Christian Perspectives on Legal Thought

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Introduction

The most famous and beloved of the parables of the New Testament follows Jesus' question of a lawyer, "What is written in the law? How do you read it?" (Luke 10:26). The form of the question makes it apparent that Jesus thought both that the law has a certain content and that there are different ways of reading it—ways that reflect the lawyer's own conscience and tradition of learning. The lawyer answered that we are to love God and our neighbor. But "desiring to justify himself," the lawyer could not leave it at that. "Who is my neighbor?" he asked—much as lawyers of today debate the meaning of words (like *perjury* or *capital gain* or *discrimination*) that define the nature and limits of our duties to others. The lawyer's response to Jesus' question reveals something about the lawyer's view of the world, and Jesus' response to the lawyer's question reveals something fundamentally important about the meaning of the law. According to Jesus, a "neighbor" is not defined by status or by race, but by love. For centuries since that day, Christians and non-Christians alike have been challenged and chastened by Jesus' hypothetical about the despised Samaritan who stopped to care for his fellow man.

In the legal academy today, there is no shortage of voices answering Jesus' questions. "What is written in the law? How do you read it?" We hear economic interpretations of law, feminist interpretations, anthropological interpretations, Kantianism, utilitarian theories, theories grounded in the experience of race, sex, and sexuality, and virtually everything else. The answers reveal something about those who offer them, and the conversations that ensue reveal something fundamentally important to all of us about the meaning of the law.

But in the midst of this multifarious conversation there is a strange silence on the part of Jesus' own followers. Where can one hear the expression of Christian perspectives on law and legal theory? There are books and articles galore on legal theory from every conceivable philosophy, ideology, and identity. But there are surprisingly few books or articles applying the gospel of Jesus Christ, other than in a few specialized areas like legal ethics and church-state law. Much the same is true in the classroom. Professors encourage law school students to analyze law from a variety of perspectives and points of view, but religious views are oddly absent. A student in criminal law, for instance, is unlikely to question modern criminological theory from the standpoint of sin and redemption. If a student did offer such a critique, many professors would not know how to react. There would likely be an awkward silence, followed by a polite change of subject.

This book is intended to break that silence. We have put together a collection of essays to introduce readers to Christian perspectives on legal thought. The editors come from different traditions within Christianity—from Roman Catholic, evangelical, and mainline Protestant churches. We are keenly aware that the religious orientation of our traditions is relevant not only to our personal lives but to our understanding of the world and ultimately to the ways we teach, write about, and practice law.

As Thomas H. Groome has suggested in *Educating for Life,* religious thinking is not confined to speculations about the transcendent but typically provides an anthropology; a cosmology; a sociology; an understanding of text, history, and tradition; an epistemology; a spirituality; an ecclesiology; and an understanding of justice. Throughout Christian history, men and women have reflected on such questions as the nature of the human person and of our role in the world, on the nature of good and evil and of grace and sin, on texts and various traditions of interpretation, on efforts of reform and renewal, on the role of reason and its relation to faith, on authority and institutions, and on what it means to be a just society. Much of this reflection has a bearing on law, because law is similarly concerned with these very questions.

We are persuaded that Christian understandings of law will serve both to illuminate the underpinnings of our legal order, which was heavily influenced by the Christian culture from which it emerged, and to provide a perspective from which to criticize that order. Democracy needs both. It is important for a free people to connect the positive law to their ideals of a higher good. Unless they perceive such a connection, the people will resist compliance with the law, and the state will be forced to turn to naked coercion. Because many people in this country derive their most fundamental sense of moral order from their religious faith, it is essential to democracy that the connections between that faith and the law be explored and understood. Yet it is equally important that a democratic people retain a critical stance from which to examine the practices of our culture and political life. Again, for the many people whose understanding of the moral order is shaped by religious faith, religion may be the most promising foothold for a critical stance.

Some might suggest that giving attention to Christian perspectives on law will exacerbate an already disturbing degree of disunity and divisiveness in legal thought, but it could also lead to areas of mutual understanding and common ground. In fact, it could lead to understanding in areas where secular perspectives have led only to division. Religious identity cuts across the racial and sexual divides of America. Christian discourse may serve as the basis for understanding between many who have little else in common with one another. A Christian conversation may enable many to find a common agenda for human well-being. As Anthony Cook has said of Martin Luther King, Jr., "He showed us that as we go deeper into our particularities, we discover commonalities."

We believe, therefore, that Christian understandings of the law might help in the wider project of restoring a sense of public right and justice—of "commonwealth"—to the American political culture. Whatever their differences, many thoughtful Americans of various religious and political stripes share a deep concern that modern life, including public life, has become dominated by selfish, shallow, materialistic, cruel, and nihilistic values. Christianity, along with other faiths, may be an antidote to this great moral failing of our time. Christ teaches us to love our neighbor, to have compassion for the poor and the alien, to love justice, and to walk humbly before God. If believers do not base their view of law on their deepest moral insights, they are likely to base it on their most selfish instincts. To ignore Christian (and other religious) perspectives on law is like ignoring a life raft on an endangered vessel.

