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# Theory, Identity, Vocation: Three Models of Christian Legal Scholarship

William S. Brewbaker III \*

*"A person either has character or he invents a method."*<sup>1</sup>

## I. INTRODUCTION

Recognizably Christian legal scholarship is becoming more commonplace in the American legal academy. Whereas it was formerly visible only (and only occasionally) in the law reviews of Catholic law schools with a traditionalist bent, in a handful of evangelically-affiliated schools, and in the popular press, today a not insignificant number of academics are writing about law from a consciously Christian perspective. The Law Professors' Christian Fellowship and The Lumen Christi Institute host a well-attended annual conference at which scholarly papers are presented, and which has eventuated in a Yale-published anthology entitled *Christian Perspectives on Legal Thought*.<sup>2</sup> While the movement does not yet rival in organizational structure (much less in influence) the various iterations of the Critical Legal Studies or Law and Economics movements, there is nevertheless a sense among the participants that something like a movement is afoot.

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\* Professor of Law, University of Alabama. For helpful comments on earlier versions of this paper, I am indebted to Alfred Brophy, Susan Hamill, Jeff Powell, Scott Pryor, Austin Sarat, David Skeel, Shane Tintle, and participants at presentations at Regent Law School and at the 2001 annual meeting of the Law Professors' Christian Fellowship. I am also grateful to Caroline Barge for secretarial assistance and Jeff Galle for research assistance. Special thanks are due to Dean Ken Randall and the University of Alabama Law School Foundation for generous research support.

<sup>1</sup> The quotation is unattributed and appears within a longer quotation from Hans Frei in MICHAEL S. HORTON, COVENANT AND ESCHATOLOGY: THE DIVINE DRAMA 1 (2002).

<sup>2</sup> CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran Jr. & Angela C. Carmella eds., 2001).

Perhaps surprisingly, however, relatively little systematic attention<sup>3</sup> has been given to the questions: What, exactly, is Christian legal scholarship? What makes Christian legal scholarship distinctive? What is the point of talking about law from a specifically Christian vantage point? What is to be accomplished? How does Christian legal thought relate to other approaches to law?

There are no doubt many reasons why so much work remains to be done on these questions,<sup>4</sup> but a contributing factor surely has been Christian legal scholars' somewhat uncritical adoption of contemporary attitudes toward the enterprise of human learning and knowing. Christian scholars have sometimes acted as if they believed that human beings could attain godlike knowledge, assuming a posture of transcendence over and above the world rather than of participation within it. In this Article, I will attempt to outline some of the main things the Christian tradition has had to say about human knowing and use those insights as a jumping-off point to analyze where contemporary Christian legal scholarship has gone right and wrong.

This Article is organized around three possible models of Christian legal scholarship: *theory*, *identity*, and *vocation*. These models are intended to describe overall patterns of legal scholarship rather than hermetically-sealed methodological approaches. A given work of scholarship might well (indeed, probably usually does) include elements of all three approaches.

Scholarship built around what I shall refer to as a *theory* model takes propositions about reality that Christians hold as true, especially theological propositions, and uses them to generate legal rules or

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<sup>3</sup> But see HAROLD J. BERMAN, *Toward an Integrative Jurisprudence: Politics, Morality, History*, in FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 289, 289–310 (1993); CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 2 (especially entries by Robert F. Cochran, Jr., John Nagle, David S. Caudill, and John Witte, Jr.); David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 EMORY L.J. 1471, 1504 (2008) (defining Christian legal scholarship as scholarship that satisfies two criteria: “First, it must provide either a normative theory derived from Christian scripture or tradition or a descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity. . . . Second, it must seriously engage the best secular scholarship treating the same issues.”) (footnote omitted); William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003).

<sup>4</sup> Some of the reasons for this absence might be the relatively small number of scholars doing this work, the relatively brief period (of the modern era) during which it has been done, and the fact that more general works on Christian scholarship are available. See, e.g., GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* (1997).

theories about law.<sup>5</sup> On this model, Christian doctrine occupies some of the same conceptual space that, say, John Rawls's or Immanuel Kant's thought might occupy in the mind of a liberal legal scholar or Jeremy Bentham's or John Austin's thought might occupy in the mind of a utilitarian. Basic principles of Christianity are used to help generate a model of law or perhaps even specific legal rules. In its strongest form, *theory* is a largely top-down enterprise. The main weakness of this approach is that it can leave insufficient place for disagreement on legal and political arrangements and degenerate into theologically unwarranted claims about what God requires of the legal system.

An *identity* model of Christian legal scholarship follows the lead of postmodern critics of the Enlightenment in asserting that reason and objectivity are not neutral, self-defining ideas. It joins such critics in challenging the power structure of the legal academy and other institutions that systematically exclude Christian viewpoints. Knowledge, it argues, is not only situated according to race, gender, class, and culture, but is also situated with respect to other factors, especially including religious belief (broadly defined to include secular worldviews that occupy the same conceptual space as religious doctrine),<sup>6</sup> sin,<sup>7</sup> or membership in a particular faith community.<sup>8</sup> While the *identity* model's besetting temptation is undue skepticism and nihilism, it nevertheless helpfully calls attention to particulars of the Christian narrative that might help explain human legal practices. The model also frames human law in a particular historical perspective that is at odds with both modernity's undue epistemological optimism and postmodern despair.

Instead of starting with theology or Christians' group identity, a *vocation* model of Christian legal scholarship emphasizes the various relationships in which the scholar finds himself (with God, the church, and the larger human community), the importance of God's activity in creating and sustaining the world, and the importance of

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<sup>5</sup> Such theories may be either normative or descriptive, although the idea of a Christian descriptive theory of law is highly suggestive as to the limitations of the normative / descriptive distinction.

<sup>6</sup> See *infra* text accompanying notes 91–94.

<sup>7</sup> See *infra* text accompanying notes 32–63 (discussing sin / rebellion against God and self-interest as situating legal knowledge).

<sup>8</sup> One might also argue that knowledge is morally situated; the universal human tendency to rebel against God and his will leads all human beings at points to reject knowledge that we ought to accept. See *Romans* 1:18 (New International) (teaching that human beings “suppress the truth by their wickedness”); see also ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. II-I, Q. 94, arts. 4, 6 (concerning obstacles to human apprehension of natural law).

studying not just the Bible or theology but also the created order itself. In this view, the scholar sees law as part of God's created order and his or her work as a God-given calling of service to the church and the world.<sup>9</sup> Legal scholarship is one of many *human* callings, and the scholar aims to please God by carrying out this normal human activity in a spirit of faithfulness. In order to know what pleases God, the scholar will, of course, need to study the Scriptures and theology—he will need the church. But the scholar will also need to study God's creation, including not only the world God has made directly, but also those relevant human institutions that, in God's providence, inhabit it. Scholarship is a communal endeavor, and the relevant community for the Christian legal scholar is broader than the church. On this view, there is no reason to prescribe a uniform methodology for Christian legal scholars, nor should we always expect widespread agreement among Christians on contestable legal issues.

As noted earlier, the main contribution I hope to make is to show how Christian legal scholarship has sometimes been inappropriately conditioned by contemporary assumptions about human knowing and learning. I thus begin by offering in Part II a rather rudimentary theological account of human knowledge as a corrective to these assumptions. Parts III, IV, and V then consider the *theory*, *identity*, and *vocation* models in turn. Contrary to the expectations generated by contemporary political debate, the distinctive contribution of Christian legal scholarship is not primarily to provide ammunition for political programs of the right or the left, but rather to situate law and human legal practices within a larger story about the world.

I recognize that the theological claims made in this paper are controversial and may be jarring for some readers. Nevertheless, rather than repeatedly saying "Christians believe," "the Bible teaches," or other similar language, I have, by-and-large, omitted these qualifiers in the discussion that follows.

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<sup>9</sup> "The whole vast range of human civilization is neither the spectacle of the arbitrary aberrations of an evolutionary freak nor the inspiring panorama of the creative achievements of the autonomous Self; it is rather a display of the marvelous wisdom of God in creation and the profound meaningfulness of our task in the world." ALBERT M. WOLTERS, CREATION REGAINED 38 (1985).

## II. HUMAN KNOWLEDGE AS PARTICIPATION

A. *Against Transcendence*

The point of being human is to glorify God and enjoy him forever.<sup>10</sup> This simple statement is full of implications for the projects of human knowing and learning, whether that knowing be about the law or anything else. It presupposes that God exists, that he is good, that he is separate from us, that we live our lives in relation to him and in dependence on him, and that we are free in the sense that it is not inevitable that we will either glorify God or enjoy him. All of human life, including human knowing, is thus intended to be a matter of human delight in God's good gifts that issues forth in grateful obedience.<sup>11</sup>

Human beings, then, are not autonomous, and because they are not autonomous, neither is human knowledge.<sup>12</sup> Indeed, knowledge is attained not by transcending the created order but by participating in it.<sup>13</sup> The distinction between knowledge by transcendence and knowledge by participation is critical to understanding the characteristic intellectual errors of modernity. Moderns have tended to equate

<sup>10</sup> Westminster Shorter Catechism, Q. 1.

<sup>11</sup> One can see the two aspects of life—delight and obedience—emphasized, respectively, in Nicholas Wolterstorff's claim that the generic telos of human endeavor (including knowledge) is shalom, and in Alister McGrath's adoption of the more traditional connection between knowledge and the vision of God. See *infra* Part IV.

<sup>12</sup> Oliver O'Donovan goes so far as to summarize his account of human knowledge as knowledge "in Christ":

[K]nowledge . . . according to the Christian gospel, is given to us as we participate in the life of Jesus Christ. He is the point from which the whole is to be discerned, "in whom are hid all the treasures of wisdom and knowledge." He is the obedient man. And he is the one whose faithfulness to the created moral order was answered by God's deed of acceptance and vindication, so that the life of man within this order is not lost but assured for all time. True knowledge of the moral order is knowledge "in Christ."

OLIVER O'DONOVAN, *RESURRECTION AND MORAL ORDER* 85 (2d ed. 1994) (citing *Colossians* 2:3) (citation omitted). See also JOHN MURRAY, *REDEMPTION ACCOMPLISHED AND APPLIED* 161–73 (1955) (discussing union with Christ); RONALD S. WALLACE, *CALVIN'S DOCTRINE OF THE CHRISTIAN LIFE* 51–100 (Wipf & Stock 1997) (1959).

<sup>13</sup> See Kent Greenawalt, *Reflections on Christian Jurisprudence and Political Philosophy*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* 715, 720 (John Witte, Jr. & Frank S. Alexander eds., 2006) (discussing "participated authority"). One might also speak of knowledge as "created" knowledge perhaps coupled with "redeemed" knowledge. This formulation has the advantage of preserving roles for both God's saving grace and common grace in the noetic process. Participation has the benefit of reinforcing both the dependent and the active nature of human knowing, although it has been put to uses that have tended toward the overly metaphysical and universalist.

knowledge with transcendence and certainty, assuming implicitly that both were attainable. Once it became apparent that human beings could not meet these criteria, the characteristic responses have been either to carry on as though the optimistic epistemologies of the Enlightenment had not been discredited<sup>14</sup> or to abandon the possibility of truth and knowledge altogether.<sup>15</sup>

A better response would have been to reject both poles—modern hubris and postmodern despair—in favor of an account of knowing that recognizes both human capacity and human finitude and fallibility. As a concept, *participation* is suggestive both of the location of human beings within a larger relational order and of human agency in the face of that order. Aquinas uses the term in the intellectual context to make sense of the tension between the human capacity to know the world, on one hand, and the limitations of that capacity, on the other.<sup>16</sup> Without endorsing Aquinas's specific (and

<sup>14</sup> See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (1997). Farber and Sherry affirm that "objective knowledge" is "something more modest than eternal, unchanging truth, or what philosophers sometimes call the God's-eye view of the universe," but they nevertheless presume that knowledge is "universally accessible and objective." *Id.* at 27.

<sup>15</sup> See, e.g., *id.* at 15–33.

<sup>16</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 399–400 (1980).

The term *participatio* translates into . . . the significance of the supreme activation of human intelligence as a kind of sharing in God's self-understanding. . . . For Aquinas, the word *participatio* focally signifies two conjoined concepts, causality and similarity (or imitation). A quality that an entity or state of affairs has or includes is participated, in Aquinas's sense, if that quality is *caused by a similar* quality which some other entity or state of affairs has or includes in a more intrinsic or less dependent way.

Aquinas's notion of natural law as a participation of the Eternal Law is no more than a straightforward application of his general theory of the cause and operation of human understanding in any field of inquiry. His bases for inference are[, on one hand, the surprising and materially incommensurable] power of human insight and[, on the other] the imperfection of human intelligence. . . . Thus Aquinas follows Plato and Aristotle in postulating a "separate intellect" which has the power of understanding without imperfection, and which causes in us our own power of insight, the activation of our own individual intelligences—somewhat as a source of light activates in us our power of sight. He then relies explicitly on revelation . . . to identify the supposed "separate intellect" as God.

*Id.* (citing ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, Bk. III, Q. 53; AQUINAS, *supra* note 8, at Pt. I, Q. 79, art. 4). See also *id.* at 400 (citing ST. THOMAS AQUINAS, *QUAESTIONES DISPUTATAE DE VERITATAE*, Q. 16, art. 3; AQUINAS, *supra* note 8, at Pt. II-II, Q. 19, art. 4, Q. 91, art. 2, Q. 93, art.3); JOHN FINNIS, *AQUINAS* 308 n.64 (1998) (translating "*participatio*" as "sharing out"); RALPH MCINERNEY, ST. THOMAS AQUINAS 118–25 (Univ. of Notre Dame Press 1982) (1977); John F. Wippel, *Metaphysics, in THE*

metaphysical) account of the mechanics of human knowing, one can nevertheless appreciate its suggestiveness as to the connections between divine reason and the human capacity to reason, and the relational dimensions of human knowing. As elaborated more fully below, human knowledge is relational in that it is always undertaken in the context of human community and, more fundamentally, in that, like the rest of life, it is never undertaken apart from the human being's relationship with God, whether broken or restored. To rightly understand the orderliness of the world, one must embrace, at least to some extent, its divinely given order. I will thus use *participation* as shorthand for true human knowing—the most important features of which I attempt to describe below.

