

## ESSAY ROUNDTABLE

# FOREWORD: WHAT DOES CHRISTIANITY OFFER TO THE WORLD OF LAW?<sup>1</sup>

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“CLS” was an acronym with two very different meanings when I was a fledgling law student some thirty-five years ago. For most, it meant “critical legal studies,” a burgeoning new movement of sundry neo-Marxist jurists and philosophers collectively bent on exposing the fallacies and false equalities of modern law. Many of my first-year law professors were the high priests of this CLS movement. They were making serious waves at the time with their denunciation of much that was considered sound and settled in the law. The best CLS professors taught black letter doctrine—and then shredded it with rhetorical and analytical power. That instruction appealed to my native ethic of *semper reformanda*—always reforming and working to improve our traditions. Other professors simply taught their pet critical topics, sending us students scrambling to the bookstore in search of study guides that would acquaint us with the legal basics. After a year of such CLS instruction, I could not wait to take the upper-level electives that would no doubt unveil the new and better legal system CLS had in mind. Little was on offer. The “crits,” I soon learned, were better at deconstruction than reconstruction of the law. Not surprisingly, this movement has now faded and fractured into sundry special interest groups.

“CLS” in the early 1980s also meant the “Christian Legal Society,” a small handful of law students who gathered for periodic worship, prayer, reflection, and good works in the community. We were very much a fringe group at my law school, the last remnant of the superstitious in the eyes of many. Ours happened to be a particularly weak local student chapter of a quite vibrant national Christian Legal Society of lawyers, judges, law students, and religious liberty advocates. But even at the national level, the Christian Legal Society then was still a small group struggling to come to terms with what it means to be a Christian and a lawyer. The Christian Legal Society has become more substantial since then, and the United States Supreme Court case has lifted the name to permanent prominence with the case of *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

“CLS” is rapidly acquiring an additional meaning today: to describe a growing “Christian legal studies” movement in legal education, led, in part, by the authors of the essays that follow. These

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scholars are part of a group of some 350 Catholic, Protestant, and Orthodox Christian law professors in North America, and several hundred more around the world, who have dedicated themselves to studying the “weightier matters of the law: justice and mercy and faith”—often working in earnest collaboration with Christian theologians, ethicists, historians, and political theorists who address these matters, too. These Christian law professors are not just abstract legal theorists who have “neglected” the technical aspects of the law—the “mint and dill and cumin” (Matthew 23:23). Many of them are leading scholars of the core doctrines of public, private, penal, and procedural law. They have mastered the power of legal science and method—the special ability that lawyers have to build and break down arguments, to separate salient from superficial fact, to argue from analogy and precedent. Some of the weightier matters of the law that they do address are familiar to scholars of law and politics, whatever their persuasion: questions concerning the nature and purpose of law and authority, the mandates and limits of rule and obedience, the rights and duties of officials and subjects, the care and nurture of the needy and innocent, the justice and limits of war and violence, the nature of fault and the means of punishing it, the sources of obligations and the procedures for vindicating them, and the origins of property and the means of protecting it, among others. On many such questions of legal doctrine, science, and philosophy Christian law professors and other scholars are not noticeably different from their peers with different convictions. A first-year class in contracts, criminal law, or civil procedure looks mostly the same whether taught at Harvard or Pepperdine, Columbia or Notre Dame.

But Christian law professors also address questions that are more specifically Christian in accent but no less important to understanding law, liberty, and politics: Are persons fundamentally good or evil? Is human nature essentially rational or relational? Is law inherently coercive or liberating? Is law a stairway to heaven or a fence against hell? Did law and government predate or postdate the fall of humanity into sin? Should authorities only proscribe vices or also prescribe virtues? Is the state a divine or a popular sovereign? Are social institutions fundamentally hierarchical or egalitarian in internal structure and external relations? Are they rooted in creation or custom, covenant or contract? What is the place of law and legal procedure in the church, and how must it be enforced? What is the place of hierarchy or democracy in the church, and how is it to be exercised? What is the role of the church in exemplifying and advocating justice for itself and for other institutions, for its own members and for the world beyond? What do the Bible and the Christian tradition still have to offer to classic legal institutions that share spiritual and temporal dimensions—marriage and family life, education and schooling, charity and social welfare?

