Bakers Melissa and Aaron Klein closed their Portland bakery, Sweet Cakes by Melissa, after an administrative law judge fined them \$135,000 for refusing to design a wedding cake for Rachel Bowman-Cryer.<sup>24</sup> Originally, Bowman-Cryer also took her mother

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<sup>18</sup> *Arlene's Flowers Inc.*, 389 P.3d at 549.

<sup>19</sup> See also *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 547 (W.D. Ky. 2020) (issuing an injunction in favor of a photographer objecting to photographing same sex weddings to prevent county public accommodations from being enforced against her); *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 433 (N.Y. App. Div. 2016) (holding that owners of a wedding venue could not discriminate against same-sex couples under the New York Human Rights Law).

<sup>20</sup> *Brush and Nib Studios, LC v. City of Phx.*, 448 P.3d 890, 926 (Ariz. 2019).

<sup>21</sup> *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

<sup>22</sup> *Telescope Media Productions v. Lucero*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *aff'd in part, rev'd in part*, 936 F.3d 740, 758 (8th Cir. 2021) (holding that videographers had a hybrid free speech and free exercise claim).

<sup>23</sup> *Id.*

<sup>24</sup> *Klein v. Oregon Bureau of Labor and Indus.*, 410 P.3d 1051, 1060 (Or. Ct. App. 2017), *cert. granted and vacated*, 139 S. Ct. 2713 (2019), (holding that the Bureau



Cheryl to visit the bakery. Afterwards, Cheryl returned to argue the Bible with Aaron, noting that she had herself been of his same viewpoint at one time.<sup>25</sup> When she suggested that the Bible did not speak to same-sex marriages, Aaron responded with what Christians call a “Bible bullet.”<sup>26</sup> He said: “You shall not lie with a male as one lies with a female; it is an abomination.”<sup>27</sup>

This very quotidian encounter between brides, grooms, and wedding vendors has been ratcheted up to a national conflict for many complex reasons. In part, it has become a topic of national discussion because for most American couples, the marriage ceremony has always had very important secular and religious meaning, as evidenced by the fact that in the U.S., unlike many other countries, the ceremony validating the marriage may be and often is performed by religious clergy.<sup>28</sup> The wedding ceremony creates perhaps the most intertwined personal relationship of all, with a host of implied obligations and rights that inhere in the legal relationship itself.

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did not violate Klein’s speech or religious rights by enforcing the state public accommodations law).

<sup>25</sup> *Klein*, 410 P.3d at 1058.

<sup>26</sup> *Leviticus* 18:22. A Bible bullet is the selection and use of one particular passage of Scripture as evidence of God’s will or commandments to human beings. *Id.* In 1937, Oswald Chambers explained as follows:

Now there is a wrong use of God’s word and a right one. The wrong use is this sort of thing—someone comes to you, and you cast about in your mind what sort of man he is, then hurl a text at him like a projectile, either in prayer or in talking as you deal with him. That is a use of the word of God that kills your own soul and the souls of the people you deal with. The Spirit of God is not in that. Jesus said, “the words I speak unto you, they are spirit, and they are life.”

Phillip G. Monroe, *Using the Scriptures in Counseling*, CROSSING CHURCH, <https://thecrossingchurch.com/wp-content/uploads/pdfs/usesOfScriptureInCounseling.pdf> (last visited Oct. 21, 2021) (quoting OSWALD CHAMBERS, *WORKMEN OF GOD* 15 (1937)).

<sup>27</sup> *Klein*, 410 P.3d at 1058. See also Robert Barnes, *Supreme Court Passes on Case Involving Baker Who Refused to Make Wedding Cake for Same-Sex Couple*, WASH. POST (June 17, 2019), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-passes-on-new-case-involving-baker-who-refused-to-make-wedding-cake/2019/06/17/f78c5ae0-7a71-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-passes-on-new-case-involving-baker-who-refused-to-make-wedding-cake/2019/06/17/f78c5ae0-7a71-11e9-a5b3-34f3edf1351e_story.html).

<sup>28</sup> See Leslie Griffin, *Marriage Rights and Religious Exemptions in the United States*, OXFORD HANDBOOK ONLINE (May 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-19> (describing the ways in which religion and family law are intertwined in the U.S., including in the solemnization ceremony).

But a wedding also signifies community recognition of both the individuals who enter the legal relationship, their bond, their obligations, and their rights. It is thus not surprising that as the U.S. has become more pluralistic, witnessing not only religious but also secular weddings that eschew any religious or ethnic wedding traditions, there should be increasing conflict between wedding vendors and wedding participants. This is particularly true as prospective marital partners have more and more come to rely on an ever-widening panoply of secular traditions considered critical to the success of the event, from the selection of just the right wedding dress with a “wow factor,” to the wedding cake, the centerpiece of it all.

So we begin with Cover’s text:

**We inhabit a *nomos*—a normative universe . . . . The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.<sup>29</sup>**

Why does Cover find it important to begin with the idea that we exist in a universe which is not best described scientifically, but normatively? Perhaps he is echoing Emmanuel Levinas who claims that ethics is first philosophy, not ontology or even hermeneutics.<sup>30</sup> Perhaps he is just trying to remind us that almost everything we do is in relation to the Other who stands over us in his need, to recall Levinas again.<sup>31</sup> If this is indeed the core reality of our existence, Cover’s observation is not surprising: the way we perceive our universe is inflected with moral import, even before we consider how we will act.

Then we have the next interpretive surprise: that our institutions and laws cannot be described or even exist apart from its stories, which is Cover’s first inversion of the way we think of the work of law. He wants to make it clear that one cannot exist without the Other, though many of us lawyers try very hard to describe the law and the institutions that carry it out without any reference to the narratives

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<sup>29</sup> COVER, *supra* note 1, at 95-96.

<sup>30</sup> See Vida V de Voss, Emmanuel Levinas on Ethics as the First Truth (Apr. 2006) (M.A. thesis, University of Stellenbosch).

<sup>31</sup> See *id.* at 12-14.

that depend on it. Cover reminds us that this prioritization of the “rules and principles of justice” is backwards—it is the narratives that have produced, grounded, and given meaning to the rules, not the other way around, though precept and narrative are interdependent.<sup>32</sup> Indeed, when he tells us that all these shelves of books of law that take up space in our law schools are only a “small part” of the normative universe of law, it can come as a shock to those of us who have roamed the stacks, under the impression that our work is special, or at least set apart from other occupations and professions.

And yet, for any lawyer who has practiced law or even spent her professional life reading legal cases, Cover’s is a perfectly sensible statement. Every beginning law student knows that we start with the story, that it defines our field of vision. However, while we exhort our students to tell a good story and tell it first before their opponents get to tell it, we also demand that “the small part”—the rules, the institutions, the conventions—define that story. How many times do we exhort students that they must stick to the relevant facts, defined as those facts can easily be tethered to or subsumed under the elements or definition of the legal rule? Often, the facts that are important to the clients—that make their experience or their narrative meaningful—are shoved out of the way, as not germane to resolution of the legal case. Some of those clients keep trying and trying to tell us and their judges the important parts of the story, until they realize that we are not going to pay attention to those “irrelevant” facts and give up trying.<sup>33</sup>

Is Cover exhorting us to start over in the way that we teach students about the law? Should we be teaching the students to enter deeply into the client’s story as the client understands it before we start interpreting the story as the legal rules would understand it? Is he arguing that we should make the rules fit the story, and not the other way around; and what would that possibly look like?

To our particular problem of the conflict between same-sex couples and wedding vendors, Cover seems to suggest that we cannot adjudicate the case of the Christian baker or the florist and the wedding partners without re-hearing in a deep way the stories that caused them to be in court and understand how they give normative power to their

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<sup>32</sup> COVER, *supra* note 1, at 95

<sup>33</sup> See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 21-32 (1990) (discussing a struggle between a lawyer and his client on what story will be told).

claims. For this, I will turn to *Arlene's Flowers*<sup>34</sup> as both Barronelle Stutzman and Rob Ingersoll told it.

[Barronelle:] Rob Ingersoll will always be my friend. Recent events [] have complicated — but not changed — that fact for me.

I've been a florist in Richland for 30 years. You don't work that long in a small town without getting to know your customers very well and counting many of them as friends. Rob and I hit it off from the beginning because, like me, he looks at flowers with an artist's eye. We see not just potential bouquets, but how different combinations and just-right arrangements can bring a special beauty, memories and even a little humor to someone's birthday, anniversary—or wedding. That's why I always liked bouncing off creative ideas with Rob for special events in his life. He understood the deep joy that comes from precisely capturing and celebrating the spirit of an occasion. For 10 years, we encouraged that artistry in each other.<sup>35</sup>

[Rob:] W[e] were at a Mexican restaurant having lunch after doing some Christmas shopping at the mall when we decided to get married. It was December 2012, and Washington voters had just made marriage legal for same-sex couples. We had been together since 2004 and were living in Kennewick, in the first home we had

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<sup>34</sup> *State v. Arlene's Flowers, Inc.*, was first decided by the Washington Supreme Court in Ingersoll and Freed's favor, finding that the refusal of Arlene's Flowers, owned by Barronelle Stutzman to make a wedding floral arrangement, violated Washington's law against discrimination and its Consumer Protection Act. 389 P.3d 543 (Wash. 2017). Arlene's Flowers appealed to the U.S. Supreme Court, which remanded the case to the Washington Supreme Court in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.* 138 S. Ct. 1719 (2018). See also *Arlene's Flowers, Inc. v. State*, 138 S. Ct. 2671, 2671 (2018). On June 6, 2019, the Washington Supreme Court reaffirmed its earlier decision and Arlene's Flowers again appealed to the U.S. Supreme Court in September 2019 but was denied certiorari. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021).

<sup>35</sup> Barronelle Stutzman, *Why a Friend is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 12, 2015, 4:11 PM), <https://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story>.

purchased together. It felt like everything had been building to this moment where we were ready and able to honor our lifelong commitment to each other. We wanted a romantic location for our wedding, so we reserved a lush garden setting for the ceremony, which was to be held Sept. 19, our ninth anniversary as a couple. We planned to have around a hundred of our closest friends and family join us for this special occasion. In March 2013, we contacted our favorite floral shop, Arlene's Flowers in Richland.<sup>36</sup> [Barronelle:] I knew he was in a relationship with a man and he knew I was a Christian. But that never clouded the friendship for either of us or threatened our shared creativity—until he asked me to design something special to celebrate his upcoming wedding.<sup>37</sup>

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<sup>36</sup> Curt Freed & Robert Ingersoll, *Why We Sued Our Favorite Florist: Marriage Equality Must Be Truly Equal*, SEATTLE TIMES (Nov. 2, 2015, 6:48 AM), <https://www.seattletimes.com/opinion/why-true-marriage-equality-matters-to-us>.

The facts as recited by the Washington Supreme Court are slightly different:

In 2004, Ingersoll and Freed began a committed, romantic relationship. In 2012, our state legislature passed Engrossed Substitute Senate Bill 6239, which recognized equal civil marriage rights for same-sex couples. Freed proposed marriage to Ingersoll that same year. The two intended to marry on their ninth anniversary, in September 2013, and were “excited about organizing [their] wedding.” Their plans included inviting “[a] hundred plus” guests to celebrate with them at Bella Fiori Gardens, complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers.

*Arlene's Flowers*, 389 P.3d at 548-49 (citations omitted).

<sup>37</sup> Stutzman, *supra* note 35. The Washington Supreme Court recited additional facts:

Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman. On February 28, 2013, Ingersoll went to Arlene's Flowers on his way home from work, hoping to talk to Stutzman about purchasing flowers for his upcoming wedding. Ingersoll told an Arlene's Flowers employee that he was engaged to marry Freed and that they wanted Arlene's Flowers to provide the flowers for their wedding. The employee informed Ingersoll that Stutzman was not at the shop and that he would need to speak directly with her. The next day, Ingersoll returned to speak with Ms. Stutzman. At that time, Stutzman told Ingersoll that she would be unable to do the

If all he'd asked for were prearranged flowers, I'd gladly have provided them. If the celebration were for his partner's birthday, I'd have been delighted to pour my best into the challenge. But as a Christian, weddings have a particular significance. Marriage does celebrate two people's love for one another, but its sacred meaning goes far beyond that. Surely without intending to do so, Rob was asking me to choose between my affection for him and my commitment to Christ. As deeply fond as I am of Rob, my relationship with Jesus is everything to me. Without Christ, I can do nothing. I'm not ashamed of that, but it was a painful thing to try to explain to someone I cared about—one of the hardest things I've ever done in my life. But Rob assured me he understood. And I suggested three other nearby florists I knew would do an excellent job for this celebration that meant so much to him. We seemed to part as friends.<sup>38</sup>

[Rob:] We were shocked when the shop's owner refused to sell us an arrangement for our ceremony. We weren't seeking her blessing, only an elegant display that would complement the beachy theme we wanted for our wedding.

Instead of being met with the service we would expect any business owner to provide his or her customers, we were turned away for being gay. We had been buying each other flowers from Arlene's Flowers for special

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flowers for his wedding because of her religious beliefs, specifically, because of "her relationship with Jesus Christ."

*Arlene's Flowers*, 389 P.3d at 549.

<sup>38</sup> Stutzman, *supra* note 35. The Washington Supreme Court described this encounter:

Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him. They also did not discuss whether Stutzman would be asked to bring the arrangements to the wedding location or whether the flowers would be picked up from her shop. Stutzman asserts that she gave Ingersoll the names of other florists who might be willing to serve him, and that the two hugged before Ingersoll left her store.

*Arlene's Flowers*, 389 P.3d at 549.

occasions and celebrations for years. To us, we were just honoring the love we have for each other. But all of a sudden, it was as if we were no longer seen as Curt and Rob, or even regular customers, but as gay marriage personified.

We were reminded how discrimination works: Individuals are categorized, depersonalized, labeled.

When we first started planning our wedding, we had been confident that any business in this state that is open to the public would accept us—two gay men about to be legally married—as customers. Fears we had never had before began to crop up: Would other businesses turn us down for being gay? Then there was the possibility of local and national media coverage. What if our ceremony became the target of anti-gay activists from other states?

