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CHRISTIAN LEGAL THOUGHT COMES OF AGE

DAVID A. SKEEL, JR.[†]

When *Christian Legal Thought*¹ arrived in the mail, I couldn't help thinking of an old Virginia Slims advertisement. The ad featured a stylishly dressed woman holding a long, slender cigarette, under a caption that said: "You've come a long way, baby."

A hundred and fifty years ago a casebook on Christian legal thought would have been unnecessary. Such a book would have seemed as redundant as legal thought on legal thought. Christian principles and law were inseparable, at least for a Protestant lawyer in mainstream American legal circles. Law was assumed to be based on Christian principles.

A hundred years ago, a casebook on Christian legal thought would have been unthinkable. The quest to make law school education "scientific" had been underway for decades by 1918, if we take Christopher Columbus Langdell's deanship at Harvard Law School as a rough starting point.² The sociological jurisprudence, a challenge to Langdellian orthodoxy, was at its peak,³ and the first hints of legal realism would soon be

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¹ PATRICK MCKINLEY BRENNAN & WILLIAM S. BREWBAKER III, *CHRISTIAN LEGAL THOUGHT: MATERIALS AND CASES* (2017) [hereinafter CLT].

² Langdell characterized common law decision making as a deductive process: judges distilled the common law to its underlying, objective principles, then applied those principles to particular cases. For a thoughtful assessment of Langdell's influence, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

³ Roscoe Pound, another Harvard Law School dean, was the principal advocate for a sociological jurisprudence. See Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

emerging.⁴ Neither Langdellianism nor its successors had space for religion, which elite scholars thought subjective and unscientific.

Fifteen years ago, some Christian legal scholars might have dreamed about a casebook on Christian legal thought. Hints of such a perspective had lately crept into mainstream legal scholarship.⁵ But the prospect of a publisher actually publishing such a casebook still seemed unimaginable. Yet here we are. A casebook on Christian legal thought is necessary, thinkable, and thanks to Professors Brennan and Brewbaker, more than just imaginable: it's now in print.

The editors have packed multitudes into a casebook of pleasingly manageable size. CLT begins by asking just what "Christian Legal Thought" is. With some legal movements, such as legal realism, law and economics, or critical legal studies, it is not difficult to summarize the distinctive features of the movement. Not so with Christian legal thought. As with law and literature and feminist jurisprudence, each of which includes a variety of often disparate approaches, an entire course could be devoted to defining Christian legal thought. After exploring these definitional issues in the opening chapter, CLT's second chapter considers the great theological questions of God, Creation, the human person, the Fall, and Redemption from a legal and cultural perspective. The readings here are eclectic, ranging from speeches by Abraham Lincoln, George W. Bush, and Barack Obama, to the Bible, several judicial opinions, and the Catechism of the Catholic Church. In the third chapter, CLT shifts from general perspectives to insights from particular Christian denominations, including Catholicism, Lutheranism, the Anabaptists, the Reformed Tradition, Calvinism, and (somewhat oddly severed from Calvinism) Abraham Kuyper. The editors are quick to acknowledge that their list is incomplete,

⁴ A 1930 article by Karl Llewellyn is often identified as the advent of legal realism. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). Llewellyn advocated "careful study of the instrumentalism, the pragmatic and socio-psychological decision elements" of the judicial process, and "careful study of [its] effects on the society concerned." *Id.* at 447 n.12.

⁵ The watershed was CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

promising to include additional traditions such as Anglicanism, Methodism, Orthodoxy and the African American church in future editions.⁶

The final two chapters are devoted to application, and suffused with large doses of Thomas Aquinas, who figures only briefly in the earlier chapters. Chapter 4 engages the great trans-substantive issues of law and legal institutions, including human equality, justice, natural law, natural rights, and the relationship between church and state. The comparatively limited treatment of church-state issues—a wise editorial decision, in my view, given that these issues are taught as a standalone course in many law schools—underscores that CLT is not simply a treatise on the Religion Clauses of the First Amendment or the nature of the liberal state. Its aim is much broader, to consider the insights of Christianity for every dimension of law and legal doctrine. In the final chapter, CLT explores a variety of contemporary legal issues, such as contracts, criminal law, property, environmental law, and tax. These topics are, as the editors note, a “limited sampling,”⁷ but teachers can easily add readings on bankruptcy, corporate law, employment or whatever their own particular interests are.

