

CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT. Edited by Michael W. McConnell, Angela C. Carmella, and Robert F. Cochran, Jr. New Haven: Yale University Press 2001. Pp. 512. \$50.00. ISBN: 0-300-087497. Paper. \$26.95. ISBN: 0-300-087500.

The invitation to review this volume arrived as I was beginning a semester's visit at Boston College Law School, my first experience on a Catholic payroll. Such an economic arrangement had flirted with me in the mid-1990s, when I was first looking for employment in the legal academy. But sobriety had imposed itself. During an interview with what I regarded, innocently, as a Catholic law school, the Dean asked me "what it means to be a Catholic law school." I began to reply, conditionally but still innocently, "If you claim to be a Catholic law school"—but was stopped short by nothing short of a declaration of independence: "We don't claim to be a Catholic law school. We claim to be a law school in a Catholic university." My reply, which the half-dozen faculty also involved in the interview may remember, is not worthy of report here; it concerned Venn diagrams, and no doubt accelerated the mailing of the ding letter.

The Dean's position was unwieldy; and even when untenable positions unfold into institutions and their postures, there are better things to do than poke holes in the strawmen dragged in to prop them up. But though the Dean was headed in the wrong direction, the question was not. It is *always* a question for Christians what their Christianity means for what they are doing, whether what they are doing is law or legal education. What Christianity means for legal education, as for education generally, is a question that seems to have slipped in stature; some part of the story is well and sadly told by James Burtchaell in *The Dying of the Light*. But it would be wrong to confuse the fading of one institutional form, and its once bright witness, with the question of what form(s) Christian action should take now in legal education. In this new and freshly troubled world, launchings such as Ave Maria and St. Thomas, as well as smatterings of new energy and insight in the old foundations, provide reason, if not for elation, then at least for sober hope.

Whatever the Christian case in the cloisters and classrooms, corridors and chapels of the putatively Christian law schools across the United States, the question about what Christianity means for law has

recently been taken up with astonishing industry, and answered with awesome honesty. In the volume under review here, unapologetically titled *Christian Perspectives on Legal Thought*, professing and practicing Christians have put into persuasive print what Christianity means for law and their work in it. The thirty contributors to this volume are Christian legal scholars accomplished across the whole range of legal topics, including but by no means limited to the relation between religion and law. Their essays, woven strongly together with energized editorial materials, make unmistakable that Christians have distinct perspectives on law, that those perspectives are operative in their legal work as well as in the legal forms we inherit, that these perspectives can be not only coherent but cogent, and that they merit the attention of all who care about law, and its limits, and even the deeds of love. Christians have long leavened law, and in this bright new work their faith is unfolding afresh, from inside the believer out into the legal world. As Harold Berman observes in the Foreword with which he has graced the volume: "It's about time!"

The book is an epochal achievement, in the sense that it embodies the concerted efforts of Christian legal minds, mainline and evangelical Protestants as well as Catholics, to end the "strange silence" (xiv) of specifically and self-consciously Christian perspectives on law and legal theory. It does this in three well-chosen and connected movements. The first part of the book, *Christian Perspectives on Schools of Legal Thought*, presents thirteen essays distributed under five headings: "Enlightenment Liberalism," "Legal Realism," "Critical Legal Studies," "Critical Race Theory," "Feminism," "Law and Economics." None of these perspectives should have been omitted, of course; others, though, such as Legal Process and Positivism, are conspicuously absent. Also conspicuous is a lumpiness in this part; for example, the "Critical Race Theory" section includes three essays, while the essay on "Critical Legal Studies" is a loner.

The book's second part, "Christian Traditions and the Law," takes its shape from the ways H. Richard Niebuhr identified (in *Christ and Culture*) for classifying the relationship of multifarious Christian traditions to law. "Synthesists: Reconciling Christ and Law," "Conversionists: Christ Transforming Law," "Separatists: Christ Against Law," and "Dualists: Christ and Law in Tension."¹ There are two contrasting and complementing essays devoted to each of these four

1. Niebuhr's fifth perspective, the "culturalist," under which the law is understood to be consistent with Christian teaching, is not treated because "this perspective does not bring a specifically Christian critique to the law." (260).

perspectives, preceded by an elegant introductory essay by Robert Cochran, not only forecasting the problematics of each of the four divisions but probing their deeper unity.

The six essays that make up the third part of the book, "Christian Perspectives on Substantive Areas of Law," are devoted to Family Law, Criminal Law, Environmental Law, Professional Responsibility, Contracts, and Torts. These six areas are worthy of the place given them; worthy too would have been essays on Property, on which Christians have held deep, distinctive and diverging views, and on Constitutional Law, which provides the positive architectonic for our lives together, and on which depend both the freedom to practice Christianity and everyone's freedom from coercion in the name of religion.

