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When the Religious Other Seems Abhorrent: Thoughts on the Power of Scholars to Represent the "Repugnant Cultural Other"

Nancy D. Wadsworth

WHEN THE RELIGIOUS OTHER SEEMS ABHORRENT: THOUGHTS ON THE POWER OF SCHOLARS TO REPRESENT THE "REPUGNANT CULTURAL OTHER"

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ALAN ROGERS, THE CHILD CASES: HOW AMERICA'S RELIGIOUS EXEMPTION LAWS HARM CHILDREN (UNIVERSITY OF MASSACHUSETTS PRESS 2014). PP. 256. HARDCOVER $80.00 PAPERBACK $29.95

In *The Child Cases*, Boston College historian Alan Rogers examines the unsettling subject of sick children who have died as a result of their (mostly) Christian Science parents refusing medical intervention for religious reasons. He reviews the legal mechanisms used to shield such parents, and the efforts of others to protect the rights of children against these practices. Rogers argues forcefully against laws and legal interpretations that would be used to defend such parents from prosecution. This is an important book of an understudied subject that will interest legal scholars, religious historians, some social scientists, child advocates, and others.

I offer this review from the perspective of a scholar of politics with no previous expertise on Christian Scientists or religion-related death cases, but who regularly teaches an array of subjects related to religion in American politics. Broadly speaking, my research focuses on the intersections of religion, politics, history, and culture, especially the efforts of people in religious subcultures to engage in politics or political conversations about fraught subjects like race and sexuality.[1] In the first section below, I summarize what I find to be the most interesting aspects of the book. In the second, I offer critical reflections on how studies like *The Child Cases* could benefit from greater attention to, or at least scholarly discussion about, the cultural worldview that informs the choices made by its subjects, and the larger, historically constituted power configurations within which both religious minority groups like Christian Scientists, and the scholars who study their behaviors, are situated.

* Associate Professor, Department of Political Science, University of Denver.

1. NANCY D. WADSWORTH, AMBIVALENT MIRACLES: EVANGELICALS AND THE POLITICS OF RACIAL HEALING (2014); FAITH AND RACE IN AMERICAN POLITICAL LIFE (Nancy D. Wadsworth & Robin Dale Jacobson eds., 2012); Nancy D. Wadsworth, *Intersectionality in California's Same-Sex Marriage Battles: A Complex Proposition*, 64 POLITICAL RESEARCH QUARTERLY 200 (2011).

I.

The Child Cases seems to be the first in a pair of Rogers' projects concerning legal battles around controversial parental choices, in this case Christian Scientists' "spiritual healing" defenses and, in his next study, vaccination refusals.[2] Prior to this, Rogers wrote extensively on the legal history of Massachusetts and on murder and the death penalty in that state.[3] Rogers is a meticulous researcher who, in each of the five Christian Science cases he reviews, carefully detangles complex slates of participants, events sequences, legal strategies, appeals processes, and political aftermaths, which he arranges into coherent narratives. Throughout each case, and in two final chapters reviewing the modern history of religious exemption statutes and successful repeal efforts in Massachusetts and Colorado, he builds a persuasive legal analysis that definitively rejects religious exemption logics when set against the constitutional rights of children. Rogers is clear from the outset that he regards Christian Science (and other) religious rights defenses against prosecution under child abuse and manslaughter laws as both unconstitutional and morally indefensible; indeed, he has publicly advocated repeal of religious exemption laws aimed to protect such parents.[4]

Given that apparently this is the first effort to systematically assemble and analyze the contemporary legal history of these battles, *The Child Cases* is, most immediately, an invaluable resource for the community of advocates, attorneys, and political activists seeking to eradicate legal protections for religious communities who deploy free exercise defenses of medical non-intervention by parents or caretakers against children. It should also attract readers who are students of religious rights law, family and children's rights law, and those interested in current controversies around parents' refusals—even for non-religious reasons—of commonly accepted protocols (such as vaccinations or psychological testing). It would be a good text to use in a class exploring First Amendment legal history or even the legal strategies of social movements, though, as I will elaborate on later, if one is interested in understanding the competing cultural meaning-making systems and practices that inform each side of these particular rights battles, the study is disappointingly narrow.