### B. *The Contours of Participated Knowledge*

Participated knowledge presupposes a created order external to the knower and the possibility of knowing parts of this order in relation to the whole. The human knower participates in and engages with an order larger than himself.<sup>17</sup> The human person is within that order and can only see the whole from within. Nevertheless, there is a whole to be participated in. Human knowledge is inescapably partial, but we may nevertheless “know what we do know as part of a meaningful totality.”<sup>18</sup>

Second, as just noted, human knowledge is given from a vantage point within the order that is being known; thus, it “never takes shape at an observer's distance; it is not knowledge-by-transcendence” but rather “knowledge which can occur only as the subject participates in what he knows.”<sup>19</sup> Human knowledge is not only “from within”; it is

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CAMBRIDGE COMPANION TO AQUINAS 85, 93–99 (Norman Kretzmann & Eleonore Stump eds., 1993).

<sup>17</sup> In contrast, Charles Taylor has described the modern condition as one of “disengagement.” See COLIN E. GUNTON, *THE ONE, THE THREE AND THE MANY* 13 (1992) (discussing CHARLES TAYLOR, *SOURCES OF THE SELF* (1992)).

<sup>18</sup> O'DONOVAN, *supra* note 12, at 77. O'Donovan compares this account of knowledge with the scope of metaphysics or philosophy in Western thought prior to the separation out of religion and science as distinct inquiries. *Id.* at 78.

[T]he fragmentation of knowledge in the pursuit of investigative science suggests a skeptical despair about the very possibility of knowing things in all their aspects and in their relations to other things; while the abstraction of religion from empirical reality represents a flight of faith into the subjective and the irrational.

*Id.*

<sup>19</sup> *Id.* at 79.

Such knowledge must always have an incomplete character; even though it is knowledge *of* the totality, it is not total or exhaustive knowledge, nor ever could become so. The whole can be known only



the particular “from within” knowledge appropriate to human beings.<sup>20</sup> Knowing is one of the tasks and privileges given to human beings within the created order: “To know is to fill a quite specific place in the order of things, the place allotted to mankind.”<sup>21</sup> In that sense, knowing is a general calling;<sup>22</sup> every well-functioning human being is called upon to know and know rightly. Knowing is also a particular calling in that some humans are vocational knowers and learners. Knowing is thus a moral enterprise, lived before God just as is the rest of the human task in the world.<sup>23</sup>

The human knower’s internal vantage point is not merely a matter of space and time, as though an essentially divine mind were confined within a geographical and temporal prison.<sup>24</sup> Human beings have a set of particular cognitive and logical capacities, often summarized as “reason.” Unfortunately, it is easily forgotten that reason is a human faculty, not an abstract state of affairs.<sup>25</sup> It is a gift and, like other human endowments, can be exercised faithfully or abused and neglected altogether. Human reason is finite; human beings are not infinitely knowledgeable, wise, or intellectually powerful, even when their faculties are exercised to the utmost.

Recognizing that reason is a human faculty draws attention to the fact that it is one human faculty among others. Human being is

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as a mystery which envelops us, in to which our minds can reach only with an awareness that there are distances and dimensions which elude us.

*Id.*

<sup>20</sup> *Id.* at 81.

<sup>21</sup> *Id.*

<sup>22</sup> See WILLIAM PERKINS, A TREATISE ON THE VOCATIONS OR CALLINGS OF MEN, WITH SORTS OR KINDS OF THEM, AND THE RIGHT USE THEREOF (1603), reprinted in PURITAN POLITICAL IDEAS, 1558–1794, at 35, 43–49 (Edmund S. Morgan ed., 1965) (distinguishing between general and particular callings).

<sup>23</sup> O’DONOVAN, *supra* note 12, at 81.

<sup>24</sup> A further limitation of human knowledge is its ignorance of the ultimate end of history. Just as human knowledge is obtained from a vantage point that is inside the space of the created order, it likewise occurs within history and not outside it. How history will, in fact, unfold is something human beings are anxious to know yet cannot know although they may attempt to “extrapolat[e] regularities from the past” in order to divine the future. *Id.* at 82. Nevertheless, the Christian presupposes not a deterministic world, but one whose ultimate fate rests with “the secret counsel of the Lord of history.” *Id.* The shape of the created order itself is thus teleological; it has a particular purpose in cosmic history. That purpose can, in principle, only be known if God decides to reveal it and only to the extent of that revelation. See *id.* at 82–84.

<sup>25</sup> Paul J. Griffiths & Reinhard Hütter, *Introduction to REASON AND THE REASONS OF FAITH* 1, 4 (Paul J. Griffiths & Reinhard Hütter eds., 2005).

not reducible to reasoning,<sup>26</sup> and a human life devoted entirely to reasoning would, in some respects, be a misshapen human life. Indeed, one's other obligations may cause one to be morally obligated *not* to reason about some things.<sup>27</sup> Human beings are not exclusively rational creatures; human life involves other dimensions which make practical and moral demands on the reasoner.

Part of the from-within-ness of human knowledge is that it invariably takes place from within a particular human culture and tradition.<sup>28</sup> As Nicholas Wolterstorff writes:

It is simply not possible to circumvent the beliefs, the purposes, and the affects acquired in everyday life and make use in scholarship just of one's indigenous, generically human hardwiring. It is simply not possible thus to circumvent the ways in which we have been programmed by experience, by induction into tradition, and by yet other factors that lead us to "see" things differently from how our fellow scholars see them. It is not possible in our scholarship to circumvent the identities bestowed upon us by our relig-

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<sup>26</sup> See G.C. BERKOUWER, *MAN: THE IMAGE OF GOD* (STUDIES IN DOGMATICS), 67–118 (Dirk W. Jellema trans., Eerdmans 1962) (1957) (summarizing the various accounts of the meaning of humanity's being made in God's image).

<sup>27</sup> ANDREW SLOANE, *ON BEING A CHRISTIAN IN THE ACADEMY: NICHOLAS WOLTERSTORFF AND THE PRACTICE OF CHRISTIAN SCHOLARSHIP* 85 (2003).

<sup>28</sup> Although "the great myth of universal reason," 2 ALISTER E. MCGRATH, *A SCIENTIFIC THEOLOGY: REALITY* 57 (2002), has been an attractive and enduring aspiration, it has become increasingly untenable philosophically and empirically. See *id.* at 64 (discussing the work of Alasdair MacIntyre); see generally *id.* at 33, 57, 59–60 (and sources cited); NICHOLAS WOLTERSTORFF, *REASON WITHIN THE BOUNDS OF RELIGION* (2d ed. 1984), 2 MCGRATH, *supra* (discussing sociology of knowledge); see also *id.* at 58–59. Indeed, Alister McGrath argues that modern objections to Christian and other particular rationalities have been primarily moral: "the idea of revelation was unacceptable in that it denied access to . . . 'revelation' to those whose historical location was, for example, chronologically prior to the birth of Jesus of Nazareth, or geographically distant from centres of Christian mission." *Id.* at 63. Nevertheless, as McGrath points out, the objection tells us nothing about revelation's truth or falsehood: "the accessibility of historical or empirical truth has no direct bearing upon its veridicality." *Id.* A similar objection might be lodged against other particular truth-claims. Following Jeffrey Stout, McGrath observes that "[t]he Enlightenment had its own agenda in wishing to affirm the supreme authority of reason, not least in relation to its role in breaking with tradition and institutionalized authorities." *Id.* at 64 (citing JEFFREY STOUT, *THE FLIGHT FROM AUTHORITY* (1987)). Oliver O'Donovan has similarly characterized epistemology as a "branch of political theory." O'DONOVAN, *supra* note 12, at 65. Once the Enlightenment's "great myth" is seen, in no small part, to have been a Western European deliverance, it is also subject to the moral objections leveled at other particularist claims. See *id.*

ions, our nations, our genders, our races, our classes. Academic learning is unavoidably perspectival.<sup>29</sup>

It follows that human knowledge is an inescapably communal enterprise. Human cultural life, including scholarship, cannot but take place in community, drawing implicitly on community standards and aspirations—reflecting those aspirations, and responding to and developing them.<sup>30</sup>

### C. *Fallen Knowledge*

Human knowledge is fallen knowledge.<sup>31</sup> This fallenness includes not only the ongoing fact of human rebellion against God but also the fact that human knowing now takes place in a created order in which the knowers and that which is being known are marred by that rebellion.<sup>32</sup> A fundamental characteristic of human beings is that we have “refused the role assigned [us] by [our] Creator,”<sup>33</sup> with the result that we do not have the knowledge of the created order we otherwise might have had. It is not that we fail to know the created

<sup>29</sup> Nicholas Wolterstorff, *Public Theology or Christian Learning?*, in *A PASSION FOR GOD’S REIGN* 65, 84 (Miroslav Volf ed., 1998). Wolterstorff nevertheless maintains that the situated nature of human inquiry need not imply antirealism:

It is of utmost importance that we retain the conviction that there is a structured world out there, created by God, independent of our human activities of conceptualizing and interpreting, along with the conviction that not only does our programming often obstruct access to that reality, but that our nature and programming together also *enable* access.

*Id.* at 85.

<sup>30</sup> Theories about reality are developed by human beings, who are invariably part of larger communities. Alister McGrath summarizes the conditions for theoretical development in religious communities as follows:

[T]heories, whether scientific or theological, are not free creations of the human mind, but are constructed in response to an encounter with an existing reality. Theory is responsible, in that it is *accountable* to the community of faith for the manner in which it depicts its corporate vision of reality—a vision which it did not create in the first place, and to which it represents a considered and faithful *response*.

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Yet theories are not passive responses to reality; they are constructed by human minds, and therefore bear at least something of a socially located imprint.

3 ALISTER MCGRATH, *A SCIENTIFIC THEOLOGY: THEORY* at xi, xiv (2003). See also *id.* at 218 (discussing Neurath’s metaphor of a ship on the sea); 2 MCGRATH, *supra* note 28, at 55–120 (discussing the role of communal traditions in theoretical knowledge).

<sup>31</sup> See generally BERKOUWER, *supra* note 26.

<sup>32</sup> See *Genesis* 3:15–24 (portraying the consequences of the Fall as physical, psychological, and social alienation).

<sup>33</sup> O’DONOVAN, *supra* note 12, at 81–82.

order at all, but rather that we “misknow” it;<sup>34</sup> and it is not possible for us to overcome our tendencies toward misknowledge, no matter how much we might wish to do so or how hard we may try.<sup>35</sup>

There has been considerable dispute between various stripes of Catholic and Protestant theologians about the consequences of the Fall for human knowing. In general, Catholics have been more optimistic about human knowing in the wake of the Fall than have Protestants, in part because some Catholic theologians have treated knowledge as a matter of the soul and interpreted the Fall, primarily, in terms of its effects on reason’s control over bodily passions. Nevertheless, these are only general tendencies, and whatever the precise differences, there is widespread agreement that the Fall has noetic consequences.

Reinhard Hütter and Paul J. Griffiths have helpfully summarized the general Christian position about knowledge in the wake of the Fall as “confidence-under-erasure.”<sup>36</sup> The fact that both we and the world are creatures gives us confidence that a loving God has fitted us to know the world into which we have been put. Even after the Fall, “[w]e remain beings for whom knowledge is the mode of their participation in the universe. . . . The ignorance, error and confusion which are attributable to us are all *failures* of knowledge, disasters which can befall only those beings which actually do know. For non-knowing creatures falsehood is no danger.”<sup>37</sup> Similarly, although the creation is disfigured by the Fall, it is not hurled into chaos but rather *disordered*; there remains the possibility that we may discern its order, however imperfectly.<sup>38</sup>

<sup>34</sup> *Id.* at 82.

<sup>35</sup> *Id.*; see also STANLEY HAUERWAS, *The Interpretation of Scripture: Why Discipleship Is Required*, in THE HAUERWAS READER 255, 255–66 (John Berkman & Michael Cartwright eds., 2001).

<sup>36</sup> Griffiths & Hütter, *supra* note 25, at 7. It might be objected that “erasure” fails to capture the distortion of human knowing that the Fall occasions. It is not merely that we fail to know, but that we know wrongly. See *infra* note 63 and accompanying text.

<sup>37</sup> O’DONOVAN, *supra* note 12, at 87–88.

<sup>38</sup> See *id.* at 88.

[E]ven in the disorder consequent upon the Fall the universe, in the merciful providence of God, does not cease to be the universe. Disorder, like misknowledge, is attributable only to things which are in their true being ordered. And the universe . . . displays . . . the brokenness of order and not merely unordered chaos. Thus it remains accessible to knowledge in part. It requires no revelation to observe the various forms of generic and teleological order which belong to it.

*Id.* See also *infra* text accompanying notes 54–56 (discussing common grace and natural law).