The book is an excellent achievement, moreover, in the sense that the essays are of admirable scholarly quality. That quality is not uniform, but overall the learning and analysis impress as they edify. Some of the essays should become classics, each for its own reasons. I think particularly of the contributions by Michael McConnell on liberalism; Elizabeth Mensch on liberalism; Angela Carmella on Catholic social thought; Marie Failinger and Patrick Keifert on the Lutheran doctrine of the uses of the civil law; Joseph Allegretti on legal ethics; and John Witte on family law.

The first dozen or so paragraphs of Witte's essay, indeed, convey one of the richest sets of insights I know concerning the relationship between Christian belief and Christian scholarship in law. It makes a good place to begin reading (to be followed by the Foreword and the fine programmatic Introduction) Witte zeros in on how the Christian's approach to legal work is one not of archaeology or eschatology, of policy science or politics, but of *search*, of persistent and open inquiry directed to discerning God's ways in the wisdom of tradition lived in history wherein God is "both revealed and concealed." (452) With breathtaking force and clarity Witte captures and conveys what I would call the passionate intelligence and intelligent passion with which Christians can and should, and sometimes do, undertake works in law.

Which risks, I understand, their rustication. Though the epistemological simplifications that claim "Enlightenment" as their warrant are gradually being corrected elsewhere, in the legal academy those who would tarnish their lustre are ruled out of court. In the exercise of what Pierre Schlag calls "border patrol jurisprudence," the levers of control of the legal academy—hiring and firing, tenuring and promoting—are largely plied by women and men who insist that pure

“reason,” cool and detached and instrumental, is the touchstone of legal legitimacy. What “reason” really *is*, no one is heard to say, because (as Suzanna Sherry reminds), “it is easier to describe what reason is by explaining what it is not.”² And what “reason” is not, turns out to be, *mirabile auditu*, exactly what believers have pitched their hope on: “faith” that works the human way toward the real and the good through “tradition” and “authority.”

Christians don’t always take their academic disqualification lying down, to be sure. But too often when they weary of the censorship, they rebound with the insistence that “faith” (which may spring from and depend upon tradition and authority about the real and the good) be granted a place next to “reason.” Nothing I say here should be understood to deny the wisdom of the hallowed alliance of faith and reason. But in the current climate, reliance on that formula risks conceding what need not and should not be conceded. Another procedure is called for. The citadel called “reason” must be attacked and shown to be false. In recommending this procedure, my aim is not to court either nonsense or nihilism. Christians must be realists—critical realists—both as to what has been created and revealed, and as to the respective places of good and evil. What must be corrected, if the Christian believer is to return from exile on terms he or she can live by, is the Enlightenment’s unrealistic fallback position, according to which in the human head—or pineal gland?—there exist two black boxes, one for faith and the other for reason, the two of them jointly exhaustive of human access to the real and the good—with faith fit for private life and simple people, and “reason” for public life and law faculty.³

What Christians must insist upon, albeit in their differing dialects and accents, is that each of us rational humans goes out from her or his interiority to embrace the real and the good, across the whole spectrum of human living and hope, through an *intelligence* (the term I prefer to “reason” because it refuses to carry the Enlightenment’s freight) that performatively combines and commingles elements of (what later get labeled) “faith” and “reason.” That intelligence of ours is not an impenetrable black box. As John Witte and others remind us, we can

2. Suzanna Sherry, *The Sleep of Reason*, 84 *Geo. L.J.* 453, 455 (1996).

3. The “black box” phrase I learned from Bernard Lonergan, in his still-unpublished 1974 essay, *Self-transcendence: Intellectual, Moral, Religious*. (It is expected that the essay will be published in volume 14 of *Collected Works of Bernard Lonergan*.) Bruce Ackerman also uses the phrase (as Stephen Carter observes (41)), but unlike Lonergan, Ackerman does not undertake to open the black box and subject its deliverances to critical scrutiny with a view toward arriving at a shared epistemic stance. See Bruce Ackerman, *Social Justice in the Liberal State* 281-282 (Yale U. Press 1980).

discover something about how our human intelligence succeeds in separating fact from fiction, history from myth, chemistry from alchemy, law from the bureaucracy, religion from the ridiculous.