These are some of the questions that are the heart of this essay roundtable on law and Christianity. The essay roundtable is a new format for the *Journal of Law and Religion*, which we hope will give space to new and emerging ideas, themes, and conversations in the field of law and religion. In this and future roundtables, we will bring together interdisciplinary scholars to contribute short essays that explore the possibilities and begin to shape the contours of a new area of inquiry. We look forward to seeing these ideas, questions, and challenges explored more deeply in future articles in the pages of *JLR*.

In this roundtable, we have brought together Christian law professors with theologians, historians, and ethicists to discuss what Christianity offers to the world of law. Biblical scholars Richard Hays and Jens Schröter probe deeply the place of legal concepts, reasoning, and cases in the New Testament narratives, and the essential, though limited, role of law in defining early Christian life and community vis-à-vis the sophisticated legal traditions of Judaism and Rome. Law professors Randy Beck and Eric Enlow use both Mosaic legal teachings and New Testament parables to show the essential meanings and proper measures of retributive justice for fault, distributive justice for the needy, and redemptive justice for the community. Fellow law

professor William Brewbaker shows further how the biblical concepts of creation, dominion, and time help ground and direct legal systems, and their doctrines, historically and today.

German systematic theologian Michael Welker analyzes powerfully how the “diaconal, prophetic, and priestly gifts of the Spirit” have and can unfold in the “serious” “justice-seeking communities” of church, state, and academy. Holding out the crucifixion of Jesus Christ as exemplary, Welker shows especially how the Christian calling to “free and creative self-withdrawal” and sacrifice in favor and service of others is one of the most powerful expressions of both justice and righteousness in the world today. Church historian David Hempton illustrates the institutional expression of these lofty theological ideas historically. He shows how free churches, at their best, have and can serve to advocate human freedom for all, protect the vulnerable, fight against injustice, offer charity and hope to those in peril and exile, rebuke religious intolerance and extremism, and build peace and reconciliation. “The time is urgent,” he writes poignantly, “to think afresh about Christianity and human flourishing” and how church and state, and the legal and clerical professions that support them, “can help compose a more harmonious melody.”

For Christianity to discharge these great prophetic and priestly roles for justice and peace, however, requires that it get and keep its own house in legal and moral order, Norman Doe and Mark Hill insist. Both these leading British ecclesiastical lawyers thus press the argument that law must always be at the backbone of the church, whatever its denominational form. The church, in fact, needs to develop a new field of “legal theology”—alongside the fields of political, systematic, moral, exegetical, pastoral, ecumenical, and missionary theology, and ecclesiology. The state, in turn, needs to recognize the power and freedom of “Christian law”—the internal canons, disciplinary norms, and ecclesiastical procedures that govern the clergy, laity, polity, and property of the church—which are essential to the church’s order and organization, mission and ministry.

We need not only a new legal theory for the church but also a new theological jurisprudence for the state, the remaining essayists argue. Gone are the days of a unified Western Christendom when theological jurisprudence could rest comfortably on the common conviction that “God is law; therefore law is dear to him.”<sup>2</sup> Gone, too, are the days of Gottfried Leibniz, who could still say easily in 1667 that “theology is a certain species of jurisprudence . . . and depends on the great part on jurisprudence.”<sup>3</sup> A more complex dialectic of theology and jurisprudence is now needed that respects both the differentiation of specialized disciplines and discourse, and the concomitant need for interdisciplinary collaboration in dealing with big subjects like law and religion, justice and mercy. Christian ethicist Timothy Jackson calls Christians to a “prophetic liberalism” that eschews nostalgic theocratic triumphalism and pessimistic sectarian withdrawal and brings Christian convictions and agapic beliefs into candid and spirited interaction with the world of positive law and normative pluralism. Catholic jurist Rafael Domingo calls for a rigorous but universally accessible jurisprudential account of the cardinal truths of scripture and tradition concerning the created order, human dignity, human equality, moral freedom and responsibility, human solidarity, and human rights, and other foundational principles. Protestant jurist Jeffrey Hammond calls for a “searching, humble, theologically oriented, biblically focused theorizing about the nature, purposes, functions, orientations, and consequences of law as a discipline” and about the specific doctrines and questions of public, private, penal, and procedural law. Whatever such a discourse of theology and jurisprudence yields, however, Christian ethicist Ellen Ott Marshall warns,

2 The words of the prologue to the German medieval law, the *Sachsenspiegel* (ca. 1200), quoted by Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 504.