If the grounds for human *confidence* in knowing relate to the continuing presence of both our capacity to know and an orderly world to be known, what may be said of the sense in which that confidence is *under erasure*? What are the causes and symptoms of human "misknowledge?" How, and how far, can it be overcome?<sup>39</sup>

One reason human knowledge of the world is problematic is that, as just noted, the world itself is disordered. The fact that there is disorder in the universe causes us to experience many disordered circumstances and occurrences as normal. Moreover, where the knowledge of God is rejected, the universe is known apart from the relation that gives it its inherent meaning and intelligibility;<sup>40</sup> it is known not as *creation* but as something else, typically something either autonomous and accidental or as the product of impersonal forces acting on eternal matter.<sup>41</sup>

The human knower also shares in the disorder that is the result of the Fall. The most famous exponent of disordered humanity is John Calvin, who is famous for, among other things, his teaching on the "total depravity" of the human person. Calvin's point was not, contrary to popular assumption, that human beings were as bad as they possibly could be, but rather that no part of the human being, not least the intellect, was left untouched by sin.<sup>42</sup> Sin left human beings in a natural state of rebellion against God, which Calvin summarized as *concupiscence*.<sup>43</sup> Whereas *concupiscence* is used, prior to Calvin, to refer primarily to the inability to restrain bodily passions, Calvin's definition is not so restrictive.<sup>44</sup> *Concupiscence* effects disordering in the intellectual faculties no less than in other aspects of

<sup>39</sup> The degree to which one expects that such misknowledge can be avoided or overcome is an important factor in the degree of hope one places in political ordering.

<sup>40</sup> O'DONOVAN, *supra* note 12, at 88 ("If the Creator is not known, then the creation is not known *as creation*; for the relation of the creation to its Creator is the ground of its intelligibility as a created universe. If one term of that relation is obscured, the universe cannot be understood.").

<sup>41</sup> If we reject the knowledge of God, "the universe confronts us as something which might have been understood but has in fact been misunderstood, giving rise to various kinds of idolatry in which the creature is regarded as absolute. . . . But this means that the order of reality is not truly known at all. *Order* cannot be known piece by piece, but only as a whole." *Id.* at 88 (emphasis added).

<sup>42</sup> See 1 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, Bk. II, Ch. 1, § 9 (John T. McNeill ed., Ford Lewis Battles trans., 1960).

<sup>43</sup> See generally WALLACE, *supra* note 12, at 53-57.

<sup>44</sup> CALVIN, *supra* note 42 (citing Lombard on the fomes of sin); cf. AQUINAS, *supra* note 8, at Pt. II-1, Q. 85, art. 3 (discussing the "wounds of sin").

the human person.<sup>45</sup> Following St. Paul's admonition to be "transformed by the renewing of your minds,"<sup>46</sup> Calvin argues that "reason alone" can no longer be "the ruling principle in man,"<sup>47</sup> but rather that, because we belong to God, we should "let His wisdom and will therefore rule all our actions."<sup>48</sup> Indeed, for Calvin, the central principle of the Christian's life is self-denial, so that the human being's naturally inordinate love of self can give way to love of God and neighbor. Where self-denial is absent, "there either the foulest vices rage without shame, or if there is any semblance of virtue, it is vitiated by depraved lusting after glory."<sup>49</sup> On the other hand, self-denial "not only erases from our minds the yearning to possess, the desire for power, and the favor of men, but it also uproots ambition and all craving for human glory and other more secret plagues."<sup>50</sup>

<sup>45</sup> WALLACE, *supra* note 12, at 55 (citing CALVIN, *supra* note 42, at Bk. II, Ch. 1, § 8).

<sup>46</sup> *Ephesians* 4:23.

<sup>47</sup> CALVIN, *supra* note 42, at Bk. III, Ch. 7, § 1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at Bk. III, Ch. 7, § 2.

<sup>50</sup> *Id.* Calvin emphasizes the connection between sinful human desires, mis-knowledge of God, and the created order. A typical form of human mis-knowledge is the overestimation of human capability and goodness, which is the result of human pride:

Nothing pleases man more than the sort of alluring talk that tickles the pride that itches in his very marrow. Therefore, in nearly every age, when anyone publicly extolled human nature in most favorable terms, he was listened to with applause. But however great such commendation of human excellence is that teaches man to be satisfied with himself, it does nothing but delight in its own sweetness; indeed, it so deceives as to drive those who assent to it into utter ruin. . . . Whoever, then, heeds such teachers as hold us back with thought only of our good traits will not advance in self-knowledge, but will be plunged into the worst ignorance.

*Id.* at Bk. II, Ch. 1, § 2.

Not only does our moral disposition tend to prevent us from appraising ourselves correctly, it likewise keeps us from developing a true understanding of God. For Calvin, "[i]gnorance of God . . . is a refusal to renounce the self-life and self-love." WALLACE, *supra* note 12, at 60. The "principal requisite to understanding," on the other hand, is "piety and the earnest desire to obey God . . ." See 1 JOHN CALVIN, COMMENTARIES ON THE GOSPEL ACCORDING TO JOHN, Ch. 7, ¶ 17 (Rev. William Pringle trans. 1948). Perhaps surprisingly, Calvin is quite optimistic about the believer's capacity to know the truth about God. His optimism, however, stems not from any innate capacity on the part of the human person, but from God's willingness to show himself to those who are ready and willing to obey. See *id.*

[I]f we be entirely devoted to obedience to God, let us not doubt that He will give us the spirit of discernment, to be our continual director and guide. If others choose to waver, they will ultimately find how flimsy are the pretences for their ignorance. And, indeed, we see that all who now hesitate, and prefer to cherish their doubt rather than, by

Calvin's pessimism about human knowledge, it should be noted, focuses primarily on those areas of knowledge in which human beings, spiritually speaking, have the most at stake. We human beings do not wish to know ourselves as we really are because the truth exposes our failings.<sup>51</sup> Nor do we naturally want to know God, whose holiness exposes the same shortcomings and our abject need for him. This observation is significant because there may not always be quite as much at stake when it comes to knowledge of other features of the world. While theology and anthropology are frequently critical components of law, the intellectual questions they raise may sometimes pose a less predictable threat to the self-love of every individual human being than does the question of the individual human's relationship to God. For this reason, there may be cause for somewhat greater optimism about the human capacity to know the truth about mundane matters (like most questions of law) than about spiritual matters.<sup>52</sup> That said, as critical theorists have taught us, when decision makers do have important interests at stake (wealth, power, group superiority), their ability to know truly is regularly compromised.

One unsettling implication of this account of human knowledge is that noetic limitation and misknowledge of the created order are seemingly intractable parts of the human condition in the world as we know it. Furthermore, we may expect varying stripes and degrees of misknowledge and, thus, a great deal of disagreement that does not seem susceptible to settlement by rational argument. This is so, not because all arguments are created equal, but because our knowledge is invariably limited and situated and none of us "listens to reason" as we should. We are all given to self-love rather than to love of God and neighbor. When this orientation is combined with our intrinsic human limitations, we can easily account for the diversity of human opinion. Indeed, rather than being dismayed at the level of

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reading or hearing, to inquire earnestly where the truth of God is, have the hardihood to set God at defiance by general principles.

*Id.*; cf. Stuntz, *supra* note 3, at 1741–46 (discussing the dangers of pride as they relate to legal scholarship).

<sup>51</sup> Cf. Stanley Hauerwas & David B. Burrell, *Self-Deception and Autobiography: Reflections on Speer's Inside the Third Reich*, in *THE HAUERWAS READER*, *supra* note 35, at 200, 200–20.

<sup>52</sup> See STEPHEN J. GRABILL, *REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS* 70–97 (2006) (discussing Calvin's view of natural law); see also David VanDrunen, *The Context of Natural Law: John Calvin's Doctrine of the Two Kingdoms*, 46 *J. CHURCH & ST.* 503, 503–25 (2004).

disagreement we observe, we might more appropriately marvel at the degree of cohesion many societies exhibit.<sup>53</sup>

Not only have we received the gifts of an orderly world and faculties equipped to help us understand it, but our rebellion has not wiped out our noetic capacities altogether. The continuing capacity for generically human moral knowledge in the aftermath of the Fall is typically described in terms of natural law or, in some Protestant traditions, common grace.<sup>54</sup> On either account, human beings may know aspects of the world truly apart from God's saving grace. In the natural law tradition, this capacity is associated with the gift of reason that is divinely given to every human being; "common grace" accounts suggest that just as God "sends rain upon the just and the unjust,"<sup>55</sup> he permits human beings to know more than they might if he gave them over entirely to their rebellious ways.<sup>56</sup> Moreover, God's revelation in Christ and in the Bible provide sufficient guidance as to the true nature of the human condition and right moral orientation.

Nevertheless, as noted earlier, "[t]here can be no true knowledge of [the natural order] without loving acceptance of it and conformity to it, for it is known by participation and not transcendence."<sup>57</sup> The grace of God enables believers to participate more fully in the created order than they otherwise would precisely because loving acceptance of God and his world is not possible apart from God's grace. This observation is emphatically not, however, a claim that believers will know specific aspects of the created order better than others by virtue of their status as believers.<sup>58</sup> Neither is it a claim that individuals and cultures inevitably fail to grasp common moral truths or that they "fail entirely to respond to this knowledge in action, disposition, or institution."<sup>59</sup> Nor does rebellious humanity fail to discern many of the particulars in the created order; "revelation in Christ does not *deny* our fragmentary knowledge of the way things

<sup>53</sup> Calvin, for example, displays a profound awareness of the fragility of political order in a fallen world. See SUSAN E. SCHREINER, *THE THEATRE OF HIS GLORY* 28–30 (1991).

<sup>54</sup> O'DONOVAN, *supra* note 12, at 87.

<sup>55</sup> *Matthew* 5:45.

<sup>56</sup> See ABRAHAM KUYPER, *Common Grace*, in ABRAHAM KUYPER: A CENTENNIAL READER 165, 165–201 (James D. Bratt ed., 1998); see generally RICHARD MOUW, *HE SHINES IN ALL THAT'S FAIR: CULTURE AND COMMON GRACE* (2001); cf. O'DONOVAN, *supra* note 12, at 85–86 (criticizing recent natural law theory for its reliance on "self-evident" truth).

<sup>57</sup> O'DONOVAN, *supra* note 12, at 87.

<sup>58</sup> This aspect of intellectual life has a close analogy with Christians' longstanding recognition of virtuous pagans. See, e.g., ABRAHAM KUYPER, *LECTURES ON CALVINISM* 121–22 (1931).

<sup>59</sup> O'DONOVAN, *supra* note 12, at 88.



are, as though that knowledge were not there, or were of no significance.”<sup>60</sup> Instead, it “catches man out in the guilty possession of a knowledge which he has always had, but from which he has never won a true understanding. It shows him up . . . as a man who has ‘suppressed the truth’ in unrighteousness.”<sup>61</sup>

As may be readily observed, unbelievers often exceed believers in understanding various aspects of the world. This is not surprising because believers inevitably persist, to some degree, in rebellious, unloving, and/or unrighteous orientations toward the world and toward others. These orientations lead to misknowledge of the created order irrespective of who holds them. Moreover, knowledge of the world (on the Christian account) is not gnostic knowledge; it does not depend on the transmission of secret knowledge that is not available through normal human faculties. Knowledge of the world requires study and work; ignorance remains a threat to knowledge. The claim that faith improves intellectual cognition must then be limited only to the claim that the believer may, but does not inevitably, know the world more truly than would otherwise have been the case,<sup>62</sup> but not necessarily well or better than others do.<sup>63</sup>

### III. THEORY

Unless one pays attention to the systematic ways in which Christian accounts of knowledge differ from their secular counterparts, Christian theorizing about law is likely to rest on incompatible foundations borrowed from the dominant culture. When we Christian legal scholars theorize about law, the mistake we are most likely to make is to assume a posture of transcendence, neglecting the historical and cultural situatedness of human lawmaking, and adopting

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<sup>60</sup> *Id.* at 89.

<sup>61</sup> *Id.* (quoting *Romans* 1:18).

<sup>62</sup> Even this claim may not always be true. Conversion may affect the believer’s investment in knowing various parts of the created order negatively because it might alter the mix of activities in which one might engage.

<sup>63</sup> See Paul J. Griffiths, *How Reasoning Goes Wrong: A Quasi-Augustinian Account of Error and Its Implications*, in *REASON AND THE REASONS OF FAITH*, *supra* note 25, at 145, 145–59 (discussing the various ways reasoning can go wrong). On the topics covered in this section, see generally Encyclical Letter from Pope John Paul II, Supreme Pontiff, Roman Catholic Church, to the Bishops of the Catholic Church, *Fides et Ratio* [Faith and Reason] (Sept. 15, 1998), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_15101998\\_fides-et-ratio\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html). See 3 MCGRATH, *supra* note 30 (discussing common grace); JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY* (1990); MURRAY, *supra* note 12, (discussing union with Christ); O’DONOVAN, *supra* note 12 (discussing knowledge in Christ); SLOANE, *supra* note 27; JAMES K.A. SMITH, *INTRODUCING RADICAL ORTHODOXY* (2005); WALLACE, *supra* note 12, at 17–27, 78–86.

instead an acultural, ahistorical (and even a-theological<sup>64</sup>), “Christian” vantage point. We may assume that the outcome of our efforts ought to be a single, certain, God’s-eye view of the law rather than multiple views from a variety of limited, if recognizably Christian, perspectives.<sup>65</sup>

Perhaps even more significantly, we may neglect the intractable influence our sinfulness exerts over our theorizing. It is all too easy to start with the assumption that we are capable of unproblematically assuming a posture of benign neutrality (or even affirmative righteousness) as we examine the world around us. If we do so, we will be likely to neglect entirely the political implications of Christian truth-claims and, indeed, truth-claims generally. We may fail to recognize when we are inappropriately using God’s name to underwrite our political opinions.

