



JOURNAL of CHRISTIAN LEGAL THOUGHT

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INTRODUCTION TO CHRISTIAN JURISPRUDENCE

JOURNAL of CHRISTIAN LEGAL THOUGHT

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Christian Legal Society (CLS), founded in 1961, seeks to glorify God by inspiring, encouraging, and equipping Christian attorneys and law students—both individually and in community—to proclaim, love, and serve Jesus Christ through the study and practice of law, through the provision of legal assistance to the poor and needy, and through the defense of the inalienable rights to life and religious freedom.

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The inside design symbolizes the spirit of a builder in its dislocated features resembling the architecture of layered bricks and the four pillars representing the four ministries of CLS. The branches represent harvest and the ongoing mission of the Church to toil the land, water the seeds, and pray to God to send the increase. The circle represents completion—embodied in the incarnation and second coming of Christ as the proverbial Alpha and Omega.

“For we are co-workers in God’s service; you are God’s field, God’s building.” (1 Corinthians 3:9)

STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer’s work, and legal institutions is central to a lawyer’s calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God—as well as the practical implications of the Christian faith for their daily work. The *Journal* exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The *Journal* seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work; and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across time.

While the *Journal* will maintain a relatively consistent point of contact with the concerns of practitioners and academics alike, it will also seek to engage outside its respective milieu by soliciting work that advances the conversation between law, religion, and public policy. Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds.

EDITORIAL POLICY

The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer’s calling. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of Christian Legal Society or any of the other sponsoring institutions or individuals.

To submit an article or offer feedback to Christian Legal Society, email us at CLSHQ@clsnet.org.

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INTRODUCTION TO CHRISTIAN LEGAL THEORY: LAW AND THE PRAISE OF CHRIST

by Eric G. Enlow*

*“For from Him and through Him and to Him are all things.
To Him be the glory forever! Amen.”*

— ROMANS 11:36

“And what is meant by, ‘to Him be glory,’ but to Him be chief and perfect and widespread praise? For as the praise improves and extends, so the love and affection increase in fervor. And when this is the case, mankind cannot but advance with sure and firm step to a life of love and joy.”

— AUGUSTINE OF HIPPO
On True Religion, 14

“Let us rejoice and be glad and give him glory!... On his robe and on his thigh he has this name written: KING OF KINGS AND LORD OF LORDS.”

— REVELATIONS 19:7, 16

Christian Legal Theory’s Fundamental Unity: To Show the Principles by Which Christ May Be Praised in Relation to Law

The legal theory of Christians, our joyful jurisprudence, shows the law in relation to Jesus Christ.¹ Because of our salvation in Jesus Christ, Christians already should praise Him generally, with respect to all things, occurrences, and circumstances. Why? Although man sins and suffers injustice, though we are oppressed by death both physical and spiritual, we have been redeemed and freed in relation to all things for righteousness, life, and love through Him.² Our proper Christian response to this is to praise Him in all things.³ For our legal theory to then be Christian—no matter how we come to define the nature of law or which aspect of law we choose to focus on—we must show the law in our account to be another occasion for the praise of Christ and the celebration of our salvation—

another instance where we count and recount our triumph through Him. Whatever else may theoretically divide Christians in exactly how we understand law or the principles of legal normativity, this praise of Christ will unite us.

How is the law related to Christ? Law is related to Christ, we learn in the Apostle’s teaching above, as “all things are.” That is, law is “from him and through him and to Him.”⁴ Christians believe all things originate from Him, are sustained through Him, and are fulfilled in Him. Because of Christ’s role in the creation, conservation, and consummation of all things, we can praise Jesus for His power, providence, and promises in relation to all things. Explaining specifically how this is true for law is the necessary Christian element of a Christian legal theory, the basic unity amid much else over which Christians may properly disagree. Christians may disagree greatly about what law is

* Dean, Handong International Law School. Eric is featured on Episode #131 of the *Cross & Gavel* podcast. See inside back cover for QR Code.

1 Or, if you like, how Christians should relate to Christ because of law, e.g., with gratitude to Him for it as a providential gift; or, relate to law because of Christ, e.g., with faith looking to it, at least, as a gift of justice or the discipline of injustice, within Christ’s providential care for us.

2 Romans 8:37-39.

3 1 Thessalonians 5:16-18.

4 Romans 11:36; see also Colossians 1:15-20.

or what way to best understand it, but are united in a new relation to it because of Christ.⁵

How can we begin to unfold this relation of law and Christ? Provisionally, we might say, law is **from** Christ because Christ is the Logos, the principle of the creation of all things and hence of their relation to the goodness of the Father; thus, like any created thing, law is from Christ.⁶ More specifically, all forms of ruling, any relationship like law by which one thing can be a proper measure of another, arises from and is dependent on the relationship of the Logos to the Father and from the Logos to all things.⁷ As the Logos is the principle by which the Father measures all things in the act of creation, it is appropriate to assign to the Logos the basic paradigm and cause of the measurement of all things.⁸ Moreover, within the general creation through the Logos, man is specifically created with the particular capacity, exemplified in law, to measure and rule others, first other creatures and then other men.⁹ Next, law is **through** Christ because Christ providentially governs the gover-

nors today, measuring them against His mercy and love, raising up and throwing down rulers, as well as using law to show us sin and the inadequacy of our own justice.¹⁰ Finally, law is especially **to or towards** Christ in its consummation because the order of love which sums up the law, and which the law seeks, can only be found in the final realization of His Kingdom. Insofar as we consider it toward Christ, we appreciate human law as something anticipating what is to come. It is a seed and not a fruit, a child and not a man, a bud and not a flower—something good in what it is now, but much more good and glorious in the potential it holds and what it evidences will come.¹¹ To sum this all up in a different way, as with God's relation to all creatures, there are relations of *causation* (i.e., God is the creator of all), *eminence* (i.e., God's greater goodness is the source of all lesser goods, something that all created goods participate in and point to), and *transcendence* (i.e., nothing created is a final end in itself, nothing created is the fundamental principle of anything else in creation;

5 In Romans, we find a different way of putting this same thing. Christians must not relate to the law only according to a practical evaluation, from fear or hope of reward, but from consciousness that law makers are God's servants. *Romans* 13:1, 5; see also 1 *Peter* 2:13-14. Although there are great debates about the quality and scope of obedience required by these passages, there is no dispute that they teach a new relation to law for Christians through faith that rulers are mere servants in the overall working of Christ's lordship.

6 Here, Christ is referred to the "Logos," rather than the "Word," to emphasize that the sense in John 1 is not that Christ is the "rhema," which is the external act of predication by written or spoken sign; in Latin, Christ is not a *verbum* as Jerome had it in the Vulgate, but the *ratio* or *sermo*, something that can be externalized in "rhema" but begins wholly internally in the meaning of speaker and is received in the understanding of the speak. "Logos" means not a written or sounding sign, rather the complete unit captured in expressed speech that can be judged true or false. Thus, Erasmus and Beza followed the early fathers, like Augustine, and better translated "logos" as "sermo." See, for further discussion, Erasmus, *Apologia de In Principio Erat Sermo*, Opera Omnia, Tom. IX (Leiden, 1706), col. 112d-113b; Theodore Beza, *Jesu Christi Domini nostri Novum Testamentum Graece et Latine Theodoro Beza interprete* (Geneva, H. Stephanus, 1565), John 1:1, note 1, "ille sermo." With its present connotations in English, "Logos" is, thus, better for our present purpose than "Word" because it reminds one of the broader sense intended: Jesus is the true statement of the principle of all things in the mind of the Creator by which they were created. See *John* 1:1-3.

7 How or that any being can properly measure, rule, or norm anything else is far from obvious. A healthy skepticism and interrogation of this idea is required to really appreciate it. The idea of normative measure of one by another is somewhat preposterous metaphysically speaking for the separation of being between any two separate things seems to provide an insufficient ground for one thing to be naturally ruling another, unless they are actually one thing as the head and body. Eusebius, quite rightly in the author's opinion, says that the very idea of such rule requires some kind of knowledge of God. He writes,

And whence came the idea of lawful government and sovereignty to a being composed of flesh and blood? Who declared those ideas which are invisible and undefined... Surely there was but one interpreter of these, the all pervading [Logos] of God.... He gave him alone of all earthly creatures capacity to rule and to obey[.]

EUSEBIUS, ORATION IN PRAISE OF CONSTANTINE ch. 4, §§ 1-2.

8 See THOMAS AQUINAS, *SUMMA THEOLOGIAE* p. I-II, q. 93.

9 See *Psalms* 8:5-6.

10 See, e.g., *Daniel* 4:17; *Proverbs* 8:15-16; *Matthew* 28:18; *Acts* 2:36.

11 Eric Enlow, *The Christian Theology of Law: An Introduction*, 8 J. CHRISTIAN LEGAL THOUGHT 4 (Fall 2018) (offers a broader discussion of this point).

there is nothing else that can be treated as God, nothing whose goodness is not eclipsed and to be fulfilled in the goodness of God himself).

Though this is good news for Christian lawyers, we mostly ignore it. We do not attend to the intimate involvement of God in the origin and operation of law, nor what its present goods—though mixed with problems—signify and evidence for the future. We want to get on to the “practical” stuff, i.e., knowledge of the universal order of the right, then the specific duties and obligations and the proper response to violations thereof appropriate to our specific circumstances, the kinds of liberties that governments should grant to Christians, when can we rebel against evil secular authorities, and how we can persuade with true arguments in the public square about what is right.

These are certainly appropriate topics in their place. But there is something wrong if we do not want to prepare ourselves to answer these questions by grounding them on or ensuring their consistency with our account of God’s glory. Maybe, we think that many of the answers to these questions are, to some extent or in some mode, available without reference to Christ. Thus, we think we can commence with them at once and do not consider what the long-term consequences will be for separating our understanding of things from our sense of the love and glory of God. For these kinds of reasons, when Christians theorize about law, we often focus exclusively on the relation of law to other things besides Christ, even in the foundations. And, lawyers certainly don’t always have to be doing Christian legal theory, or any kind of theory. Sometimes, instead of the truths of theory, we appropriately act in the law on its own terms and through its own methods, guided by considerations outside of a theoretical understanding of the law. Nevertheless, because law is truly from, through, and to Christ, when Christians do seek a theory of law, the principles by which we praise Christ for law should always be the horizon and foundation, available for initial inspiration and final confirmation, of how we think and what we conclude. These theoretical principles should be a general measure and lead to a motivating intent in all other action to recog-

nize His glory in all things and return it to Him in praise.

Practicing law, or thinking about it in any part, without an inner principle preparing praise and thanksgiving to Christ is unchristian, like acting in any other circumstance without such a fundamental orientation to our God and King. While there is nothing wrong when Christians turn intermittently to consider the relation of law to human nature, to practical rationality, to various political goals, or to the immanent order of law in relation to itself, there is something wrong with claiming any of these things to be a sufficient Christian legal theory in themselves or adequate to the needs of Christian life. Natural-law, utilitarian, economic, political, and positivist legal theories all illuminate interesting relations of law to itself and to things outside law. But, if such theories do not relate law to Christ, they leave Christians lacking something we desire and owe: “that to Him be the glory” or, to put it another way, “that we find an occasion for our celebration of salvation in Christ in all the circumstances of our life and, if we are lawyers, then in law.” When we focus on another relation of law to the complete exclusion or marginalization of Christ; or, when we focus on another principle of its coherence excluding His power and the eminence of His loving justice; or, when we consider another political goal totally eclipsing the coming of His Kingdom, then Christians err and feel the error—a faithless, joyless, needless alienation from the full appreciation of His grace. For life without the love, trust, and joy that arise in the praise of Christ is needlessly cut off from His grace and fails in the basic obligation of love and worship. Therefore, preserving the principles of divine praise as guides to all other principles, Christians would give thanksgiving to Christ for having made the law in the past; we would celebrate the providential presence of Christ now in the law; and, considering the future, we would give all the glory of law—for we often find it glorious even now—to Christ, to whom the law is directed. For the law as it is now, with its benefits and problems, will be drawn up and sublated into a greater, purer, more glorious fulfillment in Him.¹²

¹² See *Ephesians* 1:9-12.

Christians need a legal theory if we do not know how to give glory to Christ for the law in these ways. So, following the order of the petitions of the Lord's prayer,¹³ let us consider our current state of mind:

Father, hallowed be your name, your kingdom come. Give us each day our daily bread. Forgive us our sins, for we also forgive everyone who sins against us. And lead us not into temptation.

In the way that you understand the law, is your first wish, your real desire, to praise God's name in relation to law? After hallowing God for what law is now, do you identify, at least, certain elements of the law and really long for Christ to bring these to perfection in the coming of His Kingdom?¹⁴ To put it another way, what do you find in the law that fills you with hope and joy for what these elements will become in Christ? Next, before that happens, today, do you love Him for the benefits of law that currently sustain you, counting it as a gift for His sake to you as you do the food on your table? Do you see why you should ask Him to provide these benefits to you in study, court, or counseling clients, and when we receive them, to thank Him? Do you evaluate the sins of legislators, judges, opposing counsel, law professors reciprocally with your own forgiveness through Christ? Next, do you approach the law seeing it not simply as a matter of material technique, but as a place of spiritual trial, where doing our duty involves, not mere exercise of technical skill, but also a spiritual event and conquest?¹⁵ Can you see in your legal arguments a reenactment of the same spiritual issues of temptation, blindness, pride, and sin that played out in the legal arguments between Christ

and Satan, or between Christ and the Pharisees? Most generally, have you considered, and do you know how to approach law, with faith held under Christ's lordship?¹⁶ Do you understand law as a present avenue of love for God and man, which Christ has opened?¹⁷ Because you take the Scriptures to be a graciously given guide to the knowledge of Christ, do you know how the Scriptures guide you in relation to law and how they show law to be related to Christ?¹⁸

If you already approach what we do as Christian lawyers and laymen in the law with faith, hope, and love (without a Christian legal theory), then you do not need a Christian legal theory, unless you want to explain why you do this to others.¹⁹ Christian lawyers especially need a legal theory because they themselves, or at least many known to them, are often dispirited and joyless. They can see no relation between what they do in law (or under law) and their lives in Christ.²⁰ The principles by which they understand the law and the principles by which they can rejoice and give praise to God are not the same.

In review, Christian legal theory, our joyful jurisprudence, shows as a matter of first importance the law in relation to Jesus Christ, so that the grounds therein for praising God are clear. We know that we have understood something properly when we understand it in relation to our Lord—from Him, through Him, and to Him—and, thus, as providing an occasion for our Lord to be praised. When we understand how we can have confidence in Christ in the law, hope in Christ in the law, love Christ and neighbor as Christ in the law, then we have a true Christian legal theory.²¹ Why? A theory that would lead us away from praising and loving God is false. A

13 The *lex orandi* is *lex credendi*; as Prosper of Aquitaine taught, the rule of prayer is a rule of belief. Our Lord's commands with respect to prayer teach us something about the order of what should be believed. See *Luke* 11:2-4.

14 As the law of Moses led the Jews to Christ, so too, the traditional teaching is that the norms of human life—moral and social—continue to lead all of man to Christ. See, e.g., *Romans* 10:4; *Galatians* 3:24; *Micah* 4:2-3; *Jeremiah* 31:33-34.

15 See *Ephesians* 6:12.

16 For example, do you understand in what way submission to ruling authorities is undertaken for the Lord's sake (i.e., 1 *Peter* 2:13)?

17 Do you understand how to administer the law through faith (i.e., *Hebrews* 11:33)? And, can you see in the examples of Jesus and Paul's technical legal arguments a guide to how legal argument and dialectic itself can be carried out in their spirit of theology and love?

18 See, e.g., 2 *Timothy* 3:14-17; 2 *Peter* 1:2-4.

19 See, e.g., 1 *Peter* 3:15; *Deuteronomy* 6:20-21.

20 *Psalms* 16:7-11; 19:7-8.

theory that treats its subject otherwise truly, but omits the grounds for loving and praising God is fatally incomplete. A theory that is not grounded on Christ is not Christian. After we know that it will properly attribute the good of law to the goodness of God, Christian legal theory may usefully account for other things we need to know about law. Accordingly, the first principles of any Christian account of the law must agree with this end: to show how the Father in Jesus Christ has made the law a reason to love, praise, and glorify God. Our first petition in prayer is that God's name be hallowed; our first goal in theory is to show Christians that the law is another reason why, in Christ, we can see God as the holy source of law. Whatever arguments about law that we develop concerning what legislators, lawyers, and judges ought to do in the future, we subordinate to the principal duty of praising God for what He has already done, is doing, and will do in the law.²² And, as we reassure little children that God is present even in the storm and dark, we seek the means to reassure God's children, in injustice and in God-denying societies, that the Father is not absent just because He remains unseen or rejected. What Christ has accomplished—in professing His faith in the Father's providence before the judicial atheism of Pilate, in enduring hopefully the unjust Cross, in making a spectacle of the rulers of the world through His triumphant resurrection—has transformed our relation to legal authorities so that even in unjust, secular societies we may still be grateful and guided to Him.²³ Correlatively, as we teach children to thank God for their supper before they eat, wherever we find good in the law, in those things where law is just and ordered, we may give thanks to God, rather than engaging in Nebuchanezzarian self-idolatry and self-congratulation.²⁴ Our distinctive goal in Christian legal theory is to understand law as a place for grateful spiritual response to the good

for law that the Father has done in sending us His Son. Through the power of the Holy Spirit, we can begin to think about the law in a way that encourages us to praise God and love God and neighbor. As Augustine said, we seek to “improve and extend” our praise “so that love and affection increases in fervor” because “when this is the case, mankind cannot but advance with a sure and firm step to a life of love and joy.”

Conclusion: This Apt, Opportune Time for Christian Legal Theory and Recommendations for Further Reading

Modern scholarship has made significant advances in demonstrating the essential role of Christians in shaping modern law. Legal historians' scholarship has dispersed the propagandistic, prejudiced Enlightenment pseudo-history of modern legal and political forms. The shape of modern law, public and private, was determined by men who worshipped Christ and believed that the law was rightly developed on principles consistent with and calling forth that worship. The ideological view that the Enlightenment marked a sharp and substantial break with the “barbaric” Christian past to bring in modern “progress” has been overthrown. This black legend has given way, for anyone who reviews the history with good faith, to a sense of the clear foundational role of the heartfelt knowledge and worship of Christ in the formation of modern law. For anyone interested in this history, I would recommend the works of Professor John Witte as essential reading. He has persevered in recovering and demonstrating the historical truth about Christianity and law over a broader field than any living scholar. His work is proof that those who praise Christ have had and can have a determinate role in the shape of modern law and that we can praise Christ for what is good in contemporary law.²⁵

21 See WESTMINSTER SHORTER CATECHISM (Q. What is the chief end of man? A. Man's chief end is to glorify God, and to enjoy him for ever.); see also *Romans* 11:36 (“For from him and through him and to him are all things. To him be the glory forever! Amen.”).

22 As we remind ourselves that the pursuit of even true righteousness without faith in Christ is deadly and that faith without works is also dead, we strictly subordinate but never terminate the task of determining the best legal norms for magistrates, or our rights to rebel against them, to our first desire that God's name be hallowed at all times and in all conditions of law.

23 *Colossians* 2:15.

24 See *Daniel* 4:29-30.

25 The author would recommend *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (Cambridge University Press 2009) and *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (Cambridge University Press 2007) as introductions to Witte's broad body of work.

Scholars like Witte have given us a great, fresh encouragement as Christian lawyers to approach law for the praise of Christ. But there is more that is special about this time. Most likely because of the church's need for discipline and education, God has afflicted the Christians of this time with rulers who have both elevated the role of law in society to levels of political importance not seen since the Roman Empire and done so on worse theoretical foundations than the Romans. Because of changes quite recent in a historical scope, our law today is promulgated and interpreted on principles that reject not only the knowledge, norms, and worship of Christ as foundational to their project, but any truth of theology or public duty of piety.²⁶ The normative imperfection of those laws that rule us and animate the society around us, the ever more manifest contempt they display for the King of Kings, is adverse to Christians who fall into their spirit, but it is in no way adverse to Christian legal theory, quite the contrary. For it is precisely in these dimensions that our time is more easily analogized to the political and legal situations most often described in the Old and New Testament. For those interested in an account of the state and law that rest on these biblical foundations, Professor Oliver O'Donovan's works are recommended.²⁷

The direct opposition of modern atheistic legal methods and conceptions of rights, combined with our powerlessness to change the current order, force us to concentrate on the fundamental

issue of Christian legal theory—not the question of what kind of ideal legal order should we seek to implement—how we can joyfully worship Christ in relation to the imperfect law we are given. The master of this form of meditation was Augustine, particularly in Book 19 of his magisterial *City of God*. More recently, but from someone less concerned with legal imperfection than laws hostile to the true faith, John Calvin's discussion of law and politics in the last book of his *Institutes of the Christian Religion* treats how Christians can relate joyfully and thankfully even to unjust and intentionally oppressive legal systems.²⁸ In the aftermath of World War II, with the continuation of totalitarian societies in mind, Jacques Ellul's work, *The Theological Foundation of Law*, considers the same question in the frightening circumstances of contemporary societies and their lack of repentance in the face of the horrors of the twentieth-century.²⁹ In combination with the Scriptures, these sources provide a foundation for reapproaching the law to understand it as a worthy part of Christians' general grounds for the praise and worship of Christ.

“Let us rejoice and be glad and give him glory!”³⁰

²⁶ Acts 17:22-23. Even to the Roman jurists before Christ, the connection between law and God was apparent. See JUSTINIAN, *THE INSTITUTES OF JUSTINIAN* 1.1.1 (J.B. Moyle trans., 2009); JUSTINIAN, *THE DIGEST OF JUSTINIAN* 1.3.1-2, 1.10.2 (Alan Watson ed. & trans., 1979).

²⁷ Particularly, *DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY* (Cambridge University Press 1996) and *THE WAYS OF JUDGMENT* (Eerdmans 2002).

²⁸ “It is of no slight importance to us to know how lovingly God has provided [rulers, courts, and laws] for mankind, that greater zeal for piety may flourish in us to attest our gratefulness.” JOHN CALVIN, *INSTITUTES OF CHRISTIAN RELIGION* bk. IV, ch. 20, § 1 (Henry Beveridge trans., 2008).

²⁹ See generally Eric Enlow, Jacques Ellul, *The Theological Foundation of Law* (1960), 1 J. CHRISTIAN LEGAL THOUGHT 12, (2001) (review of Ellul's work).

³⁰ Revelations 19:7.

THINKING BIBLICALLY ABOUT LAW AND JUSTICE

by David McIlroy*

Introduction

If the Bible is the Word of God, we should expect the Bible to speak into every area of life. If Jesus is the Saviour of the World (John 4:42), the Son of God (1 John 5:20), the one who makes the Father known (John 1:18), and the one by whom, through whom and for whom all things were made (Colossians 1:16-17), then we need to read the Bible (both the Old Testament and the New Testament) in the way the Church Fathers read it, as a big story whose hero is Jesus, and interpret what the Bible says about everything else in the light of who Jesus is and what Jesus has done.

