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[Reviewing MICHAEL W. MCCONNELL, ROBERT V. COCHRAN, JR., & ANGELA C. CARMELLA, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Yale University Press, 2001)]

Why should anyone think about law in Christian terms? Perhaps the answer is, no one should. That is surely the conclusion most American law professors would reach. Religion is not a topic of much conversation in the law school world; what little discussion there is tends to treat serious religious commitments as a disease — call it the germ theory of religion — perhaps especially if the religion is Christianity. If that is a correct view of Christianity, the law should stay as far away from it as possible, so as not to catch the virus. One might frame the impulse in terms more favorable to religion and say that the threat of infection runs the other way, that law and Christian faith belong in separate spheres in order to protect the latter from the former. Either way, the conclusion is the same: in America's legal conversation, Christianity is an unwelcome guest.

There are two rationales for a more positive answer.[1] The first comes from outside the realm of Christian faith, the second from inside that realm. The outside

*Professor, Harvard Law School. Thanks to Barb Armacost, Jeff Ernst, Dick Fallon, Charles Fried, Heather Gerken, Mike Klarman, Kyle Logue, Dan Richman, Fred Schauer, Carol Steiker, and Henry Whitaker for helpful comments and conversations on this topic. Special thanks go to David Skeel, who has given me much good instruction both on legal theory and on Christian doctrine. Steve Lee and Andy Oldham provided very good research assistance. Errors that remain are mine.

[1]Interestingly, the introduction to *Christian Perspectives on Legal Thought* offers the first answer, but not the second (pp. xviii-xx).

answer goes to democracy. A large slice (though not, as is sometimes claimed, a majority) of this country's population believes Christianity to be true.[2] It follows that Christians and Christianity probably ought to play a major role in our nation's politics — and they do, as a moment's reflection on the civil rights and anti-abortion movements would suggest.[3] The same should presumably hold for law and legal theory. Yet in that realm, Christian voices are nearly silent.[4] To be sure, law is not purely democratic (though we do elect most of our judges), legal theory still less so. Yet both law and legal theory are supposed to be, at least in some measure, representative. That is why a President who appointed only white men to the federal bench or a law school that appointed only white men to its faculty would meet nearly universal condemnation. Why should religion be different from race or gender? Bringing Christianity to bear on legal theory, as one of many perspectives in this age that exalts different perspectives, would

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[2] *See* EILEEN W. LINDNER ED., YEARBOOK OF AMERICAN & CANADIAN CHURCHES — 2001, at 357 tbl.2 (2002) (listing 133,567,039 "full communicant or confirmed members" of Christian denominations in the United States).

[3] On the civil rights movement, see, e.g., ANDREW YOUNG, AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA, ch. 9 (1996) (the chapter is titled "The Lord Is with This Movement"). Stephen Carter agrees that Christianity and Christians played a large role in that movement, but he contends that, over time, the political side of the movement co-opted the religious side. *See* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 27-35 (2000). Some of this material is recapitulated in Carter's essay in *Christian Perspectives* (pp. 25-28). On Christians and the anti-abortion movement, see, e.g., ROBERT BOOTH FOWLER ET AL., RELIGION AND POLITICS IN AMERICA xx-xx (2d ed. 1999).

[4] To be sure, the anti-abortion movement makes a great deal of noise, and its chief target is a legal proposition: that abortion is a constitutional right rather than a legal wrong. But that kind of noise seems to me best classified as political, since the real complaint is that the issue has been taken away from politics and placed in the realm of constitutional law.

When it comes to conversations within that realm, Christianity is not a significant presence. An exception proves the rule: note the outcry when Justice Scalia spoke of his views on the death penalty in terms of his Catholicism. *See infra* notes 44-50 and accompanying text. And the point is even more true of conversations in law school classrooms, as the editors note in the introduction to *Christian Perspectives* (p. xviii).

be a good way to make legal theory for our pluralist society more pluralist.[5] That might in turn allow our law to better represent the society it serves.

The inside answer goes to truth. One of the names Jesus gave himself is "the truth."[6] That places truth-seeking at the core of Christianity. In Christian terms, truth is not just propositional but personal, and to seek it is to seek life itself. Law, too, is about truth — right and wrong, innocence and guilt, lines that separate the behavior we promote from the behavior we punish. It seems only natural that Christians should want to apply a belief system aimed at truth-seeking to a justice system that likewise seeks truth.

That inside argument is a scary proposition to those outside the Christian faith. It raises the concern that some radical or reactionary agenda will be jammed down the throats of unbelievers, that we will see an American Taliban, with the coercive power of the state enforcing the religious convictions of a portion — but only a portion — of its citizens. *Christian Perspectives on Legal Thought* does not deal with that fear explicitly, but it is the book's major, if subterranean, theme. The key lies in those words "radical" and "reactionary." The most striking thing about this book of twenty-nine essays is how little radicalism and reaction appear in its pages. For the most part, the arguments the authors use and the stances they take are both moderate and familiar, the sorts of things one could read in a good law review article.

Familiarity may sometimes breed contempt, but here it breeds comfort. And *Christian Perspectives* is a comfortable book. Feminism (Collet, 178; Griffin, 194) and environmentalism (Nagle, 435), law-and-economics (Bainbridge, 208) and critical race theory (W. Burlette Carter, 133) — all find defenses in these pages, as do a wide range of other secular legal theories and arguments. The defenses are comfortable too; they are mostly arguments one can find in ordinary legal scholarship on the relevant topics. Those who fear the consequences of thinking about law in Christian terms are bound to find this book reassuring.

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[5] As Stephen Carter alliteratively puts it: "Democracy needs diversity because democracy advances through dissent, difference, and dialogue" (p. 33).

[6] *John* 14:6 ("I am the way, the truth, and the life: no man cometh unto the Father, but by me."). Unless otherwise noted, all Biblical citations and quotations are taken from the King James Version.

In these post-September 11 days when few phrases frighten as much as "religious fundamentalist," that is a great virtue for a book about religion and law. Yet it may also be this book's biggest problem. Readers of *Christian Perspectives* might conclude that Christianity does not have much critical bite, that Christian legal theorists think about our legal system pretty much the way other legal theorists do — with some pulling to the left, others pulling to the right, and others (most, in this book) pulling straight up the middle. There is something to that conclusion: Christianity may be surprisingly conventional in some respects, more so than either believers or nonbelievers would suspect. Still, one needs to be careful. At its core, Christianity is a radical faith — not necessarily in traditional left-right terms, but radical nonetheless. As C.S. Lewis says about his allegorical Christ, the lion Aslan: "He is not a *tame* lion."[7] No one who reads the gospels would conclude that comfort ranked high on Jesus's agenda.

In short, *Christian Perspectives on Legal Thought* is a good and important book. Maybe very good and very important. It deserves a measure of celebration, for the task it undertakes is one that very much needs undertaking. It also deserves to be read widely, both by those who share its authors' faith and (especially) by those who don't. But the book might be still better were it a little less conventional and a little more subversive — like the Savior its authors and I worship.

The balance of this essay is organized as follows. Part I summarizes the book and discusses its structure and major themes. It also looks at the question why believers in such a radical creed might have legal views that look fairly ordinary. Part II examines some of the more subversive consequences of thinking about contemporary American law in Christian terms. There are a number of possibilities here; my focus is on three: moralism, special concern for the poor, and humility. The first is the territory of the Christian right, while the second belongs to the Christian left. The third is no one's territory; it pops up a few times in this book but plays a small role, both in the book and in contemporary Christian culture. The first has gotten the most ink the past two decades, yet it is the weakest, for it misperceives both Christianity and the capacities of legal institutions. The third critique, the one that receives the least attention, may be the most

[7] C.S. LEWIS, THE LAST BATTLE 24 (1956).

telling, for it addresses what may be the defining characteristic of contemporary legal theory: its arrogance. Part III concludes by addressing a different kind of Christian perspective — the possibility that, regardless of whether Christianity is a source of much wisdom about law, law might be a source of some insight into Christianity.

In all of these discussions, the arguments about Christian doctrine are, of necessity, laymen's arguments. *Christian Perspectives* is not a book of theology or church history, and this review is definitely not the work of a theologian or church historian. Another qualification is worth noting at the outset: the arguments offered here, like those offered in each of this book's essays, come out of a particular mix of denominational practice and tradition. The book's title makes the point well: there are many "perspectives" that can lay claim to the modifier "Christian." The authors of *Christian Perspectives* have perspectives of their own, as do I. And I suspect that the authors and I share something else: we all see our different Christian visions as much more than matters of taste, yet less than claims of certain truth. When different people look "through a glass, darkly,"[8] they tend to see different things. That may be the key to any Christian approach to legal thought.

I. CONVENTIONAL CHRISTIAN LEGAL THEORY

It is best to begin with an issue *Christian Perspectives* takes up in its introduction: why a book like this is needed. The book's editors give this answer:

> Where can one hear the expression of Christian perspectives on law and legal theory? There are books and articles galore on legal theory from every conceivable philosophy, ideology, and identity. But there are surprisingly few books and articles applying the gospel of Jesus Christ . . . . Much the same is true in the classroom. Professors encourage law school students to analyze law from a variety of perspectives and points of view, but religious views are oddly absent. A student in criminal law, for

[8] "For now we see through a glass, darkly; but then face to face: now I know in part, but then shall I know even as also I am known." 1 *Corinthians* 13:12.

> instance, is unlikely to question modern criminological theory from the standpoint of sin and redemption. If a student [did so], many professors would not know how to react. There would likely be an awkward silence, followed by a polite change of subject.
>
> This book is intended to break that silence. (Introduction, xviii)

Notice that the hypothetical student is silenced by silence; it is as if her perspective — and therefore, she — does not exist, so there can be no response to it. That state of affairs is the natural consequence of living in a closet. And that may be the key to what drives the authors of *Christian Perspectives*. In the authors' eyes, this is a "coming out" book, a means of inducing both those who wrote it and those who read it to do a better job of integrating their religious selves and their professional selves, and to do so publicly.

That justification for the book is natural, given the intellectual environment in which the authors work. It is probably fair to describe the conventional wisdom among legal academics as follows: religious convictions should be kept out of debates about law and politics[9] — or, if that is too much to ask, religious believers should at least translate their beliefs into secular language when participating in those debates.[10] There is something to that idea. Religion, politics, and law are a frightening mix. Woven together, they sometimes cause oppression, warfare, and murder. And it is surely true that a democracy functions best when all its participants can speak a common language, can appeal to beliefs the entire citizenry holds in common. Religious talk about politics or law, in a society where no religion is universally shared, violates that norm.[11]

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[9]Stephen Carter's essay discusses and criticizes this norm and its application by Bruce Ackerman, Kent Greenawalt, and John Rawls (pp. 37-42).

[10]For the standard argument for this position, see KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

[11]Michael McConnell's essay contains a nice discussion of these arguments, which date to Hobbes and Rousseau respectively. *See* Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, at 5, 11-15.

But there is another side to the problem. Mixing religion and politics has indeed caused violence and injustice — yet it is hardly the case that those evils disappear when politics are religion-free. The twentieth century was history's bloodiest, but most of the blood was shed for the sake of ideologies that did not hold religion dear. As for the democratic ideal of a citizenry that can appeal to shared premises, that ideal is never realized, whether or not religious arguments hold sway: the citizenry is simply too varied. In a pluralist society like ours, people (and peoples) holding incompatible visions of the good are regularly required to mix it up, both in voting booths and in courtrooms. All that one can say confidently about a political and legal realm that requires religious believers to shed (or "bracket") their beliefs as a condition of entry is this: it requires people whose faith bears on public issues either to quit the conversation or to deny a piece of their identity.[12] To see how alienating that formula is, try to imagine telling women they must pretend they are men, or African Americans that they must think and talk white,[13] when entering into conversations about politics or law. No wonder a group of Christian law professors takes pleasure in simply being who they are, in openly writing about faith and law without feeling the need to bracket the former in order to mention the latter.

That explains why a book like this was written, but it does not explain one of the book's key characteristics: the absence of any heavy reliance on authority. These essays plainly represent their authors' thinking; they are not simply rehashes of the work of thinkers from centuries past. That characteristic might seem surprising. Christianity has been around for two thousand years, and as far back as Augustine — that's sixteen *centuries* ago — there has been a sophisticated body of work on Christianity and legal

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[12] The latter point is well made in MICHAEL PERRY, MORALITY, POLITICS, AND LAW 72-73 (1988).