This is not to suggest that there is a single "Christian" perspective. There has been no shortage of disagreement within the Christian fold. Agreement on a

few first principles has led to a rich and diverse conversation on a host of other questions. In this book, by gathering authors who write from a wide variety of Christian traditions, we have tried to reflect the diversity of attitudes, doctrines, and approaches found within the broader Christian community. Indeed, the diversity is greater and more complex than even the number of different traditions might suggest. If we were to poll the authors of the essays in this book, the only common belief might be the original church's confession that "Jesus is Lord" (1 Corinthians 12:3). That, of course, was the confession that got the members of the early church into trouble. They were unwilling to say that "Caesar is Lord." The key question of this book may be, "What does it mean in America today to say that Jesus, rather than Caesar, is Lord?" Our hope is that our common bond in Christ will enable us to better understand one another and to move toward greater knowledge of what Christ would have us do.

We realize that some will view a book of this sort with skepticism or even with alarm. In this multicultural world, there is surprising resistance to the idea that Christianity is a legitimate perspective from which to address issues of the secular world. We believe this resistance to a Christian voice in legal theory has its roots in three different periods in American intellectual history. In part, the resistance is a reaction to the premodern era, in which Christianity was understood to be the privileged and sacrosanct basis for law. As late as 1844, Justice Joseph Story could write an opinion presupposing that Christianity is part of the common law (*Vidal v. Girard's Executors,* 43 U.S. [2 How.] 127 [1844]). Much of the progress of a liberal and democratic understanding of law required a break from this past—a recognition that no religion could enjoy a privileged and hegemonic status in a democratic society. We suspect that some resistance to self-consciously Christian voices in the legal conversation today is based on a fear that these would be the opening wedge in a program to reassert Christian hegemony. To that concern, we can only offer the assurance that none of us, and few in America today, entertain the notion that Christianity is entitled to a privileged status in American life. We enter into public discussion on equal terms and seek only the right that others have in equal measure: to explain our premises, to participate in the conversation, and to offer arguments on the merits.

A second source of the resistance, we think, is a throwback to the modern or "scientific" period of legal thought. During this period, leading legal scholars attempted to base the study of law on an analogy to the natural sciences. Dean Christopher Langdell of Harvard, who developed the case method in the 1870s, viewed law as a science consisting of "principles and doctrines": "Writ-

ten opinions in cases were the legal scientist's specimens or 'data.'" Under this view, a "Christian perspective" on law is objectionable because religion is said to be based on faith rather than reason. Religion is subjective, and science is objective. This view suffers from two fundamental flaws. First, for many Christians, faith and reason are not in opposition but are compatible and complementary. Second, even if science is an "objective," "rational" endeavor, the notion that law is or can be a science was discredited long ago. Underlying the law of any culture will be the pretheoretical beliefs of that culture. Those beliefs are necessarily rooted in culture, tradition, identity, and other sources of conviction. Even science itself, according to one view, is based on pretheoretical assumptions that are logically equivalent to faith. This is a lesson that Augustine taught long ago: faith precedes and conditions understanding. Before we can process data, before we know what it means to be "thinking," we require a theoretical standpoint or framework for understanding the world. That is why legal thought is now so open to diverse voices and perspectives, not all of them "rational" in any narrow "Enlightenment" sense of that term. The dream of many is of a legal academy that reflects the multicultural world in which we live. If the world of the legal academy is to be truly inclusive, if we are to have a broad-based conversation about our lives together, religious people and religious ideas need to be part of that conversation.

A third source of resistance, we think, has its source in the politics of our own time. In recent years the most vocal proponents of Christian perspectives on law and politics have come from the religious right, and they have plenty of opposition within the modern academy. The fear of many in the American academy is that a Christian view of law will yield an authoritarian conservative regime, to the detriment of gay rights, abortion rights, women's rights, children's rights, and "progressive" causes of all sorts. To this we offer two responses. First, this is an inaccurate caricature. Christians can be found at most points in the ideological spectrum. Historically, evangelical Christians have been in the forefront of "progressive" causes like abolition, women's suffrage, and universal education—as well as "conservative" causes like Prohibition and the restoration of "family values." The Catholic Church in America has been a vigorous opponent of capital punishment and a warm supporter of labor, social welfare, and immigration, as well as a supporter of protections against abortion and euthanasia. But even if religious voices were reliably antithetical to a particular brand of progressive politics, democrats (with a small d) should recognize that it is unprincipled and undemocratic to exclude or marginalize fellow citizens on the mere expectation that they will vote the wrong way.

This book has two intended audiences. First, we hope that these essays will help Christian lawyers, legal scholars, students, citizens, and lawmakers to think more deeply about the connection between the truths of the gospel, the lived experience of Christian communities throughout history, and the legal questions that face this world. It is not good to live a compartmentalized existence: one life (and one set of values) in church on Sunday and another life (and another set of values) in the office during the week. By bringing these issues into the open, those who work in the law may be able to live lives of greater understanding and greater integrity. Second, we hope that non-Christian lawyers, legal scholars, citizens, and lawmakers will find these essays an illuminating introduction to ways of thinking about law that they may never have encountered before. Perhaps they will be inspired to reflect on their own deepest beliefs and the implications of those beliefs for our legal system. With respect to both audiences, we hope that this book will promote a conversation in which people of many different faiths (including modern secular faiths) can better understand one another, and better understand the law.