The big story told in the Bible has a number of key stages. John Stott focused on four stages whenever he was thinking what the Bible had to say about issues facing Christians today: What was God's original design in creation? How has that design been affected by the Fall? What has Jesus already achieved in restoring that design through His life, death, and resurrection? How is God's original design going to be renewed and transformed in the new heaven and the new earth?

Craig Bartholomew and Michael W. Goheen see the big story of the Bible as a drama in six acts: creation, Fall, Israel, redemption by Israel's king, the mission of the church, the return of the king.² In order to take account of as much as possible of what the Bible has to say about law, justice, and politics, I looked at eight different stages of the biblical story in my book *A Biblical View of Law and Justice*.³

Stage One: Creation—principally Genesis chapters 1 and 2.

Stage Two: Fall—principally Genesis chapters 3 to 6.

Stage Three: Common Grace and Providence—principally Genesis chapters 7 to 11 and the Books of Wisdom.

Stage Four: The Law of Moses—Genesis chapters 12 to 50, Exodus, Leviticus, Numbers, Deuteronomy, and Ruth.

Stage Five (Side One): Kingship in Israel—the Historical Books of the Old Testament.

Stage Five (Side Two): Prophecy in Israel—the Prophetic Books of the Old Testament.

Stage Six: Jesus—the Gospels.

Stage Seven: The Mission of the Church—principally Acts and the Epistles.

Stage Eight: The Final Judgment and Our Future Hope—Revelation and the Apocalyptic passages in the Gospels and in the Epistles.

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1 Chris Watkin says that there are four key biblical theological turning points – creation: what exists; Fall: what is wrong with the world; redemption: how it can be fixed; and consummation: where it is all heading. Chris Watkin, *Christianity and critical race theory*, 31(2) CAMBRIDGE PAPERS (June 2022), available at <https://www.cambridgepapers.org/wp-content/uploads/2022/07/31-2-Christianity-and-critical-race-theory.pdf>. John Stott himself emphasised the need to read the whole of the Bible's story. See JOHN R.W. STOTT, *UNDERSTANDING THE BIBLE* (4th ed. 1999).

2 CRAIG BARTHOLOMEW AND MICHAEL W. GOHEEN, *THE DRAMA OF SCRIPTURE: FINDING OUR PLACE IN THE BIBLICAL STORY* (2d ed. 2020).

3 Pretty much the only material this scheme left out of account is the book of Esther.

The rest of this introduction is designed to help you see how each of these stages in the story contributes to the biblical message about God's purposes for law and God's desire for justice. In order to understand the role and responsibility of Christian lawyers, of Christian citizens, and of the Church, we need to grasp the place of law in God's design and desire for human beings.

Creation

The account of creation given in Genesis 1 is punctuated after almost every day of creation by God's judgment that the world being created was good. The world was also ordered, and the human race was given laws by God (Genesis 1:28). The Bible gives us a picture, in the Garden of Eden, of shalom—a state of perfect justice, alrightness, wholeness, and peace between human beings, animals, and the rest of creation. There was an order in creation that Christian teaching calls the natural law. God gave to humanity good gifts: life (Psalm 139), dignity (Genesis 1:27), liberty (Genesis 2:16-17), capacity to enjoy meaningful relationships (Genesis 1:28, 2:24), rewarding work (Genesis 2:15), and rest (Genesis 2:2-3). Because that natural law is given in creation, it forms a basis for Christians to engage in discussions with others about what laws will serve the common good. Good laws reflect the natural law and apply as much of its content as a particular society can bear.

Fall

The Fall had lots of dimensions, but one of them was Adam and Eve's rejection of God's authority in favour of their ability to make their own decisions about right and wrong. We make a mistake, however, if we think about the Fall as just breaking an arbitrary rule, like driving through a red traffic light when there is no one else on the road. Disobedience to God's rules was an expression of a rejection of a right relationship with God.

Because of the Fall, oppression, violence, and deception mar human relationships, thus affecting our ability to comprehend the natural law. These realities need to be addressed in order to make social life possible and bearable. This places us in a quandary. Because of the Fall, we need government to impose and to enforce laws and to provide justice, but governments themselves are marked by sin. The Bible is, from beginning to end, hostile to the idea of empire, to the idea of

unaccountable power, because the Bible knows that rulers, soldiers, and the police are just as capable of evil as their subjects. Because of the Fall, any attempt to bring about the perfect society will result in tyranny and loss of human liberty, dignity, and life rather than freedom and justice.

From now until the end of time, it will not be possible for the effects of the Fall to be eradicated. In Genesis 3:23-24, we are told that the Lord God has banished humanity from the Garden of Eden and has placed angels and a flaming sword outside to "guard the way to the tree of life." Because of the Fall, there is no way back to Eden, only forward through redemption to heaven.

Common Grace and Providence

Common grace is that goodness and blessing of God shown to human beings, whether they believe in God or not. Providence is the work of God in history, both preserving humanity against the total destruction that would otherwise result from sin and preparing space for human beings to hear the good news of the right relationship with God that comes by faith.

In the Bible's big story, the Fall of Adam and Eve was followed by Cain's murder of Abel and the descent of humanity into wickedness and violence so that by the time of Noah, God determined to wipe out humanity through a Flood and start again. After Noah and his family had been saved from the Flood, God sent the rainbow. The rainbow symbolizes God's promise not to destroy the human race, even though our wickedness would justify our receiving the same treatment as the generation destroyed in the Flood. The Flood serves as a warning that humanity cannot stand too much judgment. Although human societies cannot live without judgment, were all wrongs to be penalized, social life would be impossible. Judgments should, therefore, be rendered by rulers only on matters that have implications for the peace of the community.

After the Flood, God made a covenant with Noah, a covenant which authorises governments to combat and punish injustice. In Genesis 9:5-6, God comes to Noah and says: "from each man, too, I will demand an accounting for the life of his fellow man. Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." Christian commentators have understood this passage as teaching two things. On one hand, God will judge those who harm human beings, but on the other, humans

also have a responsibility to execute judgment on those who commit crimes of violence. This is understood to be a general responsibility of all rulers. Where there are no effective structures of public judgment, the result is a society divided by vendetta. In Genesis 4:18-24, Lamech boasted that he killed a man who wounded him and warns that if he in turn is killed, he will be avenged seventy-seven times. Judgments rendered by public authorities are necessary in order to prevent people from taking the law into their own hands.

The whole story of Noah shows us the searchlights of providence and common grace. Providence describes God's government of the world, God's pursuit of God's good purposes despite continued and inveterate human sinfulness. Providence includes preservation, those acts of God which preserve something of the goodness of creation, so that it is not totally undone by sin. But providence is not just about the actions of God to restrain the full force of sinfulness; providence is also about those acts of God which open doors, create space, and prepare people and cultures to hear the good news about Jesus Christ.

God's action in preserving the world is common grace; God's goodness shown to all, regardless of whether or not they believe. Louis Berkhof described common grace in this way: "It curbs the destructive power of sin, maintains in a measure the moral order of the universe, thus making an orderly life possible, distributes in varying degrees gifts and talents among men, promotes the development of science and art, and showers untold blessings upon the children of men." Common grace, understood in connection with the doctrine of providence, helps us to see that the work doctors, teachers, accountants, engineers, and even police officers, lawyers, and judges do is used to fulfil God's purposes in this world. Through such human activities, our societies are preserved from the worst effects of sin and, if done well, opportunities can be opened up for people to grasp the good news about the redemption and the hope we have in Jesus.

The Law of Moses

One of the most difficult parts of the Bible's teaching about law and justice for us to handle as Christians is "the Law of Moses." Throughout most of the Church's history, Christians have understood that the Law of Moses is a source of information and inspiration about what right relationships between human beings look like, but that it is also

a particular cultural expression which Christians are not called to copy and should not try to apply literally.

A Christian approach to the Law of Moses starts by affirming that Jesus is greater than Moses. The priority of Jesus over the Torah and the Prophets was shown to His disciples in the Transfiguration (Matthew 17:4-5). Our attitude to the Law of Moses ought to be the same as Jesus' attitude towards it:

- Jesus Himself points us towards the Law of Moses as part of the revelation of God through which we may discover what it means to love one another.
- Jesus gives us a guide for interpreting the Law of Moses. At the heart of the Torah are the Two Great Commandments: "Love the Lord your God with all your heart and with all your soul and with all your strength" (Deuteronomy 6:5) and "Love your neighbour as yourself" (Leviticus 19:18).
- Jesus teaches that all the Law and the Prophets hang on these two commandments (Matthew 22:40).
- The Two Great Commandments do not make all other moral principles redundant; instead, they sum up the rest of the Law of Moses (Romans 13:9).

The Law of Moses has three aspects to it. First, the Law of Moses has a ceremonial and sacrificial aspect to it. This ceremonial and sacrificial aspect prefigures and points towards Jesus. The death of Jesus on the cross put an end to the need for the sacrifices. Second, the Law of Moses has a civil aspect to it. It contains rules which were designed for a Bronze Age agricultural community in which the land was understood as having been given by God to families—then, the basic economic as well as social unit—in perpetuity. Christians have no mandate for imposing the civil law aspects of the Law of Moses because Christians do not have any homeland on earth; our land is the new heaven and the new earth. There are, therefore, no Christian nations. Finally, the Law of Moses has, however, a moral aspect summed up in the Ten Commandments. Christianity has consistently taught that the Ten Commandments are the best summary of the natural law, which is imprinted

on every human being's conscience and that they are the clearest source of the principles about how to love God, one's neighbour, and oneself.

The rest of the morality in the Law of Moses needs to be understood in light of the Two Great Commandments and the Ten Commandments. Reading the Law of Moses through this interpretative grid, the Law of Moses places special emphasis on how the Israelites treat three categories of people: the widow, the orphan, and the foreigner (e.g., Exodus 22:21-23). Widows, orphans, and foreigners are likely to be among the poorest in the community, but they are particularly vulnerable because of their lack of relationships. The widow has lost her husband; the orphans have lost their parents; the foreigner does not enjoy the protection of a clan grouping (what we would call today a supportive social network). The biblical understanding of justice is relational. A just society and a just legal system are ones which protect the rights of the relationally disadvantaged.

Israel's History and the Prophets

The Law of Moses was given before the Israelites spent forty years wandering in the desert. The Law of Moses was given a second time (Deuteronomy means "second law"), effectively, as Israel's constitution before the people enter into the Promised Land. After the conquest, the book of Judges (the Bible's equivalent of *Game of Thrones*) shows that without effective enforcement mechanisms, laws alone do not make people act justly. As Judges 17:6 and 21:25 say: "In those days Israel had no king; everyone did as they saw fit."

Israel ends up with kings because its people have refused to live as if God is Israel's King. Their failure to live in right relationship with God, to obey God's laws, and to regulate themselves leads to a need for earthly kings. But their kings are, by and large, a disaster. Even David abuses his power to seduce or rape Bathsheba and have her husband killed, and the king whose wisdom made Israel great again, Solomon, becomes a greedy, womanising tyrant. Godly political leadership matters, because the bad kings of both Israel and Judah lead their people into sin, but good political leadership is a rare and precious commodity.

In this context, God sends prophets. The prophets condemn Israel and Judah for both idolatry and injustice. The prophets also speak against the nations surrounding Israel, condemning them for their violations of natural law. The prophets are emphatic that justice requires not only just

institutional actions (*mishpatim*), but also just actions by people both within and outside of institutional frameworks (*tsedeq*). Doing the right thing is not just about obeying the law; it requires us to go beyond what the law demands.

The prophets Jeremiah and Ezekiel, tasked with explaining why God had imposed the judgment of the Exile on Israel and Judah, reached a bleak conclusion. The Law of Moses had failed to make the people of Israel just. Good laws, even if enforced by good kings like Josiah, do not make people just. What is required instead is a radical change of heart, which comes through conversion to Christ and the empowerment of the Spirit (see Jeremiah 31:33, Ezekiel 36:27, Romans 8:3-4). This message contained in the Old Testament ought to prevent us from being too optimistic about what can be achieved through law. Law is not the means by which God has chosen to redeem the world. Real change only comes when the Holy Spirit is at work.

Looking back from beyond the Exile, the prophet Zechariah sought to remind the generation returning to Israel why it had occurred. This is what the Lord Almighty says: "Administer true justice; show mercy and compassion to one another. Do not oppress the widow or the fatherless, the alien or the poor." But, they refused to pay attention, so the Lord Almighty was very angry, promising to scatter them with a "whirlwind among all the nations," where they became strangers (Zechariah 7:8-14).

Jesus

When Jesus comes on stage, the main actor reveals himself. Jesus is the Centre of Creation; the Second Adam, the one who has succeeded where Adam has failed; greater than Moses, who gave the Law; greater than Aaron and all of the priests; greater than David and Solomon and all of the kings; greater than Elijah and all of the prophets; Jesus is Justice Personified; Jesus is the One who has poured out the Holy Spirit; Jesus is the One to whom the Father has entrusted the Final Judgment.

Jesus was not a law-giver. Almost all of His teaching is best understood as a creative interpretation of the Law of Moses. Jesus' handling of the Law of Moses is like the way a superstar DJ remixes a record to make it into a dance anthem, drawing out its key themes and highlighting its beauty. Jesus puts the wholehearted love of God and the love of our neighbours as ourselves at the heart of

the Law of Moses. He fulfilled the sacrifices prescribed in the Law of Moses by offering Himself as the perfect sacrifice to end all sacrifices. Pentecost saw the outpouring of the Holy Spirit and the clear indication that the purposes of God extended beyond the nation of Israel and the Jewish people. Our Promised Land is in heaven, and so those aspects of the Law of Moses which relate to the land do not apply literally. But the moral law contained within the Law of Moses was reaffirmed and re-emphasised by Jesus.

The New Testament declares that in Jesus, justice has been personified. Acts 3:14 and 7:52 proclaim Jesus as the Holy and Righteous One. Justice was central to Jesus' mission as He announced it in His Nazareth Manifesto in Luke 4. Healings, miracles, defeating demons, rescuing those facing death, speaking good news to the poor, releasing prisoners and the oppressed—all these were characteristics of the Kingdom of God that Jesus was announcing. We tend today to interpret the release from prison and oppression metaphorically, in terms of Jesus releasing us from the prisons of bad habits, alcohol dependence, drug abuse, greed, and racism. However, Jesus' first listeners would have understood Him to have been talking about release from false or unjust imprisonment, about freedom from indebtedness, slavery, and servitude.

The nature of Jesus' ministry also challenges the way we think about justice. Jesus came as Saviour, not as judge. Retribution is the natural response to wrongdoing, but Christianity urges rulers to seek restoration wherever possible. From the time of Augustine onward, many church leaders have urged rulers to be as merciful as they can be, consistent with maintaining public order and confidence.

The crux of Jesus' ministry occurs as a result of what happens in the law-courts. He is falsely condemned by the Sanhedrin for the religious crime of blasphemy. He is wrongly sentenced to death by Pilate, even though he committed no crime against Roman law. The two greatest legal systems of the ancient world combined in a brutal miscarriage of justice. Jesus' resurrection is the verdict of the ultimate Supreme Court. The resurrection of Jesus is the declaration by God the Father that Jesus was the Son of God, that Jesus was the King of the Jews, that Jesus was the Messiah. The resurrection shows us definitively that God will overturn injustice, God will overcome sinfulness, and that God will rescue us from evil.

The Mission of the Church

The Mission of the Church is given in the Great Commission. Jesus said: all authority in heaven and on earth has been given to Him. He does not then commission His followers to take political power; He calls them to make disciples and to teach His commands (Matthew 28:19-20).

In sending out His disciples, Jesus did not give a new Law; He unleashed the Holy Spirit. Paul tells us in Romans 8:3-4:

For what the law was powerless to do in that it was weakened by the sinful nature, God did by sending his own Son in the likeness of sinful man to be a sin offering. And so he condemned sin in sinful man, in order that the righteous requirements of the law might be fully met in us, who do not live according to the sinful nature but according to the Spirit.

The purpose of the Law of Moses is now fulfilled by the Holy Spirit—given in order that God's people would know God, would love God with all their hearts, and would obey God's laws, to make us just in the way that the Law of Moses failed to do.

In Romans 12, Paul teaches Christians not to take vengeance, but to overcome evil with good. Christians are to love their enemies. Paul then goes on, in Romans 13, to talk about the responsibilities of government. Human legal systems are to punish wrongdoing and to commend the good.

The Final Judgment and Our Future Hope

Christianity teaches clearly that both the just and the unjust will be resurrected to face the Final Judgment. That judgment will be delivered by Jesus (Acts 7:13), the Advocate for the Defence (1 John 2:1). The biblical message is that there will be, one day, a judgment that will be infinite, infallible, and perfect. One day true and perfect justice will be imposed by the judge who alone knows the full facts and can see into the hearts of human beings. God was watching on every street corner the rapes, murders, and robberies that have ever occurred. God could see into the houses where the domestic violence and child abuse was happening. God saw the embezzlement and abuse of power in all the workplaces and government offices that have ever existed. God was there and He will judge. The Final Judgment will reveal the

whole truth: “There is nothing hidden that will not be made known” (Matthew 10:26, Luke 8:17, 1 Corinthians 4:15).

- The Final Judgment will condemn evil (Romans 2:5-6).
- The Final Judgment will overturn unjust verdicts (Revelations 19:11).
- The Final Judgment will deliver victims (2 Thessalonians 1:6).
- The Final Judgment will provide a new start (Revelations 21:4).
- The Final Judgment will reward faith (Hebrews 11:6).
- The Final Judgment will be followed by the full enjoyment of the Presence of God (Revelations 21:3).

The tasks of human law-making and law enforcement have to be understood in the light of the Final Judgment of Jesus which is to come. That Judgment has not yet been declared because, as 2 Peter 3:9 explains: “The Lord . . . is patient with you, not wanting anyone to perish, but everyone to come to repentance.”

Because the Final Judgment has not yet been given, public judgments should only be given when the public good is at stake. Human judgments are provisional, limited, and fallible acts, authorized by the need to protect against violence, resolve disputes, and open space for flourishing and forgiveness.

Conclusion

We can fall into one of two traps. One trap is thinking that the Bible has nothing to say about law and justice. The other trap is looking in the Bible for answers to support the views we already have about which laws and policies we want to see implemented. The challenge for us is to become biblically informed; to allow our thinking to be shaped by Jesus Christ; and, to ask the Holy Spirit to help us learn from other Christians, not only in our own context, but also in other places and

times, how to be faithful followers of Jesus in our studies and practice of law.

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THE BARE NECESSITY OF NATURAL LAW

by Adam J. MacLeod*

The Mundane Reality of Natural Law

According to legend, someone asked literary giant Samuel Clemens, better known as Mark Twain, whether he believed in infant baptism. He replied that, not only did he believe in it, he'd seen it done. Hundreds of generations of lawyers and jurists, including many of the most influential legal scholars and judges in history, have believed in natural law for the same reason. And many still do.

Natural law and natural rights are not “non-sense on stilts,” as Jeremy Bentham famously dismissed them.¹ Natural law reasoning is what lawyers and judges do every day. Today, many people tend to think of natural law and natural rights primarily as external constraints on political power whose success depends on a prior belief in God or some other higher power. But for most of the history of theorizing about natural law, philosophers and jurists have understood that, as Edward Corwin put it, natural law confers “its chief benefits by entering into the more deliberate acts of human authority.”² Natural law supplies basic principles and maxims, and natural rights supply particular presumptions and premises, to make legal reasoning and adjudication rational, accessible to the intellects of those persons whom law is supposed to govern, and legally just.

The idea is not, as Oliver Wendell Holmes, Jr., once derided it, the notion of a “brooding omnipresence in the sky.”³ It is simply the notion that legal reasoning and legal judgments can be more or less correct, more or less reasonable, in a sense that is not entirely contingent upon human conventions, customs, and positive enactments. As Corwin expressed it, the idea is that “certain

principles of right and justice” are accessible to reason and those principles “are entitled to prevail of their own intrinsic excellence,” whether or not they meet the approval of “those who wield the physical resources of the community.”⁴

Indeed, there is a basic sense in which no one can perform any legal reasoning without employing natural law. Consider what legal reasoning is. Legal reasoning is a kind of reasoning. It is a special kind of reasoning, to be sure, which employs technical concepts and methods that belong to law and legal analysis alone. But, it is reasoning nonetheless. Like all forms of reasoning, sound legal reasoning operates in obedience to the first principles of reason: the principle of non-contradiction, which states that the same proposition cannot be simultaneously affirmed and denied; the principles of logic, such as the requirement that the middle term of a syllogism must be distributed in the premises; and, the principles of observation and inference, such as a factual finding must be supported by evidence.

Natural Law in Theoretical Reason

Those principles are the starting points of descriptive natural law, the kind of natural law classically known as theoretical (or sometimes “speculative”) reason.⁵ Theoretical reason is thinking about what is the case. It is used either to describe given reality as found in nature, such as gravity, entropy, and biological sex differences, or to understand the results of human action and creativity, such as charitable gifts, inventions, and works of art. Any reasoning about the world and human acts which flouts the basic, self-evident principles of theoretical reason goes wrong at the outset. It

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1 Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* 496, 501 (John Bowring ed., 1838).

2 EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 21 (1955).

3 *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917).

4 CORWIN, *supra* note 2, at 4.

5 THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I, q. 79, art. 11 [hereinafter “SUMMA”].

fails to describe things accurately. It may even be incoherent.

To be persuasive—to appeal to and shape the understanding of those minds which it is meant to satisfy—legal reasoning must also operate in obedience to those same first principles of theoretical reason. A judgment that declares the same act to be both an act of wrongdoing and not an act of wrongdoing, or that adopts a holding that does not follow logically from the premises articulated in the opinion, or that enforces an incoherent or irrational law, will be received as an act of judicial fiat rather than reasoned judgment.

This is the legacy of *Korematsu v. United States*,⁶ the decision of the U.S. Supreme Court upholding a national policy of internment law-abiding Americans of Japanese ethnic descent during World War II. After declaring war on Japan, Congress authorized the executive branch to issue orders deemed necessary to prevent espionage and sabotage on domestic soil and directed criminal sanctions for anyone who violated such orders. American general officers then issued a series of orders directed at persons of Japanese ancestry living on the West coast. They first issued notice that some Americans, not identified in the notice, might later be excluded from certain geographic zones in California, which included Korematsu's residence. Next, an order directed persons of Japanese ancestry to remain in their homes subject to a curfew. Another order prohibited all persons of Japanese ancestry from leaving the zone in which Korematsu lived. Then, a few weeks later, an order directed all persons of Japanese ancestry within the same zone to leave and to report to an assembly center for possible transport to a detention center.⁷

For the Court's majority, it was sufficient that Congress and the executive branch had exercised war powers that the Constitution confers upon them, and that the military officers charged with defending American soil had exercised their best

judgment.⁸ The Court refused to assess the constitutionality of the legal scheme as a whole and focused instead on the last order, which Korematsu was convicted of flouting. But, Justice Owen Roberts writing in dissent, pointed out the defect in the entire scheme of Congressional enactments and military orders, a defect of law:

The predicament in which the petitioner thus found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone.⁹

Korematsu thus “was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.”¹⁰ Roberts concluded that the United States had denied Korematsu due process of law.