It is important to see how easily these mistakes can be made, particularly by American Christians living, as we do, in a liberal democracy heavily influenced by Enlightenment political thought. One strategy undertaken by liberal theorists in search of political stability has been to substitute the deliverances of human reason for controversial religious dogma,<sup>66</sup> hoping to secure common ground for political life. Significantly, in order for such a project to succeed, human reason has had to pretend to the transcendent characteristics described above—that is, it has had to part ways with traditional Christian conceptions of reason.

The following crude example illustrates the connections between political and legal theory and the modern strategy of using transcendent reason to achieve political order. Suppose that through reason and investigation one could arrive at the truth-about-everything (a God’s-eye view of the world), and proceed from that vantage point to reason one’s way to the single best political philosophy and, in turn, to the best constitutional arrangements, laws, and juridical procedures. The resulting system would have a number of obvious strengths. First, the political order that ensued would not depend on the particular traditions or interests of any one group within the polity. Second, on the authority of universal reason and truth, the political order could be assumed to command the respect of the individuals that comprise the political community irrespective

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<sup>64</sup> See generally MARK NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* (1995).

<sup>65</sup> On the indispensability of humility for Christian legal thought, see Stuntz, *supra* note 3, at 1741–46.

<sup>66</sup> Another way of seeing this move is to substitute the authority of human reason for divine authority.

of their particular attachments or differences. As a result, one would expect a high degree of political order and stability with only a relatively small degree of coercion required to bring it about. Third, the resulting political order would be impersonal in that the political authority would treat those subject to it as free and equal, not favoring anyone's tradition over anyone else's. Finally, the deliverances of universal reason could be expected to be uniform and universally accessible, again furthering stability, order, and legitimacy.

It is no accident that assumptions like these should have influenced Christian thinking about law and politics in recent decades. Christian legal scholarship does not occur in a vacuum, and liberal models of legal thought similar to the one I have just described remain influential to some degree. Moreover, like legal scholarship generally, Christian legal thought is usually directed at some feature of the political or legal order that needs to be corrected. The result is that, as with other legal theories, Christian legal theory easily assumes the following form:

1. Existing rule / practice / legal doctrine, *RI*, is mistaken;
2. It rests on a misunderstanding of the truth-about-everything, *TI*;
3. Christian doctrine teaches that the truth-about-everything is not *TI* but rather *T2*;
4. Therefore *RI* should be modified to become *R2*.<sup>67</sup>

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<sup>67</sup> See, e.g., *THE CHRISTIAN AND AMERICAN LAW* (H. Wayne House ed., 1998). The book is a collection of papers given at a conference sponsored by the National Association of Evangelicals in 1993 and includes a "series of affirmations and denials that [the conferees] believe reflect a biblical view of law and government." H. Wayne House, *Introduction to THE CHRISTIAN AND AMERICAN LAW*, *supra*, at 9, 10. Some of the affirmations set forth general, though controversial, propositions that most Christians would accept, but which only have an indirect relationship to concrete legal and policy choices. For example, "[w]e affirm that all human beings are created by God and are subject to His sovereign rule"; "[w]e deny that people are autonomous or a law unto themselves"; "[w]e affirm that all human government is ordained and instituted by God" and; "[w]e deny that any human government has absolute and sovereign power." Carl F.H. Henry, *Appendix: A Summary Statement of the Consultation on Theology and Civil Law*, in *THE CHRISTIAN AND AMERICAN LAW*, *supra*, at 287, 288–89. Others have more direct policy relevance—because they are framed in light of existing concrete policies—but are far more controversial as "biblical principles," for example: "[w]e deny that the government has the power to expropriate or redistribute wealth by means of confiscatory tax rates on income or inheritance"; "[w]e deny that this rich tradition of [social diversity and human tolerance] should be imposed by laws or regulations enforcing political correctness or multiculturalism" and; "[w]e deny the distortion of history that alleges that America's founding had little or no Christian base." *Id.* at 289–91. Others statements are too imprecise to evaluate either as statements of biblical principle or as policy prescriptions, for example: "[w]e deny that the separation of church and state means the separation of the state from God" and; "[w]e deny that legislation can be separated from moral concerns or that

As is undoubtedly obvious, this form of argument is not a recent creation. It comes naturally to lawyers (certainly lawyers in the common-law tradition), whether or not they are doing theory. Suppose a lawyer wants to argue against *R1* because it will serve the interests of his client to do so. To argue against *R1*, he need only substitute “the Law” for “the truth-about-everything” in step 2. Step 3 can be replaced with an explanation of why *R2* is a more plausible interpretation of the Law than *R1*. In the alternative, a lawyer might argue that *R1* *should not be* the law on the basis of some legal theory—say, economic analysis. In the latter case, the relevant legal theory—again, say, economic analysis—occupies the same space in step 3 that Christian doctrine did in the original example, except that the relevant misunderstanding of the “truth-about-everything” is likely to be (1) a failure to apprehend the value of economic analysis of law and/or (2) incorrect economic analysis. The appropriate understanding need only be inserted in step 3, and *R2* has been justified. In either case, the ground of *R2*’s justification is impersonal reason and truth, and this mode of justification carries with it the political benefits noted above.

It is no surprise that using theory in this way appeals to many Christians, at least those living in modernity. The model appeals to three important themes in Christian thought: (1) truth;<sup>68</sup> (2) rationality;<sup>69</sup> and (3) an account of legitimate,<sup>70</sup> political authority. The problem is that modernity subverts each of these themes by positing visions of truth, rationality, and political legitimacy that trade on the historical authority of the Christian tradition yet depart from it at

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public officials should attempt to separate public policy from moral standards.” *Id.* at 289, 291. That a focus on “biblical principles” would generate statements like this is not surprising. See *infra* text accompanying notes 149–56.

<sup>68</sup> Truth is obviously an important category in Christian thought—God is the only true God. St. Paul declares that the validity of the Christian faith depends on the facticity of the resurrection of Jesus Christ and, indeed, Jesus declares himself to be “the way, the truth and the life.” *John* 14:6 (English Standard). If there is no truth, then even Christianity is not true. Cf. *1 Corinthians* 15:13–14 (English Standard) (“But if there is no resurrection of the dead, not even Christ has been raised. And if Christ has not been raised then our preaching is in vain and your faith is in vain.”). What is crucial for Christian faith is the resurrection of Christ and not a more *abstract* truth.

<sup>69</sup> As we have seen, Christians have historically taken rationality for granted because the same God who made the world for human beings to inhabit also made the human mind. See *supra* text accompanying notes 18–19, 24.

<sup>70</sup> While the subject of political rule has been contentious in Christian theological circles, there has been general agreement that political rule is, in principle, an aspect of divine providence, e.g., *Romans* 13:1–7, but that mortal rulers may nevertheless be called to account for failing to rule in a way that promotes the common good or, one might put it, in accordance with reason and truth. See OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* 127–38 (2005).

critical points. In the terminology of this Article, the fundamental problem with Christian legal scholarship when it draws too heavily from modern assumptions about the nature and role of theory is its indebtedness to a picture of human rationality and knowledge that is transcendent rather than participatory.<sup>71</sup> As we have seen, human knowing is marked by finitude, fallenness, and plurality. Human knowing is “from within”; fully transcendent knowledge is thus out of reach to the human scholar.

The most important consequence of the critique of modern theory offered here is that pluralism, even in Christian legal scholarship, is inevitable and not necessarily undesirable.<sup>72</sup> These conclusions are at odds with the fundamental assumptions of modern theory as described above. Pluralism is modern theory’s enemy: first, because pluralism threatens consensus and implies that political rule will be to some degree personal; second, because its presence threatens modernity’s overconfidence in reason’s ability to achieve political consensus. If disputes about what the law is or should be cannot always be settled by arguing to a conclusion that all people must be able to accept on the authority of universal reason, then the political benefits of the theoretical enterprise identified above are reduced. Once one accepts that human knowledge is inescapably partial and fallen, however, recognition of pluralism provides both a potential check upon undue political hegemony masquerading as “reason” and a potential avenue to better understanding of the world, because even the wisest of us does not know everything and, thus, may be able to learn from those with whom we disagree.

One possible response to these observations might be to abandon legal theory entirely, or at least to abandon the characteristic Western project of “general jurisprudence”—the attempt to offer an account of human law that identifies those characteristics of law and legal practice that are universal across times and cultures.<sup>73</sup> Most Western Christian accounts of law, however, have not rejected this question. Instead, they have made room for both legal universals and legal particulars.

The most famous such account is that offered by Thomas Aquinas. Aquinas is well known for giving an explanation of the way in

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<sup>71</sup> See *supra* Part II.A.

<sup>72</sup> “When different people look ‘through a glass, darkly,’ they tend to see different things. That may be the key to any Christian approach to legal thought.” Stuntz, *supra* note 3, at 1710 (footnote omitted).

<sup>73</sup> See Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188 (Robert P. George ed., 1994).

which human law<sup>74</sup> is connected (via natural law) to eternal law (God's plan for the world).<sup>75</sup> Although he clearly affirms the universality of the most familiar moral precepts across time and cultures and affirms human law's necessary connection to those precepts, he acknowledges that much of human law involves the "determination of particulars."<sup>76</sup> These determinations, which involve finishing out the details of the laws in particular times and places, are connected to the universal moral order in that making them involves the use of human reason, but they involve a good deal of variation from place to place and time to time. Paraphrasing Aquinas, if we were to divide legal theory into "general jurisprudence" and "particular jurisprudence," then a great deal of legal theory deals with the way in which these particulars ought to be determined. Aquinas, a theologian, tells us where human laws are situated with respect to God's universal plan, but not a great deal more than that.<sup>77</sup> It is the work of legal theorists (or, in the old-fashioned word, jurists) to improve our understanding of particular determinations and to assist us in making them more just and workable.

Not only does Aquinas make place for cultural and historical variation in law, he also acknowledges that lawmaking is not only a matter of top-down deduction but is also a bottom-up enterprise resting on experience with lawmaking and judging. Indeed, Aquinas goes so far as to say that the natural law can be changed "by addition"<sup>78</sup> as human beings discover arrangements that are beneficial to human life.<sup>79</sup> Private property is one such addition;<sup>80</sup> it is beneficial, says Aquinas, because of the incentives it creates to work, for administrative convenience, and for peace in human affairs.<sup>81</sup>

Aquinas's awareness of pluralism and his belief in the relevance of real-world experience to law are not aberrations. In Christian thought, the world is not a necessary emanation from an impersonal God but the free, particular creation of a personal Being. Thus, the world is not susceptible to being known fully by engaging only in top-down theorizing. The legal theorist must also take seriously the

<sup>74</sup> By which he means law put into effect by human authorities.

<sup>75</sup> See AQUINAS, *supra* note 8, at Pt. I-II, Q. 93, art. 1.

<sup>76</sup> See *id.* at Pt. I-II, Q. 95, art. 2.

<sup>77</sup> *But see id.* at Pt. II-II, Q. 64, 66, 78 (discussing, respectively, capital punishment, private property and theft, and usury).

<sup>78</sup> Less frequently, the secondary principles of natural law may also be changed "by subtraction." See *id.* at Pt. II-I, Q. 94, art. 5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at Pt. II-II, Q. 66, art. 2.

<sup>81</sup> See *id.* at Pt. II-II, Q. 66, art. 2.

good, particular world God has made. Christians have not generally thought that the Bible (or the Christian tradition) is the source of exclusive or exhaustive knowledge about the world, or that sufficient additional knowledge about the world could be obtained by deduction from theological truths.<sup>82</sup> Christian legal thought cannot thus content itself with being an exclusively top-down enterprise.<sup>83</sup>

After all this, one might wonder whether Christianity has anything to offer legal theory. Has Christianity nothing to say about law? What is the purpose of divine revelation, if not to offer transcendent truth? And, if transcendent truth is available because God has spoken, is it appropriate to suggest—as I seem to have been doing—that the aspiration to transcendence is a bad thing?

God's revelation in Christ and in the Scriptures emphatically does give human beings knowledge about the world (and the world beyond) that exceeds what they would otherwise have "from within." The world in which we participate is factually a world into which God has spoken. We may thus affirm that truth, goodness, and beauty are realities and not merely human constructs; that human beings are important because they are loved by God; that sin has disordered the world (including the way in which it is governed); that we are fitted to this world and thus have hope of understanding how it works and discerning good and evil; that God is personal and has been revealed through the incarnation of Christ; that the material world is valuable; and a number of other very important truths. These truths have significant implications for our understanding of the world in general and of the law in particular, and one can see Christians attempting to

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<sup>82</sup> In the Protestant tradition, Scripture contains "*those things which are necessary to be known, believed, and observed for salvation, are so clearly propounded . . . that not only the learned, but the unlearned . . . may attain unto a sufficient understanding of them.*" Westminster Confession of Faith, Ch. I, § 7 (emphasis added) (citation omitted); see also AQUINAS, *supra* note 8, at Pt. II-I, Q. 91, art. 4 (explaining the need for divine revelation).

<sup>83</sup> Another way of approaching these questions is to note the connection between a participatory account of human knowing and the actual process of human belief formation. See SLOANE, *supra* note 27, at 215–17 (discussing the relationship between Wolterstorff's thought and Quine's naturalized epistemology). Human beings, limited and particular as we are, come to believe things about the world in different ways—by accepting the word of an authority, by logical inference, or by empirical investigation. This is not to suggest that any of these ways of acquiring knowledge is infallible, only that it is *possible* to acquire knowledge in at least these three ways. Jurists and theologians have sometimes been tempted to think that they could acquire all the knowledge necessary for their inquiries through the use of their "authorities" and their logic. The lawyer-theologian may be especially tempted in this regard, supposing that Christian legal theorizing amounts merely to refining legal theory by adopting abstract Christian premises.

work them out in their writings about law and politics over the centuries.<sup>84</sup>

Nevertheless, it should not surprise us that we find differences of opinion among Christians in matters related to politics and law. While we see general agreement on important matters—such as the value of social institutions other than the state (e.g., church, family, and other “intermediate institutions”),<sup>85</sup> optimism about human capacity to know the rudiments of right and wrong,<sup>86</sup> and a common identification of the fundamental human problem as rebellion against God—there is otherwise a great deal of disagreement. Is secular government a part of culture that can be “redeemed,” or is it merely a set of provisional arrangements about which the church ought not to be especially concerned?<sup>87</sup> Is the death penalty ever appropriate? Does democracy deserve a privileged place among the classical models of government? What is the appropriate role of market capitalism in a just society? Can war ever be just?

