

## The Paths of Christian Legal Scholarship

David A. Skeel, Jr.<sup>1</sup>

The history of twentieth century Christian legal scholarship— really, the absence of Christian legal scholarship in America’s elite law schools— can be told as a tale of two emblematic clashes: the first an intriguing historical footnote, the second a brief, explosive war of words.

The first came in a rural Nebraska courthouse, circa 1890. The counsel for the plaintiff in the case, a routine tort action against a railroad, was “a rising Nebraska politician named William Jennings Bryan,” who would soon be elected to Congress and in 1896 would become Democratic presidential nominee for the first of three times. The counsel for the defendant, Roscoe Pound, would follow the circuit court in Nebraska for a few more years, before joining the law faculty at the University of Nebraska and eventually moving east to Harvard, where he served as dean of the law school for two decades. Pound won that case, his first victorious jury trial, but he lost his share of others. He later quipped that the initials J.P., which stood for justice of the peace, the judicial official who heard many of these cases, “were popularly taken to represent ‘Judgement for Plaintiff,’ partly because the plaintiff was wise enough to select for a defendant a party who could pay the costs.”<sup>2</sup>

In the waning years of a century in which judges had unselfconsciously treated Christianity as a foundation of the common law, the elite American law schools, led by Harvard

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<sup>1</sup> S. Samuel Arsht Professor, University of Pennsylvania. This chapter was first drafted as a talk to be given at the “From Silver to Gold” conference at Emory Law School. Although I have revised in places and have added a few citations, I have preserved the tone and content of the original talk. Thanks to John Witte and his colleagues at the Center for the Study of Law and Religion for inviting me to participate in the conference and this book. [Doc: Emory Talk]

<sup>2</sup> Quoted in DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 71 (1974).

dean Christopher Columbus Langdell, had begun to conceive of legal scholarship in scientific terms. Langdell's innovation was a systematic, case-oriented approach that distilled the key principles of each area of law from the existing cases, so that these abstract principles could be applied to any subsequent controversy. Langdellian legal science, like similar reforms taking place elsewhere in American higher education, quite explicitly excluded religious perspectives, which were seen as insufficiently scientific and inappropriately sectarian.<sup>3</sup>

Roscoe Pound was a product of the Langdellian system— he took his legal training from Harvard in 1889 and 1890— but he was also one of its earliest critics. According to Pound, Langdell's system, with its singleminded focus on previously decided cases, was too narrow and formalistic, a “mechanical jurisprudence.” Pound insisted that lawyers and legal scholars needed to take into account the insights of sociology, economics, and political science to fully understand the role of law, an approach he called “sociological jurisprudence.” Sociological jurists, according to Pound, “look to the working of the law rather than to its abstract content; they regard law as a social institution involving both finding by experience and conscious making— an institution which may be improved by conscious human effort.”<sup>4</sup> Pound was not himself religious, but he traveled in the same Progressive circles as advocates of the Social Gospel, the liberal Protestant movement that married modern critical theology with an optimistic program for social reform;<sup>5</sup> and Pound, unlike Langdellian legal science and subsequent movements such as Legal Realism, which emerged in the 1930s, included morality as a central concern of the law.

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<sup>3</sup> For more detail on Langdell's innovations, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). The transformation of American higher education in the late nineteenth century is chronicled in GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (1994).

<sup>4</sup> Roscoe Pound, *Jurisprudence*, in *THE HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES* 444, 458 (H. Barnes, ed. 1925).

<sup>5</sup> Pound's biographer notes, for instance, that he urged his students, while he was teaching at Northwestern after the turn of the century, “to attend the lectures given by Charles R. Henderson, a Social Gospel chaplain who doubled as a criminologist.” WIGDOR, *supra* note 2, at 142.

William Jennings Bryan, Pound's adversary in that Nebraska courthouse, was no intellectual—his sympathetic biographer suggests he was a “rather simple man” who “showed little interest in literature, art, or philosophy”<sup>6</sup>—and Bryan was much more theologically conservative than the Social Gospel theologians. But he was fond of many of the leading Social Gospelers, and would later join forces with them on issues like Prohibition.<sup>7</sup> Thus, there was, at most, one degree of separation between Bryan and Pound.