The majority's reasoning also failed to state the case as it really was. Roberts explained that the conflicting orders “were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp.”¹¹ Rather than candidly acknowledge this plain fact and address the “actualities of the case,” the majority had “set up a figmentary and artificial situation.”¹²

One reason why many people expressed skepticism of the U.S. Supreme Court's reasoning in the more recent case *National Federation of Independent Businesses v. Sebelius*¹³ is the Court's apparent violation of the first principle of theoretical reason. In explaining its reasons for affirming the constitutional validity of key provisions of the Affordable Care Act of 2010, particularly a legal mandate that individual Americans must

6 *Korematsu v. United States*, 323 U.S. 214 (1944).

7 *Id.* at 226-29.

8 *Id.* at 218-20.

9 *Id.* at 230.

10 *Id.* at 232.

11 *Id.*

12 *Id.*

13 *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

purchase health insurance, the Court's majority rendered two holdings which appear to contradict each other. It ruled that federal courts had jurisdiction over the case, notwithstanding a federal law that prohibits suits "for the purpose of restraining the assessment or collection of any tax,"¹⁴ because the mandate is a penalty and not a tax.¹⁵ In the same opinion, the Court ruled that the same mandate is a constitutionally valid exercise of Congress's taxing power because it is a tax and not a penalty.¹⁶ One of the dissents criticized this "verbal wizardry," which moves "deep into the forbidden land of the sophists."¹⁷

The self-contradiction may be merely apparent. The word "tax" is not only a word used in the conventional parlance of everyday Americans, but is also a legal term of art. Terms of art are technical, artifactual devices that may have different meanings in different contexts. But, the appearance of incoherence can be just as damaging to the Court's credibility as actual incoherence, for the purpose of law is to govern not only the technical reasoning of lawyers, but also the practical reasoning of all people within the community who are governed by the law. Lon Fuller's famous allegory of Rex, the king whose edicts were internally contradictory, changeful, and inconsistently administered, retroactive, and unreasonable in other respects demonstrates the importance of the first principles of reasoning for the rule of law.¹⁸ Without adherence to the first principles of reason, a law fails to function as a law. It is, in an important sense, not a law.

Natural Law in Practical Reason

Lon Fuller's observation that law must meet minimal formal criteria to serve its purposes points toward a second sense in which legal reasoning

cannot do without natural law. Legal reasoning is not only a means to describe law and facts accurately. It is also a way to solve problems and answer practical questions, a kind of reasoning that is classically known as practical reasoning.¹⁹ Legal reasoning responds to the universal human need to know what is to be done or not done. It directs the actions of law-abiding citizens, guides lawful judgments that assess human acts as right or wrong, and directs the provision of remedies and sanctions for injurious legal wrongs.

Like theoretical reasoning, practical reasoning can be done adequately only when performed according to certain universal, self-evident principles.²⁰ Those principles are also part of the natural law. The truth that knowledge of truth is inherently better than confusion and falsehood; that all natural persons are to be considered as possessing intrinsic worth and not exploited as mere means to an end; that good is to be done and evil to be avoided; that one should do to others as one would want done to oneself, and not do to others what one would not want done to oneself, are the substantive predicates that make reasonable judgments possible.²¹ They are not alone *sufficient* to enable correct legal judgment. We need human laws and legal institutions to fill in what natural law leaves under-specified and undetermined.²² But, they are necessary. We cannot render legally just judgments if we reason in contravention of the first principles of practical reason, any more than we can render persuasive judgments if we violate the principle of non-contradiction.

Edward Corwin connected the basic concept of American constitutionalism to the idea of natural law. He argued that our fundamental law rests ultimately not in the will of the people, but in the rational assent of the people to certain univer-

14 26 U.S.C. §7421(a).

15 *Sebelius*, 567 U.S. at 543-46.

16 *Id.* at 563-70.

17 *Sebelius*, 567 U.S. at 670-71 (Scalia, J., dissenting).

18 LON L. FULLER, *THE MORALITY OF LAW* 33-94 (1964).

19 SUMMA, *supra* note 5, at pt. I, q. 79, art. 11; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 260-90 (2d ed. 2011) [hereinafter "NLNR"]; JOHN FINNIS, *COLLECTED ESSAYS: VOLUME I: REASON IN ACTION* 19-40, 212-30 (2011) [hereinafter "REASON IN ACTION"].

20 SUMMA, *supra* note 5, at p. I-II, q. 94, art. 2; *REASON IN ACTION*, *supra* note 19, at 9-40.

21 NLNR, *supra* note 19, at 59-127.

22 SUMMA, *supra* note 5, at pt. I-II, q. 95, art. 2; Adam J. MacLeod, *The Boundaries of Dominion*, in *CHRISTIANITY AND PRIVATE LAW* 116-25 (Robert Cochran & Michael Moreland eds., 2020).

sal and unchanging truths. Natural laws and natural rights are not contingent on sovereign will, but rather “interpenetrate all Reason as such.”²³ Because they are independent of human will, they are not products of power or human conventions; they “were made by no human hands.”²⁴ Except in matters of indifference, about which natural law provides no uniquely-correct solution, human laws and judgments are “merely a record or transcript” of the principles and rights of natural law and “their enactment [is] an act not of will or power but one of discovery and declaration.”²⁵

This does not mean that lawyers and judges should substitute their own assessments of what is just for correct judgments according to law. To the contrary, natural law itself directs obedience to human laws, including human laws that obligate judicial officials and officers of the court to reason from legal rules and precedents rather than to exercise their own discretion. Though human law has no intrinsic value, in nearly all communities larger than a family or small group, law is strictly necessary to enable members of the community to coordinate their actions toward the common good.²⁶ Every member of the community benefits from having law and has strong reasons to obey it.

Law answers practical questions. The laws promulgated by those in lawful authority within a community can settle those practical questions that natural law’s first principles leave partly undetermined.²⁷ Matters that are indifferent as a matter of natural justice become matters of legal justice when the law settles them,²⁸ and the members of

the community have an obligation to act according to that lawful settlement.²⁹ So, if the law of a jurisdiction directs judges to rule according to law rather than according to their own assessment of natural justice, equity, or reasonableness, then the judges have a moral obligation to rule as the law directs. Natural lawyers affirm this obligation.³⁰

Law As It Is and Law As It Should Be

Natural law gives judges and lawyers strong reasons to learn human laws. To act according to law first requires a sound understanding of what the law is. That understanding is distinct from any assessment of the law as naturally just or unjust. Natural law theorists and legal positivists agree that human law and natural law are different things.³¹ Even legal theorists who decline to recognize a separation between natural and human law acknowledge that the two things fall into different categories and must be identified and assessed on different criteria. What Ronald Dworkin called the “fit” of a judgment with existing legal materials is incommensurably distinct from what he called the “justification” or “soundness” of the judgment³² because the soundness of the judgment is evaluated by reference to natural law’s immutable first principles and their direct implications.³³

What law is and what law should be are not only distinct things; they are understood within distinct orders of human reason. Human law is created by human beings and so exists in what Aristotle identified as the order of making and made

23 Corwin, *supra* note 2, at 4.

24 *Id.*

25 *Id.*

26 NLNR, *supra* note 19, at 231-33, 266-70.

27 *Id.* at 284-89.

28 ARISTOTLE, *Nicomachean Ethics* bk. V, ch. 7 (David Ross trans., 1980); SUMMA, *supra* note 5, at p. I-II, q. 95, art. 1.

29 *Romans* 13:1-7; SUMMA, *supra* note 5, at p. I-II, q. 96, art. 4.

30 Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2279-81 (2001); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 110-11 (1999); LEE J. STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (2019).

31 SUMMA, *supra* note 5, at p. I-II, qs. 90-97; H.L.A. HART, *THE CONCEPT OF LAW* 185-212 (3d ed. 2012); NLNR, *supra* note 19, at 25-29.

32 RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 333-41 (1977).

33 REASON IN ACTION, *supra* note 19, at 220-23. Dworkin’s theory is more plausible if the soundness or justification of a legal judgment is evaluated exclusively by reference to the political community’s conventional political principles, as he supposed it ought to be. DWORKIN, *supra* note 32, at 105-62; see also Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975). Unlike natural law, conventional political ideals exist in the same order of made things—artifacts—in which one also encounters human law. Like human-made laws, human-made political principles can be more or less just, more or less consonant with natural law.

things,³⁴ what Aquinas identified as the order that reason establishes in external things,³⁵ what John Finnis calls the “cultural, technical” order,³⁶ and what other legal philosophers call the order of artifacts.³⁷ By contrast, natural law exists and operates firstly in the order that is given to us by nature,³⁸ the sort of natural law embedded in our bodies and instincts which we share with all animals,³⁹ and secondly in the order of human choice and action according to right reason.⁴⁰ This order of choosing and acting is what Aristotle called the order of doing.⁴¹ Aquinas identified it as the order that reason establishes in the human will as it deliberates and chooses.⁴² It is what we think of as the moral order.⁴³

We can come to identify and know truths in those different orders only in the terms and concepts that operate within each order, and the logic of each differs according to the order to which it belongs.⁴⁴ Realities that are given to us in the order of nature, rather than constructed by human creativity or habit, include the laws discerned by natural science. These are apprehended by theoretical reason and are in no way created by human beings, notwithstanding that knowledge of such realities is a product of human reason. By contrast, artifacts in the order of human making, including legal norms and institutions, though also understood by theoretical reason, are created by human beings. Their essential realities are, therefore, intelligible in terms of the functions for which human beings create and use them.

To know the moral valence of law is a different exercise altogether. Reasons for action in the order of human willing and doing, including the first principles that direct human deliberation and choice, are within the realm of practical reason.

We apprehend them insofar as we understand practical reason, including practical reason’s first principles. To know why a person acted as they did, for example in fulfilling a contractual duty, is to engage in theoretical reasoning *about* a person’s practical reasoning. Only by considering a human action from within the perspective of a practically reasonable person do we see the moral aspect of law. We can perceive from that internal point of view the basic reasons for which a lawful person acts.

A person’s practical deliberations act upon reasons of potential fulfillment. Practical reason is oriented toward what human action can bring into being. To be sure, it is enabled and limited in important respects by existing human technologies, innovations, laws, and cultures—those artifacts that exist in the order of made things—but it is not determined by them. Laws and other human creations are useful, even morally necessary, but the goodness of any law is not determined by any criteria inherent in the law itself, and law cannot by itself make a bad act good. Human law has instrumental value only. And, it is contingent on human creativity in a way that the principles of natural law are not.

This is not to deny that the project of describing law is a project of describing a purposeful, normative human enterprise, much like the project of describing moral reasoning. To know truly a legal artifact, such as a statute or a will, is of course to know the purposes for which it was created, the ends for which it is used, and the function it performs in facilitating pursuit of those (moral) ends.⁴⁵ And to evaluate those means and ends requires some criteria that are external to the legal artifacts themselves. But not all laws are

34 ARISTOTLE, *supra* note 28, at bk. I, ch. 1.

35 THOMAS AQUINAS, COMMENTARY ON ARISTOTLE’S NICOMACHEAN ETHICS 2 (C. J. Litzinger trans., 1993).

36 Finnis, *Reason in Action*, at 217-18.

37 Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C.L. REV. 1, 5, 35-37 (2019).

38 AQUINAS, *supra* note 35, at 1.

39 R.H. HELMHOLZ, NATURAL LAW IN COURT 2 (2015).

40 *Id.* at 2-3.

41 ARISTOTLE, *supra* note 28, at bk. I, ch. 1.

42 AQUINAS, *supra* note 35, at 2.

43 REASON IN ACTION, *supra* note 19, at 218.

44 *Id.* at 220-23.

moral, i.e., fully reasonable. And moral laws outlive their makers. They exist independently of the original (moral) purposes for which they were created. They can even be put to new uses.

So, human law as it exists is a different kind of thing, understood in a different kind of way than the natural law that enables us to assess what law should be. No matter how accurately one describes the law as it is, that description will not move one any closer to an accurate discernment of which provisions of a law are inconsistent with right reason because thinking in terms of right reason is a different kind of thinking than thinking about what human beings have made. For the same reason, to know what the law should be is not to know what it is. To describe human law well and to identify and apply natural law well are different acts which employ different methods of reasoning and which have different sets of objects to consider.

To be sure, the order within which one's reason encounters human law and the order in which it deliberates about natural law are related and interdependent. People make things for moral ends, and one cannot understand artifactual objects without knowing for what ends they are used. To know a law fully is to know why people made it. But the orders are neither reducible to nor entirely derived from each other. Unlike human law, the order of given nature is not contingent upon human creativity and making. It is what it is. The order of made things is dependent on the order of given nature; a person cannot create what is not possible, and to perform their intended functions created things must obey the principles and laws of nature. But, artifacts created by human beings are also contingent upon human creativity. They could have been otherwise, or not have existed at all.

Nor are human laws and other artifacts reducible to the human goods and other first principles in the order of doing. What is good and just to do does not entirely determine what law can reasonably be. Much of the law settles questions that could be answered in different ways consistent with right reason.⁴⁵ Like all lawyers, therefore, natural lawyers cannot make the law what-

ever they think it should be. That a law ought to contain a certain proposition or prohibit a certain act does not entail that it does. And in truth, when it comes to the particular specifications of human law, there are relatively few immutable, universal oughts. Natural law affirms human freedom.

Natural Law and Christianity

Natural law reasoning is a necessary predicate to coherent, rational, and just legal reasoning. Since natural law reasoning is simply what all good lawyers do, in greater or lesser degrees, it should be apparent that there is nothing inherently religious about natural law. Anyone can do it, whatever their convictions about the uncaused Cause of the universe, all the good things in the world, and all the human goods and virtues, the existence of which calls for explanation. Nevertheless, throughout modern history one finds a correlation between natural law theorists and adherents to Christian creeds. Natural law seems to fit Christianity and vice versa.

How natural law came to be associated with Christianity is a large and interesting question that goes well beyond the scope of this essay. But, from the foregoing, it should be apparent that natural law is consonant with a theistic view of the world, especially a Christian view of the world, which identifies the second person of the divine trinity as the Logos who supplies intelligible order to all things and who promises eternal flourishing to those who accept his authority and act according to his precepts. As Richard Helmholz observed, natural law makes sense if one believes that God imbued his creatures with natural reason to know "right from wrong without any special training."⁴⁷ So, though one need not be a Christian to perceive the fundamental logic and universal principles that are found within the law, maybe it helps.

FURTHER READING

Aquinas, Thomas. *Treatise on Law*. Regnery, 1996.

⁴⁵ Claeys, *supra* note 37, at 37.

⁴⁶ SUMMA, *supra* note 5, at p. 1-II, q. 95, art. 2.

⁴⁷ HELMHOLZ, *supra* note 39, at 2-3.

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CHRISTIANITY AND LAW PRACTICE

by Robert F. Cochran, Jr.*

*“For from Him and through Him and to Him are all things.
To Him be the glory forever! Amen.”*

— ROMANS 11:36

Introduction

Tom Skinner served as a Christian mentor to lawyers, businesspersons, and political leaders in New York City in the 1970s. My friend Rich Dean, a young New York City law firm associate at the time, recalls having dinner with Skinner and a group of law students one evening. The conversation turned to the Ford Pinto case, a case that had received a lot of publicity at the time. Around the country, several Ford Pintos had burst into flames when hit from the rear. Internal Ford memos emerged, revealing that Ford, with a single-minded focus on cost-savings and profits, had forgone measures that would have saved many lives. Rich confidently asserted that as a Christian attorney, he would never represent Ford Motor Company. Skinner asked, “Would it be any different if you were in the board room?”

Skinner’s question left Rich and the other law students something to think about. It is also a helpful question for us to consider as we explore what Christian faith might say to lawyers. What is it that Christian faith brings to the practice of law? We will return to Rich at the end of this essay.

God’s Image, Part One: Clients, Third Parties, and Human Dignity

Law study and law practice tend to depersonalize clients and other people in numerous ways. In part, this comes from the law school experience of reading a barrage of cases in which people have suffered a significant loss. At first, one is horrified at the injuries suffered in torts and criminal law cases. After reading the 1000th case, reports of serious loss tend to become mundane.

In law practice, dealing with numerous cases in which parties have suffered such loss has a similar numbing effect. Clients tend to become this “severed arm,” or this “complicated estate plan.”

Judicial opinions tend to depersonalize people as well. They exclude most of the personal aspects of the people involved. Often, they don’t even use the names of the parties. John Noonan charted the tendency of law to depersonalize people in his book, *Persons and Masks of the Law*. As Judge Noonan notes in *Palsgraf v. Long Island Railroad*—maybe the most famous first-year law school case—Justice Cardozo’s majority opinion does not even mention Mrs. Palsgraf’s name.¹ Were it not for the title of the case and Justice Andrews’s dissenting opinion, we might not even know the name of this person who suffered such traumatic injuries.

In law school, the process of learning to “think like a lawyer” leads law students to focus on the facts that might affect the legal outcome of a case, but it is easy to come to believe that these facts are all that is important about a case. Students learn to “brief” appellate cases, focusing on the legal issues of the case and *only* those facts that are relevant to those issues. Student briefs reduce the parties to “P” and “D.” Clients and opposing parties become merely occasions for advocacy.

The Christian message is quite different. When I teach trial advocacy, I tell students that if they want the jury to remember something, tell them three times—in opening statement, in the evidence, and in the closing statement. God must have wanted humans to remember that

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¹ See JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 111-51 (2002) (discussing *Palsgraf*).

since he created us in his image. He reminds us three times in two verses:

Then God said, “Let us make human beings in our image, to be like us. They will reign over the fish in the sea, the birds in the sky, the livestock, all the wild animals on the earth, and the small animals that scurry along the ground.”

So God created human beings in his own image. In the image of God he created them; male and female he created them (Gen. 1:26-27, NLT) (emphasis mine).

Our fellow human beings are to be treasured. The lowliest criminal defendant and the most arrogant CEO—even the CEO who approved the Ford Pinto design—bear God’s image. Of course, actions for clients affect third parties as well, and they bear God’s image too. In the final part of this essay, I discuss how lawyers might address their interests.

Scripture gives particular attention to the condition of the poor and lowly. *Proverbs* warns us against closing one’s “ears to the cry of the poor” (21:13) and encourages us to “plead the cause of the poor and needy” (31:8-9). Lawyers for wealthy and powerful clients may have the opportunity to persuade clients to act in ways that protect the poor. Lawyers should volunteer time in service to poor people. Jesus declares that “when you have [served] the least of these my brethren, you have served me” (Matt. 25:40).

God’s Image, Part Two: Business Practice and the Exercise of Dominion

The creation story not only states three times that God created humans in his image, it states twice that God created humans to exercise dominion. God *delegates* this authority to humans— “let them have dominion” (Gen. 1:26). In addition, he *commands* us to exercise this authority— “have dominion over [the earth]” (Gen. 1:28).

Thus, exercising dominion over the earth is both a human right and a human responsibility. Psalm 8:3-6 makes it clear that the human responsibility to exercise dominion extends beyond Adam and Eve, to all humans.

Biblical scholars have come to see exercising dominion as one of the implications of God’s image in humans.² Genesis 1:26 is best understood as God saying, “Let us make human beings in our image, to be like us [and thus they] will reign [over the earth].” It is hard to overstate the extent of the responsibility God gives humans as his image-bearers. The Hebrew term Genesis 1 uses for “dominion” suggests strong action. It is used elsewhere in the Bible to refer to the authority exercised by kings (e.g., 1 Kings 4:24; Ps. 72:8, 110:2). As David VanDrunen and Randy Beck have noted, “God made human beings not to be weak middle-managers, but strong rulers of creation.”³

Genesis 2’s description of Adam and Eve’s responsibility to “cultivate” and “keep” the Garden helps to define human responsibility over the earth (Gen. 2:15, NASB 1995). As James Davison Hunter puts it, to cultivate includes working, nurturing, sustaining, and husbanding; to keep it includes safeguarding, preserving, caring for, and protecting. He writes:

These are active verbs that convey God’s intention that human beings both develop and cherish the world in ways that meet human needs and bring glory and honor to him. In this creative labor, we mirror God’s own generative act and thus reflect our very nature as ones made in his likeness.⁴

One might not think of the work of business lawyers in such lofty terms as exercising dominion, but this is exactly what they do—at times for good and at times for ill. Lawyers, in collaboration with clients, organize much of human life. When lawyers draft contracts, create corporations, put together deals, draft wills, administer estates, and advise business people, they assist

² David VanDrunen & Randy Beck, *The Biblical Foundations of Law: Creation, Fall, and the Patriarchs*, in *LAW AND THE BIBLE: JUSTICE, MERCY AND LEGAL INSTITUTIONS* 29 (Robert F. Cochran Jr. & David VanDrunen eds., 2013).

³ *Id.* at 31.

⁴ JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 3 (2010).

clients in exercising dominion. These activities affect employees, customers, shareholders, families, and the environment. God calls lawyers and clients to exercise dominion on his behalf, as his representative.

Many business lawyers, along with many business people and workers, see little connection between their work and God's purposes on this earth. In part, this results from a limited view of God's purposes. Human activity in the commercial sphere is often the means whereby God meets human needs. Calvin College philosophy professor Lee Hardy gives a striking example: We express our needs to God—"Give us today our daily bread" (Matt. 6:11). God gives us our bread, but generally it does not appear supernaturally. At the very time we pray, bakers are kneading dough and baking our bread. God gives us bread through the hands of the baker.⁵ It is through the hands of people in all sorts of occupations that God meets our needs.

A second reason many business lawyers see little connection between their work and God is that they, like many workers today, are a long distance from those who benefit from their work. The modern commercial system is not as simple as the direct baker-to-customer relationship described by Hardy. In an earlier day, it was easier for people to see a connection between their work, their neighbor, and ultimately God. Today, workers seldom see the people they serve. Workers in a bread factory are several steps removed from those who benefit from their labor. This distance leads many workers—including lawyers—to be alienated from their work, making it difficult for them to see themselves as the hands of God in meeting those needs. But, both the worker in the factory and the lawyer who drafted the contract between the bread company and the supermarket serve God and neighbor.

The greatest ethical challenge for business lawyers is likely to be that commercial enter-

prises yield mixed results. Many give rise to injustices. If a client is using the lawyer's services to produce a destructive product or to oppress workers, it is hard to argue that the lawyer is exercising dominion on God's behalf. It is important for lawyers to make thoughtful decisions about what clients they will represent and what they will do for them.