Not only can we discover something about the method by which our knowledge enters. We can also fathom that even before we resolve to live in the truth, in every waking moment we are always already called out of ourselves. We intend the real and the good before we know them. This active and unchosen intention of the plentitude of being pertains to the erotic human core that Plato and Aristotle knew so well and described so artfully, and to which that father of the Church, Augustine, gave expression in those words—common to all Christians—about our restless hearts and their only place of rest.⁴ Saying this, I do not suggest univocity among these three minds, nor even among Christians; neither Plato nor Aristotle knew the name of sin, and Christians divide over its effects. But I do insist that legal minds are on common *human* ground when they start from that dynamism of ours for the real and the good.

And everything is at stake in our doing so. Christianity has recently (if belatedly) taught the world a thing or two about tolerance, but no one, least of all Christians, should tolerate law that rises from the premise of leaving all but “reason” out. Christians, like all people called out of themselves to the real and the good, must “leave[] nothing out, not person, nor present, nor freedom, nor will, nor madness, nor the individual, nor the delight of a child, nor the eyes of a fellow human being, nor our sense of the ultimate.”⁵ Any realistic hope for humans—and the creation of law, as James Boyd White has shown so beautifully, is an act of hope—must take its stand upon the terms and conditions under which that basic human eros for the real and the good might be satisfied and nothing left out.

This book begins that work by identifying, arraying and potentially correcting Christians’ and others’ judgments about the place of the transcendent—and specifically the person of Christ—in the temporal and terrestrial, and particularly in lawful living. Doing so, it brings a phase of authentically Christian work in law to an eminent conclusion. Implicated in the business of a Christian’s coming to law, however, is another and unfinished achievement—an achievement which must

4. “tu excitas, ut laudare te delectet, quia fecisti nos, ad te et inquietum est cor nostrum, donec requiescat in te.” “You have created us for You, O Lord, and our hearts are restless until they rest in You.” *The Oxford Dictionary of Quotations* 35 (Elizabeth Knowles ed., 5th ed., Oxford U. Press 1999).

5. Joseph Vining, *The Authoritative and the Authoritarian* 201 (U. Chi. Press 1986).

always be just beginning. For the Christian, as Bernard Lonergan observes, "the basic problem lies not in mistaken beliefs but in the mistaken believer A critique of mistaken beliefs is a human contrivance, and a human contrivance cannot exorcise the problem of human evil."⁶ For Christians of all kinds, the *basic* issue has to be not institutions, not laws, not even beliefs, but very believers.

The distinguished editors of *Christian Perspectives on Legal Thought* undertook this work to "promote a conversation" among Christian and non-Christian "lawyers, legal scholars, students, judges, and lawmakers." (xviii) The book invites, among all believers—believers in God, believers in "modern secular faiths" (xviii)—the activity of conversation. Sometimes conversation is a mere pass time, a waste of good time. But when our conversation is *disciplined by the desire for the real and the good*, when we "allow the question to impose its logic, its demands, and ultimately its own rhythm upon us,"⁷ we thereby progressively constitute ourselves people of true belief. This achievement is of a higher order, and in the disciplined work of the women and men producing the essays as well as the collaborative editorial materials that make up *Christian Perspectives*, it has been well exemplified.

But the work is never done. The next step must be sustained and more fully collaborative efforts aimed at bringing diverse believers to the discipline of their common and distinct questions, ever open to the destabilizing eventuality, marked powerfully by Robert Cochran, (268-270) that fresh insights on basic issues require new Christian responses in an ever emergent world. Such work will require perseverance, "painstaking enough to work out one by one the transitions to be made, strong enough to refuse half measures and insist upon complete solutions even though it has to wait."⁸ The existential issue, as Steven Smith has recently observed, is whether "we are any longer capable of thinking about such questions."⁹ As to that I shall give the last word to Bernard Lonergan, S.J. What he has to say about what happens when people refuse grace and give up on intelligence is relevant not just to law, but also to legal education, and the possibility of their Christianity:

6. Bernard Lonergan, *Insight: A Study of Human Understanding* 717 (Harper & Row 1978).

7. David Tracy, *Plurality and Ambiguity: Hermeneutics, Religion, Hope* 18 (U. Chi. Press 1987).

8. Bernard Lonergan, *The Dimensions of Meaning*, in *Collected Works of Bernard Lonergan* vol. 4, 245 (Frederick E. Crowe & Robert M. Doran, eds., U. Toronto Press 1988).

9. Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. Rev. 1041, 1137 (1999).

Schemes that once flourished lose their efficacy and cease to function; in an ever more rapid succession, as crises multiply and remedies have less effect, new schemes are introduced; feverish effort is followed by listlessness; the situation becomes regarded as hopeless; in a twilight of straitened but gracious living men await the catalytic trifle that will reveal to a surprised world the end of a once brilliant day.¹⁰

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10. Lonergan, *supra* n. 6, at 210.

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