In Part I, authors reflect on prominent schools of thought within the legal academy: liberalism, legal realism, critical legal studies, feminism, critical race theory, and law and economics, from Christian perspectives. In Part II, we introduce readers to the ways that various Christian traditions have understood law. In Part III, legal scholars apply the insights and perspective of faith to concrete legal issues arising in various substantive areas of the law: family, criminal, environmental, professional responsibility, contract, and tort. They do so in ways that critique, find commonality with, and mark new directions for legal thought.

Our purpose, in short, is to introduce the secular world of legal thought to major themes and diverse paths within Christianity. We hope this will make it easier for people of all faiths and beliefs—but most particularly fellow believers in the gospel of Christ—to address those ancient questions: “What is written in the law? How do you read it?”

Christianity and the Roots of Liberalism

Elizabeth Mensch

Liberalism stands in paradoxical relation to Christian theology. In Christianity liberalism finds much of its origin and sustenance, yet also pockets of stubborn resistance to its most basic presuppositions. Conversely, Christianity finds in liberalism both its own reflection and, simultaneously, a starkly conceived and alien antagonist. The complexity of this relation derives from centuries of Western thought during which theorists tried to explain and justify political power by reference to a largely Christian vocabulary. Liberalism is inexplicable except as an outgrowth of that history.

The prevailing model of liberalism is the model of the autonomous private individual confronting a democratic state whose power is limited by the neutrality and rationality of law. This model presupposes a clear legal boundary between a limited sphere of public governance and a sphere of private ordering within which autonomous individuals make freely willed choices based on their own subjective value preferences: moral values may be freely chosen precisely because they lack objective content. In the United States, liberalism has placed religion, like the market, within the sphere of private ordering. Arguably, that

placement has trivialized religion by treating it as merely a subjective belief preference without public or political dimension; but, as with the market, it has also invigorated religion by freeing it from the debilitating effects of direct government supervision.[1]

Public and *private,* however, are notoriously elusive and collapsible categories. What some consider a subject of obvious public concern will seem to others purely a matter of private choice. (Abortion is an oft-debated example.) Moreover, activities labeled private can in fact form a powerful part of our collective life—as with the market, perhaps our most visibly public, as well as most global, reality. In the particular case of religion, the label *private* obscures the extent to which, as traced in this essay, Christianity has shaped Western discourse about the meaning of politics itself. Paradoxically, the liberal model of public political ordering is, in no small measure, an outgrowth of the very Christianity which the same model now so insistently labels private.

To point to influence and interpenetration, however, is not to suggest congruence. Christians, over time, challenged prevailing models of political life and helped to mold new ones. In so doing they introduced elements we would now label liberal, but sometimes in the service of decidedly "illiberal" goals. The process was dialectical, not linear. When traced over centuries, even briefly and superficially, as here, the result is a series of shifting and unstable configurations that, even in their untidy malleability, contain extraordinary evocative power—power to both inspire and delude.

EARLY CHRISTIANITY

Nothing is more basic to the liberal model than the boundary of protection separating the individual from the state. That radical separation of self from polity is now so familiar that its largely Christian roots in the Roman Empire are easily forgotten. The Romans borrowed from the Greeks the micro/macrocosm imagery of individual/household/polity—the same manly virtue that gave the well-bred Roman citizen a rational, measured control over the otherwise undifferentiated urges of the body also brought governance and definition to an otherwise formless household of wife, children, and slaves, and further provided structured authority for the shifting, stirring populace of the city.[2]

1. Peter Berger, *The Sacred Canopy* 137–48 (1967).

2. *E.g.,* Plato, *Republic,* Book II. *See also* David George Hale, *The Body Politic: A Political Metaphor in Renaissance English Literature* 19 (1971); Patricia L. Mackinnon, The Analogy of the Body Politic in St. Augustine, Dante, Petrarch, and Ariosto (Ph.D. diss.) 13–18 (1988).

Self and polity were so inextricably linked that each, reciprocally, gave definition to the other. Thus an infant had value only when accepted (given political definition) by the father of the household, which is why infanticide was allowed before the influence of Christianity.

An extraordinary effect of early Christianity was to separate the meaning of personhood from the Roman political order. Christianity meant that one's primary identity came, not from the Roman polity, but from participation in a death-defeating narrative about self-sacrifice and resurrection. Martyrdom was a powerful symbol of that separation; so too was celibacy, which represented a refusal to enter into Rome's defiance of mortality through the empire's own heroic continuity in historical time. The continuity of Rome required citizen participation in the mini-polity of the household, where childbearing imposed an especially heavy and dangerous burden on women. While not usually taken to be a model of the liberal self, the celibate body, especially when female, became a powerful image of a self barricaded off from the assigned roles of the political order.[3]

This apolitical self was not apolitical in a liberal, individualist sense, however. Early Christians were called away from the pagan body politic by an alternative membership in the body of Christ, which Paul described by drawing directly, albeit paradoxically, on pagan body politic imagery. Thus Paul reinforced conventional political wisdom, but he also upended it: he reversed traditional status gradations (greater honor went to "inferior" members) and obliterated conventional dualities (slave/free, Jew/Gentile, even male/female).[4] Though capable of purely mystical interpretation, uniting believers of all times and places in a kingdom not of this earth, the body of Christ was also capable of concrete (if always imperfect) political embodiment, as in the religious orders that recognized the God-given worth of each individual in almost liberal fashion. Those orders insisted, however, that the individual's unique gifts could be realized only in (illiberal) obedience and communal self-giving.[5]

3. For an extraordinarily vivid description, here relied upon, *see generally* Peter Brown, *The Body and Society: Men, Women, and Sexual Renunciation in Early Christianity* (1988), especially 10–12, 62, 83–84.

