



Alabama Law Scholarly Commons

Essays, Reviews, and Shorter Works

Faculty Scholarship

2002

Who Cares? Why Bother? What Jeff Powell and Mark Tushnet Have to Say to Each Other Book Review

William S. Brewbaker III

University of Alabama - School of Law, wbrewbak@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_essays

Recommended Citation

William S. Brewbaker III, *Who Cares? Why Bother? What Jeff Powell and Mark Tushnet Have to Say to Each Other Book Review*, 55 Okla. L. Rev. 533 (2002).

Available at: https://scholarship.law.ua.edu/fac_essays/5

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Essays, Reviews, and Shorter Works by an authorized administrator of Alabama Law Scholarly Commons.

BOOK REVIEW

WHO CARES? WHY BOTHER?: WHAT JEFF POWELL AND MARK TUSHNET HAVE TO SAY TO EACH OTHER

WILLIAM BREWBAKER*

CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT. Edited by Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella. New Haven: Yale University Press. 2001. Pp. xxii, 510. \$50.00.

Introduction

In 1993, H. Jefferson Powell wrote a book entitled *The Moral Tradition of American Constitutionalism*.¹ Powell's book offers, among other things, "a Christian theological perspective on the 'conceptual and moral quagmire' into which the 'American constitutional tradition has worked itself.'"² Mark Tushnet eventually reviewed the book for the *Journal of Legal Education*. Although Tushnet's review consumed only six pages, his reaction to the book can be summarized even more briefly: "Who cares?" and "Why bother?"³ The review begins and ends with the same question: "What can someone who does not already share Powell's perspective gain from reading his book?"⁴ ("Who cares?"). Tushnet also complains that Powell's theological conclusions are insufficiently robust, suggesting that "the Enlightenment-influenced pragmatist or even the thoroughly rationalistic Benthamite calculator" might have reached the same conclusions.⁵ ("Why bother?").

Tushnet's two questions will undoubtedly be on the minds of many who read

* Professor of Law, University of Alabama. I am grateful to Nicholas Aroney, Charles Gamble, Susan Hamill, Kyle Logue, and David Skeel for helpful comments on earlier drafts of this review. Dean Ken Randall and the University of Alabama Law School Foundation provided generous research support, including a sabbatical leave during which a substantial portion of this paper was written. I am indebted to the Master and Fellows of St. Edmund's College, Cambridge, to the Faculty of Law of the University of Cambridge, and most especially to the Warden and Members of Tyndale House for their hospitality and support.

1. H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* (1993).

2. Mark V. Tushnet, Book Review, 45 *J. LEGAL EDUC.* 303, 303 (quoting POWELL, *supra* note 1, at 7).

3. Tushnet also criticizes Powell's use of Justice Holmes' dissent in *Lochner v. New York*, *id.* at 305, concludes that Powell "offers some insightful criticisms" of contemporary constitutional law theory, *id.*, and offers an alternative to Powell's narrative of the constitutional tradition, *id.* at 306.

4. *Id.* at 303; *see also id.* at 308 ("Except as it provides information about a particular perspective, what can someone not within that tradition gain from reading Powell's book?").

5. *Id.* at 307.

Michael McConnell, Robert Cochran, and Angela Carmella's new book, *Christian Perspectives on Legal Thought*⁶ (*CPLT*). Self-consciously an attempt to "break [the] silence"⁷ of Christians in the legal academy, *CPLT* is both an apology for the enterprise of Christian legal scholarship and an illustration of the difference explicitly Christian presuppositions might make, and have made, in legal analysis and political theory. It is also a preliminary attempt at recovering a largely forgotten tradition of faith-informed political and jurisprudential reflection and, implicitly, an invitation to renewed discussion within the Christian community on the implications of faith for the legal order.

CPLT's intended audience includes not only Christian lawyers and legal scholars, but also the wider legal academy. Part I of the book provides various Christian reactions to six influential schools of contemporary legal thought — Enlightenment liberalism, legal realism, critical legal studies, critical race theory, feminism, and economic analysis of law. Part II provides short treatments of the place of law and politics within the Catholic, Calvinist, Anabaptist, Baptist, and Lutheran Christian traditions. Part III includes examples of Christian approaches to conventional legal subjects, including torts, contracts, criminal law, family law, environmental law, and legal ethics.

This book review is organized primarily around Tushnet's two questions. Part I discusses *CPLT*'s attempts to answer the question of why legal scholarship based on an explicitly Christian analytical framework should interest legal scholars generally. Part II draws upon the essays in *CPLT* to consider whether faith-informed legal scholarship is, or should be, expected to be robust in the sense of yielding insightful approaches to legal issues. Part III evaluates *CPLT*'s efforts to assist scholars in recovering Christian traditions of political and jurisprudential reflection. *CPLT* contains nearly thirty separate essays; I have not attempted to provide an overview of each one. Instead, I discuss selected essays that seem important and representative in an attempt to give the reader a sense of the book's overall concerns.

1. Who Cares?: Is Christianity Relevant to Contemporary Legal Thought?

Regardless of the specific merit or demerit of *CPLT*, the prospect of legal scholarship that is explicitly and self-consciously informed by Christian belief will dismay many within the legal academy. One can imagine a variety of negative reactions. Some may regard Christian legal scholarship as a bizarre exercise in irrationality or superstition, akin to offering an analysis of American law from the perspective of numerology or Zoroastrianism.⁸ Such individuals might thus conclude

6. CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES].

7. Michael W. McConnell et al., *Introduction*, in CHRISTIAN PERSPECTIVES, *supra* note 6, at xvii, xviii.

8. Tushnet's review, discussed above, compares Powell's perspective on constitutional law to that of "self-styled constitutionalist tax protesters," which certainly suggests more than a hint of skepticism about its intellectual merit. See Tushnet, *supra* note 2, at 303 n.1. Tushnet is not alone in his negative

that they are not interested in *CPLT* because the claims of Christianity⁹ are, in their opinion, simply false. Indeed, some might even go so far as to insist that analysis based on such "falsehoods" has no place in the academy, where scholars should measure opinions by accepted standards of evidence and rationality.¹⁰ Others may resist the project of a specifically Christian legal scholarship because they think that giving Christian arguments a public hearing is bad politics.¹¹ Or, they might, as Tushnet seems to do with respect to Powell's book, simply dismiss Christian perspectives as inherently uninteresting, without taking a position on the epistemic or other merits of Christian faith.¹²

A. *Christian Belief and Rationality*

CPLT is not a work of Christian apologetics and is thus not primarily concerned with arguing for the reasonableness of Christian faith or refuting objections thereto. Not surprisingly, however, the question of intellectual warrant is never far below the surface of the book's essays. The main approach taken by *CPLT*'s editors and contributors is not to mount a defense of Christian belief, but rather to emphasize that all legal scholarship is situated from someone's contestable intellectual perspective.¹³ Following that view, it is wrong to characterize faith-based scholarship as "biased," while labeling secular viewpoints as "objective" and "scientific."¹⁴ The editors note

visceral reaction to Christian scholarship. One political scientist has observed that [i]f a professor talks about studying something from a Marxist point of view, others might disagree but not dismiss the notion. But if a professor proposed to study something from a Catholic or Protestant point of view, it would be treated like proposing something from a Martian point of view.

GEORGE H. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN LEGAL SCHOLARSHIP* 7 (1997) (quoting Peter Steinfelds, *Universities Biased Against Religion, Scholar Says*, N.Y. TIMES, Nov. 26, 1993, at A22) (statement of John C. Green); cf. Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1427 (1989) ("[S]uch things as divine revelation and biblical literalism are irrational, superstitious nonsense . . .").

9. E.g., Jesus is God incarnate; Jesus was raised from the dead.

10. See *infra* Part I.A.

11. See *infra* Part I.B.

12. See *infra* Part I.C.

13. See, e.g., Albert W. Alschuler, *A Century of Skepticism*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 94 (noting this fact in the context of arguing for a coherentist account of the rationality of Christianity).

14. McConnell et al., *supra* note 7, at xxi. The editors also argue that "the notion that law is or can be a science was discredited long ago. Underlying the law of any culture will be the pretheoretical beliefs of that culture. Those beliefs are necessarily rooted in culture, tradition, identity and other sources of conviction." *Id.* These statements follow a reference to Dean Christopher Langdell's attempt to develop a "science of law." *Id.* at xx. If by this the editors merely mean to suggest that very few people would be interested in a Langdellian conception of legal science, the statement is obviously true. However, a statement that laws rest on a culture's pretheoretical beliefs might be presented as an important element in an account of law that purported to be "scientific" in the sense of being merely descriptive. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 26-49 (2d ed. 1994) (arguing for the necessity of understanding a culture's "internal perspective" on law). On the non-neutrality of "mere" description, however, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3-22 (1980); see also JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY* (1990).