[13] It is surely no coincidence that the two essays in *Christian Perspectives* that deal most with identity are by African American and Latino authors. *See* W. Burlette Carter, *What's* Love *Got to Do with It? Race Relations and the Second Great Commandment*, at 133; José Roberto Juárez, Jr., *Hispanics, Catholicism, and the Legal Academy*, at 163.

theory.[14] One might expect the authors of *Christian Perspectives* to analyze and apply that body of work, and to do nothing more. The essays that discuss different Christian traditions and their relation to law and culture have that flavor.[15] But in most of the other essays, little attention is paid to denominational traditions or theological literatures. In this book, the primary authority on Christian doctrine is not Augustine or Aquinas or Luther or Calvin or all of those names put together. Instead, it is the Bible, which is cited and quoted liberally throughout the book.

That may be a sign that this book is more Protestant than Catholic in its leanings. But I think the better inference to draw is that this is a book by and for lay people. There is a great deal of theological learning in some of these essays,[16] but for the most part, the theology is fairly basic — the common set of Christian beliefs that C.S. Lewis called "mere Christianity."[17] The primary goal of the book is to apply those beliefs, or at least different authors' slants on them, to the world of contemporary American legal theory. One need not know much Christian doctrine or be well acquainted with any particular Christian tradition in order to understand these essays.

The choice of a layman's book is wise; it makes the book both readable and wide-ranging. Likewise the choice not to exalt any one denomination. Readers of this book will see Christianity as a many-sided thing, a belief system with an enormous number of

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[14]That literature dates to Augustine's classic treatment of the relationship among church, state, sin, and Heaven. See SAINT AUGUSTINE, THE CITY OF GOD (John Healey trans., 1967). For an excellent brief discussion of Augustine's view of legal coercion and the state, see Elizabeth Mensch, *Christianity and the Roots of Liberalism*, at 54, 57-58.

[15]This describes the ten essays in part II of the book (pp. 241-403). *See infra*, at xx-xx.

[16]For the best examples, see Angela C. Carmella, *A Catholic View of Law and Justice*, at 255; Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, at 242; Elizabeth Mensch, *Christianity and the Roots of Liberalism*, at 54; H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, at 73; John Witte, Jr., *God's Joust, God's Justice: An Illustration From the History of Marriage Law*, at 406.

[17]C.S. LEWIS, MERE CHRISTIANITY (rev. ed. 1952).

variations and traditions[18] — and yet with a common Biblical core. That is as it should be.

Readers will find legal learning more helpful than the religious kind. The book is comprised of twenty-nine essays by twenty-eight authors,[19] all but three of whom are currently professors at American law schools.[20] It shows. The legal discussions in *Christian Perspectives* tend to assume some familiarity with contemporary legal literature. This is a book that might interest many religious communities (and some irreligious ones), but it is very much a book by and for the *legal* community.

A. A Guided Tour

The essays in *Christian Perspectives* are divided into three parts; the balance of this section summarizes them. The first part deals with Christian perspectives on different types of legal theory: liberalism, realism, and the various other "isms" that animate contemporary legal literature. The second deals with different Christian traditions and their different views about engagement with culture and law. The third part offers a handful of Christian "takes" on particular legal fields.

1. Legal theory

The book opens with a quartet of essays about liberalism and Christianity. Michael McConnell goes first, with perhaps the best essay in the book (pp. 5-24). He

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[18]The popular historian Paul Johnson put it well when he wrote that Christianity has many "matrices," and is therefore "capable of almost infinite elaborations and explorations." PAUL JOHNSON, A HISTORY OF CHRISTIANITY 515 (1976).

[19]This does not count Harold Berman's Foreword. Harold J. Berman, *Foreword*, at xi. Berman's selection is particularly appropriate, as he wrote about Christianity and legal theory when no one else in the American legal academy did so. *See* HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974). Berman has a nice anecdote in his Foreword in which he recounts the embarrassed reaction of his law school colleagues to the publication of that book. Berman, *supra*, at xii.

[20]For the authors' academic appointments, see pages 505-10. Joseph Allegretti and Patrick Keifert hold other academic appointments, and Michael McConnell was recently confirmed as a federal judge. *Senate Confirms Nominee*, N.Y. TIMES, Nov. 16, 2002, at A14, col.6.

emphasizes the Reformation roots of liberalism, yet notes the modern tension between it and Christianity, a tension, in McConnell's view, born of contemporary liberals' intolerance of religious truth claims. The bottom line, as McConnell would have it, is that liberalism is today illiberal when it comes to religion (pp. 17-23). Stephen Carter's essay is more emphatic (pp. 25-53).[21] Carter claims that secular liberalism always tries either to domesticate religious communities or to destroy them (p. 29). Christians, he argues, are required to resist, to obey the Apostle Paul's command not to be "conformed to the pattern of the world" (p. 35).[22] The lack of that kind of resistance, in Carter's view, is an impoverished public debate: we argue about what we want, rather than about what is good for us (pp. 45-46). Elizabeth Mensch follows with a fine essay on the relationship between liberalism and Augustine's thought; the lesson here seems to be that Christians ought to be, if not opposed to the exercise of state power, at least uncomfortable with it (pp. 54-72). Jefferson Powell's essay likewise uses Augustine as his starting point, but he finds in Augustinian thought a condemnation of America's acquisitive culture (pp. 73-92). Taken together, these essays suggest that the central disease of secular liberalism is its amorality. The role of Christian legal thought, it follows, is to make law and legal theory more moral.

The same claim is made explicitly, and strongly, in Albert Alschuler's essay on legal realism (pp. 94-106). Alschuler, in addition to being one of the nation's leading criminal procedure scholars, is the author of a wonderfully scathing biography of Oliver Wendell Holmes.[23] That book makes a persuasive case that Holmes was a nasty man, and that his nastiness infected both his legal thought and American law more generally. In this essay, Alschuler takes the last part of that argument and gives it a Christian slant. His basic contention is that Holmes's skepticism of any claim of moral value has worked its way into our legal theory, and that, as a consequence, moral skepticism reigns in law's

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[21]Carter's argument, and to some degree McConnell's, echoes the argument made a generation ago in RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1988).

[22]The author quotes *Romans* 12:2.

[23]ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

empire (pp. 98-104). Again, the idea seems to be that Christianity's key virtue is its grounding in a binding, God-given morality. Yet this is a different kind of moralism from the one usually associated with religious believers, certainly different from the kind we see on the religious right. Like Powell, Alschuler seems more concerned with the law's rhetoric than with its rules.

There follows a series of essays on various strands of critical theory. These essays do not hang together as well as the ones on liberalism. David Caudill looks at Critical Legal Studies and finds a common thread with a particular line of Calvinist thought; the key is the CLS program of exposing the ideological underpinnings to seemingly neutral legal rules (pp. 109-29).[24] If I understand the point correctly (it is hard to know because Caudill's writing is hard to follow), Caudill claims that ideology always has faith at its core; CLS is thus in the business of exposing faith commitments. The point is interesting, but a less idiosyncratic take on the Christianity – CLS relationship would have been useful. One might look, for example, at the view of human nature implicit in CLS, with its focus on the tendency of those at the top of the ladder to use the law to oppress those at the bottom. That view may not be far removed from the Christian view of sin.

Burlette Carter's essay talks about racism as a violation of Jesus's command to "love thy neighbor" (pp. 133-48) — a simple point, but also a powerful one. It is a nice twist on the word "perspectives" in the title: Carter's essay suggests that a truly Christian perspective is the perspective not of the self but of the other — whites and blacks seeing through each other's eyes, not their own. Davison Douglas writes about racism and the work of Reinhold Neibuhr (pp. 149-62). Douglas concludes that we should look to politics, not law, for the answer to America's ongoing race problem. This pessimism about law's potential is unusual; most of the essays in this book are a good deal more positive about what law can do. José Juárez tilts more toward optimism. His essay discusses Latinos' struggle for equality, and notes both the key role religious faith plays in that struggle and the deep attachment the Latino community has to Catholicism (pp.

[24]The theologian whose work Caudill uses is Herman Dooyeweerd, a late-nineteenth-century Dutch Calvinist thinker (pp. 119-24).

163-75). Juárez's essay, like the essays by the two Carters, offers a useful reminder that Christianity can tilt to the left as easily as it tilts to the right.[25]

A pair of essays discuss feminist theory; one works well, while the other seems out of place. Teresa Collett contrasts different strands of feminist theory with a Biblical view of gender (pp. 178-93). She argues that relational or "difference" feminism is quite compatible with Christianity, in a way that liberal or "sameness" feminism may not be. Collett's discussion of Jesus's views on divorce, and the way those views advanced women's interests, is particularly interesting and insightful (pp. 183-84). Leslie Griffin's essay is less successful. She takes feminist theory as her baseline and critiques both law and Catholic tradition (194-205). It isn't clear that her essay belongs in this book, as it offers not a Christian perspective on feminism, but rather a feminist perspective, and a hostile one at that, on Christianity.

The feminism and race essays suggest that Christians can play the identity politics game as well as their secular counterparts. Save for Collett's essay, though, no picture emerges of how Christian thought might leaven discussions of particular issues. One searches these pages in vain for a Christian "take" on, say, affirmative action or sexual harassment.

The book then turns to the other end of the ideological spectrum, with two arguments about law and economics. Stephen Bainbridge is for it (pp. 208-23). He concedes that wealth maximization cannot be the sole end of legal policymakers, but argues that it is often proper for courts to behave as if it were (pp. 209-14). He also has a nice discussion of the close relationship between the view of human nature taken by law-and-economics scholars and the view Christianity takes. The short version is that the Christian view of sin tends to support the economists' view of men and women as selfish and acquisitive (pp. 221-22). George Garvey's reaction is more mixed. Garvey argues persuasively that Catholic social thought requires substantially more attention to distributive justice than does the standard law-and-economic view (pp. 224-40).

This first part of the book leaves one with the sense that Christianity can accommodate just about any legal theory one might want to adopt. Those who prefer a

[25]Stephen Carter opens his essay with a discussion of the role her faith played in Fannie Lou Hamer's battle to integrate the Mississippi Democratic party (pp. 25-28).

small state might like Bainbridge's version of law-and-economics or McConnell's view of liberalism. Those who like a large, interventionist and redistributive state should find Garvey's mildly leftish Catholicism appealing. And those who take their ideology from their demography could happily embrace Burlette Carter's views on race relations or Leslie Griffin's on gender politics. To be sure, there are critiques here, especially in the section on liberal theory. But the tone of most of these discussions is more friendly to these secular ideologies than critical of them. A reader might fairly conclude that, if Christians want a seat at the table, they are happy to leave control over the menu to others.

2. Christian traditions

The second part of the book deals primarily with the differences among various Christian traditions. Robert Cochran's essay on the different relationships between Christians and the culture leads off this section; Cochran nicely highlights the basic divide between Christians who wish to be part of the dominant culture and Christians who wish to be isolated from or hostile to it (pp. 242-54). Roughly speaking, Catholicism is on the former side of that line — as the heirs of the intellectual tradition of Thomas Aquinas, Catholics are "synthesists" (pp. 243-44) — while different strains of Protestantism find themselves on different sides. Calvinism has a strand of cultural imperialism, the idea that it is believers' job to convert and redeem the culture; Baptists tend toward isolationism, Lutherans toward a kind of segregation, with God's Kingdom operating on different principles than man's (pp. 244-48).

The next nine essays play out these divides. Angela Carmella and Gerard Bradley explore Catholic social thought (pp. 255-76) and natural law (pp. 277-90), respectively. These discussions are very good, but they operate at too high a level of abstraction. Perhaps as a consequence, both essays are a bit too agreeable even for a generally agreeable book — individual rights are important, but then so is community; people are capable of great evil but also great good, and so on. There is little to disagree with here, but also little to sink one's teeth into. The two essays about Calvinism — Marci Hamilton's discussion of the implicit Calvinism of the Constitution's Framers (pp. 293-306) and David Caudill's essay on the role of faith in legal scholarship (pp. 307-17) —

are better on that score, though they too suffer from the what-difference-does-it-make problem. Hamilton argues that a basic tension between distrust and hope ran through all the deliberations over the Constitution, and she nicely connects that tension with Calvinist thought. Her essay is a fun and convincing read. Yet the same tension runs through almost all political thought, so it is not clear what one is to make of the connection. Likewise, Caudill's idea that all theory begins with faith is interesting and powerful (though it is a hard slog; the writing is weighed down by too much academic jargon). Still, it is hard to see how the idea matters. Caudill plainly wants religious believers to be more open about their beliefs in their written work, but one wonder whether that openness is in service of anything other than self-identification.