God has revealed to us the things we need to know but clearly has not told us everything we would like to know; or, if he has told us, we have failed to listen to him or have not heard him clearly. We should thus not expect revelation to underwrite a single, canonical Christian legal theory, at least not in the sense that we should expect to deduce uncontroversial legal or political arrangements from first principles.<sup>88</sup> On the other hand, the project of exploring the implications of God’s revelation for our common life is extremely important. No one who has studied the rich Christian literature of reflection on matters of politics and law can fail to appreciate how much there is to learn from those who have gone before us, even if we would reject their specific conclusions on a great many things. And, it seems that we have reached consensus about a few things that used to be contested. Happily, it is much harder than it used to be to find

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<sup>84</sup> See generally OLIVER O’DONOVAN & JOAN LOCKWOOD O’DONOVAN, FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT (1999); THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (John Witte, Jr. & Frank S. Alexander eds., 2006).

<sup>85</sup> See Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 304–07 (2006) (discussing the Catholic doctrine of subsidiarity and the Protestant doctrine of sphere sovereignty).

<sup>86</sup> *Id.* at 300–04 (discussing the Catholic doctrine of natural law and the Protestant doctrine of common grace).

<sup>87</sup> See *infra* text accompanying notes 102–06.

<sup>88</sup> See, e.g., *supra* note 68 and accompanying text.



Christians defending slavery or forcible conversion to Christianity, much less slaughter of the infidels.<sup>89</sup>

Awareness of the heavily contextual nature of the bulk of ordinary law practice and the theorist's capacity for ignorance and evil ought to chasten the prophetic tone of Christian legal theory and its tendencies toward triumphalism.<sup>90</sup> Most of the things lawyers (and, by extension, legal theorists) argue about are matters about which reasonable people can and do disagree. Because they are heavily contextual, they are also not generally susceptible to resolution by deduction from general principles. The richer the context, the more general principles we might apply to the situation. In most cases, legal judgments involve prioritizing various competing principles in this particular case or set of cases. I am not suggesting that argumentation from principles is inappropriate, unimportant, or inconsequential, only that legal theory—especially Christian legal theory—ought not to be presented as if those who failed to accept its particular conclusions were either ignorant or evil, or both. More than others, Christians have cause to be aware of their own fallibility and capacity for evil.

#### IV. IDENTITY

If worldliness may be defined as inappropriate conformity by the church to the standards of the world,<sup>91</sup> then Christian legal thought

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<sup>89</sup> One might argue that this is more the result of liberalism than of developments in the outworking of Christian principles. *But see, e.g.*, OLIVER O'DONOVAN, *THE DESIRE OF THE NATIONS* (1996); Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 3, at 5, 5–24 (arguing that liberalism was an outgrowth of Western Christianity); *see also* Greenawalt, *supra* note 13, at 715–51 (identifying Christian positioning in contemporary legal debates).

<sup>90</sup> *See* O'DONOVAN, *supra* note 70, at xv (“It was an evil day for Christian thought when prophecy became the fashionable category for political reflection in place of practical reasonableness.”).

<sup>91</sup> *See, e.g.*, JOHN CALVIN, *COMMENTARIES ON THE EPISTLE OF PAUL THE APOSTLE TO THE ROMANS*, Ch. 12, ¶ 2, (Rev. John Owen ed. & trans.), available at <http://www.ccel.org/ccel/calvin/calcom38.xvi.i.html>.

The term *world* has several significations, but here it means the sentiments and the morals of men; to which, not without cause, [Paul] forbids us to conform. For since the whole world lies in wickedness, it behooves us to put off whatever we have of the old man, if we would really put on Christ: and to remove all doubt, he explains what he means, by stating what is of a contrary nature; for he bids us to be transformed into a newness of mind. These kinds of contrast are common in Scripture; and thus a subject is more clearly set forth.

Now attend here, and see what kind of renovation is required from us: It is not that of the flesh only, or of the inferior part of the soul, as

in its *theory* mode may justly be condemned as worldly to the extent that it rejects participated knowing in favor of contemporary aspirations to transcendence. In its latter stages, modernity has properly rejected these aspirations and given greater attention to the culturally and historically situated character of human knowing. When written in an *identity* mode, however, Christian legal scholarship is tempted to another variety of worldliness—that is, to adopt “the epistemological skepticism and the ontological nihilism . . . [that] have become the unexamined conventional wisdom of the intellectual class . . . .”<sup>92</sup> We may freely admit that human knowledge is affected by power without reducing truth claims to mere statements about power relations. We may also admit that human persons are not autonomous without concluding that the individual self is no more than a “site[] of conflicting narratives and incommensurable points of view.”<sup>93</sup>

As we have seen, these views are too pessimistic given God’s character as revealed in Christ, and God’s creation of human persons, who have been fitted to know both the world and him. We have sufficient reason to expect that we can know the world adequately, if not exhaustively.<sup>94</sup> Holding this view does not require denying that truth claims have all too often been vehicles for oppression (not least in Christian communities, especially when Christians have been a part of the dominant social group).<sup>95</sup> Nevertheless, the misuse of “truth” cannot justify truth’s abandonment. In personal relationships

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the Sorbonists explain this word; but of the mind, which is the most *excellent* part of us, and to which philosophers ascribe the supremacy; for they call it . . . the leading power; and reason is imagined to be a most wise queen. But Paul pulls her down from her throne, and so reduces her to nothing by teaching us that we must be renewed in mind. For how much soever we may flatter ourselves, that declaration of Christ is still true—that every man must be born again, who would enter into the kingdom of God; for in mind and heart we are altogether alienated from the righteousness of God.

*Id.*

<sup>92</sup> Reinhard Hütter, *The Directedness of Reasoning and the Metaphysics of Creation*, in REASON AND THE REASONS OF FAITH, *supra* note 25, at 160, 162 & n.7 (“The unexamined horizon is normatively Nietzschean in its fundamentally anti-metaphysical (that is, both anti-epistemological and anti-ontological) stance of celebrating ‘difference’ for its own sake and of assuming ‘perspectivism’ as an unquestioned first principle.”).

<sup>93</sup> Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 583–84 (1991) (“To be a person is to be a more or less conventional location for the eddys and cross-currents of various words, images, pictures and other representations that intersect in some way at some given point in metaphysical space.”).

<sup>94</sup> These reasons emphatically include God’s revelation in Scripture and confidence in God’s loving character and his common grace.

<sup>95</sup> See, e.g., Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990).

stronger parties can misuse reason, verbal skills, and economic or physical power to maintain and justify oppressive arrangements. The remedy for this sort of oppression is not to give equal credence to the “perspectives” of the oppressor and the victim; it is to call injustice by its proper name. Similarly, in the larger social context, recognition of human finitude and fallibility in our knowing should provide an important reason for us to judge ourselves, rather than using our “perspective” to justify the evils we commit. Recognition of our propensity to sin suggests that individuals’ judgments of self should be substantially more exacting than their judgments of other persons and institutions.<sup>96</sup>

Similarly, we may admit—and occasionally even be grateful—that we are not autonomous knowers and agents who are able to know exhaustively or to shape our actions in isolation from our social community, and that we are subject to manipulation and victimization. Yet it does not do justice to human personhood to reduce our identity to victimization and insignificance. In the midst of our victimization and insignificance, God has revealed that we are beloved victims, and he has taken on human personhood and even victimization in the person of Christ. Postmodernity’s recognition of human victimization and its concern for the oppressed<sup>97</sup> is thus a welcome development, but it vacillates between utopian moments of optimism about the prospects of collective human action,<sup>98</sup> on one hand, and undue despair about the human person, on the other.<sup>99</sup>

If we rightly can celebrate postmodernity’s concern for the oppressed, we can also appreciate its renewed focus on particularity, narrative, and community. One of the familiar features of postmodernity has been its emphasis on the particular—culture, historical setting, gender, ethnicity—and its suspicion of metanarratives.<sup>100</sup> While postmodernity’s rejection of universal reason and “objective truth”

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<sup>96</sup> See David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006); see also John M. Breen, *John Paul II, The Structures of Sin and the Limits of Law*, 52 ST. LOUIS U. L.J. 317, 334–35 (2008).

<sup>97</sup> Some argue that postmodern legal scholars’ concern with the oppressed is a cultural phenomenon rather than the result of postmodernism itself. *But see* Kathryn Abrams, *The Unbearable Lightness of Being Stanley Fish*, 47 STAN. L. REV. 595 (1995).

<sup>98</sup> See, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 109–17 (1986).

<sup>99</sup> Jamieson, *supra* note 93, at 583–84.

<sup>100</sup> If modernity is a rebellion against the universals provided by Western Christendom, postmodernity is a rebellion against the universals posited by modernity—“the public, or ‘the people’—or history or the market . . . .” See GUNTON, *supra* note 17, at 31.

has given some Christians pause,<sup>101</sup> it has also created space for Christians to notice more easily the particularities of the world God has made. Indeed, while the pluralism of modern culture has made some Christian truths harder to believe,<sup>102</sup> it has become easier for Christians to recognize the contingency of created existence, and the particularity of both the God of the Trinity and the Christian story, especially the incarnation in history of Jesus of Nazareth.<sup>103</sup>

The recovery of the Christian story, in all its particularity, is both a potential help and a hindrance to legal thought. Perhaps most significantly, the recovery of the idea of *story* in connection with Christian thinking helps recover the eschatological dimension of Christianity that, among other things, separates Christian and deist thought. This recovery raises the possibility that law is not merely a matter of divining eternal principles of right and wrong and determining to what extent those principles should be made binding by the state.

Specifically, if we use a fairly typical description of the Christian story as creation, fall, redemption, and consummation, we immediately are led to situate human lawmaking and judging historically within those horizons. We are led to wonder, for example, whether human law is an implicit part of God's creation pronounced "very good" or is merely a post-lapsarian necessity.<sup>104</sup> In either case, human rule (including lawmaking and judging) takes place in a world that is misshapen by human rebellion against God: the best efforts of humans in their pursuit of justice will be inevitably marred by that rebellion, even when they intend to pursue justice. And if the best human efforts are often fatally flawed, how much more will law be an instrument of oppression and evil in the hands of rulers who are concerned only for themselves?

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<sup>101</sup> As Part II shows, this need not have been the case, as long as "objective truth" is understood to refer to the modern project of transcendence. See Philip D. Kenne-son, *There's No Such Thing as Objective Truth, and It's a Good Thing, Too*, in *CHRISTIAN APOLOGETICS IN THE POSTMODERN WORLD* 155 (Timothy R. Phillips & Dennis L. Okholm eds., 1995).

<sup>102</sup> Relativism has undercut sin, for instance.

<sup>103</sup> See generally COLIN E. GUNTON, *THE TRIUNE CREATOR* (1997). For a good summary of the connection between the narrative structure of the Christian faith and social ethics, see Stanley Hauerwas, *Reforming Christian Social Ethics: Ten Theses*, in *THE HAUERWAS READER*, *supra* note 35, at 111, 111–15.

<sup>104</sup> This is a question that has divided Christians over the centuries. See, e.g., AQUINAS, *supra* note 8, at Pt. I, Q. 96, art. 4 (arguing that political rule would have existed even if human beings were not fallen); ST. AUGUSTINE, *THE CITY OF GOD*, Bk. XIX, Ch. 5 (stating political rule is necessitated by humanity's fallen condition). John Finnis suggests that the distinction between the two views is overdrawn, however. See FINNIS, *supra* note 16, at 248 n.148.

The reality of human rule in a fallen world has led Western Christian legal and political theorists in a number of different directions.<sup>105</sup> One reaction, associated with the Radical Reformation, has been to regard legal and political institutions as pervasively flawed constructs, instantiations of rule by demonic principalities and powers, participation in which should often be of little interest to Christian believers.<sup>106</sup> Another reaction, associated with the Magisterial Reformation, has been slightly more positive. In this view, human political structures and human laws are a mixed blessing. On one hand, political stability facilitates the preaching of the Gospel and allows human beings to live their lives in peace. Participation in such rule is not sinful but is a worthy human calling. Nevertheless, intractable human sinfulness counsels the construction of institutional frameworks intended to reduce the power of governments and individual rulers within those governments.<sup>107</sup> In the same vein, many Christians in the Reformed and Lutheran traditions have emphasized the provisional role of human law in the era between Christ's resurrection and the final consummation of his rule. There are, as Jesus taught, two kingdoms in the world as we know it between now and his return—Caesar's and God's. The secular state is a provisional institution incapable of producing the full healing and justice that the world requires.<sup>108</sup> If we forget this, we will be in danger of trying to usher in a false utopia in the name of Christ.<sup>109</sup>

Finally, the Catholic and continental Calvinist traditions have tended to be somewhat more optimistic about the capacity of Christians to affect political and legal structures for the better. These traditions assume that the redemption won by Christ in his death and resurrection was intended to effect not only individual salvation but also cultural and social deliverance from sin, and that it is exactly the

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<sup>105</sup> See Greenawalt, *supra* note 13; see also M. Daniel Carroll R., *The Power of the Future in the Present: Eschatology and Ethics in O'Donovan and Beyond*, in A ROYAL PRIESTHOOD? 116, 116–43 (Craig Bartholomew et al eds., 2002); Christopher Rowland, *The Apocalypse and Political Theology*, in A ROYAL PRIESTHOOD?, *supra*, at 241, 241–54.