That said, I learned a great deal from Rogers' study. Its focus on Christian Science child death cases has deepened my understanding of the concrete effects of First Amendment jurisprudence and legislative efforts to protect certain (especially unpopular or minority) religious communities from laws applicable to all other citizens. For most of the twentieth century, the Church of Christ, Scientist, leveraged considerable organizational resources and garnered public sympathy for the principle of "religious freedom" in order to build a web of state religious exemption laws across the United States tailored to protect their members specifically. Christian Science holds that all

2. ALAN ROGERS, BOSTON COLLEGE ONLINE CV, http://www.bc.edu/content/dam/files/schools/cas_sites/history/pdf/facultycv/rogerscv.pdf (last visited Sep. 22, 2016).

3. ALAN ROGERS, MURDER AND THE DEATH PENALTY IN MASSACHUSETTS (2008); ALAN ROGERS & LISA ROGERS, BOSTON: CITY ON A HILL (2007); MURDER ON TRIAL (Robert Asher, Lawrence Goodheart & Alan Rogers eds., 2005).

4. Alan Rogers, *Overextending a Constitutional Protection*, N.Y. TIMES, (Mar. 10, 2015),, http://www.nytimes.com/roomfordebate/2015/03/10/parents-beliefs-vs-their-childrens-health/overextending-a-constitutional-protection.

illness is a result of the failure to recognize divine perfection and that healing comes from the spiritual recognition of that fundamental perfection. When, in the 1960s, a network of medical professionals, child advocates, activists, and legislators began coalescing around public policy solutions to the long-underregulated area of child abuse—which resulted in things like the Child Abuse Prevention and Treatment Act (CAFTA) of 1974—Christian Scientists were able to secure "prayer treatment" exemptions for their members who employed church-approved spiritual treatments instead of modern medicine to treat their children's illnesses. To receive federal child abuse funds under CAFTA, states had to enact a religious exemption law that was basically tailored to Christian Science practices.

When Christian Science parents were tried for manslaughter or child abuse as a result of rejecting medical treatment, the Church provided aggressive legal defenses. Christian Scientists argued that parents' actions regarding their children are a logical extension of constitutionally protected beliefs, as delineated in now-famous decisions like *Sherbert v. Verner* and *Wisconsin v. Yoder*.[5] To paraphrase, they essentially claim (this is my own phrasing) that freedom of religion has no meaning if it ends at being able to practice one's faith in a crisis. For parents in these trials, their deepest faith was that if they prayed in the right way and pursued spiritual treatment through proper channels, God would heal their children. If that failed, the result, no matter how painful, was in God's hands. The church's legal strategy was generally to seek dismissal of the case on the basis of the state's religious exemption law, which as they understood it, allowed spiritual healing in lieu of medical care, and to argue that denial of this religious defense represented violation of their First Amendment right to free exercise of religion.[6]

In the context of parents' decision-making power over their children, Rogers reads the refusal of Christian Science defenders and some courts to differentiate religious belief from action as an egregious misinterpretation of free exercise doctrine and a violation of children's rights. Rogers interprets the period between 1963 (*Sherbert*) and 1990 (*Employment Division v. Smith*)[7] as a deviation from the Supreme Court's dominant "free exercise jurisprudence" before and after.[8] *Sherbert*, he argues, created a jurisprudential ambiguity through which religious groups were able to shoehorn immunity for criminal prosecution from actions (regarding others' children) that resulted directly from their beliefs. Justice William Brennan's subjection of laws that might impede certain religious groups' practices to strict scrutiny allowed Christian Scientists to use religious "way of life" arguments to exempt their members from laws requiring parents to provide medical care for their children.[9] In effect, *Sherbert* put the burden on the state to prove that it has a compelling interest to intervene against Christian Science healing approaches when applied to children. However, with the Court's decision in *Employment Division* (Scalia writing), Rogers asserts that

5. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).
6. ALAN ROGERS, THE CHILD CASES 18 (2014).
7. Emp't Div. v. Smith, 494 U.S. 872 (1990).
8. ROGERS, *supra* note 6, at 42.
9. *Id.* at 14.

the legal distinction between religious beliefs and actions was restored. Neutral and generally applicable laws that might incidentally burden the actions of some religious groups do not by definition offend the First Amendment.