Even assuming that a value-free account of law were possible, it is not the current practice of most

that

legal thought is now . . . open to diverse voices and perspectives, not all of them "rational" in any narrow "Enlightenment" sense of that term. . . . If the world of the legal academy is to be truly inclusive, if we are to have a broad-based conversation about our lives together, religious people and religious ideas need to be part of that conversation.¹⁵

This argument is based less on a theologically informed standard of what ought to count as good scholarship than on current practice within the legal academy. "Rationality" has become a problematic gatekeeper for entry into academic discourse, because most of us now recognize that there is no single, universally acceptable account of what qualifies as "rational." Nevertheless, *CPLT's* appeal to inclusiveness comes with its own set of potential problems. As discussed below, for Christians, inclusiveness in the academic conversation must be motivated by respect and epistemic humility on all sides, rather than by the denial of the possibility of truth.¹⁶

B. The Politics of Christian Belief

CPLT's editors are likewise aware of the political apprehensions likely to accompany the re-introduction of Christian thought into legal discourse. In *CPLT's* introduction, they note three specific concerns: (1) the prospect that specifically religious argumentation will breed civic disunity; (2) "a fear that [self-consciously Christian voices in the legal conversation today] would be the opening wedge in a program to reassert Christian hegemony";¹⁷ and (3) suspicions that "a Christian view of law will yield an authoritarian conservative regime, to the detriment of gay rights, abortion rights, women's rights, children's rights, and 'progressive' causes of all sorts."¹⁸

While McConnell, Cochran, and Carmella provide plausible reasons to suppose that fears of adverse political consequences are inadequate to justify marginalizing Christian perspectives on law,¹⁹ the actual samples of Christian scholarship in the

legal academics to limit themselves to the task of describing law in a purportedly neutral way. On the contrary, most law professors are more than prepared to offer suggestions about legal reform, to argue for a particular interpretation of various laws on the basis of contestable theories of legal interpretation, and to argue for the selection of some policies over others. In this setting, the absence of a neutral, pretheoretical ground is important.

15. McConnell et al., *supra* note 7, at xxi. Christians nevertheless may be wise to keep some distance between themselves and "perspectivalism." See *infra* Part I.C. For an insightful critique of Professor McConnell's pluralist position, see generally OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 111-95 (Nancy L. Rosenblum ed., 2000) (contributions by Graham Walker, Amy Gutmann, and Nancy L. Rosenblum). See also CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002) (defending religiously motivated political speech).

16. See *infra* Part I.C.

17. McConnell et al., *supra* note 7, at xx.

18. *Id.* at xxi.

19. Specifically, the editors argue that "Christians can be found at most points in the ideological

book will probably provide more comfort to the politically skeptical reader than editorial assertions. The essays, which were taken from presentations at the annual Law Professors' Christian Fellowship Conference over a period of several years, rather than being primarily solicited for the book, represent a wide spectrum of political opinion. Indeed, the book suggests that Christian legal scholars are found in almost every corner of the legal academy. *CPLT* contains essays that are, by and large, supportive of critical race theory,²⁰ law and economics,²¹ liberal political arrangements,²² the LatCrit movement,²³ and feminist legal theory.²⁴ There is little

spectrum," and they note that "evangelical Christians have been in the forefront of 'progressive' causes like abolition, women's suffrage, and universal education — as well as 'conservative' causes like Prohibition and the restoration of 'family values,'" and that the "Catholic Church in America has been a vigorous opponent of capital punishment and a warm supporter of labor, social welfare, and immigration, as well as a supporter of protections against abortion and euthanasia." *Id.* Moreover, "even if religious voices were reliably antithetical to a particular brand of progressive politics, democrats (with a small d) should recognize that it is unprincipled and undemocratic to exclude or marginalize fellow citizens on the mere expectation that they will vote the wrong way." *Id.*

20. See W. Burette Carter, *What's Love Got to Do with It? Race Relations and the Second Great Commandment*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 133; Davison M. Douglas, *Reinhold Niebuhr and Critical Race Theory*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 149.

21. See Stephen M. Bainbridge, *Law and Economics: An Apologia*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 208. *But see* George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 224.

22. See Stephen Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 25; Michael W. McConnell, *Old Liberalism, New Liberalism and People of Faith*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 5; Elizabeth Mensch, *Christianity and the Roots of Liberalism*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 54; H. Jefferson Powell, *The Earthly Peace of the Liberal Republic*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 73.

23. See Jose Roberto Juarez, Jr., *Hispanics, Catholicism and the Legal Academy*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 163.

24. See Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 178; Leslie Griffin, *Citizen-Soldiers are Like Priests: Feminism in Law and Theology*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 194.

David Caudill's essay is sympathetically critical of the critical legal studies (CLS) movement. See David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 109. He finds common ground between Dutch Calvinist legal philosophy and critical legal studies' emphasis on disclosure of "the inevitable tilt in all theory, including legal doctrine," *id.* at 119, even as he notes that the "faithlike commitments that a [Dutch Calvinist legal philosopher] wants to disclose are rampant in CLS," *id.* at 129. Caudill argues further that emphasizing disclosure of pretheoretical commitments could help rescue CLS from the common criticism that its "program is destructive, because things are torn down and nothing is put in their place." *Id.* at 128. According to Caudill:

Such criticism of CLS, common in law reviews, misses an important point. If every social community is a community of believers whose ideas and practices are based upon and driven by ideology, then genuine communication and debate can begin only with awareness and acknowledgment of that situation. The self-critical program of CLS consists of disclosing tilt without denying the foundational presuppositions giving rise to both the critique and whatever solutions are offered.

Id.

"take America back" rhetoric in *CPLT*;²⁵ indeed, some of the more recognizably conservative voices in the book seem to want mainly to be left alone.²⁶

On the other hand, a few of the essays offer a rather strident critique of the politics of American legal culture. Albert Alschuler's contribution is sharply critical of the worldview underlying much of contemporary legal theory. In a contribution entitled *A Century of Skepticism*, Alschuler argues that "[t]he left and the right in American legal thought . . . are united in their skepticism, especially their skepticism concerning values,"²⁷ with the result that contemporary American legal theory is infected with "[t]he vices of atomism, alienation, ambivalence, self-centeredness, and vacuity of commitment [that] appear characteristic of our culture."²⁸

While Stephen Carter offers a general endorsement of "[t]he liberalism of the enlightenment,"²⁹ he also has harsh words for modern liberal theory's patronizing treatment of religion:

The basic response of liberal theory to religiosity is to try to speak words that seem to celebrate it (as a part of the freedom of belief, or conscience, or the entitlement to select one's own version of the good) while in effect trying to domesticate it . . . or, if that fails, to try to destroy it.³⁰

Michael McConnell finds contemporary liberalism's abandonment of its commitment to limited government particularly troubling. Borrowing John Rawls' distinction, McConnell observes that liberalism has ceased being a "political"

25. While Michael McConnell says that Christians should "take [liberalism] back," McConnell, *supra* note 22, at 24, his essay contains no suggestion that Christians should have the goal of reasserting political control over American institutions, *infra* text accompanying notes 32-34.

26. See, e.g., Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 354. For Duncan, being let alone includes the "demand that our government let our children go — without penalty." *Id.* at 362. He states:

In a free and just society, government has no business commandeering an audience of impressionable children for inculcation in the ideas, beliefs, perspectives, and attitudes of those who hold the reins of political power. The government is free to speak and celebrate whatever it chooses. But it suppresses the fundamental freedoms of thought and belief formation when it requires our children to show up and pay attention to its messages.

Id. at 361.

27. Alschuler, *supra* note 13, at 94.

28. *Id.* at 100.

29. Carter, *supra* note 22, at 30. The author states:

The liberalism of the Enlightenment . . . is generally compatible with a Christian view of the world. Christianity is not, in its essence, opposed to representative democracy, to a regime of individual rights, or to the principle that we should, for the most part, be left alone by the state so that we can pursue individual visions of the good. Quite the contrary: Christianity probably could not survive in the absence of these fundamental assumptions of liberal democracy.

Id.