The essays about Christian traditions that are more hostile to cultural engagement have more bite. Thomas Shaffer's essay on "the jurisprudence of forgiveness" is particularly worth noting (pp. 321-39). It is here, for the first time in *Christian Perspectives*, that one begins to sense the radical implications Christianity might have for legal practice and legal thought. Shaffer notes the large role forgiveness plays in Christian thought and practice, and explains how that concept is deeply subversive of the legal order. It is not clear what Shaffer would have us do with this subversive idea, but that is probably asking too much; the question may have no answer. In any event, the radical nature of the argument is at once jarring and refreshing.

After Shaffer on forgiveness comes Timothy Hall on Baptist separatism (pp. 340-53), an interesting reminder that there was a time when conservative Baptists kept themselves apart from the legal order. Given Hall's critique of efforts to bring "Christian values" to the law (pp. 347-52), it seems likely that he objects to the very enterprise to which his essay contributes. Richard Duncan's posture is not separatist but it *is* hostile; the first phrase of his title says it all: "On Liberty and Life in Babylon" (pp. 354-68). Duncan argues that Christians' response to law and the state should be tactical, not principled. Thus, he says that a small state is good if those who rule it are not — a condition Duncan thinks is satisfied in contemporary America (pp. 355-56). Duncan's argument suggests that the solution to our supposed moral decay lies in better (more Christian?) rulers. Hall, by contrast, would say that it is power that corrupts rulers, not bad rulers who corrupt the exercise of power.

The choice between those different visions of Christians' relationship to power is the subject of the last two essays in this section. The visions are attached to two Protestant traditions: Lutheranism and Anabaptism. The central contrast, as David Smolin nicely demonstrates, goes to the comfort with which religious believers wield secular power (pp. 370-85). Luther's "two kingdoms" view makes it all too easy for Christians to accommodate to power — no hand-wringing about punishment versus forgiveness for them (pp. 374-79). Anabaptists, on the other hand, saw all exercise of power as tainted with sin; believers must have no part of it (pp. 371-74) — the ultimate strict-separationist stance. Interestingly enough, these opposite views lead to the same place: a governance culture that Christians do not seek to reform, either because they need not (Lutheranism) or because they cannot (Anabaptism). Marie Failinger and Patrick Keifert conclude this section with a discussion of Lutheranism that is largely repetitive of Smolin's (pp. 386-403).

Christians interested in better understanding their own traditions are likely to find this part of the book both interesting and informative. Non-Christians will likely have a different reaction: save for Shaffer's provocative essay, these discussions have little to say about what the *law* should do. It is as if the legal order is a great immovable boulder that Christians cannot alter; the only question for them is whether to climb the boulder or run away. The boulder will remain the same, and remain in the same place, either way. If climbing the boulder (or not) is what Christian legal theory is really about, it seems fair to ask whether there is any reason for non-Christians to be interested in it.

3. Christian perspectives on different legal fields

The last section of the book ought to be where the rubber hits the road. Here, several of the authors explain how their faith drives their views about particular areas of law. This is the natural place for arguments about abortion and gay marriage, about poverty and redistribution, about the contentious relationship between church and state.

Oddly, none of those questions is broached here. In part, this is because the topics chosen for review are unlikely to arouse much passion among either believers or nonbelievers. Contracts, torts, and environmental law are not prominent battlefields in the culture wars. Even where the topics are more contentious, the authors seem eager to avoid issues that might provoke serious disagreement. John Witte's elegant essay on the

history of the law of marriage (pp. 406-25) elides the question of same-sex unions, just as Phillip Johnson's essay on criminal law (pp. 426-34) has nothing to say about the criminalization of immorality. These pages hold a large measure of good sense and some excellent writing, but no fireworks.

Witte's essay leads off with an interesting discussion of how his faith leads him to see the past differently (pp. 406-09). The key passage bears quoting:

> These basic biblical themes — that time has a pattern, that history has a purpose, that life has an end of reconciliation — inform my understanding of history. The Bible teaches that time is linear, not cyclical. Biblical history moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end-time. Our lives move, circuitously but inevitably, toward a reconciliation with God, neighbor, and self — if not in this life, then in the life to come; if not with the true God, then with a false god; if not in the company of heaven, then in the crowds of hell (p. 407).

That passage sounds, and maybe is, triumphalist. Yet Witte stresses the Hegelian way God works in history, with "[c]reation, fall, and redemption" (p. 407) playing the part of the divine thesis, antithesis, and synthesis. After this nice but too-brief discussion of historical method, Witte launches into a summary of the origins of marriage law, and the competing ideologies of Catholics, Protestants, and Enlightenment liberals (pp. 409-20). This leads to some gentle criticism of twentieth-century American doctrine, not because it makes divorce too easy (the usual critique from religious folk) but because it makes *marriage* too easy (pp. 422-24). All these discussions are smart, sensible, delightfully well written, and resolutely middle-of-the-road.

Johnson's essay has a more combative tone — as one would expect from the author of *Darwin on Trial*,[26] Johnson's famous attack on evolutionary theory. But here the combat is against a less worthy opponent: the idea that all conduct is determined,

[26] PHILLIP E. JOHNSON, DARWIN ON TRIAL (1991).

hence not the proper object of blame and punishment. As Johnson himself notes, that idea is "virtually dead" (p. 433). He might fairly have said that it was never really alive, at least not in the world of criminal law doctrine and practice.[27] Meanwhile, a much harder and more contested question — how much behavior should we criminally punish? — goes unasked and unanswered.

John Copeland Nagle asks and answers a hard question about environmental law. Most of his essay deals with the difficulty of protecting endangered species while treating private landowners fairly (pp. 435-52). Nagle's response is to do both: He endorses broad endangered-species protection, but also broad government takings liability to compensate landowners harmed by the protection (pp. 444-49). The lesson here seems to be that Christians, even those who believe strongly in private property, can be environmentalists too.

Nagle's discussion is good but conventional. Joseph Allegretti's discussion of legal ethics (pp. 453-69) is *un*conventional, on two fronts. First, Allegretti emphasizes not ethical rules but ethical practice (pp. 455-56). Law, he seems to suggest, is a bit overrated in this context. Second, Allegretti argues that a genuinely Christian legal ethics would involve a good deal more attention to the needs of the poor than we see in most kinds of law practice (pp. 466-68). Both in the priority he gives to relationships over rules and in his focus on distributive justice, Allegretti reminds one of Thomas Shaffer's argument about the radicalism of forgiveness. It is noteworthy how rarely that kind of radicalism surfaces in this book.

"Radical" is not a word one can fairly apply to C.M.A. McCauliff's essay on the law of contracts (pp. 470-85). McCauliff traces the history of English contract law, highlighting the influence of particular Christian judges.[28] On McCauliff's account, that influence produced equitable doctrines like mistake, duress, and promissory estoppel — all very good things, in his view. Since those doctrines, like equity generally, leave a great deal of discretion to judges, one might fairly suppose that McCauliff thinks

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[27]Thus, David Bazelon's claim to the contrary — see David Bazelon, *The Morality of Criminal Law*, 49 UCLA L. REV. 385 (1976) — received a great deal of attention in academic circles precisely because it was so unusual.

[28]In particular, Lords Mansfield and Denning (pp. 475-81).

Christians should prefer standards to rules more generally. McCauliff seems unaware that there might be counter-arguments, but there plainly are: note that the most vocal Christian in the American judiciary is also its most vocal proponent of rules over standards.[29]

The book closes with Robert Cochran's interesting essay on tort law and "intermediate communities" (pp. 486-504). Cochran makes the classic argument for the desirability of groups and organizations that stand between the individual and the state; he goes on to note that tort law is steadily breaking down the legal immunities on which those groups — families and churches especially — have relied. This is mostly a bad thing, in Cochran's view. He attributes it to an odd combination of individualism and statism, both of which he says are dangerous for the church, and hence for Christians.

At one level, these essays are quite successful. Save for McCauliff's, they are persuasive; save for Allegretti's, they are moderate and sensible. (Allegretti's essay may be sensible, but it is surely not moderate.) But all that moderation and good sense come as a surprise, given the book's topic. The Apostle Paul wrote that Christianity is "unto the Greeks foolishness,"[30] meaning it is at odds with this world's wisdom. Yet in five of these six essays, as in most of the other essays in *Christian Perspectives*, the legal theoretic arguments are anything but other-worldly. On the contrary, the defining feature of these essays is their ordinariness. Not in terms of quality: the best, like McConnell's, Bainbridge's, and Cochran's, are very good indeed. The essays in *Christian Perspectives* are ordinary in a different sense. The ones that focus on law or legal theory take positions that quite a few non-Christians would happily take. Many are positions the law already adopts. If this book is a fair gauge of the effect serious Christians might have on

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[29]The reference is to Justice Scalia, whose preference is for rules, not standards. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Scalia's defense of that preference makes perfect sense in Christian terms: The sinners Scalia worries about are not the litigants (McCauliff's concern), but the judges. Standards constrain litigants, but rules constrain judges. And constraining judges is more important than constraining litigants, because the judges have more power.

[30]1 *Corinthians* 1:23.

legal thought, those who like legal thought just as it is needn't worry. Foolishness unto the Greeks, indeed.

B. Making Tables, Making Law

Why the ordinariness? Why, when the topic is legal theory, is Christianity so conventional? Christianity is a theory of everything, and "everything" includes law, so Christianity ought to have something to say about law. And Christianity is *different* from other theories of everything, in particular from the non-theistic theories that dominate in universities today. Among other things, Christianity holds that "good" and "bad" find their definition not in men's and women's choices but in God's character. One might think that would have a fairly powerful impact on how Christians see the law of contracts, or securities regulation, or criminal procedure, or anything else in the wide world of legal study. Yet the differences revealed in *Christian Perspectives* are mild, sometimes nonexistent. Non-Christians might be excused for wondering why the transcendent God seems to think like a typical American law professor. What gives?

Part of the answer is that Christianity may indeed be radical, but in unexpected ways. As Shaffer and Allegretti seem to understand, attitudes and relationships, not rules and standards, are at the core of Christianity's agenda. It follows that Christianizing the legal profession might have a much larger effect on law *practice* than on *law*. To see why, consider Jesus's occupation for most of his adult life: he made tables, or whatever it was that ancient Middle Eastern carpenters made.[31] Were the tables he made distinctive? Did he use different wood or a different manufacturing process than other carpenters used? The likely answer is no — at least, the gospel accounts offer no reason to think otherwise.

Now change the question, focus less on the noun and more on the verb. Instead of asking whether Jesus's *tables* were different, ask whether he *made* the tables differently — whether his motivations and attitudes toward his work, the ways he treated his

[31]The gospel accounts have very little to say about the time between Jesus's birth and the beginning of his public ministry, which began about the time he was thirty. Until then, he appears to have worked with and for his father Joseph, a carpenter by trade. *See Mark* 6:3 (crowd identifies Jesus as "the carpenter"); *Matthew* 13:55 (crowd identifies him as "the carpenter's son").

customers and his coworker, differed from the practices of other carpenters. The answer to *that* question is surely yes. The New Testament says that all Jesus's followers do, they should do "heartily, as to the Lord, and not unto men."[32] In other words, all work is an offering to the God who gave us the ability to do it. Jesus said to "love thy neighbour as thyself".[33] Genuinely want the best for those with whom you deal (as you want the best for yourself); treat them as something other than tools to advance your own interests. These commands might seem too gauzy to have any real impact, but if taken seriously, the impact is huge — on carpenters, or lawyers, or anyone else. Take an example from the academic profession. What professor (more to the point, what student) doubts that it matters enormously whether she loves the students she teaches, regards them as an audience before which to display her talents, or sees them as obstacles to doing the scholarly work she really wants to do? The differences are not reducible to some neat formula, and they are likely to play out differently with different professors in different settings. Still, the differences are both real and powerful. In short, attitudes matter a lot. They just don't matter predictably.

They *do* matter relationally. That truth undercuts any effort to turn Christianity into a how-to manual for doing a job or organizing an enterprise, whether the enterprise has to do with law, academics, or anything else. Notice what happens when one tries to construct a theory of carpentry. The natural tendency is to abstract from the relationships, which are particular, to the processes of manufacture, which are more general. (People vary more than wood.) The same is true, only more so, with law and legal theory. Law in practice is heavily relational: lawyers spend most of their working time with clients, other lawyers, and judges. How those relationships work has a lot to do with how the practice of law works. And Christianity might be quite radical in its implications for those relationships. It is no accident that the least conventional essays in *Christian Perspectives* are by experts in legal ethics, people who focus their attention on lawyer-client relationships (Allegretti, pp. 453-69; Shaffer, pp. 321-39). But most legal theory pushes these relationships to one side in order to focus on the *law*, on regulated

[32]*Colossians* 3:23.