God's Image, Part Three: Lawyers and Practical Wisdom

What is it that lawyers bring to the project of exercising dominion? Again, we find insight in the fact that God created humans in his image. God's image bearers not only have God-like dignity and God-like responsibilities, but they also have God-like capabilities. Throughout Christian history, wisdom has been the aspect of God's image in humans to which Christians have given the most attention. Aquinas quotes Augustine: "Man's excellence consists in the fact that God made him to His own image by giving him an intellectual soul which raises him above the beasts of the field."⁶ In contrast to the rest of God's creation, humans have the capacity to discern "wisdom, truth, and the relations of things."⁷

Legal scholars Mary Ann Glendon, Anthony Kronman, and Brett Scharffs have suggested that practical wisdom is the key lawyer virtue. Practical wisdom (distinguished from theoretical wisdom—the wisdom of the ivory tower academic) is the wisdom of craftsmen, engineers, and lawyers. Its concerns are "planning, understanding, judgment, and action."⁸ A lawyer's practical wisdom skills are an eye for the issue, a feel for common ground, an eye to the future, problem-solving abilities, tolerance, and recognition of the value of incremental change.⁹

As Kronman notes, practical wisdom is not merely a technical skill. It is the ability to deliberate well, "a wisdom that lies beyond technique—a wisdom about human beings and

5 LEE HARDY, *THE FABRIC OF THIS WORLD: INQUIRIES INTO CALLING, CAREER CHOICE, AND THE DESIGN OF HUMAN WORK* 48 (2003).

6 THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I, q. 93, art. 2.

7 *Id.* at pt. I, q. 12, art. 2.

8 Brett G. Scharffs, *Abraham Lincoln and the Cardinal Virtue*, 47 *PEPP. L. REV.* 341, 352 (2020).

9 MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 102-08 (1994).

their tangled affairs that anyone who wished to provide real deliberative counsel must possess.”¹⁰ With wisdom, a lawyer is able to step beyond a client’s emotional reaction to a case. Wise lawyers enable clients to see a broad range of potential responses to a problem, the implications of each response, and the means for pursuing each response. Wise lawyers enable clients to make wise decisions.

Litigation, the Fall, and the Adversary System

Whereas business practice is grounded in the Christian doctrine of creation, litigation is grounded in the Fall. Litigators are in the conflict business, and conflict typically arises when one or more parties act foolishly, selfishly, or both. Lawyers serve as advocates within the adversary system.

Lawyers’ role as advocate calls on them to do things that run counter to ordinary morality and counter to ordinary Christian morality. Whereas Jesus calls on Christians to “turn the other [cheek]” and to be candid—“let your ‘Yes’ be ‘Yes,’ and your ‘No,’ ‘No’” (Matt. 5:37,39)—the lawyers’ advocacy role at times calls on them to attack others, to take advantage of the errors of others, to withhold confidential information, and to make arguments they may not believe. Lawyers do what they can to keep out damaging, even truthful, evidence. In negotiations and in court, they exaggerate client claims. There are several justifications for such advocacy.

The primary justification for lawyer advocacy is that lawyers play a role within an adversary system. The value of the role turns on the value of the system. The system divides power and responsibility between judges, juries, parties, and lawyers. Lawyers pursue justice indirectly by playing a role within this system. Lawyers on each side press judges and juries to consider the full range of arguments that might affect their decisions. Generally, lawyers’ arguments increase the possibility that judges and juries will

discover truth and that law will be just. Each side plays by the same rules—rules that courts over time have concluded yield the best mix of truth, justice, and protection of human rights.

Non-lawyers often wonder how lawyers can represent guilty defendants and how they can seek to get guilty clients off on a “technicality.” Criminal defense lawyers play an important role within the system. They ensure defendants are guilty before we punish them. In most cases, the prosecutor has sufficient evidence to convict, and the defense attorney’s primary job is to try to find some basis for limiting the client’s sentence. That will involve learning about the defendant’s background, searching for a reason to have hope. As Thomas Shaffer and Joseph Allegretti have argued, most often, the criminal defense lawyer serves the Christ-like role of “companion for the guilty.”¹¹

What non-lawyers label “technicalities” are generally rules grounded in human dignity. Constitutions and courts have adopted them in order to protect defendants and citizens generally. For example, the state should not subject people to degrading interrogation or casually search people’s homes. Releasing an (in fact) guilty client because of an illegal search will discourage police from making illegal searches of innocent citizens. Courts do things that sometimes are in tension—they seek truth and justice, but they also seek to protect human rights. Lawyer advocacy on both sides of the issue helps courts wisely balance these important human values.

Candor is, of course, an important Christian virtue. In the book, *Law and Wisdom in the Bible*, biblical scholar David Daube notes that the Bible presents two types of wisdom. At times, wisdom appears to be pure. “Lying is condemned, straight conduct is praised, open looks, open language.”¹² Some Christian legal commentators argue that lawyers should always exercise such candor. Gordon Beggs argues that “Proverbs leaves no room for deception.”¹³ However, one of the challenges for lawyers who seek

¹⁰ ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993).

¹¹ JOSEPH G. ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 74-76 (1996).

¹² 2 DAVID DAUBE, *LAW AND WISDOM IN THE BIBLE: DAVID DAUBE’S GIFFORD LECTURES* 88 (2010) (Calum Carmichael ed., 2010).

¹³ Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 WAKE FOREST L. REV. 831, 841-43 (1995).

to limit themselves to “pure wisdom” is that they may face attorneys who are not so candid. Far too often, lawyers do not even consider the possibility of a straightforward approach to practice, but scripture itself suggests that there may be a need for deception in some cases.

Daube notes that the Bible—especially some stories in the Old Testament—praise what might be called “shrewd” or “tricky” wisdom. For example, the Egyptian midwives deceive Pharaoh to save the Hebrew babies (Ex. 1:17-21), and Solomon deceives two prostitutes to determine which was the mother of a disputed baby (I Kings 3:28). Psalm 18:25-26 (NIV) notes that even God practices both pure and shrewd wisdom, depending on the party involved:

To the faithful you show yourself faithful, to the blameless you show yourself blameless, to the pure you show yourself pure, but to the devious you show yourself shrewd.

Jesus, at a time when his brothers “did not believe in him,” sent them to the Festival of Shelters in Jerusalem, saying, “I’m not going to this festival, because my time has not yet come.” “But after his brothers left for the festival, Jesus also went, though secretly, staying out of public view” (John 7:5, 8, 10).

But, there are biblical limits to “shrewd wisdom.” Daube notes that in the Bible, “lower wisdom never takes pride in an unprovoked exploitation of the weak.”¹⁴ I think Mike Schutt proposes a helpful standard: a lawyer should refrain “from tactics—even ethically permissible tactics—that would undermine the integrity of the litigation or negotiation process.”¹⁵

Lawyers as Peacemakers

Jesus said, “[b]lessed are the peacemakers for they shall be called the children of God” (Matt. 5:9). Lawyers are not often identified as peacemakers, but in reality, much of most lawyers’ work is peacemaking. Good business lawyers draft documents with an eye toward avoiding future conflicts. Litigators settle upwards of 95

percent of cases prior to trial. And even litigation is a peaceful form of conflict, when compared with the violent alternatives. Nevertheless, litigation often involves harsh conflict and leaves parties angrier with one another than before.

Some Christian traditions oppose litigation under any circumstances. Jesus taught that when we are sued for our tunic, we should give our cloak as well (Matt. 5:40) and when we are wronged, we should forgive (Matt. 18:21-22). Both Jesus and Paul commanded that Christians resolve their disputes among themselves (see Matt. 18:15-17; 1 Cor. 6:1-10). The Anabaptist churches put these teachings into practice and established non-adversarial methods of dispute resolution within their churches. In recent decades, they took the lead in what became the legal system’s Alternative Dispute Resolution movement.¹⁶

Other Christian traditions are more accepting of litigation. John Calvin (a former lawyer) argues that Christian use of the courts is appropriate, for as Romans 13:4 says, the magistrate “is the minister of God to us for good.” Calvin’s requirements for litigation, however, are stringent. Those who are “undeservedly oppressed” may put themselves “in the care of the magistrate” and seek “what is fair and good,” so long as they are “far from all passion to harm or take revenge, far from harshness and hatred, far from burning desire for contention.” Calvin acknowledges, however, “as the customs of these times go, an example of an upright litigator is rare.”¹⁷ Unfortunately, I fear that customs have not changed over the last five centuries.

Lawyers can serve as peacemakers, both by encouraging the non-adversarial methods of dispute resolution suggested by the Anabaptists and by encouraging clients to be the non-adversarial litigants suggested by Calvin. When possible, lawyers should raise for discussion with clients the possibility of apology, forgiveness, and reconciliation.

Of course, peaceful dispute resolution requires a level of cooperation from both sides. If

¹⁴ DAUBE, *supra* note 12, at 95.

¹⁵ MICHAEL P. SCHUTT, *REDEEMING LAW: CHRISTIAN CALLING AND THE LEGAL PROFESSION* 254 (2007).

¹⁶ Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660 (1985).

¹⁷ 2 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 1507 (John T. McNeill ed., Ford Lewis Battles trans., 1960).

either side is unwilling to pursue a peaceful resolution, lawyers may have to fall back on aggressive tactics. The legal system, with all its expense, delays, and inefficiencies, will be left to take its course.

Moral Responsibility, Choice of Cases, and the Counselor-at-Law

What are lawyers to do if they believe clients are pursuing unjust objectives? If a client wants a lawyer to break the law, the answer is easy—the lawyer is required to refuse.¹⁸ But, the law does not control every moral issue. What should a lawyer do when his or her moral values run counter to those of the client? There are several possibilities.

Selection of Cases: A lawyer might refuse to handle some cases. Pope John Paul II says that lawyers “should always decline the use of the profession for an end that is contrary to justice[.]” They should “avoid becoming mere technicians at the service of any interest whatever.” John Paul made these comments in a discussion of divorce in which he highlights the importance of permanent marriage “for spouses, for children, for the Church and for the whole of humanity,” and argues that lawyers generally should not assist clients in obtaining a divorce.¹⁹

Some lawyers limit their practice to what they see as worthwhile client projects. Charles DiSalvo and William Droel note:

For example, a bond counsel must decide whether the projects being underwritten are worthy of respect and, therefore, his or her talent and efforts. Does this water treatment facility, housing project or road contribute to the well-being of humanity and thus to the kingdom of God? Or is it a project

that is nothing but a political boondoggle, with no practical justification, from which the lawyer would be better to walk away?²⁰

Such lawyers devote their efforts to projects they see as exercising dominion on God’s behalf. Other lawyers are willing to represent a broader range of clients, assisting clients with projects whether or not they agree with them. Such representation has the benefit of holding clients within legal bounds. Moreover, it can give lawyers the opportunity for the sort of counseling described at the end of the next section.

Client Counseling: Thomas Shaffer and I have suggested that two questions define the moral relationship between lawyer and client.²¹

The first question is who controls the representation. Early legal ethicists in the United States called on lawyers to control the representation and to direct clients toward the lawyer’s perception of the good. David Hoffman said, “[The client] shall never make me a partner in his knavery.”²² Judge Clement Haynsworth more recently argued, “[T]he lawyer must never forget that he is the master. He is not there to do the client’s bidding. It is for the lawyer to decide what is morally and legally right[.]”²³ However, lawyer control of the representation shows little respect for clients as God’s image-bearers. Clients generally should control decisions that affect their lives. Lawyers should not assume that they have greater moral wisdom than the client. Humility is justified when approaching the moral issues that arise in the law office.

The second question is, “Are the interests of other people (who also are God’s image-bearers) taken into consideration in law office decisions?” Some lawyers focus entirely on client interest. One client-counseling book suggests:

18 MODEL RULES OF PRO. CONDUCT r. 1.2(d).

19 Pope John Paul II, Address of John Paul II to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota, at ¶ 9 (Jan. 28, 2022), https://www.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rot.html.

20 Charles R. DiSalvo & William L. Droel, *Reflections on the Contents of the Lawyer’s Work—Three Models of Spirituality—and Our Struggle with Them*, 27 TEX. TECH L. REV. 1069, 1076 (1996).

21 See generally THOMAS L. SHAFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 5-65 (2d ed. 2009) (offers a fuller analysis of the discussion in this section).

22 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752-75 (2d ed. 1836).

23 Clement F. Haynsworth Jr., *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976).

“Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*.”²⁴

Shaffer and I argue that the lawyer should allow the client to control decisions in representation, but raise moral concerns for discussion, as a friend would raise such issues. As Anthony Kronman argues, the advice of good friends (and good lawyers) is of great value because they combine a commitment to the friend or client with objectivity. They bring “sympathetic detachment” to the relationship.²⁵ Friends raise moral concerns, without imposing their values on each other. As Jeremy Taylor, the seventeenth-century bishop and Cambridge fellow said:

Give thy friend counsel wisely and charitably, but leave him to his liberty whether he will follow thee or no: and be not angry if thy counsel be rejected ... He that gives advice to his friend and exacts obedience to it, does not the kindness and ingenuity of a friend, but the office and pertness of a school-master.²⁶

A friend will not impose his or her will on a friend, but neither will a friend sit by and let a friend go down a wrong path. A lawyer as friend will raise and discuss moral issues with clients in a way that takes those issues seriously. Lawyers can raise such concerns by bringing the interests of other people into the discussion. When considering various courses of action the lawyer might ask, “Who else would this option affect and how?” As to each alternative the lawyer might ask, “Would that be fair?”

Conclusion

In conclusion, I return to the story of my friend Rich Dean’s encounter with Tom Skinner. When Rich proclaimed that he would never represent

a client like Ford, Tom asked, “Would it be any different if you were in the board room?”

It was a providential encounter. Rich concluded that a Christian attorney who brings Christian values to the law practice might be able to make a difference. Rich went on to work for large international law firms, representing major corporate clients around the world. He was able to raise tough moral questions, even in his early years of practice, with his law firm and with clients.²⁷ As for the Ford Pinto case, in retrospect, I suspect Ford officials wish they had had a Rich Dean in the boardroom.

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CHRISTIAN ETHICS AND LAW

by Elisabeth Rain Kincaid*

Introduction

In *Law's Empire*, legal philosopher Ronald Dworkin develops his theory of "law as integrity." According to Dworkin, the idea of "law as integrity" requires judges to consider both external norms of justice and equality, and the internal moral coherence of the legal system within which they operate, to arrive at one right answer in legal interpretation.¹ The mid-century Jesuit political theologian, John Courtney Murray, also writes of the "integrity" of religious communities in their relationship to law.² According to Murray's description, this integrity requires recognizing the existence of both the legal and civic order, and of religious institutions as separate, complete societies—each with their own ends and values.³ The recognition of the integrity of the law and of the church is a statement of limits which serve as "articles of peace." This peace is preserved by the state accepting that it "must permit to the differing communities the full integrity of their own religious convictions." Murray does not argue that these two societies must be completely separate to maintain their integrity. Rather, he claims that law's integrity requires that the integrity of the ecclesial order is also maintained and protected, "however much they [the two societies] are, and need to be, related."⁴

In this essay, I will explore how Christian ethics has articulated these two different but complementary notions of the integrity and val-

ue of civil law. For Christian ethicists, the question is how to understand civil law's integrity—in this case, law that is both situated in its own context, with its own meaning and significance, and also aligned with God's law and carrying out God's purposes. I will also highlight some challenges and departures from this approach. To begin, I will briefly sketch out some key historical moments in this Christian ethical engagement with civil law resulting in this approach emphasizing two integrities.⁵ Then I will consider briefly how a non-exclusive list of several contemporary Christian ethicists have expanded upon this tradition or developed it further in alignment with contemporary challenges—both ethicists who work within the tradition and ethicists who have chosen to stand outside it.

Historical Perspectives

In the New Testament, a theological change is articulated in the status of civil law.⁶ No longer is civil law understood as developing directly out of God's rule contained in one people, governed by both civil and religious law. This is not the result of a diminishment of God's power. Jesus himself has "gone into heaven and is at the right hand of God, with angels, authorities, and powers having been subjected to him" (1 Peter 3:22). Thus, Jesus is the ruler over all. But, what does that mean for the relationship between Jesus' church and the ruler of the earth now? In Romans 13,

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1 See generally RONALD DWORKIN, *LAW'S EMPIRE* (2d ed. 1986).

2 JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 45 (1960).

3 This language of society is of course informed by Aristotle, but also forms an important element of Roman Catholic political theology following the first Vatican Council. See Patrick Granfield, *The Church as Societas Perfecta in the Schemata of Vatican I*, 48 *CHURCH HISTORY* 431 (1979).

4 *Id.*

5 Christian ethics as a separate discipline is a late-comer in theology, developing moral theology to address the need for better trained confessors in the Catholic Reformation and in Protestant thought in relationship to philosophy. However, consideration of ethical and moral questions is of course a fundamental concern of Christian theology of any period.

6 "In the first place, the terms on which the bearers of political authority function in the wake of Christ's ascension are *new terms*. The triumph of God in Christ has not left those authorities just where they were, exercising the same right as before. It imposes the shape of salvation-history upon politics." OLIVER O'DONOVAN, *THE WAYS OF JUDGMENT* 5 (2008).

St. Paul provides the foundational answer to the question for Christian ethics. First, he establishes the authority of the civil law and describes how that authority participates in God's authority. However, this participation is limited.

The civil law's authority exists because civil law itself can be used to achieve God's end—both to do good to those who obey it and to punish those wrong-doers who have sinned under the law. Paul himself demonstrates the potential good of the civil legal system when he removes himself from the authority of the Jewish rulers and places himself instead with the Roman judicial system (Acts 25:9-12). However, this approbation of the potential God-given goodness of the civil law system should not be seen as abrogating or impinging on the church's own authority. Rather, if possible, Christians should conduct their relationships within the sphere of the Church's authority, for example, resolving their disputes through ecclesial reconciliation rather than the secular court system (see 1 Corinthians 6).

Not surprisingly, St. Paul does not ask the question as to how far the church may interpenetrate into the civil order and shape the content of the civil law. His assumption—in the face of Roman imperial might—is that the church will not in this present age impact the civil laws of the Roman Empire. Rather, at the *Parousia*, all civil laws will cease and all civil powers will fall, and all of Rome will bow to the name of Jesus Christ (Philippians 2:10). The conversion of Constantine and the Christianization of the Roman Empire, therefore, posed new questions to Christians in consideration of the civil law. Did a Christian emperor promulgate divine law or civil law? Eusebius, in his *Life of the Emperor Constantine*, describes the ascension of Constantine to supreme authority in almost Christological terms. All the citizens of the Roman Empire “declared that Constantine had appeared by the grace of God as a general blessing to mankind.”⁷

Eusebius then describes Constantine's legislation in similarly Christological terms. “His laws, which breathed a spirit of piety toward God, gave promise of manifold blessings.”⁸ In Eusebius, the civil law loses its integrity—becoming a vehicle of direct divine action promulgated by an apparent, quasi-divine law giver. The Church also loses its own integrity distinct from the civic order, as it is brought under the headship of the Emperor, who stands in place of Christ.

The subsequent decline of the Roman Empire over several centuries led St. Augustine to a more sober assessment of the relationship between civil and divine laws. However, even in the face of this civic decline, Augustine still affirmed some value for civil law in society, even for Christians. In *City of God*, Augustine uses the extended metaphor of the “two cities” to describe the goods shared between the City of God (the church) and the City of Man (the secular religious order), while distinguishing their different ends. The City of God's end is union with God. However, as pilgrims *en via* through a foreign country, the citizens of the divine city “make common use” of the goods shared with the human city—including the law—which provides minimal justice and peace.⁹ However, there are both natural and supernatural limits placed on these laws. For example, Augustine writes, “it has not been possible for the Heavenly City to have laws of religion in common with the earthly city.”¹⁰ Secondly, he describes how a law which violates justice is no law at all because it is incapable of obtaining even these basic minimal ends.¹¹ Augustine also describes how Christians may make use of good laws to promote peace and justice that goes beyond a minimal standard—expanding the good which the civil law may in its own integrity achieve. For example, in a letter condemning the slave trade in North Africa, Augustine describes to his correspondent, Bishop Alypius, how he and others in the church are using the civil law pro-

7 EUSEBIUS OF CAESAREA, *The Life of the Blessed Emperor Constantine*, in 1 NICENE AND POST-NICENE FATHERS (SECOND SERIES) 494 (Philip Schaff & Henry Wace eds., 1994).

8 *Id.* at 505.

9 AUGUSTINE, *CITY OF GOD* bk. XIX, ch. 17 (2010).

10 *Id.*

11 AUGUSTINE, *On the Free Choice of the Will*, in ON THE FREE CHOICE OF THE WILL, ON GRACE AND FREE CHOICE, AND OTHER WRITINGS bk. I, § 5 (Peter King ed., 2010).

mulgated by the emperor Honorius to limit the trade and punish slave traders. This civil law, he writes, “is useful; and it could provide a remedy for this plague. However, we have begun to exploit it only to the extent necessary to get people freed.”¹² Here, we see Augustine upholding the good which is achieved by the civil law only on its own authority. However, Augustine utilizes this law in a way appropriate to the integrity of church—by *not* using the penalties of the law to their full extent. Augustine believes the penalties of beating with leaden whips is too cruel even for use on the slave traders, “even though they are abominable and deserve every condemnation.”¹³

In the Middle Ages, St. Thomas Aquinas developed on Augustine’s understanding of the relationship between Christian ethics and law. First, he expands upon the end of civil law: not just to promote peace, but also to form citizens in virtue.¹⁴ Secondly, he emphasizes the positive nature of civil law: “lawmaking,” as opposed to just “law-enforcing,” in order to “determine matters otherwise left unresolved.”¹⁵ Even with this new emphasis, the positive law is always limited by the requirements of the natural law, so its autonomy is incomplete and it is grounded in God’s act of creation.¹⁶ Third, Aquinas expands upon Augustine’s claims that the citizens of the City of God still retain many aspects of their cultural identity (e.g., language, clothing) and make use of these cultural markers, so far as “these all tend towards the same end of earthly peace.”¹⁷ Aquinas also considers the importance

of these cultural markers for civil laws, so far as they make a law most fitting to a community. The natural law is unified, but is instantiated in ways appropriate to different cultural and communal contexts.¹⁸

Are there other limits on positive law beyond the demands of justice, the natural law, and the importance of the integrity of the church? Christian theologians of the early modern period repeatedly considered this question. Some theologians like John of Salisbury and Bernard of Clairvaux—in part in response to the questions raised by the conflict between the Emperor and the Pope of the Investiture Controversy—argued that the pope, as Christ’s vicar on earth, had plenary power over the lawmaking authority of secular rulers.¹⁹ Thus, they reversed the Eusebian paradigm and collapsed the civil law with the ecclesial law. However, this argument was soundly rejected by other theologians in the tradition who followed Augustine and Aquinas, presenting a much more limited theory as to the church’s power over the content of the civil law. For the Spanish Dominican Francisco Vitoria, for example, the pope can affirm that Christians had been released from obedience to secular law in the case of violations of justice or excessive limits placed on religious practices.²⁰

The Reformation led to the development of a variety of explorations of the relationship between Christian ethics and civil law. John Calvin’s view of law is the most in line with Augustine and Aquinas. Calvin extends his well-

12 AUGUSTINE, *Letter 10, Augustine to Alypius* (428), in AUGUSTINE: POLITICAL WRITINGS 43–46 (E.M. Aktins & R.J. Dodaro eds., 2001).