Despite what Rogers sees as clear constitutional support since 1990 for rejecting religious exemptions to child abuse and neglect laws, to date, only a handful of such exemptions have been repealed across the country. Moving from constitutional jurisprudence and court decisions to legislation to repeal existing statutes turns out to be difficult. Christian Scientists and sympathetic religious groups see repeal of religious exemptions as enabling state encroachment on beliefs, parental authority, or both; child advocates see it as a straightforward step that would help the public "protect children from their religious parents."[10] Rogers himself argues that accommodating religious conduct through laws that protect Christian Scientists from otherwise neutral child abuse statutes "violates the [Lockean] no-harm rule," is "inconsistent with the public good," and does damage to religious freedom by distorting its meaning.[11]

II.

It is hard not to be sympathetic towards Rogers' argument, especially with the detailed accounts of the deaths of helpless children at the center of his narrative. The cases he has chosen are compelling and the details are excruciating to read. Not only have these children suffered and died as a result of illnesses or injuries readily treatable with modern medicine, but their parental guardians also deliberately refused to even learn what was going wrong, medically speaking, because in their religious worldview, to admit a disease diagnosis is to dangerously indulge the "myth" of disease and compromise a healing vision of health. These are parents (often college educated and middle-class) who exempt their children from basic public school health classes, who defer to medically untrained Christian Science "nurses" over actual physicians, who restrict the definition of intervention to church-supported prayer and "counseling," and who then despair over their dying children. Yet, in many cases, they could have saved their children, even up to the last hours, with medical intervention. Even when they learn from coroners' reports and doctors' assessments what had gone wrong and how easily their diabetic child (for instance) might have been saved, they defend their actions, seemingly without a trace of remorse. Additionally, in a few startling instances, the parents themselves have consulted doctors for their own health problems, but refused to do the same on behalf of their children.

To characterize defendants in these trials as unsympathetic to most readers, religious or not, would be an understatement. Of course these children's fundamental right to life has not been served when religious exemption statutes or legal defenses protect their adult guardians from criminal prosecution and punishment. Children cannot possibly give meaningful consent to such practices, and it must be, as Rogers insists, a public moral obligation to secure their rights against their parents' faith-based decisions. [12] Rogers' voice translates as the sensible, rational, and authoritative

10. *Id.* at 17.
11. *Id.* at 196.
12. *Id.* at 5.

voice of a modern humanitarian worldview. His legal argument is a clear-sighted advocacy of a constitutional interpretation that is decidedly neutral toward religion, despite the claims of some self-serving religious minorities.

But even as I agreed with much of Rogers' account of the legal and political problems and solutions at the center of his study, I found myself increasingly uncomfortable with something about his approach. His dismissive tone toward Christian Science actors, perspectives, and legal arguments; the portrayal of constitutional framers' and the Supreme Court's religious freedom decisions as relatively uncontested and unambiguous; his depiction of the American margin and center on questions of religious rights; and his use of the academic voice of reason reminded me that the academy itself has long occupied a distinctive positionality on certain kinds of religious issues, to which many, if not most, of its practitioners remain deeply wedded. What I perhaps find most troubling about *The Child Cases* is the narrative framing, in which the Church of Christ, Scientist is portrayed as a monolithic, well-resourced Goliath (with hapless members doing its bidding at the expense of their own children), and its legal and social welfare adversaries as the humble, humanitarian David. Such a framing involves a sustained refusal to acknowledge where meaningful power lies, and will continue to extend, in this area of law.