30. *Id.* at 29.

philosophy and has become a "comprehensive" ideology.³¹ He notes that "[t]oday there is a widespread sense that not only should the government be neutral, tolerant and egalitarian, but so should all of us, and so should our private associations."³² The extended regulatory sweep of the welfare state and the "conflation of 'neutrality' and 'secularism'" make matters worse, particularly with respect to the threats they pose to religious freedom.³³ Nevertheless, McConnell traces the origins of liberal political arrangements to Christian thought, advocating a return to an earlier, more limited version of liberalism.³⁴ In this chastened form, liberalism is, McConnell argues, "the form of government most consistent with the gospel, and most conducive to living in harmony with God and our neighbors."³⁵

C. *Is Christian Scholarship "Interesting"?*

As noted above, a final possible negative reaction to Christian scholarship is simply to dismiss it as uninteresting. Indeed, Tushnet does this when he wonders whether anyone who does not share Jeff Powell's perspective will gain anything by reading Powell's book.³⁶ The idea that a perspective is uninteresting or that there is "nothing to gain" from encountering it might mean a number of different things. It might mean, for example, that the speaker regards the perspective as fundamentally false or misguided in some way and, as such, unlikely to be the source of possible insight into the relevant subject.³⁷ To say that a perspective or a particular work is uninteresting might also mean that the speaker finds it unentertaining or, more importantly, unoriginal.

A more significant use of these labels, however, might be made by those who would be unwilling to say that Christianity, or any other perspective, is either true or false because they associate such statements with Enlightenment pretensions of having articulated "a universal point of view that the rational person can reach and from there deliver final truth for us all."³⁸ They might thus feel no need to consider seriously Christian truth claims and, further, might see no intellectual dishonesty (or even laziness) in dismissing Christian perspectives as uninteresting without considering the arguments for Christian belief.

Given the rather high incidence of this sort of thinking in the legal academy, it is surprising that *CPLT* does not squarely address this challenge to the enterprise of Christian legal scholarship. Perhaps the editors think (as I do) that it is utterly implausible to suppose that Christianity is not false but not interesting either. If, for

31. McConnell, *supra* note 22, at 17-20.

32. *Id.* at 18-19.

33. *Id.* at 20-24. Stephen Carter makes a similar point. See Carter, *supra* note 22, at 31-32 ("Every theory of the state — at least when put into practice — tends toward hegemony. When theory becomes law, it becomes power, and power works to sustain itself.").

34. McConnell, *supra* note 22, at 24.

35. *Id.*

36. See *supra* text accompanying note 4.

37. See *supra* Part I.A.

38. Diogenes Allen, *Christianity and the Creed of Postmodernism*, 23 CHRISTIAN SCHOLAR'S REV. 117, 124 (1993).

example, one takes the prospect of divine judgment seriously, it is difficult to imagine that Christianity's offer of deliverance from that judgment is "uninteresting." One suspects that this posture of "disinterest" is merely a substitute way of saying what some speakers might feel unable to say without undermining their own stated beliefs — *viz.*, that Christianity is false (in the ordinary sense of the word), misguided, or both. To condemn Christian belief as false might be viewed as inconsistent with a presupposition of the nonexistence of truth or unavailability of universal standards by which one might determine "misguidedness." It may be more useful, and seemingly beyond challenge, to say that the perspective is "uninteresting."

Taken seriously, a posture of "disinterest" conflicts with the whole idea of academic discourse. If scholars are entitled to ignore arguments without recourse to something beyond personal interest, the truth-seeking function of academic discourse ceases. I am well aware that many in the academy would happily deny that there is, or ever could have been, a truth-seeking function in academic discourse. Yet, one wonders what such a statement could possibly mean. Does it mean that there is no such thing as "*the way things are*"³⁹ and that scholarship is not now, and could never have been, about understanding the world in which we live? Or, is it only the rather mundane claim that only God has a God's-eye view of the world and that, as a result, many disputes will remain unsettled? The latter claim has the virtue of being more plausible than the former, but, taken alone, it does not justify radical skepticism about the prospect of learning anything true about the world.⁴⁰

Presumably, non-Christian scholars will take an interest in legal scholarship written from an identifiably Christian perspective for the same reasons they are interested in other obviously perspectival scholarship. As a practical matter, scholars of differing perspectives often learn from each other, regardless of whether they ultimately make converts to their particular school of thought. A contracts scholar who is a Kantian liberal might come to see the doctrine of promissory estoppel somewhat differently after reading the works of lawyer-economists, feminists, or critical race theorists, regardless of whether the experience changes the fundamental character of his research agenda. Such learning might take place in a number of different ways — another scholar's perspective may lead one to ask new factual or historical questions about a legal doctrine or its consequences; the other perspective may help generate a critique of some part of the conventional wisdom about the doctrine that prompts rethinking that wisdom; or the perspective may provide a critique of the morality of the doctrine that prompts a rethinking of that doctrine. Indeed, one may sometimes learn more from those with whom one profoundly disagrees than from those with whom one is in easy accord, even if the "learning" only further refines one's own position.⁴¹

39. ALVIN PLANTINGA, WARRANTED CHRISTIAN BELIEF 425 (2000).

40. *Id.* ("Postmoderns sometimes seem to oscillate between a momentous but clearly false claim (there simply is no such thing as truth at all) and a sensible but rather boring claim (there is no such thing as truth, conceived in some particular and implausible way).").

41. For one theological account of why we are right to be optimistic about academic debate in a

II. Why Bother?: Can Legal Scholarship Ever Be Distinctively Christian?

Even if one is not prepared to dismiss out of hand the enterprise of faith-informed scholarship, it remains to be seen whether such scholarship has anything distinctive to contribute. If "the Enlightenment-influenced pragmatist or . . . the thoroughly rationalistic Benthamite calculator" could just as easily produce the same work as the Christian scholar, why inject off-putting God-talk into public deliberation?

CPLT's claims for theologically informed scholarship, at bottom, are rather modest. The book frequently highlights the complexity of the relationship between theology and law. Thus, contributors not only are generally careful to state that they are offering merely *a* Christian view of their subject, rather than *the* Christian view, but they also generally agree that law should not embody each and every demand of Christian morality.

Indeed, two of *CPLT*'s contributors argue that there are at least two sets of questions that must be confronted in deciding whether laws ought to be enacted. These questions are not articulated rigorously, but seem to be roughly: (1) What does ethics require? (2) What does a Christian view of politics and law suggest about whether and how this ethical demand ought to be translated into law or other governmental action? In one of two contributions to *CPLT*, David Caudill writes:

If we consider homosexuality — and I could just as easily choose abortion or animal rights . . . — some Christians may theorize that it should be discouraged or prohibited by the government because of their belief that it is condemned in the Bible. But I might say that that is a bad political theory, and I might propose a [Christian] political theory, for our pluralistic society, recommending not just that the government should be tolerant — for tolerance implies passive condemnation — but that the government should not be meddling in family and sexual life.⁴²

Caudill argues that the Bible "does not function as a set of theories"; as a result, "Christian scholars may disagree as to *the* Christian view of politics or law, and they will not always be able to refer to the Bible for answers."⁴³

pluralistic setting, see Richard John Neuhaus, *Why We Can Get Along*, *FIRST THINGS*, Feb. 1996, at 27.

42. David S. Caudill, *A Calvinist Perspective on the Place of Faith in Legal Scholarship*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 307, 315-16. As Caudill notes, "This example highlights [a] neo-Calvinist conception . . . termed sphere sovereignty, which implies that families and schools and churches occupy spheres of authority that are distinct from the government and from each other." *Id.* at 316. For a defense of homosexual marriage from a neo-Calvinist perspective, see Julia Stronks, *Christians, Public Policy And Same-Sex Marriage: Framing The Questions Before We Shout Out The Answers*, 26 *CHRISTIAN SCHOLAR'S REV.* 540 (1997); for a neo-Calvinist defense of limiting marriage to heterosexual couples, see DAVID ORGON COOLIDGE, *SAME-SEX MARRIAGE?* (Crossroads Monograph Series on Faith and Public Policy 1996).

Caudill argues that similar difficulties also afflict secular theories of law. See Caudill, *supra*, at 315-16.