13 *Id.*

14 THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, q. 95, art. 1.

15 O’DONOVAN, *supra* note 6, at 211.

16 AQUINAS, *supra* note 14, at pt. I-II, q. 95, art. 2. All civil law is derived from natural law, either by way of “a conclusion from a principle” (“thou must not kill”) or by way of “determination” (different law makers might determine different ways by which evil doers should be punished in according to the natural law conclusion that evil doing requires punishment).

17 AUGUSTINE, *supra* note 9.

18 Understood in a different context from Aquinas, much of the same concept of a community-grounded basis for law is developed in the common law tradition. This concept of the common law is also part of Dworkin’s consideration of law’s integrity, as I discussed in the first paragraph. AQUINAS, *supra* note 14, at pt. I-II, q. 95, art. 2.

19 “[B]oth swords, namely the spiritual and the material, belong to the Church, and that although only the former is to be wielded by her own hand, the two are to be employed in her service.” BERNARD OF CLAIRVAUX, *TREATISE ON CONSIDERATION* 120 (1921).

20 FRANCISCO VITORIA, *On Civil Power*, in VITORIA, *POLITICAL WRITINGS* 1.11b [1-44] (Anthony Pagden & Jeremy Lawrance ed., 1991); see also JOHN OF PARIS, *ON ROYAL AND PAPAL POWER* 160 (1971) (“All ecclesiastical sanction is spiritual, consisting of excommunication, suspension, and interdict; other than this, the Church can do nothing except indirectly and incidentally.”).

known third use of the moral law to encompass the civil law. Law making authority is entrusted to rulers “by divine providence and holy ordinance.”²¹ Despite the Fall, God has not abandoned humanity, but still acts redemptively even in the civil sphere. “God was pleased so to rule the affairs of men inasmuch as he is present with them and also presides over the making of laws and the exercise of equity in courts of justice.”²² Civil laws have their own integrity and are necessary for humans, even the elect. “If it is God’s will that we go as pilgrims upon the earth while we aspire to the true father land and if the pilgrimage requires such helps [civil laws and all they accomplish] those who take these from man deprive him of his very humanity.”²³

However, many other theories of the post-Reformation/early modern phase departed in new ways from the Pauline/Augustinian/Thomistic approach. Martin Luther’s theories of sin, law, and grace led both to a theological Reformation and new views of the relationship between secular and civil power. Luther, at least in *Against Secular Authority*, takes a very narrow read of Romans 13. The only thing laws can accomplish is to empower princes to serve as “God’s jailors and hangmen . . . to punish the wicked and maintain outward peace.”²⁴ In this theory, he abandons the more positive read of civil law’s contribution to society and formation in virtue articulated by Augustine and Aquinas.

The sectarian approach—derived from John Wycliffe and Jan Hus, and then appropriated in various Anabaptists communities—calls upon Christians to reject or withdraw from the authority of civil law in communities in which a ruler is not in a state of grace. This approach thus disregards the civil law’s independent au-

thority. The Diggers and Levelers of the English Civil War articulate one of the more extreme and apocalyptic phrasings of this view. Gerrard Winstanley contrasts the power of the civil law with the Law of Righteousness and describes the history of the world as a conflict between those such as Abraham, Isaac, and Jacob who were standing as “watchmen . . . taught by the Spirit” and the powers and authority of the civil law.²⁵

The secularizing approach of the Enlightenment worked from the opposite presuppositions to a similar result: the division of civil law from God’s authority, while also following Luther in abandoning much of the view of civil law’s independent contribution to the common good. Rather, those like John Locke, follow Luther in describing the end of lawmaking power as being for the punishment of transgression.²⁶ Locke innovates by adding a secondary end: “the preservation of the property of all members of that society, as far as is possible.”²⁷ He also does not consider the role of justice as a limit on law. Finally, he departs from the approach taken by developers of the Thomistic tradition, such as Francisco Suárez, who argued that law making authority comes from God, but is mediated by the community.²⁸ Locke’s contract theory grounds lawmaking authority only in “the surrendering of each individual power to the commonwealth,” thus completely replacing God’s authority with communal mediation of autonomous authority.²⁹

Contemporary Perspectives

Having outlined a trajectory for analyzing the relationship between law in Christian ethics based on these brief historical reflections, in this second part of the article, I will highlight some

²¹ 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION bk. IV, ch. 20 (John T. McNeil ed., Ford Lewis Battles trans., 1960).

²² *Id.*

²³ *Id.* § 2.

²⁴ Martin Luther, *On Secular Authority*, in CALVIN AND LUTHER ON SECULAR AUTHORITY 30 (Harro Höpfl ed. & trans., 1991). Over the course of his life, Luther varied somewhat in his theology of secular authority.

²⁵ Gerrard Winstanley, *The True Levelers Standard Advanced*, in THE LAW OF FREEDOM AND OTHER WRITINGS 81 (Christopher Hill ed., 1983).

²⁶ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 88 (C.B. Macpherson ed., 1980).

²⁷ *Id.* at 88.

²⁸ Francisco Suárez, *A Treatise on Laws and God the Lawgiver*, in SELECTIONS FROM THREE WORKS bk. III, ch. 3, § 4 (Thomas Pink ed., 2015).

²⁹ LOCKE, *supra* note 26, at 88.

key contributions to this tradition made by contemporary or relatively contemporary Christian ethicists. First, John Courtney Murray, as mentioned earlier, presents an optimistic view of the potential for an “American synthesis,” which protects both the integrity of the civil square and the integrity of diverse forms of religious expressions, grounded explicitly in Augustine and Aquinas. However, writing at roughly the same time, Reinhold Niebuhr presented a less optimistic Augustinian read of what civil law can accomplish. For example, although Niebuhr gradually became more explicit in his support of the Civil Rights Movement, he remained concerned about the abuse of power by any group placed in the position of legislation and law’s ability to accomplish any type of substantive social change unless accompanied by a change of heart.

Martin Luther King, Jr., in his *Letter from Birmingham Jail*, combines both optimism and condemnation. King explicitly draws together both the Augustinian and Thomistic tradition to emphasize the lack of validity of unjust laws. He then clarifies and expands the meaning of an “unjust law” by urging his readers to not simply read a law *prima facie*, but to calculate injustice by impact and result. However, King does not condemn the legal system *tout court*. Rather, the protestor against these laws is actually showing “the highest respect for the law” and following in the model of heroic biblical figures such as Shadrach, Meshach, and Abednego, and the example of Christians throughout history martyred for resisting tyranny.³⁰

Turning to Christian moral theologians writing today, Christian realist Robin Lovin develops the thought of Dietrich Bonhoeffer for our late modern context. Lovin argues that the political solution of either a naked public square, where law is artificially separated from the religious convictions of its citizens, or the collapse of the public square into the church, fails to do justice to both the church and the law. Rather, he affirms Bonhoeffer’s call for the church to “take up physical space” in the world.³¹ This acknowl-

edgment of the church’s “space” within the field of civil society is accurate given the demands that faith places on Christians, convictions which cannot simply be shucked off when the Christian transforms to citizen upon entering the public square. However, the church’s “taking up space” also requires that the church not be absorbed into the state, “the space of government regulations, asset management, and cultural activities.”³²

Anglican theologian Oliver O’Donovan, also following an Augustinian trajectory, calls for Christians to recognize that lawmaking extends beyond the mere act of legislation, but also to implicate law in the entire government process of exercising political judgment. O’Donovan presents two implications of the view that the primary purpose of law is to render judgment. First, all actions of judgment issuing from any human are subordinate to God’s throne. Lawmaking is not fully autonomous since we live in a reality in which all people “are called to a final destiny in the life of the new Jerusalem, subject to the throne of God and the Lamb. . . . All other thrones need further justification; their role is subordinated to the task of preparing that way for the final one.” Secondly, although subordinate, lawmaking authority remains a genuine authority, but with an end which goes beyond its nature. Lawmaking and judging is “constituted, on these new terms, as a secondary theater of witness to the appearing grace of God, attesting by their judicial service the coming reality of God’s act of judgment. In the light of Christ’s ascension, it is no longer possible to think of political authority as sovereign, but neither is it possible to regard them as mere exhibitions of pride and lust for power.”³³

Roman Catholic theologian and lawyer Cathleen Kaveny has also focused on law’s end. Drawing on Aquinas, she retrieves a fuller understanding of law as a “moral teacher” in differentiating from the paradigm of “law as police officer.”

³⁰ Martin Luther King, Jr., *Letter from Birmingham Jail* (1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES* 289-302 (James Melvin Washington ed., 1991).

³¹ ROBIN LOVIN, *CHRISTIAN REALISM AND THE NEW REALITIES* 129 (2008).

³² *Id.*

³³ O’DONOVAN, *supra* note 6, at 5.

In *Law's Virtue*, she writes:

the law cannot be satisfied with merely restraining a wrongdoer; it must also seek to educate the wrongdoers about why those restraints are necessary. . . . Taken as a whole, the law tells a story about what counts for—and against—a life of virtue in actual society, a story whose elements extend far beyond the specific programs and requirements that the law enacts.³⁴

Kaveny's retrieval of Aquinas helps Christians avoid the trap of a moral minimalism—viewing law only as punitive and not as a potential instrument of grace and charity.

Roman Catholic theologian Jean Porter has also retrieved Aquinas to argue for a fuller understanding of civil law's authority. In *Ministers of the Law*, Porter draws on legal philosophy and theology to describe the derivation of legal authority from the natural law as instantiated in a specific community. Like Dworkin, she is concerned both for law's objective standard of justice and its fit for each specific community. She writes:

legal authority is derivative; insofar as it rests on a more fundamental form of natural authority, namely, the authority of a community over its individual members. The authority of the community, in turn, rests on its necessary role in specifying natural principles of judgment and choice, in and through spontaneous social processes. . . . Thus, legal authority serves the overarching purpose of expressing, promoting and safeguarding the natural purposes served by the community.³⁵

While these Christian ethicists have articulated the theological importance of upholding the integrity of civil law, other contemporary ethicists have raised a series of salutary concerns

regarding how Christians develop a theology relating Christian ethics to civil law. Stanley Hauerwas, consistent with his arguments regarding Christian non-violent communities of character, has cautioned against a too blithe wholesale acceptance of Christian engagement with law due to law's implicit incorporation of violence and coercion (while not denying the value for Christians of law which provides various services to the community).³⁶ In *The Cross and the Lynching Tree*, James Cone calls white Christians to the same exploration of the true meaning of legal justice as King did. In exploring white justifications for the practices of lynching Blacks in the Jim Crow South, Cone explores the ways in which the laws themselves and their enforcement contributed to the terrorizing and persecution of Black Americans in the South.³⁷ Although neither of these theologians reject the tradition of civil law's integrity I identify as the main trajectory of Christian ethics, they do raise concerns about the continuing temptation for Christian ethics to accept civil law's integrity without searching theological criticism.

Conclusion

The exploration of these two different but overlapping concepts of integrity—civil law as constituted by external moral standards and internal traditions, and civil law as having its own identity and space while also upholding the distinctiveness of religious communities—is the subject of much of Christian ethics or moral theology's engagement with civil law. Specifically, Christian ethics explores how Christians can uphold the integrity of civil law as distinct from the divine law revealed within scripture and the Church, while also maintaining that civil law's integrity depends upon its fundamental grounding in its own unique way in God's grant of lawmaking authority.

On one hand, the law has its identity as positive law because it is given by the ruler or the legislator—it exists contingently in a spe-

³⁴ CATHLEEN KAVENY, *LAW'S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY* 77 (2012).

³⁵ JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 144-45 (2010).

³⁶ See generally Stanley Hauerwas, *Hauerwas on "Hauerwas on the Law": Trying to Have Something to Say*, 75 L. CONTEMP. PROBS. 233 (2012).

³⁷ see, e.g., JAMES H. CONE, *THE CROSS AND THE LYNCHING TREE* (2011).

cific time, place, and culture. Its identity is not eternal, but by definition and in principle completely temporal. Given this difference in identity and principle, maintaining the integrity of civil law should not require a compromise of the identity of the Church. On the other hand, the civil law is also God's creation. The lawmaker participates analogically by God's power which grants authority to make laws that bind people in conscience. The laws themselves are judged by God's justice. An unjust law is not a law because it does not align with the law's proper end determined by the law's ultimate source of authority. By living in this tension between these two at times apparently conflicting integrities, Christian ethics affirms God's creative, sustaining, and redemptive work in the world.

It also considers two different registers in which God overcomes the powers of sin. Through the grant of his lawmaking authority which grounds the civil law, he gives humans the capacity to set some provisional and temporal limits on the power and extent of sin as realized by society. In addition, even though civil law provides possibilities for the formation of citizens in virtues, God, through the Church, overcomes sin and redeems the world. The engagement of Christian ethics with law is as of strangers and sojourners, but strangers and sojourners who experience some good in God's good action in the land in which they briefly sojourn.

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CHARITY, CONVICTION, AND CONSEQUENCES: WHAT JACK PHILLIPS CAN TEACH CHRISTIANS ABOUT CONSCIENCE

by Jeffrey Hammond*

Introduction

He's done it again. Jack Phillips, the now notorious Colorado baker, has upset the emerging sexual orthodoxy by refusing to bake another cake. In 2018, Phillips prevailed at the United States Supreme Court in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.¹ In that case, the Supreme Court found that Phillips had a right, sounding in the Free Exercise Clause of the Constitution's First Amendment, to refuse to lend his considerable artistic talent to creating a wedding cake for a gay couple.

The Court acknowledged that Phillips, in essence, was gifted a Free Exercise victory. But for the outrageous statements of the Colorado Civil Rights Commission ("Commission") in adjudicating the aggrieved couple's state civil rights complaint, Phillips would have lost. The Commission's stultifying comments comparing Phillips' religiously-motivated choices and conduct to "slavery," the "holocaust," and "one of the most despicable pieces of rhetoric people can use"² constitutionally removed the matter from one of government neutrality, whereby the Commission would likely win, to the analytical regime of government hostility, where the state's actions are viewed with a more wary eye, pursuant to the case of *Church of Lukumi Babalu Aye v. City of Hialeah*.³

In essence, Phillips won the first time, in significant part, because the state agency that handled the couple's public accommodation claim could not hide its outrage at Phillips's cultural blasphemy. Had the Commission been more disciplined in dealing with Phillips, and

not vent its collective spleen, the agency might have ultimately prevailed and religious creators like Phillips would have been crushed under a principle that promotes sexual autonomy over the considered, religiously-informed choices of artists who view their work as their dedicated gifts to their Creator. [This essay will not address another ground for the Court's decision, that of the disparate treatment Phillips and Masterpiece Cakeshop received from the Commission while other Colorado bakers discriminated against Christians for the allegedly "derogatory," "hateful," and "discriminatory" messages those Christians wanted written on their confections.]⁴

But this time, the sexually progressive testers seem to have gotten wise to the game. In the case of *Scardina v. Masterpiece Cakeshop*, Autumn Scardina, a transgender woman, phoned Phillips's business, Masterpiece Cakeshop, on the day the Supreme Court granted certiorari in the first *Masterpiece Cakeshop* case and asked him to bake a cake celebrating her then new status as a transgender woman. Like for the couple in the first case, Phillips refused, claiming that he could not infuse his artistic acumen into a creation that celebrates a status that is contrary to his anthropological understanding, as informed by the Bible. And like last time, Phillips has been keelhailed before the Commission and then in court, with Ms. Scardina claiming that Phillips and Masterpiece Cakeshop violated the state's anti-discrimination law because of her sexual orientation.⁵

Supporters of Phillips should be much more circumspect about Phillips's prospects of

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1 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 139 S. Ct. 1719 (2018).

2 *Id.* at 1729 (quoting comments made at the July 25, 2014, meeting of the Colorado Civil Rights Commission).

3 *Id.* at 1731, 1732.

4 *Id.* at 1730 (quoting the Colorado Civil Rights Division in the matters of *Jack v. Gateaux, Ltd.*, *Jack v. Le Bakery Sensual*, and *Jack v. Azucar Bakery*, respectively).

5 See *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 WL 407620 (Co. Ct. Apps. Div. IV, Jan. 26, 2023).

ultimately prevailing in the state supreme court on the anti-discrimination claim. Autumn Scardina was disciplined in her approach, and she parceled out information effectively in order to bolster her claim against Phillips and his business. Only after getting confirmation that Masterpiece Cakeshop would make a blue and pink cake with no writing on it, did Ms. Scardina inform the employees that one of the purposes of the cake would be to celebrate her recent transition as a transgender woman. And, it is only after receiving that critical piece of information that Phillips confirmed that Masterpiece Cakeshop could not make Scardina's cake.⁶ In essence, because Scardina secured the commitment of the store to make the cake first, and only then informed the store employees that it would be used to celebrate her transitioned status, that the trap was set for Phillips and his business, with the determination by the appellate court that Phillips and Masterpiece Cakeshop violated the state's anti-discrimination law.

But the point isn't so much that Phillips will ultimately lose with respect to the state anti-discrimination law.⁷ That seems to be more likely than not. The point, rather, is that Phillips has stood once again upon his biblically informed convictions—once again to the interruption of his business, his life, and his peace. In short, Phillips has yet again stood on his biblically infused conscience, and that conscience has told him not to give in to those who want a test case at the expense of his religious identity, his business, and his peace.

Christians can learn something from the gentle refusals of Phillips in how conscience expresses itself and its fruits. For the remainder of this essay, I will discuss three characteristics of a biblically informed conscience: its charity, its conviction, and its resolution to accept the consequences of its decisions. But first, I will extend my apology for biblically calculated convictions in the secular/legal marketplace of ideas in the

first place—a discussion I began in my 2021 anthology on Christianity and conscience.⁸

Biblical Norms and the Exercise of Conscience

It is nothing new to claim that the marketplace of ideas is hostile to religion, especially Christianity. Take for example Representative Alexandria Ocasio-Cortez. During the telecast of the 2023 Super Bowl, the non-profit group "He Gets Us" ran a commercial depicting a protest against police violence. Representative Ocasio-Cortez thought that the commercial was unacceptable to be aired during a virtual national gathering like the Super Bowl. But instead of making a statement that the commercial was not appropriate for public consumption, Representative Ocasio-Cortez said the inexplicable, and in a tweet wrote, "Something tells me Jesus would *not* spend millions of dollars on Super Bowl ads to make fascism look benign."⁹

The problem, of course, with freighted words like "fascism" is that its hearers are frozen in silence, not knowing how to respond to such an outrageous claim. But "claim" is not quite correct, for no argument was made by the Congresswoman. Instead of trying to persuade that the commercial was somehow wrongly aired before a captive audience, she denigrated the group that produced it and the message they attempted to convey. In short, there was an overt religious message, and in response, a member of the governmental elite declared her sharp disapproval, to the point of insulting both the message and the messenger.

It is easy to foment outrage at outlandish statements like those of Ocasio-Cortez. If one is not careful, one could be easily enticed to believe that Christians were actually harmed or oppressed by the Congresswoman's off-the-cuff shot. But, that simply is not correct. Her statement, while insulting, is nothing more than

⁶ See *id.* at *9.

⁷ I make no comment here on the appellate court's First Amendment arguments regarding compelled speech and the Free Exercise Clause stated elsewhere in its recent opinion. See *id.* at *11-*15.

⁸ Jeffrey B. Hammond, *Toward a Theology of a Redeemed Conscience*, in *CHRISTIANITY AND THE LAWS OF CONSCIENCE: AN INTRODUCTION* 152 (Jeffrey B. Hammond & Helen M. Alvaré eds., 2021).

⁹ Landon Mion, *AOC criticizes Christian Super Bowl ads, says Jesus would not fund commercials to make 'fascism look benign'*, FOX NEWS (Feb. 13, 2023), <https://www.foxnews.com/politics/aoc-criticizes-christian-super-bowl-ad-jesus-would-not-fund-commercials-fascism-benign>.

that—an insult. Both the sponsoring group and Christian viewers of the commercial and the Congresswoman’s statement would be wise to let the jab hit its mark and then move on. “Good sense makes one slow to anger, and it is his glory to overlook an offense,” says the Proverb.¹⁰ And, so it is with a group, like Christians, verbally assaulted by the Congresswoman.

Ocasio-Cortez’s epithet, while shocking, opened a perennial wound: what role should religious ideas, messages, and priorities have in the public square? The “He Gets Us” commercial was compelling, all things considered. It looks like the sponsoring group was trying to bring attention to a perennial societal problem. Yet, other actors, like Jack Phillips, do not get the benefit of the doubt for standing on biblical warrants. Which raises the question of whether biblical warrants are appropriate for public-facing actions, like those that Phillips took with the gay couple (in the 2018 case) and with the transgender woman in the most recent case. This question only makes sense when it is cast in relief with the latent assumptions that informed both the 2018 case and the more recent transgender case.

The assumption, discoverable just below the surface of both *Masterpiece Cakeshop* cases, is that all sexual identities are equally good, appropriate, and morally praiseworthy. Both sets of customers obviously thought so, for they came to Phillips and his bakery for custom works of art to celebrate their new statuses. The motivation to celebrate these statuses is borne out of the sexual revolution of the 1960s. In short, today’s westerners not only choose with whom they mate, but they also assume sexual identities—sexual selves as ones who mate—as either determined or chosen. Whether his sexual identity is determined or chosen, the western person is a sovereign, choosing self, free to take any sexual form or partner that pleases himself. And not only that, but this is also a one-way ratchet—respect must be given to autonomous sexual choices freely made, and (ironically) no criticism or disapproval of those choices will be tolerated.

Neither the first couple nor the more recent transgender woman [together, “Complainants”] made a detailed appeal once they made initial contact with *Masterpiece Cakeshop* about the respect they should be given as gay and transgender customers, respectively. However, once their requests for custom creations were denied, they gave immediate voice to their outrage and hurt. Phillips, however, did not intend to hurt the couple, nor the woman to whom he ended up refusing service. Rather than cause hurt, Phillips merely intended to live in congruence with his longstanding, biblically informed beliefs about the nature of marriage and the human person. The gay couple and the transgender woman believed that they should be shown respect (in the form of particular pieces of art made just for them) based on what they feel to be true about their selves and their statuses. Phillips believed that tailored creations would render true something that God, as expressed through the Bible, claimed to be false. Simply, Phillips relied on an authority that was greater than himself. As a committed evangelical Christian, Phillips could not shunt aside the claim that the Bible, and its teaching on the human person and human sexuality, have on his life.

Phillips can no more deny the hold that the Bible and its teachings have on his life than the Complainants¹¹ can deny that their sexual statuses are inexorable parts of their identities. Phillips and the Complainants are the same in this way: they believe that their respective reasons for action are true. The Complainants believe that their statuses should be respected either because they were born with that status or that it was freely chosen. Phillips believes that his choice (not to serve the Complainants in the way that they requested) should be respected because ultimate authority demands it. But, if each party should be respected because of who they are and their deep-seated commitments, then it seems the parties are at loggerheads. Each party’s demand of conscience and respect is irreconcilable with the other party’s demand for conscience and respect. In a perfect world, the Complainants’ demands for production would be met

¹⁰ Proverbs 19:11.