It is tempting to imagine how things might have been different if a friendship had taken root in that Nebraska courthouse. If Bryan had included people like Pound among his advisors, their friendship might (one can at least dream) have sown the seeds for an early twentieth century Christian legal scholarship.

But it didn't. Bryan, the nation's leading evangelical at the end of the nineteenth century, crafted his appeal for the untutored “common man,” keeping a wary distance from secular intellectual elites like Pound. In Bryan's mind, as Richard Hofstadter put it in a highly critical account, “faith and democracy converged in a common anti-intellectualist rationale. On the one side were the voices of the people and the truths of the heart; on the other were the intellectuals, a small arrogant elite given over to false science and mechanical rationalism.”<sup>8</sup> Pound returned the favor. Pound disdained the Populist movement that Bryan represented, lacing his later speeches with dismissive references whenever the occasion seemed to call for a laugh line. “He found the raw protest of lower-class reform distasteful,” according to his biographer: “it lacked dignity, it was not respectable, and its arguments were unsound.”<sup>9</sup> During Bryan's first

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<sup>6</sup> Quoted in MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* xx (intro)(2006).

<sup>7</sup> “Regrettably,” Bryan's biographer writes, “the long shadow of the Scopes trial has obscured Bryan's close affinity with such activist ministers as Washington Gladden, Walter Rauschenbusch, and Charles Sheldon ..., who made evangelical reform seem respectable as well as urgent.” *Id.* at 124.

<sup>8</sup> RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 127 (1963)(paperback).

<sup>9</sup> WIGDOR, *supra* note 2, at 74.

presidential campaign in 1896, Pound even published a careful, numbers crunching refutation of Bryan's signature issue, the argument for unlimited coinage of silver to inflate the currency and shore up the price of farmers' wheat.<sup>10</sup>

Pound's and Bryan's disinterest in one another, and in the perspective each man represented, was emblematic of the historical forces that would shape Christian legal scholarship for much of the twentieth century. Although the Progressive movement with which Pound was associated sometimes joined forces with Bryanite evangelical Populists on social issues, there was little evidence of this collaboration in the nation's law schools. Evangelicals, who might have generated a Christian legal scholarship, were (like Bryan himself) often anti-intellectual; and after 1925, the year of the Scopes trial and Bryan's death, many evangelicals began to turn their back on American culture altogether.<sup>11</sup> At the same time, the legal elites of the time had little interest in religious perspectives. Both Langdellian legal science and the movements that succeeded it—Pound's sociological jurisprudence and Legal Realism, which shared many of the same cross-disciplinary aspirations<sup>12</sup>—treated religion as irrelevant to the scientific study of law.

If the conflict between Pound and Bryan was one emblematic clash, the other came fifty years later, in the early 1940s, a dispute over the legacy of Supreme Court Justice and leading legal scholar Oliver Wendell Holmes. By the 1930s, Holmes had achieved revered status in

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<sup>10</sup> *Id.* at 73-75.

<sup>11</sup> This tendency is chronicled in detail in MARK A. NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* (1994).

<sup>12</sup> As historian N.E. Hull has shown, Llewellyn borrowed heavily and appreciatively from Pound in formulating his initial thoughts on Legal Realism. It was only later, during an intellectual falling out with Pound in the 1930s, that Llewellyn began to cover these tracks. N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302; N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (1997).

Of the three—Langdell, Pound and Legal Realism—Pound arguably paid the most attention to the influence of religion. Although he tended to be highly critical of the impact of religion, particularly during his heyday, he recognized its relevance in several of his articles. See, e.g., Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911)[**check page cite**: notes say 164 n.93](describing influence of Puritanism on the common law).

American legal academia. Although Pound and leading legal realists like Karl Llewellyn took scholarly potshots at one another throughout the decade, both viewed Holmes as a patron saint.<sup>13</sup> Out of nowhere (my use of the word “nowhere” is not accidental, as will be seen in a moment) came a blistering attack. Writing in 1942, shortly after America’s entrance into World War II, several Jesuit scholars condemned Holmes’s “bad man” theory of law and his skepticism of morality.<sup>14</sup> Holmes’ claim that the law has no room for morality, they argued, would leave no moral resources for combating the horrific totalitarian regimes that had sprouted in Europe. “This much may be said for Realism,” as Father Francis Lucey put it. “If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct.”<sup>15</sup> A subsequent article in the *ABA Journal* cast off decorum still further. “The fact that Holmes was a polished gentleman who did

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<sup>13</sup> In an earlier appreciation of Holmes, Pound praised Holmes as having “anticipated the teachers and thinkers of today from twenty to thirty years.” Roscoe Pound, *Judge Holmes’ Contributions to the Science of Law*, 34 HARV. L. REV. 449, 450 (1921). In the article that inaugurated the realists’ disavowal of Pound, Llewellyn characterized the realists as following in Holmes’ footsteps. “Holmes’ mind,” he wrote, “had traveled most of the road two generations back.” Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930).