4. 1 Corinthians 12:12–27, Galatians 3:28. *See* Wayne A. Meeks, *The Origins of Christian Morality: The First Two Centuries* 134 (1993).

5. For attempts to translate the Benediction spirit into modern vocabulary revealing the complexity of similarity and difference, *see, e.g.,* Kathleen Norris, *The Cloister Walk* 14–22 (1996); Joan Chittister, *The Rule of Benedict: Insights for the Ages* (1997).

The celibate orders, theoretically barricaded from the world's demands and from the pagan virtues of heroic militarism, were at the same time utterly open to the world in charity. To give of oneself, however, is to reach out to the world, including the polity. During the early fourth century CE, church and polity would, in the fateful pact with Constantine, envelop each other in warm but not always chaste embrace. The result was a decidedly illiberal unity of church and polity, but from that unity emerged a (liberal) confidence in reason and law, as well as the first glimmerings of a liberal constitutional order.

No theorist, however, complicated the Western political thought more than St. Augustine, who remains today a persistent influence. As a post-Constantinian bishop during the waning days of the Roman Empire, Augustine exercised both political and ecclesiastical power, and he wielded church authority to influence public officials. He also used political coercion (albeit reluctantly) to try to quash potentially powerful intellectual tendencies in Christian thought, thereby forever implicating Christian theology with state power.[6]

Paradoxically, however, Augustine so brilliantly undercut the self-glorifying claims of the polity that the exercise of state force thenceforward always posed a problem of legitimacy. What are kingdoms, Augustine asked, but "great robberies," whose size and coercive power convey impunity to rulers but keep them forever estranged from their subjects—a theme of alienated sovereignty Hobbes later elaborated. (According to Augustine, when a pirate captured by Alexander the Great was asked what he meant by keeping "hostile" possession of the sea, he retorted, "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst those who dost it with a great fleet art styled emperor."[7]) Over time the haunting problem of ethical legitimacy for the polity's alienating exercise of violent, coercive force came to be called, simply, the Augustinian dilemma—a dilemma that liberalism veils but does not solve by invoking the principle of legality.

Augustine acknowledged no such legally based solution. Instead, he argued that the political order is inevitably caught up in contradiction. In an irremediably sinful world, violent force is absolutely necessary to ward off chaos. The reality of sin makes the wistful longing for the utopian state (or the Marxist state that withers away) mere fantasy. Yet the political order can deal with sin only by invoking the very sins that make earthly authority necessary—the lust for

6. *See, e.g.,* William Connolly, *The Augustinian Imperative: A Reflection on the Politics of Morality* 83–85 (1993); Peter Brown, *Augustine of Hippo* 212–43, 345–52 (1969).

7. Saint Augustine, *City of God* 112–13 (Modern Library ed. 1993) (Bk. 4 § 4).

power, for violence, for property, and for domination. Although the exercise of political and economic power is necessary, it is never untainted. Moreover, Augustine deepened and intensified the old pagan micro/macrocosm relation of individual and polity by describing inevitable divisions in household and kingdom as, in effect, the self-divided Adamic soul writ large. These were the same divisions, the same Augustinian realities, which Americans recognized after the Revolution, when the New Eden so quickly lapsed into self-interested factions, requiring a national government to bring order out of chaos.[8]

Augustine juxtaposed this earthly city to the City of God, setting in motion the grand antitheses that dominated political thought for centuries. The foundation for the City of God was laid by Christ's universalistically conceived loving and innocent self-sacrifice, in contrast to the fratricide and civil warfare that mark political foundation myths, as with Romulus and Remus. At the microcosmic core of the City of God is a self healed by grace rather than a self divided against itself and against God. Augustine described the "healed" microcosmic self as radically separated from the external, habit-bound world, a separation achieved by the inner search for God. The search inward was one of Augustine's powerful contributions to Western thought, arguably laying a foundation for modern conceptions of self. Augustine's self, however, realized its freedom only through *caritas,* the result of reconciliation with God and the human community. The earthly macrocosmic realization of that self would be a world at perpetual peace rather than at war.

Augustine never believed that the City of God was realizable on earth, even within the church. Rather, both church and polity contained a radical intermixture of sin and grace ("In truth, these two cities are entangled together in this world and interunited until the last judgment effect their separation."[9]) Therefore in this "present age" no precise moral judgments or fixed legal standards could sort out the justified from the unjustified exercise of coercion.

Liberalism learned from Augustine not to try to turn the polity into the City of God. As an important example, the more muted Madisonian goal was to contain sin, not achieve perfection.[10] Liberalism did, however, yearn to solve the problem of legitimacy, which it tried to do by relying on reason and the law, a reliance it learned from the (illiberal) medieval church.

8. See Gordon Wood, *The Creation of the American Republic 1776–1787* 504–5 (1969).

9. Augustine, *supra* note 7, at 38 (Bk 1 § 35).

10. *See supra* Michael W. McConnell, Old Liberalism, New Liberalism, and People of Faith.