¹¹ I refer to “Complainant” or “Complainants” in this essay to refer to the couple in the first *Masterpiece Cakeshop* case, and Ms. Scardina in the second one.

with the same measure of toleration that Phillips extended to them. Phillips did not attempt to change the Complainants' sexual orientation or sexual choices. Instead, he merely informed them that he could not provide the exact goods for which they asked.

Thus, to this writer it seems that the best course of action would be for Phillips' artistic talent not to be co-opted to produce works that he finds morally repugnant. Rather, he should do as he has done and refuse to produce those works and then suffer whatever consequences flow from that refusal. For, just as making the requested works of art would violate his conscience—because he is making a physical representation of something he sincerely believes to be false—he would in fact be doubly damaging his conscience. And this is because the truths he learned from the Bible and other religious instruction, the basis of his conscience—the “grist” upon which his conscientious decisions are made—is a repository of truth so fundamental to his life and work that he believes he would be forsaking what is most important to him if he acceded to the requests to make the custom cakes.

Charity – The Ground of Conscience

Conscience is stubbornness masquerading as principled choices if those choices are not made with a loving approach. Conscience is mere intransigence if rudely stated. The Christian standing up for what she believes is right is puffed-up obnoxiousness-personified if she revels—either proudly or obsequiously—in the consequences she might bear for making her stand. Rather, the exercise of conscience is attractive when it is made with an open hand to the person most directly affected by the conscientious choice. For conscience is not a cudgel with which to beat an unbeliever, for beating produces resistance, and not acceptance, to the cause believed in by the conscientious person.

One of the most noteworthy and attractive revelations of the multi-year Jack Phillips saga is the charity—the love that he and his colleagues

at Masterpiece Cakeshop—showed the Complainants. When faced with requests to make a custom cake whose message would eviscerate his deepest-seated beliefs, Phillips did not recoil in horror at the requests. He plainly, but gently, stated that he could not make what Complainants requested, but he did not eject them from his store or was otherwise rude to them. He welcomed them, and in fact, he told them that he would make a cake for other special occasions in their lives; he just wouldn't deploy his artistic talent for an occasion that broke his closely held convictions.¹² This is similar, of course, to Barronelle Stutzman's statement to her long-time customer, Robert Ingersoll, in the *Arlene's Flowers* case. Stutzman gently told Ingersoll, a man she considered to be her friend, that he was welcome to buy any unarranged flowers she had, but that she could not create a custom arrangement for his wedding to another man, because like Phillips, she believed marriage to be a union between a man and a woman.¹³

Love expresses itself gently. It is not rude, proud, self-seeking, or rage-filled.¹⁴ Nor does loving expression borne out of conscience necessarily seek to be thought of as right or to make a point for the sake of making a point. Rather, a loving conscience is a *meek* conscience, recognizing that, while conscience and conscientious decisions come from conviction, and those convictions are cemented by careful reading and appropriations of biblical wisdom (as confirmed by the Holy Spirit) those convictions are in a sense provisional.

These convictions are provisional in the sense that the person who is wise in light of the Bible never finally arrives at a completely wise person. One of the Bible's metaphors for wisdom is that of walking on a path under the guidance of someone else:

Hear, my son, and accept my words,
that the years of your life may be many.
I have taught you the way of wisdom;
I have led you in the paths of uprightness.
When you walk, your step will

¹² See *Masterpiece Cakeshop*, 139 S. Ct. at 1724.

¹³ See *State of Washington v. Arlene's Flowers, Inc. et. al, and Robert Ingersoll and Curt Freed v. Arlene's Flowers, Inc., et. al.*, 193 Wash. 2d. 469, 485, 486 (2019).

¹⁴ See generally 1 *Corinthians* 13.

not be hampered, and if you run, you will not stumble.¹⁵

Ironically, no one ever crosses over the threshold called *a fully, complete wise person*. The person who is wise and who exercises her conscience based on the wisdom she gathers from wise mentors, deep consideration of the Bible, observing the actions of others, and listening to the prompting of the Spirit¹⁶ is still a sinner, whose choices might be corrupted from a thousand different inputs. And that is why that conscientious, yet still aspiring wise Christian, must temper her conscientious choices with the realization that she might be wrong. It is that sobering thought that motivates this Christian to resolutely make her choice, but at the same time open her arms to those affected by her choice.

Conviction - The Norm of Conscience

If love is the ground of conscience, then conviction is the norm of conscience. Conviction is that which makes “conscience,” conscience. Conviction makes the person resolute with the desire to see the fruits of her decision. And conviction is the frame of mind which causes the person to press ahead with that decision, even though the consequences of that decision might be severe. She is convinced, through the aid of the wise steps she has taken before making her decision, that her decision is the correct one (though wisdom counsels her, in the recesses of her heart that she could be wrong). Conviction, in other words, is the trigger that causes the conscientious Christian to make her stand.

One of the most notable examples of biblical conviction comes from the Old Testament book of Daniel. This book might be subtitled “Conviction,” as it is replete with examples of Daniel and his friends standing upon their convictions and, in some cases, suffering consequences for their choices. The book starts with Daniel and his friends Shadrach (Hananiah), Meshach (Mishael), and Abednego (Azariah) in the King’s training camp for young civil servants.

As part of their training, they were asked to eat the sumptuous food at the King’s training table. They refused, preferring rather to eat a bland diet of vegetables and water. They were allowed to eat their chosen way for a period of ten days. At the end of the testing period, they were found to look better than the others who had indulged in the King’s haute cuisine.¹⁷

Daniel’s friends were faced with an untenable legal decree—to bow down to a giant statue of King Nebuchadnezzar. And, like refusing the King’s rich food, they refused to worship the image of the King as well. They knew who their true deity was, and it wasn’t a foreign potentate who held power over them for a time. But, they had to suffer for their convictions. They were thrown into the fiery furnace, which, for their open defiance, the King ordered to be made seven times hotter than usual. Yet “a son of the gods,” accompanied the young men in the fire, and they came out without even their clothes or persons singed.¹⁸

Daniel, himself a high official in Babylon, refused the King’s decree that no other god should be worshipped than King Darius himself. To that decree, Daniel flung opened his windows, faced Jerusalem, and prayed to his God. How was he rewarded? With a trip to the lion’s den. Because the King could not automatically unwind his prior decree, he could not spare Daniel from the lions’ mouths. Yet the same King was intimately concerned about Daniel’s welfare and hurried to the lions’ enclosure at the end of the frightful night, rejoicing that an angel shut the lions’ mouths because of Daniel’s upright living and wholehearted devotion to the true God.¹⁹

To be sure, Jack Phillips is a baker and not a government official like Daniel or his friends, but just like them, Phillips has stood on his convictions. Both Phillips and Daniel show that without conviction that leads to action, conscience is empty and is nothing more than strong words. Phillips has shown his conviction in two main ways: first, he did not confuse the demands of

¹⁵ Proverbs 4:10-12.

¹⁶ See Hammond, *supra* note 8.

¹⁷ See Daniel 1.

¹⁸ For the story of Nebuchadnezzar’s image and the young men’s refusal to bow down to it, see Daniel 3. For the government officials’ statement that the fourth person accompanying the young men in the fiery furnace like “a son of the gods.” See Daniel 3:25.

¹⁹ See Daniel 6.

love when the Complainants first made their requests for custom cakes. That is, though he dealt with them gently, he did not agree to make the cakes. This shows that gentleness, meekness, and conviction are not mutually exclusive and can all co-exist together. Phillips would not violate long-considered and tightly held values. But neither would he stand upon those values in a mean-spirited way. Second, the fact that Phillips persisted all the way to the Supreme Court in the first *Masterpiece Cakeshop* case and has persisted in the second case, thus far, to the Colorado Court of Appeals, demonstrates his core-level conviction about the rightness of his action. Think of the disturbance to a person's life and livelihood that happens when they are the target of civil litigation. Routines and schedules are upset, one has to face the pointed, even angry questions of opposing lawyers and the anxiety that comes with the uncertainty of not knowing whether your business will survive the litigation. Phillips ran that gauntlet the first time—and won! His conviction must be made of titanium to endure the hardships of high-stakes litigation once again. There is no question that Phillips is a man of conviction.

Consequences – The Reality of Conscience

Convictions, even if lovingly stated, lead to real consequences. A Christian would be blind to believe that they wouldn't. Just because Jack Phillips ultimately prevailed at the Supreme Court in the first litigation does not mean that litigation was without consequences to him, his business, or his colleagues. The invasiveness—the ignominy—of having his business and his integrity questioned by a government agency would be enough to cause many, if not most, in Phillips' position to fold and give in to the charges made and the remediation ordered by the state Commission. And Phillips must be a genuinely conscience-driven man, for the consequences are obvious in the second round of litigation. In other words, it appears likelier that he will ultimately lose this round in the court system, for the Commission was not as undisciplined in making public their disdain for Phillips.

But dealing with consequences emanating from conscientious choices is tricky at best. No one wants something bad to befall them if they stand up for what they believe to be right. Phillips certainly did not want to be brought up before the Commission and the following court

cases more than once—with all of the trouble that meant for himself, his family, and his business. But neither did he recant and agree to make the cakes with messaging that he found to be morally repugnant and simply untrue.

One might ask whether Phillips should have immediately conceded the cases at the Commission and bowed to whatever punishments the Commission handed down for first refusing to bake the cakes. To that question, I believe a sensible response would say that Phillips' fight against the Commission's penalties through the court system is the ongoing exercise of conscience made first when he initially refused to make the cakes. In other words, the refusal, the Commission hearings, and the court cases are all part of one transaction consisting of Phillips exercising his conscience.

Even so, the exercise of conscience becomes more bearable for everyone—the person making the conscientious choice, the person(s) most affected by the choice, and also the public—if the person exercising conscience graciously endures the consequences of his choice. If he doesn't humbly accept the consequences of his choice, then he runs the risk of confirming the affected thinking of those who see him as being doubly privileged—both in the initial refusal to make the legally required choice and then being shielded from the legal consequences that come from that choice. For Phillips, this meant (and continues to mean with respect to the most recent case), patiently enduring as his case winds its way through the court system. It means bearing up as he and his business continue to receive unwanted attention. It means persevering. It could mean, as it pertains to the most recent case, accepting whatever punishment the Commission may hand down, that is, if his conscience will allow it.

But, there may be a point where Phillips' conscience will not allow him to go along with the Commission's punishment, if it, for example, mandates that Phillips state as true something(s) about human sexuality that he sincerely believes to be false. And if integrity calls him to reject such a punishment, his only alternative might be for Phillips to shutter his bakery. If it ever comes to that, bearing up under the consequences of his conscientious convictions means that Phillips moves on amiably and without a hint of public bitterness toward the Complainant or the Commission that occasioned those consequences.

In short, a person who exercises his conscience must not be triumphalist in the least.

Conclusion

Christian conscience is not easy. That a Christian exercises her conscience means that she has come to a troubling conclusion about her obligation in a particular set of circumstances. But Christian conscience is both distinctive and palatable to the extent that it is deployed with charity, conviction, and a sober appraisal of the consequences involved in its exercise. Jack Phillips seems to have mastered these fundamentals: we would all do well to imitate his example.

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“THE GLORIOUS LIBERTY OF THE CHILDREN OF GOD”: TOWARD A CHRISTIAN DEFENSE OF HUMAN RIGHTS

by John Witte, Jr.*

It will come as a surprise to some human rights lawyers to learn that Christianity was a deep and enduring source of human rights and liberties in the Western legal tradition. Our elementary textbooks have long taught us that the history of human rights began in the later seventeenth and eighteenth centuries. Human rights, many of us were taught, were products of the Western Enlightenment—creations of Grotius and Pufendorf, Locke and Rousseau, Montesquieu and Voltaire, Hume and Smith, Jefferson and Madison. Rights were the mighty new weapons forged by American and French revolutionaries who fought in the name of political democracy, personal autonomy, and religious freedom against outmoded Christian conceptions of absolute monarchy, aristocratic privilege, and religious establishment. Rights were the keys forged by Western liberals to unchain society from the shackles of a millennium of the church’s oppression of society and domination of the state, and centuries of religious warfare. Human rights were the core ingredients of the new democratic constitutional experiments of the later eighteenth century forward. The only Christians to have much influence on the development of human rights, the conventional story goes, were a few early Church Fathers who decried pagan Roman persecution, a few brave medieval writers who defied papal tyranny, and a few early modern

Anabaptists who debunked Catholic and Protestant persecution. But these exceptions prove the rule, according to many human rights scholars: Christianity as a whole, they argue, was an impediment to the development and expansion of human rights—doubly so in our day when religious freedom and other fundamental rights are often counterposed.¹

It will come as an equal surprise to some Christian readers to learn that their forebearers proved so critical to the development of rights in the Western tradition and now well beyond. A number of Christian theologians and philosophers today—Catholic, Orthodox, and Protestant alike—view human rights with suspicion, if not derision. Yes, these critics acknowledge that Christians from the start embraced the right to religious freedom, at least for the Christian church and its members.² Many Christians today lament the myriad persecutions of Christians and others around the world,³ and the growing tension between religious freedom and sexual freedom in late modern liberal democracies.⁴ But many sincere Christians today question seriously whether their spiritual predecessors really had much to do with rights and whether modern human rights ideas faithfully express the moral norms and narratives of the Bible and the Christian tradition. Many view human rights as a dangerous invention of Enlightenment liberal-

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3 See CHRISTIANITY AND FREEDOM: HISTORICAL AND CONTEMPORARY PERSPECTIVES (Timothy Samuel Shah & Allen D. Hertzke, eds., 2016); UNDER CAESAR’S SWORD: HOW CHRISTIANS RESPOND TO PERSECUTION (Daniel Philpott & Timothy Samuel Shah eds., 2018).

4 See Helen M. Alvaré, *Religious Freedom versus Sexual Expression: A Guide*, 30 *J.L. & RELIGION* 475 (2015).

ism, predicated on a celebration of reason over revelation, of greed over charity, of nature over scripture, of the individual over the community, of the pretended sovereignty of humanity over the absolute sovereignty of God. These scholars call for better ideas and language to emphasize core virtues like faith, hope, and love, and core goods like peace, order, and community.⁵

These Christian skeptics about rights are not isolated and eccentric cranks. They include leading theologians like Stanley Hauerwas,⁶ Oliver O'Donovan,⁷ Joan Lockwood O'Donovan,⁸ John Milbank,⁹ Alasdair McIntyre,¹⁰ Nigel Biggar,¹¹ Vigen Guroian,¹² and scores of mainline Protestant and Evangelical scholars influenced by Karl Barth's early "Nein!" to natural law and natural rights talk.¹³ While many human rights lawyers today dismiss premodern Christian rights talk as a betrayal of liberalism, many Christians today dismiss modern Enlightenment rights talk as a betrayal of Christianity.

However commonplace these positions in popular and academic circles, the historical narratives that have conventionally supported them can no longer be sustained. Over the past few decades, a veritable cottage industry of important new scholarship has emerged dedicated to the history of rights talk in the Western tradition prior to the Enlightenment. We now

know a great deal more about classical Roman understandings of rights (*iura*) and liberties (*libertates*); Anglo-Saxon guarantees of *ryhtes* and *rita(e)*, *freoles* and *freo-doms*; and the ample elaboration of these ancient legal teachings in medieval charters and in civilian and common law jurisprudence. We can now pore over an intricate latticework of arguments about individual and group rights and liberties developed by medieval Catholic canonists, philosophers, and moralists, and their enforcement by ecclesiastical and secular authorities. We can now trace the ample expansion and reform of this medieval handiwork both by neo-scholastic writers in early modern Spain and Portugal, and by Lutherans, Anglicans, and Calvinists on the Continent and in Great Britain and their later colonies. We now know a good deal more about classical republican theories of liberty developed in Greece and Rome and their transformative influence on early modern common lawyers and political revolutionaries on both sides of the Atlantic. We now know, in brief, that the West knew ample "liberty before liberalism"¹⁴ and had many fundamental rights in place before there were modern democratic revolutions fought in their name. It is a telling anecdote that by 1650, almost every right listed 150 years later in the French Declaration of the Rights of Man and Citizen (1789)

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- 5 See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (early classic statement).
 - 6 See Stanley Hauerwas, *How to Think Theologically About Rights*, 30 J.L. & RELIGION 402 (2015); see also STANLEY HAUERWAS, *THE HAUERWAS READER* 90-110, 116-99, 221-66, 318-26, 426-80, 522-35, 556-76, 603-22 (John Berkman & Michael Cartwright eds., 2001).
 - 7 See Oliver O'Donovan, *The Language of Rights and Conceptual History*, 37 J. RELIGIOUS ETHICS 193 (2009).
 - 8 JOAN LOCKWOOD O'DONOVAN, *The Concept of Rights in Christian Moral Discourse*, in A PRESERVING GRACE: PROTESTANTS, CATHOLICS, AND NATURAL LAW 143-56 (Michael Cromartie ed., 1997); Joan Lockwood O'Donovan, *Historical Prolegomena to a Theological View of 'Human Rights'*, 9 STUDIES IN CHRISTIAN ETHICS 52 (1996).
 - 9 John Milbank, *Against Human Rights: Liberty in the Western Tradition*, 1 OXFORD J.L. & RELIGION 203 (2012); John Milbank, *The History of Natural Right*, CHURCH LIFE J. (January 18, 2019), <https://churchlifejournal.nd.edu/articles/the-history-of-natural-right/>.
 - 10 See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69-70 (1984); Mark D. Retter, *The Road Not Taken: On MacIntyre's Human Rights Skepticism*, 63 AM. J. JURISPRUDENCE 189 (2018).
 - 11 NIGEL BIGGAR, *WHAT'S WRONG WITH RIGHTS?* (2020).
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 - 13 See KARL BARTH AND EMIL BRUNNER, *NATURAL THEOLOGY: COMPRISING "NATURE AND GRACE" BY PROFESSOR DR. EMILY BRUNNER AND THE REPLY "NO!" BY DR. KARL BARTH* (Peter Fraenkel trans., 2002); see also STEPHEN J. GRABILL, *REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS* 21-53 (2006) (offering detailed analysis).
 - 14 QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (Cambridge University Press 2012) (1988).

and the United States Bill of Rights (1791) had already been defined, defended, and died for by Christians on both sides of the Atlantic.¹⁵

But Christianity is more than an (oft forgotten) historical voice in the development of modern rights talk. In my view, Christians today should remain part of broader public debates about human rights and public advocacy for their protection and implementation. I agree with some Christian skeptics who criticize the utopian idealism of some modern rights advocates, the reduction of rights claims to groundless and self-interested wish lists, the monopoly of rights language in public debates about morality and law, and the dominant liberalism of much contemporary rights talk. I also recognize that Christian believers and churches will inevitably vary in their approaches to human rights—from active involvement in litigation, lobbying, and legislation, to quiet provision for the poor, needy, and strangers in their midst. In the church, the Bible reminds us, “[t]here are varieties of gifts, but the same Spirit; and there are varieties of service, but the same Lord.”¹⁶

I further acknowledge that some rights and liberties recognized today are more congenial to scripture, tradition, and Christian experience than others. But a good number of contemporary public, penal, private, and procedural rights and liberties have deep roots in the Christian tradition and reflect the Bible’s ringing admonition that we all enjoy “the glorious liberty of the children of God.”¹⁷ Family laws, for example, protect the reciprocal rights and duties of spouses, parents, and children at different stages of the life cycle. Social welfare rights speak to the basic human need for food, shelter, health care, and education—especially for vulnerable populations. Laws governing speech and the press protect the rights of persons to speak, preach, and publish. Private laws protect rights to contractual performance, property and inheritance, and the safety and integrity of our bodies, rela-

tionships, and reputations, along with the procedural means to vindicate these rights when they are threatened or breached. Criminal procedural rights ensure individuals of proper forms of arrest and detention, fair hearings and trials, and just punishments proportionate to specific crimes. Freedom of conscience and the free exercise of religion protect the essential right (and duty) of Christians to love God, neighbor, and self.

When Christians affirm such rights—in defense of themselves or others—they need not abandon their religious and moral traditions, much less defy their duty to love God and neighbor. Leading rights skeptic Stanley Hauerwas is correct to warn that rights can become a grammar of greed and grasping, of self-promotion and self-aggrandizement at the cost of one’s neighbor and one’s relationship to God.¹⁸ But Christians from the start have claimed their rights and freedoms first and foremost in order to discharge the moral duties of the faith. Claiming one’s religious freedom rights to worship God, to avoid false gods, to observe the Sabbath, and to use God’s name properly enables one to discharge the duties of love owed to God under the First Table of the Decalogue. Claiming one’s rights to life, property, and reputation, or to the integrity of one’s marriage, family, and household gives neighbors the chance to honor the duties of love in the Second Table of the Decalogue—not to murder, steal, or bear false witness; not to dishonor parents or breach marital vows; not to covet, threaten, or violate “anything that is your neighbor’s.”¹⁹ To insist on these Second Table rights can also be an act of love towards one’s neighbors, giving them the opportunity and accountability necessary to learn and discharge their moral duties.

Viewed this way, many rights claims are not selfish grasping at all—even if they happen to serve one’s own interests. Rights claims can reflect and embody love of God and neighbor.

¹⁵ See generally JOHN WITTE, JR., *THE BLESSINGS OF LIBERTY: HUMAN RIGHTS AND RELIGIOUS FREEDOM IN THE WESTERN LEGAL TRADITION* 1-170 (2021); JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007).

¹⁶ 1 *Corinthians* 12:4-5.

¹⁷ *Romans* 8:21.

¹⁸ Hauerwas, *supra* note 6, at 402–05.

¹⁹ *Exodus* 20:17.

The claims of the poor and needy, the widow and the orphan, the prisoner and the stranger are, in part, invitations for others to serve God and neighbor: “As you did it to one of the least of these . . . you did it to me,” Jesus said.²⁰ To insist on the rights of self-defense and the protection and integrity of one’s body or loved ones, or to bring private claims and support public prosecution of those who rape, batter, starve, abuse, torture, or kidnap you or your loved ones is, in part, an invitation for others to respect the divine image and “temple of the Lord” that each person embodies.²¹ To insist on the right to education and training, and the right to work and earn a fair wage is, in part, an invitation for others to respect God’s call to each of us to prepare for and pursue our distinct vocation.²² To sue for contractual performance, to claim a rightful inheritance, to collect on a debt or insurance claim, to bring an action for discrimination or wrongful discharge from a job serves, in part, to help others to live out the Golden Rule—to do unto others as you would have them do unto you.²³ To petition the government for due process and equal protection; to seek compensation for unjust taxes or unlawful takings or searches of property; or to protest governmental abuse, deprivation, persecution, or violence—all of these are, in part, calls for political officers to live up to the lofty ideals of justice that the Bible ascribes to the political office. To sue to protect the freedoms of speech and press or for the right to vote is, in part, a call for others to respect God’s generous calling for each of us to serve as a prophet, priest, and sovereign on this earth. And to insist on freedom of conscience and free exercise of religion is to

force others to respect the prerogatives of God, whose loving relationship with his children cannot be trespassed by any person or institution.