<sup>106</sup> See ALISTER MCGRATH, CHRISTIANITY'S DANGEROUS IDEA 77–82 (2007) (describing key features of the Radical Reformation).

<sup>107</sup> See, e.g., Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 3, at 293, 293–306.

<sup>108</sup> See O'DONOVAN, *supra* note 89, at 211–12 (“Secular institutions have a role confined to this passing age (*saeculum*). . . . The corresponding term to ‘secular’ is not ‘sacred’, nor ‘spiritual’, but ‘eternal’. Applied to political authorities, the term ‘secular’ should tell us that they are not agents of Christ, but are marked for displacement when the rule of God in Christ is finally disclosed.”).

<sup>109</sup> See VanDrunen, *supra* note 52.

mission of the church to pursue this redemption in both its individual and its cultural dimensions. It is fair to say, however, that in each of these reactions—Anabaptist, Reformed, and Catholic—there is both a “now” and a “not yet” dimension; a firm hope that the death and resurrection of Christ will affect political structures here and now, coupled with a realization that justice in our lives together will only be fully and finally realized when the two kingdoms are merged in the personal reign of Christ.<sup>110</sup> In the Radical Reformation, the “now” dimension is represented in the new political society embodied in the church.<sup>111</sup> In the Magisterial Reformation, the “now” dimension is reflected in the church and also, to some degree, in political structures that provide a context of relative peace and justice.<sup>112</sup> In more perfectionist Christian circles, the “now” dimension occurs not only (or perhaps not exclusively) in the church as a separate political society, but in the human political society at large.<sup>113</sup> It follows that the “not yet” dimension in the worldly power structures looms largest in the Radical Reformation and plays a significant role in the political theory of the Magisterial Reformation. Even in perfectionist circles, however, there remains some recognition that the job cannot be completed through human agency alone but will ultimately require the deliverance of Christ.

Just as the various Christian accounts of knowledge stand in contrast to both modern aspirations toward transcendence and hypermodern nihilism,<sup>114</sup> Christian political thought stands in contrast to both modern optimism and postmodern despair. The optimism of modern autonomous humanity can only be maintained by denying the dire condition of the world or by positing a technological diagnosis and solution to the world’s ills.<sup>115</sup> The range of technological diagnoses and solutions is quite broad, from the eradication of disease, hunger, and even death through advances in genetic research to the forcible suppression of pernicious ideas and ideologies via manipulation or stronger means. Whatever form the supposed technological

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<sup>110</sup> It is only in the future that, as in the passage made famous by Handel, “[t]he kingdom of this world [will] become the kingdom of our Lord, and of his Christ . . .” *Revelation* 11:15 (English Standard).

<sup>111</sup> See STANLEY HAUERWAS & WILLIAM H. WILLIMON, *RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY* (1989).

<sup>112</sup> See O’DONOVAN, *supra* note 89, at 227–36.

<sup>113</sup> See NICHOLAS WOLTERSTORFF, *UNTIL JUSTICE AND PEACE EMBRACE* 3–22 (1983).

<sup>114</sup> See *supra* Part II.A.

<sup>115</sup> In the alternative, the autonomous individual might conclude there is no problem because his (material) prospects remain acceptable, whatever the fate of others may be.

solution takes, it requires having the right people in charge to ensure that the appropriate strategy can be implemented.

Putting modern politics into such stark terms helps reveal the worldliness of recent Christian politics in America on both the right and the left. In its conservative flavor, worldly Christian politics involves obsession with material prosperity, confidence in mechanistic market forces as a means of achieving such prosperity, and a tendency to romanticize the American past. Worldly liberal Christian politics rests on the faith that government can intervene to dismantle unjust institutional structures, which it sees as the heart of the human problem, without itself taking on its own oppressive characteristics. More discouraging than the specific positions staked out by Christian partisans on any particular issue have been the worldly tactics engaged in for the sake of the "greater good." The tactics themselves disclose the true location of the partisans' hope, which ultimately is founded upon having the right people in place to impose the right laws on society.<sup>116</sup> This hope is worldly precisely in that it mirrors the secular technological ground of optimism described above.

Although it is the most obvious place to begin, eschatology is probably not the only aspect of the "thick" Christian story whose recovery would further our understanding of law and legal institutions. Consider, for example, the implications of the incarnation of Christ for our understanding of the lawyer's role. Christians have long been concerned about being implicated in evil by representing guilty persons in courts of law. Were God the distant, impersonal god inspired by Newtonian laws of physics, representing the guilty would be unambiguously problematic. But the incarnate Christ is represented as our "advocate before the Father,"<sup>117</sup> and this is precisely because human beings are universally guilty before God. Indeed, the crucified Christ willingly implicates himself in our evil, taking it upon himself in order to save us. Whatever the contours of appropriate representation of the guilty turn out to be, it seems unlikely that distancing ourselves from the guilty, lest we be touched by their sin, sums up the Christian response.<sup>118</sup>

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<sup>116</sup> William Stringfellow takes this criticism even further and argues that the problem is a "social ethic of osmosis," an individualistic view of evil that suggests that evil can be eradicated by persuasion and conversion. WILLIAM STRINGFELLOW, *AN ETHIC FOR CHRISTIANS AND OTHER ALIENS IN A STRANGE LAND* 17 (1973).

<sup>117</sup> 1 *John* 2:1.

<sup>118</sup> See Stuntz, *supra* note 3, at 1732-33. Note the analogues with the practice of medicine and the physically sick (in which no one is finally "cured") and pastoral ministry to the spiritually deformed. *Id.*

Indeed, as Steven Smith has recently argued, the modern “ontological inventory” may be too sparse to make adequate sense of the world.<sup>119</sup> A far more extreme example than any Smith proposes in his book is the existence of what the Bible calls “principalities” and “powers.”<sup>120</sup> The beings referred to in this phrase have been understood in a variety of ways over the centuries, but their existence is frequently associated with the intractability of evil institutional structures in the world since the Fall. William Stringfellow develops a relatively full account of the principalities and powers, arguing that the avoidance of death is the idol among idols.<sup>121</sup> Therefore, as specific created institutions (principalities)<sup>122</sup> insist on their own survival, even when it means death for others, they take on the demonic characteristics ascribed to them in the Bible.<sup>123</sup> Stringfellow describes the acts of the principalities as “not only a loss of dominion by human beings over the rest of Creation but, more precisely than that, an inversion or reversal of dominion,” with the result that “those very realities of Creation—traditions, institutions, nations—over which humans are said in the Genesis Creation story to receive dominion and the very creatures which are called thus into the service and enhancement of human life in society exercise, in the era of the Fall, dominion over human beings.”<sup>124</sup>

A more modest ontological development might consist of the recovery of the church as an important category of Christian *political* thought. Again, this recovery may lead in a number of different directions. First, the recovery of the church as a political reality<sup>125</sup> helps resist modernity’s tendency to reduce political life to a dialectic between the individual and the state. Moreover, recovery of the church as a political reality highlights the Two Cities (church and world) that

<sup>119</sup> STEVEN D. SMITH, LAW’S QUANDARY 8–11 (2004).

<sup>120</sup> See *Ephesians* 6:12.

<sup>121</sup> STRINGFELLOW, *supra* note 116, at 92–94.

<sup>122</sup> See *id.* at 78.

<sup>123</sup> See *id.* at 80–82. For a full description of the traits of the principalities according to Stringfellow, see *id.* at 77–94. For other accounts of the principalities and powers, see HENDRIKUS BERKHOF, CHRIST AND THE POWERS (John Howard Yoder trans., Herald Press 1962) (1953); MARVA J. DAWN, POWERS, WEAKNESS, AND THE TABERNACLING OF GOD (2001); JOHN HOWARD YODER, THE POLITICS OF JESUS 134–61 (2d ed. 1994).

<sup>124</sup> STRINGFELLOW, *supra* note 116, at 81. He continues: “The work of the demonic powers in the Fall is the undoing of Creation. The gravest effort of the principalities is the capture of humans in their service, which is to say, in idolatry of death, whatever external appearance or particular form that may assume.” *Id.* (citing *Genesis* 6:11–13) (citations omitted).

<sup>125</sup> Not to say political actor. The point here is not to endorse ecclesiastical political activism.



have been a significant feature of classical Christian political thought at least since Augustine.<sup>126</sup> Contrasted with the church is a world that some have argued is more properly called “pagan” rather than merely secular.<sup>127</sup> Peter Leithart has recently suggested that we may need to call attention to the West’s paganism, helping our friends see that “for all our pretense of sophistication, the West has never entirely escaped the impulses and habits of primitive culture . . . .”<sup>128</sup> If we take paganism, for purpose of illustration, as the ascription of agency and power to inanimate objects, one need not reach far for modern illustrations—the “selfish” gene, the “decisions” of the market, and so forth.<sup>129</sup> One may make the case that, far from freeing itself from superstition, Western culture has simply traded in old superstitions for new ones.

Finally, two other positive consequences may flow from Christian assertion of “thick” identity. First, while “thick” stories may tend to breed social division, only communities with “thick” stories have the resources to challenge the larger culture when it goes astray, instead of drifting along with it. Stanley Hauerwas argues that the moment the church begins to feel as though it has a stake in the preservation of its society’s political order is the moment at which it loses its ability to call the society to account in the way that it should.<sup>130</sup> Second, one

<sup>126</sup> See ST. AUGUSTINE, *supra* note 104.

<sup>127</sup> But see C.S. LEWIS, *THE PILGRIM’S REGRESS* 192–99 (Sheed & Ward 1935) (1933) (observing that “pagan” is an appropriate label for pre-Christian culture but not for post-Christian culture).

<sup>128</sup> Posting of Peter Leithart to *On the Square*, <http://www.firstthings.com/onthesquare/?m=200709&paged=2> (Sept. 6, 2007, 07:10 EST).

<sup>129</sup> See, e.g., GUNTON, *supra* note 17, at 32–33 (noting the oppressiveness of mass culture in the east and west); GUNTON, *supra* note 103, at 145 (“When God is not confessed as the Lord of creation, either titanic man or deified gene take the floor, with the result that both understanding and the world are distorted.”); STRINGFELLOW, *supra* note 116, at 34–37 (discussing paganism).

<sup>130</sup> Stanley Hauerwas describes a conversation he and a Jewish philosopher had over school prayer. His Jewish interlocutor urged him to support school prayer because he thought Jews would be better off in a nominally religious society than in a secular one. Here is an excerpt from the exchange:

PHILOSOPHER: You Christians have to take responsibility for what you have done. You created a civilization based on belief in God and it is your responsibility to continue to support that civilization.

THEOLOGIAN: But you know yourself that such a social strategy cannot help but lead to the continued degradation of Christianity. The more Christians try to make Christianity a philosophy sufficient to sustain a society, especially a liberal society, the more we must distort or explain away our fundamental beliefs. Therefore, in the name of sustaining a civilization Christians increasingly undercut the ability of the church to take a critical stance toward this society. Even when the church acts as a critic in such a context, it cannot be more than a

of the ways the church may act as a blessing to the world is to explain the world to itself. Human beings cannot properly understand themselves (and their cultural practices) apart from a story that is at least “thick” enough to declare to them that they are creatures and should not “persist in the pretentious assumption that [they] can and should be morally autonomous,”<sup>131</sup> and that they are valuable and loved.

It hardly needs saying that there are also downsides to telling “thick” stories in the midst of talking about law and politics. God-talk is a “conversation stopper,”<sup>132</sup> is politically divisive,<sup>133</sup> and is allegedly disrespectful of conversation partners who disbelieve the religious claims being relied upon.<sup>134</sup> Without denigrating (or accepting) these claims, let me focus upon three others. First, because the Christian eschatology is one of hope grounded in the victory of Christ over the powers of sin and death, and because Jesus’ people will not be condemned when the injustice of the world is undone, Christian politics always carries with it the danger of earthly triumphalism—of forgetting that our legal and political systems, no matter how morally sound and carefully engineered, are not the answer to humanity’s main problems. In the contemporary context, triumphalism of this sort feeds into our technocratic, cultural inclinations, reinforcing the idea that our social problems would be substantially resolved if people like us, i.e., Christians, were in charge.<sup>135</sup>

friendly critic, since it has a stake in maintaining the basic structure of society.

PHILOSOPHER: Why should that bother me? Christians have always been willing in the past to degrade their convictions to attain social and political power (of course, always in order that they might “do good”). Why should they start worrying about being degraded now? . . . So if you care anything about the Jews you ought to support school prayer.

STANLEY HAUERWAS, *A Christian Critique of Christian America*, in THE HAUERWAS READER, *supra* note 35, at 459, 461. See also Duncan B. Forrester, *John Michael Yoder*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 13, at 481, 497.

<sup>131</sup> STANLEY HAUERWAS, *On Keeping Theological Ethics Theological*, in THE HAUERWAS READER, *supra* note 35, at 51, 73.

<sup>132</sup> RICHARD RORTY, *Religion as a Conversation-Stopper*, in PHILOSOPHY AND SOCIAL HOPE 168, 171 (1999).

<sup>133</sup> Richard W. Garnett, *Introduction: Religion, Division, and the Constitution*, 15 WM. & MARY BILL RTS. J. 1 (2006).

<sup>134</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* 385–95 (1996). But see MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 181–82 (1988); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 141 (2006).

<sup>135</sup> See Forrester, *supra* note 130, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 13, at 495.