<sup>14</sup> John C. Ford, S.J., *The Fundamentals of Holmes’ Juristic Philosophy*, in PHASES OF AMERICAN CULTURE 51 (1942); Francis E. Lucey, S.J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942). See also Kennedy, *Realism, What Next?*, 7 FORD. L. REV. 208 (1938).

These attacks were the bubbling over of a neo-Thomist ferment in Catholic law schools and universities that had begun several years earlier. The immediate catalyst for the 1942 articles seems to have been the publication of Holmes’ correspondence with Sir Frederick Pollock, which revealed a harsher, more condescending and cynical side of Holmes than was reflected in his public persona. For a helpful discussion of these developments, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973). Purcell notes the influence of the completion of the third edition of *Jurisprudence* by Father Francis P. Le Buffe, S.J. in 1938, which forcefully rejected the relativism of much modern philosophical thought. Although Holmes was their principal target, the neo-Thomist challenge was aimed at legal realism generally. Other than Jerome Frank, however, who adopted a more accommodating stance toward natural law, the realists “did not ... give in to their critics on any fundamental point.” *Id.* at 175.

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Lucey, p. 531.

not go about like a storm-trooper knocking people down and proclaiming the supremacy of the blond beast,” the author wrote, “should not blind us to his philosophy that might makes right, that law is the command of the dominant social group.”<sup>16</sup>

In 1951, Harvard Law Professor and future Holmes biographer Mark DeWolfe Howe rallied to Holmes’ defense in the pages of the *Harvard Law Review*, arguing, among other things, that Holmes’ most notorious statements, which seemed to reflect a thorough-going positivism, had been misconstrued by his critics.<sup>17</sup>

For present purposes, two aspects of the clash between the Catholic scholars and Holmes’ defenders are especially noteworthy. The first is that, unlike with evangelicals, who produced little serious scholarly reflection on legal issues, there was a much better developed Catholic legal scholarship throughout the twentieth century, most of it drawing on natural law principles. This scholarship, which was nourished by the writings of theologians and scholars outside of legal academia, was reflected in the founding of several new legal journals at mid-century, including the *Catholic Lawyer* in 1955 and *Natural Law Forum* in 1956.

Second, it is not accidental this Catholic legal scholarship took place almost entirely outside the elite American legal journals. It was Howe’s article, not those of Holmes’ critics, that appeared in the nation’s flagship law review, and the Howe article can fairly be read as dismissive of the religious dimension of the attack on Holmes.<sup>18</sup> “It would have required no special insight,” he wrote, “to predict, twenty years ago, that Jesuit teachers of law would find Holmes’ skepticism philosophically unacceptable.” Howe also warned that, if an “eagerness” to

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<sup>16</sup> Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A.J. 569 (1945)

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Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951). See also Rodell, *Holmes and His Hecklers*, 15 THE PROGRESSIVE 9 (1951).

<sup>18</sup> I should perhaps note that *Georgetown Law Journal*, which ran the best known attack on Holmes, is quite elite now—most law professors would be thrilled to publish an article there-- but was far from elite in 1942.

accept “the implications of divine authority ... becomes predominant in our philosophy, we shall be obliged once more to free ourselves from the old shackles.”<sup>19</sup> In short, unlike evangelical scholarship, Catholic scholarship existed, but it rarely saw the light of day in the top law reviews. In a survey of the articles of the elite law reviews from 1900 to 2000, I found only a handful prior to 1990 that reflected a discernible Christian perspective.<sup>20</sup> For much of twentieth century, there simply was no real Christian legal scholarship in America’s leading law reviews.