In response to these concerns, we moved up the date and decided to have the wedding in our home instead, with only 11 guests. We had a cake and flowers from a florist, but overall our July 2013 wedding was a much smaller, simpler celebration than we had originally intended.<sup>39</sup>

The Washington Supreme Court supplied some context for the hurt and concern of the couple. In its narrative:

Ingersoll maintains that he walked away from that conversation “feeling very hurt and upset emotionally.” Early the next morning, after a sleepless night, Freed posted a status update on his personal Facebook feed regarding Stutzman's refusal to sell him wedding flowers. The update observed, without specifically naming Arlene's Flowers, that the couple's “favorite Richland Lee Boulevard flower shop” had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt “so deeply offended that apparently our business is no longer good business,”

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<sup>39</sup> Freed & Ingersoll, *supra* note 36.

because “[his] loved one [did not fit] within their personal beliefs.”<sup>40</sup>

Ironically, the decision to post a Facebook message led inexorably to the small home wedding the couple had, because the message intended only for family and friends went viral, eventually reaching media outlets who went after the story. The couple “lost enthusiasm for a large ceremony” which they attributed both to the rebuff they had received at Arlene’s Flowers and concern that other wedding vendors would deny them service.<sup>41</sup>

[However, t]he couple also feared that in light of increasing public attention—some of which caused them to be concerned for their own safety—as well as then-ongoing litigation, a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group . . . . For the occasion [of the wedding], Freed and Ingersoll purchased one bouquet of flowers from a different florist and boutonnieres from their friend. When word of this story got out in the media, a handful of florists offered to provide them wedding flowers free of charge.<sup>42</sup>

[Barronelle:] But then I was sued . . . . I’ve never questioned Rob’s and Curt Freed’s right to live out their beliefs. And I wouldn’t have done anything to keep them from getting married, or even getting flowers. Even setting aside my warm feelings for them, I wouldn’t have deliberately taken actions that would mean the end of being able to do the work I love or risk my family’s home and savings. I just couldn’t see a way clear in my heart to honor God with the talents He has given me by going against the word He has given us. This case is not about refusing service on the basis of

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<sup>40</sup> *Arlene’s Flowers*, 389 P.3d at 549. In *Klein v. Oregon Bureau of Lab. & Industries*, the court also describes the plaintiff’s reaction to the bakery’s refusal to make her a cake: “Rachel began crying, and Cheryl took her by the arm and walked her out of the shop. 410 P.3d 1051, 1057 (Or. Ct. App. 2017), *cert. granted and vacated*, 139 S. Ct. 2713 (2019). On the way to their car, Rachel became ‘hysterical’ and kept apologizing to her mother, feeling that she had humiliated her.” *Id.*

<sup>41</sup> *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019).

<sup>42</sup> *Id.*



sexual orientation or dislike for another person who is preciously created in God's image. I sold flowers to Rob for years. I helped him find someone else to design his wedding arrangements. I count him as a friend. I want to believe that a state as diverse as Washington, with our long commitment to personal and religious freedoms, would be as willing to honor my right to make those kinds of choices as it is to honor Rob's right to make his.<sup>43</sup>

This is the richer and more complicated narrative that Cover is reminding us about. The typical lawyer's version of this narrative would instead go something like this: The owner of Arlene's Flowers refused to create a floral wedding arrangement for a gay couple because of her religious belief that she would be cooperating with the sinful act of a same-sex marriage. That summary does not get close to the fear and diminishment that Rob and Curt experienced in this refusal, as did others who were turned away in similar cases, nor the anguished uncertainty Barronelle reckoned with before turning Rob down.<sup>44</sup>

What would Cover have us make of the fact that these narrators' stories of the same experience resound so differently? By acknowledging that competing narratives create competing law, it seems that he is once again testing our assumption that there is one proper way for the judge to resolve this case. That is, we assume that the judge must select one and only one set of facts that seem most coherent with the legal rules and principles that themselves seem most coherent with the facts, i.e., we find ourselves in a vicious circle in the making of meaning.

But the litigants do not agree to this—and indeed, the litigation communities that have sprung up on each side of this controversy refuse to agree to a single set of facts, much less a common set of legal principles. For example, the National Legal Foundation applauds Barronelle's "courageous stand" and argues that the state court ruling "threatens to bankrupt Barronelle and her business, simply because she

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<sup>43</sup> Stutzman, *supra* note 35. In fact, Stutzman's expectation that her fellow citizens would be tolerant of her beliefs were too optimistic, "Stutzman also received a great deal of attention from the publicity surrounding this case, including threats to her business and other unkind messages." *Arlene's Flowers*, 441 P.3d at 1211.

<sup>44</sup> *Arlene's Flowers*, 441 P.3d at 1211.

did not promote something with which she disagrees.”<sup>45</sup> On the other side, Human Rights Watch celebrates the decision to deny her appeal, arguing that “[t]he Supreme Court has once again said that critical nondiscrimination laws protecting LGBTQ people are legally enforceable and has set a strong and definitive precedent.”<sup>46</sup> These do not appear to be two organizations that have given up their quest to have their own “law” recognized.

### III. PAIDEIC COMMUNITIES CONTEND

**COVER’S TEXT: The first such pattern, which according to rabbinic commentator and mystic Joseph Karo, is world-creating, I shall call “paideic,” because the term suggests (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction and growth that is constituted as the individual and his community work out the implications of their law. Law as Torah is pedagogic . . . . Obedience is correlative to understanding.”<sup>47</sup>**

Another surprise: Cover introduces the idea that paideic communities---teaching communities--can be law-making communities. We do not usually associate teaching and law-making—one is soft, invitational, diffuse in its objectives, uncertain in its accomplishments. The other is hard, coercive, focused on its objectives, definite in its accomplishments. One is relational, the other, as Cover repeats over and over in *Violence and the Word*, is violent and coercive, working on a field of pain and death.<sup>48</sup> But again, what Cover says makes perfect sense if one is not of the “law as command/law as coercion” school of legal thought. If the effectiveness of law is obedience, then those paideic communities of

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<sup>45</sup> *NLF Supports Barronelle Stutzman’s Courageous Stand and Fights to Preserve the Freedoms of Speech and Assembly*, NAT’L LEGAL FOUND. (Aug. 13, 2020), <https://nationallegalfoundation.org/updates/nlf-supports-barronelle-stutzmans-courageous-stand-and-fights-to-preserve-the-freedoms-of-speech-and-assembly>.

<sup>46</sup> Aryn Fields, *Human Rights Campaign President on Supreme Court Denying Certiorari for Ingersoll & Freed v. Arlene’s Flowers, Inc.*, HUM. RTS. CAMPAIGN (July 2, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-president-on-supreme-court-denying-certiorari-for-ingersoll-freed-v-arlenes-flowers-inc>.

<sup>47</sup> COVER, *supra* note 1, at 105-06.

<sup>48</sup> ROBERT COVER, *Violence and the Word*, in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 211-12 (1995).

which we are a part are usually much more effective law than the legal system as we think of it.

For as Cover says, “obedience is correlative to”—having a reciprocal relationship with—“understanding.”<sup>49</sup> It is noteworthy that he does not simply say understanding “causes” obedience, or even that obedience causes understanding of the law obeyed. By choosing the word “correlative,” he reaches for the notions of mutuality, of interchange, even of symbiosis between what we know and believe, and what we do. As we sit at the feet of our teachers—whether they are law professors or parents—we see our lives embedded in a tradition that teaches our consciences how to live a worthy life, indeed, how to resist the call of destructive traditions or even benign traditions that are not our own. Perhaps more importantly, we see through learning our own paideia what we must and must not do, what is and is not authentic to our calling to the world, our responsibility to repair it.

The law of the paideia is not, thus, soft and undemanding quasi-law or inferior law to the law of the state. It is perfect law because it engenders obedience without external coercion, unlike legal institutions where criminal defendants and other litigants comply under the implicit threat of violence.

In *Violence and the Word*, Cover shows how the law of the imperial community barely masks both the unwillingness of those sentenced to accede to the order of the court, and the court’s implied threat of pain, violence or even death if they fail to play along with the conceit that all is well among the litigants.<sup>50</sup> Conversely, it is in the paideic stories of obedience that we come to understand what is expected of us. These paideic stories make law within us for our lifetimes, as understanding ripens into dedication and dedication into action. And these paideic understandings make law within us because we yearn to obey, because it is in obedience, even in the face of external threats such as Rabbi Akiba’s execution,<sup>51</sup> that we find a sense of meaning and sometimes even internal peace.

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<sup>49</sup> MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/correlative> (defining correlative as “naturally related” or “reciprocally related”).

<sup>50</sup> COVER, *supra* note 48, at 211-12 (noting that “the experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated”).

<sup>51</sup> *Id.* at 206-07. In Cover’s telling, Rabbi Akiba chose to continue teaching despite a public decree forbidding it, which led to his gruesome execution. *Id.* At the end,

In the battle for control of the wedding, it might seem that only one community fits Cover's description of the paideic community, the conservative community that primarily identifies itself as Christian (though there are parallel streams in other religions).<sup>52</sup> Members of that community have weighed in visibly for the last couple of decades over recognition of same-sex marriage in the states. I will describe this as the traditional Christian community. But I will suggest that there are two more communities engaged in this struggle over the creation and killing of law of same-sex marriages that have some paideic characteristics: the community of those who identify as LGBTQ+ and allies (which I will usually refer to as the gay rights community), and a new community that has arisen directly from this battle for control of the wedding, which I'll call the Christian political community.

The traditional Christian community is composed of smaller congregations, many of which closely conform to Cover's description of the paideic community.<sup>53</sup> Structurally, this Christian community is

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he said he had wondered if he could love the Lord with all his heart and with all his soul, and in his death, he saw that he could fulfill that obligation. *Id.* at 207.

<sup>52</sup> By focusing on Christian communities, I do not mean to diminish the importance of the struggles going on in the Jewish, Muslim or any other religious communities over the question of same-sex relationships and marriage. I focus on them because I come from a Christian community and understand its theological and social disagreements better than the theological disagreements in these non-Christian communities. For some discussion about how these communities view the issue, see, e.g., Jonathan A.C. Brown, *Muslim Scholar on How Islam Really Views Homosexuality*, VARIETY (June 30, 2015), <https://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047>; *LGBTQI Resources*, MUSLIMS PROGRESSIVE VALUES, <https://www.mpvusa.org/lgbtqi-resources> (last visited Oct. 21, 2021). As examples of Jewish views, see Elliot Dorff, Daniel Nevins and Afram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, RABBINICAL ASSEMB. (2012), <https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>; *Orthodox Union Statement on Supreme Court's Same-Gender Marriage Ruling*, YESHIVA WORLD (June 26, 2015), <https://www.theyeshivaworld.com/news/headlines-breaking-stories/322380/orthodox-union-statement-on-supreme-courts-same-gender-marriage-ruling.html>; *Same Sex Marriage as Kiddushin*, CENT. CONF. AM. RABBIS (2014), <https://www.ccar-net.org/ccar-responsa/same-sex-marriage-kiddushin> (discussing reform views).

<sup>53</sup> I think it important to note that I am disregarding one presumption I think Cover made when he describes a paideic community—*i.e.*, that it is small and continuous, *i.e.*, a congregation where everybody knows each other. It is beyond Cover's conception to suggest that, for example, the Southern Baptist Convention, which is

made up of many streams of Protestant and Catholic theology and history, each centering upon the precepts and stories of the Bible and, in some cases, other canonical books, as well as a denominational history that, for some communities stretches back thousands of years and for others is measured in decades. Each of these communities has a teaching structure, which begins in worship but includes study of both narrative and precept in Sunday School or Vacation Bible School.<sup>54</sup> These traditional Christian communities are not primarily political, though they do enter into American politics at times and places where they have considered public social life to be particularly endangered.

**COVER'S TEXT: [In the paideic community], [d]iscourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgement, the recognition that individuals have particular needs and strong obligations to render person-specific responses.<sup>55</sup>**

Cover's description rings true for traditional Christian streams of community. Usually centered around a physical church structure, these communities primarily engage in weekly community rituals of worship, rituals of initiation such as baptism and membership liturgies, rituals of celebration such as confirmation, and rituals of repentance and mourning.<sup>56</sup> Other than the pastor's sermons, there is no attempt to analyze the liturgy or critique it. Through this community's rituals—in the Christian community, the Christmas pageant, the youth

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a denomination of churches, one which Barronelle Stutzman belongs to, is a paideic community, but it certainly is a community of such communities, which functions in some respects like the home congregations that Cover had in mind, and in other respects not. For purposes of describing the interplay between larger communities in this problem, however, I will disregard that distinction, hoping not to thereby invalidate the argument.

<sup>54</sup> See Timothy Larsen, *When Did Sunday Schools Start?*, CHRISTIANITY TODAY (Aug. 28, 2008), <https://www.christianitytoday.com/history/2008/august/when-did-sunday-schools-start.html>; see also Chris Gertz, *A Brief History of Vacation Bible School*, ANXIOUS BENCH (June 20, 2017), <https://www.patheos.com/blogs/anxiousbench/2017/06/vbs-brief-history>.

<sup>55</sup> COVER, *supra* note 1, at 106 (emphasis added).

<sup>56</sup> *Rites and Ceremonies*, PATHEOS, <https://www.patheos.com/library/christianity/ritual-worship-devotion-symbolism/rites-and-ceremonies> (last visited Oct. 21, 2021).

choir, the Easter egg hunt, and the summer Bible camp among others—discourse is indeed, in Cover’s words, “initiatory, celebratory, expressive, and performative, rather than critical and analytic.”<sup>57</sup>

These rituals carry young conservative Christians from infancy to maturity, indeed, to the culmination of marriage and children, when many of the rituals begin all over. In many communities, they foster strong intergenerational ties among members of the community, ties that Cover notes both acknowledge the reciprocal and equal “citizenship” of each member in the community and engender responsive aid to those members. While the social and geographical mobility of young workers has attenuated what formerly were lifelong ties, and young evangelicals are abandoning some of the political commitments of their elders, research suggests that they are staying within the church and contesting some of the politics or even changing congregations within their tradition rather than abandoning these communities.<sup>58</sup>

In Christian orthodoxy, rituals of the Christian church begin with Cover’s reminder that obedience is not correlative to coercion but to understanding—and more importantly, to relationship. When Martin Luther explained the potentially frightening First Commandment, “[y]ou shall have no other gods before you”—he clarifies that this command goes well beyond an implied threat if there is disobedience—“[w]e should fear, love, and trust in God above all things.”<sup>59</sup> This is not only a warning about how the world will fail us. It is a promise that our relationship with the divine will be strong enough to engender our obedience to divine will because of gratitude, not fear, just as our love for human beings is enough to engender sacrificial acts on their behalf.

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<sup>57</sup> COVER, *supra* note 1, at 106.

<sup>58</sup> Terry Shoemaker, *White Gen Xers and Millennial Evangelicals are Losing Faith in the Conservative Culture Wars*, CONVERSATION (Jun. 22, 2021), <https://theconversation.com/white-gen-x-and-millennial-evangelicals-are-losing-faith-in-the-conservative-culture-wars-162407>. *But see* Heather Murphy, *Support of L.G.B.T. Rights Drops Among Young Republicans, Survey Finds*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/26/us/lgbt-rights-young-republicans.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> (noting that support for LGTBQ rights has increased or remained steady among Mormons, Muslims, independents, Southerners, and seniors but has fallen by nearly 10% among Republicans under 30 between 2015 and 2018).

<sup>59</sup> LUTHER’S SMALL CATECHISM WITH EXPLANATION 9 (Concordia Publishing House eds., 1986).