I do not blame Rogers for his approach; framing the story as one of an innocent (child) victim of a powerful, manipulative institution is a reasonable strategy attendant to his objectives as an ally of the movement to end religious exemption laws. Nonetheless, it may be fruitful to employ some tools in the study of religious culture and history to consider where a study like Rogers' fits in a larger pattern of academic knowledge production, and why it may behoove us to consider the position of groups like Christian Scientists on these sorts of religious rights issues through a more multivalent perspective. I believe it is especially important to engage in cross-disciplinary dialogue when it comes to religion and culture.

As a matter of professional self-awareness, especially when we, as scholars, approach the study of minority or unpopular groups, we must keep in view that the academy, as a broad array of epistemological, institutional, political, and cultural resources, is powerful. In the West, it has achieved cultural centrality and influence over time through concrete historical developments, such as the rise of the Enlightenment, secularism, and the growth of the modern nation-state that (not without tension) strategically employs the academy's resources. Today, academics are at the epicenter of an array of historically constituted discourses of modernity (even in the postmodern age) that inform and reproduce our understanding of rationality, the scientific method, law, the state, knowledge, and authority, and which are never detachable from power.

Within the modern scholarly worldview, broadly speaking, the persistence of religion, especially orthodox forms of it, continues to perplex and agitate. Especially in fields like law, understanding the cultural histories or contexts informing a particular group's actions may be regarded as extraneous to the technical socio-legal problems at hand. But practical scholarship, as necessary as it is, can leave us with anemic comprehension, both of religions and other minority subcultures, and of the complex

negotiations with state power and societal norms that have marked their presence in the United States. I worry that *The Child Cases* falls into the pattern of flattening the rich cultural dynamics that inform its subject(s) and losing sight of the project's own epistemological positioning.

Anthropologist Susan Harding's path-breaking article, "Representing Fundamentalism: The Problem of the Repugnant Cultural Other," which influenced my own work on American conservative evangelical Christians, offers a helpful counterpoint.[13] Harding "renarrates" the infamous 1925 Scopes "Monkey Trial" with a view to the function of cultural representation in it. As with any highly symbolic spectacle, outsiders participated in representing the trial in particular ways, yet Harding focuses on how the characterization of an epic showdown between two famous orators of the time—the agnostic Clarence Darrow and the Bible-believing William Jennings Bryan—became the vehicle for forces of an ascendant modernist consensus to represent orthodox, Bible-believing Christians as a "repugnant cultural other" and themselves as neutral arbiters of knowledge and reason.

Harding argues that, as a "representational event," *Scopes* was the cultural moment in which American conservative Protestants were created—that is, discursively constructed—as "fundamentalists." In many ways they participated in this creation, though in the larger picture they could not hope to control it. Conservative Protestants had used the term to refer to people committed to certain "Biblical fundamentals," but of course "fundamentalism" took on a whole host of negative connotations from the modernist point of view. The representations of religious conservatives by the modernist pro-science camp "traveled" in the court of national public opinion with much more influence than religious conservatives could secure in representing themselves, at least after *Scopes*. In the process, "[t]he fundamentalist, even the conservative, point of view, spoken in its own voices, was erased, and then reinscribed within, encapsulated by, the modern metanarrative in the 'news' read, and heard, around the country and abroad."[14] So even though the "fundamentalists" won the trial, they lost the cultural war. This loss bred in Protestant conservatives a distinctive positionality as defiant victims of secular elite forces, a viewpoint that for decades informed (and continues to inform) their collective identity.