By the mid 1970s, evangelicals had fully emerged from their cultural slumber and would soon flex their political muscles on issues like the tax exemption for religious schools, abortion, and gay rights.<sup>21</sup> But Christian legal scholarship lagged well behind. Although there were important exceptions— such as work by Michael McConnell and others on the religion clauses of the First Amendment, and a revival of natural law theory that is generally associated with John Finnis— there was precious little Christian legal scholarship, especially in leading law reviews, even as of the early years of this century. Two years ago, I wrote the first draft of an article on this theme that I have entitled, with apologies to Milan Kundera, “The Unbearable Lightness of Christian Legal Scholarship.”<sup>22</sup>

I fully stand by the assessment of that article. But there also is increasing evidence that a real renaissance may finally be underway. Several very promising articles have appeared in the law reviews in the past year, and more seem to be on their way.<sup>23</sup> Mirror of Justice, a blog

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<sup>19</sup> Howe, *supra* note 17, at 546. Interestingly, Howe later wrote an important (and for advocates of religion in American public life, not unsympathetic) book on the first amendment religion clauses. MARK DeWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

<sup>20</sup> The survey is described in David A. Skeel Jr., *The Unbearable Lightness of Christian Legal Scholarship*, EMORY L.J. (forthcoming, 2008).

<sup>21</sup> These developments are chronicled in more detail in *id.*

<sup>22</sup> *Id.*

<sup>23</sup> See, for example, Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CALIF. INTERDISC’Y L.J. 1 (2006); John Copeland Nagle, *The Evangelical Debate Over Climate Change*, U. ST. THOMAS L.J. (forthcoming 2008).

started by a group of leading Catholic scholars, has become an important voice on faith-inflected issues and was ranked third among all legal blogs in an *American Lawyer* survey at the end of 2007.<sup>24</sup> The conference that gave rise to this book, the work of the Center for the Study of Law and Religion, and the existence of an increasingly well-attended annual Christian law professors meeting<sup>25</sup> are all further evidence that something may be afoot. Given the new vitality in Christian legal scholarship, the remainder of this chapter will look (mostly) forward rather than back. To organize the discussion, I will ask three very basic questions: What?, Who?, and How?– What are the most promising directions for Christian legal scholarship? Who is a Christian legal scholar? And how can Christian legal scholarship best be facilitated?

### What?

Let me start with the “What” question– by which I mean, as just mentioned– what are some of the most promising directions for the next generation of Christian legal scholarship? The short answer, in my view, is that seeking to do Roscoe Pound’s sociological jurisprudence (and its first cousin, Legal Realism) all over again, but with religious perspectives included, would be a worthy mission for the next several decades of Christian legal scholarship. Recall that Pound admonished the scholars of his era to “look to the working of the law rather than [solely] to its abstract content,” and to treat law “as a social institution involving both finding by experience and conscious making.” A Christian scholar might qualify these words with a reminder that the backdrop against which our lawmaking takes place is the moral order that God has structured into the universe. But the attention to social, political, and economic context– and the warning against the temptation to debate abstract concepts– is, in my view, precisely the right note to strike for the Christian legal scholarship of the next generation. I can imagine at

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<sup>24</sup> See <http://www.mirrorofjustice.com> (describing and linking to the *American Lawyer* ranking).

<sup>25</sup> Sponsored by the Law Professors’ Christian Fellowship and the Lumen Christi Institute, the conference meets during the week when the Association of American Law Schools’ annual conference is held.



least three forms such a project might take. Others can no doubt imagine more, and the best scholarship may well mix two or all three of these approaches.

The first might be described as historical retrieval. This has been the strategy of choice for much of the existing Christian legal scholarship. In the religion clause literature, McConnell and other scholars have explored the history of the Framers' era, including the religious perspectives that helped to shape the First Amendment.<sup>26</sup> In family law, scholars like John Witte have traced the complex historical relationship between Christian and secular regulation of marriage and related issues.<sup>27</sup> The inspiration, in ways both direct and indirect, for much of the existing historical work by Christian legal scholars was Harold Berman, whose magisterial work on the relationship between religious turmoil and legal reform included, most recently, the second of two volumes on law and revolution.<sup>28</sup> At its best, this scholarship can have a prophetic quality, using the past to point the way forward.

