

Commissioner Peter Kirsanow Rebuttal

Responding to all the errors, misstatements, and mischaracterizations in my colleagues' statements would require the wholesale destruction of an entire forest in violation of the Paperwork Reduction Act. I will therefore only address two points.

Response to Statement of Chairman Castro

The answer to the question posed by the title of this briefing has been answered by the majority of my Commission colleagues with an unequivocal "no." Any doubt that the majority maintains that nondiscrimination principles trump and/or extinguish principles of religious liberty was erased by their statements in response to the report.

The majority's take on the primacy of nondiscrimination over religious freedom was perhaps most clearly and succinctly stated by Chairman Castro in the Commission's April 15, 2016 meeting. In responding to a proposed Tennessee bill that would provide an accommodation for therapists and counselors with moral objections to a patient's lifestyle by allowing the therapists to refer such patient to another counselor, Chairman Castro asked:

"So why is it even necessary for there to be an accommodation on any of this because of someone's sexual orientation? *They [the therapists] shouldn't have to be accommodated.* The services should just be provided." (Emphasis added)

Chairman Castro asserts that religious liberty has been used in the past to justify slavery and invidious discrimination. Chairman Castro's singling out of Christianity is especially puzzling. At first I thought he surely meant to identify for opprobrium religions in addition to Christianity. But, as it happens, his venom is directed against American Christians past and present. Of course, there were Christian slave owners in America. That is indeed a repugnant period in American and Christian history but, unfortunately, unremarkable when viewed in the context of history as a whole. Slavery has been an almost universal institution. It is the *abolition* of slavery, largely because of individuals motivated by their Christianity, that is unusual.

So, it is peculiar that the Chairman singles out Christianity for opprobrium in regard to slavery. Slavery has existed in almost every society and among the adherents of almost every major religion. But it was only in the Christian world that a serious critique of slavery arose. Those Christians who supported slavery were utterly unremarkable in the sweep of human affairs, no better or worse than millions of others throughout history. In contrast, it is remarkable, perhaps even astonishing, that there were Christians who rose far above the historical propensities of humankind to call for abolition as a religious and moral imperative.

In criticizing Christianity in regard to Islam and slavery, the Chairman fails to recognize that Islam's ties to slavery are at least as deep as those of Christianity.¹ It was the self-avowed Christian British Empire that initially ended its own involvement in the international slave trade and then acted to curtail the slave trade within the Muslim world. As the Middle Eastern scholar J.B. Kelley wrote:

No movement of any consequence towards abolition ever arose of its own accord in the Muslim world; it was the reproach of Muslim slavery, not Christian, that men and boys were castrated for service in the *harim*; and it was a Christian nation, Britain, which led the campaign to end the Arab slave trade and to compel Muslim rulers to forbid it to their subjects. . . . It was [British officials], after all, who led the Arab tribes of the Persian Gulf to cease trading in their fellow-Muslims, the Somalis.²

Religious believers were also in the forefront of the civil rights movement. Of course, the most prominent leaders of the civil rights movement were disproportionately Christian ministers - Rev. Dr. Martin Luther King, Jr., Rev. Fred Shuttlesworth, Rev. Ralph David Abernathy, Rev. C.K. Steele. Rev. Theodore Hesburgh, perhaps our own Commission's most renowned member, was among them. "More than 900 Catholics participated in the Selma protests" and a log of out of town participants in the Selma protests included "140 priests, 50 sisters, 29 ministers, four rabbis".³ Mary Parkman Peabody, the wife of a prominent Episcopal bishop, "at the behest of the Rev. Dr. Martin Luther King Jr. and his Southern Christian Leadership Conference" travelled to Florida, engaged in civil disobedience, and spent two nights in jail.⁴

A sense of modesty, humility, and perspective should temper our remarks about those who lived before us. We are all creatures of our own time, our minds and attitudes shaped by influences and assumptions of which we are largely unaware, our actions constrained by weighty responsibilities

¹ Bernard Lewis, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS* 124, 126 (1995) ("At first [the janissaries] were recruited exclusively from Christian captives and slaves, mainly by the *devshirme*"; "To some extent the dwindling supply of captives and renegades from Europe could be made good by importing slaves from the Caucasus. Caucasian women had always been appreciated in the harems of the Middle East, and Caucasian men-slaves had also played a role of some importance").

