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“THERE ARE NO ORDINARY PEOPLE”: CHRISTIAN HUMANISM AND CHRISTIAN LEGAL THOUGHT

RICHARD W. GARNETT[†]

It seems to me that what my colleague, teacher, and friend, the late Robert E. Rodes, Jr., liked to call “the legal enterprise” is the project of coordinating, structuring, facilitating, and constraining human activities in a way that promotes and secures the common good and, thereby, promotes the flourishing of human persons.¹ This project proceeds from, and depends on, an account of what the human person is and is for—a “moral anthropology.”² I have argued elsewhere, for example, that certain “truths about the nature, goods, and destiny of the human person, namely, that we were made by God—whose love for us is precisely what imparts to us the worth that makes rights-and dignity-talk meaningful—to know, love, and serve Him in this world and to be happy forever with Him in the next,” must be appreciated in order to construct and employ a good law of religious freedom.³ The point is, the answer we give to the

[†] Paul J. Schierl / Fort Howard Corporation Professor of Law, University of Notre Dame. I am honored to have the opportunity to celebrate the accomplishment of Professors Patrick McKinley Brennan and William S. Brewbaker, the editors of the new casebook, *Christian Legal Thought: Materials and Cases* (Foundation Press 2017). Deep gratitude is owed to Liam Ray and his colleagues on the *Journal of Catholic Legal Studies* for their invitation and their patience. This paper’s title, “There Are No Ordinary People,” is taken from C.S. Lewis’s essay, *The Weight of Glory*. C.S. LEWIS, *THE WEIGHT OF GLORY, AND OTHER ADDRESSES* 19 (Walter Hooper ed., rev. & expanded ed. 1980).

¹ For Rodes, the “central problem” of the legal enterprise was “the relation of love to power.” See Robert E. Rodes, Jr., *Pilgrim Law*, 11 *J.L. & RELIGION* 255, 266 (1994) (quoting JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* xii (1976)).

² “[B]y ‘moral anthropology,’ I mean ‘an account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated.’” Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 541, 543 (2003).

³ Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 *CARDOZO L. REV.* 1815, 1816–17 (2011) (footnote omitted); see also *id.* at

question “What are humans?” or “What is a person?” is among “the more important questions we face in our lives. The answer we give . . . helps to determine our view of our own selves, our lives, our very being and purpose, and of what makes a good society.”⁴ The answer and the question matter, then, for law.

Professors Patrick McKinley Brennan and William S. Brewbaker’s new casebook, *Christian Legal Thought: Materials and Cases*,⁵ is a gift both to the legal academy and to all those thinking and conversing about the legal enterprise and the vocation to a life in the law. It is a rich collection of readings and questions about jurisprudence, theology, and history, and invites students and readers on a gently but wisely guided exercise of applying Christian insights and concerns to several key areas of contemporary law, including Property, Criminal Law, Contracts, Taxation, and Environmental Law.

It appears that the casebook grew out of another Brennan and Brewbaker collaboration, the 2013 statement *Evangelicals and Catholics Together on Law: The Lord of Heaven and Earth*.⁶ That statement built on a shared “conviction that law’s place and role in society are shaped by enduring truths—truths that transcend the differences among cultures and traditions—about God, about the world, about the human person, and about what the entire human family is called by its divine creator and redeemer to be.”⁷ I like to think that the book also reflects Professor Brennan’s years of engagement with and contributions to the *Mirror of Justice* blog—a blog founded in 2004 and

1817 (“It is a fact of moral anthropology that we are hard-wired to search for, and cling to, the truth about ourselves and the world. As Saint Augustine famously wrote, ‘you have made us for yourself, [O Lord,] and our heart is restless until it rests in you.’”) (citations omitted).

⁴ CHRISTIAN SMITH, WHAT IS A PERSON: RETHINKING HUMANITY, SOCIAL LIFE, AND THE MORAL GOOD FROM THE PERSON UP 7 (2010).

⁵ PATRICK MCKINLEY BRENNAN & WILLIAM S. BREWBAKER III, CHRISTIAN LEGAL THOUGHT: MATERIALS AND CASES (2017) [hereinafter CLT].

⁶ This statement was the product of approximately 8 years’ worth of meetings and conversations among a group of Evangelical and Catholic law professors, including me. It was published in both the Summer 2013 issue of the *Journal of Christian Legal Thought* and in Volume 11 of the *Journal of Catholic Social Thought*; it can also be found at this link: <http://mirrorofjustice.blogs.com/files/evangelicals-and-catholics-together-on-law--the-lord-of-heaven-and-earth.pdf>.

⁷ Joint Statement by Evangelical and Catholic Legal Scholars, *Evangelicals and Catholics Together on Law: The Lord of Heaven and Earth*, 3 J. CHRISTIAN LEGAL THOUGHT 2, 2 (2013).

"dedicated to the development of Catholic Legal Theory."⁸ In my own inaugural blog-post, I proposed as a starting point for this development that moral and legal arguments and positions rest on anthropological premises—on claims about the nature and destiny of persons—and that it is critically important to get these premises right.⁹ The Psalmist's question, "What is man, that thou art mindful of him?"¹⁰ is not only a prayer, then, but also a starting point for jurisprudential reflection. It is just one of the *Christian Legal Thought* casebook's merits that its editors share and expertly develop this view.