Harding underscores two points I wish to link back to *The Child Cases*: (1) that the representation of fundamentalists as repugnant cultural others at *Scopes* and after helped secure the modern subject itself; and (2) that this representation leads to an ongoing orientation in academia toward fundamentalists (and related "others") as objects not particularly worth understanding on their own terms, or certainly not to the degree that we might approach other, more "sympathetic" minorities, such as ethnic, sexual, or non-Christian religious minorities.[15] This may be a blind spot born of academics' own, often unrecognized, attachment to narratives of modernizing pro-

13. Susan Harding, *Representing Fundamentalism: The Problem of the Repugnant Cultural Other*, 58 SOC. RES. 373, 373-93 (1991).

14. *Id.* at 382.

15. *Id.* at 376.

gress, in which people who are "too religious" or somehow "strangely religious" appear as obstacles to progress—forces of irrationality. Harding notes: "the voices of modernity emplot the opposition between fundamentalist and modern in history, producing a naturalizing narrative of the progressive spread of modern ideas, at times lamentably thwarted by outbursts of reactive and reactionary fundamentalist fervor."[16]

Though most of us might agree with it, there is a naturalizing narrative of progress in the idea that to responsibly raise a child a parent must, whenever possible, rely on modern medicine. Not to do so seems highly irrational in a secular society, especially when it is a matter of someone else's life and death. In an era of advanced medicine, to leave such a thing to individual choice, especially when it concerns a child, is not an option. One of the arguments Christian Science practitioners proffer is that those who avail themselves of the resources of the medical profession are exercising a kind of faith (in the medical profession), yet they are not charged with criminal negligence if their child gets worse or tragically dies under medical authority, even as a result of a mistake. In other words, other people's "faith" in modern medicine is not taken to task. Rogers does not answer this claim by referring to the logics of accidental hospital death statistics, the scientific method, the protections of medical insurance, or the remedies of tort law. He does not seem to regard the point as worth answering. Rather, alongside the prosecutors and the modern apparatus that advocate against child abuse, he reads failure to provide a child with medical care as a straightforward criminal liability, not an infringement on religious faith.[17] So he can never take seriously Christian Scientists' perspective that "free exercise" is superficial indeed, if it translates legally as something like "belief only, not actions that are a direct extension of that belief."[18] While he does concede that Christian Scientist adults are free to refuse medical care for themselves, he regards raising their children according to that stance as a criminal rights violation against children. Rogers sees that conclusion as a legal reflection of humane approach to such a conflict. But in the course of this argument, the overwhelming power of the system to discipline these parents, and the fact that that system is the product of a chain of historical developments, is never critically engaged.

Christian Scientists and other advocates of natural or spiritual solutions to health problems feel that they are not granted the same rights to make health care decisions for their children that other parents enjoy. They feel they are unfairly prosecuted as criminals when their sick children die, despite their church having used appropriate legal and political channels to secure explicit exceptions for their health-related beliefs in child abuse law. But from the perspective of modern discourses of knowledge, reality is, on every level, stacked against them even if they were able to "get away" with certain practices for a time. For starters, the apparatus of constitutional law generally protects the modern liberal subject through the concept of individual rights, which over time have been figured as primary relative to group rights

16. *Id.* at 374.
17. ROGERS, *supra* note 6, at 61, 67-69.
18. *Id.*.

(to a belief or culturally specific practice). Unpopular minorities have not fared historically well in this regard. In addition, Western medicine is centered in the narrative of progress and, indeed, modern civilization. As medical disciplines ascended with modernity itself, certain practices (say, childbearing in the hospital instead of at home; routine check-ups; dentistry) became more normative than optional. Interestingly, it is only unthinkable for contemporary Americans to witness a disease or injury taking its natural course (something humans have done for most of our existence, and which these Christian Science parents are constrained to do) because modern medicine has become not just central to our lives, but legally hegemonic—that is, the only legal option most parents have. If rejecting such practices results in something like the death of a child, the full force of the social welfare, law enforcement, and American legal apparatuses will respond definitively. In the process, noncompliant parents will be branded as ignorant, backward, irresponsible fundamentalists—repugnant cultural others—who offend the common sense of the modern era. This might not trouble most of us, at least until the day we find ourselves on the side of the noncompliant.