CLT is a deeply satisfying book. It raises more questions than it answers, just as a casebook should. Perhaps most surprising, CLT looks and feels like a true casebook, a book one could actually use for a class that students might wish to take. As I worked my way through its pages, three features stuck out. I will briefly consider each, then conclude by putting the casebook in larger perspective.

I. BEYOND THE “BROODING OMNIPRESENCE”

Two decades ago, discussions of Christian legal thought often went something like this: Once upon a time, it was perfectly acceptable to talk about God in law school, and to consider the divine authority on which, in the Christian understanding, government and legal institutions are based. In the early twentieth century, however, the legal realism movement banished God from polite legal discourse. Pragmatist in their outlook and relentlessly instrumental, the legal realists rejected

⁶ CLT, *supra* note 1, at viii.

⁷ *Id.*

any consideration of the supernatural. This sentiment was summed up in Oliver Wendell Holmes' pronouncement—invariably quoted at this point in the talk—that there is no “brooding omnipresence in the sky.”⁸

After offering up this sketch of the wrong turn in legal education, the speaker usually proposed a simple solution: Christian legal scholars should seek to put God back in the halls of the leading law schools, and to kick legal realism out. Out with messy, pragmatic perspectives on law and in with the pure principles provided by Christianity. More God and less instrumentalism would save the day.

In my view, this perspective was well-intentioned but deeply mistaken. The legal realists were wrong to exclude religion from legal discourse—indeed, the exclusion violated the legal realists' commitment to exploring the full range of factors that shape law and legal rules. But this admittedly massive blind spot did not invalidate the other insights of legal realism. The legal realists' insistence that legal thought needs to take account of social, economic, and political pressures is compelling, in my view; it is fortunate that law schools have so fully taken this message on board that the lessons are simply assumed. Banishing these insights would have been a step backward. Jesus himself warned that if one demon is chased out, seven others may come to take its place.⁹

Christian legal scholars can of course debate how much pragmatism is desirable, and when pragmatism should give way to a more prophetic stance. There is a time to stand on principle, even if it proves counterproductive from a practical perspective. But there are other times when a different stance is called for, and Christians might reasonably differ on some issues—such as the optimal tax regime or the scope of anti-discrimination law. A perspective on law and legal institutions that excludes any consideration of the consequences of existing law or a proposed reform—and is thus pervasively anti-pragmatic—is not true to the Bible. The law in the Hebrew Bible is full of nuance and

⁸ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”).

⁹ *Luke* 11:24-26.

context.¹⁰ The need to take pragmatic considerations into account is even more evident in the New Testament, where Jesus warns that anger at my brother is murder¹¹ and looking in lust is adultery.¹² No human legal system could effectively police such a wide range of misbehavior. Choices must be made, and pragmatic considerations should and invariably do guide those choices.

CLT does not juxtapose Christian legal thought with legal realism or the other great jurisprudential movements of the past century. As tempting as it must have been to assert Christian legal thought's relevance by comparing it to law and economics or critical legal studies, side-by-side comparisons and contrasts would have been a distraction. The editors were wise to omit them, in my view.¹³

Instead, CLT plunges the teacher and students directly into Christian theologians' and scholars' musings on the proper role of secular law, including both recent literature and the classical insights of Thomas Aquinas, John Calvin, Abraham Kuyper and others. Nowhere do the editors imply that the ills of contemporary legal education can be solved by putting God back in and kicking pragmatic perspectives out. The readings make it clear there is room for, and a need for, both. With the publication of CLT, Christian legal thought has moved beyond the simplistic battle cries of two decades ago.