MEDIEVALISM

The early Middle Ages were marked by intense struggles between rulers and ecclesiastical officials. Christianity was a more unifying force than political allegiance, and Charlemagne set an important precedent by receiving his crown from the pope in 800 CE. Nevertheless, kings routinely turned clergymen into mere crown functionaries, and the reality of temporal power over religion was symbolized by the emperor's investment of bishops. Pope Gregory VII condemned the practice in 1075, and Henry V finally renounced it in 1122, after a century of conflict. Henry's renunciation laid an important foundation for the liberal notion of limited government and separation of spheres.[11]

On the other hand, arguments for ecclesiastical autonomy quickly led to the church's claim to its own supremacy, based on the successful assertion of centralized ecclesiastical authority as against both local churches and Europe's wide variety of competing political forms. (There was no "state" in anything like the modern sense—except, perhaps, the church.[12]) The result was the all-encompassing medieval conception of organic unity within a simultaneously spiritual and political body modeled symbolically on the body of Christ. This imagery suggested that all of humanity was a single divinely constituted universal body—an extraordinary moral vision of human worth and interconnection, which also led naturally to the view that the head of such a body must be Christ, whose vicar on earth was the pope. A wholly independent emperor would mean the monstrosity of a body with two heads. Arrangements were bound to be hierarchical (a head sat higher than the feet on a human body and was meant to rule), but organic interconnection offered notions of apportionment and interrelation that cut against absolutism. Members of the organic/political body, including pope and political ruler, should serve the welfare of the whole; and because the whole lives only in and through the members, loss of even one member is a loss to all.

Central to this conception was the idea of "mediate articulation." Individuals were not separated, atomized individuals confronting each other and the state, as in later liberal formulations, but were socially grouped by function; groups (for example, gentry or artisans) had their own unities as wholes, even

11. Steven Ozment, *The Age of Reform 1250–1550: An Intellectual and Religious History of Late Medieval and Reformation Europe* 86, 138 (1980).

12. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 114–15 (1983).

while being, collectively, members of the larger body.[13] The decline of this notion of mediating structures was a hallmark of an emerging liberalism.

The great unifying theorist of the High Middle Ages was Thomas Aquinas, who almost suggested that the Augustinian gulf between the City on Earth and the City of God might be closed through the church. He replaced Augustine's dialectical method of posing antitheses with a methodology that closed gaps, eased contradiction, and unified dualities, suggesting a polity in which Christian grace would perfect but not overturn the natural virtues of the pagan polity.

The perfected and the natural came together through an Aristotelian epistemology in which knowing was a process achieved by internal natural reason operating in relation to external sense data that were themselves part of a natural, moral ordering ordained by God's own reason. The Thomistic celebration of natural reason, which laid the groundwork for a "reasoned" Enlightenment liberalism, thus presupposed an (illiberal) ontological relation between divine reason, the human mind, and a morally ordered world. The individual was not an autonomous actor selecting his/her own moral viewpoint, as in later liberalism. Rather, God, humans, and the natural were ethically interconnected by the very structure of reality itself—an ontological relationship which meant that the organically conceived universal polity on earth could actually approach the City of God.[14]

Reality thus understood provided the basis for considering relationships in legal and eventually constitutional terms. The central, essentially teleological (illiberal), concept was of a natural law grounded in the being of God and directing all things to their appointed ends. Human beings, through natural reason, were capable of apprehending this substantively moral natural law, which was supplemented by revelation (divine positive law) and also by human positive law, which bore the nature of "law" only if it did not violate natural law.[15]

13. See Otto Gierke, *Political Theories of the Middle Age* 4–22 (F. W. Maitland trans., 1900). Gierke's is the classic text on medieval political conceptualism, relied upon here.

14. For a relatively modern account of the underlying presuppositions of the Thomistic approach, *see* A. P. d'Entreves, *The Case for Natural Law Re-Examined,* 1 Nat. L.F. 5 (1956); on the political implications of grace perfecting nature, *see* Ozment, *supra* note 11, at 147–48. On Thomistic ontology, *see id.* at 54–55; on medieval law as reconciliation of opposites and contradictions and ultimately of God and human, *see* Berman, *supra* note 12, at 132–43, 163–64. For the link between the church as mystical body and the "natural" body, *see* Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* 194–218 (1957). Kantorowicz traces much of what follows herein.

15. *See, e.g.,* Francis Oakley, *Natural Law, Conciliarism and Consent in the Late Middle Ages: Studies in Ecclesiastical and Intellectual History* 65–83 (1984).

The medieval church employed the methodology of law to construct itself as a vast, legally constituted political entity. Moreover, by epistemologically combining the mystical and the legal, it invented a number of concepts still central to liberal legalism. For example, with the church as the first case in point, medieval canonists described a corporate body sufficiently of the present age to own property and enter contracts, yet sufficiently like the body of Christ to survive the death of any particular church official. From thence emerged the modern corporation, which has an existence apart from the mortality of any individual CEO or group of shareholders.[16] Similarly, canonists produced something like a theory of representation: the pope was head of the church, with authority over members because he "embodied" the whole church, which was in him. The obvious model was Christ, who was head of the Church, which was his body, and at the same time was the whole body, head and members together. The concept of embodiment was a first step toward a theory of representation: because the many were mysteriously present in the one, the one could legitimately make decisions on behalf of many.