[33]*Matthew* 22:39.

conduct and adjudication procedures. That is roughly analogous to focusing on the physical processes by which tables are made: what wood to use, what tools, what product designs.

Christianity may have things to say about those processes (both making tables and making litigation), but the things it has to say may seem pretty obvious. In order for carpenters to love their customers they must make good tables, with "good" defined mostly by customers' needs and preferences.[34] In order to make good litigation, lawyers must follow procedures that treat litigants fairly and produce accurate results. One hardly needs to be a Christian to believe those things, either about carpentry or litigation. Which means that, on a lot of issues, Christianity might be very conventional indeed.

Put that together with another aspect of Christianity, a characteristic it must share with any plausible theory of everything: Christianity does not dictate a particular political form. Monarchs and oligarchs, dictators and democrats — over the centuries, Christians have been scattered through all these categories. Some may have been wrong even for their time and place, and most may be wrong for *this* time and place. Still, it is possible that all those political forms are proper, given the right circumstances. And it seems likely that multiple political structures are proper in any given set of circumstances. Some modern democracies have parliamentary systems; others have powerful executives independent of their legislatures.[35] If there is a distinctively Christian "take" on the choice between the two, I am unaware of it. And if Christianity holds no lessons for that question, it probably has little to say about subsidiary questions, such as the proper scope of judicial power or the optimal allocation of authority among national, state, and local governments.

So in some areas, the lessons seem obvious (treat litigants fairly) and in other areas, there may be no lessons to draw. Is there a third category — a set of legal

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[34]Mostly, though not entirely, for Christianity is not neutral about preferences. I assume that most of the reasons for wanting a table are honorable ones — and that the same held true in Palestine twenty centuries ago.

[35]For a brilliant analysis of the differences between the two, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643-71 (2000).

questions Christianity might definitively answer, where the answers are different from those other, more secular philosophies would provide?

Almost certainly. But the answers are hard to discern. Consider the choice among the set of legal theories extant in the law school world. One can be a Christian and a "crit" — a large part of what the Critical Legal Studies movement had[36] to say about law is that many of its seemingly neutral rules are really the product of self-interested groups entrenching their own power,[37] an idea that comes as no surprise to anyone who believes in the Christian doctrine of original sin. Yet, as Bainbridge's fine essay shows, one can also be a Christian and a devotée of law and economics (pp. 208-23) — because we are sinful we seek to advance our own interests, and those interests (and hence the behaviors that seek to advance them) are often predictable through economic modeling. Judging by *Christian Perspectives*, one can also be a Christian and a feminist (Collett, pp. 178-93), a critical race theorist (Burlette Carter, pp. 133-48), a small-government conservative (Duncan, pp. 354-69), a classical liberal (McConnell, pp. 5-24), a more modern liberal (Stephen Carter, pp. 25-53), an environmentalist (Nagle, pp. 435-52), and the list goes on.

There may be a correct choice among these options — not "correct" in the sense that the legal literature or the case law supports it better, but in the sense that it best conforms to the way God would have us think. After all, choosing a legal theory is not like ordering lunch, where all items on the menu have the same moral status but some are to more to the diner's taste than others. Justice, sometimes life itself, is at stake in legal disputes. It is worth getting the law right, and getting the law right may require getting the antecedent theory right. But even if there *is* a right answer in God's eyes — even if

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[36] As the verb tense indicates, I assume CLS is more a piece of legal intellectual history than a part of the contemporary academic landscape. Unsurprisingly, my colleague Duncan Kennedy disagrees. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 8-10 (1997).

[37] David Kairys's famous collection of essays is filled with examples. *See* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998). A good, basic discussion appears in his introduction. *See* David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, supra, at 1, 2-6 (discussing the false neutrality of legal norms and the way those norms legitimate existing power structures).

the choice among legal theories is not like the choice between parliamentary and presidential systems — that answer is not part of the divine revelation. Thus, Christians have to figure it out as best they can, the same as everyone else. Since, as Paul put it, all of us have the same "law written on [our] hearts,"[38] that figuring-out process will often look pretty similar when engaged in by a committed Christian and an equally committed atheist. Legal theory is hard, and Christian faith does not make it easier.

Christian Perspectives gets this point mostly right. One piece of evidence for that conclusion is the admirably unconfident tone of most of these essays. And the sheer multiplicity of views among the twenty-eight authors sends a message. Whatever Christianity's virtues (or vices) may be, they do not include certainty about matters of politics and law.

That message is particularly important in a society like ours. Because it has not been widely enough heard and understood, Christians who speak as Christians on contested legal issues are sometimes treated as though they are guilty of bad manners, or worse. Consider the recent flap over a speech by Justice Antonin Scalia about the death penalty. In that speech, Scalia explored the relationship among the law, the views of the Catholic Church, and his own faith (he is an observant Catholic).[39] Scalia made four points. First, he noted that if the death penalty were immoral — meaning contrary to his religious convictions — he would be bound to resign from the Supreme Court rather than take part in its administration.[40] Second, he argued that execution as punishment for crime is *not* immoral, basing his argument on an exegesis of Romans 13:1-5, where Paul states that "the powers that be are ordained of God," and that earthly governments are "the minister of God, a revenger to execute wrath."[41] Third, Scalia argued that in a democracy people tend not to see God's hand in the constitution of human governments,

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[38] *Romans* 2:15.

[39] An adapted version of Justice Scalia's speech was published as Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17-21.

[40] *Id.* at 18.

[41] *Id.* at 18-19 (quoting *Romans* 13:1-5).

as though popular sovereignty and divine sovereignty are at odds.[42] Fourth, he said that Christians ought to resist that tendency, that Paul's discussion in Romans 13 applies to democratic governments as much as to monarchies.[43] The people may be sovereign, but only God is *Sovereign*.

Scalia's speech did not go down well with the secular press. *The Washington Post* thought the speech "disturbing," and appeared to accuse the Justice of "worship[ing]" the government.[44] Writing in *The New York Times*, Sean Wilentz used harsher language, calling Scalia's speech "chilling" and saying it "threatens democracy."[45]

These reactions might be understandable if Scalia's claim were that Christianity gives him access to the correct answers to legal problems. (Even then, he would be saying no more than any ideologue says about his preferred ideology. It is unclear why a knee-jerk view of law is worse when religion is jerking the knee than when partisan affilation is doing so.) But he claimed no such thing. Scalia began his speech by noting that the death penalty's constitutional status is independent of its moral status; the discussion of Romans 13 thus did not bear on *any* legal issue, but only on the question whether Scalia is duty-bound to quit his job. Like most of the essays in *Christian Perspectives*, Scalia's view of law is no different from the view of many secular thinkers. The meat of his argument goes to his faith, not his legal agenda.

Obviously, that was not enough to reassure Wilentz or the *Post*'s editorialist. Why not? Why this fear of a Christian judge speaking publicly about Christian doctrine? People fear the claim that right answers exist — that God is God, that he is sovereign, that Christ's ownership of all time and place is total. Those are strong claims, and they

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[42] *Id.* at 19.

[43] *Id.* at 19-20.

[44] *God, Death and Justice Scalia*, WASH. POST, Aug. 12, 2002, at A14. The key phrase in the editorial reads as follows: "America is a society built around suspicion of government action, not worship of it." *Id.*

[45] Sean Wilentz, Editorial, *From Justice Scalia, A Chilling Vision of Religion's Authority in America*, N.Y. TIMES, July 8, 2002, at A19.

are not readily susceptible to secular argument. The fear makes sense, though, only if another claim follows: that the speaker knows — really *knows* — what all the right answers are. The second claim does not follow from the first. The proposition that God's agenda governs (the idea for which Scalia was castigated) does not entail the proposition that Christians know what that agenda is. Indeed, for Christians the real implication is nearly the opposite. My conclusions are suspect because the reasoning that produces them is tainted by my sin. My faith makes me *less* confident about my views, legal and otherwise, not more so. Christian belief is not a club to be wielded against those who do not share that belief. If anything, the club threatens those who hold it — the belief commands that believers see themselves as half-blind fools who are constantly tempted both to act in their own interest and to think too highly of themselves.[46] Far from being a chilling threat to democracy, invoking a faith like that is something to be welcomed in a pluralist legal order. I will return to that point below.[47] For now, it is enough to say that even those who believe in truth with a capital "T" may, in practice, resolve legal problems much the same as those who do not share that belief. Pluralism of the sort America must practice, with strong religious believers sharing power with equally strong skeptics, is not impossible after all. It may not even be that hard. Perhaps, when it comes to the political and legal issues that so often divide us, we speak a common language after all.[48]

II. RADICAL CHRISTIAN LEGAL THEORY

Of course, making law is not the same thing as making tables. Laws can be evil; at worst, tables are ugly and useless. Remember, in the Judeo-Christian account, God

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[46] *Cf. Proverbs* 26:12 ("Seest thou a man wise in his own conceit? there is more hope of a fool than of him.").

[47] *See infra*, part II C.

[48] *Cf.* ALAN WOLFE, ONE NATION AFTER ALL (1998) (arguing that intellectuals have vastly overstated the cultural and ideological divisions in American society). *But cf.* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (discussing the ramifications of those divisions).

spoke to his people in large part through law — through stone tablets, not wooden tables. There is a lesson here that the discussion has thus far elided. Law sends moral messages. God sends moral messages. It would be very odd if God did not care what messages law sends. And it would be dishonest to claim that readers of the Christian Bible find in it no guidance to any legal question. The pro-life movement is proof enough that any such claim would be false.[49] When it comes to contemporary law and legal theory, Christianity's bite may be (in my view, is) mostly relational and attitudinal. Still, "mostly" does not mean "entirely."

So how is one to combine these points? (1) Where law and legal theory are concerned, Christianity's implications bear more on relationships than on rules. (2) Christianity embodies no one legal or political theory but is (at least somewhat) consistent with many of them. (3) Christianity is, in part, the belief in a moral God who cares deeply about law and the moral messages it sends. (4) Last but not least, Christianity is an upside-down religion: its central figure is constantly reversing the natural order of things, saying that the last shall be first and the first last,[50] that those who lose their lives will save them (and vice versa).[51] How can these disparate threads be woven together into one fabric?

One possibility is that, instead of looking for the Christian theory of contracts or criminal law or anything else, we ought to be looking for the Christian lines of critique, the sin-induced tendencies that run through all legal fields and all legal forms. That is

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[49]Official statements of organizations are a less than perfect guide to the thought processes of their members. Still, it is worth noting that the official statements of a number of Christian denominations oppose abortion on expressly Biblical grounds. *See* JOHN PAUL II, EVANGELIUM VITAE: ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE (1995); J. GORDON MELTON ED., THE CHURCHES SPEAK ON: ABORTION 26 (1989) (American Baptist Church); *id.* at 29-31 (Assemblies of God); *id.* at 34 (Association of Free Lutheran Congregations); *id.* at 131-34 (Presbyterian Church in America) [**Note to editors**: I left the cite form of John Paul II's encyclical as it was, not as the cite checker revised it. The cite checker's revision is incredibly long and difficult to read; I've seen the encyclical cited in other law reviews and I haven't seen that particular form. Can we come up with something more reasonable?]

[50]*Matthew* 20:16.

[51]*Luke* 9:24.

true to Christianity's radicalism — it embraces no one theory but criticizes all — yet also to its focus on relationships more than on rules.[52]

That approach is not the norm in *Christian Perspectives*. All of the essays offer some legal criticism, but only four can plausibly be called radical or subversive. Stephen Carter's essay exalts subversion; he claims that Christian faith produces a kind of resistance that the liberal state must find intolerable.[53] But it is not clear, either in Carter's essay or in the book from which the essay is largely drawn, what the source of the subversion is. Carter's Christianity thus looks like radicalism for radicalism's sake, without any unifying theme or purpose. Elizabeth Mensch takes a similar tack, with similar results. She concludes her essay on liberalism by stressing the sharp distinction between Christian community — a community "formed on a promise . . . that the learned practice of forgiveness can replace coercion" (p. 72) — and a liberal legal community in which order is maintained and rights protected only by threat of "pain and death" (p.

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[52]The link between critique and relationships might seem obscure. The basic point is made nicely in McConnell's essay:

> The Christian understanding of human sin leads . . . to the idea that Christian politics should be antiutopian in character. We will not bring about the Kingdom of Heaven on this earth through our political efforts. If we allow our governments to try, the result will be tyranny (p. 8).

