

# THE UNBEARABLE LIGHTNESS OF CHRISTIAN LEGAL SCHOLARSHIP

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## ABSTRACT

*When the ascendancy of a new movement leaves a visible a mark on American politics and law, its footprints ordinarily can be traced through the pages of America's law reviews. But the influence of evangelicals and other theologically conservative Christians has been quite different. Surveying the law review literature in the 1976, the year Newsweek proclaimed as the "year of the evangelical," one would not find a single scholarly legal article outlining a Christian perspective on law or any particular legal issue. Even in the 1980s and 1990s, the literature remained remarkably thin. By the 1990s, distinctively Christian scholarship had finally begun to emerge in a few areas. But even today, the scope of Christian legal scholarship is shockingly narrow for so nationally influential a movement.*

*This Article argues that the strange trajectory of Christian legal scholarship can only be understood against the backdrop of the fraught relationship between religion and American higher education starting in the late nineteenth century. As the nation's modern*

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*research universities emerged in 1870s, leading reformers began to promote nonsectarian, scientific approaches to scholarship. These developments increasingly excluded religious perspectives. But the disdain did not run in one direction only. For much of the twentieth century, American evangelicals absented themselves from American public life. Theologically conservative Christians who remained in legal academia operated under cover, a stance reflected in the absence of Christian legal scholarship except on church-state issues, in the Catholic natural law tradition, and in a handful of other areas. The first half of the Article is devoted to this historical exegesis and to a survey of current Christian legal scholarship. The Article then shifts from a critical to a more constructive mode, from telling to showing, as I attempt to illustrate what a normative, and then a descriptive, Christian legal scholarship might look like.*

- I. INTRODUCTION (1)
- II. WHY SO LITTLE CHRISTIAN LEGAL SCHOLARSHIP? (6)
  - A. *The Historical Hostility to Religious Perspectives* (8)
  - B. *The Wages of Evangelical Anti-Intellectualism* (13)
  - C. *Hidden in Plain Sight: Catholic Legal Scholarship* (17)
- III. CHRISTIAN LEGAL SCHOLARSHIP TODAY: A BRIEF SURVEY (20)
  - A. *Natural Law (and International Human Rights)* (21)
  - B. *Christian Lawyering and Legal Ethics* (23)
  - C. *First Amendment and Church-State Issues* (25)
  - D. *Christian Legal History* (27)
  - E. *What Counts as Christian Legal Scholarship?* (28)
  - F. *The Dearth of Christian Legal Scholarship* (32)
- IV. THE RULE OF LAW AND NORMATIVE CHRISTIAN LEGAL SCHOLARSHIP (32)
  - A. *Kuyper's Sphere Sovereignty* (33)
  - B. *Christianity and the Double Game of Law* (35)
  - C. *The Perils of Symbolic Lawmaking* (38)
  - D. *Conclusion* (39)
- V. TOWARD A NEW DESCRIPTIVE CHRISTIAN LEGAL SCHOLARSHIP: THE BONO PUZZLE (41)
  - A. *The International Religious Freedom Act of 1998* (42)
  - B. *Debt Relief and the Restructuring of Sovereign Debt* (44)
- VI. CONCLUSION (50)

## I. INTRODUCTION

For many evangelicals and other theologically conservative Christians,<sup>2</sup> as for other Americans, the legal system is the solution of first resort for nearly every conceivable issue. In the thirty years since *Roe v. Wade*,<sup>3</sup> theologically conservative Christians have continuously lobbied for state abortion restrictions and for the appointment of Supreme Court justices who might prune or reverse the constitutional right to abortion. They have pushed for restrictions on gay rights for much of this same period— at least since Anita Bryant, a singer best known for her commercials proclaiming that “a day without orange juice is like a day without sunshine,” headlined a campaign to overturn an anti-discrimination law in Dade County, Florida in the 1970s. In 2004, when the Florida state courts authorized Michael Schiavo to instruct Terri Schiavo’s doctors to remove her feeding tube, despite her parents’ objections, theologically conservative Christians pushed Congress to authorize the federal courts to intervene. The penchant for legal and legislative solutions extends to less explosive issues as well. As crime rates surged in recent decades, theologically conservative Christians were among the biggest cheerleaders for tougher penalties and more aggressive law enforcement. They have led the opposition to state casino and lottery legislation, and the campaign to prohibit internet gambling. Whatever the question, law seems to be the answer.

If theologically conservative Christians were simply another voice crying in the wilderness, the calls for legal intervention would not be especially noteworthy. But both those who applaud and those who worry about them agree that theologically conservative

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<sup>2</sup> The principal groups of theologically conservative Christians in the US are Protestant evangelicals and theologically conservative Catholics. This Article focuses most extensively on the role of evangelicals, but theologically conservative Catholics figure as well. Less theologically conservative (“mainline”) Christian thought is also considered but figures less prominently, for reasons discussed at note 10 and elsewhere. After a long history of political and theological animus, evangelicals and conservative Catholics have joined forces on many issues in recent years. Theologically, this trend is reflected in *Evangelicals & Catholics Together*, a series of documents produced by a group of prominent evangelicals and Catholics in the early 1990s. See, e.g., *Evangelicals & Catholics Together: The Christian Mission in the Third Millennium*, FIRST THINGS, May 1994, at 15. See also MARK NOLL & CAROLYN NYSTROM, *IS THE REFORMATION OVER? AN EVANGELICAL ASSESSMENT OF CONTEMPORARY ROMAN CATHOLICISM* (2005).

The term “evangelical,” and the group it refers to, eludes precise definition. The best known definition is the four-part specification offered by British historian David Bebbington. According to Bebbington, evangelicals are characterized by a commitment to 1) the authority of the Bible, 2) the cross (the belief that salvation is only possible through the atoning work of Jesus Christ), 3) conversion (a believer must, like Jimmy Carter, be “born again”), and 4) activism (in evangelism, missions, and social work). D.W. BEBBINGTON, *EVANGELICALISM IN MODERN BRITAIN: A HISTORY FROM THE 1730s TO THE 1980s* 2-3 (1989).

<sup>3</sup> 410 U.S. 113 (1973).

Christians are more than simply another voice. Most of the nation's presidents since Jimmy Carter have identified themselves as evangelicals, none more explicitly than George W. Bush. Evangelicals regularly flex their political muscles, as in the Schiavo affair and with the "Justice Sundays" they held in 2005 to pressure President Bush to nominate sympathetic judges to the Supreme Court and lower federal courts.<sup>4</sup>

When the ascendancy of a new legal movement leaves so visible a mark on American politics and law, its footprints ordinarily can be traced through the pages of America's law reviews. The usual pattern is profuse discussion in the scholarly literature, from which one or two celebrities emerge, attaining a visibility and influence that extends well beyond law school circles. During the Progressive era, then-Boston lawyer Louis Brandeis and Harvard law school dean Roscoe Pound were known both for their scholarly articles and as leading national figures in the Progressive movement.<sup>5</sup> Much of the legislation of the New Deal era was influenced by Legal Realism and by Legal Realists like William Douglas and Jerome Frank whose vision for an interdisciplinary approach to law had revolutionized legal scholarship.<sup>6</sup> More recently, conservative legal scholars made the case for deregulation and for originalist approaches to Constitutional interpretation in the academic literature, and continued to debate these approaches in the law reviews as lawmakers and judges began to implement some of the principles.<sup>7</sup>

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<sup>4</sup> See, e.g., Family Research Council, *Justice Sunday: Stop the Filibuster Against People of Faith* (April 2005), available at <http://www.frc.org/get.cfm?i=LH05D02> (open letter advocating Justice Sunday).

<sup>5</sup> As a progressive lawyer in Boston, Brandeis was famous for briefs (now known as "Brandeis briefs") that marshaled extensive sociological evidence in support of progressive litigation. He co-authored the first law review article to identify and defend a right of privacy; Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); and wrote a book excoriating the dominance of J.P. Morgan and small group of other banks in American finance. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* (1913). Roscoe Pound was a leading advocate of "sociological" jurisprudence. See, e.g., Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911)(Part I) and 25 HARV. L. REV. 140 (1912)(Part II).

<sup>6</sup> The founding texts of legal realism include Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) and JEROME FRANK, *LAW AND THE MODERN MIND* (1930). Classic histories are WILLIAM TWINING, *KARL LLEWELLYN & THE LEGAL REALIST MOVEMENT* (1977); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); and JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

<sup>7</sup> Robert Bork's law review articles and books transformed antitrust theory; see, e.g., Robert Bork, *The Rule of Reason and the Per Se Concept: Price and Market Division II*, 75 YALE L.J. 373 (1966); ROBERT BORK, *THE ANTITRUST PARADOX* (1993)(book based on Bork's earlier scholarship); and the interest of Justice Scalia and others in originalism and textualism draws on the work of predecessors in the 1970s and 1980s. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH*

The theologically conservative Christian influence on recent American law is radically different. Surveying the leading law reviews in 1976, the year *Newsweek* proclaimed as the “year of the evangelical,”<sup>8</sup> one would not find a single article— not one— outlining a Christian perspective on law or any particular legal issue. Even in the 1980s and 1990s, the literature remained remarkably thin. By the 1990s, distinctively Christian legal scholarship had finally begun to emerge in a few areas. But even today, the scope of Christian legal scholarship in the American legal literature is shockingly narrow for such a nationally influential movement.<sup>9</sup> Why is there almost no trace of the intellectual underpinnings of the recent movement?<sup>10</sup>

To some extent, theologically conservative Christians have piggybacked on other legal movements, especially conservative legal theory. Many supported deregulation, for instance, and favor original intent in Constitutional interpretation.<sup>11</sup> Perhaps the theologically conservative Christian perspective is captured by these other movements. But conservative legal thought is far too imperfect a proxy for this explanation to hold up. Several of the signature Christian issues— such as abortion and gambling prohibition— are issues that figure very little in contemporary conservatism. And to the extent the issues do figure, ideological conservatives and theologically conservative Christians often part ways. An alternative explanation trades on American evangelicals' reputation

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AMENDMENT (1977).

<sup>8</sup> Kenneth L. Woodward, *The Year of the Evangelical*, NEWSWEEK, Oct. 25, 1976, at 68.

<sup>9</sup> The statements in the text about the paucity of Christian legal scholarship are confirmed by an examination of the articles published in the leading law reviews from 1900 to 2000. The study is described in note 39, *infra*.

<sup>10</sup> Like the evangelicals and other theological conservatives that are the principal focus of this Article, the more theologically liberal mainline Protestants also have not produced a distinctive legal scholarship. This is in part due to the developments discussed in Part II of this Article, but also because mainline Protestants have tended to adopt the secular language of the academy in their public engagement. For an excellent analysis of the public role of contemporary mainline Protestants, see *THE QUIET HAND OF GOD: FAITH-BASED ACTIVISM AND THE PUBLIC ROLE OF MAINLINE PROTESTANTISM* (Robert Wuthnow and John H. Evans eds. 2002)[cited hereafter as *QUIET HAND OF GOD*]. For an impressive study of mainline Protestant influence on New Deal legislation, see MICHAEL JANSON, *LIBERAL PROTESTANTISM AND THE NEW DEAL* (unpublished dissertation, University of Pennsylvania 2006).

<sup>11</sup> Originalism is standard fare in the Christian legal defense funds and other organizations that emphasize Christian perspectives on law. The instruction provided at the Center for Christian Statesmanship, an institute for politics and religion in Washington DC, and at the Blackstone Institute, a Christian think tank and legal fund headquartered in Texas, for instance, relies heavily on originalism.

for anti-intellectualism.<sup>12</sup> Perhaps evangelicals, as a slew of recent books and articles darkly suggest, systematically discourage scholarly inquiry.<sup>13</sup> This explanation is closer to the mark, but it begs more questions than it answers. How, for instance, can the charge of anti-intellectualism be squared with the recent proliferation of Christian think tanks, legal defense funds, and law schools? And to describe evangelicals as anti-intellectual doesn't explain when this tendency emerged, and why. Nor does it explain the absence of Catholic legal scholarship in the leading law reviews for most of the twentieth century.

Only against the backdrop of the fraught relationship between religion and American higher education starting in the late nineteenth century can we fully make sense of the strange trajectory of Christian legal scholarship. As the nation's modern research universities emerged in the 1870s, leading reformers began to promote nonsectarian, scientific approaches to scholarship. Although many of the reformers were themselves (liberal Protestant) Christian, their reforms increasingly excluded religion from universities and law schools altogether. Within a few decades, these trends hardened into an aversion to religion in scholarly discourse that lingered well into the twentieth century.

The absence of Christian legal scholarship, especially evangelical legal scholarship, can't simply be chalked up to secular hostility, however. After campaigning for one social cause after another in the nineteenth century, from abolition to Sunday closing laws,<sup>14</sup> American evangelicals absented themselves from American public life for much of the twentieth. Starting in roughly 1925, the year of the Scopes "monkey" trial and the death of populist evangelical William Jennings Bryan, evangelicals' "optimistic prospects for reform and [their] support for activist government," as a prominent religious historian puts it, "gave way to cultural pessimism and a fear of governmental encroachment. Concern for political involvement was replaced with an almost exclusive focus on personal evangelism and personal piety."<sup>15</sup> Not until the 1970s

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<sup>12</sup> This indictment was most famously leveled in RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1962). For a recent reiteration, see, e.g., Franklin Foer, *Brain Trust*, *NEW REPUB.*, Nov. 14, 2005 (suggesting that "[e]vangelicals supply the political energy [in religious right politics], Catholics the intellectual heft").

<sup>13</sup> Books and articles raising concerns about American evangelicals on these and other grounds include Foer, *supra* note 12; Damon Linker, *Without a Doubt: The Christianizing of America*, *NEW REPUB.*, April 3, 2006; RANDALL BALMER, *THY KINGDOM COME: HOW THE RELIGIOUS RIGHT DISTORTS THE FAITH AND THREATENS AMERICA—AN EVANGELICAL'S LAMENT* (2006); MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (2006).

<sup>14</sup> For a useful history of these efforts, see GAINES M. FOSTER, *MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920* (2002).

<sup>15</sup> MARK A. NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* 165

did evangelical re-engagement with American culture begin in earnest. Only then, as *Newsweek* put it, did “large numbers of evangelicals ... step[] out of cultural isolation and [begin to assume] the burdens of political responsibility once exercised largely by mainline Protestants in consort with Jewish and Catholic leaders.”<sup>16</sup>

The legacy of this mutual alienation can be seen both in the relative absence of Christian legal scholarship, and in the few exceptions to the rule. Much as with African-Americans and race discrimination, theologically conservative Christians who wished to write faith-informed scholarship invariably found themselves writing about a single issue: the church-state issues governed by the religion clauses of the First Amendment. Aside from a handful of other areas— most notably, Catholic scholarship informed by the long tradition of natural law theory-- the church-state literature is almost the only place one can find extensive Christian legal scholarship. This literature wrestles with an important but quite narrow question, what kinds of religious expression are permissible in the public square?

What would a more robust Christian legal scholarship consider? First, scholars might draw on Christian scripture or tradition to address the overarching, normative question of what the secular legal system should and should not attempt to regulate. The working assumption of theologically conservative Christian activism on issues such as abortion, gambling or criminal punishment seems to be that the law should promote morality by prohibiting immoral or sinful behavior. But the law obviously can’t punish every sin: if it could, we would be putting people in jail for their angry or lustful thoughts. One might expect to find a rich legal literature discussing and debating more nuanced Christian conceptions of the proper role of the secular law. But one doesn’t.<sup>17</sup>

Not all legal scholarship is normative, of course. One of the most influential recent developments in the legal, economic, and political science literature is the emergence of institutional economics and public choice.<sup>18</sup> This literature, much of it wholly descriptive, has shed enormous light on the mechanisms of interest group influence, and on the nature of institutional and political decision making. It offers obvious promise as a way to examine the influence of theologically conservative Christians on legislative and judicial decision making in the United States. One might expect to find a rich legal literature using public choice and related scholarship to explore

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(1994)[cited hereafter as SCANDAL].

<sup>16</sup> Woodward, *supra* note 8, at 70.

<sup>17</sup> Again, almost the only exceptions come not from Protestant evangelicals but from the natural law tradition in Catholicism. Recent natural law theory is briefly surveyed in Part III(A), *infra*.

<sup>18</sup> For a general overview of this literature, see David A. Skeel, Jr., *Public Choice and the Future of Public Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997).



whether this influence operates through opinion leaders such as James Dobson or Chuck Colson, through church networks or through other, nonchurch organizations; whether it is ideologically or economically driven; and whether the influence (or its absence) manifests itself differently on different issues. Once again, one does not.