In turn, representation moved the church toward a conception of constitutionalism. Inevitably, difficult situations arose that tested the meaning of representation. When the papacy was vacant, for example, the church did not cease to exist; the corporate body of the faithful remained, with Christ as the true head. In such cases the power of the papacy seemed to revert, or escheat, to the community, and thus to the cardinals, who chose a new pope.[17]

The more telling case was the problem of the heretical pope. Canonists actually affirmed the power of the whole body of the church to depose a head who deviated from the faith and therefore was spiritually dead. Once this exception was allowed others suggested themselves, so that it came to be said that ultimate church authority existed in the whole mystically conceived *congregatio fidelium,* the corporate association of members under Christ.[18]

Such notions came to the fore during the great schism, when three compet-

16. 1 Sir Frederick Pollock and Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 501 (1968); *see also* Frederick Maitland, *Selected Essays* 73–103 (Hazeltine et al. eds., 1936).

17. Gierke, *supra* note 13, at 41, 49–50, 154 n. 174.

18. Ozment, *supra* note 11, at 161. The major study of the power of the notion of *congregatio fidelium,* especially in the conciliarist period, is Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (1955).

ing popes were each backed by political allies. Obviously no body could have three heads. In the resulting conciliar struggles, language that once exalted the papacy served to limit individual popes. Although language of limitation was employed with equivocation, and amid much practical failure, conciliarist language was later echoed during political struggles with secular rulers, as, for example, during the English Civil War.[19]

Medieval law thus emerged from within a Christian worldview that linked the juridical to the spiritual, the natural to the mystical, the external world to the mind of God, and the "self" to an organic polity of almost infinite mediating wholes within wholes where the spiritual so interpenetrated the actual that the two became virtually indistinguishable. It is a world the modern liberal can barely comprehend, yet from which liberalism has derived some of its most indispensable constructs.

For a time, however, the ecclesiastical vocabulary of simultaneous exaltation and limitation was borrowed by secular rulers to inflate their own authority. Bracton described a king who, in the famous protoliberal formulation, was both above and below the law; as Bracton explained, with obvious (illiberal) comparison to the pope, the king was *Vicarious Dei* only if and so far as he submitted to the law "like the Son Himself."[20] By the thirteenth century the legal profession was called a "priesthood," a parallelism, repeated often in early American legal culture, which helped to constitute the "virtual holiness" of the legally constituted secular state.[21]

Eventually many theological constructs were grafted onto the kingship, giving it a mystical existence, like the church's, separate and apart from any existing king or set of institutions and thereby dividing, in modern terms, the office from the person. Thus the king in his "body politic" or in the "dignity" of the crown, did not die with the natural death of the king, and the king who was obligated to no man was nevertheless obligated to the dignity of the crown, which was, like the mystical body of Christ or the congregation of the faithful, perpetual. So, too, the king incorporated in his person the whole body politic, of which he was at the same time only its head, as his subjects were the members. Just as Christ was both head and head-and-members, as well as both God and man, so too the king was both body natural and body politic, both king and

19. Oakley, *supra* note 15, at 804–5.

20. Kantorowicz, *supra* note 14, at 157.

21. *Id.* at 124, 128–29. On this phrase in early American legal culture, *see* Mensch, History of Mainstream Legal Thought, *in The Politics of Law* 14 (D. Kairys ed., 1990).

king-and-parliament, and also the embodiment of the whole polity as a *corpus republicae mysticum.*[22]

A more democratic version of the transfer of religious vocabulary to the secular realm occurred as theorists began to upend all hierarchy by arguing that if the true mystical body of Christ was the *congregatio fidelium,* then true authority belonged with the lay members. The laity, in turn, could be found most directly and concretely in the polity. Thus emerged, from constitutional language within the church, an (illiberal) argument for complete political control over ecclesiastical institutions, including confiscation of land. ("For with food and raiment the priests should be content," Marsilius announced, a position which led Pope John XXII to denounce him for heresy in 1327.) Such arguments would be repeated in the court of Henry VIII.[23] In effect, the ultimate language of exaltation—the pope's role as Vicar of Christ and head of a universal, organic, church-state unity—by its own inner logic became an argument for total political takeover of the church.

REFORMATION

Neither political control over church nor papal authority over polity allowed for the liberal separation of church and state. The move toward separation is commonly attributed to the Reformation, but the real separation that occurred during the Reformation occurred at a deeper level and did not lead directly to church-state separation at all. Rather, it entailed a separation of individual faith from the sacralized, integrative ordering of the High Middle Ages and a return to the Augustinian insistence on a radical disjuncture between God and human beings. Reformation theorists, drawing on nominalist strands in Catholic thought, blasted through the whole elegantly conceived organic/epistemological/juristic medieval unity by emphasizing the free will of God, not his reason, an emphasis that underscored the corresponding subjectivity of the individual believer. This emphasis on God's unfettered will meant that God related to humans not because of any ontological unity linking his reason to ours but rather by the words he has chosen to utter *(sola scriptura)* and the undeserved grace *(sola gracia)* he has freely willed to confer on the faithful *(sola fides).*

22. Kantorowitz, *supra* note 14, at 385–87, 399. On the probable influence of canon law even on the Magna Carta, that classic document of English common law, *see* R. H. Helmholz, *Magna Carta and the Ius Commune,* 66 U. Chi. L. Rev. 297 (1999).