Eschatological visions also tempt Christians to forget that they are, as Luther put it, “justified sinners”<sup>156</sup> rather than members of a better race of humans. They create the danger that, instead of seeing our political opponents as human beings who disagree with us about matters of penultimate importance, we encounter them as obstacles to be overcome—hindrances not just to our projects but also to God’s. All too often, the messages inherent in the “thick story” Christians have unintentionally spread abroad in the community are (1) we are good people, (2) you are bad people, (3) we are going to take over and force you to be good like we are, and (4) you should be grateful.

Perhaps the greatest danger that a focus on *identity* poses to Christian legal scholarship is that it can tend to minimize the scholar’s interest in the particular thing—human law—he is studying. Particularly when the culture’s story is dramatically at odds with the Christian story, the scholar’s focus can easily become the Christian story to such an extent that the created world becomes merely the occasion for scholarship, rather than an object of interest in its own right.<sup>157</sup>

## V. VOCATION

A final approach to Christian legal scholarship may be summarized under the term *vocation*. The word vocation is a close cousin of *calling*, which is a particularly helpful term to modern ears because it connects work with both *relationship* (one can only be “called” by another person) and *direction* (one is called to something or away from something one is already doing).<sup>158</sup>

The concept of vocation has traditionally been understood in connection with both the universal and the particular realms within the human moral life. All human beings are called “to glorify God, and enjoy him forever,”<sup>159</sup> and this means love of God and neighbor, expressed in obedience and delight in God and loving service to our fellow human beings. However, the shape of individual human lives

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<sup>156</sup> Paul Valliere, *Introduction to the Modern Orthodox Tradition*, in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, *supra* note 13, at 503, 509.

<sup>157</sup> Christian theologians in the Anabaptist tradition, emphasizing as they do the identity of the church in opposition to the world, are frequently accused of withdrawing from the world and its problems. For one response to this charge, see HAUERWAS, *supra* note 130, in THE HAUERWAS READER, *supra* note 35, at 477–80.

<sup>158</sup> In these senses, the idea is more helpful to understanding scholarship than merely repeating the ideas of *participation* or *engagement* invoked in Part II.

<sup>159</sup> Westminster Shorter Catechism, Q. 1 (citations omitted).

is diverse. We would lose something if, as Kant suggested, we always acted in ways in which everyone else in the world should also act.<sup>140</sup> As separate persons with different gifts, abilities, backgrounds, and circumstances, much would be lost if we insisted on uniformity in all our beings and doings. That recognition has resulted in Christian doctrine not only about God's general calling to humanity, but also his particular callings to individual creatures, which may vary a great deal from person to person.<sup>141</sup>

It seems obvious, within this framework, that legal scholarship is a particular calling. Nevertheless, it is also true that legal scholarship is not merely a Christian activity, but a human activity, engaged in with great skill and learning by many people who have no sense that they are responding to God's call in doing so. We would be surprised to find someone who professes to be an atheist engaged in the religious activities of prayer, evangelism, or devotional Bible study, but we are not at all surprised to find him teaching law. Why not? Is it appropriate to use the term *calling* to describe scholarly (or other) work done by unbelievers? Would it not be more appropriate to describe their work as an *occupation* or a *career choice*, recognizing the role of free human choice in the matter?

In the fullest understanding, *vocation* is best understood as obedient service to God issuing out of gratitude for what God has done. In this sense, one's vocation is a setting for worship and resembles the "religious" activities described above; however, there are two senses in which one might say that unbelieving legal scholars are following a calling whether they would say so or not. First, human beings are creatures. Learning about the world is one of the things we seem unable to help doing as a group, at least when there are enough resources to permit some of us to stop producing food, clothing, and shelter.<sup>142</sup> We cannot choose to be turtles or antelopes, neither of which presumably has much interest in cultural matters. Nor can we choose to be space aliens who have gotten beyond such mundane, lo-

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<sup>140</sup> "Act only according to that maxim through which you can at the same time will that it should become a universal law." IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington, trans., 3d ed. 1993).

<sup>141</sup> Calling might include many other generic roles. I am not merely a teacher or scholar, but also a colleague, husband, father, friend, brother, church officer, and so forth.

<sup>142</sup> Even then, we learn about the world in order to provide for ourselves and to help answer the fundamental non-material questions of life: Who am I? Where did I come from? Where am I going?

cal interests.<sup>143</sup> So while we may choose, as individuals, whether or not we want to spend our particular lives engaged in learning and teaching, we cannot choose whether we want to be *the sort of being* who is interested in such things. We (whether Christian or not) are already that sort of being.

Indeed, it is precisely because we recognize that most people will have neither the opportunity nor the inclination to be legal scholars that we may go a step farther in affirming the calling of those who participate in legal scholarship. What sorts of people are likely to wind up studying, writing, and teaching about human law? Those whose particular sort of intelligence, temperament, social background, and life experience place them in a position to excel at elite law schools and whose interests and circumstances lead (call?) them to the legal academy. In another time, we might have called this combination of factors Providence.

In that legal scholarship is a human calling, we may affirm its goodness. God has declared the world he has made "very good indeed,"<sup>144</sup> and this must include humanity and the characteristic (non-sinful) inclinations of the human person.<sup>145</sup> We may celebrate human capacities and inclinations to learn about, understand, and shape the world around us as part of the good gift of being human. Significantly, God gives gifts like these to human beings in general, not only to those who believe in him, and he has mercifully restrained the effects of our rebellion so that these gifts are not lost altogether.<sup>146</sup>

What, then, is the connection between the general human calling "to glorify God and enjoy him forever" and the way that particular callings, especially those related to scholarship, are carried out? In

<sup>143</sup> See generally WALKER PERCY, *LOST IN THE COSMOS* 113–26 (1983) (discussing the problem of reentry). Percy's "re-entry" is a metaphor for reassuming a creaturely, as opposed to a transcendental, posture with respect to the world.

<sup>144</sup> As Alister McGrath has observed, the goodness of the created order is part of the scholar's motivation:

The Christian doctrine of creation provides a fundamental motivation to the investigation and appreciation of nature, in terms of both providing an intellectual framework which allows nature to be seen as a coherent witness to God, and enkindling an intellectual curiosity, a love of truth, a desire for knowledge, and a yearning for understanding which impels the baptized mind to explore what it finds around it and within it.

3 MCGRATH, *supra* note 30, at 3–4.

<sup>145</sup> The untarnished image of God in human form is made available to us in Jesus Christ. See 1 CALVIN, *supra* note 42, at Bk. 1, Ch. 15, § 4.

<sup>146</sup> See ABRAHAM KUYPER, *LECTURES ON CALVINISM* 121–36 (1931); *supra* text accompanying notes 54–56 (discussing common grace).

the Western Christian tradition, the enjoyment of God has been closely associated with the *visio Dei*—the prospect of seeing God, which is the final destiny of the believer in the life to come.<sup>147</sup> In this tradition, every aspect of the world is sought to be known as itself and as a part of the whole of the created order in which God has revealed himself. Part and whole are likewise to be known as *God's creation*—a testimony to God's glory. The vision of God thus “destroys any restrictive categorizations which insist that certain domains of knowledge are to be deemed religious, and others secular.”<sup>148</sup> Moreover, “engagement with every aspect of the world offers the potential to deepen an appreciation of its creator, according to its own distinctive nature and the capacity of a fallen human mind to discern it.”<sup>149</sup>

Despite the expectation that engagement with the created world can lead human beings to a greater knowledge of God, this sort of engagement is quite different from the modern project of attempting to see the world as God sees it. It is one thing to encounter God's speech in the world—in the Book of Nature or in the Book of Scripture—and another to attempt to see the world from God's vantage point. The former project is consistent with the limitations on human knowing and learning surveyed above in Part II; the latter is decidedly not. Seeing the world as God's creation is not merely to passively observe the world, but involves recognizing it for what it really is. This process is active, situated, and communal: it is *active* in that observation and interpretation require human effort and involve using the faculties of particular human persons;<sup>150</sup> *situated* in that the observation and interpretation occur “on the basis of a tradition-mediated framework of rationality”;<sup>151</sup> and *communal* in that learning cannot ultimately be an individualistic enterprise.<sup>152</sup> Indeed, once we recognize that human beings know in partial and limited ways, and

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<sup>147</sup> See generally 3 MCGRATH, *supra* note 30, at 3 (citing KENNETH E. KIRK, *THE VISION OF GOD: THE CHRISTIAN DOCTRINE OF THE SUMMUM BONUM* (1931)).

<sup>148</sup> *Id.* at 4.

<sup>149</sup> *Id.* Nicholas Wolterstorff speaks of shalom, rather than the vision of God, as the ultimate end of human action. As in the discussion in the text, *enjoyment* of God and neighbor is central to Wolterstorff's account. See NICHOLAS WOLTERSTORFF, *UNTIL JUSTICE AND PEACE EMBRACE* 69–72 (1983); see also SLOANE, *supra* note 27, at 148–60 (discussing Wolterstorff's heuristics of shalom).

<sup>150</sup> The point is not merely to see / observe the world but to recognize it for what it really is—that is, God's creation. This is a spiritual activity; indeed it is the glorification and enjoyment of God, the “forget[ting] not [of] all his benefits.” *Psalms* 103:2.

<sup>151</sup> See 3 MCGRATH, *supra* note 30, at 4.

<sup>152</sup> See *id.* at 8 (discussing the communal dimensions of theory).

learn within the context of scholarly communities, we can see more clearly the indispensability of community to learning.<sup>153</sup>

Someone reading this paper because she is interested in doing Christian legal scholarship might well complain at this point that, if (1) learning and knowing are human callings rather than specifically Christian ones, (2) Christian perceptions of the world may be just as limited and fallen as secular ones, and (3) the Bible does not function as a sourcebook of Christian principles from which legal theory can be derived with certainty, then (4) neither Christian doctrine nor even Christian discipleship stands to make a distinctive contribution to the scholarly enterprise.<sup>154</sup>

If the complaint is that Christianity does not provide scholars with a methodology for doing legal scholarship that yields “the Christian account of x,” then it must be accepted as far as it goes. Neither the Bible nor the Christian tradition tells legal scholars precisely what methodologies they should be using to investigate law, nor do they give more than general guidance about analyzing the legal or political controversy *du jour*. Christian scholars disagree, with good reason, about whether the best approach to legal analysis is attempting to discern “the law” behind the law, investigating the formal coherence of a particular line of cases, considering the consequences of rules, or examining the rhetorical structure of constitutional argument. They differ, with good reason, as to whether they should be textualists or interpretivists, as to the relevance of economic analysis for law, and they have varying degrees of confidence or skepticism about particular institutions. They disagree about which problems are most interesting or most important, and they write for different audiences.

In fact, there is a theological argument that a legal theory wholly determined by theology is not only impossible, but would be wrong. For one thing, to accept such an approach is to “tacitly accept[] the characteristically modern constriction of Christian learning to Christian theology.”<sup>155</sup> Even though theology is important to Christian learning, such learning is not just about theology but is also about learning within the relevant discipline, “learning pursued in fidelity

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<sup>153</sup> Cf. SLOANE, *supra* note 27, at 110 (reporting Nicholas Wolterstorff’s idea that “the very particularities of our cognitive constitutions which were so problematic for the project of generic learning are best seen as ways of accessing reality”).

<sup>154</sup> This question is addressed in the context of Christian scholarship generally in MARSDEN, *supra* note 4.

<sup>155</sup> Wolterstorff, *supra* note 29, in *A PASSION FOR GOD’S REIGN*, *supra* note 29, at 65, 76.

to the gospel and in the light of the coming kingdom.”<sup>156</sup> As Nicholas Wolterstorff observes:

It is *economists*—*Christian economists*—who will have to work out the import of the gospel of the kingdom for the economic dimension of society. It will not do to consign the development of economics to those who care nothing about the kingdom, and then content ourselves with having theologians around who lodge a criticism here and there against the results and set the totality within a theological context. What is needed is not a theology of economics but theologically faithful economics.<sup>157</sup>

Why is this so? What is the distinction between a “theology of [law]” and “theologically faithful [legal scholarship]?” One distinction surely has to do with the task of the legal scholar, which involves, among other things, study of the laws and related institutions that are part of the created world.<sup>158</sup> The theologian’s calling is different; being a good theologian does not automatically make one a good lawyer.<sup>159</sup> Indeed, Wolterstorff observes that theological commentary offered in the “prophetic critique” may come across simply as “complaint” to those who are doing the work of wrestling with the difficult questions of a particular discipline.<sup>160</sup>

Much of the scholarly diversity described above should have been expected in light of this Article’s prior discussion of pluralism, but it is also consistent with traditional Christian accounts of scholarship generally. Aquinas, for example, pays sustained attention to the different objects of knowledge in the world, the different possible modes of human knowing, and the different motives one can have for acquiring knowledge.<sup>161</sup> Aquinas’s account strongly suggests that it would be wrong to expect that the study of law should yield only

<sup>156</sup> *Id.* at 77.

<sup>157</sup> *Id.*

<sup>158</sup> Despite the fact that David Skeel calls for the development of “a normative Christian theory of the proper role of the law generally, or of a particular area of law,” he suggests that the theory “draw[] not so much on moral or political philosophy as on economics, sociology, or political science.” Skeel, *supra* note 3, at 1506. He thus seems to be rejecting a heavily top-down account of “theory” in favor of an emphasis on theologically-informed study of the law and legal institutions.

<sup>159</sup> Cf. Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 3, at 208, 211 (observing that Christian scholars in other disciplines are sometimes poorly trained in economics).

<sup>160</sup> Wolterstorff, *supra* note 29, in A PASSION FOR GOD’S REIGN, *supra* note 29, at 65, 76–77.