This body of precept and narratives of those who “feared, loved, and trusted God above all things” provides more than just a claim—it marked a promise to Christians who follow, literally, the Biblical commands even when they seem completely crazy in “the real world.” As an example, one important early narrative in the Christian canon (as well as in the Jewish and Muslim canons) is the completely crazy story of Abraham who, against all natural instinct and feeling, is ready to plunge the knife in to sacrifice his own son on the altar, before the voice of God stays the command to kill.<sup>60</sup> Their common message for Christians is to expect the unexpected, not to dismiss what seems crazy according to “the world’s” reality and ethics, without probing what God expects.<sup>61</sup> And, as Cover notes that “[o]bedience is correlative to understanding”<sup>62</sup>; these narratives, repeated over and over in worship and Sunday School, provide a powerful impetus to obey the precepts that accompany them.

#### IV. THE MITOSIS OF COMMUNITY: FROM TRADITIONAL CHRISTIAN TO MODERN GAY RIGHTS TO CHRISTIAN POLITICAL COMMUNITIES

**COVER’S TEXT: Thus it is in that the very act of constituting tight communities about common ritual and law is the juris generative by a process of juridical mitosis. New law is constantly created through the sectarian separation of communities. The radical instability of the paideic nomos forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimension of their common lives—to maintain their coherence as**

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<sup>60</sup> See Younas Y. Mirza, *Depicting Abraham’s Sacrifice: Differing Biblical and Islamic Textual Traditions*, MAYDENL (June 6, 2018), <https://themaydan.com/2018/06/depicting-abrahams-sacrifice-differing-biblical-islamic-textual-traditions>, (discussing the significance of the Abraham/Isaac story in all three traditions).

<sup>61</sup> See Samuel Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465, 481 (1998) for another view of Cover’s Biblical examples where the law as precept appears to have been turned upside down by God.

<sup>62</sup> COVER, *supra* note 1, at 13.

**paideic entities by expulsion and exile of the potent flowers of normative meaning.<sup>63</sup>**

What does Cover mean by using a biological metaphor to describe the way that paideic communities change? He might have employed metaphors that were geological (the community split open), belligerent (the community fought until it died); or even the obviously religious (the community suffered a schism). Instead, he chose mitosis, which is:

a process where a single cell divides into two identical daughter cells (cell division). During mitosis one cell divides once to form two identical cells. The major purpose of mitosis is for growth and to replace worn out cells. If not corrected in time, mistakes made during mitosis can result in changes in the DNA that can potentially lead to genetic disorders.<sup>64</sup>

Notice the assumptions his use of the term evokes: first, division is a natural and inevitable process when human beings come into community with each other, and humans' needs for security, stability, and coherence clash with their needs for creativity, exploration, growth. Mitosis is thus bound to happen if human community is to experience growth and not be worn out, not die. Second, the subcommunities that come from mitosis are very much alike, sisters even, despite the fact that they will take every opportunity to explain how they differ—how, for example, the Catholic belief in transubstantiation is different than the Lutheran belief in The Real Presence in the Eucharist. Finally, by using the term mitosis, Cover acknowledges something important: **things can go very wrong** in the process of mitosis. A juridical mitosis of a Christian community can produce a January 6 insurrection at the U.S. Capitol,<sup>65</sup> or even a Jim Jones and Jonestown.<sup>66</sup>

Perhaps it is possible, in the story of the wedding vendor and the gay couple, to see something like mitosis at work (though the

<sup>63</sup> COVER, *supra* note 1, at 109 (emphasis added).

<sup>64</sup> See *Facts in the Cell, Your Genome Organization*, YOUR GENOME, <https://www.yourgenome.org/facts/what-is-mitosis> (last visited Oct. 21, 2021).

<sup>65</sup> See Sarah Posner, *How the Christian Right Helped Foment Insurrection*, ROLLING STONE (Jan. 31, 2021), <https://www.rollingstone.com/culture/culture-features/capitol-christian-right-trump-1121236>.

<sup>66</sup> See *Jonestown*, HISTORY (Nov. 20, 2019), <https://www.history.com/topics/crime/jonestown>.



original cell remains). From the traditional Christian community, one can see the casting or splitting off of a gay rights community supporting same-sex marriage, and a Christian political community opposing it. Whether this thesis can be established historically, I will leave to others more historically competent than I am but as a way to think about the current relationship of these two communities to each other, it might be a helpful conception.<sup>67</sup>

For traditional Christian communities, the issue of same-sex marriage and related relationships may currently be a prominent, and for some, a critical concern. However, it is only one of many concerns that these communities address as they seek to live a life consistent with Biblical teachings and in accordance with their understanding of how people are saved, respond to their salvation, or “walk with Jesus,” to use another metaphor linking understanding and obedience. Consistent with Cover’s description of a paideic community, the traditional Christian community grounds its claims against the recognition of same-sex sexual relations and legal recognition of same-sex marriage in both Biblical precept<sup>68</sup>— “[y]ou shall not lie with a

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<sup>67</sup> I hope that my attempt to describe these communities will be more accurate than inaccurate, more respectful than disrespectful, more helpful to the project of understanding how we heal the complex divisions not limited to the conflict over same-sex marriage, but for which the wedding ceremony has become a critical symbol of ultimate commitments.

<sup>68</sup> Robert Gnuse, *Seven Gay Texts: Biblical Passages Used to Condemn Homosexuality*, BIBLICAL THEOLOGY BULLETIN (Apr. 22, 2015), <https://journals.sagepub.com/doi/abs/10.1177/0146107915577097?journalCode=btba>. Of course, theologians have also attempted to explain why these texts are incorrectly read to condemn all same-sex relations. Robert Gnuse enumerates these texts:

There are seven texts often cited by Christians to condemn homosexuality: Noah and Ham (Genesis 9:20–27), Sodom and Gomorrah (Genesis 19:1–11), Levitical laws condemning same-sex relationships (Leviticus 18:22, 20:13), two words in two Second Testament vice lists (1 Corinthians 6:9–10; 1 Timothy 1:10), and Paul’s letter to the Romans (Romans 1:26–27). The author believes that these do not refer to homosexual relationships between two free, adult, and loving individuals. They describe rape or attempted rape (Genesis 9:20–27, 19:1–11), cultic prostitution (Leviticus 18:22, 20:13), male prostitution and pederasty (1 Corinthians 6:9–10; 1 Timothy 1:10), and the Isis cult in Rome (Romans 1:26–27). If the biblical authors did assume homosexuality was evil, we do not theologize off of their cultural assumptions, we theologize off of the texts we have in the canon.

*Id.*

male as with a woman; it is an abomination”—and narrative—the story of Sodom and Gomorrah, for example.<sup>69</sup>

Because of the discomfort in this community about explicit sexual description, the traditional conservative view of what God demands through the Bible has been passed on to each new generation more implicitly than explicitly until recent decades, as same-sex relationships have come out from obscurity and demands for recognition of legal rights of LGBTQ persons have accelerated. The views of this community on the immutability of sexual orientation, whether orientation or only behavior should be condemned, and where same-sex sexual behavior “ranks” among the human sins that the traditional community condemns vary from stream to streams of these religions.<sup>70</sup> And, notably, contemporary polls suggest that even young evangelical Christians are not uncritically accepting the conservative Church’s stance on this issue.<sup>71</sup>

Cover talks in *Nomos and Narrative*, and in *Violence and the Word* about the paradoxical character of this mitosis-like growth. He acknowledges both-and of the paideic community. On the one hand, it is “an etude on the theme of unity.”<sup>72</sup> On the other, “[t]he unity of

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<sup>69</sup> See Perry Kea, *Sodom and Gomorrah: How the ‘Classical’ Interpretation Gets it Wrong*, WESTAR INST. (Sept. 19, 2018), <https://www.westarinstitute.org/blog/sodom-and-gomorrah-how-the-classical-interpretation-gets-it-wrong> (arguing that the Sodom and Gomorrah story was about the consequences of gang rape and not targeted at normal homosexual behavior).

<sup>70</sup> See, e.g., Michael Lipka, *Rift Over Gay Rights Comes as United Methodists in U.S. Have Become More Accepting of Homosexuality*, PEW RSCH. CTR. (Feb. 26, 2019), <https://www.pewresearch.org/fact-tank/2019/02/26/rift-over-gay-rights-comes-as-united-methodists-in-us-have-become-more-accepting-of-homosexuality>.

<sup>71</sup> See *Views About Homosexuality Among Evangelical Protestants*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/religious-tradition/evangelical-protestant/views-about-homosexuality> (last visited Oct. 21, 2021) (describing the variety of evangelical views about acceptance of homosexuality); see also Rob Schwartzwalder, *How Are Younger Evangelicals Responding to Homosexuality?*, RELIGION TODAY (Feb. 28, 2014), <https://www.frc.org/op-eds/how-are-younger-evangelicals-responding-to-homosexuality> (discussing the protest that occurred at Wheaton College, a conservative Christian college that affirms the traditional teaching about homosexuality).

<sup>72</sup> COVER, *supra* note 1, at 109.

every paideia is being shattered [at the very moment of its] creation.”<sup>73</sup> As he suggests, to maintain the etude, these communities must break apart the original community expelling those who threaten its unexamined precepts and stories that make paideic continuance possible. Or, through revolution and resistance, sometimes bloody, the insurrectionists overcome the authorities.<sup>74</sup>

The traditional Christian community, whether described literally as the Christian denomination or figuratively as the Christian-inflected ethos that has permeated all American life, expels the threats to its “etude of unity.” It justifies that expulsion, sometimes even reluctantly, by the precept “we must obey God rather than men.” Many personal narratives from members of the LGBTQ community describe this very experience of expulsion from the paideic communities that gave birth to them.<sup>75</sup> That expulsion might include formal shunning, “the complete withdrawal of social, spiritual, and economic contact

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<sup>73</sup> *Id.* Professor Resnik discusses mitosis which happens because of a “conflict within paideic communities about their own practices and authoritative interpretations.” Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover (An essay on Racial Segregation at Bob Jones University, Patrilineal Membership Rules, Veiling, and Jurisgenerative Practices)*, 17 *YALE J.L. & HUMANS*. 17, 27 (2005). This is particularly a problem when agents of the state feel obligated to intervene in the affairs of paideic communities because they are concerned that a central value of the secular polity is at stake. I have addressed some of these issues affecting religious women contending with their communities elsewhere. Marie A. Failing, *Finding a Voice of Challenge: The State Responds to Religious Women and Their Communities*, 21 *S. CAL. REV. L. & SOC. JUST.* 137, 139 (2012).

<sup>74</sup> COVER, *supra* note 48, at 208 (“Rebellion and revolution are alternative responses when conditions make such acts feasible and when there is a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating powers.”). Cover makes an interesting claim I cannot pursue here—that the social organization of legal precepts in the U.S. resembles the imperial ideal type he describes, while the social organization of the narratives “has approximated the paideic” but those narratives are “radically uncontrolled . . . subject[s] to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence.” COVER, *supra* note 1, at 110-11. It is not clear to me why Cover believes that this description would not also apply to some present day paideic communities in the U.S. with their “patterns of commitment, resistance, and understanding,” at least if we include religious communities larger than those that Cover has in mind. *Id.* at 110.

<sup>75</sup> See, e.g., Alex Morris, *The Forsaken: A Rising Number of Homeless Gay Teens are Being Cast Out by Religious Families*, *ROLLING STONE* (Sept. 3, 2014, 1:31 PM), <https://www.rollingstone.com/culture/culture-news/the-forsaken-a-rising-number-of-homeless-gay-teens-are-being-cast-out-by-religious-families-46746>.

from a member or former member of a religious group.”<sup>76</sup> It might involve excommunication<sup>77</sup> to strong unexpressed messages that the LGBT members are not welcome unless they “repent” or go through conversion therapy to be “cured” of their evil tendencies.<sup>78</sup> But there are other ways to make the point. The gay member may be accepted or supported by his or her family or friends, or his or her newly disclosed identity results in awkward encounters or social withdrawal by those who constituted his or her community.<sup>79</sup>

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<sup>76</sup> Justin K. Miller, *Damned if You Do and Damned if You Don't: Religious Shunning and the Free Exercise Clause*, 137 UNIV. PA. L. REV. 271, 272 (1988) (describing how individuals are shunned in conservative Christian communities).

<sup>77</sup> *Stances of Faiths on LGBTQ Issues: Church of Jesus Christ of Latter-day Saints (Mormons)*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-church-of-jesus-christ-of-latter-day-saint> (last visited Oct. 21, 2021); Laurel Wamsley, *In Major Shift, LDS Church Rolls Back Controversial Policies Toward LGBT Members*, NPR (Apr. 4, 2019, 5:42 PM), <https://www.npr.org/2019/04/04/709988377/in-major-shift-mormon-church-rolls-back-controversial-policies-toward-lgbt-membe>. For example, under a 2015 policy, the Church of Jesus Christ of the Latter-Day Saints held that Mormons who acted on their same-sex attractions were apostates or could be excommunicated if they were not repentant. *Stances of Faiths on LGBTQ Issues*, *supra* note 77. In 2015, the Church of Jesus Christ of the Latter-Day Saints reversed its position on apostasy which denied baptism to children of gay parents and required the children to abandon their parents to stay in the church. Wamsley, *supra* note 77.

<sup>78</sup> See Jason Crosby, *Kentucky Baptist Pastor: Conversion Therapy To 'Get the Gay Away' is Barbaric and Deadly*, COURIER J. (Jan. 27, 2020, 11:00 AM), <https://www.courier-journal.com/story/opinion/2020/01/27/kentucky-pastor-conversion-therapy-get-gay-way-deadly/4586844002> (“Conversion therapists use a variety of shaming, emotionally traumatic or physically painful stimuli to make their victims associate those stimuli with their LGBTQ identities.”); see also Rad Berky, *Franklin Graham Urges Buttigieg to Repent for Sin of Being Gay*, WCNC (Apr. 25, 2019, 4:03 PM), <https://www.wcnc.com/article/news/politics/franklin-graham-urges-buttigieg-to-repent-for-sin-of-being-gay/275-52cc1c94-c8f5-4877-a57a-bbe756532bf6>.

<sup>79</sup> Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCH. ASS'N, <https://www.apa.org/pi/lgbt/resources/historyhttps://www.apa.org/pi/lgbt/resources/history> (last visited Oct. 21, 2021) (“Social movements, organizing around the acceptance and rights of persons who might today identify as LGBT or queer, began as responses to centuries of persecution by church, state and medical authorities. Where homosexual activity or deviance from established gender roles/dress was banned by law or traditional custom, such condemnation might be communicated through sensational public trials, exile, medical warnings and language from the pulpit.”).