That's the bad news, at least for those of us who care deeply about the relationship between theologically conservative Christianity and American law. The good news is that these gaps in the literature do not seem likely to endure. The current political environment has created a demand for insights into how theologically conservative Christians view the secular law and into the mechanisms of their influence. My expectation, and my hope, is that scholars will soon start to fill this vacuum. As we shall see, there are hints that this shift may already be underway.

The remainder of the Article proceeds as follows. Part II describes the dearth of Christian legal scholarship and develops a historical explanation for this absence. Part III surveys the four limited areas where one does find important Christian legal scholarship, including the church-state literature, natural law and international human rights, Christian lawyering and Christian legal history. I conclude that part by developing a simple definition of Christian legal scholarship, arguing that it: 1) must provide either a normative theory derived from Christian scripture or tradition; or a descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity; and 2) must seriously engage the best secular scholarship treating the same issues. With Part IV, the Article shifts to a more constructive mode, from telling to showing, as I attempt to illustrate what a normative, and then a descriptive, Christian legal scholarship might look like. Part IV develops the normative argument that Christian scripture calls for a more diffident use of secular law than the "law-as-morality" perspective assumes. I use Bono and the debt relief campaign to explore the mechanisms of Christian influence in Part V, and offer a brief conclusion in Part VI.

## II. WHY SO LITTLE CHRISTIAN LEGAL SCHOLARSHIP?

Until very recently, legal scholars have stayed almost entirely on the sidelines as the political and legal influence of theologically conservative Christians has increased. Outside of a small handful of areas, each discussed in the next part, there has been very little reflection in the scholarly legal literature on the relationship between Christianity and the secular law. The most prominent exceptions to this vacuum are two recent books. Both were published this decade; both underscore as much as dispel the strange absence of a rich body of Christian legal scholarship throughout the entire twentieth century.

In 2001, Michael McConnell, Robert Cochran and Angela Carmella published *Christian Perspectives on Legal Thought*, a collection of essays by twenty-eight legal

scholars.<sup>19</sup> The essays range from historical studies of classical liberal theory and marriage law, to Calvinist or Anabaptist or Catholic perspectives on particular legal issues, to a great deal of shop-talk: Christian assessments of legal academia and the various movements that have dominated secular legal scholarship in recent years. A few of the essays are excellent, and *Christian Perspectives* is a pathbreaking experiment in possible Christian approaches. But the essays do not develop any particular thesis or set of theses about the relationship between Christianity and law.<sup>20</sup>

In 2005, a second book, *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, appeared.<sup>21</sup> The essays in this second book take a more unified tack. For the principal volume, the editors selected twenty figures from the three major Christian traditions— seven Catholic, eight Protestant, and five Orthodox, and commissioned essays exploring the legacy of each. (The second volume lets the twenty speak for themselves, providing a medley of excerpts culled from their writings). The twenty succinct intellectual biographies tell one story more than any other: the great twentieth century struggle to define an appropriate stance of Christian churches toward the state. In a century that saw European churches responding to totalitarianism in sometimes ambiguous ways, it is not surprising to find leading Christian figures worrying through theories of the state. What is far more surprising, particularly for a project whose principal focus is law,<sup>22</sup> and whose two editors are law professors, is that none of the twenty figures featured in *The Teachings of Modern Christianity* is a legal scholar, and the essays only rarely grapple with particular legal issues and legal systems. Does Christianity offer insights into the proper scope of the criminal law, or into the rise of administrative lawmaking in the twentieth century? What might a Christian perspective on gay rights and gay marriage or gambling regulation look like? We aren't told. Although the twenty subjects are singled out for their contributions on law, they have remarkably little to say about the kinds of issues the term "law" brings to mind for most of us. The chief exceptions, moreover, come from those known more for their social and

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<sup>19</sup> CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella eds. 2001).

<sup>20</sup> For a summary of the individual essays, and a superb review, see William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003).

<sup>21</sup> THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE (ed. John Witte & Frank S. Alexander)(2 volumes, 2005)[cited hereafter as THE TEACHINGS]. The discussion in this paragraph is drawn in part from a short review of the book. David A. Skeel, Jr., *What's Law Got to Do With It?*, BOOKS & CULTURE, July/Aug 2006, at 32.

<sup>22</sup> The two volumes of *The Teachings of Modern Christianity on Law, Politics and Human Nature* are the product of the "law" team, one of ten groups of specialists assembled by The Pew Charitable Trusts and the University of Notre Dame "to stimulate and support new scholarship on the place of Christianity in various fields of academic specialty." THE TEACHINGS, *supra* note 21, at xix.

political contributions than for scholarly ones: Susan Anthony's campaign for women's suffrage in the late nineteenth century, Martin Luther King and the Civil Rights movement.

The observations that the essays of *Christian Perspectives* lack coordinating themes, and that law figures hardly at all in *The Teachings of Modern Christianity*, should not be taken as criticisms of either book. Both are important scholarly contributions, as their frequent appearance in the footnotes of this Article will attest, and the essays in the latter are consistently superb. Instead, the two books are profoundly representative of the recent history of Christian legal scholarship in America: for most of the twentieth century, there was almost no Christian legal scholarship (the dog that doesn't bark in *The Teachings of Modern Christianity*); even now, it is not clear whether there is any "there there" (the lesson of *Christian Perspectives*).

#### A. *The Historical Hostility to Religious Perspectives*

What gives? Why, as the twentieth century progressed and the legal system came to play an increasingly prominent role in American life, do we not see a similar growth in Christian legal reflection on law and legal issues? As noted in the Introduction, the most obvious explanations—that Christian legal theory is a subsidiary of conservative legal thought, that American evangelicals are anti-intellectual—are unsatisfying. The editors of *The Teachings of Modern Christianity* offer a more plausible, historically informed explanation drawn from the evolution of Anglo-American legal education.<sup>23</sup> The explanation is incomplete, as we shall see, but it begins to make sense of the puzzling absence of Christian legal scholarship.

Starting in the mid nineteenth century, the editors write, a "new legal movement—known variously as legal positivism, legal formalism, and analytical jurisprudence—sought to reduce the subject matter of law to its most essential core." Generally identified with John Austin in England and Christopher Columbus Langdell in the U.S., the legal positivists insisted that law "is simply the concrete rules and procedures posited by the sovereign and enforced by the courts. Many other institutions and practices might be normative and important for social coherence and political concordance. But they are not law."<sup>24</sup> "This positivist theory of law," they continue, "which swept over American universities from the 1890s onward, rendered legal study increasingly narrow and insular... Legal study was simply the analysis of the rules that were posited, and their

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<sup>23</sup> Although this Article focuses on the absence of Christian legal reflection in American law schools, the pattern in Great Britain is similar. See, e.g., GEORGE M. MARSDEN, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* 21 (1997)(citing and discussing the account given in ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL INQUIRY* (1990))[cited hereafter as *OUTRAGEOUS IDEA*].

<sup>24</sup> *THE TEACHINGS*, *supra* note 21, at xxii-xxiii.

application in particular cases. Why these rules were posited, whether their positing was for good or ill, how these rules affected society, politics, or morality were not relevant questions for legal study.”<sup>25</sup> In this account, then, the absence of Christian reflection on legal issues can be traced to the lingering effects of legal positivism, and the positivists’ campaign to establish law as a science, a self-contained system disconnected from the messy world of politics, religion or culture.

It isn’t simply that the narrow legal positivism associated in the US with Langdell crowded out the consideration of other perspectives on law, however, and that Christian reflection was a casualty of the positivists’ austere, formalistic vision. Throughout the twentieth century, this narrow legal positivism jostled for supremacy with alternative perspectives that were explicitly interdisciplinary and often nonpositivist in orientation. In the 1930s, the Legal Realists insisted that legal scholars needed to consider sociology, economics, psychology and even anthropology if they wished to fully understand the law.<sup>26</sup> In the 1970s, Critical Legal Studies, drawing on continental philosophy and literary criticism, among other resources, insisted that the law is inherently political, an insight that paved the way for feminist, race-based and other perspectives.<sup>27</sup> Throughout the century, there were even scholars, such as Lon Fuller and later Ronald Dworkin, who insisted that the law is inherently moral.<sup>28</sup>

But religion was different. In the 1970s, one of the few legal scholars who contended that religion has contemporary as well as historical relevance for law was Harold Berman, then a professor at Harvard Law School. When his book *The Interaction of Law and Religion* appeared in 1974, Berman sent copies to each of his colleagues.<sup>29</sup>

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<sup>25</sup> *Id.* at xxiii.

<sup>26</sup> Although Legal Realism was often viewed as positivist, especially by critics such as Lon Fuller, this was a matter of ongoing debate. Llewellyn, for instance, was careful to insist that the separation of “is” from “ought” in Legal Realist inquiry was only temporary. Moreover, the sociological jurisprudence that preceded Realism and the movements that challenged or succeeded it were often non-positivist. *See generally* Roscoe Pound, *Jurisprudence*, in *THE HISTORY AND THE PROSPECTS OF THE SOCIAL SCIENCES* 444, 458 (H. Barnes, ed. 1925)(suggesting that the sociological jurisprudents were “chiefly positivists or neo-realists”); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 *VA. L. REV.* 999 (1972)(comparing the Realists’ skepticism of moral values to the moralism in Roscoe Pound’s sociological jurisprudence).

<sup>27</sup> The classic anthology on this theme is *THE POLITICS OF LAW* (David Kairys, ed.).

<sup>28</sup> As we shall see, Fuller even characterized his approach as having a “natural law” orientation and served on the advisory board of the Natural Law Forum. But his was an explicitly secular natural law. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 660 (1958); Charles L. Palms, *The Natural Law Philosophy of Lon Fuller*, 11 *CATH. L.* 94, 112 (1965).

<sup>29</sup> HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

None of them acknowledged the gift. “It was simply an embarrassment to them,” he recalled with a hint of bitterness, “for a colleague to link law with religion, and especially with Christianity.”<sup>30</sup> Even as non-positivist approaches proliferated in the legal literature, most legal academics assumed that religion had little to offer for the study of law and legal issues.

There was a great historical irony in this disinterest in religion: many of the university leaders who ushered in the perspective were themselves genuinely religious, theologically liberal Protestant Christians. “Most of the first generation of university builders” who transformed American higher education in the last third of the nineteenth century, historian George Marsden has written, “were New Englanders who had grown up during the Civil War era and were inspired by ideals that paralleled those of the Yankee cause in the Civil War.”<sup>31</sup> For the university builders, the central theme was freedom. “In their view,” as Marsden puts it, “freedom was an outgrowth of the best in the Protestant tradition as opposed to Catholic authoritarianism.”<sup>32</sup>

In defending his decision to permit students to choose their own courses in the 1880s, for instance, Harvard President Charles Eliot argued that “[t]he elective system is in the first place, an outcome of the spirit of the Protestant Reformation. In the second place, it is an outcome of the spirit of political liberty.”<sup>33</sup> To honor both, he believed, the university should promote unfettered inquiry and the most up-to-date scientific thought. Although traditional religious inquiry was excluded, he and other university leaders did not believe the exclusion undermined Christianity. “Rather,” as Marsden puts it, “they believed that scientific investigation would advance civilization and hence promote the kingdom of God.”<sup>34</sup>

Starting in 1870, Christopher Columbus Langdell—who, though not identifiably religious himself, had been handpicked by Eliot to run Harvard’s law school-- had applied similar principles to legal education, devising a systematic, case-oriented

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What made Berman’s book distinctive was not so much the historical claim that law and religion have influenced one another, as his claim, noted in the text, that religion has contemporary relevance for law.

<sup>30</sup> Harold J. Berman, *Forward*, in *CHRISTIAN PERSPECTIVES*, *supra* note 19, at xi, xii.

<sup>31</sup> *MARSDEN, OUTRAGEOUS IDEA*, *supra* note 23, at 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Quoted in* GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* 188 (1994)[cited hereafter as *SOUL OF THE UNIVERSITY*].

<sup>34</sup> *MARSDEN, OUTRAGEOUS IDEA*, *supra* note 23, at 14-15.

approach to law that divided legal doctrine into principles and categories. Legal scholars systematically analyzed judicial cases to determine the key principles that animated a given area of the law. These principles could then be applied to any subsequent dispute that arose. “If law be not a science,” he wrote in defense of his method:

a university will consult its own dignity in declining to teach it. If law be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it.<sup>35</sup>

By the 1910s and 1920s, Langdellian legal science was itself derided as too metaphysical and quasi-religious—as insufficiently scientific—by a new generation of legal scholars. Roscoe Pound dismissed the Langdellian approach as “mechanical jurisprudence;” to the Legal Realists, it was “transcendental” nonsense.<sup>36</sup> A truly scientific approach, both argued, must look beyond the cases and rules. It must bring the insights of the sociology and other human sciences to bear. Religion was almost entirely ignored by both, especially the Realists, many of whom were fascinated with psychological insights but skeptical of traditional morality.<sup>37</sup> Although the Realists began to place more emphasis on morality later in the 1930s, when the emergence of totalitarian regimes in Europe called their apparent moral indifference into severe question, the new interest in moral values never extended to religion. Nor did the interest in religious perspectives increase after the Realists were succeeded by other American legal movements. “Residual prejudices against religious viewpoints as inherently unscientific,” as George Marsden has argued about the academic world more generally, “seem[ed] to persist as a dominant academic paradigm” throughout the twentieth century.<sup>38</sup>

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<sup>35</sup> Quoted in Thomas C. Grey, *Langdell's Oxthodoxy*, 45 U. PITT. L. REV. 1, 38 (1983). Langdellian legal science swept the nation's leading law schools, but not so early as is often supposed. “[T]he ultimate triumph of that system,” Konefsky and Schlegel have written, “was not apparent until at least 1910 when the West Publishing Company thought that the market was large enough to support an entire series of case books.” Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 837 (1982).

<sup>36</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

<sup>37</sup> These tendencies seem to have been linked. “The thrust of behaviorial science research,” Ted White has written, “was that human behavior was idiosyncratic and often irrational and that external sanctions on personal actions were actually products of an individual's own psyche. This insight was subversive of collective behavior standards based on external phenomena, such as religious or moral beliefs.” White, *supra* note 26, at 1015.

<sup>38</sup> MARSDEN, OUTRAGEOUS IDEA, *supra* note 23, at 27. For a still more recent

One revealing, though admittedly rough, measure of the absence of religious perspectives in legal scholarship is the articles published in the leading law reviews over the course of the twentieth century. To assess the relative visibility of Christian legal scholarship, I surveyed the articles in the elite law reviews from 1900 (or the year when the review began, whichever was later) to 2000.<sup>39</sup> Although articles that might qualify as Christian legal scholarship occasionally appeared in leading reviews in the opening decade or so of the century,<sup>40</sup> religious perspectives almost entirely disappear after this.<sup>41</sup> The one exception, not surprisingly, is articles debating the First Amendment cases decided by the Supreme Court in the late 1940s and thereafter.<sup>42</sup> Even these articles,

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sounding of this theme, see C. John Sommerville, *The Exhaustion of Secularism*, CHRONICLE OF HIGHER EDUCATION, June 9, 2006 at B6 (noting that “the great bulk of the American population identifies itself as religious, while universities make a point of not recognizing any such point of view”). For a critique of Marden’s claim, BALMER, *supra* note 13, at 142 (“Contrary to Marsden’s assertions, people of faith are welcome in [America’s universities], but they have to compete on an equal footing in the marketplace of ideas”). For a largely sympathetic account of the secularization of law academia in the twentieth century as of the late 1960s, see Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

<sup>39</sup> For the first half of the twentieth century, the elite law reviews were *Harvard Law Review*, *Columbia Law Review*, and *Yale Law Journal*, so I began with these reviews. I initially looked at the titles of the articles. If the title suggested that an article might possibly draw on Christianity or Christian perspectives (if it included the word “moral” for instance, or alluded to the Bible or religion), I looked at the article itself. In order to obtain a somewhat broader sense of the trends in leading law reviews, I also surveyed *Michigan Law Review*, *University of Chicago Law Review* (as well as *Illinois Law Review*, which was published by Northwestern and Chicago in the early twentieth century), *University of Pennsylvania Law Review*, *Virginia Law Review*, and *California Law Review*. In future work, the study will be expanded to develop a comparison between the most elite and other law reviews.

<sup>40</sup> See, e.g., Charles Foster Kent, *A Tentative Codification of the Old Testament Laws*, 15 YALE L.J. 284 (1905-1906); John Marshall Gest, *The Influence of Biblical Texts on English Law*, 59 U. PENN. L. REV. 15 (1910); Clarence A. Lightner, *The Mosaic Law*, 10 MICH. L. REV. 108 (1911); Carl Zollman, *Religious Liberty in the American Law*, 17 MICH. L. REV. 355 (1919). The Kent and Lightner articles reflect the theologically liberal perspective of nineteenth century critical scholarship on the Bible.