43. Caudill, *supra* note 42, at 315.

John Nagle's essay on environmental law also illustrates this view of the relevance of Christian doctrine for legal scholarship. Nagle begins by asking "What is the distinctively Christian message about environmental law? How would environmental law be different if it were purposely founded on Christian principles?"⁴⁴ His attempt to answer these questions begins with theology; he identifies eight specific themes related to God's creation of the earth.⁴⁵ Nagle is quick to acknowledge, however, that it does not end there. Not only do the theological themes themselves suggest important further questions to consider,⁴⁶ but "[a] Christian approach to environmental law must be based . . . on a Christian view of law."⁴⁷ Not surprisingly, he does not present his analysis as *the* Christian perspective on environmental law; rather, he presents it as his best effort to consider environmental law issues *as a Christian*.⁴⁸

Nagle's Christian consideration of current issues in environmental law leads him to two categorical conclusions and several more modest judgments about current policy debates. One categorical judgment is that justice involves a "duty to care for the elderly, the sick, and all of those whose ability to care for themselves is impaired."⁴⁹ A second is that "the Christian view of creation [is] theocentric — God centered — rather than biocentric (all creatures are created equal) or anthropocentric (humans are at the apex of the world)."⁵⁰ While "[b]iblical teaching

44. John Copeland Nagle, *Christianity and Environmental Law*, in CHRISTIAN PERSPECTIVES, *supra* note 6, at 435, 438 [hereinafter Nagle, *Environmental Law*].

45. Nagle summarizes his themes under the following headings: "God Created the World"; "God Pronounced the Creation to Be Good"; "God is the Owner of All Creation"; "God Gave Humanity Dominion over Creation"; "God Charged Men and Women with the Responsibility of Caring for Creation"; "God Alone Is Worthy of Worship"; "Creation Has Suffered the Effects of the Entry of Sin into the World"; and "God Will Redeem His Creation." *Id.* at 438-41.

46. The author states:

This perspective yields a number of questions. What is the relation between humanity and other creatures? When do human needs justify actions that are harmful to the rest of creation? When must people make sacrifices for the good of the rest of creation? When must people sacrifice so that other people can better enjoy the goodness of creation? What significance do the utilitarian arguments for environmental protection have for Christians?

Id. at 442.

47. The author states:

These theories generate another group of questions when they are applied to the specific role of the legal system in protecting creation. When is it appropriate to write Christian environmental principles into statutory law? Can Christian teachings about creation be expressed through secular terms so that they are acceptable to those who are not Christians? When should those of other (or no) religious faiths be commanded to respect creation in the way suggested by Christian teaching? Who should bear the burden of environmental protection efforts?

Id.

48. The author states, "I cannot hope to answer all of these questions here. What I shall attempt instead is to explain how one Christian — namely, me — tries to take the Christian teaching on creation and a Christian understanding of law and apply them to several current problems in environmental law."

Id.

49. *Id.* at 449.

50. *Id.* at 442-43.

anticipates that people will rely upon animals and plants for food, clothing, and other needs[,] [t]hat teaching also indicates . . . that God cares for the rest of creation and expects us to care for it."⁵¹ Christians do not believe "that every form of life has an equal right to exist,"⁵² but they must also ask "which places [they] are leaving for other members of God's creation."⁵³

Nagle draws on the first judgment to "applaud . . . attention . . . to the effects of pollution on poor and minority communities."⁵⁴ He draws on the second to support mandatory (*i.e.*, legal as opposed to voluntary) measures to preserve species habitat.⁵⁵ Yet, Nagle also is concerned for the interests of landowners bearing the brunt of endangered species legislation. Nagle supports both voluntary efforts to compensate affected landowners and "narrowly focused takings legislation that seeks to compensate . . . landowners when 'unanticipated regulations destroy a significant portion of the total assets of a property owner.'"⁵⁶ Nagle finds this solution attractive, but not necessarily unique. Although he supports this solution biblically, the solution itself does not "depend upon exclusively Christian principles."⁵⁷ Rather, it "seeks to simultaneously accommodate the biblical concern about protecting wildlife and preserving species, the practical need to protect habitat, and the general principles of equity and justice that prevent the government from placing a disproportionate burden on any individuals."⁵⁸

All this may reassure those who might have assumed that Christian legal scholarship would involve nothing more than advocacy of a direct transfer of Scriptural precepts into the statute books. But, one might ask (as Tushnet implicitly does of Powell) why one would bother injecting controversial religious beliefs into legal debates if these beliefs fail to yield robust conclusions as to the practical decisions that are the ultimate objects of legal inquiry?

CPLT answers this objection primarily by letting the essays in the book speak for themselves. Indeed, Part III includes contributions on contract law, environmental law, family law, tort law, criminal law, and professional ethics. There is more to be said on the subject, however.⁵⁹ All scholars bring certain contestable background beliefs to their scholarship,⁶⁰ and, depending on the work that is being done and the scholar who is doing the work, these beliefs will be more or less evident to the reader. Such beliefs likely influence the arguments the scholar finds persuasive and the questions he thinks it important to ask.⁶¹ As George Marsden

51. *Id.* at 443. For an elaboration of a biblical case for the obligation to protect endangered species, see John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1217-30 (1998).

52. Nagle, *Environmental Law*, *supra* note 44, at 443.

53. *Id.* at 444.

54. *Id.* at 450-51.

55. *Id.* at 445.

56. *Id.* at 449 (quoting William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1155 (1997)).

57. *Id.*

58. *Id.*

59. For a general treatment of Christian scholarship, see MARSDEN, *supra* note 8.

60. For an influential account of the influence of "control beliefs" on scholarship, see NICHOLAS WOLTERSTORFF, *REASON WITHIN THE BOUNDS OF RELIGION* (2d ed. 1984).

61. See MARSDEN, *supra* note 8, at 65 ("Christianity does not so much supply the learned person

has written, "One would hardly argue that because virtually any question or scholarly agenda that might be proposed by a Marxist scholar could be posed by a non-Marxist that therefore a distinctive Marxism was not shaping the scholarship."⁶²

Many of the contributions to *CPLT* demonstrate these rather indirect effects of Christian faith. Not surprisingly, issues of church and state have attracted Christian legal scholars, and Michael McConnell's and Stephen Carter's respective contributions reflect this interest and expertise.⁶³ Many of the contributions to *CPLT* also reflect an interest in tracing the Christian roots of current legal and political concepts. Elizabeth Mensch, for example, traces the paradoxical historical relationship between Enlightenment liberalism and Christianity.⁶⁴ Marci A. Hamilton notes the application of Calvinist concepts in the framing of the American Constitution.⁶⁵ These works will presumably be useful to legal historians or to scholars wanting a greater understanding of American liberalism, whatever their faith commitments.

In other cases, the challenges that *CPLT*'s contributors make to conventional thinking about various subjects evidence the contributors' Christian viewpoints more directly.⁶⁶ Phillip Johnson, for example, provides a provocative account of the development of the insanity defense.⁶⁷ Johnson begins by making clear the naturalistic presuppositions of modern psychiatry:

[In the view of modern psychiatry,] human behavior, like all other natural phenomena, is caused. From a scientific materialist point of view, it is virtually meaningless to say that a person "chose" to commit a particular action. What is important is to understand what combination of genetic or environmental circumstances caused him to commit this action rather than a different one. In the more logically rigorous versions of this model, the human subject itself — the "I" in "I choose" — is taken to be merely a placeholder for causative factors that we do not yet understand. . . . Blame and retributive punishment are seen as relics of

with answers as it does raise questions.") (quoting Robert Wuthnow, *Living the Question, in CHRISTIANITY IN THE TWENTY-FIRST CENTURY: REFLECTIONS ON THE CHALLENGES AHEAD* 209 (1993)). Marsden also argues that Christian belief may affect scholarship by motivating scholars to work hard and do their work well, by helping determine the applications scholars see for their scholarship, by "help[ing] shape a sub-field, specialty, or questions one asks about one's work," or by influencing how the scholar "sees the field, or its assumptions, fitting into a larger framework of meaning." *Id.* at 63-64.

62. *Id.* at 69.

63. See Carter, *supra* note 22; McConnell, *supra* note 22.

64. Mensch, *supra* note 22.

65. See Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 293.

66. See MARSDEN, *supra* note 8, at 63-65 (arguing that faith influences scholarship by setting research agendas).

67. Phillip E. Johnson, *Human Nature and Criminal Responsibility: The Biblical View Restored*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 426.

prescientific superstition, premised on a view of human nature that science has discarded.⁶⁸

He then argues that the old *M'Naghten* insanity test, which focused on whether the defendant was capable of knowing what he was doing and, if so, whether it was wrong,⁶⁹ "finds its metaphysical support in biblical theism, not scientific materialism" because it "conclusively presumed that human adults have freedom to choose between good and evil" and because it turned not on whether the defendant knew his conduct was prohibited by law, but on whether he knew the conduct was morally wrong.⁷⁰

Johnson recounts the story of *M'Naghten's* replacement by standards based on the American Law Institute's Model Penal Code. These standards permitted an insanity defense if either the defendant lacked the capacity "to appreciate the wrongfulness of his conduct" or if the defendant lacked "substantial capacity . . . to conform his conduct to the requirements of law."⁷¹ Johnson argues that the Model Penal Code test (and similar contemporaneous standards) "reflect[] a philosophical position called 'soft determinism,' which is best described as an uneasy halfway house between the scientific model (behavior is caused) and the common-law model (behavior is chosen)."⁷² Surprisingly, however, after experimenting with the Model Penal Code and other similar tests, Congress and many state courts have reverted to tests more closely resembling *M'Naghten*.