In sociological terms, when LGBTQ individuals are seen as threats to the law of their communities, they have often been subject to what Schur calls an “inferiorization” process that involves “[s]tereotyping . . . general social disvaluation, avoidance tendencies and restriction of opportunities.”<sup>80</sup>

Sometimes, after they have surmounted the isolating pain of being informally shunned, ignored, or denied, as Cover predicts, gay, lesbian, and transgender individuals have proposed that the Church accept new understandings about the law of God concerning sexuality and interpersonal commitment.<sup>81</sup> In some Christian and other religious communities, these new understandings of the divine text have been accepted as legitimate re-interpretations and their proponents reabsorbed into the mainstream of the communities.<sup>82</sup> In the traditional Christian communities, the response has often been mitosis—to “maintain their coherence as paideic entities,” these communities have declared that the tradition of precepts and narratives cannot stretch far enough to embrace these new interpretations.

Indeed, numerous arguments during the litigation over same-sex marriage dramatically claimed that same-sex marriage would “destroy” the heterosexual marriages at the heart of the Church’s paideic structure.<sup>83</sup> Even today, litigants argue that refusing to exempt conscientious objectors from public accommodations laws requiring that they serve same-sex couples for their weddings are sometimes larded with dire consequences for the state of religious freedom.<sup>84</sup>

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<sup>80</sup> EDWIN M. SCHUR, *THE POLITICS OF DEVIANCE: STIGMA CONTESTS AND THE USES OF POWER* 151 (Suse L. Cioffi ed., 1980).

<sup>81</sup> *Acts* 5:29 (New American Standard Bible). Peter and the other apostles made this declaration when they were ordered by the high priest not to teach about Jesus. *Id.*

<sup>82</sup> Nolan Feeney, *3 Other Christian Denominations That Allow Gay Marriage*, TIME (Mar. 18, 2015, 2:42 PM), <https://time.com/3749253/churches-gay-marriage>; David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RSCH. CTR. (Dec. 21, 2015), <https://www.pewresearch.org/Fact-Tank/2015/12/21/Where-Christian-Churches-Stand-On-Gay-Marriage>. For example, in 1972, the United Church of Christ ordained its first gay minister in 1972, and it was followed by Christian denominations’ acceptance of marriage for same-sex couples. Feeney, *supra* note 82.

<sup>83</sup> Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 UNIV. ILL. L. REV. 431, 434-35 (2014).

<sup>84</sup> See ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT* 22-24 (Oxford Univ. Press ed., 2020).

But, as Cover notes, these “potent flowers of normative meaning”<sup>85</sup> will not be killed by the original community even if they are expelled. LGBTQ folks instead have formed new communities for themselves and allies, new “families” of friends where their families have deserted them, new meaning-creating associations where their old ones (the Boy Scouts, the military) have expelled them.

While much of this history is shrouded in secrecy, as it well had to be, what history we have suggests that the gay rights community has functioned as a loose network of smaller paideic communities in many respects, at least during the 20<sup>th</sup> and 21<sup>st</sup> centuries. Some of these communities were social, centered around transgressive practices like Greenwich Village and Harlem.<sup>86</sup> Professor Morris argues that the locational disruption of World War II also allowed gay and lesbian people to meet in the throes of war and create supportive communities.<sup>87</sup> Scientists and theorists also described the gay and lesbian experience in scientific or philosophical terms to normalize gay sexuality.<sup>88</sup> Still, other organizations supported individuals while proposing transparency and recognition for persons who lived these lives, the best-known among them the Mattachine Society and the Daughters of Bilitis.<sup>89</sup>

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<sup>85</sup> COVER, *supra* note 1, at 109.

<sup>86</sup> Morris, *supra* note 79 (“[P]rewar gay life flourished in urban centers such as New York’s Greenwich Village and Harlem during the Harlem Renaissance of the 1920s. The blues music of African-American women showcased varieties of lesbian desire, struggle and humor; these performances, along with male and female drag stars, introduced a gay underworld to straight patrons during Prohibition’s defiance of race and sex codes in speakeasy clubs.”).

<sup>87</sup> *Id.* (“The disruptions of World War II allowed formerly isolated gay men and women to meet as soldiers and war workers; and other volunteers were uprooted from small towns and posted worldwide.”).

<sup>88</sup> *Id.* (noting that civil rights organizations such as the Mattachine Society were supported by prominent sociologists and psychologists, and that Donald Webster Cory’s “The Homosexual in America” argued that LGBTQ persons were a legitimate minority group, and Evelyn Hooker “demonstrated that gay men were as well-adjusted as heterosexual men, often more so”).

<sup>89</sup> *Id.* (describing some of these organizations, including the Mattachine Society, founded in 1950 by Harry Hay and Chuck Rowland as an advocacy group for gay men as an oppressed minority, One, Inc., founded in 1952, and the Daughters of Bilitis, which Phyllis Lyon and Del Martin began in 1955); see JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, 234-36 (Univ. Chi. Press ed., 1983) (discussing institutions that supported gay and lesbian community in the 1950s and 1960s).

Indeed, these expelled members of traditional Christian communities have even formed new religious communities. In addition to changing the “law” on sexual behavior and marriage in religious communities of which they are a part—one can find over 9,000 “gay-affirming” Christian communities on one website<sup>90</sup>—gay, lesbian, and transgender people have formed new congregations and even a denomination for themselves.<sup>91</sup> Like Cover’s description of mitosis, these new communities have allowed for survival and growth.

These expelled LGBTQ members, whether they live their lives as secular or are involved in a religious community, have also begun to create new law as Cover understands it. The values of this community are perhaps more diffuse and abstract than those of the Ten Commandments—the equality of all persons, the right and moral responsibility of individuals to live authentic lives, the embrace of radically diverse self-expression, the denial of narratives painting gay identities as distorted, sick, or corrupt, the embrace of courage to “come out.”<sup>92</sup> In religious language, these precepts can be summarized by the idea that every human person is made in the image of God and thus deserves to be treated with the dignity and respect that this understanding requires.

Not unlike the experience of the first Christian converts, until recent times, much of passing on “the law” between LGBTQ community members about their sexuality had to take place under the cloak of darkness, in private homes and quiet organizations, in gay newsletters and books.<sup>93</sup> But the creation of a “sense of direction and

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<sup>90</sup> See *Finding an Affirming Church*, GAY CHURCH, <https://www.gaychurch.org> (last visited Oct. 21, 2021).

<sup>91</sup> The first gay and transgender-specific denomination, as opposed to individual congregations in established Christian denominations, was the Universal Fellowship of Metropolitan Community Churches founded in 1968. Morris, *supra* note 79 (noting that major denominational acceptance of gays and lesbians was followed by the 1972 formation of Parents and Friends of Lesbian and Gays (PFLAG)).

<sup>92</sup> *UCF’s PRIDE Values*, UNIV. CAL. S.F., [https://diversity.ucsf.edu/sites/diversity.ucsf.edu/files/PRIDE\\_Values.pdf](https://diversity.ucsf.edu/sites/diversity.ucsf.edu/files/PRIDE_Values.pdf) (last visited Nov. 25, 2021) (describing the values of “solidarity, collectivity, and identity as well as resistance to discrimination and violence”); Proclamation No. 10222, 86 Fed. Reg. 30135 (June 1, 2021) (discussing a “celebration of visibility and a personal celebration of self-worth and dignity”).

<sup>93</sup> See, e.g., *The Homophile Movement*, UNIV. MO., <https://info.umkc.edu/makinghistory/the-homophile-movement/> (last visited Oct. 21, 2021); Ben Kessler, *‘Homophiles’: The LGBTQ Rights Movement Began Long Before Stonewall*, NBC (June 10, 2019, 6:56 AM),

growth that is constituted as the individual and his community work out the implications of their law” is apparent in the multitude of “coming out” stories the community tells. That these are truly paideic stories and not simply self-referential ones is seen by simply reciting the names of the protagonists—from historical figures like Harvey Milk and Bayard Rustin to popular contemporary figures—names known to the broader community as embodying the community’s values such as authenticity, courage, embrace of diversity, and self-expression.<sup>94</sup>

Although the gay rights community also has its law-creating instructive narratives, the community is perhaps only quasi-paideic because it is not easy to identify any canon of writings or sacred space important to the community. And, in the sense that Cover intimated that paideic communities are somewhat insular, in the last decades, values embraced by this community have moved into the mainstream, as reflected in the large number of books, movies, TV shows with gay characters that have become part of the national culture.<sup>95</sup> The celebratory aspect of this paideic community are reflected in PRIDE, an acronym that now is recognizable throughout American culture.<sup>96</sup>

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<https://www.nbcnews.com/feature/nbc-out/homophiles-stonewall-there-was-growing-gay-rights-movement-n1015331>.

<sup>94</sup> See, e.g., *LGBT Rights*, HUM. RTS. WATCH, <https://www.hrw.org/topic/lgbt-rights> (last visited Oct. 21, 2021) (illustrating the embrace of diversity and the protection of human dignity); *Coming Out: Living Authentically as Lesbian, Gay and Bisexual+*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/coming-out-living-authentically-as-lesbian-gay-and-bisexual> (last visited Oct. 21, 2021).

<sup>95</sup> See Emma Green, *America Moved On From Its Gay-Rights Moment—And Left a Legal Mess Behind*, ATL. (Aug. 17, 2019), <https://www.theatlantic.com/politics/archive/2019/08/lgbtq-rights-america-arent-resolved/596287> (noting that “conservative advocates argue that LGBTQ people face little to no discrimination, and that their identities have been normalized—LGBTQ folks are featured on TV shows and in movies, and many businesses have voluntarily crafted their own nondiscrimination policies,” while GLBTQ advocates document the innumerable instances of discrimination against them; and some controversies, particularly those relating to children, continue). See, e.g., Betsy Gomez, *Banned Spotlight: And Tango Makes Three*, BANNED BOOKS WK. (Sept. 5, 2018), <https://bannedbooksweek.org/banned-spotlight-and-tango-makes-three> (discussing censorship of a book about male penguins).

<sup>96</sup> Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 673-74 (2009) (“In the modern period, what is now known as PRIDE (Lesbian, Gay, Bisexual, Transgendered, Transsexual, Queer and their Friends, Families and Supporters Pride Parade), began as a protest march commemorating the Stonewall Riots in New York City . . . [which] gave rise



The ways in which values of the gay rights community are translated into specific precepts and obligations are also as complicated and sometimes as conflicted as the traditional Christian community's views are on a host of issues, from premarital sex to stem cell development.<sup>97</sup> In fact, there is an element of mitosis within the GLBTQ community.<sup>98</sup> As an example, we might reference the intellectual debate over a conflict that has divided other marginalized groups: whether the goal of civil rights and social acceptance is to normalize same-sex relations within the umbrella of respectable social behavior, or whether to be authentically LGBTQ is to resist conventional mores on sex, marriage and family, to reformulate and live under a completely different social conception than the one that has excluded them.<sup>99</sup>

Importantly, while the word “conscience” is not often used in these stories, perhaps because of its too close association with religion, the fact is that the precepts and narratives that give this community a somewhat paideic character are sometimes moral lessons that implicate conscience. For example, GLBTQ people are exhorted, implicitly or explicitly, that the moral thing to do is come out of the shadows,<sup>100</sup> to stand up to the state and to society for who they are, to resist the violence and oppression of white male supremacy directed

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to the community activist group, The Gay Liberation Front, which planned a march to commemorate the first anniversary of the Stonewall riots in June of 1970. That June weekend in 1970 saw demonstrations of commemoration not just in New York but also in Chicago, Los Angeles, and San Francisco. These marches ultimately morphed into the PRIDE parades we see today.”)

<sup>97</sup> For a discussion of splits among Catholics, Protestants, Mormons, and Jews on public ethical issues such as abortion and stem cell research, see Jeffrey M. Jones, *U.S. Religious Groups Disagree on Five Key Moral Issues*, GALLUP (May 26, 2016), <https://news.gallup.com/poll/191903/religious-groups-disagree-five-key-moral-issues.aspx>.

<sup>98</sup> Morris, *supra* note 79, at 2 (noting that movement leaders struggled to try to respond to the concerns of a diverse GLBTQ community, and that women's issues were often left out of theory formation and activism).

<sup>99</sup> Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights*, 64 UCLA L. Rev. 184, 196 (2017). Neo Khuu describes this divide as between marital and early LGBTQ pluralist groups, who “saw marriage as a problem, rather than a solution to their subordinated identities.” *Id.*

<sup>100</sup> See, e.g., D’EMILIO, *supra* note 89, at 235 (describing how gay liberationists of the 1960s changed the understanding of “coming out” to be a fusion of a political act and a personal statement that would improve the lives of gay and lesbian people and move individuals to social action).

toward themselves and others, and to nurture and support others who have to make this journey, whether they are alike (e.g., gay males) or unlike (e.g., transgender persons).

The same-sex marriage movement actually has its roots in a paideic religious community. The Metropolitan Community Church was advocating for marriage while the wider gay community was focused on other civil rights denied to them.<sup>101</sup> Indeed, as Mary Ziegler recounts it:

major radical gay rights organizations like the Gay Liberation Front and the Gay Activists' Alliance viewed marriage reform as unimportant, if not dangerously conformist. . . . As Michael Brown, a member of the Gay Liberation Front, explained to the New York Times in August 1970, 'We're not oriented toward acceptance but toward changing every institution in the country—male domination, capitalist exploitation, all the rest of it.'<sup>102</sup>

She also points out that “[o]ne reason for the movement's inattention to the issue was the outbreak of the AIDS epidemic, which made marriage seem of marginal importance.”<sup>103</sup>

Yet, recognizing that gay and lesbian couples understood their commitments to partners to be moral imperatives that go beyond short-term interest, the marriage movement gained traction in the wider GLBTQ community.<sup>104</sup> In Lutheran terms, gay and lesbian partners may perceive that they are “called” to care for their significant others

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<sup>101</sup> Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. UNIV. L. REV. 467, 475-76 (2012) (noting that the first commitment ceremonies performed in this church in 1970 were religiously focused). The presiding minister, Reverend Perry “explained that gay couples had spiritual reasons for seeking marriage and ‘settling down like anyone else.’” *Id.* These religious commitment ceremonies led to some of these couples and others trying to obtain legal recognition for their marriages and filing test cases to do so. *Id.*

<sup>102</sup> *Id.* at 476.

<sup>103</sup> *Id.* at 477.

<sup>104</sup> Though many gay and lesbian couples would not use these terms, they do perceive their commitments to intimate associates, especially partners, to be conscience-driven, moral imperatives that defy social convention or short-term self-interest. See Marie A. Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U.L. REV. 383, 415-16 (2001).

or spouses<sup>105</sup> in the same way that heterosexual couples who marry may understand themselves as called to care for their spouses.<sup>106</sup>

I would also suggest that, as Cover predicts, a third law-making community has split off from the traditional Christian community—a Christian political community that has entered the debate over same-sex marriage and related family issues as its key concern.<sup>107</sup> It is a community of primarily conservative Christians who are drawn to contend against same-sex marriage as a political issue that threatens society. Over time, they have joined together across ethnic, political, and even religious boundaries to oppose same-sex marriage as a threat to the traditional institution.<sup>108</sup>

Mary Ziegler traces the origin of the Christian political community to the Stop ERA movement headed by Phyllis Schlafly starting in 1975.<sup>109</sup> That year, Schlafly used the spectre of same-sex marriage to drive religious conservatives away from women's rights, arguing that the "ERA [would] legalize homosexual marriages and give homosexuals and lesbians all the rights of husbands and wives such as the right to file joint income tax returns, to adopt children, to teach in the schools, etc."<sup>110</sup>

Ziegler argues that *Baehr v. Lewin*<sup>111</sup> was a turning point for the Christian political community, shifting its focus from gay people and AIDS and passage of a school prayer amendment to a fight against same-sex marriage.<sup>112</sup> After *Baehr*, more conservative groups focused

<sup>105</sup> Ziegler, *supra* note 101, at 479-80.

