

# The Unbearable Lightness of Christian Legal Scholarship

## A Conversation with David Skeel

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Q: So you wrote here in your paper that Christian legal scholarship was surprisingly absent from premier law journals in the twentieth century. Can you start by explaining what you mean by the phrase “Christian legal scholarship”?

SKEEL: Well, I define Christian legal scholarship in terms of two things in the paper. The first is that I see Christian legal scholarship as developing either a normative or a descriptive theory of law that is anchored in Christian scripture or Christian tradition. So that’s the first prong, and then the second prong is that it seriously engages the best secular scholarship in that particular area. It seems to me that the amount of scholarship that really does both of those things is surprisingly limited even now, although I’ve become slightly more optimistic since I wrote the paper that that may be changing.

Q: What do you argue in your paper about the scarcity of Christian legal scholarship in the previous century? What were the causes as you understood it?

SKEEL: Well, I focus on two major causes. The first is that there were a series of movements in the law which paralleled movements in other disciplines starting in the late nineteenth century that attempted to put law on a more “scientific” footing. Religion quickly became seen as inconsistent with that, as somehow unscientific, and therefore, the sort of thing that ought to be kept out of legal scholarship. So the first of the two causes, I think, was this transformation of legal scholarship and other areas of scholarship as well.

The second was that the most important Christian movement of that time, evangelicalism, tended to be anti-intellectual. I talk a fair amount about William Jennings Bryan, who epitomizes in my view both what was good about evangelicalism in the late nineteenth century and what was bad about it. He had a deep hostility to Northeastern intellectual discourse; his audience, as he saw it, was common people not the intellectual elite. So there was this hostility to high-level scholarship in evangelicalism starting in the late nineteenth century, which continued into the twentieth century.

By 1925 when Bryan died and when the Scopes trial cast evangelicalism in an embarrassing light, evangelicals turned their back on the culture altogether. So all of these things together, it seems to me, are responsible for the absence of Christian legal scholarship. The one interesting counterpoint was Catholic legal scholarship. Unlike with evangelical scholarship, there was in fact a serious Catholic legal

scholarship for much of the twentieth century, but it too took place almost entirely outside of the leading law journals for some of the same reasons. There was a fascinating exchange, which I talk about in the paper, between a number of Catholic scholars, such as John Ford and Francis Lucey on the one hand, and defenders of Oliver Wendell Holmes on the other hand. One of Holmes' most eloquent defenders essentially dismisses Christian perspectives and says that, if the kinds of Christian influence that characterized American law in the nineteenth century returned, we would have to remove those shackles all over again. So there was a hostility to Christian perspectives well into the twentieth century.

Q: So with regard to a small but flourishing Catholic scholarly area, do you feel like the mainstream journals evince some sort of anti-Catholic bias in the way that broader culture did?

SKEEL: I do. There was an ongoing debate as to whether Catholicism was and is antithetical to the democracy. A lot of people thought that Catholicism was authoritarian and was not consistent with democracy, and so there was very much a suspicion of Catholicism, which prompted a number of Catholic scholars to respond. This debate between Ford and Lucey and others on the one hand and Holmes and his defenders on the other, seems in part to have been an attempt by Catholic scholars to prove that Catholicism was fully compatible with democracy. In fact, they argued, people like Holmes were the ones we needed to worry about because Holmes was skeptical of any morality, and his skepticism seemed to eliminate any moral resources we might have for dealing with totalitarianism and Hitlerism.

Q: So moving forward to the, more closer to the present day, you said cite a kind of renewal or a flourishing of Christian legal scholarship and you pick out a couple areas where you see that happening. Could you briefly explain what those areas are and which are the most dominant sorts of flourishing?

SKEEL: Well, the biggest one and the most obvious one is First Amendment religion clause scholarship. There has been a substantial literature on the religion clauses, at least some of which reflects Christian perspectives, since about 1947 when the Everson decision was handed down. Perhaps the best known example of a scholar, though not a law professor, whose articles reflected his Christian faith was the Catholic political scientist and theologian John Courtney Murray.

More recently there have been a number of Christian scholars who have been prominent contributors to that literature. The most well known in the last 15 or 20 years has been Michael McConnell, who was a law professor for many years and now is a Circuit Court Judge. So the First Amendment scholarship is the biggest area or one of the two biggest areas.

The other area where you find a significant amount of Christian legal scholarship is on natural law. In its recent iteration, a lot of it seems to have been influenced by

John Finnis' work, and there are other people that are at least loosely writing in this tradition, people like Mary Ann Glendon and a number of others.