<sup>41</sup> An intriguing exception-that-proves-the-rule is William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 YALE L.J. 191 (1925), which explores the act that gave rise to the Scopes trial. Before embarking on an analysis of Constitutional problems with the act, Waller attributed its enactment to three factors: “(1) an aggressive campaign by a militant minority of religious zealots of the ‘Fundamentalist’ faith; (2) lack of knowledge of modern scientific and religious thought in the rural districts which control Tennessee politically; (3) political cowardice and demagogy.” *Id.* at 191.

<sup>42</sup> For a prominent example outside the reviews I surveyed, see *Symposium on Religion*

moreover, generally are not written from an identifiably religious perspective and often do not draw on the insights of Christianity or other religions.<sup>43</sup> Overall, the more quantitative assessment of this study confirms what our qualitative analysis would have predicted: the leading law reviews published very few articles that could be described as Christian legal scholarship during the course of the twentieth century.

### B. The Wages of Evangelical Anti-Intellectualism

It would be a mistake to attribute the dearth of Christian legal scholarship solely to the academy's disinterest in religious perspectives, however. The disdain did not run in one direction only. Secular academics may have closed the door, but for much of the twentieth century, theologically conservative Christians weren't asking anyone to let them in. Especially was this so with Protestant evangelicals.

The late nineteenth century assumption that science and nondoctrinal Christianity went hand-in-glove was one of two very different Christian responses to modernity. Rather than embracing Darwinism and the new "higher" criticism of the Bible, as did the education reformers and their theological counterparts in the Social Gospel movement,<sup>44</sup> theologically conservative Christians confronted these developments head on.<sup>45</sup> The subset of evangelicalism known as fundamentalism is often dated to 1910, when a group of American and British Christians began publishing *The Fundamentals*, a defense of

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*and the State*, 14 L. & CONTEMP. PROBS. 1-159 (1949).

<sup>43</sup> Some of them do, however, qualify as Christian legal scholarship under the definition I propose in Part III(E), *infra*.

<sup>44</sup> The Social Gospel was an optimistic movement whose leading figures campaigned for social reform, downplayed the supernatural aspects of Christian scripture, and expected continuing progress in human affairs. The movement, which was in some respects the forerunner to the Progressive movement, and key proponents such as Walter Rauschenbusch and Shailer Mathews are chronicled in GARY DORRIEN, *SOUL IN SOCIETY: THE MAKING AND RENEWAL OF SOCIAL CHRISTIANITY* (1995). For an excellent recent biography of Rauschenbusch, see CHRISTOPHER EVANS, *THE KINGDOM IS ALWAYS COMING: A BIOGRAPHY OF WALTER RAUSCHENBUSCH* (2004).

<sup>45</sup> The clash between Christian liberalism and the theologically orthodox was reflected in Daniel Coit Gilman's university presidencies at Berkeley and then Johns Hopkins. During Berkeley's founding years, Gilman fended off the barbs of theologically conservative critics who complained about the absence of religion at university ceremonies in 1873. MARSDEN, *OUTRAGEOUS IDEA*, *supra* note 23, at 27. When he headed East to serve as the inaugural president of Johns Hopkins, Gilman was excoriated by orthodox Christians for inviting the prominent Darwinian Thomas Huxley to give a public lecture shortly after the university opened. MARSDEN, *SOUL*, *supra* note 33, at 151-52 (noting that the editors of the *Christian Advocate* "suggested that the Hopkins board should perhaps 'retrace their steps, repent of their sins, make their peace with God and give their university a Christian management.'")



theological orthodoxy and assault on modernity that filled twelve paperback volumes by 1915.<sup>46</sup> The fundamentalists of this era weren't ones to duck a cultural fight. Indeed, a leading historian defines a fundamentalist as "an evangelical who is militant in opposition to liberal theology in the churches or to changes in cultural values or mores, such as those associated with 'secular humanism.'"<sup>47</sup>

One of the last notable legislative victories in which evangelicals and fundamentalists participated during this era was Prohibition, enacted in 1919. By the mid 1920s, with the death of William Jennings Bryan and the failure of Prohibition, evangelicals had begun to abandon the cultural battlegrounds and to turn resolutely inward. In the churches, many evangelicals left the major denominations rather than fighting for doctrinal orthodoxy; in politics, their campaigns for reform "gave way to cultural pessimism and a fear of governmental encroachment."<sup>48</sup>

In the universities, the disappearing act had begun even earlier. Populist in orientation, evangelicals had long defined themselves against the intellectual elite, generally thumbing their nose at secular learning. The relationship between William Jennings Bryan and Roscoe Pound is revealing in this regard. The two met at least once, as opposing counsel in a Nebraska courtroom, but seem to have had an instinctive distaste for each other and their respective constituencies. Pound "found the raw protest of lower class reform distasteful," according to his biographer, and "Bryan's people" had little time for the intellectual establishment.<sup>49</sup> By the mid 1920s, as the broader retrenchment began, evangelicals were nowhere to be found in American academia. No doubt there were at least a few evangelical law professors, but their presence is not reflected in any discernible way in the legal literature.

The first hints of an end to the evangelicals' hibernation from American public life came in the 1940s. Harold Ockenga, the longtime pastor at Park Street Church in Boston, as well as the president at various times of Fuller Theological Seminary in California and Gordon-Conwell Theological Seminary outside of Boston, promoted a

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<sup>46</sup> THE FUNDAMENTALS: A TESTIMONY TO TRUTH, 12 VOLS. (1910-15). For discussion, see, e.g., GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM 41 (1991).

<sup>47</sup> MARSDEN, *supra* note 46, at 1. In addition to their reaction against modernity, fundamentalists have tended to adopt an extreme literalist stance toward Biblical interpretation. For discussion, see, e.g., NOLL, SCANDAL, *supra* note 15, at 123-26. Fundamentalists also were quicker to abandon the mainline denominations in the early twentieth century than other evangelicals.

<sup>48</sup> NOLL, SCANDAL, *supra* note 15, at 165.

<sup>49</sup> DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 71 (1974). The (non)relationship of Bryan and Pound is discussed in more detail in David A. Skeel, Jr., *The Paths of Christian Legal Scholarship* (unpublished manuscript, 2007).

“‘new evangelicalism’ that would value scholarship and take an active interest in society while maintaining traditional Protestant orthodoxy.”<sup>50</sup> Carl Henry, a reporter, seminary professor and later the first editor of the magazine *Christianity Today*, sounded the same themes as Ockenga in a 1947 manifesto called *The Uneasy Conscience of Modern Fundamentalism*. “The troubled conscience of the modern liberal,” Henry wrote, “growing out of his superficial optimism, is a deep thing in modern times. But so is the uneasy conscience of the modern Fundamentalist, that no voice is speaking today as [the Apostle] Paul would, either at the United Nations sessions, or at labor-management disputes, or in strategic university classrooms.”<sup>51</sup> Henry called for an end to fundamentalism’s “embarrassing divorce from a world social program.”<sup>52</sup> Theologically conservative Christians “must offer a formula for a new world mind with spiritual ends, involving evangelical affirmations in political, economic, sociological, and educational realms, local and international.”<sup>53</sup> In the academic setting, evangelicals needed to “contend for a fair hearing for the Christian mind,” and to “develop a competent literature in every field of study, on every level from the grade school through the university.”<sup>54</sup>

Ockenga, Henry and a handful of others, bolstered by the encouragement and support of Billy Graham, founded a series of important evangelical institutions, including the National Association of Evangelicals in 1942, Fuller Theological Seminary in 1947, and *Christianity Today* in 1957.<sup>55</sup> These institutions, each of which remains prominent today, laid the foundation for an evangelical voice in American public life. So too did a series of Supreme Court decisions— most prominently, the school prayer decisions of the 1960s— which evangelicals perceived as threatening. But the full flowering of this re-engagement did not come until several decades later, in the 1970s.

One of the lightning rods for the true re-emergence of evangelicals was the Supreme Court’s enshrinement of abortion rights in its 1973 *Roe v. Wade* decision, although *Roe* did not become an evangelical bete noir until late in the decade.<sup>56</sup> Another

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<sup>50</sup> *Id.* at 213.

<sup>51</sup> CARL F.H. HENRY, *THE UNEASY CONSCIENCE OF MODERN FUNDAMENTALISM* 34 (1947). In keeping with the usage of the time, Henry treated the terms “evangelical” and “fundamentalist” as completely interchangeable. His call for Christian re-engagement in social issues marks him as what we would now call an evangelical.

<sup>52</sup> *Id.* at 76.

<sup>53</sup> *Id.* at 68.

<sup>54</sup> *Id.* at 70.

<sup>55</sup> See, e.g., MARSDEN, *UNDERSTANDING FUNDAMENTALISM*, *supra* note 46, at 69-73.

<sup>56</sup> George Marsden, *The Sword of the Lord: How ‘Otherworldly’ Fundamentalism Became a Political Power*, *BOOKS & CULTURE*, March/April 2006, at 10, 11.

was the debate over states' ratification of the Equal Rights Amendment, which activists like Phyllis Schaeffly successfully portrayed as a threat to the traditional family structure.<sup>57</sup> Other key events included singer Anita Bryant's campaign to overturn a Miami-Dade County law that protected gay rights, and an IRS challenge to the tax exempt status of Bob Jones University and other Southern Christian schools on racial discrimination grounds.<sup>58</sup>

The most visible representatives of the new evangelical activism were the Moral Majority, which was formed by Jerry Falwell in 1979; and later Pat Robertson's Christian Coalition. The intellectual heft, however, came from a small group of less widely known evangelicals who were the direct intellectual heirs of Henry and Ockenga. Of these, the most important was Francis A. Schaeffer.

A Presbyterian minister who started his career as a pastor in St. Louis, Schaeffer established a Christian retreat center known as L'Abri at a small mountain cabin in Switzerland. Western culture, he argued, has abandoned its Christian origins and drifted into a pervasive humanism that devalues life and eschews moral absolutes. It was Schaeffer who singled out *Roe v. Wade* as a particularly dire illustration of the culture gone amok, and helped turn the case into a focal point of evangelical activism, most famously with a film series (co-produced with C. Everett Koop) called *Whatever Happened to the Human Race?*, which made the rounds of evangelical churches throughout the U.S. and Britain.

Although Schaeffer railed most angrily at the prevailing culture, he also directed his ire inward, at his fellow evangelicals— particularly evangelical lawyers. “Now I have a question,” he wrote in *A Christian Manifesto*. “In the shifts that have come in law [from Christian conceptions of truth to relativistic pluralism], where were the Christian lawyers ...?”<sup>59</sup> “[W]e must say,” he concluded, “that the Christians in the legal profession did not ring the bell, and we are indeed very, very far down the road toward a totally humanistic culture.”<sup>60</sup> While Schaeffer recognized that “there are going to be people who

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<sup>57</sup> See, e.g., *id.* Marsden notes that Schlafly was one of the first Catholics “to effectively reach across the long-standing divide” between Catholics and evangelical Protestants.

<sup>58</sup> *Id.* The fight over the schools is viewed by many as having been the most important stimulus for evangelical activism. See, e.g., NO LONGER EXILES: THE RELIGIOUS NEW RIGHT IN AMERICAN POLITICS 26 (ed. Michael Cromartie 1993)(statement by conservative activist Paul Weyrich that “[w]hat caused the movement to surface was the federal government’s moves against Christian schools,” rather than school prayer or abortion); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 340 (2001) (attributing evangelical activism to proposed IRS regulations that “would have presumed that schools begun during a period of desegregation were segregationist”).

<sup>59</sup> FRANCIS A. SCHAEFFER, *A CHRISTIAN MANIFESTO* 47 (1981).

<sup>60</sup> *Id.* at 49.

say, ‘don’t use the legal and political means, just show the Christian alternatives,’” he insisted that sticking to spiritual rather than worldly responses “is absolutely utopian in a fallen world, and specifically in a world such as ours at the present moment.”<sup>61</sup>

Other evangelicals sounded similar themes. In the late 1970s and 1980s, after his dramatic jailhouse conversion, Watergate felon Chuck Colson founded the evangelistic prison ministry Prison Fellowship and chronicled his spiritual journey in a series of widely read books.<sup>62</sup> Colson’s example, as well as his call for Christian engagement, sent the message that evangelicals could make a difference in law, business, or politics. In 1984, the Lutheran-turned-Catholic Richard John Neuhaus published *The Naked Public Square*, a call to arms decrying the perceived exclusion of religious voices from the political debate.<sup>63</sup> By the 1980s, the era of evangelical retrenchment was a fading memory.

A similar message has percolated into the academic setting, but the diffusion has been much slower. In the 1980s and 1990s, and even today, evangelicals cannot be said to have fully achieved Carl Henry’s vision for “a competent [Christian] literature in every field of study, on every level from the grade school through the university.”<sup>64</sup>

### C. Catholic Legal Scholarship: Hidden in Plain Sight

The trajectory of Catholic legal scholarship over the course of the twentieth century was quite different from that of evangelicals, yet with the same overall result. Unlike with evangelicals, Catholic scholarship never disappeared. Drawing on the Neothomist natural law tradition inaugurated by Pope Leo XIII’s writings at the end of the nineteenth century, Catholic scholars produced serious, faith-inflected scholarship throughout the twentieth century. The most influential scholarship in this vein came outside the law school context, as exemplified by writings of theologian and philosopher Jacques Maritain and theologian-political scientist John Courtney Murray. But an extensive body of Catholic legal scholarship also emerged, particularly in the second half

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<sup>61</sup> *Id.* at 133. Schaeffer’s manifesto directly inspired John Whitehead and Schaeffer’s son Franky Schaeffer to start the Rutherford Institute, a Christian legal defense fund, and it can be seen as the indirect inspiration for other defense funds such as the American Center for Law & Justice (ACLJ), whose chief counsel is Jay Sekulow. Whitehead’s own manifesto is JOHN WHITEHEAD, *THE SECOND AMERICAN REVOLUTION* (1982). The leading evangelical defense funds are described and analyzed in STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* 27-45 (2002).

<sup>62</sup> *See, e.g.*, CHARLES W. COLSON, *BORN AGAIN* (1976); CHARLES W. COLSON, *LOVING GOD* (1983).

<sup>63</sup> RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (1984).

<sup>64</sup> HENRY, *supra* note 51, at 70.

of the century after Notre Dame started its Natural Law Institute in 1947 and with the advent in 1955 of *The Catholic Lawyer*.<sup>65</sup>

Yet this writing had little effect on American legal scholarship, and it was conspicuously absent from the elite law reviews.<sup>66</sup> In part, the absence of Catholic legal scholarship can be traced to the same tendencies described earlier. In the quest to establish law as a scientific discipline, reformers consciously excluded religion, and the disinterest in religious perspectives endured for decades thereafter. Indeed, natural law scholarship was singled out for particular disapproval because it was viewed, rightly or wrongly, as responsible for the perceived doctrinal rigidities of the nineteenth century.<sup>67</sup>

With Catholic legal scholarship, an additional factor came into play as well. The Catholic church faced sustained criticism from American intellectual elites for much of the century. Catholics, according to the standard indictment, isolated themselves from other Americans and answered to an authoritarian church hierarchy that was inimical to democracy.<sup>68</sup> The criticism intensified shortly before and during World War II, when the church's support for or acquiescence in fascist regimes in Spain and elsewhere seemed to confirm that the church had authoritarian, anti-democratic tendencies.<sup>69</sup> This debate had occasional reverberations in the legal literature. *Everson v. Board of Education*,<sup>70</sup> for instance, the 1947 Supreme Court decision that busing Catholic children to parochial schools did not violate the First Amendment, spawned a large literature. But it seems

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<sup>65</sup> See, e.g., Edward F. Barrett, *The Notre Dame Experiment*, 2 CATH. L. 294 (1956)(describing the founding of the Natural Law Institute).

<sup>66</sup> One of the few articles in my study of leading law reviews that reflected a distinctively Catholic perspective appeared in the *Virginia Law Review*. Brendan F. Brown, *The Canon Law of Marriage*, 6 VA. L. REV. 70 (1939).

<sup>67</sup> See, e.g., Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 465 (1909)(criticizing the Constitutional law of his time as “full of natural law notions”); Oliver Wendell Holmes, Jr., *Natural Law*, 62 HARV. L. REV. (1918). The extent to which natural law did in fact shape American law in the nineteenth century has been questioned. See, e.g., Robert W. Gordon, *The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1239-40 (1995).