Brennan and Brewbaker report that their aim is "to illuminate law and legal institutions by seeing them in light of Christian accounts of God, the world, and the human person."¹¹ Throughout the casebook's opening chapters and sections, they highlight the basic, perennial questions that Christians—like everyone else—have asked and that have implications for legal rules, practices, and institutions—questions like "Who am I? Who are 'we'? Where did we come from? What, if anything, are we here for? Where, if anywhere, are we going?"¹² Accordingly, their foundational Chapter Two, on "Christian Theology and Legal Thought," opens with sections titled "Who Is God?," "Creation," "The Human Person," "Fall and Redemption," and "Culture."¹³ And, it strikes me that these five sections and their titles supply both an outline and the content of the moral anthropology on which the Christian understanding of the legal enterprise should stand and by which it should be illuminated: The human person is a creature, loved and sustained by God, fallen but redeemed, made to live and flourish in relationships, communion, and culture, dependent and vulnerable yet destined for eternity. The aim and challenge of Christian legal thought, then, is to propose to the world a truthful vision of the human

⁸ MIRROR OF JUSTICE, <http://mirrorofjustice.blogs.com/> (last visited May 22, 2018).

⁹ Richard W. Garnett, *Law and "Moral Anthropology,"* MIRROR OF JUSTICE (Feb. 6, 2004), http://mirrorofjustice.blogs.com/mirrorofjustice/2004/02/law_and_moral_a.html.

¹⁰ *Psalm* 8:4 (King James Version).

¹¹ CLT, *supra* note 5, at v.

¹² *Id.* at 95.

¹³ *Id.* at 97–191.

person as—in the words of my colleague and teacher, Thomas Shaffer—“the noblest work of God—infininitely valuable, relentlessly unique, endlessly interesting.”¹⁴

Other accounts are on offer, of course; other accounts do shape and have pervasively shaped American law, legal doctrine, and legal practice. We might regard persons as electrified “meat puppets moving through particle-clogged space,”¹⁵ as Promethean John Galts, as carefully calculating clusters of preferences, as cheapest cost-avoiders, or as bundles of intersecting tribal and other “identities.” The question, again, is a jurisprudential one and it is, again, the question of the Psalmist, which serves as the epigraph for the Brennan and Brewbaker casebook’s section on “The Human Person”: “What is man that you are mindful of him, and the son of man that you care for him?”¹⁶ What is, as Pope Saint John Paul II put it, the “moral truth about the human person?”¹⁷

Brennan and Brewbaker open the section with a passage from the first chapter of *Genesis* that reveals at least three dimensions of this “truth”: first, the human person is created “in [God’s] image, after [God’s] likeness”; second, the human person is embodied (“male and female he created them”); and, third, the person is blessed and, like “everything that [God] . . . made . . . very good.”¹⁸ We are invited to ask, “what difference does it make that we live in a world that . . . was made intentionally by God,” that was declared good, and that could have been different?¹⁹ What difference does it make, in other words, that “human beings [are] different from meat?”²⁰

¹⁴ Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 2 (1995) (quoting *Chisholm v. Georgia*, 2 U.S. 419, 463 (1793)).

¹⁵ Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Clause Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 660 (2009).

¹⁶ CLT, *supra* note 5, at 137 (quoting *Psalm* 8:4 (English Standard Version)).

¹⁷ John Paul II, *Address of the Holy Father Pope John Paul II to the Bishops of the Church in the States of Texas, Oklahoma, and Arkansas (U.S.A.) on Their “Ad Limina” Visit*, VATICAN (June 27, 1998), https://w2.vatican.va/content/john-paul-ii/en/speeches/1998/june/documents/hf_jp-ii_spe_19980627_ad-limina-usa-ix.html.

¹⁸ CLT, *supra* note 5, at 137 (citations omitted). These points are elaborated in a longer excerpt from the 1997 *Catechism of the Catholic Church*. *Id.* at 137–42.

¹⁹ *Id.* at 117.

²⁰ Garnett, *Christian Witness*, *supra* note 2, at 541 (quoting Matthew Rose, *Things Fall Apart*, WKLY. STANDARD (June 17, 2002, 12:00 AM), <https://www>

A contemporary author who, I believe, takes up this invitation is also one of my favorites: Cormac McCarthy. Bear with me. It says something, I admit, both about McCarthy's work and about my taste in fiction that what might be his most uplifting novel, *The Road*, is the tale of a father's and his son's harrowing journey through a bleak and sunless post-apocalyptic hellscape planted thick with madmen and patrolled by roving bands of cannibals.²¹ The father—whom the reader knows only as "the Man"—is determined that, no matter what, he and his son ("the Boy") will never become one of those from whom they are hiding and for whom other people, we learn, *have* become just "meat." He assures and promises the Boy often that they are, and will remain, "the good guys," who "carry the fire." To "carry the fire" is to be human, to continue to love and to hope, to embrace dependence, to live in relation to and communion with other persons. Recall that Christians often say not only that the human person is made and created in God's image, but that we "bear" and "carry" it. Similarly, McCarthy's Man looks on the Boy as an icon, approaches him like a tabernacle, and even refers to him as a "chalice." Surrounded by danger and despair, he is "good" and, like the chalice, he bears and carries God.