So those are the two main areas. I also talk in the article about historical scholarship. There is a fairly deep Christian inflected historical scholarship. The main figure there is probably Harold Berman. And I also talk about legal ethics. There's a fairly deep scholarship there that is most prominently influenced by the work of Tom Shaffer. But even when you put all of this together, it's not a particularly big scholarship and there are vast areas, which until quite recently were almost untouched in my view by Christian legal scholarship, at least in the preeminent legal journals.

Q: And in the process of describing these areas, you also exclude a few other budding, but what you consider to be marginal in some way, types of scholarship. Can you say a word about what doesn't fit and why.

A: Well, there are a couple kinds of scholarship that I want to exclude because I don't think they fit within this two-part definition of what I see as Christian legal scholarship. One is a small cottage industry of scholarship that critiques various legal movements from a Christian perspective. My concern about much of this scholarship is that it tends to be fairly ungrounded. It often doesn't have a serious theological foundation, or at least one that's explicitly developed. And too often it seems to me it doesn't truly engage the secular scholarship that it's critiquing.

So it's not so much that it would be impossible to have a Christian legal scholarship that critiqued jurisprudential movements. I don't think it's impossible at all, but much of the Christian legal scholarship doesn't seem to do that. So that's one area I exclude.

Another area that I more cautiously exclude is scholarship that takes a passage of scripture typically and applies it to a particular legal issue. Again, this is not necessarily outside the boundaries of Christian legal scholarship, but often what the scholarship seems to be doing is treating the scripture simply as another piece of literature, and again it doesn't seem to be firmly anchored in a theological perspective drawn either from scripture or from tradition.

I should emphasize again probably that in both of these areas that I critique, I'm not saying that you couldn't have a Christian legal scholarship there. I would hope that you will. I'm just saying that a lot of the articles that have titles like *Christianity and...*, *Christianity and Critical Legal Studies*, *Christianity and Feminist Legal Scholarship* don't really qualify in my view as Christian legal scholarship.

Q: In your definition of Christian legal scholarship, what's the impact or importance of engaging secular scholarship? Why is that so critical to your model?

SKEEL: This is a great question. One answer is that if Christian legal scholars want their scholarship to be taken seriously, the scholarship needs to engage the leading secular scholarship of the time. And when Christian legal scholarship doesn't engage fully the secular legal scholarship, it's appropriately dismissed. If you're critiquing an area of law and you don't even know what the leading secular scholars are saying about it, I just don't see how you can call what you're doing serious Christian legal scholarship.

So that cluster of responses would be one response. I also believe very firmly in what the Apostle Paul talks about in Romans 12, when he talks about the importance of developing a Christian mind. And I think part of developing a Christian mind is engaging the creation, and not separating this from the revelation we have in Scripture.

So I don't think you can have a full-bodied Christian legal scholarship that doesn't mix it up with the best secular scholarship.

Q: Do you see some of the more populist or popular evangelical social activist communities, like *Sojourners*, as having any impact on this legal discussion. Are people from that community contributing to Christian legal scholarship or are they focused on other areas?

SKEEL: This is another good question. In my view, the influence thus far has been at most indirect. I think there is an influence. I think a lot of people read Jim Wallis's *God's Politics* when it came out. A lot of people at least look at *Sojourners*, but in terms of influencing either the secular legal scholarship or Christian legal scholarship I wouldn't say that his writing has had a major influence. For example, one of the areas that I study is bankruptcy and debt relief. The things that *Sojourners* is saying do get noticed by they don't figure especially prominently in the scholarly discussion.

Q: So the second half of your paper is committed to beginning the conversation about what a proper Christian legal theory would look like. Could you say a word about the two primary starting points you offer and what the primary upshot of that is in your theory?

SKEEL: As I mentioned earlier, the first prong of my two-prong definition of Christian legal scholarship was that Christian legal scholarship should have either a normative or a descriptive theory that is based on a foundation of Christian scripture or tradition. What I try to do in the second half of the paper is give examples of each of those things, a normative theory and a descriptive theory.

Along the way I also try to pay some attention to the stuff that other folks are doing as well, but not surprisingly I'm most familiar with the things that I've been working on. So, first, on the normative side I talk about some work that I've done with Bill Stuntz, who's a criminal law scholar, on what we refer to as the modest

rule of law. The question we're trying to offer an initial answer to is: what's the proper role from a normative Christian perspective of the secular law. And the argument that we make is that the usual tendency to assume that the secular law should be co-extensive with morality, that anything that's immoral should be prohibited by the secular law, is deeply misguided.

We talk about the Sermon on the Mount, which seems to us to contradict the idea that the secular law should police all sinful behavior. And we also talk about what we see as some counterproductive effects of trying to criminalize things like drinking in the 1920s and 1930s, some of the things that have been done by folks who share our pro-life position with respect to abortion, some of the things that have done in the area of gambling, and we give a couple other examples as well.