On this view of Christianity, Christians believe in the "city on a hill," but in a different sense than the one Ronald Reagan liked to invoke. (Reagan used the phrase to represent a particular society at a particular point in history — the United States, in his lifetime. *See* RICHARD V. PIERARD & ROBERT D. LINDER, CIVIL RELIGION AND THE PRESIDENCY 283 (1988).) Law and politics cannot convert the earthly city into the heavenly city. Hence, relationship with the One who embodies the latter is superior to the law that governs the former. At the same time, the gap between the former and the latter offers a basis for critique, a means of challenging the earthly city to better live up to its ideals. This picture dates to Augustine. *See supra* note 14.

[53]In the book from which Carter's essay is drawn, Carter uses the civil rights movement as an example of the kind of resistance he has in mind, but with a twist: his claim is that the resistance ceased only because the movement became too enmeshed in partisan politics. *See* CARTER, supra note 3, at 27-39.

72).[54] Like Carter, though, Mensch says little about what this conflict might mean for a legal system like ours. Unless we are to do away with legal coercion altogether, the conflict must remain unresolved. The other two radical essays offer a more direct Christian critique. Both Thomas Shaffer and Joseph Allegretti stress God's concern for outcasts — especially prisoners and the poor (Shaffer, pp. 324-25; Allegretti, pp. 466-67). Both also show some of the implications of translating that concern into legal practice.

I think Shaffer and Allegretti are on to something. But theirs is not the only form of Christian radicalism, and may not be the most important. Two other lines of critique are worth noting. The one that gets the most attention in contemporary political debates comes not from the left but from the right, and the concern goes not to poverty or oppression but to moral standards and the need to raise them. Interestingly, that position has no real representative in this book.[55]

The other critique tilts neither right nor left, and like conservative moralism, it has no clear exponent in *Christian Perspectives*. The key word here is "pride" — the vice that Christians believe produces all others.[56] Our proud, sinful nature (to Christians, those words are a redundancy) makes us delusional about our own capacities. We tend to think that all problems have their source in someone else's behavior, and that smart people like us (us lawyers, us judges, and especially us law professors) can always solve them, that if we can only get our hands on the levers of power, we can manipulate them so that everything will turn out just right. The antidote, and perhaps the one word that should most define Christian legal thought in our time and place, is humility. In the culture of twenty-first century American law schools, *that* is a genuinely subversive

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[54]The author quotes Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986). The internal quotation has been omitted.

[55]Other, less right-wing kinds of moralism have some representation; Burlette Carter's discussion of racism (pp. 136-42) and Albert Alschuler's discussion of Holmes (pp. 94-96) are examples.

[56]For a good, basic discussion of "the great sin," see LEWIS, *supra* note 17, at 94-99 (1952).

concept. Perhaps it is a kind of subversion that Christians on the left and those on the right might agree to embrace.

A. Distributive Justice

The phrase "distributive justice" does not appear in English translations of the Bible. But the concept is everywhere. Allegretti's essay on legal ethics captures the idea's pervasiveness. Discussing the proper scope of requirements of pro bono representation, he writes:

> What if we begin with the story of Jesus, who came to bring good news to the poor, release to the captives, and freedom to the oppressed? What if we ponder the words of Jesus at the Last Judgment, where he says that each of us will be judged by how we have treated the hungry, the thirsty, the naked, the stranger, and the prisoner? What if we consider as well the teachings of the Hebrew prophets — Amos, Isaiah, Jeremiah, and the rest — who insist that God demands not pious rituals but lives dedicated to justice for the poor and the outcast? Doesn't Isaiah exhort us to "cease to do evil, learn to do good; seek justice, rescue the oppressed, defend the orphan, plead for the widow["]? Doesn't Jeremiah proclaim that to know God is to do justice to the poor and the needy? (p. 467).[57]

It would be a mistake to read Biblical passages like the ones Allegretti cites as a legal blueprint. Equally, it would be a mistake to ignore them, to measure justice solely in terms of accuracy or efficiency or moral probity or anything else that ignores this aspect of God's character. Jesus offered no political program. Yet he did say that the last

[57]The author cites *Luke* 4:18-19; *Matthew* 25:31-46; *Isaiah* 1:16-17; *Jeremiah* 22:15-16.

shall be first,[58] which ought to strike fear into the hearts of those who receive goods and services first, and most, in this life.[59]

What implications do these things have for the legal order? When answering that question, the natural tendency is to focus on redistribution — on wealth transfers, progressive tax structures, minimum wages, and the like. Those may be good things in Christian terms, though they raise questions about government power and the potential for that power to be used oppressively; some forms of redistribution like minimum wages may also hurt the poor more than they help. Sorting those cross-currents out is well beyond my capacity. Still, it is worth noting that Christianity might have a natural leftward tilt when it comes to tax and poverty policy.[60]

Another, less obvious implication may be more important for contemporary law and legal theory. Justice Hugo Black famously wrote that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[61] That norm is by no means *exclusively* Biblical, but it *is* Biblical. In America's criminal justice system, it is honored almost entirely in the breach. To be sure, the Constitution guarantees indigent defendants a lawyer at the government's expense.[62] That lawyer must be more than window dressing: according to the Supreme Court, counsel's representation must be "effective," not perfunctory.[63] Yet "window dressing" turns out to be a fair description of a good deal of indigent criminal defense.

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[58] *Matthew* 20:16.

[59] *See also Mark* 10:25 ("It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God.").

[60] Two points deserve emphasis. First, the question whether *Christianity*, properly understood, pushes to the left or to the right on economic issues is distinct from the question whether most *Christians* lean left or right on those issues. Second, the claims offered in the preceding paragraph are both speculative and tentative, even by the standard of an unusually speculative and tentative essay.

[61] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[62] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[63] *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

Public defenders (note: *individual* public defenders, not the whole office) represent hundreds of felony cases per year[64] — far too many cases to investigate, much less take to trial. In jurisdictions without public defenders' offices, court-appointed lawyers are often paid a pittance, and given low fee caps, the effective hourly rate is often zero for a case that goes to trial, meaning that defense counsel must donate her time for free.[65] Even for serious felonies, ordinary representation is likely to include no interviewing of witnesses[66] — public defenders' offices lack the investigative staff, and court-appointed attorneys can afford neither to do the work themselves nor to hire someone else to do it for them. The result is that a typical indigent defendant receives not an advocate, not someone able and willing to make the best case for him, but an overworked bureaucrat, someone whose only realistic option is to plead the case out as quickly as possible. No wonder defendants perceive their lawyers not as theirs, but as agents of the state — the same state that is seeking to punish them.[67]

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[64]A study from the early 1990s reported that, in one jurisdiction, one public defender had represented over four hundred felony defendants in an eight-month period. In another jurisdiction, caseloads ran as high as 1,200 misdemeanor cases per year. *See* RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS 8 (1993).

[65]State statutes typically set both an hourly rate and a fee cap. A typical rate would be $40 per hour for out-of-court time and $60 per hour for in-court time. *See, e.g.*, ALA. CODE § 15-12-21(d) (Supp. 2002); S.C. CODE ANN. § 17-3-50 (Law. Co-op. Supp. 2001). *See also* WIS. STAT. ANN. § 977.08(4m)(c) (West Supp. 2001) (establishing rate of $40 per hour for time spent "related to a case"). Fee caps are usually in the $500 to $1000 range. *See, e.g.*, MISS. CODE ANN. § 99-15-17 (2000) ($1000); N.H. REV. STAT. ANN. § 604-A:5 (1986) ($500); VA. CODE ANN. § 19.2-163 (Supp. 2002) ($120 for district court cases and between $158 and $1,235 for circuit court cases, depending on the seriousness of the case). In jurisdictions where attorney compensation follows those patterns, defense counsel is likely to earn nothing for trial work if she does any appreciable amount of pre-trial preparation.

[66]In their 1986 study of appointed defense counsel in New York City, Michael McConville and Chester Mirsky found that attorneys interviewed witnesses in 21% of homicide cases, and in only 4% of other felony cases. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986-87).

[67] Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing"

Justice for the poor surely requires more than that. One wonders what the Psalmist might say about a system that allows O.J. Simpson to buy a "dream team" of high-priced defense counsel and an eight-month-long trial,[68] while less wealthy murder defendants receive either cursory plea bargains or preparation-free trials. Whatever else a Christian view of criminal justice might change, it would presumably change that.

Distributive injustice of this sort is not limited to criminal cases. Civil litigation is plagued by tactics designed to impose costs on opponents in order to drive down (or up, depending on who is wielding this weapon) the settlement value of the case. Such tactics ought not to be used by anyone, but they have special dangers when used by rich litigants against poor ones, for the latter cannot bear the costs. A game of chicken is unproductive no matter who plays it. The game is both unproductive and unjust when one contestant drives an armored tank and the other rides a bicycle. A more Christian ethics doctrine might rein such tactics in.

As Allegretti recognized, though, the largest implications of this special solicitude for the poor bear more on legal careers than on legal rules (pp. 466-67). A justice system that truly does justice for the poor must have not only the right legal doctrines. It must have the right lawyers. I think of Steve Bright, one of the most talented litigators in America, who has devoted his career to bringing high-quality representation to capital murder defendants in the South.[69] I have no idea what Bright's religious convictions are,

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> and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public defender."

Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 86 (1993) (footnote omitted).

[68]On the legal "dream team" that defended Simpson, *see, e.g.*, JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON 128-33 169-71, 212-20 (1996). On the length of Simpson's criminal trial, see *id.* at 242, 429.

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but in a more Christian legal profession, there would be more Steve Brights, more people as willing as he has been to defend the defenseless and befriend the friendless.

One might respond that the merits of such careers depend on whether the defenseless and friendless are also guilty. Perhaps if they are, they don't deserve lawyers of Bright's talent or legal rules that allow those lawyers to scratch out the occasional victory. Yet that response should cause Christians to wince. For if the Christian story is true, each of *us* is a guilty defendant, without hope save for a divine advocate. That is precisely Christ's role in this supernatural litigation: the accuser becomes the advocate, and the client is acquitted not by his own merit, but by the merit of his lawyer. In our justice system, the advocate's merit occasionally produces the guilty client's acquittal, but that happens mostly to wealthy clients, who have the resources to buy the best lawyers. (Remember the dream team.) The Christian story turns that story upside down: the *lawyer* buys — redeems — the *client*.

That redemption may capture the real lesson Christianity has to teach when it comes to the many ways the legal system interacts with the poor. Notice that God does not offer justice, much less mercy, at no cost to himself. In Dietrich Bonhoeffer's famous phrase, there is no "cheap grace."[70] The divine representation is sacrificial; the advocate dies that the client might live. (The authors of *Christian Perspectives* do not discuss the point, but it seems significant that among Jesus's many Biblical names are two that are commonly given to lawyers: "advocate"[71] and "counselor."[72]) Perhaps sacrifice, not unto death but sacrifice nonetheless, is an essential part of doing justice for the poor.

See Talbot "Sandy" D'Alemberte, *The Heroism of Steve Bright*, A.B.A. J., Sept. 1991, at 8. For Bright's analysis of the problems organizations like his must combat, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

[70] DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP 35 (1959) [**Note to editors**: Should we indicate that this is a translation?].

[71] 1 *John* 2:1 ("And if any man sin, we have an advocate with the Father, Jesus Christ the righteous").

[72] *Isaiah* 9:6 ("For unto us a son is born, unto us a son is given: and the government shall be upon his shoulder: and his name shall be called Wonderful, Counsellor, The mighty God, The everlasting Father, The Prince of Peace.").

Perhaps the key is not simply to generate accurate litigation outcomes, but somehow to enter into the defendant's distress, to share it with him. Burlette Carter's idea, that Christianity requires seeing the world through the other's eyes and not one's own (pp. 133-48), may have its best application in the world of criminal defense, where empathy is most needed yet seems to be in shortest supply.

If that kind of empathy is the ideal, our system falls horrifically short. There is no reason to think we even generate fair outcomes, least of all for poor litigants. Meanwhile, sacrificial empathy is all but unknown, aside from an occasional lawyer like Bright. Instead we have large, populous penitentiaries, the places where poor defendants regularly go after their inevitable convictions.

That word "penitentiary" ought to prompt some serious thought among Christians interested in criminal justice. Criminal punishment is good and proper in the right cases, and incarceration may be a proper form of that punishment. Stirring as Shaffer's essay on forgiveness is (pp. 321-39), few readers will be ready to open all the prisons. Still, those of us who live outside those awful warehouses have good reason to be penitent for what we have done to, and failed to do for, those inside.

