The Paths of Christian Legal Scholarship

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

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

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

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

[2] Quoted in DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 71 (1974).

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

William Jennings Bryan, Pound's adversary in that Nebraska courthouse, was no intellectual– his sympathetic biographer suggests he was a "rather simple man" who "showed

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

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

If the conflict between Pound and Bryan was one emblematic clash, the other came fifty years later, in the early 1940s,

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

13

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

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

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

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

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[16] Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A.J. 569 (1945)

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

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

accept “the implications of divine authority ... becomes predominant in our philosophy, we shall be obliged once more to free ourselves from the old shackles.”[19] In short, unlike evangelical scholarship, Catholic scholarship existed, but it rarely saw

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

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

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

[29] See, for example, MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN of 6eGa0iw:

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

[33] Wolterstorff describes the perspectival nature of human knowledge with characteristic directness and eloquence. "It is simply not possible to circumvent the beliefs, the purposes, and the affects acquired in everyday life," he writes, "and make use in scholarship just of one's indigenous, generically human hardwiring. ... It is not possible in our scholarship to circumvent the identities bestowed upon us by our religions, our nations, our genders, our races, our classes." Nicholas Wolterstorff, *Public Theology or Christian Learning?*, *in* A PASSION FOR GOD'S REIGN 65, 84 (Miroslav Volf, ed. 1998); *see also* Nicholas Wolterstorff, *Abraham Kuyper*, *in* THE TEACHINGS OF MODERN CHRISTIACS,egD5 Td(direh2),il42 Tw 12 0 fANuth, that tr

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

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

Who?

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

I suppose the obvious answer to this question would be yes, one must be a Christian to produce Christian legal scholarship. It says so right in the label. But I don't think this is correct. Perhaps the answer depends on just what one means by Christian legal scholarship. In my view, Christian legal scholarship is scholarship that does two things: 1) it provides either a normative theory derived from Christian scripture or tradition; or a descriptive theory that explains some

Let me start my answer with a word of warning about what has been perhaps the most popular legal strategy of theologically conservative Christians in the past several decades: legal defense funds. In a 1981 book called

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schools,[45] and the renewed focus on faith perspectives at long established law schools like Notre Dame, Boston College and Villanova. These faith-oriented schools are wrestling with many of

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

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

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

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

themselves as participants in the same scholarly conversation. And it may be that this generation's Mark DeWolfe Howe won't feel the need to warn about the "old shackles" of soants ilaw. Td(18)Tj