These examples, and many others, demonstrate that human rights are not inherently antithetical to Christianity. They are part of the daily currency of life, law, and love in this earthly realm, damaged and distorted as it inevitably is. Rights and their vindication help the law achieve its basic uses in this life—the “civil use” of keeping peace, order, and constraint among its citizens even if by force; the “theological use” of driving one to reflect on one’s failings and turn to better ways of living in community; and the “educational use” of teaching everyone the good works of morality and love that please God, however imperfect and transient that achievement inevitably will be in the present age.²⁴

To have and use rights in a fallen world does not mean that Christians must always pursue those rights to their furthest reaches. Just as judges must apply the law equitably, so Christians (and others) must pursue the lawful claim of rights equitably. Christians are often called to turn the other cheek,²⁵ to forgive debtors,²⁶ to love enemies,²⁷ and to settle disputes privately.²⁸ Such acts of faith can serve important theological and educational “uses” of their own, even without directly engaging the civil law. To love a debtor, defendant, or adversary in such ways is, in part, to “heap burning coals upon his head,”²⁹ to induce them to respect their neighbor’s person and property, and to urge them to reform their actions. To forgive an egregious felon—as Pope John Paul II forgave his would-be assassin,³⁰ or as the Amish forgave those who

²⁰ *Matthew* 25:40.

²¹ *1 Corinthians* 3:16.

²² *Ephesians* 4:1.

²³ *Matthew* 7:12.

²⁴ See JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 263-94 (2006).

²⁵ *Luke* 6:29.

²⁶ *Matthew* 6:12.

²⁷ *Matthew* 5:44.

²⁸ *1 Corinthians* 6.

²⁹ *Romans* 12:20-21.

³⁰ Pope John Paul II publicly forgave and requested that Mehmet Ali Ağca be pardoned for an assassination attempt on May 13, 1981.

murdered their school children³¹—is to echo and embody a form of self-sacrifice at the heart of Christian faith.³² But such acts of faith are atypical precisely because they are exceptions to the usual rules of an earthly order in which laws must be enforced if they are to be effective, and in which rights must be vindicated for the law to fulfill its appropriate civil uses and maintain a basic level of peace and order.

To say that rights are useful within the state and civil society is not necessarily to recommend the same set or reach of rights within the church. The state is a universal sovereign; the church is more limited in its membership and reach. The state has ultimate coercive power over life and limb; the church has only spiritual power over its members. The state's authority is inescapable for those who live within its borders; the church's authority rests on voluntary membership. Against the state, rights and liberties have emerged as powerful ways to protect the dignity of individuals and the integrity of social institutions from the totalitarian tendencies of those who command political authority. Within the state, rights and liberties have also emerged as an expedient means for citizens and institutions to establish boundaries and bonds with their neighbors, to protect and preserve their property and promises, to negotiate and peaceably litigate their differences, and more. Here, rights are common and useful instruments for social order, peace, and predictability.

By contrast, churches operate by different means and measures of fellowship; different norms for keeping order and peace; and different models of authority and submission, love and sacrifice, caring and sharing. Some basic rules and rights of canon law and ecclesiastical structures are comparable to those of the state. After all, churches are legal entities that deal, in part, in contracts and property, labor and employment, incorporation and procedures for

leadership and members. But rights are less central to spiritual fellowship.

Finally, to say that human rights are useful and important is not to say that rights constitute a freestanding system of morality or to render Christian moral and religious teachings superfluous. Some contemporary scholars do describe human rights as the new religion and catechism of modern liberalism, invented in the Enlightenment to replace worn-out Christian establishments. Indeed, core human rights can take on near-sacred qualities in modern societies. Moreover, ideals like "liberty, equality, and fraternity," or "life, liberty, and property," or "due process and equal protection of the law" often function as powerful normative totems.³³

Modern human rights norms are better understood, however, as the *ius gentium* of our times—the common law of nations—which a variety of Jewish, Greek, Roman, Patristic, Catholic, Protestant, and Enlightenment movements have historically nurtured in the West, and which today still needs the constant nurture of multiple communities, in the West and beyond. To be sure, many formulations of human rights today are suffused with the fundamental beliefs and values of modern liberalism, some of which run counter to the cardinal beliefs of various religious traditions, including Christianity. But secular political philosophy does not and should not have a monopoly on the nurture of human rights; indeed, a human rights regime cannot long survive under the exclusive patronage of secular philosophy. For human rights are "middle axioms" of political discourse.³⁴ They are a means to the ends of justice and the common good. But the norms that rights instantiate depend upon the visions and values of human communities for their content and coherence—or, what the Catholic philosopher Jacques Maritain described as "the scale of values governing [their] exercise and concrete manifestation."³⁵

31 Members of the Old Order Amish Community in Barth Township, Pennsylvania, publicly forgave the perpetrator of a mass shooting at the West Nickel Mines School after he murdered five young girls and wounded five more before committing suicide on October 2, 2006.

32 Luke 23:34.

33 See WITTE, *supra* note 24, at 74-77.

34 Robert P. George, *Response*, in *A PRESERVING GRACE: PROTESTANTS, CATHOLICS, AND NATURAL LAW* 157-61 (Michael Cromartie ed., 1997).

35 Jacques Maritain, *Introduction*, in *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* (UNESCO ed., 1949).

In order to provide exemplary values and liberating visions, however, Christian believers and churches must embody and exemplify the moral ideas that modern rights and liberties in part reflect and help individuals and institutions to realize. Like other institutions, Christian churches are not immune to the vices of their members and leaders. Yet the gross injustices, negligence, and abuses that infect too many Christian institutions today are inexcusable in light of the divine truths and moral ideals they confess. Think of the clerical abuse of minors. The embezzlement of tithes and gifts. The profligate lifestyle of some clergy. The politicization of theology. The degradation and mistreatment of women. Indifference to the poor and needy. A lack of compassion in matters of sexual orientation. Racially and economically segregated congregations. Inhospitability toward immigrants and foreigners. Wrath. Greed. Sloth. Pride. Lust. Envy. Gluttony. “Therefore you have no excuse ... whoever you are, when you judge others,” the Bible tells us; “for in passing judgment on [another] you condemn yourself, because you, the judge, are doing the very same things.”³⁶ Our failure as Christians to live up to our own truths and values rightly undercuts our moral authority in the eyes of others. Only by embracing and embodying the truths and values we profess can Christians retain the ability to call out injustices in other social spheres and institutions. Christian communities simply must do more to habitualize, institutionalize, and exemplify respect for basic human rights, especially the rights of vulnerable populations within their midst.

Martin Luther King, Jr. once said that the church “is not the master or the servant of the state, but rather the conscience of the state.”³⁷ When their own houses are in good order, churches are well situated to play this important prophetic role. Well-ordered churches, in this sense, make for effective thorns in the sides

of complacent societies and states. Healthy and vibrant churches are well situated to serve a number of other important functions within society, too. Christian communities that more fully embody the rights and duties they profess can act as a sort of ballast in otherwise turbulent contexts. Like other religious organizations, they can catalyze social, intellectual, and material exchange among citizens; trigger economic, charitable, and educational impulses; provide healthy checks and counterpoints to social and individual excess; build relationships across racial and ethnic boundaries; diffuse social and political crises and absolutisms by relativizing everyday life and its institutions; transmit cultural traditions, wisdom, and memories; provide leadership and aid amid social crises and natural disasters; form persons in the virtues and skills of civic engagement and shared decision-making processes; provide material aid to the underprivileged and downtrodden; enrich and structure family life and other important relationships; and more.³⁸ Taken together, these tasks represent a tall order for a community of fallible humans. Yet, as Dr. King reminded his listeners:

If the church will free itself from the shackles of a deadening status quo, and, recovering its great historic mission, will speak and act fearlessly and insistently in terms of justice and peace, it will enkindle the imagination of mankind and fire the souls of men, imbuing them with a glowing and ardent love for truth, justice, and peace. Men far and near will know the church as a great fellowship of love that provides light and bread for lonely travelers at midnight.³⁹

³⁶ *Romans* 2:1.

³⁷ MARTIN LUTHER KING, JR., *The Strength to Love*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 501 (James M. Washington ed., 1986).

³⁸ See MARTIN E. MARTY, *POLITICS, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION'S ROLE IN OUR SHARED LIFE* (2000) (note especially chapter 2).

³⁹ KING, *supra* note 37, at 501.

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THEOLOGY FOR INTERNATIONAL LAW

*A Conversation with Esther D. Reed
on Global Community, Christian Responsibility,
and Love of Neighbor.*

Interviewer: Anton Sorkin

Q. Professor Reed, thank you so much for taking part in this conversation about your book *Theology for International Law* (Bloomsbury, 2013). I suspect you already know this, but you've chosen to tackle a slightly large topic in the confluence of theology and international law. What made you such a glutton for academic punishment?

A. My fear of boredom probably exceeds fear of risk! And my sister took a law degree. I needed at least to grapple in response to her many informed and profound questions about what good legislation looks like.

Q. Certainly, you could have stayed home so to speak and focused on things more pertinent to domestic matters in the UK. Was there something about the international scene that drew your theological attention?

A. The book grew from my involvement with the Theology and International Law Project based at the Center of Theological Inquiry (CTI) in Princeton, New Jersey; which, in turn, arose from concerns about torture and detainee abuse. Uppermost in our minds were the so-called "torture memos" prepared by lawyers in the administration of President George W. Bush. These memos claimed, in effect, that the President had the legal authority to permit the use of torture during interrogation. We were concerned about how a fundamental human right was conceived as something to be balanced against security and intensely aware also that Pope John Paul II

had spoken shortly before his death of the need for a "profound renewal of the international legal order" similar to that which occurred after World War II. Neglect of the legal order because it serves the interests of some states to allow the breakdown of normal setting and attainment of granularity in shared understanding of how international law applies is surely to be called out and denounced. The role of the religions and faith communities seems paramount in this regard—perhaps increasingly at the United Nations Alliance of Civilizations (UNAOC).

Q. This calls to mind that line from John Witte, Jr. when he says that "[r]eligion is too vital a root and resource for democratic order and rule of law to be passed over or pushed out. Religious freedom is too central a pillar of liberty and human rights to be chiseled away or pulled down." Can you talk to me a little bit more about the role of religion and faith communities in all this?

A. The tightrope we walk in addressing this demanding question is between *assessment of the theories and practices of democracy in Christian perspective and deriving from Christian tradition theoretical justifications of the democratic principle*. I want always to engage in the former, but I am uneasy about the latter for fear of turning the work of political theology into the promotion of democracy as a mode of governance or suggesting that political theology has a manifesto or political programme of its own.

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Perhaps no one put it better than Dietrich Bonhoeffer in his daringly exegetical, contextual, and confrontational challenge:

Hasn't the individualistic question of saving our personal souls almost faded away for most of us? Isn't it our impression that there are really more important things than this question (—perhaps not more important than this matter, but certainly more important than the *question!*!)? I know it sounds outrageous to say that, but after all, isn't it fundamentally biblical? Does the question of saving one's soul even come up in the Old Testament? Isn't God's righteousness and kingdom on earth the center of everything? And isn't Rom. 3:24ff. the culmination of the view that God alone is righteous, rather than an individualistic doctrine of salvation? What matters is not the beyond but this world, how it is created and preserved, is given laws, reconciled, and renewed. What is beyond this world is mean, in the gospel, to be there *for* this world—not in the anthropocentric sense of liberal, mystical, pietistic, ethical theology, but in the biblical sense of the creation and the incarnation, crucifixion, and resurrection of Jesus Christ.... At the moment, I am thinking about how the concepts of repentance, faith, justification, rebirth, and sanctification should be reinterpreted in a "worldly" way—in the Old Testament sense and in the sense of John 1:14. (*Dietrich Bonhoeffer Works in English* 8:372-73).

Because the meaning of salvation exceeds the salvation of individual souls, we need to think harder about the social meaning of salvation, how the practice of citizenship may be learned from the ecclesial life in common, structural sin, God's bias to the poor, and more. "[T]he liberal state," says Jürgen Habermas, "has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well" (*Religion in the Public Sphere*). I could not agree more. But the courage and competence to speak well is hard to find. Developing an ethic of citizenship from the ontology of the resurrection and informed

by the basic New Testament concepts of *apolytrōsos* (redemption), *alētheia* (truth), *praeconia* (proclamation), *koinonia* (community), *leiturgia* (worship), *diakonia* (service), *iasis* (healing) and *eirēnē* (peace) is a task indeed.

Q. At the core of your project is a synthesis of the works of Thomas Aquinas and Karl Barth, or what you refer to as a Protestant Thomist Perspective. Why did you sense this combination was useful?

A. Whether an appreciation of "ecumenical gifting," too many Sunday School addresses based on the parable of "The Blind People and the Elephant," or just a dislike of waste, I find it difficult to say. A personal resolution moving forward is to devote equal amounts of time to reading new scholarship from around the world as I spend with "the Western Greats." If unity is a mark of the church catholic and a sign of its life, however, we cannot be confined by prejudice or pessimistic about finding new sources of wisdom. When challenged in *Theology for International Law* by such egregious violations of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other international standards of humanity, I reached for those "Western Greats" most likely to be familiar to the widest of audiences engaging these issues. As long as they continue to discomfort my attempts at tropology, i.e., everyday striving after the moral sense of the Bible, I shall probably keep returning.

Q. I think you're harboring a deeply dangerous idea there, which is the idea that our intellectual pursuits are meant to bring a sense of "discomfort" to our lives. In Anthony Kronman's *The Assault on American Excellence*, he speaks to this discomfort in powerful terms by defining among the goals of universities is to teach students how to cultivate a "tolerance for ambiguity." This brings me to your own discussion on responsibility, which I find fascinating. Specifically, where you write about the eschatological tension between our knowledge of the end of times and our need to invest resources to advance the common good. Can you talk to me about responsibility and how it plays a role in your own project in promoting "just peacemaking, good order, and common good"?

A. Responsibility is a modern concept. Where versions of the Bible use the word “responsibility,” they variously translate in the Hebrew *mishmereth* (מִשְׁמֶרֶת)—“guard,” “charge,” “office,” “duty,” i.e., the act of watching over, preserving, and keeping safe (Num. 4:27 NIV); *’emûwnâh* (עֲמֻנָה)—“office of trust” (1 Chron. 9:26); *mitsvâh* (צִוְיָהּ)—“command” (Neh. 10:32). Or, in the Greek, *ὄν ὄψει*—“something that one must see to oneself” (Matt. 27:4); or, *καθίστημι* *kathístēmi*—“something of which one is put in charge” (Acts 6:3). A genealogy of the concept of responsibility in modern, Western philosophy shows it to be associated closely with the sovereign self, i.e., the “I” capable of choice and autonomy.

Responsibility is an individualized concept in the sense that it’s easier to hold individuals rather than collectives (i.e., groups, communities) responsible because questions of shared responsibility and liability become complex. A genealogy of the concept of responsibility in modern, Western philosophy shows it to be associated closely with the sovereign self, i.e., the “I” capable of choice and autonomy. Modern concepts of responsibility tend to assume linear connections between agent, act, and consequence, and struggle therefore to retain traction in relation to international affairs where complexity and rapid change outstrip and outmaneuver linearity. As such, personal notions of responsibility make little sense in some aspects of international affairs. It’s not my fault that the UN Security Council is incapable of fulfilling its responsibilities of international peace and security! An individual citizen is not personally responsible for their government’s violation of the UN Convention Against Torture, and such like. And, collective notions of responsibility have their own problems, too. All this combined with your point about “tolerance for ambiguity,” i.e., that most of us would welcome the opportunity to equivocate about what we are responsible for, and the meaning of responsibility seems to dissipate even as we inquire.

I argued in *The Limit of Responsibility* for a Christocentric account of Christ Jesus as the meaning of my responsibility in encountering the face of every neighbour—near and far. Self-generated accounts of responsibility are fictions. Only in

Christ, as Bonhoeffer taught, is the meaning of responsibility not bound by human knowledge and speculation or by the limits of how the self can conceive of relationship(s) with others. Applied at the interface between theology and international law, we find ourselves moving away from modern notions of the sovereign “self” generating their own feelings or rational perceptions of responsibility, and toward a dynamic understanding of responsibility that is inherently relational, responsive to the situation(s) in which we find ourselves, learned from every neighbour (near and far), learned from the rivers and oceans, soil and fauna, learned from the tortured and those who torture. Outside of Christ, responsibility becomes overwhelming; responsibility is potentially infinite and thus unbearable: “There is a boundary only for a concrete human being in its entirety, and this boundary is called Christ” (Bonhoeffer, *Act and Being*).

Collective or corporately shared responsibility is more difficult to conceive. Can intention be ascribed to a collective of individuals? When can or should a group be held responsible for the actions of an individual? At the interface between theology and international law, the question of corporately shared responsibility may perhaps be cast as the question of what service the Church owes the international community. The Holy See has a particular role to play due to its permanent observer status at the United Nations, and we must surely welcome Pope Francis’s plea in *Laudato Si* for global regulatory norms; strong institutions to regulate human relationships; an ecclesial ministry of warning, condemnation, renunciation and lament; and, bias to those most vulnerable and whose human rights are being violated. How to conceive more strategically of the service owed by the Church to the international community, i.e., ecumenically, internationally, across multifaith relations, etc., is a challenge. In weapons control, for instance, no ethic unites major faith traditions across their respective quests for justice and protection of the innocent/victims/rightful beneficiaries of protection. While much of today’s International Humanitarian Law has religious roots stretching back to the great twelfth-century Jewish rabbinic figure Maimonides, early Medieval church lawyers, comparable legal literature of Islam, and beyond, the recently renewed vis-

ibility of religion in public life—nationally and internationally—is yet to impact these debates. A religiously informed consideration of the development of international law is needed in the face of technological change.

Q. I'm fascinated by this idea you just mentioned about the role of informed consideration as linked to duty and action. Much of the challenge in the book seems to be a challenge in how Christians respond. You write that "there remains upon every human community a responsibility to strive after justice." Can you talk to me about this idea of "answerability" and how it ties to a communal versus individual mandate?

A. Your question prizes open the multi-way dynamic inherent in responsibility. Thank you! "Forward-looking responsibility" means that: *A owes it to B to see to it that X.* The dynamic here is subjectively driven and requiring of agent A to exercise virtue, act in accordance with values and principles, etc. "Backward-looking responsibility" means that it is fitting for B (or another appropriate party) to hold A responsible for X. The dynamic here is judicial. "When the Son of Man comes in his glory, and all the angels with him, then he will sit on the throne of his glory" (Matt. 25:31) is the ultimate Christian rationale for an ethic of backward-looking responsibility—which we might call an ethic of answerability or accountability. But, the basic idea of answerability or accountability is deeply engrained somehow in most, if not all, worldviews.

Applied at the interface between theology and international law, we might consider how the terms "responsibility" and "accountability" are being used in requirements under Article 36 of 1977 Additional Protocol I to the Geneva Conventions of 1949 pertaining to the review of weapons. Consider the Guiding Principles adopted by the 2019 Meeting of the High Contracting Parties to the CCW (CCW/MSP/2019/9-Annex III)¹ specify that "[h]uman responsibility for decisions on the use of weapons systems must be retained since accountability cannot be transferred to machines" and that "[a]ccount-

ability for developing, deploying and using any emerging weapons system in the framework of the CCW must be ensured in accordance with applicable international law."

Working out what "responsibility" and "accountability" mean across the life cycle of a weapons system, from innovative design ideas to post-deployment review, is self-evidently and increasingly complex. Lack of progress at the CCW since 2019 when the Guiding Principles were adopted is deeply lamentable, with some wondering if states want to make progress in working through in more detail what "responsibility" and "accountability" mean or should be held to mean. Who is to be held accountable for the (wrongful) taking of human life when the ethical status of these machines is contingent upon a multiplicity of design features, supervision and review, availability of data to interrogation, compliance reporting, oversight, and enforcement? What should be done if nation states fail in their duties regarding weapons reviews? What should such reviews entail? What responsibilities fall to the weapons design and production industry/ies? Should international standards be set for "explainable AI" to ensure that decisions made within the computing systems are available for interrogation and lost in a "black box" of unknowability?

In other words, the importance attaching to the words "responsibility," "answerability," and/or "accountability" is critically high.

Q. Man, that's rich and obviously a daunting task for anyone seeking to create a cohesive system of contingent parts that have to be equally yoked in order to tread toward a common purpose. I suspect if there is a single lodestar that can help navigate this work, it's a "common love." You write how Christians need to realize that "the law of love connects a person to all for whom Christ died." Do you think that insufficient love is one of the primary reasons why the Church fails to engage with the world in a transformative way?

¹ EDITORIAL NOTE: CCW is the Convention on Certain Conventional Weapons. Its purpose is to ban or restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately.

A. Oliver O'Donovan's *Common Objects of Love* is still, to my mind, the pithiest restatement of Augustine's City of God Book 19 discussion of love in public life. Eric Gregory's *Politics and the Order of Love* also captures superbly the struggles of Christian people striving today to develop a conception of love as a civic virtue. Their approaches are rich and diverse. I welcome the question of love in public discourse because it engages the passions/emotions/desires together with reason and intellectual conceptions of the good. Love is understood typically as something experienced by individual persons. Love is a passion belonging to the sensitive appetite, i.e., pertaining to how a person encounters and perceives external stimuli, and feels about or is affected by them. O'Donovan and Gregory's challenge is to consider how people(s) are united into political communities by having common objects of love. This challenge is VUCA at the interface between theology and international law, i.e., volatile, uncertain, complex and ambiguous, but nonetheless vital if the international community seeks to avoid finding itself in more ruinous conditions. Again, the challenge is to work out what it means to love not only as individuals, but as the body of Christ.

Q. I'm actually a big fan of those two books. If I may, maybe ask a more personal question in response to your answer. One of the things I remember O'Donovan warning us about in his *Common Objects of Love* was the need to remain vigilant. He was looking at Revelations 16:15 ("[b]lessed is the one who stays awake and remains clothed, so as not to go naked and be shamefully exposed") in respects to the danger of the Church being stripped of its true representation—especially when it seeks to find appropriate cultural entrees for the commendation of the gospel. Given your broad focus, have you ever found yourself feeling the concept of love is being manipulated to serve other ends (e.g., political, ideological, humanitarian)?

A. In addressing this question, may I refer you to the March 2022, "Declaration on the Russian World (Russkii Mir) Teaching" drafted in reaction to the Russian Orthodox Church's ideological underwriting of both Putin's regime and the Russian invasion of Ukraine. It opens:

The Russian invasion of Ukraine on February 24, 2022, is a historic threat to a people of Orthodox Christian tradition. More troubling still for Orthodox believers, the senior hierarchy of the Russian Orthodox Church has refused to acknowledge this invasion, issuing instead vague statements about the necessity for peace in light of "events" and "hostilities" in Ukraine, while emphasizing the fraternal nature of the Ukrainian and Russian peoples as part of "Holy Rus;" blaming the hostilities on the evil "West", and even directing their communities to pray in ways that actively encourage hostility.