What is most interesting for Johnson about the demise of the Model Penal Code test is not the fact of its rejection, but rather the psychiatric community's "enthusiastic agree[ment]" with its rejection.⁷³ The American Psychiatric Association (APA) (whose reports have influenced the legal community) has not changed its fundamental position that "psychiatry is a deterministic discipline that views all human behavior as, to a good extent, 'caused'."⁷⁴ Why, then, Johnson wonders, "does the APA continue to say that there should be a defense for those defendants who lack free will if nobody has free will? And what scientific content does the concept of 'wrongfulness' have?"⁷⁵

68. *Id.* at 427.

69. The author states:

According to the *M'Naghten* rule, an accused is excused from criminal punishment (but usually remitted to civil commitment) only if "at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

Id. (quoting *United States v. Freeman*, 357 F.2d 606, 608 (2d Cir. 1966)).

70. *Id.* at 428.

71. *Id.* at 429 (quoting MODEL PENAL CODE § 4.01 (1974)).

72. *Id.*

73. *Id.* at 431-32.

74. *Id.* at 432 (quoting American Psychiatric Association, *Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 6 (1983)).

75. *Id.*

Johnson argues that the APA's embarrassing position is the result of the limitations of psychiatric science and "the inherent shortcomings of the attempt to understand human nature and the human predicament in exclusively scientific categories."⁷⁶ The psychiatrists themselves have found that they cannot live with laws based on the account of human nature that they have bequeathed to us. Beneath the surface of Johnson's essay (but only barely) is the suggestion that much of what passes for rational, detached argumentation today is incoherent: it is emphatically dismissive of religion, yet cannot finally free itself from religious presuppositions both as to the world's order and as to its externally given meaning.

Jeff Powell's contribution to *CPLT* likewise challenges conventional thinking; indeed, he begins by challenging the entire enterprise of social criticism.⁷⁷ Powell draws on Augustine's argument, in *The City of God*, that classical Roman social critics were "moral[ly unable] or unwilling[] . . . to achieve true critical distance from their society."⁷⁸ Because their critique of Roman society "depended for its effectiveness on a fundamentally positive evaluation of society and the state," it was doomed to "eventuate either in social nihilism, perhaps tinged by nostalgia, or in the celebration of a renovated status quo."⁷⁹ Augustine, says Powell, finds that "[e]ven the greatest of the pagan critics ultimately succumbed to the temptation to do one or the other because they lacked an ultimately critical — because ultimately truthful — theological perspective."⁸⁰

Powell argues that contemporary critics of American politics are in a similar situation.⁸¹ Today's critics of "rights talk," of excessive governmental centralization, and of the exclusion of religious belief from political life all tend both to overvalue society's pretensions and to undervalue the positive aspects of the specific institutions under consideration.⁸²

Powell is not glib about the prospects that contemporary Christian social critics will achieve sufficient distance from their culture to enable meaningful social critique. He notes at the outset of his essay that "our comfortable accommodation with American society long ago became a virtual Babylonian captivity to which American Christians have willingly submitted our thought and practice."⁸³ Christians, he argues, are in a "particularly difficult" position: recovering a sense of Christian distinctiveness requires an effort that includes withdrawing from culture in some respects; yet Christian faith requires social engagement for the common

76. *Id.* at 433.

77. Powell, *supra* note 22, at 73-74.

78. *Id.* at 77.

79. *Id.*

80. *Id.*; see also *id.* at 77 n.8 ("Now those historians judged it a part of honourable freedom not to keep silence about the evils of their country, which in many places they have been constrained to praise in terms of the highest eulogy, since they have not another City which is a truer one than theirs, one whose citizens are chosen for eternity?") (quoting AUGUSTINE, *THE CITY OF GOD*, Book III, Chapter 17).

81. *Id.* at 83-87.

82. *Id.*

83. *Id.* at 73.

good.⁸⁴ Nevertheless, he attempts to draw on Augustinian theology to construct an avenue for social critique that accommodates social engagement while attempting to avoid either the uncritical celebration or social nihilism that beset classical critics of Roman society.

The starting point for Powell's critical enterprise is the theological truth that human beings are creatures designed to find their fulfillment in fellowship with God. The inherent self-insufficiency of the human condition is further complicated by human sinfulness.⁸⁵ The problem of political ordering is thus "inextricably linked with the fundamental issue of what it is to be a creature animated by desire, whose characteristic marks are lack and hunger, who is made to be *this* kind of creature by a central and unforgettable absence, by lack and hunger."⁸⁶ Human politics is thus "constituted around the reality of what actual human beings love, of how they respond to their creaturely and fallen lack and hunger."⁸⁷

These premises lead Powell to a critical methodology, which he summarizes as follows: "The primary question to be asked . . . concerns the character of the society The society's underlying nature will be shaped and revealed by the human needs that it identifies and the manner in which it seeks to fulfill them"⁸⁸ The critic will then ask about the extent to which "society's forms and institutions actually achieve temporal peace, avoid violence, relieve suffering, and achieve justice: In asking this second question, the Augustinian critic will take care to avoid either uncritical acceptance of the society's pretensions or pseudocritical assumptions about its moral bankruptcy."⁸⁹ Powell employs this methodology to conclude, for example, that while there is considerable validity to critiques of "rights talk," such critiques may be insufficiently radical in that they assume that some adjustment to the employment of rights discourse will put America "back on" the right course.⁹⁰ But, if American society is fundamentally oriented toward a "shared commitment to individual acquisition and 'self-actualization,'"⁹¹ Powell argues that "[t]hose who seek a refuge from excessive individualism in . . . shared values . . . will find only that from which they are fleeing."⁹² Moreover, such critics may underestimate the degree to which "the language of individual rights is . . . the most effective means . . . of raising questions about social justice and social peace."⁹³

84. *Id.* at 73-74.

85. *Id.* at 78. Powell defines human sinfulness as "that primal and pervasive disorientation [i.e., away from God] of human existence." *Id.*

86. *Id.* (quoting Rowan Williams, *Politics and the Soul: A Reading of the "City of God,"* 19/20 MILLTOWN STUDIES 55, 69 (1987)).

87. *Id.*

88. *Id.* at 82.

89. *Id.* at 83.

90. *Id.* at 84-85.

91. *Id.* at 85.

92. *Id.*

93. *Id.* at 86. Powell offers perhaps surprising appraisals of proposed solutions to the problems of excessive government centralization and the removal of religion from political life. Rejecting subsidiarity as a valid theological principle, he argues that no particular governmental structure "has any *a priori* claim to Christian support." *Id.* at 89-90. As a result, the question of whether greater power should be

As noted above, Part III of *CPLT* provides examples of Christian perspectives keyed to various doctrinal subjects of law. As is the case in any similar collection, the quality of the essays varies. Nevertheless, as a group, they lend credence to the idea that Christian perspectives may make important contributions to legal thought. Joseph Allegretti's contribution, *Can Legal Ethics Be Christian?*,⁹⁴ asks whether legal ethics has any need for religion and whether it is "possible to talk about a Christian legal ethics."⁹⁵ Allegretti examines the relationship between Christian teaching and legal ethics. Borrowing from Daniel Callahan, he argues that legal ethics needs religion because: (1) religion is an important source of societal wisdom; (2) ethical discourse becomes too "legalistic" when religion is neglected; (3) ethics involve the development not only of rules, but also of character and virtue; and (4) religion can provide perspective from which to question the status quo.⁹⁶ Christian faith, moreover, contributes distinctively to legal ethics by providing a specific motivation for ethical conduct and shifting the focus "away from rules and problems to broader questions of personhood and virtue."⁹⁷ Allegretti argues that this shift likewise is suggestive of a more narrative approach to legal ethics teaching.⁹⁸ Finally, Allegretti argues that Christianity provides distinctive points of reference to guide moral choices.⁹⁹

Allegretti's contribution is recognizably Christian, but not necessarily distinctively so. The first part of his essay focuses on the values of "religion" and draws on an Aristotelian virtue-ethics critique of rule-based analysis.¹⁰⁰ He concludes by cautioning that Christian principles "do not eliminate the need for moral reflection, but they do provide a starting point, as well as a kind of trajectory, for our moral deliberations."¹⁰¹ However useful Allegretti's essay may be for alerting Christians that "our character and values may put us into conflict with the norms and values of the wider community, including the legal profession,"¹⁰² it leaves unaddressed the relevance of Christian thinking about appropriate lawyering within the liberal, pluralistic world that lawyers inhabit. Christian ethics may be relevant to lawyers, but how is it relevant to law (or, more precisely, to the Model Rules)?¹⁰³

devolved to the states is "strategic or prudential." *Id.* at 90. Given recent history with habeas corpus litigation and welfare reform, he argues that in the current context, national power may have important advantages over state power. *Id.* at 89-90. He also argues against expressions of "civic religion" by public officials. *Id.* at 91.