A second promising strategy is to develop a normative analysis of the proper role of law. Many of the most important legal developments of the twentieth century, such as the emergence of the administrative state and the expansion of federal criminal law, have been largely unstudied by Christian legal scholars. Scholarship that marries theological perspectives with sophisticated institutional analysis seems long overdue. For Catholics, there is of course a rich reservoir of natural law and Catholic Social Thought to draw on; for Protestants, the tradition is thinner but includes valuable predecessors, from Abraham Kuyper to Reinhold Niebuhr. There are hints that a new normative Christian legal scholarship may be emerging. The most important

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<sup>26</sup> For an example of McConnell's historical work, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

<sup>27</sup> See, for example, John Witte Jr., *Retrieving and Reconstructing Law, Religion, and Marriage in the Western Tradition*, in *FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE* 244 (Steven M. Tipton & John Witte Jr. eds. 2005).

<sup>28</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003).

illustration is the vibrant literature on international human rights.<sup>29</sup> In domestic law, several scholars have recently asked the question of when and how the law should be used to police morality, one drawing on the Catholic Social Thought tradition to analyze the Supreme Court's invalidation of Texas's anti-sodomy law several terms ago,<sup>30</sup> and others exploring the institutional effects of using federal criminal prohibitions as the strategy of choice for addressing vice, gambling, corporate misbehavior and other forms of immoral behavior.<sup>31</sup> But this work is quite preliminary; a great deal remains to be explored.

A third approach is, in a sense, to turn inward, and to examine the nature of Christian influence on American (and international) law. When the Progressives and Legal Realists vowed to pursue a more genuinely scientific approach to law, what they had in mind was a careful, empirical study of how law was made and implemented. This same strategy can be used to explore, for instance, the influence theologically conservative Christians have had in particular areas such as gambling, abortion, and religious freedom and human rights.<sup>32</sup> There is now a great deal of recent work by sociologists and political scientists that could be used to inform this scholarship.

When I described these three approaches to a friend, his first reaction was, "What about philosophy?" What he meant by this question, I think, was that he assumed that Christian legal scholars would begin by developing a set of abstract, foundational principles, or by challenging the postmodern assumptions of much contemporary legal thought on theological grounds. The approach I have suggested seemed to him to skip this step, which he envisioned as the chief end

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<sup>29</sup> See, for example, MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* (2007).

<sup>30</sup> Kalscheur, *supra* note 23.

<sup>31</sup> See, e.g., David Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 PENN. J. CONST. L. 809 (2006).

<sup>32</sup> For my own preliminary efforts in this mode, see, for example, Skeel, *supra* note 20 (examining the influence of religious groups and individuals on the campaign for debt relief; David Skeel & William J. Stuntz, *The Puzzling History of the Criminal Law of Gambling* (unpublished manuscript, 2007).

of any serious Christian legal scholarship. In suggesting that the next move for Christian legal scholarship might be to appropriate many of the aspirations of Pound and the Legal Realists, I do not purport to be exhaustive; and I do not want to downplay the importance of more traditionally philosophical approaches. Indeed, the project I have outlined can be seen as drawing, at least implicitly, on the philosophical insights of scholars such as Alasdair MacIntyre, Alvin Plantinga, and Nick Wolterstorff. My typology assumes, for instance, that Christian legal scholarship should be a quest for truth, that truth exists, and that our access to truth is partial and perspectival (that is, influenced by the particulars of our own perspective).<sup>33</sup> I also suspect that philosophical approaches will continue to be particularly influential in some areas. With international human rights, for example, the level of abstraction common to analytic philosophy may be appropriate to the objective of establishing broad, general principles that will be applied differently in different nations. Thus, much as philosophers like Jacques Maritain influenced the discussions that eventually led to the Universal Declaration of Human Rights sixty years ago, philosophers may continue to influence the debate over and articulation of human rights at the international level.<sup>34</sup>

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<sup>33</sup> Wolterstorff describes the perspectival nature of human knowledge with characteristic directness and eloquence. “It is simply not possible to circumvent the beliefs, the purposes, and the affects acquired in everyday life,” he writes, “and make use in scholarship just of one’s indigenous, generically human hardwiring. ... It is not possible in our scholarship to circumvent the identities bestowed upon us by our religions, our nations, our genders, our races, our classes.” Nicholas Wolterstorff, *Public Theology or Christian Learning?*, in *A PASSION FOR GOD’S REIGN* 65, 84 (Miroslav Volf, ed. 1998); see also Nicholas Wolterstorff, *Abraham Kuyper, in THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* 288, 298-306 (John Witte Jr. & Frank S. Alexander, eds. 2006)(describing and endorsing Kuyper’s perspectival view of human knowledge). For a nice summary by a Christian legal scholar of this view of knowledge, drawing on both the Catholic and Protestant traditions, see William S. Brewbaker III, *Theory, Identity, Vocation: Three Models of Christian Legal Scholarship* 5-20 (unpublished manuscript, 2007)(distinguishing between “transcendent” and “participatory” views of knowledge, and arguing for the latter).