23. Ozment, *supra* note 11, at 151–55.

The Reformation rejection of the sacral Aristotelianism of the medieval period was crucial for Enlightenment individualism. The emphasis on God's words rather than reason, for example, meant that God related to the world through a series of disparate linguistic events, requiring no institutional mediation. Replacing organically conceived unities within unities was the starkness of the individual confronting a normatively neutral material world.

Although this starkness almost defines liberalism, its most obvious implication was in fact absolutism, as Hobbes ruthlessly argued. Scripture, Hobbes explained, described the history of Israel and of Christ's appearance in actual historical time to proclaim the Second Coming. During this interim period, between the First and Second Coming, we have been left by God with only the biblical text. Furthermore, to avoid the atomization of a multitude of prideful individual textual interpretations, the church must humbly submit to whatever interpretation the sovereign provides.

Other than a text, we have only the (desacralized) materiality of our own existence in an atomized world of objective forces of attraction and repulsion—which is all we can mean by "good" or "bad." As a result, all existing political authority is rendered contingent, provisional, and without spiritual significance. Its very contingency, however, renders it absolute—because its legitimacy depends solely on the force it can exert, it is required to respect no ecclesiastically based ethical limits. Hobbes the Protestant had no patience for the mystical legal language that simultaneously exalted authority and limited it. The materialized and atomized self, in a one-time alienation of sovereignty, consented to authority for the sake of self-preservation, the state's sole (but totally sufficient) source of legitimacy that carried with it no normative limitation.[24]

At the opposite Protestant extreme were the Puritan radicals of the Civil War period, feared by Hobbes. They were eager to experience in participatory democracy itself a kind of apocalyptic infusion of grace, making them a people being and acting "as itself before God," without need for the mediation of legal

24. See J. G. A. Pocock, *Politics, Language and Time: Essays in Political Thought and History* 148–201 (1971), and for a somewhat different interpretation, Joshua Mitchell, Thomas Hobbes: On Religious Liberty and Sovereignty, *in Religious Liberty in Western Thought* (Noel B. Reynolds and W. Cole Durham, Jr. eds., 1996). For a somewhat different account of the importance of the "religion books" (III and IV) of *Leviathan see* S. State, *Hobbes and Hooker; Politics and Religion: A Note on the Structuring of Leviathan,* 20 Canadian J. Pol. Sci. 79–96 (1987). For the reduction of morality to forces of appetite and aversion, *see* Thomas Hobbes, *Leviathan* part 1, chapter VI at 41 (A. Lindsay ed., 1950). Although Hobbes posited a right of self-preservation against Leviathan, its only normative basis lay in the aversion to being destroyed.

limits or political authority.[25] Similarly, James Harrington, the English republican theorist who powerfully influenced the American colonies, described the participatory republic, modeled after ancient Israel, as itself, Christlike, a perfect dual-natured mediation between heaven and earth.[26] Much of this (illiberal) ecstatic Protestant spirit swept through the colonies during the Great Awakening, igniting a powerful (liberal) democratic spirit.[27] Not illogically, some have found in politicized Protestantism a source of totalitarian impulses. Rousseau provides the secular version: the new Adam as citizen, obeying only himself, unites himself with the collectivity and thereby achieves a moral/political transformation, finding his "true self" in the state.[28]

Within such political/religious apocalypse, any liberal "legal" limit to democracy constituted an artificial, illegitimate restraint to religiopolitical purity. The church, in particular, required no legal protection because the true polity and the true church were one. Harrington and Hobbes, the republican and the absolutist royalist, agreed in their antilegalism and anticlericalism. Both were, in that sense, decidedly "illiberal." Nevertheless, liberalism combined, however illogically, the Hobbesian atomized individual in a material world with a contradictory Harringtonian faith in democratic process as a self-justifying moral good. Both are elements of modern liberalism.

No single model of church-state relations emerged from Reformation theology, which was more concerned with how the church should relate to the world than with how the polity should relate to the church. Models ranged from complete separation (Anabaptist) to unity under the crown (Anglican).[29] In between were complex notions of duality, with the dual nature of the self (redeemed but still sinner) replicated in the church (pure mystical church and inevitably sinful institutional church), which served in turn as a model of church and state (voluntary community under Christ and coercive polity).[30]

25. J. G. A. Pocock, Introduction, *The Political Works of James Harrington* 373 (1977); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought of the Atlantic Republic Tradition* 372–73 (1975).

26. See W. C. Diamond, *Natural Philosophy in Harrington's Political Thought,* 16 J. Hist. Phil. 396–97 (1978).

27. See Elizabeth Mensch, *Religion, Revival and the Ruling Class, A Critical History of Trinity Church,* 36 Buff. L. Rev. 427, 456–62.

28. See d'Entreves, *supra* note 14, at 25.

29. See John Tonkin, *The Church and the Secular Order in Reformation Thought* (1971).

30. See W. D. J. Chargill Thompson, The "Two Kingdoms" and the "Two Regiments": Some Problems of Luther's Zwei-Reiche-Lehre, *in Studies in the Reformation: Luther to Hooker* (1980); W. J. Torrance Kirby, *Richard Hooker's Doctrine of the Royal Supremacy* 41 (1990).