I am not a literary scholar, and it could well be that I have this all wrong. Still, it seems to me that *The Road* is (among other things) a meditation on moral anthropology and about what it means and why it matters to be human. In this way, it is like the law, the legal enterprise, and *Christian Legal Thought*. Notice, it is not the Boy's strength, capacities, potential, or autonomy that makes him "good" or that constitutes the "fire" he carries. In this way, the moral anthropology of *The Road* is unlike the "flawed" one that, as Professor Mary Ann Glendon contends in a paper excerpted by Brennan and Brewbaker, has "predominated in the U.S. legal system throughout the life of the republic: the image of a free, self-determining, and self-sufficient individual."²² This is, as many have noticed, the moral

.weeklystandard.com/matthew-rose/things-fall-apart-2629 (reviewing JOHN LUKACS, *AT THE END OF AN AGE* (2002))).

²¹ CORMAC MCCARTHY, *THE ROAD* (2006).

²² CLT, *supra* note 5, at 142–43 (quoting Mary Ann Glendon, *Conceptualization of the Person in American Law*, in *CONCEPTUALIZATION OF THE PERSON IN SOCIAL SCIENCES*, at 103, 104 (Edmond Malivaud & Mary Ann Glendon, eds. 2006) (Proceedings of the Eleventh Plenary Session of the Pontifical Academy of Social Sciences)).

anthropology of the so-called “mystery passage” in the joint opinion in the Supreme Court’s *Planned Parenthood v. Casey*, which asserts that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”²³ This account is, as the late Jean Bethke Elshtain insisted, “impoverished,” and yet there is no getting around the fact that it is “so deeply entrenched that . . . it is simply part of the cultural air we breathe.”²⁴

Christian Legal Thought reminds us that there is another account and points toward a jurisprudence that reflects it. This Christian anthropology turns, in a way, the “mystery passage” on its head. It locates what John Paul II called “the grandeur of the human being”²⁵ not in our autonomy and self-sufficiency but in our dependence and incompleteness. It emphasizes, as was noted above, that the world is creation, that it is good and redeemed, and that we are creatures, made in the image and likeness of God. That is, our dignity is grounded not so much in claims of self-sovereignty but in our status of creatures. The “grandeur of the human being”—and the facts that we matter and have rights that laws should protect and that governments should respect—is a result of our being creatures of a loving God, and not the self-styled authors of our own destiny. We are like the Velveteen Rabbit; it is God’s love for us that gives us great worth.²⁶ We are not only agents who choose; we are persons who belong.

As was observed earlier, Brennan and Brewbaker open their casebook’s section on “The Human Person” with a passage from Genesis and they ask what this passage, with its invocation of God’s “image” and “likeness,” suggests “about what human beings *are* [and about] what they are *for* [.]”²⁷ Of course, later in Genesis, God says to Adam and Eve—and to us—that they and we are “dust” and “into dust [we] shalt return.”²⁸ Indeed, Robert

²³ 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJs.).

²⁴ Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries*, 14 J.L. & RELIGION 53, 58 (1999).

²⁵ JOHN PAUL II, ENCYCLICAL LETTER *FIDES ET RATIO* ¶ 107 (1998).

²⁶ Richard W. Garnett, *Righting Wrongs and Wronging Rights*, FIRST THINGS (Oct. 2008), <https://www.firstthings.com/article/2008/10/003-righting-wrongs-and-wronging-rights> (reviewing NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* (2008)).

²⁷ CLT, *supra* note 5, at 149 (citations omitted).

²⁸ *Genesis* 3:19 (Douay-Rheims 1899 American Edition).

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Cardinal Sarah recently suggested that “the source of our troubles comes from the illusion that we are something other than mere dust.”²⁹

What should we make of this, which seems considerably less attractive than an anthropology of “good guys” “carrying the fire,” of God’s “image” and “likeness,” of love making us—like the Velveteen Rabbit—“real”? Sarah continues:

Psalm 103 says that God himself “knows our frame; he remembers that we are dust. As for man, his days are like grass; he flourishes like a flower in the field; for the wind passes over it, and it is gone, and its place knows it no more.”³⁰

Thankfully, for us and for the legal enterprise, that is not the end of the story, though. “God is our joy,” Sarah continues, “and in him our dust can become splendor.”³¹ This is what we are, and it matters for law: “Everlasting splendours.”³²

²⁹ ROBERT CARDINAL SARAH & NICOLAS DIAT, *THE POWER OF SILENCE: AGAINST THE DICTATORSHIP OF NOISE* 88 (2017).

³⁰ *Id.* (quoting *Psalm* 103:14-16).

³¹ *Id.*

³² LEWIS, *supra* note †.