<sup>106</sup> For an explanation of Luther's understanding of callings, including the calling of marriage, see GEORGE W. FORELL, FAITH ACTIVE IN LOVE 122-128 (1954).

<sup>107</sup> I use the term "entered the debate" because technically, political religious conservatives do not have what we would consider legal standing on the questions of marriage and family at the heart of this problem. They are not directly harmed by the state's decision to enforce anti-discrimination law against a merchant objecting to assist a same-sex wedding, nor by the state's decision to grant that merchant an exemption. It is not their conscience which is disturbed. Rather, they seek to enter the legal and political debate in order to enforce their "law" on other communities.

<sup>108</sup> During this period, "social conservatives from various ethnicities, religions, and political orientations united together in framing both the marital and pluralist movements within the LGBTQ community as one and the same, threatening their cherished traditional institution of marriage." Khoo, *supra* note 99, at 197-98.

<sup>109</sup> Ziegler, *supra* note 101, at 476.

<sup>110</sup> *Id.* at 476.

<sup>111</sup> See generally 852 P.2d 44 (Haw. 1993) (holding that marriage statute excluding same-sex marriages discriminates on the basis of sex and is therefore subject to "strict scrutiny").

<sup>112</sup> Ziegler, *supra* note 101, at 480.

resources and time on passing the Defense of Marriage Act.<sup>113</sup> Focus on the Family's James Dobson described same-sex marriage "as the greatest threat to family values."<sup>114</sup> Louis Sheldon of the Traditional Values Coalition warned that "[l]egalizing homosexual marriage would place our youth at risk, in addition to having a disastrous effect on individual citizens, businesses, churches and practically every segment of our society," and "would result in the 'degendering' of America."<sup>115</sup> Gary Bauer of the Family Research Council warned the Congress considering the Defense of Marriage Act ("D.O.M.A.") that if same-sex marriage were allowed, we would have to "restructure our entire sexual morality and social system to embrace a concept that has never been accepted anywhere in the world by any major culture."<sup>116</sup>

During this period, the Christian political community opposed to same-sex marriage also began to coalesce more firmly. A coalition of these Christian political organizations formed the Arlington Group to oppose same-sex marriage.<sup>117</sup> When James Dobson spoke at an important event in May 2004, he turned to the argument that same-sex marriage advocates, not opponents, were supporting discrimination because they would use the public schools "as a propaganda machine for the gay community" and deny religious parents the right to raise their children with Christian values that opposed homosexual behavior and its consequences. He claimed, "[p]ublic schools [would] be used as propaganda machines for the gay agenda."<sup>118</sup> That was the beginning of a shift by the Traditional Values Coalition and Focus on the Family, two of the most influential national organizations, to a new theme in their rhetoric: protecting the rights of those with religious objections to same-sex marriage.<sup>119</sup>

As *Obergefell* and other marriage cases began going up the appellate ladder, the civil rights arguments of same-sex marriage opponents only became more prominent, apparently causing Justice Kennedy to believe he had to address them in the opinion. And, of course, since *Obergefell*, the advocacy groups within this community

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 497.

<sup>116</sup> *Id.* at 501.

<sup>117</sup> *Id.* at 499.

<sup>118</sup> *Id.* at 499.

<sup>119</sup> *Id.* at 498.

have stepped up to represent marriage license officials, wedding vendors, and others who have refused to recognize same-sex marriage after it was legalized.<sup>120</sup>

This Christian political community formed of such groups does resemble paideic communities in some ways. Members of the Christian political community do support each other, as they did Barronelle Stutzman, with prayers and letters encouraging her (as others) to stay the course with their lawsuits and their defiance.<sup>121</sup> They have a network of communication, and they attend rallies and conventions focused on building group solidarity. They also come together for protest events, as they did at the Supreme Court when it was hearing *Masterpiece Cakeshop*. They also have an instinct toward mitosis, easily expelling the “foreign object,” the discordant legal meaning, and the persons who propose it.<sup>122</sup>

Yet, in other ways, the Christian political community does not have attributes of traditional paideic communities, including the one it grew from. The bonds of the Christian political community are not, for the most part, permanent interpersonal commitments of its members, as Cover describes the paideic community’s bonds to be.<sup>123</sup> Although it presents a particular theology about same-sex marriage, its rituals and celebrations are largely focused on winning its goals with lawmakers and judges. It does not appear to practice “the discipline of study and the projection of understanding onto the future that is interpretation.”<sup>124</sup> Unlike the dynamics of this community, paideia invites others to be taught, to consider, to interrogate, and to embrace the meaning of law.

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<sup>120</sup> *Religious Liberty and the “Wedding Vendor” Cases*, CTR. RELIGIOUS LIBERTY, <https://downloads.frc.org/EF/EF16L23.pdf> (last visited Nov. 25, 2021).

<sup>121</sup> Alliance Defending Freedom, *The Barronelle Stutzman Story*, YOUTUBE (Mar. 16, 2014), <https://www.youtube.com/watch?v=MDETkcCw63c>.

<sup>122</sup> Sociologist Edwin Schur explains this phenomenon in somewhat different terms:

Deviance defining contributes to social cohesion and reinforces the dominant standards in a society by establishing social and moral limits. As Erikson comments, . . . when the community calls [the deviant] to account for that vagrancy it is making a statement about the nature and placement of its boundaries. It is declaring how much variability and diversity can be tolerated within the group before it begins to lose its distinctive shape, its unique identity.

SCHUR, *supra* note 80, at 21 (quoting KAI T. ERIKSON, *WAYWARD PURITANS A STUDY IN THE SOCIOLOGY OF DEVIANCE* 11 (1966)).

<sup>123</sup> COVER, *supra* note 1, at 106.

<sup>124</sup> COVER, *supra* note 1, at 105-06.

Yet, I would suggest that the Christian political community acts as paideic communities do in opposing the “world maintaining” law of the imperial state, where “[i]nterpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.”<sup>125</sup> Additionally, it understands itself to be engaging in redemptive constitutionalism, focusing on “the world as they would transform it,” in a vision that goes beyond their insular paideic community and argues for replacement of the current “unredeemed character of reality as we know it” with a “fundamentally different reality that should take its place,” (i.e., a nation under God).<sup>126</sup>

One thorn in the rosebush for this community, is that paideic communities do not always adapt to the world around them—sometimes clinging to the status quo causes them to implode or fade away as adherents leave or die.<sup>127</sup> Sometimes their substantive beliefs are so deviant from the norm that everyone in society thinks they are too dangerous to keep around, and the imperial state finds it necessary to destroy them. Sometimes they implode because of their leadership—look at Jim Jones and Jonestown again as an example.<sup>128</sup>

Perhaps a more important way communities are problematic centers on a community’s self-reflection. The paideic process assumes the possibility of adaptation and reinterpretation, and the practice of that interpretation by reciprocal servanthood or care for others.<sup>129</sup> A community composed of persons who have come together without a shared tradition for a specific short-term political gain is unlikely to have the resources to examine itself to determine its own corruption and ask whether the chase or the “win” has eclipsed the original values which drew it together. In Christian theology, a community that puts its trust in legal victories is likely to disregard the most important commandments: “You shall love the Lord your God with all your heart

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<sup>125</sup> *Id.* at 106.

<sup>126</sup> *Id.* at 131-32.

<sup>127</sup> See Katherine Lucky, *The Last Shakers? Keeping Faith in a Community Facing Extinction*, COMMONWEAL (Nov. 28, 2019), <https://www.commonwealmagazine.org/last-shakers>. The Shakers, who did not believe in producing children, are now down to two adherents. *Id.*

<sup>128</sup> See *Jonestown*, *supra* note 66.

<sup>129</sup> See COVER, *supra* note 1, at 106.

and with all your soul and with all your mind . . . . And a second is like it: You shall love your neighbor as yourself.”<sup>130</sup>

#### IV. NARRATIVES OF MARTYRDOM

**COVER’S TEXT: Whenever a community resists a rule of silence or some other law of the state, it necessarily enters into a secondary hermeneutic—the interpretation of the texts of resistance . . . . The group must understand the normative implications of struggle and the meaning of suffering and must accept responsibility for the results of the confrontations that will ensue . . . . Religious communities have a special jurisprudence of exile and martyrdom.**<sup>131</sup>

Sociologist Edwin Schur suggests that groups that are stigmatized as deviant by society, before they become normalized and accepted, attempt to define themselves as oppressed minorities “[as] they strive to reduce the stigma and oppression they experience.”<sup>132</sup> They also adapt by labeling themselves non-conformists, a self-description Schur argues will only be accepted by the wider society if they can “convince people that one is advocating strongly believed-in ideals and goals and not simply trying to get around the prevailing norm.”<sup>133</sup>

In the traditional Christian community, tales of the oppression of martyrs have an important place, and there are many of them. Their themes, from Shadrach, Meshach, and Abednego<sup>134</sup> to Saint

<sup>130</sup> *Matthew* 22:37, 39.

<sup>131</sup> COVER, *supra* note 1, at 150, 152 (emphasis added).

<sup>132</sup> SCHUR, *supra* note 80, at 150-51.

<sup>133</sup> *Id.* at 152. Schur notes that other factors such as the size of the constituent group, its ability to mobilize and develop coalitions may influence whether such groups are considered deviant or legitimate protesters. *Id.* at 153.

<sup>134</sup> The Book of Daniel, chapter 3, tells their story. Because they would not bow down to King Nebuchadnezzar’s likeness, and “obeyed God rather than men,” the three were thrown into a fiery furnace. *Daniel* 3:28. However, the fire did not touch them and they emerged unscathed, which caused the king to proclaim, “Praise be to the God of Shadrach, Meshach and Abednego, who has sent his angel and rescued his servants! They trusted in him and defied the king’s command and were willing to give up their lives rather than serve or worship any god except their own God.” *Id.*

Lawrence<sup>135</sup> not only help the traditional Christian community acknowledge the brutality of the imperial community, lest they forget that this community, through its judges, imposes violence on their communities. They also enhance the solidarity of the group: if there is an enemy, an oppressor, it is easier to ignore the political or social differences between individuals within the group, to reinforce solidarity and the willingness to take collective action against social norms such as protests.

Just as the traditional Christian community has its stories of martyrdom, so there is a somewhat similar stream of paideic stories of violence and repression of gay people. In these narratives, the violence done by the state or by private persons is premised on the claim that gay and lesbian citizens are distorted persons, corrupting society or encouraging evil behavior. Some of these stories of the gay rights community bear some relationship to the Christian metaphor of the sacrificial lamb—it is as if the individual is selected by his community’s oppressors to die for his community, chosen by the killers as a symbol and warning to others in the community, sometimes because he told the truth. As they retell the stories of Stonewall, Matthew Shephard and Harvey Milk, for example, gay people remember that they continue to be subject to the possibility of being harmed or even killed for just being who they are, that it is not a far step from their being excluded from communities or forced to become re-closeted. When under threat, it is easier for LGBTQ citizens to trust each other than to trust the state or other communities they interact with.

Finally, even if it does not function exactly like a paideic community, the Christian political community employs these same martyrdom themes in the stories it tells. This community understands itself as a community of conscience and a community under threat. It

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<sup>135</sup> See *St. Lawrence, Deacon and Martyr*, CATH. ONLINE, [https://www.catholic.org/saints/saint.php?saint\\_id=366](https://www.catholic.org/saints/saint.php?saint_id=366) (last visited Nov. 24, 2021). St. Lawrence was martyred in 258 A.D., an era when Roman authorities were charging Christians with “odium humani generis” (hatred of the human race). *Id.* Emperor Valerian ordered all Christian bishops, deans and priests to be executed. *Id.* Tradition has it that Deacon Lawrence started to give all of the Church’s valuables to the poor, and when the emperor heard of it, he offered Lawrence clemency for the location of the Church’s gold and silver. *Id.* Lawrence arranged to meet the emperor with the Church’s treasures, and gathered the poor together to meet the emperor, telling the emperor that they were the Church’s true silver and gold. *Id.* Enraged, the emperor ordered that St. Lawrence be burned alive on a griddle. *Id.*



sits on the edge between deviance and acceptability by focusing on the conscience of its members like Jack Phillips and Barronelle Stutzman and their persecution.

For example, when the Christian political community talks about Barronelle Stutzman, who could not in conscience arrange flowers for a gay couple's wedding, or Jack Phillips, who could not in conscience bake a wedding cake for another such couple, the community uses martyrdom language. They have been singled out by what Cover calls the imperial state—as an example and a warning to those who would stand on conscience to resist the demands of the state. They have received hate mail for their conscientious decision.<sup>136</sup> They have been coerced by a state indifferent to their suffering consciences—unnecessarily, given the plethora of florists who offered flowers to the plaintiff couple.<sup>137</sup> This metaphor receives extended treatment in an American Conservative blog post by Ron Draper on the original Arlene's Flowers case:

I am deeply aware of how scandalous, even how obscene, it seems to speak of martyrdom from within the relative safety and prosperity of the liberal West, while so many of our brothers and sisters elsewhere in the world are dying for the faith. . . . And yet the suffering of a Barronelle Stutzman does not become less real simply because liberal order has perfected the art of bleeding its victims slowly and invisibly through ten-thousand bureaucratic paper cuts, rather than with the sword or lions in the Colosseum. Certainly we must be grateful for that, and yet there is a peculiar challenge for Christian faith and witness in the fact that liberal order diffuses its power quietly, almost imperceptibly, without blood or spectacle or responsibility. It creates a real possibility that one's sufferings may be visible only to God, so that it will always be possible to say, as

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<sup>136</sup> See Alliance Defending Freedom, *supra* note 121.