<sup>161</sup> See AQUINAS, *supra* note 8, at Pt. I, Q. 14, art. 16; RALPH MCINERNEY, ETHICA THOMISTICA 38–40 (rev. ed. 1997). For a summary of Aquinas’s account of human knowledge and its implications for legal theorizing, see William S. Brewbaker III, *Thomas Aquinas and the Metaphysics of Law*, 58 ALA. L. REV. 575, 600–05 (2007).



one kind of knowledge: Knowledge about law can be practical, theoretical, or a mixture of both. Law may be approached from the standpoint of moral philosophy or from other vantage points—scientific, economic, historical, or cultural.<sup>162</sup> If this is the case, then we should not be surprised to find scholars analyzing law from these varying perspectives.

This is not to say that the content of Christian faith should not have any influence on the substance of Christian legal scholarship. Wolterstorff argues that Christian doctrine's primary function in the scholarly enterprise is as a *control belief*.<sup>163</sup> He divides the beliefs that affect scholarship into at least three categories: *data beliefs*, *data-background beliefs*, and *control beliefs*.<sup>164</sup> These correspond respectively (and very roughly) to (1) beliefs about what the facts are, (2) beliefs about how we know what the facts are, and (3) fundamental assumptions about human identity and the meaning and purpose of life that are shaped not only by our religious commitments but also by our cultural background, life experience, and other factors.<sup>165</sup> Wolterstorff's account of the place of control beliefs is both descriptive and normative: descriptive in that he argues that we all do have a web of beliefs that control which theories of the world we are likely to accept; and normative in that for Christians, our "authentic Christian commitment" *should* function in this manner.<sup>166</sup> Christian control beliefs, then, while not dictating full-orbed theoretical accounts of legal or political controversies will tend to place Christians in predictable places with respect to certain theories. We might expect Christians, for example, to question legal theories that rely exclusively on behavioristic accounts of the human person<sup>167</sup> or those that posit that the ultimate goal of law ought to be the maximization of a society's material wealth, or that law or political processes are sufficient to respond to a society's deepest questions of meaning and purpose.

<sup>162</sup> See generally Brewbaker, *supra* note 161.

<sup>163</sup> Wolterstorff, *supra* note 29, in *A PASSION FOR GOD'S REIGN*, *supra* note 29, at 65, 70.

<sup>164</sup> *Id.* at 63–70.

<sup>165</sup> See generally *id.* at 63–84; SLOANE, *supra* note 27, at 132–48. Wolterstorff's discussion includes a helpful account of the ways scholars actually do relate their scholarship to their control beliefs, including inadequate tendencies to "harmonize," "contextualize," or "apply" whatever accounts of the world are popular at the time. Wolterstorff, *supra* note 29, in *A PASSION FOR GOD'S REIGN*, *supra* note 29, at 65, 76–84; see also SLOANE, *supra* note 27, at 138–39.

<sup>166</sup> Wolterstorff makes a distinction between one's "actual Christian commitment" and one's "authentic Christian commitment" in this regard. Wolterstorff, *supra* note 29, in *A PASSION FOR GOD'S REIGN*, *supra* note 29, at 65, 76–84.

<sup>167</sup> See *id.* at 68–69 (discussing B.F. Skinner).

Moreover, as argued above in Part IV, attention to Christian identity may shape our control beliefs in a more authentic direction. As we have seen, it is difficult for American Christians to recognize themselves as contingent, created beings living in a world in which their job is not to dominate but to serve. It is likewise difficult for us to conceive of ourselves politically as “strangers and aliens” with twin political loyalties.<sup>168</sup> Connecting one’s intellectual life with Christian discipleship may help correct judgments that are, to use biblical terminology, worldly rather than spiritual. Similarly, connecting scholarship to Christian discipleship ought to affect the way we deal with our tendencies to “misknow” the world. We may focus on two themes at this point: our tendency not to know the world as *creation* and our tendency toward self-love.<sup>169</sup>

At the level of one’s “official position,” Christians universally affirm that the world is God’s creation, so it may be difficult to see how this tendency presents a problem for those who affirm that God exists and that he is the maker of heaven and earth. Nevertheless, given the connection between failing to see the world as creation and human misknowledge, it is worth considering whether this really is a problem that faces only those who reject God.

There are two reasons to think that failing to see the world as creation is a universal problem, i.e., one that affects even those whose official position conforms to the idea. First, if Calvin is correct that human pride is a large part of the “concupiscence” that affects human beings after the Fall,<sup>170</sup> we do not have to look far to see how creation is easily viewed as an affront to our pride. Seeing the world as creation invites us to see ourselves as creatures, which in turn implies limitation, dependence, and fallibility. Creation’s contingency and particularity likewise reminds us that we are not merely creatures, but that we are created to live *in relation to* God. Since we may be naturally inclined, as Adam and Eve were, to flee from God’s presence, we may suppress the reminders the created order gives us about who we are.

Moreover, as already noted, we are not isolated individuals; we live in a culture the governing principle of which has been characterized as the denial of creation<sup>171</sup>—whether that denial takes the form

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<sup>168</sup> See *supra* text accompanying notes 103–07.

<sup>169</sup> I should note that in referring to creation, I refer only to the fact that God purposefully created the world and not to the controversies over the means by which he did so.

<sup>170</sup> See WALLACE, *supra* note 12, at 53–57.

<sup>171</sup> MARSDEN, *supra* note 4, at 84.

of the desire for a transcendent mastery of the world through the harnessing of the impersonal forces that allegedly govern it or of a radical individualism and relativism. We are unlikely to be taught in such a culture to recognize the world as creation; to the contrary, we are likely to acquire myriad habits of mind that cut in the opposite direction.

An important way in which a failure to see the world as creation has consequences for Christian legal scholarship is that it can generate a disinterest in the particularity of the created world. The human being who thinks of himself as intellectually transcendent, but has only eighty years or so on this earth, is not likely to waste his time studying details that will shortly pass away. He will be more inclined to study the "forces" that "lie behind" those details, so that they can be employed in a "beneficial" direction. Creation reminds us that there are no impersonal forces behind the world, only secondary causes created by God. Even more interestingly, it reminds us that God did not have to make the world in the way he did; that this world is itself a particular creation of a personal being not a necessary emanation from an impersonal life-force. It is entirely appropriate for human creatures to spend their short lives glorifying God by exploring and delighting in and being surprised by small corners of the world he has made. This project is pointless without creation, unless the small corner is anticipated to generate increased capacity to master the world in some way.

Our tendency to self-love is another important source of noetic dysfunction. For participants in the modern legal academy,<sup>172</sup> the difficulties associated with this tendency probably need no elaboration. We are judged in our professional community by one thing: our individual reputation. Our reputation among our professional colleagues is the key to where we will teach, how much money we will make, what conferences we will be invited to attend or to speak at, and, if we are not careful, the way we feel about ourselves. This is itself, of course, a gross misknowledge of the created order, and one that leads to more misknowledge as we are constantly tempted to orient our work toward furthering our own prosperity rather than loving others and God.<sup>173</sup>

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<sup>172</sup> There is a clear analogue here in terms of modern political life. Our knowing should likewise not be compromised by the quest for power.

<sup>173</sup> George Marsden likewise argues for the relevance for scholars of the doctrine of the incarnation, MARS DEN, *supra* note 4, at 90–93, and the doctrine of the Holy Spirit. *Id.* at 94–96.

The main dangers in the vocation model are, perhaps not surprisingly, neglect of the theoretical insights that Christian doctrine may offer and, especially in the current cultural context, a failure to recognize the limitations of universal human reason. It may be wrong to think that one can argue one's way to *the* Christian account of law, but it is equally wrong not to press for whatever concrete insights Christian teaching has to offer. The theorist's impulse to demand a full account of ideas and robust conclusions can help compel scholars to address important questions that can illuminate faith and scholarship. Similarly, the quest for a reasoned reconciliation between theological givens and theoretical accounts of an academic discipline can help prevent Christian scholars from attaching themselves too uncritically to intellectual fashions.

## VI. CONCLUSION

Some time ago, as I was preparing to teach a jurisprudence class on the Critical Legal Studies (CLS) movement, I had an illuminating conversation with a now-retired friend who was "present at the founding" of CLS (or very nearly so). He had attended many of the early Conferences on CLS. To my surprise, he told me that he had always felt like an outsider at those conferences. When I pressed him about the reasons for his feelings, he replied that, in his opinion, CLS was from its inception essentially a postmodern movement. My friend is a Marxist; he "really believes" that capitalism and the class structure are at the root of humanity's problems. While his CLS friends were influenced by Marx, their skepticism about all metanarratives necessarily extended to the Marxist metanarrative and eventually (now famously) to their own as well. Moreover, he said that his perception was that CLS was, from its inception, surprisingly careerist. The conferees and organizers quickly became adept at facilitating the professional success of the participants, and the focus on achieving social justice was obscured in the process.

I have no way of knowing whether these criticisms are well-taken, but whether they are or not, they raise two important issues for Christian legal scholars: an issue of theory and an issue of practice. The theoretical issue is the primary one posed by this paper—the danger that Christian legal scholarship will be insufficiently Christian, and that it will accept the background assumptions of modernity even as it cites Bible verses or the doctors of the Church in support of whatever thesis is being argued. The specific set of assumptions addressed in this paper relate to a Christian view of knowing and learning, but other background assumptions likewise need attention: What differ-

ence does it make for our understanding of law that, for example, we live in a world that God has made and inhabited in bodily form in the person of Christ? That we live in a world that is fallen? In a world that is waiting for a fuller justice than can be given by human rule? That this world is one in which, like yeast permeates dough, the kingdom of God is unfolding and being revealed? That the world is awaiting judgment? That it is awaiting redemption? That it is more than the sum total of its mechanisms? What difference does it make that we live in a world in which political and legal rule has been entrusted to human beings? That it would have been possible for God to have made a world in which this was not the case?

Until questions like these are addressed (and they are never addressed definitively), there is always the danger that Christian scholarship will affirm either the wrong things or the right things for the wrong reasons. Put another way, the default categories for contemporary thinking about law are Enlightenment categories and legal realist and postmodern categories, and we will have to unlearn at least some of the things we have learned from these sources or we will produce legal scholarship that is ultimately either (1) un-Christian in some of its conclusions or (2) Christian in its conclusions but intellectually incoherent.

Regrettably, this is not as simple as reading a few books to put our thoughts right. As twenty-first century Westerners, Christians in the American legal academy live in a world that has been stripped of any fundamental connection to the transcendent. We desperately need to recapture the capacity to inhabit (*participate in*) our Father's world, the world in which, as the old hymn says, "All nature sings, and round me rings, / The music of the spheres,"<sup>174</sup> without reducing that project to mere sentimentalism.

Even worse, we are peculiarly ill-equipped for this task given our cultural-historical setting. The American church has little patience for theology; most Christians know next to nothing about important teachings of the Christian faith.<sup>175</sup> The average Christian in the legal academy today is a smart person whose implicit understanding of the world is likely to have been shaped far more by John Locke or John Dewey than by Augustine, Aquinas, or Calvin.<sup>176</sup> Many of us grew up in educational environments that taught us more about learning how

<sup>174</sup> Maltbie D. Babcock, *This Is My Father's World*, in THE EPISCOPAL CHURCH (U.S.), THE HYMNAL 651 (1982).

<sup>175</sup> See GEORGE BARNA, GROWING TRUE DISCIPLES 64–74 (2001) (documenting theological ignorance among American churchgoers).

<sup>176</sup> Or some other important figure within the Christian scholar's own tradition.

to learn than about learning anything in particular. We are distracted by the endless media around us. To paraphrase Aquinas, we are curious but not studious.<sup>177</sup>

Nevertheless, there are grounds for optimism. Christians who enter law school or law teaching today have a far more accessible intellectual base on which to build than was the case ten or twenty—much less fifty—years ago. If credentials are any measure of ability, the quality of the American law professoriate is improving; thus, we can expect that scholarly capacities of Christian law professors entering the academy are likewise improving. Moreover, there are at least hints of cultural shift among younger Christians, who may well prove to be more culturally and intellectually serious as a group and thus might be expected to generate more intellectual heft than we have done.<sup>178</sup> An important task for today's legal scholars may be self-consciously to lay a foundation for our as-yet-unmet colleagues.

This is where the issue of practice comes in. At least some of what Christian legal scholars write ought, in my opinion, to be written self-consciously to inform other Christians about what Christianity has had to say about matters relevant to law, and to help them locate themselves with respect to contemporary currents of thought.<sup>179</sup> Some part of what we write ought to be free of the self-censorship and intentional obscurity that is a customary part of legal academic writing,<sup>180</sup> and some of it ought to be perceived in some quarters as (1) scandalous, (2) useless, and (3) not career-enhancing.<sup>181</sup>

Indeed, one of the chief dangers for contemporary Christian legal scholarship is that it so easily becomes the academic analogue to "Christian fiction" or "contemporary Christian music"—aping the culture in fundamental assumptions and style, while adding a patina of God-talk and moralism. Christian legal scholars make valuable contributions to the community of legal scholars when we understand who we are and what we think. All too often, we seem not to know.

<sup>177</sup> See Hütter, *supra* note 92, at 178–82 (explicating AQUINAS, *supra* note 8, Pt. II-II, Q. 166).

<sup>178</sup> The Methodist theologian Thomas Oden has called this group the "young fogies." THOMAS C. ODEN, *THE REBIRTH OF ORTHODOXY: SIGNS OF NEW LIFE IN CHRISTIANITY* 10 (2003).

<sup>179</sup> Cf. LEWIS, *supra* note 127.

<sup>180</sup> See David Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345, 415 (1988).

<sup>181</sup> It goes without saying that being scandalous and useless without being thoughtful is nothing to celebrate.