<sup>34</sup> The history of the Universal Declaration is recounted, and the role of a group of philosophers briefly described, in MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

Nevertheless, I suspect that many of the most exciting developments in Christian legal scholarship in the next generation of work will come from outside the domain of traditional philosophical analysis. In part, this is simply a matter of numbers and percentages. Of the Christian legal scholars who had emerged by the end of the twentieth century, surely 70 or 80% can be characterized as focusing on philosophy, the First Amendment religion clauses, or some combination of the two. Other areas have received far less attention. These comparatively underexplored issues and perspectives offer opportunities for exciting new contributions.

It also seems to me that in the hands of us legal scholars, moral philosophy often becomes a debate about abstract propositions, and never quite gets to the street level business of trying to make sense of how the law actually functions and the lessons that can be learned from this. Rather than abstract propositions, the focus of the coming generation of Christian legal scholars will, I think, more often be on the orientation of the law: does it reflect the God who welcomes back the prodigal son, and who became flesh and dwelt among us? In short, for the decade to come, there is something to be said for, if not entirely reversing the percentages I referred to a moment ago, at least shifting them somewhat.

### Who?

The second question I would like to consider is, “Who,” or “Whose work are we talking about when we talk about Christian legal scholarship?” The particular question here is whether a scholar must be a Christian to write Christian legal scholarship.

I suppose the obvious answer to this question would be yes, one must be a Christian to produce Christian legal scholarship. It says so right in the label. But I don’t think this is correct. Perhaps the answer depends on just what one means by Christian legal scholarship. In my view, Christian legal scholarship is scholarship that does two things: 1) it provides 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; and 2) it seriously engages the best secular scholarship treating the same issues.<sup>35</sup>

Now, the reality is that the vast majority of scholarship that satisfies this standard will come from scholars who are themselves professing Christians. But one can imagine work that satisfies the two criteria I have just outlined, yet issues forth from the word processors of scholars who do not identify themselves as believing Christians. A fascinating recent article by John Jeffries and Jim Ryan that argues that the recent rapprochement between evangelicals and theologically conservative Catholics will have a significant impact on the Supreme Court's religion clause jurisprudence is, in my view, an example of precisely this.<sup>36</sup>

I should emphasize again that Christian legal scholars inevitably will be responsible for all but a fraction of Christian legal scholarship. Moreover, as George Marsden has pointed out, scholars who are themselves professing Christians may bring a unique perspective to particular issues. A Christian may be more inclined, for instance, to consider the possibility that faith or the working of the Holy Spirit influenced the direction of a historical movement.<sup>37</sup> For much of my discussion, I therefore have assumed that Christian scholars are the ones producing Christian legal scholarship. But in my view, this will not always be the case.

### How?

The final question is how: How can the renaissance of Christian Legal Scholarship be facilitated?

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<sup>35</sup> This definition is discussed in more detail in Skeel, *supra* note 20, at 28-31.

<sup>36</sup> John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

<sup>37</sup> See, e.g., GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* 64-65 (1997).

Let me start my answer with a word of warning about what has been perhaps the most popular legal strategy of theologically conservative Christians in the past several decades: legal defense funds. In a 1981 book called *A Christian Manifesto*, Francis Schaeffer posed a pointed question to Christian lawyers. “Now I have a question,” he wrote. “In the shifts that have come in law [from Christian conceptions of truth to relativistic pluralism], where were the Christian lawyers ...?” “We must say,” he concluded, “that the Christians in the legal profession did not ring the bell, and we are indeed very, very far down the road toward a totally humanistic culture.”<sup>38</sup> While Schaeffer recognized that “there are going to be people who say, ‘don’t use the legal and political means, just show the Christian alternatives,’” he insisted that sticking to spiritual rather than worldly responses “is absolutely utopian in a fallen world, and specifically in a world such as ours at the present moment.”