<sup>137</sup> *Id.*

many of our Catholic brethren seem only too eager to say, “Move on, there is really nothing to see here.”<sup>138</sup>

Even acknowledging that both Barronelle Stutzman and Jack Phillips have been subjected to serious threats, this is a graphic and dramatic statement.<sup>139</sup>

The state governments that enforce non-discrimination laws, and most especially Washington’s attorney general, also appear to the Christian political community to be imperial, according to Cover’s term, using their non-discrimination law and their violence to crush the Christian political community. Austin Nimocks at the Alliance Defending Freedom says:

At every turn, they have attempted to shame Americans into jettisoning their basic beliefs about marriage, and at any cost, especially civility. Victims of these reprehensible attacks have included politicians, corporate America, educational institutions, [and] churches . . . . [T]he Alliance Defense Fund and our allies have warned that the agenda driving same-sex “marriage” in this country, if allowed to persist, will have devastating consequences to our freedoms of conscience, religious liberty, and speech.<sup>140</sup>

Indeed, the Alliance Defending Freedom video of Barronelle describes the lawsuit as an unprecedented move by the state attorney general to file a lawsuit based on social media accounts rather than the complaint of a citizen.<sup>141</sup>

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<sup>138</sup> Ron Dreyer, *White Martyrs of Liberalism*, AM. CONSERVATIVE (June 30, 2016, 4:58 AM), <https://www.theamericanconservative.com/dreher/white-martyrs-of-liberalism>; see also Ilya Shapiro, *Kim Davis is No Martyr, But Barronelle Stutzman is*, CATO INST. (Sept. 8, 2015, 9:53 AM), <https://www.cato.org/blog/kim-davis-no-martyr-barronelle-stutzman>.

<sup>139</sup> See *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019) (discussing threats to Stutzman’s business); Kaitlynn Schallhorn, *Colorado baker: Death Threats and Hate for Refusing to Make Gay Wedding Cake*, FOX NEWS (June 29, 2017), <https://www.foxnews.com/politics/colorado-baker-death-threats-and-hate-for-refusing-to-make-gay-wedding-cake> (discussing death threats against Masterpiece Cake’s Jack Phillips, “vile online reviews,” and hateful comments to his wife and daughter).

<sup>140</sup> Austin Nimocks, *The Intolerance of the “Tolerant”*, ALL. DEF. FREEDOM (Oct. 17, 2017), <https://adflegal.org/blog/intolerance-tolerant>.

<sup>141</sup> See Alliance Defending Freedom, *supra* note 121.

More recently, as Jack Phillips has been sanctioned once again for refusing to make a gender transition cake for a potential customer,<sup>142</sup> this language of threat and martyrdom has become even more strident. Not only has he been literally called a Christian martyr,<sup>143</sup> and described as “persecuted,”<sup>144</sup> in an op-ed, author David Haryani says of the human rights commissioner who found him to be noncompliant with the Colorado Human Rights Act: “It was Rice who intended to hurt people. Her words, and the actions of the commission, were a warning to Christian businesses that a failure to take orders from a culturally approved class of customers could mean destruction of your livelihood.”<sup>145</sup>

Indeed, one fundraising pitch describes a “crusade” against Jack Phillips, with the state punishing him for refusing to create a gender transition cake; it decries the harassment of people of faith by the government.<sup>146</sup> Thus, we hear the claim of a threat not only to excise the individual from society, but also to destroy those in her community who do not conform to the state’s laws.<sup>147</sup>

Cover argues that the paideic community “**must understand the normative implications of struggle and the meaning of suffering and must accept responsibility for the results of the**

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<sup>142</sup> Isabella Grullón Paz, *Colorado Baker Fined for Refusing to Make Cake for Transgender Woman*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/06/18/us/wedding-cake-colorado-jack-phillips.html>; see also KOPPELMAN, *supra* note 84, at 136-38 (discussing the Satanist cake and the gender transition cake ordered by attorney Autumn Scardina, whom Koppelman claims was intending to trap Phillips).

<sup>143</sup> John Wright, *Anti-Gay Colorado Baker and Christian Martyr Jack Phillips Gets a Book Deal*, TOWLEROAD (Jan. 31, 2020), <https://www.towleroad.com/2020/01/anti-gay-colorado-baker-and-christian-martyr-jack-phillips-gets-a-book-deal>.

<sup>144</sup> See, e.g., Kaylee McGhee White, *The Supreme Court failed Jack Phillips*, WASH. EXAM’R (Mar. 26, 2021), <https://www.newsbreak.com/news/2191461206775/the-supreme-court-failed-jack-phillips>.

<sup>145</sup> David Haryani, *The Crusade to Destroy Jack Phillips Continues*, DAILY SIGNAL (June 25, 2021), <https://www.dailysignal.com/2021/06/25/the-crusade-to-destroy-jack-phillips-continues>.

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *Jack is Back in Court Again. Enough is Enough*, ALL. DEF. FREEDOM, <https://adflegal.org/enough-is-enough> (last visited Oct. 21, 2021) (“Opponents of religious freedom want to strip away your freedom to live and work consistently with your deeply held beliefs. And they’re going to extreme lengths to punish those—like Jack—who are willing to stand for their faith. With so much at stake, we cannot back down.”).

**confrontations that will ensue.**<sup>148</sup> The Christian political community similarly prepares its members to accept the responsibility of resistance, to understand that the state will require of its members the Hobson's choice of violating their consciences by cooperating with the evils that state non-discrimination laws impose on them or losing their livelihoods and lives as they know them.

Indeed, Stutzman accepts this responsibility in the language of traditional Christian resistance and martyrdom: "we must obey God rather than men."<sup>149</sup> She says, "I have to have faith that He's going to protect me and give me the courage and the knowledge and the wisdom to stand firm on this but it's also helped me understand what obedience is and what . . . following Christ is. You can't sit on the fence." And, like the martyrs, the reward is there, Stutzman continues: "like He says, you can't be lukewarm that's what I was obviously born."<sup>150</sup>

Although they have received significant threats to their physical safety,<sup>151</sup> it may be difficult for outsiders to imagine how political Christians can compare the threats to Barronelle Stutzman or Jack Phillips to the threat of being beaten up or killed, which members of the LGBTQ community still realistically face; or to see how the Christian political community imagines the state's sanction against these bakers to be in league with the persecution and discrimination that fellow Christians face in other parts of the world. But the fact is that this political Christian community does indeed imagine this threat to be deeply damaging to religious individuals, their traditional religious communities, and to society as a whole.

The interviews of Stutzman's new friend, Jack Phillips, owner of Masterpiece Cakeshop, take up the theme of defending against an enemy: "But we're not friends just because we love weddings. Barronelle and I both have been forced into long, hard legal battles.

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<sup>148</sup> COVER, *supra* note 1, at 49 (emphasis added).

<sup>149</sup> Alliance Defending Freedom, *supra* note 121.

<sup>150</sup> *Id.*

<sup>151</sup> See Schallhorn, *supra* note 139 (discussing death threats against Jack Phillips and Stutzman); Sam Brasch, *Looking Ahead, Masterpiece Baker Jack Phillips Says His Religion Can't Be Hidden*, CPR NEWS (June 11, 2018), <https://www.cpr.org/2018/06/11/looking-ahead-masterpiece-baker-jack-phillips-says-his-religion-cant-be-hidden> ("Phillips says he lost six of his nine employees as a result . . . . And while he knew the position caused pain and frustration in the gay community, he says the turmoil went both ways. He says he came to expect death threats. 'Recently, in the last few weeks, someone threatened to come in and kill me with a machete. That's a frightening thing.'").

We didn't start these fights, but we're at the center of a national conversation about the First Amendment and the rights of creative professionals."<sup>152</sup> These are two people who would never have met but for similar decisions they made, apparently on the spur of the moment in their shops; decisions that were seized on by conservative religious advocacy forces as epitomizing both the danger of the state and the virtue of standing up to the state as it insists on social and legal conformity.

**COVER'S TEXT: If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.<sup>153</sup>**

Here is the irony of the matter: in the two contending legal orders in the wedding cases, the non-discrimination precept is embraced by most in both the gay rights and the Christian political communities. Indeed, both the traditional religious community and the political Christian community have increasingly called upon the non-discrimination principle as the core meaning of both the Free Exercise and Establishment Clauses as well as the Equal Protection Clause.<sup>154</sup> Yet, its enforcement in the wedding cases is regarded as fundamentally unjust by this community, while the LGBTQ community, having

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<sup>152</sup> Jack Phillips, *Masterpiece Cakeshop Owner Jack Phillips: Florist Barronelle Stutzman Deserves Another Chance at Justice*, FOX NEWS (Jan. 16, 2020), <https://www.foxnews.com/opinion/masterpiece-cakeshop-jack-phillips-florist-barronelle-stutzman>.

<sup>153</sup> COVER, *supra* note 1, at 99 (emphasis added).

<sup>154</sup> The Supreme Court has apparently accepted this argument. See *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2022 (2017) (discussing why the Church should be eligible for a state grant for playground materials, noting "the express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant"); see also *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (involving a state education grant held unconstitutional under Montana's constitutional establishment clause, stating: "[t]his rule against express religious discrimination is no 'doctrinal innovation,' and '[t]he protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests.'").

waited so long for the day of public commitment to, and enforcement of, non-discrimination norms on their behalf, finds that principle and its enforcement to be “universally venerated.”<sup>155</sup> And, conversely, the right to disobey the law on matters of human dignity and conscience—embraced by both the political Christian community and the LGBTQ community—is considered fundamentally unjust by the LGBTQ community in this case, while it is venerated by the religious political community.

**COVER’S TEXT: Courts, at least the courts of the state, are characteristically “jurispathic” . . . in myth and history, the origin of and justification for a court . . . is understood to be the need to suppress law, to choose between two or more laws, to impose on laws a hierarchy . . . . [b]y exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is shared throughout our community.<sup>156</sup>**

Cover appears to be right in the case of the wedding vendors: the courts of the state understand their work as choosing between two laws of the imperial community—here, the state law barring discrimination on the basis of sexual orientation and the state and federal religious freedom clauses.<sup>157</sup> The courts will either decide that one of these laws predominates over the other or interpret one law in such a narrow or distorted fashion that it is compatible with the other. In Coverian terms, as between legal meta-principles of non-discrimination and respect for conscience, both of which are founded in the value of human dignity, it appears on first glance that the secular law must murder one.

Viewed from another angle using religious language, the court must decide among competing centuries—old legal traditions—between the tradition that we must obey God rather than man or the tradition that secular human law is instituted by God for governance in this world.<sup>158</sup> Or, put still another way, the court must choose between

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<sup>155</sup> COVER, *supra* note 1, at 99.

<sup>156</sup> *Id.* at 139 (emphasis added).

<sup>157</sup> See COVER, *supra* note 48, at 55 (noting that when judges confront “the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest”).

<sup>158</sup> FORELL, *supra* note 106, at 129-30.

the tradition that each person is made in the image of God,<sup>159</sup> whose conscience and commitment we owe the deepest respect, and the tradition that each person is a flawed sinner, whose motives we must suspect, and whose selfish excesses must be reined in by the state lest the world “devour itself.”<sup>160</sup>

The secular law does not brook the prospect of a world in which these commands simply exist in tension with each other, even though in reality, they have historically always been in tension. That is, in some cultures and historical moments, the divine law as interpreted from scriptures triumphs over the human, and in others, the man-made law prevails. Indeed, the whole of American First Amendment jurisprudence might be seen as the ebb and flow of either secular or religious law triumphing over the other. *Sherbert v. Verner*<sup>161</sup> gives way to *Employment Div., Dep’t of Human Resources of Oregon v. Smith*,<sup>162</sup> which gives way to *Gonzales v. O Centro Espiritu*<sup>163</sup> and

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<sup>159</sup> Caryn D. Riswold, *Imago Dei and Coram Mundo: Theological Anthropology for Human Life Today or, the World is the Woman*, J. LUTHERAN ETHICS (Jan. 2008), <https://www.elca.org/JLE/Articles/4681> (“We are always, even right now, four things: coram Deo (in relationship to God), coram mundo (in relationship to the world, which here means the concrete physical world of existence), coram hominibus (in relationship to other people), and coram meipso (in relationship to ourselves). These relationships are all constitutive of human life . . . . In baptism, we can see all of these relationships at work: God’s grace is present, the world is actively present in the living water, other people are witnesses and supporters, and the self is newly defined. Human life is coram.”) (quoting Gerhard Ebeling’s understanding of Luther’s use of this metaphor).

<sup>160</sup> FORELL, *supra* note 106, at 130.

<sup>161</sup> 374 U.S. 398, 410 (1963) (holding that infringements on religious exercise should be governed by the strict scrutiny standard).

<sup>162</sup> 485 U.S. 660, 673-74 (1988) (holding that neutral, generally applicable laws are constitutional even when they make religious exercise difficult or impossible). However, *Smith* has also been under attack, and as Justice Barrett acknowledges in *Fulton v. City of Philadelphia*, what would replace it is a conundrum for the Court. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

<sup>163</sup> 546 U.S. 418, 439 (2006) (holding that under the Religious Freedom Restoration Act, the strict scrutiny test will be applied to federal law that substantially burdens religious exercise).

*Fulton v. City of Philadelphia*<sup>164</sup>; *Lemon v. Kurtzman*<sup>165</sup> gives way to *Trinity Lutheran Church of Colombia v. Comer*<sup>166</sup> and *Espinoza v. Montana Dep't of Revenue*.<sup>167</sup> Yet, of the many ways which we law scholars and the state's courts have used to determine which law will be killed, none is satisfactory.

Some may argue that the courts' obligation is to do the least amount of damage to the decade long social and political contest over how morally justifiable sexuality and marriage should be defined and supported. Whether because they are incompetent to make these kinds of decisions, as Madison thought about judges and religion,<sup>168</sup> or because the "case or controversy" requirement limits the scope of their vision, in this view, the courts should play a relatively passive and incremental role when resolving these problems.

We must wonder whether Justice Kennedy in *Obergefell* thought about this as the likely outcome when he virtually promised America's religious political communities a safe zone in which to practice their faith as they saw fit, despite the state's recognition of

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<sup>164</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (holding that strict scrutiny is applicable under the Free Exercise Clause when the state grants discretionary power to a government agency to make exceptions to its neutral and generally applicable law).

<sup>165</sup> 403 U.S. 602, 624-25 (1971) (holding that a law will be upheld under the Establishment Clause if it has a secular purpose, its principal or primary effect is not to advance or inhibit religion and there is no excessive entanglement with the state).

<sup>166</sup> 137 S. Ct. 2012, 2024 (2017) (holding that laws that do not allow religious entities to seek government funding on the same terms as secular entities violate the Free Exercise Clause).

<sup>167</sup> 140 S. Ct. 2246, 2260, 2263 (2020) (holding that states cannot exclude religious entities from participating in state programs under the Free Exercise Clause even if they are prohibited by a state's Establishment Clause).