94. Joseph G. Allegretti, *Can Legal Ethics Be Christian?*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 453, 453.

95. *Id.*

96. *Id.* at 454-58.

97. *Id.* at 461.

98. *Id.* at 462-64.

99. *Id.* at 464-69 (citing JAMES M. GUSTAFSON, *CAN ETHICS BE CHRISTIAN?* (1975)).

100. *Id.* at 454-58.

101. *Id.* at 465.

102. *Id.* at 462.

103. For Allegretti's more developed work on these topics, see generally JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING* (1996).

Catherine McCauliff's essay, *A Historical Perspective on Anglo-American Contract Law*,¹⁰⁴ argues that "[t]he Christian tradition demands that contract law, like all law in society, be viewed from the focal point of justice."¹⁰⁵ McCauliff provides an informative, historical explanation of the relationship between contract law and Christian theological concepts; but again, one wishes for more specificity about the relationship between specifically Christian norms of justice and contract law.¹⁰⁶ Is it as simple as placing liability on the party that overreached the most?¹⁰⁷ How does natural law theory (which McCauliff invokes) recognize a place for predictability and settled rules?

John Witte, Jr.'s excellent essay, *God's Joust, God's Justice: An Illustration from the History of Marriage Law*,¹⁰⁸ begins by affirming the Christian legal historian's vocation, which Witte argues is "to try to seek God's revelation and judgment over time without presuming the power of divine judgment."¹⁰⁹ Although "[m]uch of what we see in our collective lives comprises the sinful and savage excesses of corrupt creatures," yet "there is simply too much order in our world, too much constancy in our habits, too much justice in our norms for us to think that the course of human events is not somehow channeled by God's providential plan."¹¹⁰

The essay historically reconstructs what Witte argues are the four main Western perspectives on marriage and the family. In legal and social conceptualizations of the marriage relationship, priority has sometimes been given to the *spiritual* aspect of marriage, in which marriage is seen "as a religious or sacramental association, subject to the creed, code, cult, and canons of the religious community."¹¹¹ At other times, pride of place has been given to marriage as a *social* estate or a voluntary association (a *contractual* perspective).¹¹² Finally, marriage is sometimes

104. C.M.A. McCauliff, *A Historical Perspective on Anglo-American Contract Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 470.

105. *Id.* at 470. McCauliff defines justice in the Christian tradition as "a complex tapestry of principles woven from many historical periods — classical antiquity, medieval Christendom, the Reformation, the Enlightenment, and our own period." *Id.*

106. Even so, McCauliff deserves credit for putting the ideal of justice on the table in the face of contemporary skepticism. In the Foreword to *CPLT*, Harold Berman tells the following story about his last law school class at Yale in the 1940s:

[I]t was in June 1947 . . . when Professor Eugene Rostow, in the course in corporate finance, somehow brought the discussion around to the day's news of the failure of a South Carolina grand jury to indict persons charged with carrying out the lynching of a black man, though the evidence against them was overwhelming. "Is that justice?" Professor Rostow asked. "What *is* justice?" I remember it particularly because it was the first time the word *justice* had been mentioned in any of the courses I had taken during three years of law study.

Harold Berman, *Foreword*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at xi, xi-xii.

107. I am indebted to David Vernon for this phrase.

108. John Witte, Jr., *God's Joust, God's Justice: An Illustration from the History of Marriage Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 406.

109. *Id.* at 409.

110. *Id.* at 408-09.

111. *Id.* at 411.

112. *Id.* ("A social perspective treats the family as a social estate, subject to special state laws of

regarded in a *naturalist* perspective "that treats the family as a created or natural institution, subject to natural laws."¹¹³ Witte argues that although these perspectives are complementary, they "have also come to stand in considerable tension, . . . for they are linked to competing claims of ultimate authority over the form and function of marriage."¹¹⁴

The body of Witte's essay traces the initial primacy of the Catholic emphasis on marriage's spiritual or sacramental nature prior to the sixteenth century, the dominance of Catholic and Protestant models (either as a hybrid or separately) between the sixteenth and nineteenth century, and the emergence of an Enlightenment (contractually oriented) perspective in the nineteenth century.¹¹⁵ Witte's articulation of the theology and anthropology implicit in the now-prevailing Enlightenment visions of marriage is helpful not only in understanding the trends toward privatization in modern marriage and family law, but also its intellectual roots. While "[t]he achievements of the Enlightenment in reforming the traditional theology and law of marriage cannot be lost on us," Witte argues that "we must resist the temptation to reduce marriage to a single perspective, or to a single forum."¹¹⁶ He states that

[b]oth Catholic and Protestant traditions have seen that a marriage is at once a natural, religious, social, and contractual unit; that in order to survive and flourish, this institution must be governed both externally by legal authorities and internally by moral authorities. From different perspectives, these traditions have seen that marriage is an inherently communal enterprise, in which marital couples, magistrates, and ministers must all inevitably cooperate. After all, marital contracts are of little value without courts to enforce them. Marital properties are of little use without laws to protect them. Marital laws are of little consequence without canons to inspire them. Marital customs are of little cogency without natural narratives to ground them.¹¹⁷

Part of the significance of Witte's contribution is the careful attention he devotes to law and history. Although his scholarship is theologically sensitive and clearly reflects his worldview, Witte's primary focus is on learning about law and history.

In a similar vein, Robert Cochran's essay, *Tort Law and Intermediate Communities*,¹¹⁸ illustrates how theologically sensitive scholarship can illuminate traditional legal doctrine. Cochran begins by noting the place of "intermediate

contract, property, and inheritance and to the expectations and exactions of the local community. A contractual perspective describes the family as a voluntary association, subject to the wills and preferences of the couple, their children, their dependents, their household.").

113. *Id.*

114. *Id.*

115. *Id.* at 412-20.

116. *Id.* at 421.

117. *Id.*

118. Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 486.

communities" in both Calvinist and Catholic thought.¹¹⁹ He then notes that these communities point to little-noticed pockets of tort law that are exceptional in that they are not aimed at individual conduct. Thus, he observes, intermediate communities have traditionally received special protection (though decreasingly so) through various immunities, and they are becoming the object of judicially imposed duties to act affirmatively to protect individual welfare.¹²⁰ He then argues that policy makers should be more aware of the ways in which tort law can needlessly impair the flourishing of intermediate communities.¹²¹

The selections in *CPLT* dealing with conventional legal subjects display similar strengths and suffer from similar weaknesses. The essays are, in general, worthwhile in that they offer an evaluation of the subject area from a recognizably Christian perspective. The main weakness in these contributions is their failure to articulate a faith-informed understanding of the role of law and its relationship to Christian ethics. As the next section of this review explains, this weakness is not surprising.

III. Recovering Christian Legal Thought

If one goal of *CPLT* is to open the way for legal scholarship that is specifically informed by Christian faith, another is certainly to provide a background resource for law students and scholars. Indeed, *CPLT* will be of use to Christian scholars and law students regardless of whether Christian legal scholarship becomes an accepted feature of the academic mainstream. Christian law students are often baffled as they attempt to relate what they learn in law school to a Christian worldview. If my own experience in law school is representative, most law students have never heard any of their law teachers identify themselves as Christians, much less heard any of them make an argument about law that depended overtly on faith-based presuppositions about the world.¹²² Nor, for the most part, are the presuppositions underlying classroom approaches to legal thinking often considered with sufficient specificity for students to identify points of convergence or departure with respect to their own thinking.