<sup>68</sup> A study of Philadelphia's Polish Catholics overseen by the prominent philosopher John Dewey in the 1910s concluded, for instance, that Polish Catholicism “is a world which is simply not our world, a world in which independent criticism and disinterested science is and must remain unknown.” The root cause was the church itself, which posed a “many-sided and in some ways impossible barrier to the real democratization of the communities it controls.” Quoted in JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 169 (2003).

<sup>69</sup> *Id.* at 171-73.

<sup>70</sup> 330 U.S. 1 (1947).

unlikely that a distinctively Catholic perspective on these issues would have been welcome in the leading law reviews. Even after tensions between American liberal intellectuals and Catholics began to thaw starting in the late 1950s, Catholic legal scholarship was largely confined to Catholic law journals.

A remarkable illustration both of the existence Catholic legal scholarship and of its exclusion from the elite law reviews came during a critical backlash against Oliver Wendell Holmes during the turbulent years of the 1940s. The tendencies for which Holmes had been lionized by the Legal Realists and others—his skepticism of morality, his insistence that the life of the law is experience, not logic—were sharply criticized by several Jesuit scholars.<sup>71</sup> Holmes' claim that the law has no moral content, they argued, would leave no moral resources for combating the horrific totalitarian regimes that were sprouting in Europe. Or in the more incendiary language of the most prominent of the articles: "This much may be said for Realism. If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct."<sup>72</sup>

In 1951, Harvard Law Professor and future Holmes biographer Mark DeWolfe Howe rallied to Holmes' defense in the pages of the *Harvard Law Review*, arguing that Holmes' most notorious statements, which seemed to reflect a thorough-going positivism, had been misconstrued by his critics.<sup>73</sup> For present purposes, two aspects of

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<sup>71</sup> John C. Ford, S.J., *The Fundamentals of Holmes' Juristic Philosophy*, in PHASES OF AMERICAN CULTURE 51 (1942); Francis E. Lucey, S.J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942). See also Kennedy, *Realism, What Next?*, 7 FORD. L. REV. 208 (1938).

For a discussion of the neo-Thomist revival in Catholic law schools and universities that inspired the challenges to Holmes and legal realism, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 159-78 (1973)(citing the work of the American Catholic Philosophical Association, which added a roundtable on philosophy and law to its annual meetings as of 1933, and the publication in 1938 of the third addition of Father Francis P. Le Buffe's *Jurisprudence*, as important early developments). The Catholic criticism of Holmes came at a time when the church was defending itself against the charges noted earlier, and Catholic scholars sought to demonstrate the compatibility of Catholicism and American democracy. See, e.g., MCGREEVY, *supra* note 68, at 192 (Catholics defended their church "as more American than mid-twentieth century liberals, as the rightful descendants of Thomas Jefferson and James Madison").

<sup>72</sup> Lucey, *supra* note 71, at 531. For similar criticism of Holmes in less scholarly venues, see, e.g., Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A.J. 569 (1945)("The fact that Holmes was a polished gentleman who did not go about like a storm-trooper knocking people down and proclaiming the supremacy of the blond beast should not blind us to his philosophy that might makes right, that law is the command of the dominant social group.") See also Ben W. Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946).

<sup>73</sup> Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951).

the critique of Holmes's legacy and of Howe's elegant defense are especially striking. First, as already noted, none of the distinctively Catholic contributions appeared in a then-elite law review. Although the leading law reviews devoted countless pages to writings by (and about) Holmes and the Legal Realists, and by critics such as Lon Fuller, none of the writings reflected a Catholic perspective. The Catholic response was confined to Catholic legal journals and the law reviews of Catholic law schools.<sup>74</sup>

Second, and related, although the principal response to Holmes's skepticism of traditional morality was characterized as natural law, both its proponents and critics like Howe emphasized that the natural law in question was divorced from the divine.<sup>75</sup> The living end of the theological and philosophic tradition of natural law, at least as perceived by American legal scholars, was secular in nature. After noting that Fuller and other scholars "are encouraging the revival of natural law," for instance, Howe quickly added that these scholars "do not ask us to receive it with all its implications of divine authority."<sup>76</sup> Howe himself was skeptical even of this nontheological natural law. "If we should accept it," he concluded, "are we not likely soon to find ourselves not only allied with those who repudiate the achievements of skepticism but eager to rediscover the comforts of the absolute? If that eagerness becomes predominant in our philosophy, we shall be obliged once more to free ourselves from the old shackles."<sup>77</sup>

Although Catholic legal scholarship in the natural law tradition existed, it, like other Christian legal scholarship, was thus almost entirely absent from the mainstream American legal literature for much of the twentieth century.

### III. CHRISTIAN LEGAL SCHOLARSHIP TODAY: A BRIEF SURVEY

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<sup>74</sup> It may be that Catholic legal scholars themselves are part of the explanation here. See generally John A. Obrien, in *CATHOLICS AND SCHOLARSHIP* (complaining that Catholic universities had not produced a single nationally important scholar). But this clearly is not the entire explanation.

<sup>75</sup> Roscoe Pound was a partial exception to this tendency. After surveying natural law theory in France as part of an overview of recent jurisprudential developments, Pound had earlier suggested that the religious version of natural law theory usually had "very little result" as an explanation of "juridical progress and to legal institutions," but that "such cases as the Stoic influence upon the classical period of Roman law and Puritan influence on the common law warn us that this interpretation is not to be despised." Pound, *supra* note 5, at 164 & n.93. See also Linus J. McManaman, *The Legal Philosophy of Roscoe Pound*, 13 *CATH. L.* 98, 122 (1967) ("Though not a strong advocate of natural law himself, [Pound] has been largely responsible for introducing European ideas of legal philosophy into America").

<sup>76</sup> Howe, *supra* note 73, at 545. See also Fuller, *supra* note 28, at 112.

<sup>77</sup> Howe, *supra* note 73, at 546.

The idea of Christian legal scholarship is no longer unthinkable. The deep ties between evangelicals and the current administration, as well as the suggestion that “values” issues may have tipped the last presidential election, have stirred up interest on both sides of the cultural divide: theologically conservative Christians are anxious to contribute faith-informed scholarship to the scholarly conversation, and secular scholars are anxious to understand what makes American evangelicals tick. But the most important recent Christian legal scholarship is still clustered in a small group of niches. The discussion that follows briefly surveys the four contexts in which distinctively Christian insights are best developed.<sup>78</sup>

A. Natural Law (and International Human Rights)

Throughout the twentieth century, Neo-Thomist Catholic theologians and scholars ranging from Jacques Maritain to John Courtney Murray explored the insights of natural law theory outside of the law school setting, and Catholic legal scholars considered its implications in publications such as *Catholic Lawyer* and *Natural Law Forum*.<sup>79</sup> But theologically informed natural law scholarship was largely absent from mainstream American legal scholarship, as we have just seen. In the past several decades, however, there has been a dramatic revival of faith-inflected natural law scholarship.

The revitalization of natural law theory in the legal and jurisprudential literature can be traced to the Australian legal philosopher John Finnis. In his 1980 book *Natural Law and Natural Rights*, Finnis developed both a sustained critique of positivist legal philosophy and a distinctively new conception of natural law.<sup>80</sup> At the heart of Finnis’s theory are seven basic goods: life, knowledge, play, aesthetics, friendship, practical reasonableness and religion. According to Finnis, the seven goods are incommensurable. Each is essential and cannot be weighed against the others. A person acts morally, Finnis argues, if she acts in a manner that does not directly harm any one of the seven

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<sup>78</sup> This part will not attempt to provide a complete bibliography of Christian legal scholarship. For additional citations, see, e.g., Michael P. Schutt, *Law and the Biblical Tradition: Select Bibliography for Christian Law Students* (unpublished manuscript, 2001), available at [www.regent.edu](http://www.regent.edu). It also bears emphasis that the Article is concerned with the American legal literature, and thus does not consider developments in Europe and elsewhere.

<sup>79</sup> The modern well-spring of the developments described in this section and of the closely related natural law concepts of subsidiarity and Catholic Social Thought was Pope Leo XIII—in particular, his 1891 encyclical *Rerum novarum*. For a useful overview, see Russell Hittinger, *Pope Leo XIII*, in *TEACHINGS*, *supra* note 21, at 39. Recent legal scholarship drawing on the tradition of Catholic Social Thought is described in Part IV(D), *infra*.

<sup>80</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). Finnis draws extensively and explicitly on the work of Germain Grisez.



goods. Based on this framework, Finnis has defended the traditional Catholic views on birth control, abortion and gay rights, arguing that only sexual activity that is consistent with reproduction is inherently moral.<sup>81</sup> More recently, several other prominent scholars have made important contributions to the natural law literature, and have applied their analysis to many of the same fraught legal issues.<sup>82</sup>

Another legal scholar whose work should be mentioned, since it also draws on the natural law tradition, is Mary Ann Glendon. Glendon has figured prominently, both as a scholar and as a representative of the Catholic Church, in United Nations meetings on international human rights. Although much of her best known work is not explicitly theological in orientation, it is closely related to her more theologically-inflected writing on human rights.<sup>83</sup> Both draw on comparative law perspectives, and argue against the tendency in American law to think narrowly in terms of individual rights.

Glendon's most recent work on international religious freedom is part of a vibrant recent literature on international human rights, much of it anchored in the Catholic natural law literature and inspired by the writings of Maritain and Murray. Prominent new contributions include work by Michael Perry and others.<sup>84</sup> This work has already had a profound influence on the international debates about human rights.

Crucial to these scholars' effectiveness has been their direct engagement of the leading mainstream secular jurisprudence. The best of the new natural law theorists have debated contemporary legal and jurisprudential questions in terms with which their non-religious peers are familiar. The new natural law jurisprudence also has the virtue of

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<sup>81</sup> See, e.g., John M. Finnis, *Law, Morality, and 'Sexual Orientation,'* 69 NOTRE DAME L. REV. 1049 (1994)(defending laws designed to discourage homosexual activity).

<sup>82</sup> Among the leading contemporary natural law theorists are Robert George, a student of Finnis', and Russell Hittinger, who applies a more traditional Thomist perspective. See, e.g., ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999); ROBERT P. GEORGE, NATURAL LAW, LIBERALITY, AND MORALITY (2002); RUSSELL HITTINGER, THE FIRST GRACE: RE-DISCOVERING NATURAL LAW IN A POST-CHRISTIAN AGE; RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987). Although neither George nor Hittinger is a law professor, both write on jurisprudential and legal issues.

<sup>83</sup> Glendon is most famous for her book *Rights Talk*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF LEGAL DISCOURSE (1991) and related work on the nature of Constitutional rights.

<sup>84</sup> See, e.g., MARY ANN GLENDON, A WORLD MADE KNEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001); Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005); MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2007).

offering specific, contestable positions on at least some particular legal issues, such as the debates over abortion and gay rights noted above.

### B. *Christian Lawyering and Legal Ethics*

The second niche where genuine Christian legal scholarship can be found is in a small but vibrant literature on Christian lawyering and Christian legal ethics that emerged in the late 1970s and 1980s. For several decades, a handful of Christian legal scholars have explored how the Christian faith might affect a lawyer's perspective on law practice and the legal profession.<sup>85</sup>

The Christian lawyering scholars are intellectual magpies, drawing from an eclectic mix of sources and traditions. "Readers [of the leading Christian lawyering scholar] encounter," as one commentator puts it, "neo-orthodox and narrative theology, biblical studies; the nineteenth century novel of manners and sensibility (especially Trollope); material from film, stage and television; the deviance theory of Kai Erikson; the history and sociology of later immigrant cultures in America; C.P. Snow and C.S. Lewis; Martin Buber's understanding of I-Thou relations; the history of British and American legal-ethical concepts."<sup>86</sup> The common threads that tie these materials together are narrative and the belief that lawyering should be viewed in its social context, rather than as a series of isolated, individual decisions.

Much of the Christian lawyering literature has been influenced by the theology of John Howard Yoder and Stanley Hauerwas, who have insisted on the communal nature of Christianity and the centrality of the church. Echoing this theme, the leading Christian lawyering scholar insists: "Faithfulness to the tradition of Israel and of the Cross means that the lawyer stands in the community of the faithful and looks from there at the law."<sup>87</sup>

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<sup>85</sup> The well-spring of much of the literature was Thomas Shaffer, who has written numerous books and hundreds of articles, and directly inspired most of the other leading scholars. Probably his best known book is THOMAS SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); for extensive commentary on his work, see 10 J.L. & RELIG. 277-366 (1993-94). Other leading scholars, each of them deeply influenced by Schaffer, include Milner Ball, Emily Hartigan, Bob Cochran, and Joseph Allegretti. See, e.g., MILNER S. BALL, *THE WORD AND THE LAW* (1993); Emily Hartigan, *Surprised by Law*, 1993 BRIGHAM YOUNG U.L. REV. 147; Robert F. Cochran, Jr., *Introduction: Can the Ordinary Practice of Law be a Religious Calling?*, 32 PEPPERDINE L. REV. 373 (2005); JOSEPH C. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (1996). See also HOWARD LESNICK, *LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT* (1998).

<sup>86</sup> Leslie E. Gerber, *Can Lawyers be Saved? The Theological Legal Ethics of Thomas Shaffer*, 10 J.L. & RELIG. 347, 347 (1993-94).

<sup>87</sup> THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 198 (1991).

Like the “trial lawyers of American fiction,” he argues, lawyers should “live and suffer through the pain of their clients, those who are guilty and those who are not.”<sup>88</sup> Lawyers also should strive to develop the kinds of virtues reflected in these fictional heroes, such as civility, self-possession, judgment and diffidence. They must not, however, come to worship the law itself. The lawyer’s “community of memory,” her church or synagogue, is primary; the law is secondary.<sup>89</sup>

The Christian lawyering scholars do not speak with a single voice, of course.<sup>90</sup> But they are few enough, and the literature is cohesive enough, to permit us to generalize about its focus and significance. Rather than emphasizing particular legal issues, with the prominent exception of the nature of the professional responsibility rules, the Christian lawyering scholars are most concerned with how lawyers should view the practice of law. The abiding question, to borrow a phrase, is “how to live, what to do.”<sup>91</sup> To explore this question, the Christian lawyering scholars have immersed themselves deeply in a variety of secular literatures. As a result, the best of the Christian lawyering literature has been both deeply and distinctively Christian, and potentially relevant to scholars who would not characterize themselves as Christian.

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<sup>88</sup> THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 73 (1981). “William Faulkner’s lawyer, Gavin Stevens,” Shaffer writes by way of illustration, “has his most extensive exposure as a trial lawyer in the *Intruder in the Dust*, a murder defense which is not about the administration of justice in Mississippi but is about the relationship between an establishment white lawyer and an unfortunate old black man.” *Id.* at 73-74. In *To Kill a Mockingbird*, and its portrayal of Atticus Finch’s heroic but unsuccessful rape trial defense, “the message— the sense of the story and the point it has to make— turns on the barrenness of dealing with people outside human relationships.” *Id.* at 74.

<sup>89</sup> The temptation to idolatry of law also figures prominently in the writings of William Stringfellow, another important influence on Shaffer. “To ignore for a moment that law itself is part of creation,” Frank Alexander writes in a survey of writings by and about Stringfellow, “and thus apart from the Grace of God, is to permit the law to become an idol unto itself, a substitute for grace.” Frank S. Alexander, *Book Review*, 16 J.L. & RELIG. 762, 772 (2001).

<sup>90</sup> A good illustration of a familial dispute among Christian lawyering scholars was Shaffer’s effort to rehabilitate the concept of the gentleman lawyer. Although Shaffer is mindful of the sexist, class-bound legacy of the gentleman lawyers of the past, he believes their virtues remain relevant today. Compare SHAFFER, AMERICAN LAWYERS, *supra* note 87, chapters 2, 3, 4; with Milner S. Ball, *Out of the West Rides an Unmasked Stranger ...*, 10 J.L. & RELIG. 339, 340 (1993-94)(characterizing himself as “wary of [Shaffer’s] romance with gentleman’s ethics”).

<sup>91</sup> Wallace Stevens, *How to Live. What to Do*, in WALLACE STEVENS: THE COLLECTED POEMS 125 (1955)(reprinted 1990). For an article that takes up this question in the large law firm setting, see Amelia J. Uelman, *Can A Religious Person be a Big Firm Litigator?*, 26 FORD. URB. L.J. (1999).