<sup>168</sup> See James Madison, *Memorial and Remonstrance (1795)*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/primary-sources/memorial-and-remonstrance> (last visited Oct. 21, 2021). In opposing a bill to fund religious education, Madison suggested that the bill

implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

*Id.*



same-sex marriage. Both *Masterpiece Cakeshop*<sup>169</sup> and *Fulton*<sup>170</sup> appear to be the Court's determination to keep that promise, at least (for Justice Barrett) until the Court can find an acceptable alternative to either *Smith* or *Sherbert*.<sup>171</sup> In recent litigation, the Supreme Court elides the question of whether non-discrimination law or individual/collective dissent from that law undergirded by the Free Exercise Clause should prevail. In *Masterpiece Cakeshop*, the Court falls back on the "animus" exception in *Smith* on a fairly thin record<sup>172</sup>; and in *Fulton*, the Court stretches to employ the "equal exemption" exception in *Smith*, going so far as to construe a contract differently than lower courts in order to protect the Catholic diocese against violating "conscience" regarding same-sex families.<sup>173</sup>

In Cover's understanding, the imperial state does not necessarily wish to stake its own ethical territory.<sup>174</sup> Here, we could acknowledge Cover's recognition that the imperial state simply maintains universal norms and enforces them, with weak interpersonal commitments, its only clear moral value to "refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms."<sup>175</sup>

As Cover suggests, the problem with turning "law" in the broader sense over to a pluralistic imperial state is that it lacks, for the most part, the deep paideic underpinning that ensures permanent preservation of its values, at least at the level of concrete cases. While it can propose ideals such as equality and liberty on an abstract level, there is no stable normative commitment or history that can ensure that courts, legislatures, and executives correctly and consistently interpret those ideals.<sup>176</sup> And the state's claim to "objectivity" is a ruse, because there is no objective way to discern the correct answer to these

<sup>169</sup> *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1720 (2018).

<sup>170</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882-83 (2021).

<sup>171</sup> See cases cited *supra* notes 159-60 and accompanying text.

<sup>172</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1737.

<sup>173</sup> *Fulton*, 141 S. Ct. at 1877-78.

<sup>174</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 646-48 (2015).

<sup>175</sup> COVER, *supra* note 1, at 106

<sup>176</sup> VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019). There may be some exceptions. First Amendment speech law, for example, includes many different narratives that permit us to loosely define and apply the limits of its protection consistently, though not consistently across specific kinds of speech. Inciting speech, for example, is governed by a different set of rules than defamation and commercial law. *Id.*

questions: Which community—the gay rights community or the Christian political community—has correctly invoked the ideal of equality and its legal product, the non-discrimination principle? Which community correctly describes what it means to honor the constitutional liberty of a person? Which community has captured the notion of human dignity in its call for the other to step down?

We have witnessed this uncertainty throughout the history of litigation and legislation over same-sex marriage. From *Baker v. Nelson* (defeat of same-sex marriage)<sup>177</sup> to *Baehr v. Lewin*<sup>178</sup> and *Baker v. Vermont*<sup>179</sup>; from D.O.M.A. and numerous state constitutional bans<sup>180</sup> (same sex marriage's seemingly certain defeat) to *Obergefell* (its seemingly certain victory),<sup>181</sup> the bumbling and contradictory path

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<sup>177</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972) (holding that Minnesota's statute prohibiting same-sex marriage did not violate Baker's First, Eighth, Ninth, or Fourteenth Amendment rights).

<sup>178</sup> 852 P.2d 44 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>179</sup> 744 A.2d 864 (Vt. 1999).

<sup>180</sup> As of 2004, thirteen states had enshrined bans against same sex marriage in their constitutions. Deborah K. McKnight, *Features of State Same-Sex Marriage Constitutional Amendments*, MINN. H. REP. RSCH. (Feb. 2005), <https://www.house.leg.state.mn.us/hrd/pubs/ss/ssmrgca.pdf>. Other states had statutes prohibiting such marriages. While in *United States v. Windsor*, this Court invalidated the D.O.M.A. to the extent it barred the federal government from treating lawful same-sex marriages in any state differently from lawful marriages in other states, even when they were lawful in the state where they were licensed. 570 U.S. 744, 744-45 (2013). The D.O.M.A. provisions which provided for full faith and credit for these bans was still good law (albeit moot in light of *Obergefell*). Even today, six years after *Obergefell v. Hodges* ruled that statutory and constitutional bans are unconstitutional, numerous states still have them on the books, and repealing them has become controversial in some states. 576 U.S. 644, 681 (2015). Moreover, bills continue to be introduced to “poke holes” in existing protections for same-sex marital couples. *Id.* See Julie Moreau, *States Across the U.S. Still Cling to Outdated Gay Marriage Bans*, NBC OUT (Feb. 18, 2020, 10:44 AM), <https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936>.

<sup>181</sup> See Garrett Epps, *The U.S. Supreme Court Fulfills Its Promises on Same-Sex Marriage*, ATL. (June 26, 2015), <https://www.theatlantic.com/politics/archive/2015/06/same-sex-marriage-supreme-court-obergefell/396995> (arguing that *Obergefell* was “inevitable” and noting that both Justice Roberts and Justice Scalia “wrote against a seeming assumption that same-sex marriage advocates were winning the fight outside the courtroom, and that the court was thus intruding in a struggle that did not concern it”).

that marriage cases have taken us does not assure either side that its “law” in Coverian terms has prevailed permanently.

Indeed, so uncertain are the consequences of *Obergefell* that when the Court sidesteps the question of which law holds in *Masterpiece Cakeshop*, declaring that it will only decide the issue of individual animus in that case,<sup>182</sup> some commentators supporting same sex marriage issue dire predictions about what this means for the survival of their legal interpretation.<sup>183</sup>

One might cynically note that the triumph of one legal tradition over another is only as secure as the next open Supreme Court seat. While this uncertainty about how the imperial state will use its coercive power is one step removed from the sheer physical brutality of the Civil War as a way to decide which legal tradition within the United States will endure, it is not a particularly encouraging way of thinking about how the secular law decides to exercise its jurispathic power.

Indeed, each side in this debate can offer its own plausible parade of horrors if the decision is not made clearly, comprehensively, and convincingly: if the principle of non-discrimination in public accommodations is not upheld for same-sex couples, then what is to stop the next public accommodation from discriminating against gays (or even others) in other areas of public life?<sup>184</sup> If the principle of conscience exceptions is not upheld for

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<sup>182</sup> *Masterpiece Cakeshop Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1729 (2018).

<sup>183</sup> See Liz Hayes, *The Ripple Effect of the Supreme Court’s Masterpiece Cakeshop Decision*, WALL OF SEPARATION BLOG (June 8, 2018), <https://www.au.org/blogs/wall-of-separation/the-ripple-effect-of-the-supreme-courts-masterpiece-cakeshop-decision> (“In our Supreme Court amicus brief in the *Masterpiece* case, we warned that allowing businesses to use religion to deny service to certain customers could open a Pandora’s box of discrimination – not just against people who are LGBTQ, but also based on religion, race or marital status. I don’t want to say ‘told you so,’ but already stories are surfacing of people misinterpreting the *Masterpiece* ruling as giving a greenlight for discrimination.”); see also the more balanced argument of David von Drehle, *The Religious Freedom Bomb May be About to Detonate*, HAWKEYE REP. (June 18, 2021), <https://iowa.forums.rivals.com/threads/the-religious-freedom-bomb-may-be-about-to-detonate.360315> (“The 2015 Supreme Court decision extending the right to marry to same-sex adult couples contained a ticking time bomb. Six years later, the noise is getting loud. The explosive material has to do with religious freedom.”).

<sup>184</sup> See KOPPELMAN, *supra* note 84, at 50 (quoting Slate columnist Mark Joseph Stern who predicted that any religious accommodation in this area would soon stretch “to all facets of public life” and “lead directly to anti-gay segregation”). Koppelman

wedding vendors, then what is to stop the government from requiring ministers to marry same-sex couples or doctors to perform abortions, or telling religious communities who their religious leaders will be?

Of course, the courts, backed up by the violence of the United States, can perhaps simply kill one legal tradition without trying to justify (or at least plausibly justify) why they do so. While that may seem unsettling to those of us who live with the illusion that the law is a more humane and more reasoned basis for moral action than brute force, perhaps as Cover reminded us in *Violence and the Word* it is at least more truthful than pretending that there is no paideic homicide involved.<sup>185</sup>

Or conversely, perhaps there is some elusive legal rule that can get all of the people in both paideic communities to agree. At times in the Supreme Court's Free Exercise cases, it has intimated such a principle: if a person who makes a claim of conscience can never be interrogated, and we must always accept his statement as sincere and deeply held, as the Court has suggested in cases such as *Hobby Lobby*,<sup>186</sup> perhaps we could get universal assent to that principle, since it would uphold the self-interests of both those from the gay rights community and the religious community.

With some limitations—the universal boundary seems to be “no human sacrifice permitted”—the “no-questioning” principle for sincerity could permit a wide variety of self-seeking behavior by people from any religious or secular persuasion that could sustain the culture wars into the next generation. Wedding vendors and others could use any reason, or no reason, to turn down LGTBQ customers. Conversely, post-*Obergefell*, these customers and their allies, following their own consciences that tell them that non-discrimination is the sacred principle that must be upheld at all costs, could mount such damaging social campaigns (social media, picketing, threats, vandalism) against these vendors that they could not survive. We

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notes that this is unlikely, given that exemptions requested “have arisen almost exclusively in the context of weddings.” *Id.*

<sup>185</sup> See COVER *supra* note 48, at 210-11 (discussing the pretense that a criminal defendant walks to imprisonment without the use of violence).

<sup>186</sup> See *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 759 (2014) (“RFRA, properly understood, distinguishes between ‘factual allegations that [plaintiffs] believe are sincere and of a religious nature,’ which a court must accept as true, and the ‘legal conclusion . . . that [plaintiffs] religious exercise is substantially burdened,’ an inquiry the court must undertake.”).

know from the early union wars that eventually, one side will come out a winner, at least for the time being.

The problem with sanctioning courts to be jurispathic is that they will kill more than a narrow legal principle proffered by one or more paideic communities in their defense—they may damage, or even kill, the very heart of this community. As evidence, we could start with *Reynolds v. United States*<sup>187</sup> and the rest of the cases involving the Latter Day Saints, which demonstrates how jurispathic courts can kill a whole tradition's theology, in that case, the relationship of marriage to salvation.<sup>188</sup> We could continue on to the Native Free Exercise cases showing how, in the name of the imperial state, the Supreme Court permitted the destruction of sacred sites of worship and communion with the divine,<sup>189</sup> sacred rituals commensurate with Christian communion, even the spirit-robbing attachment of a Social Security number to Little Bird of the Snow.<sup>190</sup> While in some cases there will be a paideic community whose beliefs are so inimical to the state or its people that its tradition must be killed, e.g., a religion that preaches the unjustified taking of life, those communities will be few and far between.

Considered another way, what law of the paideic communities would we be willing to sacrifice? Imagine a country in which no claim of conscience, religious or otherwise, was honored, either explicitly by a Free Exercise claim by rejecting a military exemption for conscientious objectors, or implicitly by the state's simply ignoring civil disobedience when it happens, as it has done in many of the post-George Floyd protests? In a constitutional culture that prizes dissent, including by the lone individual, a blanket rule repressing all claims of conscience against the power and the law of the state would be very

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<sup>187</sup> 98 U.S. 145 (1879).

<sup>188</sup> Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1322-40 (1998) (tracing the history of the Mormon abandonment of polygamy in the face of persecution).

<sup>189</sup> *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 459-62, 467-68 (1988) (Brennan, J., dissenting) (discussing why protection of this sacred site was critical to the practice of the tribe's religion, and how the government's action of building a road through the site will "completely frustrate the practice of their religion").

<sup>190</sup> See *Bowen v. Roy*, 476 U.S. 693, 695-98 (1986); see also *id.* at 696 (discussing Roy's belief that attaching a Social Security number to his daughter for welfare purposes "will serve to 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power").

damaging to the core of the American experience. We know this through many, many stories of such repression and its aftermath.<sup>191</sup>

Conversely, what would be the consequence of always treating non-discrimination principles as subject to the whim of the objecting landowner, shopkeeper, or school board. We know the answer to this question as well, many of us in the legal academy having lived through dangerous and tumultuous times as *Brown v. Board of Education*<sup>192</sup> and the Civil Rights Acts were being ridiculed and refused by racist landowners, shopkeepers, and school boards, particularly in the South.<sup>193</sup>

There is a reason that it is so difficult for the Supreme Court to find a satisfying solution to the wedding vendor cases—as noted, they implicate two of the most profoundly important legal values of the American experience—the value of human equality and the value of human conscience, both grounded in the value of human dignity. Killing either law does irreparable damage to the soul of the nation.

**I shall use “redemptive constitutionalism” as a label for the positions of associations whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of the association itself . . . . Redemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with another.**<sup>194</sup>

Here, some paradox appears. In *Nomos and Narrative*, Cover has first put forth a vision of the imperial state that is minimalist, holding the world together by secular law and force. In these pages, he is inching forth toward a vision that the imperial community can collaborate with, if not unify, paideic communities. Just before this he says, “it is a great

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<sup>191</sup> Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684> (discussing cases of suppression of religious minorities).

<sup>192</sup> 349 U.S. 294 (1955).

<sup>193</sup> *Social Protests*, CONST. RTS. FOUND., <https://www.crf-usa.org/black-history-month/social-protests> (last visited Oct. 21, 2021).

<sup>194</sup> COVER, *supra* note 1, at 132 (emphasis added).

advantage to the community to have such principles [of autonomous communities] resonate with the stories of other communities that establish overlapping or conflicting normative worlds.”<sup>195</sup> Then he offers some hope that in the intersection of these communities’ distinctive commitments, if they are indeed transformational enough, there is the possibility of finding constitutional redemption, not salvation in the eschatological sense but here-and-now redemption of our common life.<sup>196</sup>

Indeed, Cover seems to be envisioning paideic communities that overflow their own insular boundaries, that reach out beyond themselves, offering their precepts and narratives in transformational activity to repair the world, *tikkun olam*. Their legal projects are bridge-building, not only temporally, recognizing the “unredeemed character of reality” and working to replace it someday with a normative reality that should be.<sup>197</sup> They are also building bridges to each other’s communities. How state actors will fit into this forward motion is not very clear.

**“[T]he court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law or force them into resistance) or share their interpretation.”<sup>198</sup>**

Here, we seem once again back in the imperial community, where the state, through judges, is killing law, where the judge must choose one or another vision of the bridge between the unredeemed reality and the redeemed future. It is not clear how the state itself can move itself beyond “world-maintaining” to this more redemptionist vision if judges are required to identify precepts, statements of law that must preclude their opposite.

In the wedding vendor controversy, the redemptionists point to different visions: in one, law is in the process of re-forming the minds and hearts of citizens so they respect the dignity and worth of every individual; in the other, the state has come under the reign of God, and people treat each other as *imago dei*, the image of God. The *nomos*

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<sup>195</sup> *Id.* at 130.

<sup>196</sup> COVER, *supra* note 48, at 172 (noting that the end of the statist impasse in constitutional creation “will likely come in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state. Perhaps such a resistance—redemptive or insular—will reach not only those of us prepared to see law group, but the courts as well.”).

<sup>197</sup> COVER, *supra* note 1, at 132.

<sup>198</sup> COVER, *supra* note 1, at 163 (emphasis added).

that is denied by the state may stall where it is, which is essentially what has happened in the wedding vendor cases, at least for now.