B. Moralism

The second critique has a much weaker claim, though it is the one we see the most in our political life. In one sense, all normative legal theory is moralist. Normative claims about law always make some version of the claim that one state of affairs will be better than another, and that is a moral claim. That kind of moralism is hardly controversial. Another kind is only slightly more contentious: the kind that Jefferson Powell and Albert Alschuler exhibit in their essays (Powell, pp. 73-92; Alschuler, pp. 94-106), the kind that stresses legal rhetoric and culture over legal rules and punishments.

The kind of moralism I have in mind is different. It begins with the claim that law's highest goal is to identify some classes of behavior that are not just socially wasteful or inefficient but *evil*, and then to stamp them out. This brand of moralism need not come solely from the right side of the political spectrum. Stephen Carter (pp. 25-53) and Burlette Carter (pp. 133-48) both speak in moralist tones about racism, as does Leslie Griffin about sexism (pp. 194-205). But the moralist arguments that cause the most

controversy in legal circles *do* come from the right; the usual target is not racism or sexism but sinful behavior associated with sex or reproduction.

I have already mentioned the most obvious example: abortion. It is by no means the case that all abortion opponents are Christians (or conservatives, for that matter). But many are, and those who are tend to believe that abortion should be illegal because it is deeply wrong — and that it is deeply wrong because God has, at least implicitly, said so.[73] This raises the specter that must have prompted the *Washington Post* editorial quoted earlier[74] and that prompts most of the concern with Christians active in political affairs: it smacks of theocracy. Sin means illegality, so all sinners are lawbreakers, and all lawbreakers must be punished. Moral law and positive law become one, and the moral law is defined by a particular religious tradition. And since the moral law is readily knowable — again, Christians believe it is written on every heart[75] — the kind of legal certainty that nonbelievers find most frightening appears easily grasped.

Judging from *Christian Perspectives*, the fear is unfounded: none of the authors makes an argument like the one just described. But we live in a place and time in which that kind of moralism seems quite common in Christian circles. (I doubt it is as common as it seems, but leave that aside.) Since fear of such arguments is probably the motivating force behind the view that religion needs to be kept as far from the law as possible, it is worth exploring the arguments in more detail.

The moralist critique begins with a syllogism: The law permits X; X is wrong; hence, the law is wrong.[76] I am about to criticize that type of argument, but before doing

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[73]For official church statements to this effect, see generally EVANGELIUM VITAE, *supra* note 54; MELTON, *supra* note 54. For a good example from more popular literature, see CHARLES COLSON & NANCY PEARCEY, HOW NOW SHALL WE LIVE? 117-128 (1999). For an excellent discussion of the anti-abortion movement, see FOWLER, *supra* note 3, at xx-xx.

[74]*See* note 49 *supra*.

[75]*Romans* 2:15.

[76]For a good example from a prominent evangelical author, see CHARLES COLSON & ELLEN SANTILLI VAUGHN, KINGDOMS IN CONFLICT 279-80 (1987) (discussing and defending "legislated morality"). For more scholarly versions of the argument, see Robert P. George, *The Tyrant State*, FIRST THINGS, Nov. 1996, at 39;

so, it seems only fair to acknowledge its power. If law is in the business of sending moral messages, and if the way it sends those messages is by prohibiting some kinds of wrongful behavior, and if God's law — what philosophers call "natural law" — defines what behavior is wrongful, then the most "natural" thing in the world is to make man's law correspond more closely to God's. Since moral messages are being sent whether we like it or not, they may as well be *good* moral messages. For anyone who believes in some form of a divine moral code, this kind of moralism is almost instinctive.

And yet it is wrong. The syllogism works only if immorality and illegality are supposed to be coextensive. Yet they cannot possibly be coextensive. Christians believe that "all have sinned, and come short of the glory of God,"[77] yet punishing "all" is not an option for human governments. We cannot all be inmates. Who would be left to pay for the prisons? Who would serve as guards?[78] The moral law may be absolute, but positive law must be relative. Different societies at different times and places have different behavioral problems and different resources with which to combat those problems. Law has to respond to those differences.[79] It follows that lines must be drawn not between

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Paul Ramsey, *Reference Points in Deciding About Abortion*, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 60 (John T. Noonan, Jr. ed., 1970).

[77]*Romans* 3:23.

[78]Of course, punishment need not mean incarceration. If punishment took the form of a fine, and if the proper adjudicative processes were put in place, then it might be barely possible to have a regime in which everyone was punished. But that kind of "punishment" is nothing more than a tax; it uses sin as a device for raising revenue. If the word "punishment" applies to that practice, then state lotteries and government-run liquor stores are punitive, and the idea of punishment has lost its meaning.

To put the point more abstractly, inherent in punishment is the idea that some are blaming others. All cannot be blamed, or "blame" loses its meaning. This is why all retributive theory — the moralist theory of criminal law — is about the business of separating the blameworthy from the blameless. If the second category does not exist, the first cannot either, for someone must be in the morally superior position in order for the game to begin. For a wonderful discussion of that blaming dynamic and the problems it poses, see Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984).

[79]This is different from the claim that a given kind of conduct is permissible (whether morally or legally or both) in some circumstances but not others. That claim

good and bad but between bad and worse — and also between that which is practically possible and that which isn't. Relativism and contingency are dirty words in conservative Christian circles. But they are necessary starting points for all who find themselves in Christian *legal* circles, conservative or otherwise.

Notice what happens when the law goes farther than it should down the road of equating wrongdoing with illegality: we give law enforcers the power to define illegality. In that event, positive law no longer equals moral law — on the contrary, the positive law disappears, replaced by official whim. Consider the several hundred federal criminal statutes that deal with fraud and misrepresentation.[80] Taken together, those statutes criminalize a hefty portion of the lies and almost-but-not-quite lies that one might be tempted to tell in the course of transactions with the government or with some financial institution. Criminalization is not limited to false statements — some of these laws cover misleading half-truths[81] — nor is it limited to active deception — in many federal fraud cases, the fraud is simple nondisclosure.[82] It is probably safe to say that all the conduct

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is not relativist, for the same circumstances might always lead to the same conclusion. Law must go farther. Imagine a given kind of conduct in a given set of circumstances that, in those circumstances, is *always* immoral. It does not follow that the relevant conduct should always be illegal — illegality must depend on the system's resources and the frequency of the violation. Ordinary adultery may always be wrong. But it can only be consistently punished in societies that are very wealthy (so they can afford massive enforcement costs), or have very few adulterers (so enforcement will be fairly cheap). Moral absolutism and legal relativism are thus consistent. Indeed, the latter is the only possible stance, even for those who embrace the former.

There is an exception to this rule. If a legal system is willing to embrace sufficiently brutal punishment, the proposition stated above does not hold true. Were we willing to execute adulterers on a regular basis, a meaningful ban on adultery would be possible. Assuming even rough proportionality, though, the relativist stance is the only one a legal system like ours can embrace.

[80]Five years ago, Jeffrey Standen said there were 325. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998). I assume the number is significantly higher by now.

[81]The most important example is 18 U.S.C. § 1001 (2000), which covers anyone who, on a matter within federal government jurisdiction, "falsifies, conceals, or covers up by any trick, scheme, or device a material fact."

[82]The classic discussions of the breadth of federal fraud offenses appear in a pair of articles by John Coffee. *See* John C. Coffee, Jr., *Does "Unlawful" Mean*

covered by these statutes is morally wrong, because all of it is deceitful and self-interested. Yet the wrongs are defined broadly enough that a great many people commit them. Needless to say, only a very small fraction of those people are punished.

Now consider the most famous misrepresentation case of our time: the Clinton impeachment investigation. The former President either lied or misled his questioners, both in his deposition and in his grand jury testimony,[83] and he did so not for noble reasons but to protect his own hide. One need not be a cynic to believe that a similar level of dishonesty — lying about a sexual relationship in order to avoid both embarrassment and an unfavorable litigation outcome — is quite common. Punishment for such dishonesty is quite *un*common.[84] So Clinton's antagonists were seeking to punish him for some combination of the following: lying, being President, and being Clinton. The first may be morally proper in the abstract, but it is impossible. Everyone lies, but not everyone can be punished. Perhaps the first and second together are morally defensible, though it is hard to accept the proposition that *any* President is always truthful. The third — punishment for being someone the authorities do not like — is

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"Criminal"? Reflections on the Disappearing Tort / Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

[83]For a good analysis, see RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 44-46 (1999).

[84]Note that in contemporaneous public discussions, supporters of Starr could only identify a handful of examples of similar behavior leading to criminal sanctions. Republican members of the House Judiciary Committee were able to find two previous prosecutions for "lies about sex." *See* The Consequences of Perjury and Related Crimes: Hearing Before the House Comm. on the Judiciary, 105th Cong. 6-57 (1998) (statements of Pam Parsons and Barbara Battalino), *reprinted in* 67 IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON, THE EVIDENTIARY RECORD, No. 67, S. Doc. 106-3, at 6-57 (1999). In his book about the Clinton-Lewinsky affair, Judge Posner found only six perjury prosecutions involving sex or domestic relations between 1992 and 1999. *See* POSNER, *supra* note 88, at 85. Robert Gordon estimates that only 115 defendants are currently in federal custody for perjury, out of a federal custodial population of approximately 130,000. *See* Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 666 (1999) (using data unearthed by Representatives during the House impeachment debate).

indefensible. Yet that practice is inevitable in a world in which millions of us are felons, and prosecutors' job is to select the few thousand who must go to prison.

Cases like Clinton's are rare in one sense — not many Presidents are impeached — but they are depressingly common in another. Out of a host of low-level frauds, agents and prosecutors select a few to go after, and the few are selected on criteria not found in the law. The chief criterion may be no more than the defendant's prominence, and the consequent likelihood that an arrest and prosecution will make the evening news. Clinton's case was an unusually public version of a thoroughly ordinary phenomenon.

The fraud in such cases is not solely the defendant's. There is another, arguably worse kind of fraud inherent in the business of punishing someone for reasons other than the ones stated in the charging documents. Criminalizing sin does not eliminate the sin. On the contrary, it compounds it: the government's wrongdoing is added to the wrongdoing it ostensibly seeks to punish. As a legal strategy, moralism is self-contradictory, producing the very thing it wishes to stamp out.

So the positive law must forbid no more than a small fraction of what the moral law forbids, if the moral law is seen in Christian terms. Jesus made this clear by defining murder as anger[85] and adultery as lust.[86] A decent society could aspire to punish all murder, but all *anger*? Perhaps, in some imaginable society (though certainly not ours), law enforcers could punish adultery while avoiding selective prosecution. But not lust. By making sin so expansive, by defining it so radically, Jesus removed all possibility of the kind of oppressive theocratic state that nonbelievers fear most. Christianity does not imply, indeed does not *permit*, a Taliban-like regime that seeks to forbid all sin.

Moralism as a critical strategy has a large problem: if applied generally, it defeats itself. Those inclined toward the moralist strategy might respond by retreating to a more

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[85] *Matthew* 5:21-22 ("Ye have heard that it was said of them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: But I say unto you, That whosoever is angry with his brother without a cause shall be in danger of the judgment").

[86] *Matthew* 5:27-28 ("Ye have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.") (internal quotation omitted).

defensible line. Instead of maximizing the amount of sin we punish, we can instead identify particularly serious forms of sinful behavior and prohibit those. Again, think of abortion. If, as its opponents claim, it really is the moral equivalent of homicide, the case for legal prohibition becomes very strong indeed. Perhaps the proper ground for critique of contemporary American law and legal theory is that it is *selectively* amoral, that it treats a few serious wrongs (abortion, pornography, perhaps some forms of suicide) not only as not-wrongs, but as affirmative rights.

Yet there is a problem even here. Legal prohibition of morally contested behavior has not been a successful strategy. In the 1850s, assisting runaway slaves was morally contested. Those who held slaves and those who wanted them freed fought a series of legal battles to decide whose side of the moral debate the law would endorse. By and large, the slaveholders won those battles. (They lost only when the battles ceased to be legal, when guns rather than law books became the weapons of choice.) Helping runaway slaves became a clear legal wrong, subject to legal sanction. The result was not to the liking of the slaveholders: the Fugitive Slave Act of 1850 was one of the best things that could have happened to the anti-slavery movement.[87] Twice more in the next decade slaveholders won great legal victories. The Kansas-Nebraska Act of 1854 opened new territories to slavery,[88] and the *Dred Scott* decision[89] seemed to open all territories (and perhaps even free states) to slavery.[90] Both times, legal victory led to political

[87] *See* THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 130-85 (1974).