Inspired in part by the calls of Schaeffer and others, evangelicals started a number of legal defense funds to litigate cases on the religion clauses and related issues.<sup>39</sup> One of the earliest was the Rutherford Institute, which was founded by a protégé of Schaeffer, John Whitehead, in 1982, and has litigated religious liberty cases for more than two and a half decades.<sup>40</sup> The other leading Christian legal defense funds include the American Center for Law

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<sup>38</sup> FRANCIS A. SCHAEFFER, *A CHRISTIAN MANIFESTO* 47, 49 (1981). The quote that follows is from p.133.

<sup>39</sup> The first may have been the Center for Law and Religious Freedom, which was started in 1975 as a branch of the Christian Legal Society to defend the rights of religion clubs to operate on the same footing as other student organizations in public high schools. The Center has a significantly smaller budget than the three funds discussed in this paragraph, but it continues to be a major presence in many of the high profile cases. For a comparison of the budgets of the leading evangelical litigation funds, see STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* 29 (2002)(chart listing 1999 budget of the Center for Law and Religious Freedom as \$1.5 million; of Rutherford Institute as \$4.5 million; of the American Center for Law and Justice as \$9 million; and of the Alliance Defense Fund as \$9 million).

<sup>40</sup> Whitehead’s prominence in the evangelical community was reinforced by a manifesto he published the same year as the Rutherford Institute was founded. JOHN WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* (1982). The Rutherford Institute, which is named for a seventeenth century Scottish minister who rejected the divine right of kings, is viewed by some

and Justice, which was founded by Pat Robertson in 1990 as a Christian challenge to the American Civil Liberties Union;<sup>41</sup> and the Alliance Defense Fund, the 1994 brainchild of a group of evangelical leaders, including Bill Bright (the former head of Campus Crusade for Christ), James Dobson (president of Focus on the Family), and James Kennedy (former president of Coral Ridge Ministries in Florida).<sup>42</sup> These defense funds have been quite successful on many levels, but they are not a promising seedbed for Christian legal scholarship. They are designed to defend Christian positions, rather than to debate or wrestle with the appropriateness of the particular position. This is not a recipe for the kind of intellectual give-and-take that is likely to inspire innovative Christian legal scholarship. The historical track record seems to reinforce this conclusion, particularly within American evangelicalism: at least since the mid-nineteenth century, as historian Mark Noll has pointed out, the activism of evangelicals has usually discouraged rather than encouraged serious reflection.<sup>43</sup>

A much more promising development from the perspective of Christian legal scholarship is the emergence, or rededication, of faith-oriented law schools. Among Protestants, scholars at law schools like Pepperdine and Regent Law School are producing increasingly valuable Christian Legal Scholarship.<sup>44</sup> The Catholic side has seen both the formation of new law

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as “the black sheep of the New Christian Right legal family” due to Whitehead’s reluctance to form litigation coalitions with the other legal funds. BROWN, *supra* note 39, at 35.

<sup>41</sup> The ACLJ has arguably become the most prominent of the Christian legal funds, in no small part due to its colorful current chief counsel, Jay Sekulow.

<sup>42</sup> Until recently, the Alliance Defense Fund did not directly litigate religious defense cases. “The ADF neither retains staff attorneys nor directly takes cases to court,” as a 2002 study put it, “but its unique role as an umbrella organization that provides funding to both individual lawyers and public interest law firms unites it with the other New Christian Right [legal funds].” *Id.* at 41. In the last several years, however, the ADF has established a litigation branch and has begun to litigate its own cases.

<sup>43</sup> NOLL, *supra* note 11, at 243; *see also id.* at 173, 245.

<sup>44</sup> Pepperdine’s law school was founded in the 1970s, and Regent law school was founded (as part of Pat Robertson’s Regent University) in 1986, after the law school at Oral Robert University closed and donated its library to Regent. Other Protestant law schools include Trinity Law School in California (founded 1980) and Liberty University Law School in Virginia (founded 2003).