¹⁰ For an effort to distill the nuances into general paradigms, see CHRISTOPHER J.H. WRIGHT, *OLD TESTAMENT ETHICS FOR THE PEOPLE OF GOD* (2004).

¹¹ *Matthew* 5:22.

¹² *Matthew* 5:28.

¹³ When I made this point at the conference giving rise to this symposium, moderator Nicholas DiMarco pointed out a tension with my claim, in earlier writing, that Christian legal scholars need to develop distinct theoretical perspectives. David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 *EMORY L.J.* 1471, 1503–04 (2008). His point is an astute one, but the tension seems to me to dissolve if we consider the difference between developing and defending a particular Christian perspective on law, on the one hand, which requires a coherent theory; and teaching a class on CLT, on the other. A teacher need not adopt a particular account for a class on CLT. Even if she did adopt a unified theory, the class could easily get bogged down if the teacher attempted to contrast her vision of CLT with other jurisprudential movements.

II. THE ONE OR THE MANY

The choice between one and many is perhaps the trickiest strategic decision for a book like this one: Do the editors provide a single, unified perspective—“the” Christian perspective, or do they attempt to represent the rich diversity of Christian thought? The chief virtue of a unified perspective is greater coherence and fewer loose ends. Once the foundation is laid, the rest of the casebook would take care of it itself: just apply the perspective to whatever issues the editors choose.¹⁴ The downside is that the unified perspective may have limited appeal if it is narrow or idiosyncratic, or depends on a particular set of theological commitments. Including multiple perspectives avoids the risk of narrowness, but creates a risk of incoherence.

CLT takes the second path, including readings from a variety of Christian traditions, rather than constructing a single, overarching vision of Christian legal thought. The editors themselves have different allegiances—one is a traditional Catholic and the other a Protestant evangelical.¹⁵ But they could nevertheless have melded their perspectives into a unified approach. The widely discussed *Evangelicals and Catholics Together* statements might have served as a model for such an approach.¹⁶ Indeed, the editors were principal drafters of *Evangelicals and Catholics Together on Law*.¹⁷ The editors nevertheless opted for eclecticism—a good choice, in my view. Legal doctrines and institutions do not lend themselves well to a unified perspective that has sufficient breadth to speak for many or most Christians and sufficient depth to provide insight into a rich array of issues. This limitation is evident in *Evangelicals and Catholics Together on Law*. The statement is excellent and compelling as far as it goes, but it speaks only to general issues

¹⁴ The best recent illustration of this approach is Richard Posner’s classic treatise on the economics of law. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

¹⁵ CLT, *supra* note 1, at vi.

¹⁶ See *Evangelicals and Catholics Together: The Christian Mission in the Third Millennium*, FIRST THINGS (May 1994), <https://www.firstthings.com/article/1994/05/evangelicals-catholics-together-the-christian-mission-in-the-third-millennium>.

¹⁷ Joint Statement by Evangelical and Catholic Legal Scholars, *Evangelicals and Catholics Together on Law: The Lord of Heaven and Earth*, 3 J. CHRISTIAN L. THOUGHT 2 (2013), reproduced at <http://mirrorofjustice.blogs.com/files/evangelicals-and-catholics-together-on-law--the-lord-of-heaven-and-earth.pdf>.

such as the nature of human beings. The statement does not grapple with the myriad issues or areas of law that call for a more particularized analysis.

CLT lets a variety of theological traditions speak for themselves, and engages the full range of legal issues, from the structure of legal institutions to narrower doctrinal issues such as criminal or environmental law. The coverage is, inevitably, incomplete. The editors recognize the gaps and promise to fill some of them in future editions.¹⁸ The coverage also is somewhat uneven. The writings of Thomas Aquinas are surprisingly scarce early in the book, for instance, but later appear in force, threatening to overwhelm other perspectives on issues such as criminal law and contracts. But the inclusion of multiple perspectives works extremely well. It is particularly fitting for a casebook. In a casebook, an editor can raise questions without necessarily answering them; it is not essential the discussion lead to a single, clear conclusion. Far better that the casebook include a judicious selection of readings from differing perspectives and that it direct teachers and their students to the central questions. CLT does just that.