So the first normative theory is an argument that the role of the secular law, the aspirations of the secular law ought to be more modest than evangelical Christians in particular and to some extent theologically conservative Catholics as well have tended to assume.

On the descriptive side I talk about what I refer to as the Bono puzzle. The puzzle is that debt relief internationally was a huge movement in England and has been a huge movement for several decades. It also was a movement that was very much religiously influenced. But in the US until Bono came over and started meeting with the Clinton Administration and then the Bush Administration, debt relief had a very low profile, and people seemed to see it as relatively unimportant.

So the question that I ask and try to begin to answer is: why was the profile of the debt relief movement so much lower in the U.S.? By way of answer I talk about the difference in the structure of the church in the US as opposed to the UK. Disestablishment produces a different kind of religious influence in my view in the US than what you see in England. I also think that the relative disinterest in the debt relief movement in the US is historical fallout of evangelicals having turning their back on the culture in the 1920s, and their hostility to social reform when it involves issues like poverty, at least social reform done through the political and legal process rather than volunteristically. I am cautiously optimistic that this is changing a little bit. That American evangelicalism is becoming more interested in social issues, and I think for better and perhaps for worse, the candidacy of Mike Huckabee right now is a small-scale reflection of that.

Q: And in terms of the normative groundings of your Christian legal theory, you draw upon a conception of the *imago dei* and a recognition of the fundamental nature of human sin. And for the Protestant readers among this, there might be an immediate reflection back to Reinhold Niebuhr in American religious thought. How would you respond to that and how would he fit into the model that you're bringing to bear here?

SKEEL: I think that Niebuhr is very much one of the fathers of this theory. To be perfectly candid, I wasn't thinking about Niebuhr and I don't think Bill Stuntz was thinking about Niebuhr when we began developing this theory, but when I think about it in historical perspective, I think the two Protestant fathers of this theory are Abraham Kuyper and Reinhold Niebuhr. Kuyper's idea of sphere sovereignty, which is very closely related to the Catholic idea of subsidiarity, has a strong family resemblance to our idea of the modest rule of law.

Niebuhr's idea of the sinfulness of political structures and the way that sin inevitably insinuates itself into institutions is, I think, very closely related to what we're doing and what we're thinking as well. So I think that Niebuhr is very much one of the fathers of this theory. If I were to critique Niebuhr, I would give the kind of critique that a lot of people have made, which is that his work doesn't often seem as Christological as I might like it to be. With respect to Kuyper, Kuyper is a little bit more sympathetic to government involvement in religion and vice versa, religious involvement in government than we are.

But I think our theory very much comes out of that kind of a tradition. There's a deep that sinfulness must be central to how we think about government and law in a post-Fall world.

Q: One thing that I would think, and I'm not aware of particularly explicitly legalistic writing from Niebuhr in the world of legal scholarship, but his sense of a chastened political and theological ambitions and concern for the structures of society seems to fit within the overarching model, so you would agree that contemporary Niebuhrians might fellow travelers on this path.

SKEEL: I think that's absolutely true. But I feel as though this modest rule of law idea is a very preliminary theory, and that one of the great growth areas in Christian legal scholarship may be scholarship that thinks deeply about institutional structures and how to bring a Christian perspective to bear on it. At least I hope so. A lot of what we have so far is quite preliminary, it seems to me. I'm hopeful that conservative evangelicals will think a little more about poverty and issues of that sort going forward, and that liberal evangelicals will maybe think a little bit more about some of the other issues, such as the life issues.

Q: Do you think that non-Christian legal theories might have something to teach your own model of Christian legal theory and perhaps vice versa? As you know, there's a very long tradition of Islamic legal thought and it extends across a range of things into the very practical discussions of Sharia today, but also at a broader theoretical level, and Jewish legal thought has a very long tradition as well.

A: I see linkages both in terms of ways that the perspectives can inform one another and sort of negative linkages. I have a particular interest in looking at things historically and looking at the ways that Islamic cultures say, have interacted with the law, as compared to the way the Christian cultures interacted with the law, I

think sheds light on both of them. And one of the examples of that that I've encountered in my own work and work other folks have done is with respect to the emergence of large-scale corporations. Corporations emerged much, much later in Islamic culture than they did in the Christian West, and one reason for that seems to be an Islamic hostility to things like limited liability and the corporate form, whereas on the Christian side the Catholic Church was a real innovator with respect to the corporate form and used it as a way, among other things, to keep separate from the state. Those kinds of cross-fertilization, I think, are very, very valuable, and I'm sure other folks could think of normative implications that could be traded across those perspectives.

Q: Great. Well, thank you so much.