### C. First Amendment and Church-State Issues

We come now to the literature most often associated with the term Christian legal scholarship: First Amendment and church-state issues. Not surprisingly, the First Amendment has exerted a magnetic attraction on Christian legal scholars. Issues such as school prayer, state funding of sectarian schools, and the creationism-evolution debate necessarily implicate religion. For scholars who wish to be taken seriously in academic circles, but also wish to explore issues touching directly on religion, church-state issues are the obvious choice. Although these scholars often kept their faith in the background in the 1950s and 1960s, several wrote from a recognizably Christian perspective.<sup>92</sup>

In the current generation, the brightest star has been Michael McConnell.<sup>93</sup> Starting in the 1980s, McConnell unleashed a trenchant historical and theoretical critique of the Supreme Court's First Amendment jurisprudence. McConnell's principal theme is equal treatment. Given the pervasive infusion of the government into all aspects of life since the advent of the administrative state, he argues, drawing a sharp line between government and religion unfairly discriminates against religion.<sup>94</sup> The government should not favor religion, but neither should churches and religious organizations be excluded from benefits available to other non-religious institutions. On this view, organized school prayer cannot be squared with the Establishment Clause, but a voucher program that parents can use for religious as well as secular schools is neutral and should be permitted. Other Christian scholars have developed alternative positions, some calling for more governmental accommodation.<sup>95</sup>

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<sup>92</sup> Two of the most prominent in this regard were Wilbur Katz and Paul Kauper. See, e.g., WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964); Wilbur G. Katz, *Responsibility and Freedom: A Difficulty in Relating Christianity and Law*, 3 J. LEG. EDUC. 269, 269 (1953) ("Possibly I exaggerate out of a wish to believe that most professors with religious convictions are like me in being at a rudimentary stage in integrating their religion with their respective fields"); Paul G. Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829 (1954). See also Paul Kauper to United Student Christian Council, Kauper Papers, University of Michigan Archives, Box 2 (Aug. 6, 1964) (agreeing to serve on committee on the relationship of church and state).

<sup>93</sup> Steven Smith has also figured prominently. See, e.g., Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266 (1987).

<sup>94</sup> See, e.g., Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES, *supra* note 19, at 5, 21 ("As the domain of government increases in scope, government involvement in religious activity becomes necessary if religious exercise is to be possible at all. ... That is why the old paradigm of 'strict separation' under the Establishment Clause has had to give way to such ideas as 'equal access,' 'neutral funding,' and 'accommodation.'")

<sup>95</sup> Other key scholars include Bob Tuttle and Thomas Berg. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. (2006); Thomas C. Berg, *Minority*

The second branch of church-state scholarship addresses the broader issue of religion and public decision making. Should citizens and lawmakers be permitted to invoke their religious views as a reason for supporting or opposing legislation? Can judges rely on their religious views to help resolve hard cases? Although the debate goes back much further, it took on particular urgency in the 1980s, when prominent Christian intellectuals decried the exclusion of religion from the public square,<sup>96</sup> and attracted widespread scholarly attention after the philosopher John Rawls proposed that citizens should “bracket” their religious views, and should exclude them from political debate, because these views are not subject to rational scrutiny and cannot be interrogated by those who do not share the religious beliefs.<sup>97</sup>

The suggestion that religious believers set their religious beliefs aside drew immediate and sustained critique. Critics pointed out the implausibility of bracketing one’s beliefs and the risk that precluding citizens from invoking their beliefs would force religious believers to disguise the real basis for their views, thus discouraging candor in public debate. Over the past two decades, several prominent Christian legal scholars have attempted to develop alternative conceptions of the proper role of religion in public decision making.

The two leading Christian legal theorists distinguish between the use of private convictions as a ground for decision, on the one hand, and in public deliberation, on the other.<sup>98</sup> Each suggests that “ordinary citizens should feel free to rely on convictions informed by religious and other similar views when they consider difficult political issues.”<sup>99</sup> But in public discourse, politicians, judges and other decision makers should steer clear of arguments based on religion wherever possible. According to Kent Greenawalt, they can properly rely on their personal convictions only on exceptional

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*Religions and the Religion Clauses*, 82 WASH. U.L.Q. 919 (2004).

<sup>96</sup> The most important legal scholar sounding these themes was Stephen Carter, who reached a huge audience through his influential book *The Culture of Disbelief*, his law review articles, and his commentary in the popular press. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

<sup>97</sup> Rawls maps out this position (in infinitely more nuanced fashion) in JOHN RAWLS, *POLITICAL LIBERALISM* (1993) and a number of scholarly articles.

<sup>98</sup> The discussion that follows foregrounds the work of Kent Greenawalt and Michael Perry, each of whom has written extensively about these issues. See also Steven L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

<sup>99</sup> KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 7 (1995).

occasions.<sup>100</sup> In all other cases, they should identify “publicly accessible” reasons for their decision making. Michael Perry would allow a wider scope for religion. “Because of the role that religiously-based moral arguments inevitably play in the political process,” he argues, “it is important that such arguments, no less than secular moral arguments, be presented in public political debate, so that they can be tested there.”<sup>101</sup> But he contends that decision makers should “forgo reliance” on religious arguments unless they can identify “an independent secular argument” that points in the same direction, and which they find persuasive.<sup>102</sup> In response to the two theories, still another Christian scholar, echoing the position held by many theologically conservative Christians outside the academy, has argued for a much less restrained role for religion.<sup>103</sup>

#### D. *Christian Legal History*

The final habitat where Christian legal scholarship can be found is legal history. The deepest vein of this work is connected to the church-state literature, and explores the relationship between religion and the Constitution and other foundational documents of the Republic.<sup>104</sup>

Other legal historians have reached even back further in time, but with work that

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<sup>100</sup> *Id.* See also KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

<sup>101</sup> Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DePAUL L. REV. 1, 5 (1998). See also MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997)[cited hereafter as RELIGION IN POLITICS].

<sup>102</sup> Perry, *supra* note 101, at 20. Perry retrenches somewhat, proposing that a secular justification is not always necessary, in PERRY, RELIGION IN POLITICS, *supra* note 101.

<sup>103</sup> David Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991). For a useful summary of the literature, with particular reference to judicial decision making, see Mark C. Modak-Truran, *Reenchanted the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U.L. REV. 709 (2004).

<sup>104</sup> One of the classics in this genre, though not written from a Christian perspective, was published (interestingly) by Mark deWolfe Howe in the mid 1960s. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965). More recent exemplars include PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2005). My colleague Sally Gordon also has written important historical work on the Religion Clauses. SARAH B. GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL LAW IN NINETEENTH CENTURY AMERICA (2002).

has either implicit or explicit relevance to the relationship between Christianity and modern American law. The pioneering work of contemporary Christian legal scholarship, *The Interaction of Law and Religion*, developed a historically based argument that law and religion are inextricably intertwined.<sup>105</sup> Another fine legal historian has brought a Christian perspective to bear on, among other things, the evolution of laws on marriage and divorce.<sup>106</sup> Although the historical work often seems more influential with historians than with legal scholars, it is distinctly legal in focus and is likely to become increasingly important if the scope of Christian legal scholarship continues to expand.

#### E. What Counts as Christian Legal Scholarship?

Some readers may object to my four categories as too stingy a reckoning of the current state of Christian legal scholarship. It is indeed true, as these readers will point out, that law reviews have published many articles that feature an identifiably Christian perspective, but do not fit into any of the categories we have considered. These articles are not, however, the basis for a serious body of Christian legal scholarship. To see why, we should briefly consider the two most important kinds of articles that have been excluded.

The first is articles that use a Biblical passage or person to explore a legal issue. The articles in this genre have usually been inspired by the law and literature movement. In one strand of law and literature, sometimes referred to as “literature as empathy,” scholars use a literary text to explore a legal issue or legal dilemma.<sup>107</sup> The text may

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<sup>105</sup> BERMAN, *supra* note 29. Berman, whose scholarly reputation initially rested on his work on Soviet law during the Cold War, has subsequently written a sweeping historical account of the relationship between religious upheaval and secular legal reform. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003). *See also* HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993).

<sup>106</sup> JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997); *FAMILY TRANSFORMED: RELIGION, VALUES AND SOCIETY IN AMERICAN LIFE* (Steven M. Tipton & John Witte Jr. eds. 2005). *See also* JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002); JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* (2006). Witte and Berman, both of whom teach at Emory, are the best known of the current Christian legal historians. Witte (together with Frank Alexander) runs the Center for the Study of Law and Religion at Emory University, which was established in 1982 and is the most prominent law and religion institute.

<sup>107</sup> The various modes of law and literature scholarship are labeled and analyzed in Jane B. Baron, *Law, Literature, and the Problem of Interdisciplinarity*, 108 *YALE L.J.* 1059 (1999).

itself have a discernibly legal theme (as in Kafka's stories and novels) but often does not (as with Mark Twain's *Huckleberry Finn*). Some scholars, often Christian scholars, have taken Biblical passages as their texts.<sup>108</sup> The classic article in this genre uses the parable of the Prodigal Son to explore the Supreme Court's cases on desegregation and institutional housing for the mentally handicapped.<sup>109</sup> If the relationship between the Biblical passage and the legal issue is simply illustrative—that is, the analysis does not seriously engage the passage in theological terms or treat it as having normative force—these articles are not Christian legal scholarship at all.<sup>110</sup> Nor, on the other hand, is an article that does not engage the secular legal scholarship in any meaningful way.<sup>111</sup> Although some of this literature clear does qualify, the genre is too thin, at least thus far, to constitute a separate category of Christian legal scholarship.

The second exclusion is a closer call. An increasing number of scholars have provided “Christian critiques” of prominent movements in, and modes of, legal scholarship. *Christian Perspectives on Legal Thought* is a rich vein of this work, with chapters on “Reinhold Niebuhr and Critical Race Theory,” “A Christian Response to Liberal Feminists,” and “Law and Economics: An Apologia.”<sup>112</sup> The usefulness of work in this genre is sometimes limited by the authors' failure to master the literature being critiqued, much as Christian attacks on postmodernism are often undermined by the critic's unfamiliarity with leading postmodern thought.<sup>113</sup> But even the more

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There is a lively debate whether law and literature qualifies as a genuine “movement,” or whether it is congeries of somewhat related scholarly works. In my own view, it is (or was) a movement, but not an entirely coherent one.

<sup>108</sup> I include myself among those who have written in this vein. David A. Skeel, Jr., *Saul and David and Corporate Takeover Law*, in LITERATURE AND LEGAL PROBLEM SOLVING (Paul Heald ed. 1995)(using Biblical accounts of Saul and David to analyze the Delaware Supreme Court's hostile takeover cases).

<sup>109</sup> Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984).

<sup>110</sup> I view my own contribution as right on the borderline, but probably qualifying as Christian legal scholarship.

<sup>111</sup> Many of the articles in nonscholarly Christian publications have this quality, explicating a biblical passage without addressing, even indirectly, the scholarly literature on the issue.

<sup>112</sup> Davison M. Douglas, *Reinhold Niebuhr and Critical Race Theory*, in CHRISTIAN PERSPECTIVES, *supra* note 19, at 149; Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in CHRISTIAN PERSPECTIVES, *supra* note 19, at 178; Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES, *supra* note 19, at 208.

<sup>113</sup> I hasten to add that none of the articles just cited suffer from this shortcoming. Bainbridge, for instance, has written extensively and well from within the law and economics



sophisticated critiques must be put to one side. The reason for exclusion can be summed up in the adage, “it takes a theory to beat a theory.” To offer a meaningful Christian critique of Critical Legal Studies or Critical Race Theory, a scholar must first develop a Christian theory of law against which the legal movement will be measured. The normative Christian account would certainly qualify as Christian legal scholarship, and the critique of other prominent legal movements would serve as applications of the underlying theory. But the existing critiques usually skip the first step. They do not outline a theoretical (or in many cases, a theological) baseline that can be meaningfully challenged, questioned or applauded. They provide the application without the theory itself, dessert without the dinner.

The discussion thus far suggests a simple test for Christian legal scholarship. Christian legal scholarship must satisfy two criteria. First, it must provide either a normative theory derived from Christian scripture or tradition;<sup>114</sup> or a descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity. The first touchstone, in other words, is an identifiably Christian account of what ought to be, or what is. Second, it must seriously engage the best secular scholarship treating the same issues.

Each of the four areas considered earlier meet this test. The new natural law and the Christian lawyering literature develop deeply Christian normative accounts of law and lawyering. The work of the Christian legal historians is generally descriptive rather than normative, attempting to identify and explain the influence of Christianity on legal change. In the church-state literature, one finds both normative and descriptive theory at work, at times in the same work.<sup>115</sup> The “equal access” thesis of church state relations, to give the most obvious example, is defended both as the historical understanding of the religion clauses, and as a normative theory of the proper stance of the state toward religion.

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perspective. *See, e.g.*, STEVEN BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* (2002); Steven Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 *UCLA L. REV.* 601 (2006).

<sup>114</sup> The best work in this vein will of course reflect serious theological reflection as well as legal expertise. *See, e.g.*, William Brewbaker, *Who Cares? Why Bother? What Jeff Powell and Mark Tushnet Have to Say to Each Other*, 55 *OKL. L. REV.* 533, 556 (2002)(reviewing *CHRISTIAN PERSPECTIVES*, *supra* note 19 (“[I]f Christian perspectives are to provide a distinctive voice, Christian scholars must have a theologically informed understanding of the relationship between Christian faith and the structure of the most important currents of contemporary thought”).

<sup>115</sup> It is important to note that some of the doctrinal First Amendment scholarship by Michael McConnell and others would constitute Christian legal scholarship as defined in this Article, but some would not. McConnell’s historical account of the treatment of religion prior to the enactment of the First Amendment is descriptive Christian scholarship, for instance, whereas some of his other work on First Amendment issues does not draw in any direct way on Christian scripture or tradition, and does not offer a descriptive account of Christian influence.

With respect to the second requirement, the theoretical contributions in the four areas have not been made in a scholarly vacuum. The leading scholars also are deeply engaged with the best secular work being done by their peers, as vividly illustrated when Michael McConnell was nominated for a judgeship on the Court of Appeals for the Tenth Circuit in 2001. Although McConnell's views on church-state relations and abortion are controversial, more than three hundred law professors signed a letter supporting his nomination.<sup>116</sup> The new natural law scholars, Christian lawyering scholars and legal historians have not been singled out quite so publicly, but they are equally engaged in the scholarly conversation in their fields.

One last nagging question remains. The criteria for Christian legal scholarship outlined here focus on the scholarship, not the scholar herself: must one identify herself with a Christian tradition to contribute to Christian legal scholarship? In practice, scholars who seek to develop an identifiably Christian normative analysis, or who explore the intersection of Christianity and law, will usually be drawn by personal as well as scholarly commitment. Moreover, those who hold Christian beliefs may ask questions about the interaction between Christianity and law that other scholars are less likely to ask.<sup>117</sup> This suggests a close correlation between Christian belief and Christian legal scholarship. But this does not mean that Christian belief is a prerequisite for Christian legal scholarship. The key factor for scholarly purposes is the nature of the scholarship itself.<sup>118</sup>

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<sup>116</sup> "McConnell's scholarly work has been path-breaking and influential," the letter read. "It has also been characterized by care, thoroughness, and fairness to opposing viewpoints. ... Some of us have disagreed with McConnell on constitutional issues and undoubtedly will disagree with him again. All of us, however, hope that the Senate will confirm Professor McConnell." Professor Albert Alschuler & Professor Michael Heise, Correspondence to Honorable Patrick Leahy, Chairman, Committee on the Judiciary, United States Senate (July 9, 2001). See also Cass R. Sunstein, *A Conservative Nominee Liberals Should Love*, WALL ST. J., Sept. 17, 2002, at A20 ("McConnell qualifies, simultaneously, as one of the nation's top law professors and one of its top lawyers— superb preparation for the federal bench.")

<sup>117</sup> For a similar point about historical analysis, see MARSDEN, *OUTRAGEOUS IDEA*, *supra* note 23, at 64-65 (discussing, among other illustrations, work on the history of American Puritanism by Charles Hambrick-Stowe and suggesting that "[o]nly a Christian, I think, is likely to take questions about piety as seriously on their own terms as Hambrick-Stowe does").

<sup>118</sup> A superb recent example is Jeffries & Ryan, *supra* note 58, which predicts, based on the declining anti-Catholic animus in American life and the proliferation of non-Catholic private schools, that the Supreme Court will be increasingly open to allowing funding to religious schools but will continue to prohibit Bible reading and school prayer. I do not believe that Jeffries or Ryan would identify themselves as Christians. I would nevertheless characterize their article as Christian legal scholarship.

#### F. *The Dearth of Christian Legal Scholarship*

In the four areas we have seen, conditions are favorable for Christian legal scholarship. But these areas cover only a tiny portion of legal scholarship. Even the most visible area, church-state relations, rarely occupies more than two or three classes in a Constitutional law course. There is a general pattern to the scattered outposts of Christian legal scholarship. Each draws on philosophy, history, or both. But when it comes to other methodologies, or legal issues outside the four we have considered, one finds very little in the American legal literature. Despite the vast recent literature on public choice and comparative institutional analysis, for instance, legal scholars have not developed general Christian theories about the proper role of law and legal institutions. Pathbreaking recent work has been done on immigration, debt relief and poverty— all of which would seem to have obvious relevance for a scholar steeped in Christian scripture, yet each is largely untouched by Christian legal scholarship.<sup>119</sup> What might a less cloistered, more robust Christian legal scholarship look like? This question will occupy the final two parts of the article.