[88] *See, e.g.*, DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 152-67 (1976).

[89] Scott v. Sandford, 60 U.S. 393 (1857).

[90] In his 1858 debates with Stephen Douglas, Lincoln claimed that *Dred Scott* implied the right of slaveholders to take their slaves into free states. For a good, succinct argument that Lincoln's claim was fair, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 179-81 (1988).

defeat: Kansas-Nebraska gave birth to the Republican party, while *Dred Scott* may have ensured the election of a Republican President.[91]

The pattern was repeated in the 1920s with Prohibition. Public attitudes toward drinking were a good deal more tolerant after 1933 than before 1919, meaning that criminalization actually undermined the norms it sought to advance.[92] And in the 1960s with abortion: all fifty states criminalized the practice, yet there were about a million illegal abortions per year, and readers of *Newsweek* and *The Saturday Evening Post* saw reports of thousands of women killed through botched efforts to terminate their pregnancies.[93] Today we see a mirror image of the phenomenon, with some forms of abortion *protest* criminalized, and public sentiment moving toward support for restrictions on late-term abortions.[94] If one were seeking to minimize the number of abortions over time, it is not clear that overturning *Roe v. Wade*[95] would advance that goal. It might make the goal harder to reach.

It isn't obvious what lesson Christians who believe in a God-given moral law should draw from these examples. If abortion is evil, perhaps it is right to prohibit it regardless of the consequences. Yet Christianity does not compel indifference to consequences. And I suspect that most abortion opponents care a great deal about consequences: as its preferred name suggests, the larger goal of the pro-life movement is to save lives. Given the current division of opinion on abortion, that goal may be better advanced by persuasion than by legal force. If so, perhaps the right lesson to draw is this: Always err on the side of freedom rather than legal restraint. Don't forbid — at the least,

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[91]On the effect of the Kansas-Nebraska Act, see, e.g., POTTER, *supra* note 93, at 175-76; on the effect of *Dred Scott*, see DON E. FEHRENBACHER, THE DRED SCOTT CASE 533-42 (1978).

[92]For a discussion and explanation, see William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874-78 (2000).

[93]*Id.* at 1886-87 & nn. 36-38, and sources cited therein.

[94]*Id.* at 1888 & n.41, and sources cited therein.

[95]410 U.S. 113 (1973).

don't criminally punish — behavior that a large fraction of the populace thinks is morally permissible.[96]

The point is not that morals and law don't mix. They plainly do. Rather, the point is that when morals are contested, when the populace is divided about the relevant rights and wrongs, the side that gets its hands on the law's weapons often finds that those weapons backfire. Backlashes against this kind of legal moralism are not the exception in American history. They are the rule. That pattern suggests that moralists might do better to target the culture instead of the law. The pattern may also suggest that morally charged topics like abortion are good candidates for legal compromise, for solutions that do not award total victory to either side. Compromise has not been the norm in America's various culture wars. (The label is false — the usual topic of our culture wars is the law, not the culture.) As my colleague Mary Ann Glendon wisely noted a generation ago, some other Western countries have dealt with divisive topics like abortion more successfully than we have, and their success seems closely tied to their willingness to find middle ground.[97]

Observations like Glendon's may not follow inevitably from Christian premises. But they do follow plausibly, maybe even naturally. Moralism in the extreme form, the form that irreligious folk fear the most, is thoroughly *in*consistent with Christianity. Even moralism of a milder form is contestable in Christian terms, if only because it may be counterproductive. Like other religions, perhaps especially in these times, Christianity is seen as inherently intolerant by some of those who do not accept the truth of its claims. But it may be more tolerant than most or all of the alternatives, including the secular alternatives. Not because it has a narrow view of sin, but precisely because it has such a broad view, a view that encompasses the sins of the governors along with the sins of the governed.

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[96]Several of the essays in *Christian Perspectives* argue for the benefits of a small state with sharply limited powers. (Bainbridge, pp. 210-11; Duncan, pp. 354-68; McConnell, pp. 8-13). That small-government position might be another way of protecting against the use of legal coercion to pick winners in the culture wars.

[97]*See generally* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987).

Law may sometimes be an effective moral teacher, though I confess to having some doubts; I suspect that law follows the culture, not the other way around. Even if I am wrong, law surely teaches best when the relevant legal norms are enforced across the board,[98] and when the moral precepts on which those legal norms rest are widely shared. In spheres like the ones conservative Christians tend to emphasize most — reproduction, sexuality, physician-assisted suicide — the relevant morals are *not* widely shared. Where that is so, agnosticism — a poor moral stance, but often a wise legal posture — may be the law's best option.

C. Humility

The third critique, like the second, plays a small role in *Christian Perspectives*. Yet it may be the most powerful critique of all. It begins with a complaint not about the legal *system*, but about the legal *profession*, and especially that part of the profession that populates the legal academy. The complaint is simple: we know less than we claim to know, and we are not as smart as we claim to be. Our theories may be beautiful things to behold (if anything published in a law review can fairly be called a thing of beauty), but they tend to ignore a great deal of messy reality — especially the reality of our own limits. Like everyone else, legal academics are prone to err. And prone to err in a particular way: as we go about the business of building theoretical structures and doctrinal tests, we fail to see all the ways in which our structures and our tests might do harm.

The source of the error is pride. In the Christian sense of the word, "pride" refers not to the pleasure one takes in doing something well (that is a virtue, not a vice); rather, it signifies a spirit of self-exaltation, a spirit whose object is to displace the Creator with

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[98]One of the more interesting academic trends of recent years is the increasing popularity of expressive theories of law, and in particular of criminal law. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999): Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997). To a much greater degree than their proponents have realized, those theories depend on across-the-board enforcement of the relevant legal rules. Where rules are *not* enforced generally, the law's signal is at best muffled, and at worst drowned. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 521-23 (2001).

the creature.[99] And self-exaltation fairly describes the spirit in which a lot of legal theory is produced. That spirit has three defining characteristics. The first is certainty: the belief not only that my normative claims are right, but that they are *clearly* right — anyone who disagrees must be either foolish or malignant. The second is a kind of blindness: the conviction that the law of unintended consequences either doesn't apply to legal rules, or doesn't apply to the legal rules I suggest, so that error costs can safely be ignored. The third is self-display: a desire not to better understand the piece of the world I study, but to show others how clever I am.

The first of these three hallmarks leads to the odd state of affairs that Mike Seidman and Mark Tushnet note in their book, *Remnants of Belief*.[100] Seidman's and Tushnet's subject is the literature on constitutional law and constitutional theory. Their examination of that literature leads them to conclude that everyone in it is preaching to his or her own choir.[101] Different scholars promote different schools of thought, but the operative word is "promote." There almost no exchange across boundaries of ideology and legal philosophy. Instead of focusing on the ways in which conflicting elements in a pluralist society might manage their conflicts more peaceably, America's enormous constitutional law literature is largely a debate about whose side should win. Needless to say, any advocate in that debate convinces no one — her own side is already convinced, and the other side is not paying attention.[102]

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[99] *Cf.* LEWIS, *supra* note 17, at 96 ("Pride always means enmity — it *is* enmity. And not only enmity between man and man, but enmity to God."). As pride involves self-exaltation, so its cure necessarily involves self-denial — "not to deny things to myself, but to deny myself to myself." JOHN R.W. STOTT, BASIC CHRISTIANITY 111 (2d ed., 1999).

[100] LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996).

[101] *Id.* at 21.

[102] Seidman and Tushnet put the point this way:

> There has been a persistent tendency to treat constitutional questions as if they were easy and the answers as if they were obvious. It naturally follows from this belief that one's opponents are foolish, or evil, or

That kind of conversation, where all speak but no one listens, in turn leads to intolerance. If I am positive I know how the world ought to be organized, what reason do I have to yield ground to someone with a different view? When the choice is truth or error, truth would seem always to be the right choice. This is, of course, precisely the complaint that non-believers make about those with strong religious convictions. Yet, at least if the convictions are Christian, the complaint may be backward. The recognition of one's own uncertainty promotes a willingness to hear other views. And that recognition follows from another: the recognition of one's sin, of the beam in the eye that prevents clear sight.[103]

The second characteristic — blindness to risks — has tended to widen the gap between legal theory and legal practice. Judges cannot help but worry about the consequences of their decisions. Academics likewise pay attention to consequences, but often only the good consequences figure in academic analyses. This compounds the first problem: in the law reviews, legal issues seem easier than they are. Take a seemingly easy issue that is the subject of a great deal of analysis today: racial profiling. Of course it's a bad thing for police officers to discriminate against black suspects. So, the thinking goes, it must be a good thing to ban the use of race as a factor in police decisions to detain suspects. Some states have enacted such bans;[104] the likelihood is that more will follow in the months and years to come.

> dangerous extremists bent on fundamentally transforming bedrock constitutional principles.

Id. at 4.

[103] *See Matthew* 7:3-4 ("And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye? Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye?").

[104] *See, e.g.*, CONN. GEN. STAT. ANN. § 54-11L (West 2001); KY. REV. STAT. ANN. § 15A.195 (Michie Supp. 2001); MD. CODE ANN., Transp. § 25-113 (Michie Supp. 2001); R.I. GEN. LAWS § 31-21.1-2 (2000) .

Those bans may be a bad thing even if profiling itself is a bad thing.[105] In the first place, the bans are easily evaded. Police officers can use race when targeting suspects without testifying that they do so. There are plenty of other visually observable cues to which officers can point — "I saw a bulge in the jacket that looked like it might be a gun;" "in my experience cars of that type driven on this road are likely to contain drugs,"[106] and so on. In practice, a ban on profiling is a ban on certain kinds of police *testimony*, not a prohibition of a kind of police *conduct*. The effect may be not to stop or even reduce police discrimination, but rather to drive it farther underground — and to raise the level of dishonesty in suppression hearings.[107] Racism plus fraud is not an improvement over racism *simpliciter*. And there is another, perhaps worse problem. Even if anti-profiling statutes somehow work as intended, they might stop some kinds of policing that have great social value. Consider the possibility that concerns about

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[105] To date, the two best analyses of the rights and wrongs of profiling are Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); RANDALL KENNEDY, RACE, CRIME, AND THE LAW, 136-63 (1997).

[106] *Cf*. United States v. Arvizu, 534 U.S. 266, 270 (2002) (minivan with two adults and three children targeted as a vehicle likely to be involved in drug trafficking).

[107] Alan Dershowitz makes a similar argument about police torture. *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 151-54 (2002). I would not take the argument that far, for two reasons. First, while race-conscious policing is inevitable, police torture is not, at least not in any significant number of cases. It follows that, while profiling raises a classic "second best" problem, with torture the law can seek first-best solutions. Second, the use of race in policing is sometimes morally defensible. Consider, for example, the possibility that a measure of ethnic profiling by FBI agents might have prevented the September 11 hijackings. *See infra* note 113. Gains of that magnitude may justify significant social costs. Though Dershowitz contends that a similar balance of harms justifies torture, see DERSHOWITZ, *supra*, at 134-63, the argument is unconvincing: It is worth noting that, in the wake of September 11, FBI agents complaining that terrorism suspects were refusing to talk wished not to torture those suspects, but to drug them. *See* Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6. Agents' preference for drugs over torture suggests that Dershowitz exaggerates torture's gains. This point leads to another difference between police torture and racial or ethnic profiling: torture tends to reduce accuracy — suspects' incentive is to say whatever will stop the torture, true or not — while profiling potentially raises it, by allowing police to draw statistically accurate inferences.

profiling prevented a more thorough investigation of some of the September 11 hijackers before they could do that awful day's work.[108]

None of this is to say that profiling is a good thing. I think the conventional wisdom is mostly right — in some settings it is a bad thing, and in all settings the police are likely to do too much of it.[109] But it is a *complicated* thing. In addressing this hard problem, the law has the potential to cause other, worse problems. The tendency to downplay error costs raises that risk.

The third characteristic — self-display — is perhaps the most deeply rooted. The work law professors like, we call "interesting" or "creative," not "sensible" or "correct." Junior professors seeking tenure do well to listen to that choice of words. Their incentive is not so much to better understand the piece of the legal world they study as to excite their senior colleagues with new ideas, without much regard to whether the world would be better off were those ideas put into practice. Similarly, those senior colleagues compete in an intellectual marketplace that rewards the exciting over the good, and originality over wisdom. Nearly everyone who has enjoyed any success in that marketplace is guilty of this particular sin, both in their teaching and in their scholarship. I certainly am.