III. CHRISTIANITY IN THE AMERICAN LEGAL GRAIN

The breadth, depth, and richness of CLT is remarkable, especially in a casebook of manageable size. Like any other Christian legal scholar who thumbs through the pages, I was hoping to discover interesting readings that were new to me and looking for obvious omissions. I found far more of the former than the latter, including, to mention just two, writings by Oliver O'Donovan¹⁹ and Yves Simon²⁰ that I had not seen before. Perhaps I would add a supplemental reading or two if I were

¹⁸ The editors single out, as chapters they intend to expand, "Chapter 2's limited selection of theological topics . . . Chapter 3's treatment of Christian traditions (to include at least the Anglican and Methodist traditions, Orthodoxy, and, perhaps most significantly, the African-American church . . . and Chapter 5's limited sampling of conventional legal subjects." CLT, *supra* note 1, at viii.

¹⁹ OLIVER O'DONOVAN, *Government as Judgment, as reprinted in CLT*, *supra* note 1, at 441–42.

²⁰ YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* (1980), *as reprinted in CLT*, *supra* note 1, at 477–78.

using CLT, but all of my own favorites are already here: Calvin's chapter on law in the *Institutes*,²¹ Niebuhr,²² Kuyper²³ and many others.

The one topic on which CLT is, to my mind, somewhat thin is Christian influence on American law over the past century or so. The editors include excerpts from Reinhold Niebuhr and a portion of Martin Luther King, Jr.'s *Letter from a Birmingham Jail*, but only as exemplars of writing on discrete issues.²⁴ I did not see any reference to Williams Jennings Bryan or Walter Rauschenbusch, whose writings and public presence profoundly influenced the evolution of American law in the early twentieth century. William Jennings Bryan ran (unsuccessfully) for president three times as the Democratic nominee and served as Woodrow Wilson's Secretary of State for a year, resigning when Wilson's intention to enter World War I became clear.²⁵ The best-known evangelical of his era, Bryan campaigned for Prohibition—the ban on the manufacture or sale of alcohol—and woman's suffrage. Rauschenbusch, a Baptist pastor and longtime seminary professor, was the most famous proponent of the social gospel movement, which promoted morals regulation, government ownership of monopolies, and the general perfection of American society.²⁶

Niebuhr, the most influential mid-twentieth century American Christian public figure, is best known as an architect of the pragmatist Cold War policy known as a "realism." This stance flowed directly from Niebuhr's theology, which emphasized our fallenness and had little of Rauschenbusch's

²¹ JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* (Henry Beveridge trans., 1845) (1559), as reprinted in CLT, *supra* note 1, at 281–92.

²² *E.g.*, REINHOLD NIEBUHR, *CHRISTIAN REALISM AND POLITICAL PROBLEMS* (1953), as reprinted in CLT, *supra* note 1, at 442–44.

²³ Chapter 3 devotes a section to "Abraham Kuyper and His Influence," which contains an extended excerpt from his *Lectures on Calvinism*. CLT, *supra* note 1, at 318–38.

²⁴ Brief excerpts from Niebuhr's *The Nature and Destiny of Man* and *Christianity and Power Politics* are included in a section called Doing Justice, CLT, *supra* note 1, at 363, and *Letter from a Birmingham Jail* is excerpted in Defining Law, *id.* at 392.

²⁵ For Bryan's life, see MICHAEL KAZIN, *A GODLY HERO: THE LIFE OF WILLIAM JENNINGS BRYAN* (Knopf 2006).