#### IV. THE RULE OF LAW AND NORMATIVE CHRISTIAN LEGAL SCHOLARSHIP

The first of the roads not taken is to develop a normative Christian theory of the proper role of the law generally, or of a particular area of law, drawing not so much on moral or political philosophy as on economics, sociology or political science.<sup>120</sup> A little over a hundred years ago, the Dutch theologian and politician Abraham Kuyper did precisely this. His example suggests what a general Christian theory of law might look like.<sup>121</sup> The discussion that follows argues that Kuyper would be an obvious starting

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<sup>119</sup> There are a few scattered exceptions. *See, e.g.*, Michael Scaperlanda, *Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997).

<sup>120</sup> In the theological literature, a small group of theologians developed a normative theory in the 1970s that enjoyed a brief burst of notoriety. Various known as Christian Reconstructionism, Theonomy, and Dominion Theology, these theologians argued for a direct re-implementation of the legal framework of the Hebrew Bible in contemporary America. The key figures include John Rousas Rushdoony, Greg Bahnsen, and Gary North. *See, e.g.*, JOHN ROUSAS RUSHDOONY, *INSTITUTES OF BIBLICAL LAW* (1973); GREG L. BAHNSEN, *THEONOMY AND CHRISTIAN ETHICS* (1977). The zenith of Christian Reconstructionism is well past, but it still attracts at least some attention in evangelical circles, as well as shivers of disapproval from outsiders. Theonomy never had a discernible impact on the legal scholarship, and has not engaged the secular legal or jurisprudential literature in any sustained way. For theological critique, *see, e.g.*, *THEONOMY: A REFORMED CRITIQUE* (William Barker & Robert Godfrey eds. 1990).

<sup>121</sup> I am not the first to note that Kuyper's work is both relevant and underutilized. *See, e.g.*, *RELIGION, PLURALISM AND PUBLIC LIFE* (ed. Luis E. Lugo 1994); Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in

point for developing a Protestant Christian perspective on law, then outlines another possible normative Christian theory of law.

A. *Kuyper's Sphere Sovereignty*

Kuyper began his career as a Calvinist pastor in a rural Dutch church in the late 1860s.<sup>122</sup> He subsequently pastored churches in Utrecht and Amsterdam; started a newspaper, to which he contributed columns for decades; founded a political party; helped found the Free University in Amsterdam and served as a theology professor thereafter; was twice elected to the Second Chamber in the Dutch Parliament; and capped off his political career by winning a term as the nation's Prime Minister from 1901-1904.

The theme that ran through all of these endeavors was God's sovereignty, or as Kuyper himself famously and more emphatically put it: "Oh, no single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over *all*, does not cry: 'Mine!'"<sup>123</sup> Kuyper's own label for the normative, Christian theory of politics and law he proposed was "sphere sovereignty," which he defined in an 1880 speech inaugurating the Free University as an outworking of the sovereignty of Christ in the world. "This perfect sovereignty of the *sinless* Messiah," he argued, "at the same time directly denies and challenges all absolute Sovereignty among *sinful* men on earth, and does so by dividing life into *separate spheres*, each with its own sovereignty." He then elaborated on the nature of these spheres:

Our human life ... is so structured that the individual exists only in groups, and only in such groups can the whole become manifest. ... [T]he circumference of each [sphere] has been drawn on a fixed radius from the center of a unique principle, namely, the apostolic injunction *hekastos en toi idioi tagmati* ["each in its own order": 1 Cor. 15:23]. Just as we speak of a 'moral world,' a 'scientific world,' a 'business world,' the 'world of art,' so we can more properly speak of a 'sphere' of morality, of the family, of social life, each within its own *domain*. And because each comprises its own domain, each has its own Sovereignty within its bounds.<sup>124</sup>

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CHRISTIAN PERSPECTIVES, *supra* note 19, at 486.

<sup>122</sup> For an excellent introduction to Kuyper and his thought, see Nicholas Wolterstorff, *Abraham Kuyper (1827-1920)*, in *THE TEACHINGS*, *supra* note 21, at 288. For a sampling of Kuyper's most important writings, see ABRAHAM KUYPER, *LECTURES ON CALVINISM* (1898)(reprinted 2000); JAMES D. BRATT, *ABRAHAM KUYPER: A CENTENNIAL READER* 461, 467(1998).

<sup>123</sup> Abraham Kuyper, *Sphere Sovereignty*, in BRATT, *supra* note 122, at 461, 488.

<sup>124</sup> *Id.* at 467.

The state, too, is a sphere, but it differs from the other spheres in a critical respect. Whereas the family or church or community organization is organic, the state is “mechanical.” The other spheres would exist and develop organically even in a more perfect world. The state, by contrast, is necessary only because of our fall into sin through Adam and Eve. The state’s role is to restrain sin, but the state must not interfere with the other spheres; it must not, in Kuyper’s more vivid metaphor, “become an octopus which stifles the whole of life.”<sup>125</sup> Only in three circumstances, he argued, may the state encroach on the other, more organic spheres: 1) to compel mutual respect of boundary lines when the spheres clash; 2) to defend individuals and weak ones against the abuse of power within a sphere; and 3) to ensure that each citizen helps to bear the personal and financial burdens necessary to maintain the unity of the state.<sup>126</sup>

Kuyper’s conception of sphere sovereignty, which bears an obvious and oft-noted resemblance to the Catholic concept of subsidiarity,<sup>127</sup> suggests a relatively limited role for the state, and has obvious implications for legal doctrine. State and local regulation presumably is to be preferred over nationwide oversight, and intervention into the family and other organic spheres can only be justified under limited circumstances.

More a visionary than a systematic scholar, Kuyper did not fully develop either his definition of “spheres” or the implications of the sphere sovereignty thesis. Subsequent Dutch theorists attempted to draw out its implications, and a few more recent theologians and historians have underscored its potential relevance for today.<sup>128</sup> But the use of his work in contemporary American legal scholarship has tended to be more impressionistic than sustained, and Christian legal scholars have not employed it as a base camp for a sustained normative account.<sup>129</sup> Here, it would seem, is an opportunity. A theory that married Kuyper’s insights with, say, the sophisticated understanding of

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<sup>125</sup> KUYPER, *supra* note 122, at 96.

<sup>126</sup> *Id.* at 97.

<sup>127</sup> See, e.g., Cochran, *supra* note 120, at 486 (noting the similarities and contrasts between sphere sovereignty and subsidiarity, which dates back to Pope Leo XIII’s 1891 encyclical *Rerum Novarum*); Stephen M. Bainbridge, *Community and Statism*, 82 CORN. L. REV. 856, 895 n.197 (1997)(noting similarities).

<sup>128</sup> Kuyper’s best known follower is the Dutch Philosopher Herman Dooyeweerd. Dooyeweerd developed an elaborate philosophical system that distinguished among fourteen categories of spheres. (One application of this system was the Free University itself, which had fourteen floors, one for each sphere, with theology on top). Dooyeweerd’s work is briefly summarized in David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, in CHRISTIAN PERSPECTIVES, *supra* note 19, at 109, 119-24.

<sup>129</sup> I hasten to add that several recent articles drawing on Kuyper’s sphere sovereignty may foreshadow the kind of sustained treatment that the literature so far lacks. See, e.g., Cochran, *supra* note 121.

institutions and decision-making biases provided by contemporary public choice theory and behavioral economics, might go a long ways toward filling the current vacuum in normative Christian legal scholarship.

### B. Christianity and the Double Game of Law

Having briefly considered Kuyper's theory of sphere sovereignty, this section briefly sketches an alternative theory.<sup>130</sup> The theory bears a family resemblance to Kuyper's sphere sovereignty, although it was not devised with Kuyper in mind.

Start with the foundation in the Christian Scriptures. If we wish to develop a Christian theory of the proper role of civil and criminal liability, what key scriptural principles should serve as our guide? One can imagine a variety of principles, but two seem particularly central. First, we are created in God's image.<sup>131</sup> This theme, which is sounded in the very first chapter of the Bible and continues through the prophets and into the New Testament, suggests that each one of us deserves to be treated with dignity, male as well as female, the poor as well as the rich. The second theme is sin. Although each of us is made in God's image, every one of us is inherently sinful. "[A]ll have sinned and fall short of the glory of God," as the Apostle Paul writes in his letter to the Romans.<sup>132</sup>

These two themes, together with Jesus's dramatic reconceptualization of the nature of law, have important implications for thinking about the role of law.<sup>133</sup> Because we all are prone to sin, law is necessary. Otherwise, chaos would engulf us, just as surely as it engulfs the boys stranded on an isolated jungle island in *The Lord of the Flies*.<sup>134</sup> But human law cannot possibly police every sin. When Jesus teaches in the Sermon on

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<sup>130</sup> This theory was first developed in co-authored work with William Stuntz, and also draws on earlier work by Stuntz. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PENN. J. CONST. L. 809 (2006); Stuntz, *supra* note 20, at 1733-40; William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000). For recent critiques of the theory, see, e.g., Robert F. Cochran, Jr., *The Bible, Positive Law, and the Legal Academy*, at 13 (unpublished manuscript, 2006); John M. Breen, *Modesty and Moralism: John Paul II, The Structures of Sin, and the Limits of Law—A Reply to Skeel and Stuntz* (unpublished manuscript, 2007).

<sup>131</sup> See, e.g., Genesis 1:27 ("So God created man in his image,/in the image of God he created him;/male and female he created them.")(English Standard Version).

<sup>132</sup> Romans 3:16.

<sup>133</sup> For a fascinating exploration of the distinctions between Jesus's and a rabbinic conception of law, see Chaim Saiman, *Jesus's Legal Theory: A Rabbinic Perspective*, 30 J.L. & REL. (forthcoming, 2007).

<sup>134</sup> WILLIAM GOLDING, *LORD OF THE FLIES* (1954).

the Mount that anger is a form of murder and to lust is to commit adultery,<sup>135</sup> he underscores the pervasiveness of God's law. But an obvious secondary implication is that human law must have more modest aspirations. Liability rules that attempt to stamp out every sin simply magnify the discretion of regulators and prosecutors. Not only are regulators and prosecutors unable to enforce such sweeping liability, but they, unlike God, are sinful themselves. As a result, extensive discretion invariably translates to discriminatory enforcement, to an abandonment of the principle that each of us should be treated with equal dignity. A properly designed legal system must thus play a double game: it should restrain the worst wrongs of the citizenry, but at the same time not give unbridled discretion to regulators and prosecutors.

The classic example of legislation that backfired because it failed to heed these principles is Prohibition. The Constitutional prohibition of manufacturing or selling alcohol was a great legislative victory for those who believed that drinking was immoral.<sup>136</sup> But a sweeping ban on alcohol couldn't possibly be enforced in systematic fashion. Very quickly, a disturbing pattern emerged. The proprietor of an establishment that sold beer in a working class Irish or Italian neighborhood in New York City might well wind up in jail; those who sold gin in an upscale, upper East Side neighborhood were far more likely to wind up in an F. Scott Fitzgerald novel. The discriminatory enforcement bred disrespect for Prohibition, and ultimately undermined the very moral norm against drinking that Prohibition was meant to reinforce.<sup>137</sup>

Many of the prominent culture war issues fit a similar pattern. Evangelicals have waged a decades long battle against *Roe v. Wade*.<sup>138</sup> Yet one of the great ironies of the abortion wars is that the side that has the law behind them loses ground in the courtroom of public opinion. In the 1960s, when abortion was illegal in much of the country, *Newsweek* and *Life* ran gruesome stories about deaths from back alley abortions, and abortion rights sentiments were in the ascendancy. Since *Roe v. Wade*, the more salient image of abortion is the gruesome procedure anti-abortion advocates call partial birth abortion.<sup>139</sup> With closely contested social issues, the temptation to use the legal system

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<sup>135</sup> See, e.g., Matthew 5:21-22 ("You have heard that it was said to those of old, 'You shall not murder; and whoever murders will be liable to judgment.' But I say to you that everyone who is angry with his brother will be liable to judgment."); Matthew 5:27-28 (lust is adultery).

<sup>136</sup> In addition to evangelicals, the coalition that campaigned for Prohibition included liberal Protestants and others. The temperance movement is recounted in detail in FOSTER, *supra* note 10.

<sup>137</sup> See Stuntz, *supra* note 130.

<sup>138</sup> 410 U.S. 113 (1973).

<sup>139</sup> The Supreme Court recently upheld a state law ban on partial birth abortion. *Gonzales v. Carhart* (U.S. S.Ct. April 18, 2007).

to lock in one side's position is almost irresistible, but it often backfires.<sup>140</sup>

The dangers of drifting away from rule of law values are not confined to evangelicals and culture war issues. In much of the federal criminal law, law plays only one half of the double game. Homing in on citizens' misbehavior, while ignoring the risks of expanding prosecutorial discretion, lawmakers criminalize each new form of misbehavior that seizes public attention. The metastasis of federal criminal law can be traced in part to the institutional dynamic of lawmaking. Lawmakers know the laws will rarely be enforced, which makes criminal prohibition a cheap way to take a stand against the acts of highly publicized miscreants. Moreover, lawmakers face powerful pressures to cast their lot with advocates of criminalization. A lawmaker who votes yes can portray herself as tough on crime with little risk that the vote will come back to haunt her.<sup>141</sup> If anyone is punished for a hopelessly overbroad criminal statute, it will be those who enforce it, not the lawmakers who enacted it. A lawmaker who votes no, by contrast, is sure to be tarred as soft on crime as soon as she comes up for reelection.<sup>142</sup>

Is this pattern inescapable? Courts could nibble away at the federal criminal code by drawing on common law doctrines such as desuetude, which is sometimes used to invalidate provisions that are invoked after having gathered dust for years.<sup>143</sup> But desuetude would not apply to laws that are in fact applied, but are wielded arbitrarily or in discriminatory fashion. A more complete solution would require Congress to step in and tie its own hands. Imagine a federal statute that declared any criminal or civil provision invalid if it is not systematically and consistently enforced.<sup>144</sup> Under such a rule, a defendant like Martha Stewart could invoke the new rule if she were charged under a rarely used law and ask that the provision be declared invalid. In effect, this strategy would hardwire the modest rule of law approach into the criminal and civil justice framework. A law that legislators enacted to restrain the misbehavior of the citizenry would endure only if it could be and was systematically enforced, thus limiting the potential for abuse by prosecutors and regulators.

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<sup>140</sup> For a discussion of similar tendencies in the enforcement of gambling laws, see David A. Skeel, Jr., *A Channeling Approach to Gambling and Market Speculation* (unpublished manuscript, 2003); David A. Skeel, Jr., *When Markets and Gambling Converge*, in *THEOLOGY AND THE SOUL OF THE LIBERAL STATE* (Charles Cohen & Leonard Kaplan, eds.)(forthcoming, 2007).

<sup>141</sup> The dynamic outlined in the text that follows is described in William J. Stuntz, *Plea Bargaining and Law's Disappearing Shadow*, 117 *HARV. L. REV.* 2548 (2004).

<sup>142</sup> The civil liability system is subject to similar pressures, but has more checks than the criminal law. When lawmakers propose sweeping new civil liability, they invariably face pushback from interest groups that will be exposed to liability under the new law.

<sup>143</sup> For discussion of the desuetude doctrine, citations to the caselaw, and an argument for the doctrine's revitalization, see Note, *Desuetude*, 119 *HARV. L. REV.* 2209 (2006).

<sup>144</sup> See Skeel & Stuntz, *supra* note 130.



### C. *The Perils of Symbolic Lawmaking*

The modest rule of law perspective assumes that laws need to have consequences. Lawmakers worry too little about consequences when they criminalize the latest form of misbehavior, because they are held accountable only for their initial vote. To appreciate the dangers of symbolic lawmaking in other contexts, consider a prominent recent proposal for reshaping the First Amendment's Religion Clauses.

In *Divided by God*, Noah Feldman contends that the Supreme Court has been too stingy about permitting "public religious discourse" and too accommodating when it comes to "state funding of religious institutions."<sup>145</sup> To remedy this imbalance, Feldman argues that the Court should "offer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities."<sup>146</sup> Posting the Ten Commandments and stamping "in God we trust" on coins would be fine under this proposal; school vouchers that could be used for religious schools would not. "Such a solution," Feldman concludes, "would both recognize religious values *and* respect the institutional separation of religion and government as an American value in its own right."<sup>147</sup>

Feldman's symbols-but-no-money proposal is clever and lucid, a powerful blast of fresh air. The theory defended here suggests, however, that theologically conservative Christians and others who find the modest rule of law thesis persuasive should have serious reservations. From the modest rule of law perspective, symbols-but-no-money gets things exactly backwards.