Finally, I want to draw attention to some broader historical patterns informing the relationship between law, the American state, and religiocultural margins and center. At the heart of Rogers' legal reasoning in *The Child Cases* is the idea that the framers and the bulk of Supreme Court jurisprudence (with the exception of the 1963-90 period) converge on the doctrine that while religious beliefs are guaranteed protection by the Constitution, behaviors are not. Free exercise *per se* does not exempt citizens from obeying religiously neutral laws that apply to everyone else; otherwise, the rule of law would mean little. Rogers leans heavily on Thomas Jefferson (via John Locke) to make this case for the framers—and he needs to because so many others in the late-eighteenth century saw Jefferson as the outlier and vociferously defended states' rights to promote religion. Indeed, many advocated for the religion clauses in the First Amendment precisely to protect their specific religious laws.[19] At any rate, the case here is that the finding of criminal liability against Christian Scientists by courts is not a product of religious bias, but the extension of laws that protect the public good for everyone, including Christian Scientists.

Rogers turns to *Reynolds v. U.S.* as the first case in which the Supreme Court renders the beliefs vs. actions distinction, laying the groundwork for a century of free exercise jurisprudence in which religious beliefs are not found to be legitimate reasons for violating "neutral, generally applicable laws."[20] After the almost three-decade "deviation" from this interpretation after *Sherbert*, the Court re-inscribes this distinction in *Employment Division v. Smith*.[21] I am not equipped to rebut Rogers' interpretation of Supreme Court jurisprudence, as that is not my area, but I am struck by the elision involved in this characterization of the natural arc of Court reasoning. After all, the religious practice at issue in *Reynolds* was Mormon polygamy, and the laws against it were anything but religiously neutral.

19. STEVEN WALDMAN, FOUNDING FAITH 84-85, 110-11 (2008).
20. Reynolds v. U.S., 98 U.S. 145 (1878); ROGERS, *supra* note 6, at 15.
21. 494 US 872 (1990).

As legal historian Susan Barringer Gordon deftly demonstrates in *The Mormon Question*, American antipolygamy laws in states and territories were imported almost whole cloth from English Common Law traditions that codified Christian marriage norms.[22] A whole host of biblical mandates related to phenomena like blasphemy, immorality, monogamy, and coverture were enforced through "generally applicable" laws, but they tended to be enforced most ferociously on groups considered repugnant cultural others.[23] Sexual morality laws were used to discipline and control white women (who also received benefits from such laws), but especially African Americans and American Indians (in the latter case to control land through the enforcement of nuclear family structures). By the 1860s, Mormons were the "other" threatening the norms of the American Christian center.

Such examples demonstrate that the multiple discourses that infuse the system minorities like Christian Scientists are up against are not just powerful, but also profoundly intertwined. As an historian and legal scholar, Rogers is, as are all scholars who produce knowledge, embedded in those interrelated discursive systems. In developing his case against religious exemption laws and Christian Science legal rationale, the choices Rogers makes in representing Christian Scientists' worldview, their religious logic, and their own self-described experiences with the court, medical professionals, and social welfare personnel bear conceptual and political power. It is not that Rogers misrepresents the general outlines of Christian Science origins and practitioners' beliefs; he does a fairly restrained job of reproducing the basic history of their activism and their main claims in court. But he does not seem interested in understanding what the struggle looks like through their eyes, their understandings (which are surely diverse) of the meaning of their actions, and of their community and its place in a hostile world. Without an understanding of how Christian Science practitioners' meaning-making systems and practices function not only to inform their choices day-to-day and in crisis, but their willingness to, in their darkest moments, face systems so overwhelmingly disproportionate that we can only understand one dimension of the story. The legal solutions proposed by Rogers and others may be life-saving, and I suspect they will be triumphant in the long run, but they are as produced by an array of power dynamics and structures as any other socio-political phenomena.

22. SUSAN BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 135 (Thomas A. Green & Hendrik Hartog eds., 2002).

23. *Id.* at 66.