But with resistance comes division; with division comes the need to have an enemy, one whose word is not trusted, who will use coercion to overcome, one whose mind is made up and who will not listen to the narratives of the resisters. Thus, we see the two sides in the wedding vendor controversy take up the metaphors of war and destruction to describe the threat they are under.<sup>199</sup>

That is to say, depending on where the court decides cases like these in the future, either the gay rights community or the Christian political community will see the courts' decisions to represent a grave threat to their nomos and resist the state, as they have taken turns doing over the past few decades. In the imperial community, Cover suggests, one will prevail and one will be cut off, root and branch.<sup>200</sup>

Several times, Cover appears to think coercion is the only way the secular law can enforce human rights. To be sure, as a last resort, the courts may have to choose to kill some legal meaning to save others, at least temporarily. But to achieve Cover's vision of redemptive constitutionalism, which seems to imply respect for the multiplicity of legal meanings in any conflict, there may be some virtue and not cowardice in the courts' modesty in selecting how much they have to kill some legal meaning in order to save others (doctrinal limits), and the words they will use to kill it (rhetorical condemnation or approval), and the power they give to those on behalf of whom they kill (remedies).

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<sup>199</sup> See *supra* notes 143-47, 206 and accompanying text. See also Irin Carmon, *The New Culture War*, MSNBC (Nov. 18, 2014, 6:46 AM), <https://www.msnbc.com/msnbc/gop-new-culture-war-religious-freedom-msna460126> (quoting a conservative activist on the wedding vendor cases, “[w]e know how far it can go. Look at Nazi Germany, where the first inhabitants of concentration camps were Christian pastors who would not submit to the Third Reich.”). The language on the gay rights side is not quite so dramatic, but still uses these same metaphors. See German Lopez, *Bakeries are at The Center of the Fight for LGBT Rights. Why?*, VOX (Jan. 23, 2015, 9:00 AM), **Error! Hyperlink reference not valid.**<https://www.vox.com/2015/1/23/7874489/gay-wedding-cakes> (arguing, “[b]akeries have become a flashpoint in the battle for LGBT rights . . . . The bakery cases show the possible fallout of how society—and particularly private businesses—will deal with same-sex marriages as they’re allowed in more states.”) (emphasis omitted).

<sup>200</sup> See COVER, *supra* note 48, at 155 (noting that judges are people of violence and “characteristically do not create law, but kill it”).



The courts have, in some areas, developed modesty in legal rules and standards to account for the reality that there may be two legitimate forms of action colliding, rather than one good and one evil nomos, one which must be adopted and the other which must be killed. One of my favorite examples of such modesty is the *Grayned* doctrine in speech law, which asks whether the speech that is being excluded from a public space is “basically incompatible with the normal activity of a particular place at a particular time.”<sup>201</sup> This Doctrine starts with the presumption that both speech and other activities should be allowed in a public space unless there is no way that they can occupy the same space without harm to the purpose the state has dedicated the space to.

It is not clear that the incompatibility doctrine would work for the wedding cake conflict, though pro-baker advocates have pointed out that in most cases, couples have many other possibilities for cakes, flowers, food, and venue given the centrality of marriage in our society. Indeed, they give as an example in *Arlene’s Flowers*, where the couple was showered with offers to supply them a floral arrangement when word got out, who indeed got an arrangement from a florist who was compassionate about their situation.<sup>202</sup>

Given the distinctively important and pervasively contested institution of marriage, as Andrew Koppelman argues, “there are many ways to compromise” that are not “rotten compromises.”<sup>203</sup> He also properly notes that a change in the secular law is not necessarily required to find this “sweet spot.” “The religiously scrupulous could choose to work for businesses that will serve as buffers between them and the public, in order to insulate them from work that they are unwilling to do,” e.g., merge with a larger company with other employees who do not have the same religious objections.<sup>204</sup> Or, they can “refrain from holding [themselves] out to the public, and rely entirely on private social networks.”<sup>205</sup>

Even if these self-chosen solutions do not resolve the problem, there are secular legal rules that can find a balance between the values of non-discrimination and religious freedom. Some have proposed that the state could carve out a narrow exemption for wedding services, recognizing that marriage is a fraught enterprise at this point in

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<sup>201</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

<sup>202</sup> *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019).

<sup>203</sup> KOPPELMAN, *supra* note 84, at 128.

<sup>204</sup> *Id.* at 129.

<sup>205</sup> *Id.*

American life. Koppelman points to a model statute proposed by several very thoughtful Free Exercise scholars who would limit an exemption to weddings, and to services primarily performed by a small business owner.<sup>206</sup> Such an exemption would permit a small and targeted window for claims of conscience without unleashing the whole power of the state to either compel their violation of consciences or shut these businesses down. It would also reassure members of the gay community and civil rights advocates that such exceptions to nondiscrimination law would not be so endless as to eviscerate the protection they receive from public accommodations laws. The *Smith* doctrine<sup>207</sup> might discourage others from filing constitutional lawsuits for other kinds of religious exemptions, although the carve-out for weddings might trigger a *Smith* claim that the law is not neutral and generally applicable. However, from the perspective that we should kill as little law as possible, it is a potential starting point.<sup>208</sup>

Others have suggested that a business should be able to post a disclaimer that it opposes such marriage but will “comply with applicable anti[-]discrimination laws” though might plead with customers not to ask them to violate their conscience.<sup>209</sup> Such a right would warn same-sex couples about the vendors’ policy so they are not blindsided when they enter such an establishment, as the plaintiffs were in both *Masterpiece Cakeshop* and *Arlene’s Flowers*. Ultimately, though, this solution does not respect the vendor’s right of conscience

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<sup>206</sup> *Id.* at 132.

The model statute declares that “no individual, sole proprietor, or small business shall be required to . . . provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage” if doing so would cause those providers “to violate their sincerely held religious beliefs.”

*Id.* The law also contains a Mrs. Murphy type exception for landlords. Koppelman notes that the substantial hardship section of the law is vague and could give rise to more lawsuits. *Id.* at 133.

<sup>207</sup> *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”).

<sup>208</sup> There are other things to think about, as Koppelman notes; it might raise questions about whether a wedding vendor could refuse service on racial grounds. KOPPELMAN, *supra* note 84, at 133.

<sup>209</sup> *Id.* at 134-35. Koppelman notes, however, that such a disclaimer might give rise to a hostile environment claim, though he suggests that a successful hostile environment claim would violate the Speech Clause. *Id.* at 134.

if a customer still insists on service or, as in Jack Phillips' most recent encounter with the non-discrimination law, it will allow a potential customer who chooses to "destroy Philips" and use this as a way to "entrap" and "punish" him for his beliefs.<sup>210</sup>

Or, Koppelman suggests, the state could give the exemption, but *require* notice at the place of business and in advertising that the vendor will not service same-sex weddings.<sup>211</sup> He argues that the greatest harm in the wedding vendor cases is the anxiety caused to couples who do not know in advance where they will encounter discrimination, "an exhausting source of stress that poisons all one's commercial interactions."<sup>212</sup> He acknowledges Laycock's caution that requiring vendors to notify the general community of their position might invite "boycotts, defamatory reviews, and, simultaneously, repeated confrontational demands for service from gay couples. The merchant would also risk vandalism and worse."<sup>213</sup> But, this provision may be less damaging to the flourishing of each community than no exemption or an exemption without notice.

Or, some combination of these approaches might work even better. The "Mrs. Murphy" home sale exemption to the Fair Housing Act required that sellers must be of a certain small size and they could not advertise their services using commercial means such as newspapers and agents, so the exemption was limited to actual human beings with actual consciences instead of corporations with constructive consciences.<sup>214</sup> Limiting the subject matter and the defendant pool, plus requiring that wedding vendors must announce their policy clearly in their store windows or websites so that same-sex partners are not subject to a surprise rejection and others who disagree

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<sup>210</sup> *Id.* at 137.

<sup>211</sup> *Id.* at 138.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 139-40.

<sup>214</sup> See Fair Housing Act of 1968, 7 C.F.R. § 1901.203; see also 42 U.S.C. § 3603(b)(1) (providing that an owner can discriminate in any single-family house sold or rented by an owner, who does not own more than three houses and did not sell more than one per two years). The law provided that the sale must be made (A) without the use in any manner of the . . . services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling . . . and (B) without the publication, posting or mailing . . . of any advertisement or written notice in violation of section 3604(c) of this title.

*Id.*

can avoid supporting their businesses, would go a long way toward preventing harm to either party.

Or, the courts' attempt to respect the *nomoi* of both parties might take the form of a redescription of a "compelling state interest" and "least restrictive alternative" to reflect the fact that when the *nomoi* of *paideic* or quasi-*paideic* communities collide, it is a very different case from when the state employs its power to oppress a minority and crush its "potent flowers" of meaning.

Or, courts could assign the right to non-discrimination to the gay couple, but limit remedies to declaratory relief instead of injunctive relief or damages.<sup>215</sup> That would vindicate the state's interest in declaring that discrimination in public accommodations is odious, the couple's interest in having their dignity recognized by the state, and the vendors' interests in not being compelled to act against conscience.

## V. FINALE

All the "compromise" solutions proposed by lawyer-academics are simply "world-maintaining" solutions. They keep the parties apart in their own *paideic* communities, for the most part, continuing to view the other community with distrust and derision. And, so long as wedding vendors and same sex couples insist on staying the course because of its implications for their whole communities, and not just themselves, conflicts will continue, and the state will have to employ "world-maintaining" solutions like those mentioned.

There is a messier option, though it is not traditional in constitutional cases. The courts could refuse the invitation to be "of first resort" in handling very particular cases in which the values of non-discrimination and conscience collide. Judges could require litigants to give up the crusade to establish their positions as the law triumphant, the law that the imperial community will enforce. They could look deeper than the wedding cake or floral arrangement to respect the *nomos* that each party is offering to the whole world: one, a *nomos* of inclusion and respect for difference, the *imago dei*; the other, a *nomos* that reminds the world, eschatologically, that there is a power and a goodness beyond this moment, a divine compassion that

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<sup>215</sup> Failing, *supra* note 104, at 424-26.

embraces the world and will make it whole, to whom obedience is freely and joyfully given.

As Cover is clearly aware, redemption through the bridge of law is difficult on a large scale, with historically shaped and complex *nomoi* always contending for their law to be the law of the state. But redemptive encounters, those moments where individual human beings see other individual human beings as *imago dei*, as a world of right and wrong in themselves, are not as difficult.

Courts could thus ask the litigants to encounter each other, to make an attempt to see each other as, borrowing the image of Emmanuel Levinas, an Other standing over them in his or her need. Rather than “sharing the interpretation” of one of these *paideic* communities and denying the other the power of the state as the first move of the courts, what if the courts would only intervene when there had been every attempt of the parties to understand the *nomos* of the other, to hear the pain of being turned away as unworthy at one of the most important moments of one’s life or the anguish of trying to decide between a friend and obedience to a higher law?

We can, of course, only guess what might have happened if Barronelle Stutzman had been required by the courts to attend a mediation or sit in a restorative circle, to listen to what humiliation she actually caused her friend Rob, which she clearly did not see when they talked. We can only guess how Rob might have re-understood what Barronelle was trying to tell him if he were required to listen in a deep way to her refusal to design his wedding flowers not as an intent to diminish his personhood, but as an action she felt compelled to take in conscience in order to be faithful to her God. We do know that these human encounters have moved hearts and minds on the issue of same-sex marriage. We know that people who conscientiously could not support same-sex marriage have changed their views after encounters with couples who have borne the pain of being excluded from important experiences of social life because of how they were created as human beings.

Rather than having Barronelle embraced by a national community of religious advocates telling her she is a hero for sacrificing on behalf of her conscience, perhaps we would see a Barronelle whose first instinct—to cherish and respect a friend regardless of his sexual orientation—would lead her and her church to change their minds on this issue. At the very least, those whom she harmed—Rob Ingersoll and Curt Freed—would walk away with a less

damaging sense that she had reinforced the disrespectful and soul-diminishing way they had been treated all of their lives by persons who did not understand or respect them as persons made in the image of God.

Even now, the idea that the forms of human encounter that modern legal systems have devised such as mediation and restorative justice are a critical and integral part of the law, and particularly of constitutional jurisprudence, is far from accepted.<sup>216</sup> These forms are still considered optional, attempts that perhaps it is good to try before “real law” presses on to a legal decision. That is especially so in constitutional litigation, where it appears that critical human values and ultimate social wellbeing are on the line in almost every case and litigants are eager to establish a binding principle.

Yet, if the law does not demand that those who contend over these critical values do not first open their eyes and hearts to see the Other as a human being embedded within an important paideic community—one that will have its blind spots and its illusions of certainty about its duties and rights, as well as its virtues and contributions to social life—are any of these competing principles that contend for the power of the law to kill their opposites worth the candle?

I’d suggest that placing the human encounter, the exchange of both personal and communal narratives between constitutionally contending parties, at the center of most rights-vs.-rights constitutional litigation would fulfill Cover’s promise of redemptive constitutionalism more successfully than the current way in which we do constitutional politics, which is an indeterminate and uncertain triumph of one legal principle over another.

In a fallen world, of course, not all mediations or restorative processes are successful. Human beings do choose not to see each other as “made in the image of God,” and they choose to misunderstand or mis-remember their own prejudices and predilections and unreflectively accept that what is told them by authorities as the

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<sup>216</sup> See, e.g., Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667, 682 (2005) (noting that, “[n]ot only do legal systems adopt change slowly, other legal ramifications also hinder systemic adoption of restorative justice and raise the question of whether restorative justice can operate within the legal parameters currently existing within the criminal justice system. Critics of restorative justice have noted concerns about due process protection and procedural safeguards that exist in more formal processes.”).

demand of their own consciences. In my view, this is true of both secular and religious people, and on virtually every subject where contending constitutional norms are at issue.

So, as a last resort, if these encounters break down, and the parties cannot continue to communicate with each other until they reach a solution that is compassionate to both parties, the Court could create a new Free Exercise doctrine among the options Koppelman and I have catalogued. Such a doctrine would ask whether the paideic values of each party in the wedding vendor cases can exist in the same particular time and place without extreme damage to the other, like *Grayned*.<sup>217</sup> Such a compromise would play the modest role in establishing that both non-discrimination and conscience are values that we prize and that we should protect side by side whenever it is possible to do so.

Let Cover have the last, though equally perplexing, word:

**In the normative universe, legal meaning is created by simultaneous engagement and disengagement, identification and objectification . . . . Creating legal meaning, however, requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed. . . . It entails the disengagement of the self from the “object” of law and at the same time requires an engagement to that object as a faithful “other” . . . . And just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimate, within a different framework, communities and movements . . . . We ought to stop circumscribing the *nomos*; we ought to invite new worlds.**<sup>218</sup>

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<sup>217</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

<sup>218</sup> COVER, *supra* note 1, at 144-45, 172.