schools,<sup>45</sup> and the renewed focus on faith perspectives at long established law schools like Notre Dame, Boston College and Villanova. These faith-oriented schools are wrestling with many of the same difficult issues that religiously-oriented universities invariably face, such as the question whether to limit the faculty and student body to people who hold the beliefs of a particular denomination or faith.<sup>46</sup> Perhaps in part due to the relative dearth of scholars writing from a discernibly faith-oriented perspective, many of the faith-oriented law schools have defined their mission relatively broadly, including, for example, orthodox Jews, on the faculty.<sup>47</sup> The great promise of these law schools is their willingness to nurture and reward religiously informed scholarship. Young scholars in secular law schools still face important disincentives to producing faith-oriented scholarship early in their careers, such as the possibility that Christian legal scholarship will be valued less highly in the tenure and promotion process than more traditional secular legal scholarship, and that it may be more difficult to place in elite law journals. If some or many of the scholars in Christian law schools respond by producing scholarship that seriously engages the best secular scholars in their fields, the Christian law schools may foster significant new Christian legal scholarship in the coming years.

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<sup>45</sup> The two most prominent of the new Catholic law schools are Ave Maria Law School in Michigan (founded 1998) and the University of St. Thomas Law School in Minnesota (re-opened in 1999, sixty-six years after having closed).

<sup>46</sup> The practical dilemma faced by a school with a faith-oriented mission statement is that the narrower the mission statement the smaller the pool of scholars who both fit the mission statement and are among the leaders in their particular field. A recent illustration of the tradeoff was the decision by Wheaton College, a premier evangelical college, not to renew the contract of Joshua Hochschild, a promising young philosopher, after he announced his intention to convert to Catholicism. See, e.g., Alan Jacobs, *To Be A Christian College*, FIRST THINGS (April, 2006)(description and analysis of the controversy by a Wheaton professor).

<sup>47</sup> For a discussion and defense of one version of this approach, written by the dean of Villanova's law school, see Mark Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOLEDO L. REV. 171 (2001). Pepperdine's mission statement reflects a somewhat similar perspective: "The school's Christian emphasis leads to a special concern for imbuing students with the highest principles of professional, ethical, and moral responsibility. An effort is made to call together a faculty, staff, and student body who wish to share this experience of quality legal education in a value-centered context." See <http://law.pepperdine.edu/welcome/mission.html> (visited Jan. 9, 2008).



A second strategy for fostering the new generation of Christian legal scholarship is through foundations and Christian think tanks. Some of the most active Christian institutes are themselves linked to defense funds. The Alliance Defense Fund, for instance, is both actively involved in litigation efforts and an institute that funds scholarly events and educational training. These ties to ongoing litigation efforts may give dual purpose funds some of the same limitations as venues for Christian reflection as the single purpose defense funds have. But standalone think tanks, like the Center for the Study of Law and Religion, as well as funds like Pew Charitable Trusts that fund research on religion in a variety of disciplines, can provide the kind of high level interaction and a venue for serious reflection that is necessary for Christian legal scholarship.

A final strategy is targeted scholarships for students and professors. Establishing scholarships for Christian law students, and endowing chaired professorships, at leading law schools seems a promising way to foster a new generation of Christian legal scholarship. As with each of the strategies, there are potential obstacles to funding scholarships and chairs. A few years ago, for instance, Yale failed to use and eventually returned a gift that the donor had pledged for the purpose of funding an intensive course in Western Civilization.<sup>48</sup> One can imagine a similar reaction in a leading law school to a chair established for a theologically conservative Christian legal scholar. But that won't always be the case—witness the chairs used at schools like Emory Law School to attract leading scholars— and funding individual students and professors is an important way to nourish Christian legal scholarship.

It is important not to overstate the potential effect of Christian legal scholarship. Law, Christians believe, is not what saves us; only God's grace can do that. But if the history of Christian legal scholarship in the twentieth century is depressing, the developments of the last few years are grounds for cautious optimism looking forward. If these trends continue, it may even be that the William Jennings Bryan and Roscoe Pound of the new century will see

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<sup>48</sup> The \$20 million gift was pledged by Lee Bass, but given back four years later after Yale failed to use the money to fund professors and put the program in place. See, e.g., Ryan E. Smith, *The Bass Grant: Why Yale Gave \$20 Million Back*, YALE HERALD (1995), available at <http://www.yaleherald.com/archive/xix/3.24.95/news/bass.html> (visited Jan. 9, 2008)(noting that Yale chaffed at Bass's requirement that he be permitted to approve the professors).

themselves as participants in the same scholarly conversation. And it may be that this generation's Mark DeWolfe Howe won't feel the need to warn about the "old shackles" of religious perspectives on the law.