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[108]There is some reason to believe that more extensive use of ethnic profiling might have prevented the attacks on September 11. *See* William Safire, *The Rowley Memo*, N.Y. TIMES, May 27, 2002 at A13 (citing memo to this effect from Coleen Rowley, an FBI field agent in Minneapolis, to FBI Director Robert Mueller); James Risen, *F.B.I. Told of Worry Over Flight Lessons Before Sept. 11*, N.Y. TIMES, May 4, 2002, at A10 (discussing pre-September 11 memo from FBI field office in Phoenix, which identified Arab men with possible terrorist ties enrolled in American flight schools and urged a nationwide review of this trend); Ann Davis, Joseph Pereira & William M. Bulkeley, *Silent Signals: Security Concerns Bring New Focus On Body Language*, WALL ST. J., Aug. 15, 2002, at A1 (quoting congressional testimony from Rafi Ron, an Israeli security consultant, that well-trained body-language profilers might have spotted and questioned some of the Sept. 11 hijackers "by very basic behavior pattern recognition work").

[109]The key point here is that police officers internalize the benefits of profiling, but not the costs; the consequence is that there will always be too much race-conscious policing — even by the standards of those who find racial profiling acceptable as a matter of principle. *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2177-80 (2002).

How, then, ought we to argue about hard problems? First, with caution — acknowledging that one might not be weighing costs and benefits quite right, that there is usually a case to be made on the other side when it comes to the particular legal solution one advocates. That is no small thing. Imagine how differently most law review articles would read if their authors admitted the possibility that they might be mistaken. Judges suffer from this disease as well. The usual result is an opinion that treats a hard case as if it were an easy one, thereby misleading lawyers and litigants about the law's likely path. None of this is to say that strong arguments are out of bounds, only that hard legal questions should be seen for what they are.[110] Second, with modesty — paying attention to the possibility that other institutions might be able to contribute more to solving the problem at hand than could lawyers and courts. Racial profiling is a good example. Judicially enforced bans on the practice may have slight, or perverse, consequences.[111] But changes in the cultures and training programs of urban police departments might prove more promising — and those changes are probably better produced by political pressure than by litigation.

Those two attitudes — caution and modesty — sound conservative, but they need not be so. Franklin Roosevelt inaugurated the New Deal by promising "bold, persistent experimentation,"[112] hardly a recipe for reactionary legal thinking. That spirit of

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[110]This is the central theme of Seidman's and Tushnet's wonderful book. *See* SEIDMAN & TUSHNET, *supra* note 105, *passim*.

[111]On the other hand — and there *is* an "other hand" — those bans may have the beneficial effect of saying, publicly, that as a society we think race-conscious policing is wrong. My colleague Randall Kennedy makes this argument, and adds that there will be less profiling if the practice is illegal than if it is legal. *See* KENNEDY, *supra* note 110, at 165. I am skeptical of the claim that race-conscious policing will decrease much if the law purports to disallow it. But the symbolic benefit to those most likely to be the targets of police attention may be real and substantial. *See id.* at 157-59.

[112]The full quote captures the spirit better: "The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something." 1 FRANKLIN D. ROOSEVELT, *Address at Oglethorpe University* (May 22, 1932), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 639, 646 (Samuel I. Rosenman ed., 1938).

experimentation is quite consistent with the kind of humility I am describing. Roosevelt put it well: "Better the occasional faults of a government that lives in a spirit of charity than the consistent omissions of a government frozen in the ice of its own indifference."[113] Humility does not counsel inaction, and it is not a posture of indifference. Rather, humility always sees the possibility of its own mistake. That implies not blindness to the errors and injustices that attend the status quo, but awareness that proposed solutions must be tentative, subject to revision as experience dictates.

In practice, American law and legal theory may have the worst of both worlds. Our legal system is often far from cautious in embracing broad changes: Consider the Warren Court's revolution in criminal procedure,[114] or the current Supreme Court's sweeping redefinition of federalism.[115] Once embraced, those changes are locked in by the strong weight our courts place on precedent. This gets it backward. Change ought to be embraced readily in some areas, hesitantly in others, but always provisionally, understanding that some legal moves have surprising consequences, and sometimes the surprises are unpleasant. Our courts would do well to emulate Roosevelt's spirit of experimentation, including his willingness to abandon paths that seem not to be working.

That spirit is not distinctively Christian. Followers of Jesus obviously hold no monopoly on it. But it *is* Christian in character, in its combination of a strong desire to do justice with an equally strong sense of the limited vision of those of us who seek to re-mold the justice system.

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[113]The quote is taken from Roosevelt's acceptance speech at the 1936 Democratic convention; it is reprinted in 2 VITAL SPEECHES OF THE DAY 634, 636 (1935-1936).

[114]For the classic discussion of this phenomenon, written while it was still happening, see generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[115]The Supreme Court's federalism cases have spawned a huge literature. Most of that literature is scathing; for a good example, see Larry D. Kramer, *Foreword: We, the Court*, 115 HARV. L. REV. 4 (2001). For a less harsh, more balanced analysis, see Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

And it is unpredictable — neither clearly liberal nor obviously conservative nor inevitably anything else. Humility in legal theory is, in that respect at least, like Christianity more generally. He is not, after all, a tame lion. It is also quite *un*like what one hears in most law school classrooms and reads in most legal literature these days. If there is one common theme in contemporary American legal thought, it is confidence — the sense of utter certainty that my camp has it right and all others represent the forces of darkness. A good word for that sensibility is arrogance. And it may be that arrogance, not some theory, poses the greatest danger to the kind of pluralist legal order that America must have. After all, it must be hard to build a tolerant culture on a foundation of competing certainties. Perhaps making legal thought more Christian would also make it more tolerant — an odd idea to a good many non-Christians, I suspect, but one that follows quite naturally from the Christian view of who we are, and who we are in relation to our God.

III. CONCLUSION: ANOTHER KIND OF CHRISTIAN LEGAL THEORY

This book, like (so far) this book review, sees Christian legal theory as a particular kind of enterprise. The goal of that enterprise is to better understand law, to see how a view of the world that millions of Americans share affects the kinds of arguments one might make for and against certain types of legal rules. There is a very different way to think of Christian legal theory. Instead of, or in addition to, seeing law more clearly by thinking about Christianity, one might see Christianity more clearly by thinking about law. *That* kind of Christian legal theory (or is it legal Christian theory?) does not appear in *Christian Perspectives*. Perhaps it should.

Take the following example. Some Christians are prone to see their faith as essentially behaviorist, as if the Bible were a divine legal code.[116] Anyone who reads

[116]This is the temptation common to all the Christian legal theories referred to above and all those referred to in *Christian Perspectives*. In the course of arguing that Christianity suggests X, there is a tendency to make X — redistribution, or legal moralism, or even humility in legal theorizing — the point of Christianity, when it is but a very small byproduct.

legal texts would understand how wildly wrong that claim is. Above all else, the Christian Bible is a *story*, a narrative. Law plays a part in the narrative, but it is plainly not the main actor; its point is to focus attention away from itself and toward the One who *is* the main actor.[117] To focus on law is to miss the story, to reduce it to a set of abstract propositions. It is a bit like converting a Shakespeare sonnet into prose: So much is lost in the translation that one can no longer call it as a translation. Knowing law, knowing what it looks like, what it *reads* like, makes that all the more clear. If we understand our profession and our faith correctly, Christian lawyers ought to be among the least likely people to become Christian legalists.

Or, consider the Christian doctrine of adoption. According to that doctrine, not only does God forgive my sins; he actually takes me into his family, gives me the spirit not of a slave but of a son.[118] Why? What is the point of the changed familial arrangement? Why is it not enough for God to forgive and be done with it?

Law offers a hint at an answer. Begin with two more questions:[119] What sphere of ordinary life does our law regulate the least? And what sphere of ordinary life sees the most behavior that is not just prudent or nonnegligent, but actually loving — behavior that genuinely treats the other as more valuable than the self? The answer to the first question is probably families. The law of domestic relations regulates a great many transactions, but it says little about the ordinary interactions between spouses, parents and

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This problem has been around for as long as Christianity itself. It is the basic subject of Paul's letter to the Galatians, written in the middle of the first century. *See* J.B. LIGHTFOOT, THE EPISTLE OF ST. PAUL TO THE GALATIANS 40-56 (dating the letter between 57 and 58 A.D.).

[117] *See Galatians* 3:17-25. The key sentence appears in verse 24: "Wherefore the law was our schoolmaster to bring us to Christ, that we might be justified by faith."

[118] *Galatians* 4:6-7 ("And because ye are sons, God hath sent forth the Spirit of his Son into your hearts, crying, Abba, Father. Wherefore thou art no longer a servant, but a son; and if a son, then an heir of God through Christ.").

[119] This paragraph and the two that follow it borrow from a slightly longer discussion of the same themes in William J. Stuntz, *Law and the Christian Story*, FIRST THINGS, Dec. 1997, at 28-29.

children, or siblings. Consequently, that law is a small presence in daily life. The second question has the same answer. There is plenty of cruelty, violence, selfishness, and exploitation in families, as there is plenty of those things in all areas of life. But families also see a fair amount of genuine altruism and self-sacrifice, which is not true of other areas of life.

Those two answers stand oddly together. Law is supposed to be about the business of modifying behavior. One might suppose that where it is largely absent, behavior is pretty bad. Yet it turns out to be nearly the other way around. The two areas where law is arguably the *largest* presence in ordinary life — driving cars and paying taxes — are probably the two areas where there is the largest amount of self-conscious cheating. Perhaps my vision on this point is skewed because I live near Boston, but driving an automobile does not seem conducive to decency, much less altruism.

When it comes to behavior modification, a particular sort of carrot seems to work better than sticks. Legal threats produce some compliance (a lot of us do, after all, pay our taxes), but they also produce resistance, as regulated actors invest in finding loopholes and evading detection. Tax rules generate tax lawyers who concoct tax shelters which generate yet more tax rules, and the cycle continues. Speed traps on the highway generate radar detection devices, which lead to better police technology or restrictions on the devices, which lead to new evasion strategies by drivers, and *that* cycle continues. Yet the promise of a family bond leads, at least sometimes, to something much better than compliance: the desire to sacrifice one's own well being for another's (or maybe to *identify* one's well being *with* another's).

Good fences, it turns out, do not make good neighbors.[120] Law can accomplish a great deal; certainly there is no basis in Christianity for thinking that law doesn't matter. But it cannot by itself put a stop to the selfishness and exploitation to which we are so obviously prone. The solution lies not in better fences (legal boundaries, rules) but in a better family — a set of family attachments that will motivate us to do good for the sake of the household, for that is the one place in life where we seem most prone to advance others' interests rather than our own.

[120]With apologies to Robert Frost.

God's adoptive parenthood may suggest that our behavioral problems are not really behavioral after all. We need a different family because we need to become different people. Forgiveness can't do that. Only a new birth[121] into a new household can. Christians familiar with law, and with law's limits, may find that story especially compelling.

There are other examples, but this is not the place to explore them. Suffice it to say that thinking about Christianity and law at the same time might help us to better understand *both* — not just the latter. Theories of everything are like that. They help explain the world we inhabit, and law is one of the more important aspects of that world. It is good and right for *Christian Perspectives* to highlight the ways in which this particular theory of everything offers insights into our law and legal institutions. But we should look through the other end of the telescope as well. Theories of everything, if they are at all plausible, are deep and rich and complex, so much so that none of us can finally get to the bottom of them. So the things the theory helps explain can also help explain the theory. Truth runs in both directions.

That, of course, is a lesson American legal theorists should understand well, for truth running in both directions — down from theory to practice, up from practice to theory — is the essence of a common-law system. This is why it is doubly unfortunate that American Christians have largely been isolated from, or isolated ourselves from,[122] American legal theory. That isolation has not been good for legal theory, and it has probably contributed a little to the extremism and paranoia that attend some religious-right politics. *Christian Perspectives on Legal Thought* contributes to the work of addressing those harms. The isolation has caused another harm, to Christians who have missed the chance to better understand our faith and the God we seek to serve. That harm likewise needs to be addressed. And of the two, it is probably the greater injury. For Christianity is not, above all, about the business of making better rules. Relationships — especially the one between us and our Creator — matter infinitely more.

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[121] *See John* 3:1-8.

[122] I'm inclined toward the latter explanation. For the best account of the dynamic, see MARK A. NOLL, THE SCANDAL OF THE EVANGELICAL MIND (1994).