² J.B. Kelly, "The European Empires and Islam," in *FIGHTING THE RETREAT FROM ARABIA AND THE GULF: THE COLLECTED ESSAYS AND REVIEWS OF J.B. KELLY, VOL. I*, 308-09 (2013); *see also* Lewis, *supra* note 1 at 318 ("The abolition of legal chattel slavery [within the Ottoman Empire] was accomplished, in the main, by Western rule, interference, or influence, and did not evoke much concern or debate.").

³ Paul Murray, *54 miles to freedom: Catholics were prominent in 1965 Selma march*, NAT'L CATH. REP., Mar. 7, 2015, <http://ncronline.org/news/peace-justice/54-miles-freedom-catholics-were-prominent-1965-selma-march>.

⁴ Robert D. McFadden, *Mary Peabody, 89, Rights Activist, Dies*, N.Y. TIMES, Feb. 7, 1981, <http://www.nytimes.com/1981/02/07/obituaries/mary-peabody-89-rights-activist-dies.html>; Karen Grigsby Bates, *Why a Proper Lady Found Herself Behind Bars*, NPR, Mar. 28, 2014, <http://www.npr.org/sections/codeswitch/2014/03/28/294816965/why-a-proper-lady-found-herself-behind-bars>.

and unacknowledged self-interest. We all like to think that had we lived in the past we would be among the few righteous. But history is plain - the visionary righteous are few. Most of us are far more likely to have subscribed to the conventional wisdom of our time, or in good faith to have been unable to see our way clear to what is now considered self-evident. We cannot know the reasons future generations will condemn us.⁵ All we can know is that they will indeed condemn us, and hope that they judge us with more charity than the Chairman does our predecessors.

Response to Statement of Commissioners Achtenberg, Kladney, Yaki, and Chairman Castro⁶

In footnote 35, Commissioner Achtenberg approvingly quotes Professor Ira Lupu:

Despite *Obergefell's* nod to the existence of good faith religious opinion against same sex marriage, religious objections to same sex intimacy will ultimately retain no more respect than religious objections to racial integration and inter-racial intimacy. In a nation committed to a more Perfect Union, the arc of the religious universe is long, but it too bends toward justice. [footnotes omitted.]⁷

What Professor Lupu argues for is the subordination of religious beliefs to the secular orthodoxy of the moment. This presumes religious beliefs are temporal rather than eternal. This fundamentally misapprehends the nature and quality of religious belief. It also misunderstands the lessons of history. Spectacularly so.

The twentieth century had no shortage of those who believed that they were ushering in a new and better age, and that ushering in that age was worth silencing unpopular beliefs and squelching unpopular views. Some of those individuals lived in places such as the Soviet Union, Maoist China, and areas of the Middle East. Rhetorical flourishes about the arc of history or the religious universe bending toward justice are, tragically, often disproven by *actual* history. The history of totalitarian regimes in the twentieth and twenty-first centuries should disabuse everyone of the notion that history's, or the religious universe's, arc *necessarily* bends in a particular direction, a predictable direction, a beneficent direction.

Accepting that we are not inexorably moving toward an immanentized eschaton leads to the realization that we can make mistakes. Indeed, we can make potentially catastrophic mistakes like the triumphalist thought-conformity contemplated in footnote 35.

⁵ For example, at one time eugenics was a pet cause of the Progressive great and good. Today eugenics is publicly regarded with horror. See Thomas C. Leonard, *Retrospectives: Eugenics and Economics in the Progressive Era*, J. OF ECON. PERSPECTIVES, Vol. 19, No. 4, 207 (2005), <https://www.princeton.edu/~tleonard/papers/retrospectives.pdf>.

⁶ For simplicity, throughout this section I will refer only to Commissioner Achtenberg, although I am of course referring also to the three other commissioners who signed this statement.

⁷ Achtenberg Statement, *supra* n. 35 at 40.

Such thought conformity may seem comfortable and enlightened when, during any given moment in the arc of history, the regnant thoughts, beliefs, and values are consistent with one's own. But when the prevailing thoughts and beliefs shift, as they inevitably do, such conformity can prove disastrous. That is precisely why religious liberty, freedom of belief, freedom of *thought* is so important. That is why it should be accommodated, whenever possible, in a manner that affords an appropriate balance with other constitutionally-protected rights. Without such accommodation for freedom of belief all other freedoms are not merely fragile, but illusory.