Many of the concerns with public religious symbolism are well-known. State endorsed religious symbols may be experienced as oppressive by outsiders. Of particular concern from the modest rule of law perspective, however, are the effects on Congressional lawmaking. Because symbolic laws do not have tangible consequences, lawmakers are too quick to enact them. The same institutional pressures that lead to criminalization of the latest misbehavior also can make symbolic religious legislation irresistible.

The dangers of symbolic religious legislation are particularly stark in the current political environment, in which evangelical Christians have been a large and cohesive constituency within the Republican party, much as unions once were for the

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<sup>145</sup> NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM- AND WHAT WE SHOULD DO ABOUT IT* 237 (2005).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

Democrats.<sup>148</sup> An intriguing new model of political decision making suggests that the existence of a well-defined constituency that comprises nearly half of the populace invites “strategic extremism.”<sup>149</sup> If one party can gain more votes from the constituency than it loses from those who hold opposing views, the argument goes, the party will send extreme messages to curry favor with the constituency in question. These messages will not be limited to symbolic issues. Indeed, the principal current illustration is abortion, which is the subject of both symbolic and very real lawmaking.<sup>150</sup> But symbolic issues—think of the debates over the Ten Commandments, the Pledge of Allegiance, and Terri Schiavo-- lend themselves particularly well to strategic extremism, and have exacerbated the sharp polarization in current American politics.

A money but no symbols approach to church-state issues, by contrast, might force lawmakers to devote more of their energy to laws with real consequences. Rather than the size and location of a Ten Commandments plaque, the salient debate for theologically conservative Christians might become whether to direct money to school vouchers or to strengthen the social safety net. These are issues with real consequences, which do not lend themselves to the cynical lawmaking that so often characterizes the politics of symbolic legislation. They also are issues on which theologically conservative Christians themselves hold divergent views. If the question is whether to direct scarce budget dollars to welfare or to school choice, evangelicals and other theologically conservative Christians might part ways and even part parties. A politics in which evangelicals could be found in both parties, rather than just one, might be a healthier politics.<sup>151</sup>

#### D. Conclusion

The normative theory sketched out here is only one possible Christian perspective

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<sup>148</sup> For an interesting recent illustration of the tensions this can create in evangelical churches, see Laurie Goodstein, *Disowning Conservative Politics, Evangelical Pastor Rattles Flocks*, NEW YORK TIMES, July 31, 2006, at A1 (describing reaction to megachurch pastor when he preached a series of sermons suggesting that the “church should steer clear of politics”).

<sup>149</sup> Edward L. Glaeser, Giacomo A.M. Ponzetto & Jesse M. Shapiro, *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values* (Harv. Inst. of Econ. Research Discussion Paper No.20444, Oct. 2004).

<sup>150</sup> As evidence of strategic extremism, Glaeser and his colleagues track the evolution of the parties’ presidential platforms. The Republican platform has become more doctrinaire pro-life with each presidential election cycle, while the Democratic platform has evolved in the opposite direction.

<sup>151</sup> For a brief application to the debate over evolution and intelligent design theory, see David Skeel, *How School Vouchers Might Help Religion-Science Debate Evolve*, PHIL. INQ., April 16, 2006, at C7.

on the proper role of the secular law.<sup>152</sup> One can imagine other, very different Christian approaches both to the legal system generally and to particular legal issues. There is a somewhat Kuyperian flavor to aspects of the modest rule of law perspective, for instance, but a deeply Kuyperian approach might center more directly on family, church, and other intermediate institutions.<sup>153</sup>

Each of these illustrations is distinctively Protestant in emphasis. A Catholic approach might draw on the Catholic social and economic tradition that has developed over the last century. The most likely antecedents are Jacques Maritain and John Courtney Murray, whose theological and political writings deeply influenced the thawing of the church's hostility toward democracy and its important pronouncements on religious freedom and human rights after World War II. There are in fact early hints of just such a development. Drawing on the Second Vatican Council's 1965 Declaration on Religious Freedom, for instance, one scholar has begun to develop a theory of the proper scope of morals legislation that would preclude regulation on issues such as sexual behavior unless the regulation could be justified as necessary to "public order."<sup>154</sup> Several other scholars have recently applied Catholic Social Thought to corporate governance.<sup>155</sup>

Although most American Christians are either Protestant or Catholic, one also can imagine similar work from an Orthodox perspective.<sup>156</sup> The important thing is that this

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<sup>152</sup> John Nagle's work on environment law issues offers another. *See, e.g.,* John Copeland Nagle, *Christianity and Environmental Law*, in *CHRISTIAN PERSPECTIVES*, *supra* note 19, at 435.

<sup>153</sup> Kuyper also was more sympathetic to explicit governmental endorsement of religion-to symbols-- than the theory developed in this part.

<sup>154</sup> Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 *S. CALIF. INTERDISC'Y L.J.* 1 (2006)(applying this principle to the Supreme Court's invalidation of a Texas anti-sodomy law in *Lawrence v. Texas*, and concluding that Kennedy's majority opinion and O'Connor's concurrence were consistent with the principle, but Scalia's dissent was not). *See also* Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 *J. CATH. SOC. THOUGHT* 231 (2004).

<sup>155</sup> Susan Stabile argues for regulatory intervention in corporate law to promote the common good. Steve Bainbridge has interpreted the same principles as counseling deference to corporate managers. For a summary and critique of the debate, with citations to the leading contributions, see Mark A. Sargent, *Competing Visions in Catholic Social Thought*, 1 *J. CATH. SOC. THOUGHT* 561 (2004).

<sup>156</sup> *See, e.g.,* Stephanos Bibas, *Bringing Moral Values into a Flawed Plea Bargaining System*, 88 *CORNELL L. REV.* 1425 (2003).

work be undertaken. A true Christian legal scholarship would marshal the resources of Christian Scripture and tradition for a normative analysis of law and legal institutions that engages the best and most innovative secular scholarship in law and other disciplines.

#### V. TOWARD A NEW DESCRIPTIVE CHRISTIAN LEGAL SCHOLARSHIP: THE BONO PUZZLE

In current American politics and lawmaking, few questions are as visible and hotly contested as the influence of religion in general, and of evangelical Christians in particular. The debate over America's culture wars has coursed through the opinion journals since James Davison Hunter's famous 1991 book gave the controversies over abortion, gay rights and other social issues a name and definition.<sup>157</sup> The most recent lightening rod was a controversial exit poll suggesting that 22% of Americans in the 2004 presidential election cast their vote based on "moral values" issues.<sup>158</sup>

Scholars in a variety of disciplines have begun to explore the implications of these developments in earnest. Political scientists are developing models attempting to explain Christian voters and the politicians who court their votes.<sup>159</sup> Sociologists have used polling data to assess the culture wars divide.<sup>160</sup> They also have conducted important qualitative work on the re-engagement of evangelicals over the past thirty years.<sup>161</sup>

The opportunities for legal scholarship that draws on these insights are evident. The political science and sociology scholarship is a rich source of information on voting

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<sup>157</sup> JAMES DAVISON HUNTER, *CULTURE WARS* (1991).

<sup>158</sup> See, e.g., Dick Meyer, *How Story of 2004 Election Hinged on One Exit Poll*, SAN FRAN. CHRON., Dec. 6, 2004 (noting that 22% of voters answered "moral values" to the question "Which one issue mattered most in deciding how you voted for president?").

<sup>159</sup> See, e.g., Glaeser et al, *supra* note 149; Kevin M. Murphy & Andrei Shleifer, *Persuasion in Politics*, 94 AMER. ECON. ASS'N PAPERS & PROCEEDINGS 435 (2004)(developing model that starts from the assumption that there is mutual persuasion within a network of people who hold similar views, and that this can be "rented by politicians"); cf. NOLAN MCCARTHY, KEITH POOLE & HOWARD ROSENTHAL (2006)(developing model of ideological preference and presenting evidence that Christian voters do not vote against their economic interests nearly to the extent pundits suggest).

<sup>160</sup> See, e.g., James L. Guth, Lyman A. Kellstedt, John C. Green, & Corwin E. Smidt, *Religious Coalitions in American Politics*, BOOKS & CULTURE, Nov/Dec., 2005 at 32 (poll data confirming existence of culture wars divide and questioning revisionist literature doubting the existence of serious polarization in American life).

<sup>161</sup> See, e.g., ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988).

attitudes and their political ramifications. What it does not yet explain is the mechanism by which these attitudes are translated into legislative and judicial decision making. Do Christian churches or non-church organizations figure prominently, or can the influence be traced to prominent leaders like James Dobson or Chuck Colson? Or is it simply the implicit clout of millions of Christian votes? A Christian legal scholarship that drew on the new political science and sociological literature, and on a lawyerly familiarity with the legal process, to explore the mechanisms of Christian influence would be a valuable scholarship indeed.

As with the normative Christian scholarship considered in the last part, very little of this more descriptive Christian legal scholarship currently exists. This part begins by considering an exception to the scholarly void: the International Religious Freedom Act of 1998. I then offer an additional example of descriptive Christian legal scholarship. The example comes not from the culture wars, but from the international movement for debt relief and sovereign bankruptcy. In Europe, the Christian organization Jubilee played a prominent role. In the United States, by contrast, the principal influence has been a complicated (and complicatedly) Christian rock star named Bono.

#### A. *The International Religious Freedom Act of 1998*

In 1998, Congress enacted a rather remarkable piece of legislation known as the International Religious Freedom Act. The act, which was several years in the making, established a new governmental Office on International Religious Freedom in the State Department, to be headed by an Ambassador-at-Large for religious freedom. The act also created a new Commission on International Religious Freedom and added an additional adviser on international religious freedom at the National Security Council. In addition to its ad hoc advisory functions, the Office on International Freedom is required to issue an annual report assessing the state of religious freedom in every foreign country and explicitly identifying those that violate religious freedom.<sup>162</sup>

The political dynamics of the Act have been chronicled in a small but illuminating literature.<sup>163</sup> Two facets of the debate stand out. The first is the unlikely coalition that

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<sup>162</sup> For an overview of the basic contours of the act, see, e.g., T. Jeremy Gunn, *A Preliminary Response to Criticisms of the International Religious Freedom Act of 1998*, 2000 *BYU L. Rev.* 841, 843-44. The legislation has generated controversy, in part because of the evangelical influence on its enactment and in part because it makes the U.S. a moral arbiter of religious freedom in the rest of the world. Compare Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 *COLUM. J. TRANSNAT'L L.* 33 (2002)(criticizing U.S. unilateralism) with Gunn, *supra* (defending the legislation).

<sup>163</sup> Most directly relevant is a book by political scientist Allen Hertzke, which chronicles the political process that led to the International Religious Freedom Act of 1998, with a particular emphasis on the role of evangelicals. ALLEN D. HERTZKE, *FREEING GOD'S CHILDREN* (2004). See also ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON* (1988).

pushed for legislative intervention. The most sustained lobbying came from Michael Horowitz, a Jew for whom contemporary religious persecution spurred memories of the Holocaust, together with evangelical Christian groups alarmed by increasing reports of religious persecution in many parts of the world.<sup>164</sup> These groups allied with human rights activists, many of whom were seasoned, resolutely secular campaigners for international human rights. Pope John Paul II's frequently expressed concerns about religious persecution, and the long Catholic tradition of support for human rights, added further ballast to the campaign. It was a fractious coalition, undercut at times by tensions and false steps (including a pronouncement by Pat Robertson that violent Liberian leader Charles Taylor should be supported as a good Christian); but it successfully countered opposition from business groups and initial skepticism in the Clinton administration.

Equally striking was the nature of the evangelical influence. Because evangelical Protestant churches are generally nonhierarchical, and there is no established church in the U.S., the religious freedom debate was shaped more by entrepreneurial individuals and nonchurch organizations than by a church leadership structure.<sup>165</sup> A cluster of Christian organizations, such as Christian Solidarity International, continuously pressed for intervention. Two prominent activists, Nina Shea and Paul Marshall, wrote books whose titles hint at the urgency and at times sensationalism of their appeals: *In the Lion's Den; Their Blood Cries Out*.<sup>166</sup> Finally, several Christian lawmakers adopted religious persecution as a signature issue and served as point persons in Congress.<sup>167</sup>

This pattern of decentralization is the key to understanding American evangelicalism and the mechanisms of its political influence. It is thrown into even starker relief by the debt relief movement, due to the striking differences between

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<sup>164</sup> See, e.g., David Aikman, *Compassionate Bedfellow*, CHRIST. TODAY, Feb. 2007, at 122 (tracing evangelical involvement to a 1996 meeting convened by the National Association of Evangelicals and noting that the meeting “had been sparked not by an evangelical, but by a Jew, Michael Horowitz, whose knowledge of Christian persecution came from an Ethiopian refuge living in his house”).

<sup>165</sup> The more theologically liberal, mainline Protestant churches have denominational lobbying organizations, but they were somewhat wary of the proposed legislation and played a less prominent role in its enactment. For a helpful analysis of the national offices of the mainline churches, see Laura R. Olson, *Mainline Protestant Washington Offices and the Political Lives of Clergy*, in THE QUIET HAND OF GOD, *supra* note 10, at 54.

<sup>166</sup> NINA SHEA, IN THE LION'S DEN: PERSECUTED CHRISTIANS AND WHAT THE WESTERN CHURCH CAN DO ABOUT IT (1997); PAUL MARSHALL, THEIR BLOOD CRIES OUT (1997).

<sup>167</sup> Virginia Congressman Frank Wolf and New Jersey Congressman Chris Smith were two of the key players. Wolf, along with Pennsylvania Senator Arlen Specter, co-sponsored the International Religious Freedom Act in 1997.

religious influence in Europe, as compared to the U.S.

B. *Debt Relief and the Restructuring of Sovereign Debt*

The movement described as “debt relief” consists of several interrelated concerns. The first, which supplies the label, is the campaign to cancel the debt of impoverished nations. Usually this envisions voluntary relief by a country’s creditors, but it may also comprise the use of international or domestic law to prevent creditors from collecting what they are owed. Much of the lobbying undertaken by Bono, as well as the 2005 Live Eight concert and work of British musician Bob Geldoff, has been aimed at debt relief.<sup>168</sup>

The other issue is sovereign debt restructuring. Here, the principal debate has been whether to establish a formal debt restructuring mechanism such as a sovereign bankruptcy framework— that is, bankruptcy provisions designed for financially troubled *countries*. Unlike with debt relief, which involves the poorest nations (think Africa), most of the beneficiaries of sovereign debt restructuring are middle income nations (Latin America, Russia, Asia) that have significant debt repayment capacity but have encountered a financial crisis.

On both issues, the Christian voice can be traced to the work of a nongovernmental organization called Jubilee. Jubilee, which now has branches in more than sixty countries, began in England in the 1990s. It was conceived in a British pub by Martin Dent, a 75 year old retired professor and great-great-great-grandson of an eighteenth century British Christian abolitionist. “Dent knew that the Old Testament calls for jubilee every 50 years,” according to one account:

a fresh start for slaves and debtors. Linking that Leviticus teaching to the coming of the millennium, he figured, might goad politicians and galvanize the public. In 1996 Dent and Bill Peters, a retired British ambassador, dubbed the quest Jubilee 2000.<sup>169</sup>

The movement quickly caught fire in England. Rallies in Birmingham in May 1998 drew an estimated 50,000 people, and by November 27, 2000, the *Guardian* described Jubilee 2000 as “comfortably the most successful mass movement of the past 25 years.”<sup>170</sup> These

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<sup>168</sup> See, e.g., Sarah Lyall, *Musical Cry to Help Africa’s Poor is Heard at Concerts Around Globe*, NY TIMES, July 3, 2005, at A8 (describing the ten Live 8 concerts, which were “intended to send a loud message to the leaders of the Group of 8 industrial nations before their meeting”). Bono and Geldoff also have been involved in the campaign to increase aid to impoverished nations, often drawing attention to crises such as the malaria and AIDS epidemics in Africa. Strictly speaking, these efforts involve aid rather than debt relief, but the movements are closely connected.

<sup>169</sup> Dennis R. Hoover, *What Would Moses Do? Debt Relief in the Jubilee Year*, RELIGION IN THE NEWS (Spring 2001)(internal quotation marks removed).