CPLT is thus likely to be quite useful to law students and scholars in positioning contemporary legal thought relative to Christian faith. As already noted, this "positioning" occurs along two dimensions. Part I of *CPLT* considers contemporary jurisprudential movements such as liberalism, law and economics, critical legal studies, feminism, and critical race theory from Christian perspectives. Part II is an effort to assist Christian scholars in recovering the long history of Christian reflection on law and politics.

119. *Id.* at 487-90. Intermediate communities are "the families, religious congregations, and other associations that stand between the individual and the state." *Id.* at 486.

120. *Id.* at 493-96.

121. *Id.* at 496-504.

122. This is not to say that law professors do not regularly make arguments that rest upon controversial fundamental presuppositions or, perhaps unwittingly, presuppose that the world has a given order and intelligibility.

The essays in Part II of *CPLT* are organized around the taxonomy of the relationship between culture and Christian faith developed by Richard Niebuhr in his well-known 1951 book *Christ and Culture*.¹²³ Niebuhr divided the various Christian traditions' perspectives as follows: Christ above culture (synthesists),¹²⁴ Christ transforming culture (conversionists), Christ against culture (separatists), Christ and culture in paradox (dualists), and the Christ of culture (culturalists).¹²⁵ *CPLT*'s editors have used Niebuhr's taxonomy to arrange the essays in a way that summarizes some of the key differences and similarities between Catholic (synthesist), Calvinist (conversionist), Baptist and Anabaptist (separatist), and Lutheran (dualist) views of the relationship between Christianity and law or church and state.¹²⁶

The essays in Part II are likely to be quite helpful to the reader who needs an introduction to Christian political theology. Most of these essays provide a systematic and well-executed, if rudimentary, overview of the political theology of each writer's faith tradition.¹²⁷ Unfortunately, a twenty-page essay cannot both introduce the reader to centuries of a particular tradition's theological reflections on law and politics and also engage important features of the contemporary jurisprudential landscape.

123. H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951). Niebuhr's taxonomy is probably the best known, but it has its competitors. See, e.g., A. JAMES REICHEL, *RELIGION IN AMERICAN PUBLIC LIFE* 9-52 (1985). It also has its critics. See, e.g., STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS* 39-43 (1989) (arguing that Niebuhr's taxonomy creates a "false . . . dilemma of whether to be in or out of the world, politically responsible or introspectively irresponsible"). In a similar, though less openly critical vein, Robert Cochran seeks to reconcile Niebuhr's various perspectives. See Robert F. Cochran, Jr., *Christian Traditions, Culture and Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 242, 250-52.

124. Robert Cochran describes this viewpoint as "Christ plus culture" because, in his view, Niebuhr's label "is too easily misunderstood as one of Christ controlling culture." Cochran, *supra* note 123, at 243. The terminology may make more sense to readers if they substitute "Christian faith" for "Christ."

125. See NIEBUHR, *supra* note 123.

126. There is no separate contribution representing Niebuhr's fifth category (culturalist) because Niebuhr thought that a culturalist would presumably have nothing special to say about a given culture's law, politics, or culture. See Cochran, *supra* note 123, at 248. *But see* Berman, *supra* note 106, at xiii ("Can we not say that God has revealed Himself in existing legal institutions, and that he continues to reveal Himself in the development of those institutions, insofar as they reflect justice and mercy and good faith?").

127. See, e.g., Gerard V. Bradley, *Natural Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 277 (Catholic natural law theory); Angela C. Carmella, *A Catholic View of Law and Justice*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 255-76 (Catholic social teaching); Caudill, *supra* note 42 (Dutch Calvinist legal philosophy); Timothy L. Hall, *"Incendiaries of Commonwealths": Baptists and Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 340 (Baptist political theology); David M. Smolin, *A House Divided?: Anabaptist and Lutheran Perspectives on the Sword*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 370 (Anabaptist and Lutheran perspectives). Other essays in Part II focus more narrowly. See Marie A. Failing & Patrick R. Keifert, *Making Our Home in the Works of God: Lutherans on the Civil Use of the Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 386; Hamilton, *supra* note 65; Thomas L. Shaffer, *The Radical Reformation and the Jurisprudence of Forgiveness*, in *CHRISTIAN PERSPECTIVES*, *supra* note 6, at 321.

Indeed, more than any other section in the book, this section evidences the marginalization of Christian belief in academic discourse during the past century. The average law student or professor may be expected to know something about economic analysis, liberal political theory, feminism, or postmodern theories of interpretation, but is likely to know next to nothing about Christian theology, even key elements in his own religious tradition.¹²⁸ These essays will help fill that gap and also provide a general roadmap for deeper investigation.

The bad news for Christian legal scholars (and the good news) is that a vast amount of work remains. To live in modern America, especially to live in the circles that tend to produce law students and law professors, is to live with a deep indoctrination into particular ways of thinking about the world, ways of thinking that for all their diversity nevertheless have in common an indebtedness to both secularism and liberalism. The process of recovering the heritage of Christian thinking is important not because there is some golden age of Christian thought to which one ought to return, but rather because modern minds — modern Christian minds — are unpracticed at thinking about "worldly" matters in such a way as to take God's existence seriously.¹²⁹

Indeed, some of the essays in *CPLT* that purport to consider contemporary legal movements from a Christian perspective display more intellectual indebtedness to the relevant modern (or postmodern) movement than to Christian belief. Stephen Bainbridge, for example, in a spirited defense of the law and economics movement, acknowledges the moral force of the standard objections to the use of economic theory in policymaking.¹³⁰ He nevertheless argues vigorously that "legal institutions are more effective when they promote wealth maximization than when promoting wealth redistribution."¹³¹ Although Bainbridge buttresses his argument briefly with a Calvinist defense of the limited state,¹³² his main argument is prudential: the problems of incorporating "Other Justice" norms in the legal process are simply too great, whether we introduce such norms as external values that judges may consider in the judicial process or we incorporate such norms as part of a broadened welfare-economics approach.¹³³

Burlette Carter's essay on critical race theory is also, at least by appearances, more influenced by critical race theory than by theology. Carter uses theological sources in two ways. First, based upon a topical survey of articles in law journals

128. For an insightful explanation of why this is particularly likely to be true of evangelicals, see MARK A. NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* (1994).

129. Two recent and particularly important attempts at recovering distinctively theological perspectives are MILBANK, *supra* note 14, and OLIVER O'DONOVAN, *THE DESIRE OF THE NATIONS* (1996).

130. Bainbridge, *supra* note 21, at 209.

131. *Id.* at 213.

132. *Id.* at 214-15.

133. *Id.* at 213-14. Bainbridge argues that legislatures are better equipped than courts to make decisions about wealth distribution, and that welfare economics cannot be broadened to take account of "Other Justice" norms without being rendered overly indeterminate. *Id.* His essay also includes a sophisticated economic and theological defense of rational choice theory. *See id.* at 216-23. No doubt, Professor Bainbridge would also argue that prudence and theology are not necessarily enemies.

and in theology journals, she finds that both sources ignored or downplayed race issues prior to the hiring of African-American faculty members.¹³⁴ The significance of these patterns for Carter is that many writers have defined what counts as important scholarship according to white standards.¹³⁵

She next draws on the commandment to "Love your neighbor as yourself"¹³⁶ and Jesus' exposition of it in the parable of the Good Samaritan¹³⁷ to "connect [her comments on race] to the concept of Christian love."¹³⁸ For Carter, "get[ting] on with the business of being Good Samaritans" means, "in legal terms, to arrive at a true vision of equality under the law."¹³⁹ To do this, "we need a broader understanding of how group prejudice operates in our lives."¹⁴⁰ Regrettably, Carter does not elaborate on the theological basis for these jurisprudential conclusions; they are presented as self-evident truths. Less controversially (perhaps because the parable's application to personal conduct is more straightforward), she concludes that "[w]ithout denying the reality of race in America, . . . we must learn to celebrate the heroes who every day violate group injunctions by shuttling acts of kindness across racial lines."¹⁴¹

Conclusion: The Future of Christian Legal Scholarship

As this review suggests, *CPLT's* editors and contributors have done Christian lawyers, law students, and academics a great service in being courageous enough to speak openly about some of the implications of faith for legal discourse. *CPLT's* efforts to promote the recovery of Christian thinking about law are likely to be immensely helpful to many within the American legal community. Moreover, the essays set a generally high standard for responsible faith-based scholarship. It may be inevitable that perspectival scholarship (i.e., all scholarship) will sometimes seem inaccessible or even incomprehensible to particular listeners in a particular scholarly

134. Carter, *supra* note 20, at 136-42.

135. Carter states that

white writers wrote from their own racial perspective, and in their experience, racism directed against people of color, though perhaps intellectually disturbing, had no perceived direct negative effects on their lives. Perhaps the benefits of racism for the white majority made the pain it brought to victims' lives difficult to see or easy to rationalize; perhaps the widespread acceptance of dominant modes of scholarly discourse among whites rendered challenging those modes too lonely a course. Thus the fact of these writers' whiteness determined what subjects did and did not receive the benefits of their efforts and, moreover, what approaches they would take in their work. This principle seems to hold true whether or not these writers actually ever consciously thought a single racist thought — in other words, the principle is true irrespective of whether they individually harbored any specific racist intent.