²⁶ The principal biography of Rauschenbusch is CHRISTOPHER H. EVANS, *THE KINGDOM IS ALWAYS BUT COMING: A LIFE OF WALTER RAUSCHENBUSCH* (Eerdmans 2004).

optimism. Niebuhr conceived justice as an ongoing effort to prevent any group from obtaining disproportionate power. “Without a tolerable equilibrium,” as he put it:

[N]o moral or social restraints ever succeed completely in preventing injustice and enslavement. In this sense an equilibrium of vitality is an approximation of brotherhood within the limits of conditions imposed by human selfishness.²⁷

Although Martin Luther King, Jr. found Niebuhr’s diagnosis of social frictions compelling, King insisted that genuine change was possible, a commitment he traced in part to Rauschenbusch.²⁸ The signal legal achievements of the civil rights movement were not paternalistic in the social gospel or Bryanite sense, nor centered on a recognizably Niebuhrian style of justice. Both the Voting Rights Act and the Civil Rights Act were designed to foster relationship across divides that had long made relationship impossible.²⁹

More recent decades saw the emergence of the religious right, associated with figures such as Jerry Falwell and Pat Robertson. The religious right harkened back to Bryan-era evangelical activism but with striking differences. Housed principally in the Republican Party, the religious right drew sharp lines between the church and the world, and was pessimistic about the prospects for genuine social transformation.

It is with some trepidation that I urge the editors to entertain an expansion proposal; CLT already is just the right size. But it is hard to imagine teaching a course on Christian legal thought in an American law school without devoting several classes to Christian influence on American law. In future editions, I hope the editors will add a historical section at the end of the chapter on Christian traditions, or a short new chapter immediately following this chapter. An even more ambitious treatment might include sections on Christian influence in other countries as well.

²⁷ 2 REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN: A CHRISTIAN INTERPRETATION* 95 (Westminster John Knox Press 1996).

²⁸ For Niebuhr’s influence on King, see Davison M. Douglas, *Reinhold Niebuhr and Critical Race Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 5, at 149, 159–60 (discussing Niebuhr as a corrective to King’s general optimism about human nature).

²⁹ For discussion, see David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 829–31 (2006).

IV. WHO WILL ADOPT CHRISTIAN LEGAL THOUGHT?

The publication of CLT will spur questions about whether Christian legal thought is a full-fledged legal movement, and if so, where it is headed. If a Christian legal thought movement were to spring into existence, CLT would surely be one of its foundational texts. But whether or not Christian legal thought qualifies as a legal movement seems like the wrong question. It's not clear it matters one way or another. A more pertinent question is this: Who is likely to adopt CLT for their classes?

I suspect a surprising number of the professors who use CLT will not identify as Christians themselves. The casebook is thorough and even-handed in its approach, rather than doctrinaire in any way. A professor who is not herself Christian, but is interested in the implications of Christianity for law, is likely to find CLT quite congenial.

The teachers most naturally drawn to CLT, however, will be those who are Christians themselves. As I look around, I am surprised that there still are so few identifiably Christian law professors. I wish there were more, and increasingly believe that one of the most important things those of us who are Christian professors can do is to encourage aspiring Christian professors in some way. Imagine how differently many Christians would view our education system if every Christian student were likely to have at least one Christian professor at some point in her years of college or law school.

Many of these new Christian professors might never teach a class on Christian legal thought. That would not be a problem. As C.S. Lewis wrote many years ago, "What we want is not more little books about Christianity, but more little books"—or, we might say, classes—"by Christians on other subjects—with their Christianity latent."³⁰ "It is not the books written in direct defense of Materialism that make the modern man a materialist," Lewis reasoned, wisely; "it is the materialistic assumptions in all the other books."³¹ Yet even if they wrote and taught in other areas, some of these professors might teach a class on Christian legal thought from time to time. After all, one of the joys of teaching in a law school is the freedom most of us

³⁰ C.S. LEWIS, *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* 93 (Walter Hooper ed., Eerdmans 1970).

³¹ *Id.*

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have to teach an occasional class outside our principal area of expertise. Christian legal thought is a natural choice. In this world I imagine and hope for, CLT would never go out of print.