Modelled on the 1934 Barmen Declaration, this Declaration reminds readers of Jesus words in Article 4: "Love your enemies and pray for those who persecute you, so that you may be children of your Father in heaven" (Matt. 5:43-45), whilst rejecting as non-Orthodox and profoundly un-Christian teaching that perverts love of Russia as beloved of God into political ideology justifying the annexation of Crimea and illegal invasion of Ukraine. Love of Russia is manipulated to excuse an egregious violation of international law. The war is a failure of love. As the fighting still rages, we pray for a speedy and just end to this conflict.

Q. If I may shift directions a bit here: Karen Taliaferro in her book *The Possibility of Religious Freedom* posits that the natural law can serve as a mediator between the conflict wrought by Divine and Human law. Your book is deeply invested in the utility of natural law and its importance for grounding the moral imperative in something permanent. Can you talk to me about the role that natural law plays in your project?

A. My preference typically is to talk about natural law reasoning (i.e., verb) rather than natural law (noun) in order to draw attention to the "lived experience," always contested, character of humankind's participation in the eternal law, through reason and will. This said, we need more today than familiar emphases on the labour of discerning what is good or naturally desirable because it tends to flourishing, and evil its contrary (*De Malo* A.2, Answer). Needed today, to

my mind, is the (re-)developing of Thomist ethical naturalism as an ethic of care.

Aristotle was, in part at least, a biologist interested in the flourishing of the natural order. As a natural law reasoner or “ethical naturalist” (to borrow the ever-insightful Jean Porter’s phrase), Aquinas does not delimit ethical decision-making to narrow fields of behaviour, adherence to the mores of a particular social group, slavish compliance to the rules, official policy, or law. Instead, he demands a more expansive assessment of what natural law reasoning looks like, might or could look like, if the action or decision were to achieve its proper perfection. Recent Roman Catholic Social Teaching, notably *Laudato Si*, in effect, recognizes natural law reasoning as an ethic of care by virtue of the cry for “care for our common home.”

In contrast to discussions associated with Carol Gilligan’s *In a Different Voice* (1982), which tend to see an ethics of care as an alternative normative ethical theory alongside natural law theory, duty ethics, virtue ethics and utilitarianism, I think it important to develop an ethic of care as integral to Thomist ethical naturalism. Too few theologically-rooted traditions of natural law reasoning, especially those related to war and peace, are closely enough related to Thomist natural law reasoning in ways that unfold his ethical naturalism as an ethic of care. This omission is detrimental to ethics, including in new security environments, where we need urgently to think of care as a consideration of the will, i.e., of the rational appetite in its inclination toward something desirous (ST I-II, q.8), or “care” as signifying a wealth of biblical connotations, which Aquinas would have been familiar: “cultivation” (Gen. 2:15 | Heb. עָבַד *’abad*), “enabling something to fare well” (Gen. 30:29 | חָיָה *hâyâh*), “protection” or “charge” (Gen. 30:35 | יָרַח *yâd*), “keeping” or “guarding” (Gen. 12:6 | מִשְׁמֶרֶת *mishmereth*), “keeping watch over” (Num. 23:12 | שָׁמַר *shâmar*), “ministering unto” (Num. 1:50 | שָׁרַח *shârath*), “to be concerned about” (1 Sam. 9:5 | מִן *min*), “attend to”/“pay attention to” (Ps. 8:4 | פָּקַד *pâqad*), “oversight” (Job 10:12 | פָּקַדְתִּי *p^equddâh*), “seek well-being of” (Jer. 30:14 | שָׁרַח *dârash*), “bandage or bind up” (Luke 10:34 | Gr. *Kataδέω kataadêō*), “have a mind to care for physically or otherwise” (Luke 10:35 | ἐπιμελεομαι *epimelêomai*), “be interested in” (Luke 10:40 | μέλω

mélō), “guard or have regard for” (Acts 20:28 | προσέχω *proséchō*), “promote the interests of” (1 Cor. 12:25 | μεριμνάω *merimnâō*), “earnestness of heart for” (2 Cor. 8:16 | σπουδῆν . . . ἐν τῇ καρδίᾳ). The challenge, perhaps, is to (re-)graft natural law reasoning back onto its rootstock of ethical naturalism, to reconnect reason with flourishing, and doctrines of sin and evil in order to better develop the criteriological function of Christian ethics across complexity and systems.

Q. You spend a lot of time talking about this concept of war and peace, but ultimately there is a hidden aspect to all this in the proliferation of sin and the way it impacts our capacity for finding true joy and manifesting God’s love to our neighbors. How does sin play a role in your attempt to create a system based on need and reality?

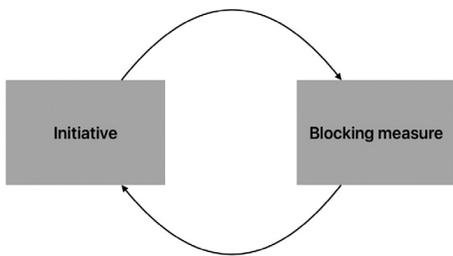
A. I’m not trying to “attempt to create a system,” but your question is very helpful in drawing attention to the need for systems thinking in war and sub-war ethics. Christian discussions of sin and evil tend to veer between the universal (original/ancestral sin) and the particular (personal choices/habits, virtue, and vice). Despite the church’s wisdom in pointing to the presence of sin in social conditions and in the structure of society (*Caritas in veritate* 34)—and, the testimony of theologians of liberation especially on how social structures become oppressive, problematically discriminatory, disregarding of the needs of many, and so on—Christian ethics and political theology is typically slow to think about how the proliferation of sin impacts our capacity to love God and neighbour.

One approach to meeting the complexity of these ethical challenge(s) is to adopt some of the techniques of systems thinking in order to see better the interrelationships and patterns across a given social issue, problem set, or challenge, e.g., the life cycle of a weapons system. Commonly defined as “a discipline for seeing wholes,” systems thinking is a framework for “seeing interrelationships rather than things, for seeing patterns of change rather than static ‘snapshots’” (see Peter M. Senge, *The Fifth Discipline*). In complex contexts, including security contexts, especially where technology is driving rapid change, accountability before God and neighbour demands not only that we strive to

see “the whole picture” of how, for instance, political decisions in a given nation-state bear upon the entire life cycle of a weapons system, but also how the many ethical aspects impinge.

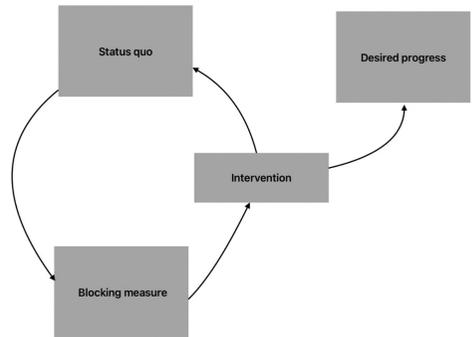
Q. At the risk of sounding obtuse, but the creation of systems to me sounds like a corollary to the creation of networks. I’m very much a fan of Niall Ferguson’s work on networks (*The Square and the Tower*) in his attempt to show that the greatness of human output is largely driven through a network of connections that yield fruit in advantageous soil. Which is why in my own work I try to cultivate a deep sense of community among student chapters in order to create spiritual systems based on an engine of love and service. All that to say, the biggest problem I’ve seen is our underdeveloped sense of who should be a part of our networks. Often, it’s a problem of absorbing too readily “bad company” (1 Corinthians 15:33), while avoiding those pesky “sinners and tax collectors” Jesus was so fond of surrounding himself with. Can you talk to me about how a proper theology of “who is my enemy” plays in your work in international law?

A. It’s not about *creating* systems but ‘seeing wholes’ in order to manage better the complexities of how individuals or groups make decisions, the interdependence(s) of people and teams, and the role of institutions in exploiting feedback. For example, we might want to investigate reasons for lack of progress at the CCW since 2019. Systems thinking might help us to see more clearly how certain reinforcing processes produce stalemate and impasse. How we describe what actually happens can affect perceptions and possible changes to actions in the future. When an initiative is met with a blocking pro-



cess, no progress is made. Perhaps the initiative was never expected to breakthrough anticipat-

ed blocking measures and only ever a cover for keeping things as they are. Perhaps the blocking measures are protective of particular interests. Systems thinking doesn’t solve problems, but drawing the process using causal loop mapping techniques can be a powerful tool that helps everyone get a fuller picture of the situation, especially when complexities layer up. How, for instance, might we picture interventions by faith communities active in international relations? What kind of intervention would be needed to turn a vicious balancing loop that maintains the status quo into genuine progress?



To be clear: the point is *not* to compromise the labour of conscience by turning moral reasoning into a system but, rather, to understand how interacting and interdependent parts in complex decision- and policy-making combine into a dynamic whole. The point is to represent and advance our thinking about structural sin. “The Church’s wisdom,” said Benedict XVI in *Caritas in veritate* (2009), “has always pointed to the presence of original sin in social conditions and in the structure of society.” Systems thinking at the interface between theology and international law is about seeing this more clearly.

Q. If I can pull this thread a bit further by incorporating your work on borders in Chapter 6. You just spoke about the need to manage the complexity of how individuals or groups make decisions. Part of that complexity is obviously an abundance of input or ideological vagaries that increasingly make cooperation difficult. You wrestle with this tension between universal brotherhood (Peter Singer’s “cosmopolitanism”) and a seeming nationalistic “personal state” that leaves room for an authentic internal culture. In your discussion of Deuteronomy 32:8-9, you write how there’s no avoiding the suggestion that “the nations en-

joy territorial identity at least in part because of divine decision.” Can you talk to me about this “Christian ethic of borders” and how it plays into your thinking on how to advance “love of neighbor”?

A. The ethical challenge is how best to love neighbours—near and far. When participation in the holy Eucharist and eschatological conviction that all things hold together in Christ Jesus (Col. 1:15-20) take no account of nationality and territorial borders, should Christian people echo those cosmopolitans whose outrage at the arbitrariness political borders prioritises universal “brotherhood” over national partiality? Similar to how Aquinas argues that money is permitted within divine providence as a medium for exchanging commodities (ST, II-II, 78.1) but vulnerable always to abuse and alienation, my point is that political, territorial borders are permitted and necessary within divine providence for the ordering of care.

The book argues that, despite the considerable and proper challenges from Peter Singer and others, it remains possible and indeed necessary at the present time for Christian people to work with an account of nation and nationhood, but only in conjunction with an account of divine wrath (Gen. 11:1-9) against aggressive, harmful nationalism and immoral partiality. A hard but repeated witness in Christian tradition is that we cannot love everyone equally: “[A]ll men are to be loved equally. But since you cannot do good to all, you are to pay special regard to those who, by the accidents of time, or place, or circumstance, are brought into closer connection with you” (Augustine, *Christian Doctrine* bk. I, ch. 28). Twenty-first-century love of neighbour in a globalised era will look different from Augustine’s 5th-century existence. That my consumerist lifestyle impacts very directly the lives of people around the world, and that transnational corporations span territorial borders too often in ways that evade taxation within nation states, all demands a rethink of what love of neighbour looks like today. Perhaps the challenge is to allow what we know of neighbours nearby to inform our love of neighbours far away, and vice versa. Only by finding every neighbour in the face of Christ Jesus will we learn to love better.

Q. Earlier you mentioned Oliver O’Donovan in this powerful idea of “the corruptibility of our imaginations” in discussing hopes of transformation. You write that the “primary calling of a Christian ethics and political theology is not to draft policy or prescribe jurisprudence but bear witness to Christ crucified and risen.” Can you put some meat on the bones here and talk to me about why drafting policies or prescribing jurisprudential approaches remains a secondary priority?

A. Throughout his discussion in *Church and State* of the service which the church owes to the state, Karl Barth places intercession in a central position (1 Tim. 2:1-2). With Barth, I understand Christian ethics to be an extension of the church’s priestly ministry of intercession; Christian ethics is a criteriological function of prayer and worship implicit in completing the sentence: “Good Lord deliver us[.]” Christian ethics is an extension of the litany, i.e., a mode of public prayer comprising *invocations* (solemn penitential addresses to the three persons of the Trinity, individually and collectively, and typically followed by the prayer “have mercy upon us miserable sinners” or a modern variant of the same), *deprecations* (prayers for deliverance various kinds of evil, typically followed by the response “Good Lord deliver us”), *obsecrations* (entreaties or beseeching calls upon God for the assistance of Christ Jesus by the power of the Holy Spirit), *suffrages* (intercessory prayers for very some specific human and planetary conditions), and concluding *supplications*. Measures against which something may be judged or decided becomes clear(er) as the church prays: “Good Lord deliver us”—from what in particular?—the evils of poverty, extreme inequality, pollution of the rivers and seas, climate change, etc.

Drafting policies or prescribing jurisprudential approaches is a secondary priority only in the sense that it follows from the church’s priestly ministry of intercession. How close church leaders get to the minutiae of policy details is a matter of discernment in the given situation. Where and how disciples of Christ Jesus fulfill personal vocations in their chosen profession(s), voluntary work, family life, and other paid or unpaid employment will be various. Only the individual or fellowship knows in their heart when loud

and dramatic prophetic protest is demanded along with silent prayer, and what form this should take in the workplace or elsewhere. For those of us not on the front lines of service, so to speak, a challenge, perhaps, is more meaningful ministries of accompaniment alongside those making difficult policy or other decisions every day in high-pressure situations.

Q. In your concluding remarks, you write:

Everything that the believer might venture to say about the purposes of law within divine providence is consequential upon logically prior confession of God's saving dealings with creation. The origin and end of all things, including human law, is in God. The source of truth about human law is pre-eminently the person of Jesus Christ.

That is a dense and important statement of theological insight, but unfortunately not one often entertained on American law school campuses. In fact, this foundational truth that Christ pre-eminently informs our understanding of human law is a non-starter in most conversations. Can you give the students some advice on what you've seen on the other side of the legal "immanent frame"? Maybe some advice on how to begin thinking with reference to transcendence?

A. Rowan Williams, the former Archbishop of Canterbury, spoke in his Reith Lecture in 2022 of how self-styled liberal societies remain capable of asking themselves serious critical questions. He spoke of the role of religions and major world faith traditions in generating critical energy in such conversations that can, because of an appeal to transcendence, actually challenge consensus and change the status quo on the basis of a developing sense of what is due to humanity as such. Rowan Williams recognized that religiously-based appeals to transcendence are always culturally conditioned: "Religious belief may be transcendentally justified but is also in practice a human culture, that's to say, it is itself engaged in learning." In other words, believers' faith perspectives and appeals to transcendence are always themselves to be exposed to critique, but are potentially a way of questioning the tyranny of the majority and unsettling the unquestioned—whether religious or secular.

Q. My last question is one rooted in my ongoing frustration with the Church in failing to adapt to present courses and then having fallen behind revert to reactive measures. You spoke above about how a "religiously informed consideration of the development of international law is needed in the face of technological change." What other challenges do you foresee in the coming decades that Christians should start thinking about now?

A. My hope is that the world's major religions, especially the religions of the book (i.e., Judaism, Christianity, and Islam) will think better together about the risks and benefits of new technologies, including in law enforcement and defence. The lack of sustained engagement is a problem because building strong alliances around international humanitarian law (IHL) requires acknowledgement of the role of culture, religion, and traditions in shaping nations' and communities' core values. A religiously informed consideration of the development of international law is needed for sustainable regulation and accountability in the face of technological change. Perhaps together we can affirm an obligation upon persons of faith from a variety of traditions (together) to seek weapons control (international restrictions upon the development, production, stockpiling, proliferation, and usage of various weapons types) and control over weapons (clear lines of responsibility and accountability for actions performed with weapons, and the capacity to disarm them), which arises variously from accountability before God for beliefs and willful actions.

Key assumptions in IHL (notably the principles of humanity, necessity, distinction, proportionality) all derive from late medieval, religiously inspired currents and are profoundly linked to doctrinal convictions as taught by the rabbis, church fathers, and Islamic jurists. These principles are expected to remain central to a future-facing ethic of weapons control, even as their ramifications are further explored and as the religions energe their revitalization through a *ressourcement* from their wells of tradition. Religious voices at the UN are often perceived as "linked to illiberal and authoritarian views" (Jeffrey Haynes 2013), however. Religion is often perceived as a source of conflict and international law is viewed fre-

quently as a European tradition that “imagines itself as universal” (Martti Koskenniemi 2015). My hope is that a religiously pluralised study of weapons control can yield enough consensus (understood as concurrence or possibility of assent) for concrete proposals and ethical guidance.

Future thinking is always difficult. Thinking from horizons 1, 2, and 3 will be different for everyone who engages in the exercise. Jürgen Moltmann’s distinction in *The Theology of Hope and The Coming of God* between future thinking (*L. futurum*), which develops out of the past and present, as compared to God’s *adventus*, which comes to us from outside time, is a wise reminder that any future thinking is vulnerable to decay.

KODY COOPER AND JUSTIN DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* (CAMBRIDGE UNIVERSITY PRESS, 2022). 270 PP.

*Book Review by Owen Anderson**

In this timely book, Kody Cooper and Justin Dyer step into the busy discussion about the origins of American political thought. There has been a rigorous debate about this for a number of decades, often revolving around the religious beliefs of the Founding Fathers. In eight chapters (including an introduction and conclusion), they take the reader through the influential political and legal debates of the founding era. This will become a standard resource in the field of American political thought.

The authors take aim at the interpretation of American political history that says, “The influential academic narrative that claims the roots of the American founding are ultimately Hobbit—because allegedly wedded to a voluntarist ontology of moral obligation, pantheist theology, and rejection of final causality—gets the story exactly wrong” (238). They counter this view with a sustained argument making the case that a “careful analysis of the founding period reveals that ideas central to American founding thought are not only compatible with but presuppose classical natural law and natural theology” (7). This means that American law is built on the idea that God the Creator determines the nature of things, including human nature, and that law is the means of directing human nature to the good.

How can we know if God the Creator is real? This has been a major debate in American history and even today the skeptical position is the most common in politics. That view says God might exist, and people are free to their opinions, but we cannot know. In their chapter on Orestes Brownson, Cooper and Dyer enter into this debate by relying on the Thomistic argument from causation

(178). Affirming God the Creator also calls into question the early modern “state of nature” story (179). That human will is not absolute and is not the determiner of good and evil.

But, what is good and how do we know it? Again, the contemporary United States takes a skeptical position. Or, it affirms a two-fold perspective of the good, wherein there are known this-worldly goods and skeptical other-worldly goods. Cooper and Dyer also utilize this Thomistic division of the two-fold good and use it to discuss church and state relations (235). Rather than there being a unifying good, there are the goods of this life and then the hoped-for-goods of the next life. They write:

In this way, it [the state] would remain cognizant of genuine but underspecified religion and the duty owed by individuals and society to God while accepting the state’s incompetence to judge specific doctrines or modes of worship. It therefore would vigorously defend institutional and individual religious liberty in order to secure the good of religion (236).

If an addition were to be made, it would have been to deal with the arguments that have been raised against classical theism in both the modern and postmodern world. Relying on the Five Ways, and especially the argument from causation, needs to be supported by an acknowledgement of the challenges to that argument from thinkers like David Hume and Immanuel Kant. Humean skepticism gets mentioned (207), but Kant is noticeably absent. Both challenge the idea that we

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can argue from known causes to an unknown past and propose that, even if we could, this unknown cause is far from the God of Classical Theism or the Scriptures.

Professors and students alike will find this a useful resource. I can see it becoming a commonly used textbook in 400 level and graduate classes. Cooper and Dyer have given us an important contribution that repays careful study.

NICHOLAS ARONEY AND IAN LEIGH, EDs.
CHRISTIANITY AND CONSTITUTIONALISM.
(OXFORD UNIVERSITY PRESS, 2022). 512 PP.

Book Review by Justin Dyer*

"If we ask what book was most frequently cited by Americans during the founding era," Donald Lutz wrote four decades ago, "the answer somewhat surprisingly is: the Book of Deuteronomy."¹ *Christianity and Constitutionalism* demonstrates why.

In the opening chapter titled "Torah and Constitutionalism," Jonathan Burnside treats Deuteronomy as a description of the constitution of ancient Israel. Here, he is following the first century Jewish historian Josephus, who used the Greek term *politeia* to describe the book of Deuteronomy. Ancient Israel's *politeia* separated political powers and functions among four distinct offices (judges, kings, priests, and prophets) and guarded against the concentration of power in a single human authority (39).

Americans in the founding era drew on these insights in their political debates, recognizing that the wisdom of ancient biblical literature is "consistent with a range of constitutional regimes" (49). The remaining twenty-one essays explore Christianity's contributions to the development of constitutionalism in the West. The chapters are grouped into three thematic sections. Part I focuses on the historical influence of Christianity, moving from the Torah to the New Testament, patristics, early Christendom, medieval period, the Reformation, and the modern era. Part II explores Christianity's contributions to core legal and constitutional concepts, including sovereignty, the rule of law, democracy, the separation of powers, individual rights and liberties, conscience and religious freedom, and federalism. Part III highlights the relevance of specific Christian theological doctrines or concepts for the theory and practice of constitutionalism. These final chapters respectively address divine revelation, the Trinity, justice, Christianity, natural law, subsidiarity, and eschatology.

Nicholas Aroney and Ian Leigh have brought together a distinguished list of contributors, and their introduction provides a valuable road map for what lies ahead. Early Christians developed doctrines of natural law and distinguished between the authority of civil government and the authority of the church. Whereas the Roman emperors had combined the roles of King and Priest into one office, the fifth-century Pope Gelasius I taught that Christ had separated these offices on account of "human weakness" (5-6). Modern constitutional government developed largely from the practical delineation of jurisdictional boundaries between civil and ecclesiastical offices, as Brian Tierney argued in *Religion, Law and the Growth of Constitutional Thought* (Cambridge University Press, 1982). From these early debates emerged the idea that the King is under law and must rule by law, and that subjects have a right and even duty to resist unlawful commands. In seventeenth-century England, the seed of written constitutionalism took root and soon spread to the North American Colonies, where the colonists wrote compacts, charters, and constitutions, incorporating and developing constitutional ideas related to the separation of powers, rule of law, and of limited government under a higher law.

The most significant question raised by this volume is whether modern constitutionalism can survive in a secular form divorced from its Christian origins. Related questions follow: Can Christianity's contributions to constitutionalism outlast Christianity's cultural and political influence? As Christianity continues to spread to the Global South, what significance will its theological influence have on global constitutionalism? Is it plausible or wise to seek to recover a religious foundation for our constitutional practices, and what would such a recovery look like in the modern

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¹ Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78(1) AM. POL. SCI. REV. 192 (1984).

world? For anyone interested in these questions, *Christianity and Constitutionalism* is an essential resource that will inform and frame these important debates in the coming decades.

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