3 See quotes and discussion of Leibniz in essays by Eric Enlow and Rafael Domingo herein.

Christians must proceed with “theological humility” about the limits of human knowledge of divine truth, and awareness of the ongoing dangers of religious authoritarianism, political smugness, or biblical fundamentalism.

Collectively, these thirteen essays work hard to balance the quadrilateral of scripture, nature, reason, and experience in addressing the question of what Christianity offers to the world of law. All the essayists take the Bible seriously, but no one pretends that the Bible is a complete legal textbook or a comprehensive legal code. All the essayists take the Christian tradition seriously, but none of them is pressing for the resurrection of some golden age of Christian law and government. They understand that for every “nomos there is a narrative,”<sup>4</sup> for every Torah a Talmud, for every biblical legal principle a long set of precepts and procedures to make it real and concrete. The laws of the Bible are part of a larger narrative about God and humanity, sin and salvation, faith and order. The Bible’s commandments are the anchors of long traditions of legal reasoning, application, and enforcement that are constantly reshaped and reformed by new experiences and new challenges.

The challenge for Christian jurists today is to find responsible ways of making biblical and historical Christian teachings on law effective and responsible vehicles both for critique and for reform of Western postmodern legal systems. For those who think this exercise is futile, it is worth noting that some of the Bible’s basic laws are still at the heart of these legal systems today: “Thou shalt not kill” remains at the foundation of laws of homicide. “Thou shalt not steal” grounds laws of property and theft. “Thou shalt not bear false witness” remains the anchor of laws of evidence and defamation. The ancient laws of sanctuary still operate for fleeing felons, refugees, and asylum seekers. The ancient principles of Jubilee are at the heart of modern laws of bankruptcy and debt relief. “Honor the authorities” remains the starting premise of modern constitutional law. Any good legal historian can point out the biblical genesis and Christian exodus of many modern rules of contract and promise, evidence and proof, marriage and family, crime and punishment, property and poverty, liberty and dignity, church and state, business and commerce. Some of these legal creations were wholly original to Christianity, born of keen new biblical insight and theological ingenuity. Others were converted and recast from Hebrew, Greek, and Roman prototypes. Still others were reworked and reformed by Renaissance humanists and Enlightenment philosophers and their ample modern progeny. But whether original or reformed, canonical or casuistical, Western Christian teachings on law, politics, and society have made enduring contributions to the development of Western law as we know it today.

These legal teachings of the Bible and the Christian tradition still hold essential insights for legal reform and renewal in this new millennium. What would a legal system look like if we were to take seriously the final commandment of the Decalogue, “thou shalt not covet,” especially when our modern systems of capitalism, advertisement, and wealth accumulation have the exact opposite premise? What would our modern law of torts and criminal law look like if we took seriously Jesus’s command to “turn the other cheek”? What would our laws of civil procedure and dispute resolution look like if we took seriously the New Testament admonition for those with grievances against fellow believers to “go tell it to the church”? What would our system of social welfare, charity, or inheritance look like if we followed the Bible’s repeated commands to tend to the poor, the widow, the orphan, the strangers—the “least” of society—knowing, as Jesus put it, that “as much as you do it to them you do it to me”? What would our public and private laws look like if we worked

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4 Robert Cover, “Foreword: Nomos and Narrative—The Supreme Court 1982 Term,” *Harvard Law Review* 97 (1983): 5–68.

hard to make real and legally concrete the biblical ideals of covenant community or sacramental living?

It is a fair question whether these and many other biblical passages now define the ethics of the communicant and the church rather than the laws of the citizen and the state. That, at minimum, requires that our modern churches get their legal and moral houses in order, as Norman Doe and Mark Hill properly encourage. But Michael Welker and Richard Hays are also right when they say that the Bible's call to Christians to serve as "prophets, priests, and kings" provides lawyers with a unique vocation: to speak prophetic truth to power, to offer priestly service to all neighbors, and to foster rules and regimes that are marked with justice, mercy, and faith. Promoting such virtues with critical and constructive courage, would give this current "Christian legal studies" movement a more enduring legacy than the "critical legal studies" movement of a generation before.