<sup>170</sup> Quoted in *id.*, at 2. The well-known British evangelical theologian (now Bishop)

efforts helped goad the G7 nations to adopt a \$34 billion debt relief plan in 2000.<sup>171</sup> The campaign for a sovereign bankruptcy framework has not yet succeeded, but it has achieved several lesser victories, and Jubilee continues to argue for a restructuring framework.<sup>172</sup>

In the United States, the picture could hardly have looked more different. Whereas visitors to London in the late 1990s were surrounded with headlines about Jubilee, and saw graffiti urging England to “Drop the Debt, not Bombs,” the debt relief movement was nearly invisible in the U.S. There were no mass rallies or marches on Washington. Few Americans, Christians or otherwise, were familiar with the Bible-inspired efforts of Jubilee. If assessments of the debt relief movement in England “erred on the side of triumphalism,” as one commentator put it, “most of the U.S. coverage erred on the side of indifference.”<sup>173</sup>

Why such radically different reactions on opposite sides of the Atlantic?<sup>174</sup> One

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N.T. Wright added his voice to the choir in a lecture later published as *The Millennium Myth*. N.T. WRIGHT, *THE MILLENNIUM MYTH: HOPE FOR A POSTMODERN WORLD* (1999). Wright described debt relief as the signature issue of our time. “There is no reason in the world’s terms,” he wrote, “why one should cancel debts. If you have people in your power, why not keep them there? Debt cancellation is inexplicable in terms of Marx, Nietzsche or Freud... It is a sign of hope, of love, of the gospel.” *Id.* at 108.

<sup>171</sup> See, e.g., Jeff M. Sellers, *How to Spell Debt Relief*, CHRISTIANITY TODAY, May 21, 2001, at 64, 64 (describing planned \$34 billion in debt relief for 22 countries in 2000). The G-7 is a loose affiliation of the seven leading developed economies: the US, the UK, Japan, Germany, France, Italy and Canada. The G-8 is these countries plus Russia. For an overview and history, see LEX RIEFFEL, *RESTRUCTURING SOVEREIGN DEBT* 24-27 (2003).

<sup>172</sup> Responding to a sovereign bankruptcy framework proposed by the International Monetary Fund, Jubilee’s research department wrote: “For us, any international insolvency practice should operate under a ‘framework of justice, accountable to the people of the debtor nation, as well as all creditors.’ ... [A better proposal would ensure] an independent, fair and transparent process that would genuinely serve to bring justice and reasons into international finance.” Romilly Greenhill, *IMF Meetings Give Go-Ahead for Bankruptcy Plan – But on Whose Terms?*, JUBILEE RESEARCH, Oct. 1, 2002, available at [www.jubileeresearch.org/analysis/articles/imf011002.htm](http://www.jubileeresearch.org/analysis/articles/imf011002.htm) (visited Oct. 13, 2005). For a critique of the Jubilee, IMF and other proposals, and an alternative proposal, see Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured*, EMORY L.J. (2003); Patrick Bolton & David A. Skeel, Jr., *Time to Rethink Sovereign Bankruptcy: A New Role for the IMF?*, in *SOVEREIGN BANKRUPTCY* (Joseph Stiglitz & Jose Ocampo eds)(forthcoming 2007).

<sup>173</sup> Sellers, *supra* note 171.

<sup>174</sup> My thanks to the students in my fall 2005 Debt Relief and Sovereign Debt Restructuring class for insights into this question. The analysis in this paragraph draws on our extensive class discussions on the puzzling divergence in responses to the debt relief campaign.



possible explanation is that the starkest need is in Africa, which has long been more salient to the British than to Americans. Africa is more geographically proximate to Britain; and England's colonial empire created lasting ties to the continent that are evident in everything from the substantial numbers of African immigrants in the U.K., to the coverage of the BBC evening news. A related explanation is that Americans simply are not interested in international news. If the legacy of England's colonialism is a sense of connection to the wider world, the longstanding tendency of U.S. isolationism continues to influence American reading and viewing patterns.

Both theories are plausible and seem likely to be part of the explanation. But at least as important is still another factor: the radically different nature of Christian influence in the two countries. In England, most evangelicals, like most nonevangelical Christians, are part of the state church, the Church of England. English evangelicals also tend to be comfortable with an active state role in addressing social issues such as the need for poor relief.<sup>175</sup> It is no accident that Tony Blair, the representative of the socially liberal Labor party, attracted substantial evangelical support in each of his election campaigns (as one suspects will current Prime Minister Gordon Brown). The debt relief movement chimed perfectly with each of these qualities: it benefited from strong ties to the established church, and found a receptive audience in British Christians who were already concerned about social issues.

In America, evangelicalism looks very different. Although evangelicals campaigned vigorously for governmental intervention on social issues throughout the nineteenth century, they were extremely wary for most of the twentieth, as we have seen. With the important and unhappy exception of Prohibition, evangelicals steered clear of social issues, which they associated with the liberal Protestantism of the Social Gospel. American evangelicals did not deny the ubiquitous concern in the Bible for the poor and oppressed.<sup>176</sup> But they treated this as secondary to the message of salvation, and preferred private, voluntaristic efforts to address poverty rather than government intervention.<sup>177</sup>

In America as in England, the debt relief campaign proceeded according to form. Working through their Washington offices, the mainline Protestant churches aligned themselves with Jubilee and championed debt relief early on, much as they have

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<sup>175</sup> See, e.g., BEBBINGTON, *supra* note 2, at 263-7 (describing resurgence in English evangelical social activism since the 1960s).

<sup>176</sup> The prominent liberal evangelical Jim Wallis often illustrates the pervasiveness of Scripture admonitions about poverty by brandishing a Bible from which all the references to poverty and the oppressed have been scissored out. The Bible is in tatters. See, e.g., JIM WALLIS, *GOD'S POLITICS* (2004).

<sup>177</sup> This was the tendency Carl Henry criticized when he insisted on the need for an evangelical social policy. HENRY, *supra* note 51, at 76.

advocated other social issues. But debt relief barely registered as an issue within the more politically influential evangelical circles. The combination of a general lack of interest in poverty outside America's borders, and the inability of mainline American churches to generate grassroots support made any serious intervention on debt relief unlikely.<sup>178</sup> Shifting the political dynamic in the U.S. would require a transformation of evangelical resistance to social reform. Or to use the terminology of the literature on social norms: a norm entrepreneur.<sup>179</sup>

This seems to have been what the Irish rock star Bono provided. Bono's role in the campaign for debt relief dates back to 1997, when he was given briefing materials authored by Jamie Drummond of Jubilee. Drummond's brief, as a *Time* magazine cover story recounts, "pointed out that although [the 1995 benefit conference] Live Aid raised \$200 million, Ethiopia alone paid \$500 million in annual debt service to the world's lending institutions. After contacting Drummond, Bono signed on as a spokesman for Jubilee 2000."<sup>180</sup> Since then, he has made debt relief a signature theme, both in his personal appearances and for the U2 band.<sup>181</sup>

Bono's influence has taken two forms, each aimed in important part at evangelicals. First is direct appeals to key politicians. In 1999 and 2000, he crisscrossed

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<sup>178</sup> See, e.g., Lestur Kurz & Kelly Goran Fulton, *Love Your Enemies? Protestants and United States Foreign Policy*, in THE QUIET HAND OF GOD, *supra* note 10, at 364, 373-76 (describing "widespread participation of [mainline] Protestants in Jubilee 2000"); NOREENA HERTZ, THE DEBT THREAT: HOW DEBT IS DESTROYING THE DEVELOPING WORLD 4 (2004)(noting that "despite the support of various religious groups, the Jubilee Coalition had almost no profile" in the U.S.).

<sup>179</sup> Robert Ellickson argues that norm entrepreneurs are most effective when they have a significant technical knowledge, and "there are appreciative experts ... who are likely immediately to esteem the norm entrepreneur for trying to change the social practice at issue." Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy* (1999); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PENN. L. REV. 2083, 2108-18 (2001)(applying Ellickson's insights to erosion of norm against hostile takeovers in Japan).

<sup>180</sup> Josh Tyrangiel, *The Constant Charmer*, TIME MAGAZINE, Dec. 26, 2005.

<sup>181</sup> U2's most recent album includes a powerful, Biblically-based musical plea for debt relief and aid to developing nations. "You speak of signs and wonders," the chorus runs, "but I need something other/I would believe if I was able/But I'm waiting on the crumbs from your table. U2, "Crumbs from Your Table," in HOW TO DISMANTLE AN ATOMIC BOMB. The phrase "crumbs from your table" comes from a parable in Luke 16. The parable describes a wealthy man who was merciless to a poor man named Lazarus while both were alive. When the rich man begs Abraham (who is in heaven with Lazarus) for help, Abraham recounts how the rich man had denied Lazarus even the crumbs from his table. On one reading, the song links America and other wealthy nations with the rich man who was reluctant to use his riches to assist those in need.

the Atlantic to meet with leading Congressional leaders. A key breakthrough came in 2000, when Bono met with former North Carolina Senator Jesse Helms. Recounting the wrenching human tragedy he had seen in Africa, and appealing to the Biblical mandate to assist the poor, Bono brought Helms to tears. Previously a staunch opponent of assistance for Africa, Helms agreed to end his interference.<sup>182</sup> Bono's entre to the Bush administration was speechwriter Michael Gerson, who reportedly heard about a speech Bono gave at Wheaton College, the evangelical college from which Gerson graduated and to which he retains close ties.<sup>183</sup> "Gerson and Budget Director Josh Bolton are evangelical Christians who believe there's a biblical imperative to help the world's poor," the *Time* story noted. "Along with then National Security Advisor Condoleeza Rice, they opened a dialogue with Bono and ultimately persuaded Bush to meet him."<sup>184</sup>

Bono's second, less well appreciated, source of influence is the mass audience he can tap through the DATA organization and the One campaign U2 promotes at each of its concerts.<sup>185</sup> The One campaign email list includes hundreds of thousands of names. The mailing list is, in effect, a large grassroots constituency that can be mobilized in the time it takes to send an email message. Indeed, the effective constituency is even larger than the email list, including thousands of others who are familiar with Bono's initiatives but have not joined the list. This substantial grassroots constituency, much of it evangelical, is the backdrop against which Bono's conversations with national leaders take place.<sup>186</sup>

Although much of Bono's press has been laudatory— including his selection as co-winner of *Time Magazine's* person of the year award in 2005— he also has taken flack for

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<sup>182</sup> According to Bobby Shriver, who has worked extensively with Bono in Washington, "Bono connected to [Helms] in a spiritual way. The two talked about the vast gulf between Africa's misery and America's prosperity. About the Bible, children, and so forth. And Helms was very moved by Bono's sincerity and evident knowledge. Not only in terms of Scripture, but in terms of the financing. He said he would come on board." Quoted in HERTZ, *supra* note 178, at 17. The episode is also recounted in James Traub, *The Statesman: Why, and How, Bono Matters*, N.Y. TIMES MAG., Sept. 18, 2005, at 86 (recounting how Senator Helms "listened, and his eyes began to well up" as Bono quoted Scripture and told him that "women and children were dying of AIDS ... and governments burdened by debt couldn't do a thing about it").

<sup>183</sup> Gerson's role in the Bush administration is profiled in Jeffrey Goldberg, *The Believer: George W. Bush's Loyal Speechwriter*, NEW YORKER, Feb. 13, 2006.

<sup>184</sup> Tyrangiel, *supra* note 180; *see also* Traub, *supra* note 182.

<sup>185</sup> DATA stands for Debt AIDS Trade Africa. The website, [www.data.org](http://www.data.org), posts updates about debt, trade and health issues related to Africa, often including stories about or messages from Bono. The One campaign is the grassroots campaign to address these issues.

<sup>186</sup> *See, e.g.*, David Brooks, *A Natural Alliance*, NY TIMES, May 26, 2005 ("Bono, who is a serious if nonsectarian Christian, is at the nexus of a vast alliance between socially conservative evangelicals and socially liberal N.G.O.'s").

his political efforts. "I'm surprised Bono can still talk," the Irish singer Sinead O'Connor has been quoted as saying, "his mouth is so full of American political cock."<sup>187</sup> But the results are remarkable. Under his prodding, Congress agreed to forgive \$435 million of African debt at the end of the Clinton administration. Bono's efforts figured prominently in the Bush administration's \$15 billion Millennium Challenge initiative, and in the U.S. representatives' agreement to sign on to a \$50 billion debt relief program under the auspices of the G-8 nations in 2005.<sup>188</sup>

It is too early to tell whether the debt relief campaign will genuinely transform the stance of American evangelicals on social issues. The norms literature suggests that norm transformation is most likely when the new norm is more "efficient" than the norm it displaces.<sup>189</sup> Evangelicals' resistance to activism does not neatly map onto this literature, since it is not obvious that the evangelical stance is driven by rational financial calculation.<sup>190</sup> There is an intriguing analogy, however, that may warrant further exploration. Evangelical reluctance to support intervention has long created cognitive dissonance within American evangelicalism, given the repeated Biblical injunctions to attend to the poor,<sup>191</sup> but the stance has endured due to the historical factors described at the outset of this section (most importantly, the reaction to the perception that the Social Gospel movement abandoned the redemptive role of Christianity). If the quiescence norm is shifting, at least on the issue of debt relief, the shift can be seen as a move to a more cognitively consistent norm— a norm that is "efficient" in the functionalist sense that it creates less friction with evangelicals' ostensible commitment to the authority of scriptural teaching. In this sense, the norm transformation would parallel the shift from an economically inefficient to an efficient norm.

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<sup>187</sup> Michael Odell, *The Q Interview*, Q MAG., [Month], 2005, at 63, 64.

<sup>188</sup> In a joint appearance with Bono in 2002, President Bush joked about Bono's influence, saying "Bono, I appreciate your heart and to tell you what an influence you've had, Dick Cheney walked into the Oval Office, he said, 'Jesse Helms wants us to listen to Bono's ideas.'" *President Proposes \$5 Billion Plan to Help Developing Nations: Remarks by the President on Global Development*, available at <http://www.whitehouse.gov/news/releases/2002/03/print/20020314-7.html>.

<sup>189</sup> See, e.g., Milhaupt, *supra* note 179. Norms also appear to be sticky until they near a tipping point. See, e.g., Randal Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHICAGO L. REV. 1225 (1997)(testing norm shifts with computer simulations).

<sup>190</sup> On the other hand, recent empirical evidence casts some doubt on the common assumption that evangelicals regularly vote against their economic interests. See, e.g., MCCARTHY, POOLE & ROSENTHAL, *supra* note 158 (finding that the voting patterns of people who regularly attend church fairly closely track their economic status).

<sup>191</sup> Evangelicals' failure to make poverty a central concern has been a longstanding lament of liberal evangelicals. See, e.g., RONALD J. SIDER, *RICH CHRISTIANS IN AN AGE OF HUNGER* (1977); WALLIS, *supra* note 175; BALMER, *supra* note 13, at 171.

## VI. CONCLUSION

The principal explanation for the dearth of Christian legal scholarship appears to be a form of historical path dependence. Religion was dismissed by American legal scholars for much of the twentieth century, its “brooding omnipresence” deemed irrelevant to serious legal scholarship. Evangelicals returned the favor by deserting America’s political and scholarly life. Although evangelicals re-engaged American political life in the 1970s, the skepticism of religious perspectives, and the absence of a critical mass of Christian legal scholarship, lingered. There is now a substantial interest in Christian legal scholarship, but surprisingly little scholarship to turn to.

While the tone of much of this Article has been pessimistic, there is a silver lining: the paucity of Christian legal scholarship seems unsustainable. With significant numbers of self-identified Christians in positions of prominence, and substantial Christian influence in American politics and law, there is a pent-up demand for both normative and descriptive Christian legal scholarship. The formation in the past decade or so of several new law schools dedicated to pursuing a distinctively Christian vision of legal studies, including Catholic laws schools such as Ave Maria and St. Thomas and Regent on the Protestant side, is perhaps a forerunner of this trend.<sup>192</sup> More recently, Catholic legal scholars have begun applying Catholic Social Thought in a variety of contexts.<sup>193</sup> There is evidence of a similar though as yet more limited ferment from the Protestant perspective. It is still much too early to tell if this new scholarly activity will have a sustained impact on legal scholarship generally, or on internal debate within Christian circles. But it might. In ten years, or possibly even five, this Article’s laments may come to seem quaint. I pray this is so.

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<sup>192</sup> A few more longstanding law schools, such as Villanova, also have begun to focus more intensively on religiously-oriented scholarship. See Mark Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOLEDO L. REV. 171 (2001)(describing vision of law school as neither sectarian nor secular in orientation).

<sup>193</sup> See Part IV(D), *infra*. Perhaps the most vibrant current venue for debate about legal issues is the Catholic website Mirror of Justice, [www.mirrorofjustice.com](http://www.mirrorofjustice.com), which provides ongoing commentary and debate on legal and political issues.