Id. at 142-43.

136. *Matthew* 22:39 (NIV).

137. *Luke* 10:25-37 (NIV).

138. Carter, *supra* note 20, at 135.

139. *Id.* at 147.

140. *Id.*

141. *Id.* at 148.

community at a particular time, but we should certainly not regard this necessity as a virtue. And, indeed, inaccessibility is all the more to be lamented if nothing in particular has been added to the relevant discipline at the end of the day. *CPLT's* contributors deserve credit for their concern on these fronts.

That said, *CPLT* also raises a number of paradoxes that confront Christian scholars. The first relates to the relationship between Christian faith and the general demise of Enlightenment epistemologies. Christians ought to be delighted about postmodernity's easing of Enlightenment entry barriers into academic discourse,¹⁴² and they may also find other aspects of postmodern thought worthy of approval. Because Christianity begins with the presupposition that human beings are finite creatures whose reason is not only limited but also affected by moral fallenness, Christian scholars may readily concede that mere mortals lack the objectivity attributed to them by the Enlightenment. They may also appreciate other aspects of some postmodern writers' work, such as its concern for justice for the oppressed and the abuse of power relations.¹⁴³

Nevertheless, as Alan Jacobs has noted, "as common ground goes, . . . an anti-Enlightenment view of rationality doesn't constitute a particularly expansive patch."¹⁴⁴ It would be ironic were Christianity to shed its second-class status in the academic world because of the triumph of new ideologies purporting to welcome¹⁴⁵ a great variety of perspectives only because these new ideologies generally agree that no perspective can possibly be true. Christians may thus find themselves between two worlds — finding common ground with scholars of other persuasions who are interested in discovering "the way things are," while simultaneously affirming that humans do not possess the capacity for objective description.¹⁴⁶

142. See Diogenes Allen, *The End of the Modern World*, 22 *CHRISTIAN SCHOLAR'S REV.* 339 (1993).

143. As Alvin Plantinga has written:

For example, postmoderns typically reject classical foundationalism, which has also been rejected . . . in anticipatory fashion by Augustine, Aquinas, Calvin, and Edwards. . . . Many other themes of postmodernism can elicit only enthusiastic applause from a Christian perspective: one thinks of sympathy and compassion for the poor and oppressed, the strong sense of outrage at some of the injustices our world displays, celebration of diversity, and the 'unmasking' of prejudice, oppression, and power-seeking masquerading as self-evident moral principle and the dictates of sweet reason. Another theme on which Christian and postmodern can heartily agree is the way in which, even in the best of us, our vision of what is right and wrong, true or false, is often clouded and covered over by self-interest. True, postmoderns tend to see these beams in the eyes of others, not in their own; but in this they don't differ from the rest of us, including Christians.

PLANTINGA, *supra* note 39, at 423-24.

144. Alan Jacobs, *A Tale of Two Stanleys*, *FIRST THINGS*, June 1994, at 18, 19.

145. One might question whether such a stance would be welcoming or merely patronizing.

146. George Marsden argues that

Christians and other believers who reject the dominant naturalistic biases in the academy would be foolish to do so in the name of postmodern relativism. What they should be arguing is that the contemporary academy *on its own terms* has no consistent grounds for rejecting all religious perspectives. If postmodernists who denounce scientific objectivism as an illusion are well accepted in the contemporary academy, there is little justification for the same academy to continue to suppress religious perspectives because they are "unscientific." Christians, however, need to challenge relativistic postmodern anti-realist naturalism just as much as the older objectivist naturalism. Both these parties start with

A second paradox relates to the role of belief disclosure in legal scholarship. As noted above, one of the recurring themes in *CPLT* is that all scholarship is perspectival.¹⁴⁷ One of the arguments found in *CPLT* is that disclosure of underlying philosophical presuppositions can facilitate scholarly communication.¹⁴⁸ But, it is also true that, as a practical matter, belief disclosure can sometimes impede deliberation. It is important to understand, for example, the relationship between one's worldview and liberal democratic institutions. Liberal democratic institutions, however, can be (and are) taken for granted in American political life without the necessity of agreeing on a theoretical account of their origins and virtues.¹⁴⁹ A similar observation may be made about everyday legal discourse. A wide variety of scholars may be able to affirm common principles (e.g., "courts should interpret statutes in accordance with theory *x*"; "we should not waste resources"; "power relations affect a society's conception of what counts as 'neutrality' or 'fairness'") without raising the rhetorical stakes by seeking agreement at a deeper level. This sort of discourse is presumably an everyday feature of academic and political life, whether the discussion is between a Kantian liberal and a Posnerian pragmatist or a Presbyterian Christian and an Orthodox Jew. Speakers must make practical judgments about when to press underlying disagreements, and these judgments will vary according to the objectives being pursued.

Finally, *CPLT*'s editors have rightly argued that there are a number of reasons why people who are not Christians ought to be interested in *CPLT* and in scholarship by Christians and other people of faith. The editors were appropriately concerned with demonstrating the potential relevance of Christian legal scholarship and attempting to dispel expectations that it would be a simplistic, univocal, right-wing enterprise. Paradoxically, however, the most important contribution most Christian scholars could currently make to the church and the academy may turn out to be doing scholarship that seems "uninteresting" or "irrelevant" to some. Again, obscurity is not something to be sought for its own sake. But, if Christian perspectives are to provide a distinctive voice, Christian scholars must have a theologically informed understanding of the relationship between Christian faith and the structure of the most important currents of contemporary thought. Recognizably Christian voices have been in such short supply for so long that gaining such an understanding is a daunting task, especially given that their education (legal and otherwise) will often provide Christian scholars with little assistance in this task. Unless this hard work is done, Christian

purely naturalistic assumptions and make these normative for good scholarship. Christians need to challenge these assumptions and to suggest that scholarship might just as responsibly take place within the framework of the assumptions that God has created an ordered reality. Far from being relativistic, this is a claim that our experience makes best sense if we realize that we are in a universe of truths sustained by God, even if humans can glimpse these truths only imperfectly.

MARSDEN, *supra* note 8, at 30-31.

147. See *supra* Part I.A.

148. See Caudill, *supra* note 24, at 111-12.

149. Differences about their origins and virtues will shape the specific arrangements that scholars will advocate.

scholarship will merely be a "baptized" version of some other (more influential) strand of legal analysis.¹⁵⁰

Another way of making this point is to say that what is badly needed are rigorous accounts of the relevance of various Christian traditions to some of the main questions confronting legal analysis — works that would help Christians develop coherent internal perspectives about law from which they could comment more generally. Part II of *CPLT* provides some helpful gestures in this direction, but there are relatively few contemporary works,¹⁵¹ apart from those written by Catholic natural law scholars,¹⁵² that systematically address key questions of jurisprudence such as authority, legitimacy, obligation, rights, and consequentialism. As a result, Christian scholars tend to "borrow," perhaps unconsciously, key elements of systems whose presuppositions may sometimes be quite foreign to the writer's own explicit faith commitment. Producing works that analyze these foundational questions is a critical first step if a more meaningful Christian jurisprudence of contracts, torts, or administrative law is to materialize.

Indeed, in my judgment, part of the considerable service *CPLT* has done in opening the conversation about Christian legal scholarship is to suggest the possibility of future scholarship that is influenced even more profoundly by Christian faith. God has been dead in the legal academy for so long that it may take some doing to remember that He is there.

150. At the end of the day, people of faith will necessarily be part of various "parties" within the academic community. See *NO GOD BUT GOD* (Os Guinness & John Seel eds., 1992).

151. One might cite works of Harold Berman, Stephen Carter, Jefferson Powell, and Thomas Shaffer, among others, as notable counterexamples.

152. The most obvious example is FINNIS, *supra* note 14.