Largely following Augustine, Luther described the polity as only a necessary (but therefore divinely ordained) dike against chaos; and, especially in his early writings, he recognized no conceptual basis for legal limits to a ruler's power. He conceded all coercive jurisdictional power to the prince, including power even over ecclesiastical appointments and property. The prince's acts should be treated as a gift of God, he stated, an argument that served chiefly to legitimate political absolutism in early modern Europe. Luther did lay down principles of duty which a godly prince should follow, and advocated passive resistance if a ruler commanded unchristian acts, yet he denied a right to active resistance. Tyranny is "not to be resisted but endured." Calvin, by contrast, found some moral worth in both law and polity, and at least some warrant for a "right" to resist despotism, as would later Calvinists and Lutherans as well. [31]

Notably, however, the first articulation of a natural right in the "subjective" sense most familiar to liberalism—as a sphere of individual choice—emerged not with the atomizing effect of the Reformation, nor with Locke and the Enlightenment, but rather with twelfth-century canonists who had noted that *jus* could mean not just "rightness" in the Thomistic sense of objective justice but also the "power" that one person could licitly exercise, as with property or self-protection. This subjective notion had been developed in the fourteenth century during a protracted dispute concerning the intelligibility of the Franciscan claim to imitate Christ by relinquishing all property rights. The pope declared the claim incoherent: because neither Christ nor the Franciscans starved themselves, he argued, they necessarily exercised at least a simple use right over what was eaten.

Both sides to the quarrel debated the meaning of subjective rights without suspecting that the concept itself might be, as we now assume, incompatible with either "objective" Thomistic natural law or an organic/mystical community modeled after the body of Christ. The idea of subjective rights was further developed by subsequent Catholic theorists and was familiar to Thomistic counterreformation scholars of the Spanish "second scholasticism." Grotius provided the bridge to Protestants and to the Enlightenment.[32]

Thus by the time of Locke, the "rights" conceptualism so often associated with him had, in fact, a long Catholic history. Locke did, however, base his

31. See Quentin Skinner, *The Foundations of Modern Political Thought,* vol. 2, *The Age of Reformation* 15 (1978).

32. For the complete history, from which this account is drawn, *see* Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (1997).

analysis of rights on a conception of natural reason sharply different from that of the Thomists. Locke did not describe a reason that discovered in nature a substantive moral order reflecting God's wisdom or divinely ordained teleological ends. Rather, as with Descartes, Locke's reason was the disengaged, instrumental reason that came to characterize the Enlightenment generally, a reason that confronted and dominated an objectified material world—corresponding to the individual right to property as derived from human industry and the capacity to control.[33]

Paradoxically, although Locke is usually taken to have established the individual's natural rights as *against* the state, this Lockean conception of disengaged, instrumental reason is closely associated with the emerging capacity of the Enlightenment absolutist state to regulate and discipline vast fields of human endeavor, from trade, to health, to mores, and even to modes of piety.[34] The individual exercising reason instrumentally is mirrored by a Benthamite bureaucracy capable of extraordinary instrumental power—the conceptual relationship is one of reciprocity and symbiosis, rather than true limitation. In effect, the transcendent Protestant God of unfettered freedom created its own image, as it were, in both a state and an individual that were free to exercise reason instrumentally in relation to a desacralized world.

Notably, moreover, although Locke (illiberally) recognized important religiously based exceptions to the individual rights he described, with respect to religion itself he was tolerant only in a very modern sense. He recognized freedom of conscience as an inalienable right (like life itself, which was a gift from God), but this right extended only to belief, not to practices that violated reasonable state regulations. Locke assumed a neat congruence between reasonable religious practice and those reasonable laws that a polity of sensible and industrious property owners would enact. In case of noncongruence, Locke made no exception for protecting what we now label free exercise.[35] Thus on the American constitutional law question of religious exemption as opposed to strict neutrality, Locke advocated a standard of neutrality—consistent with Jefferson and current doctrine, but arguably contrary to the Madisonian conception of religious liberty as a recognition of prior membership in the king-

33. See John Locke, *An Essay Concerning Human Understanding* chapter 3 at 6–9, chapter 4 at 7, chapter 28 at 7–13 (P. Nidditch ed., 1975); John Locke, *Essays on the Law of Nature* 161, 153, 135 (W. von Leyden ed., 1954).

34. Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 159–76 (1989).

35. John Locke, A Letter Concerning Toleration (1689), *in* 6 *The Works of John Locke* I at 44–45 (photo reprint 1963) (1823).

dom of God.[36] Indeed, when religion posed a political threat, Locke's famous toleration ended. Atheists were not tolerated because they could not be trusted to honor oaths, nor were those who might be drawn to foreign political loyalties (Muslims, or by implication, Catholics). Locke thus enunciated liberalism's version of religious toleration, which quickly becomes pacification of true difference and resistance.[37]

Perhaps the most influential articulation of the liberal argument for the legal protection of individual autonomy derived, however, not from Locke, but rather from Kant, who did not actually urge that his model of individual ethical reasoning be a basis for law or politics at all.[38] More radically than Locke, Kant sought a definition of moral reasoning freed from the claims of religious authority and also from instrumentalist, consequentialist reasoning. The two points were related. Kant, unlike Locke, argued that the exercise of instrumental reason is not necessarily an exercise of freedom. Whereas Locke assumed a God who had freed humans to exercise their instrumental reason in a world designed precisely to reward consequentialist calculation, Kant saw in such calculation only enslavement to desire—enslavement to the longing for the desired consequence.[39]

In contrast, Kant postulated freedom as the freely willed choice to act disinterestedly, in accord with the duty-defining dictates of human reason itself—dictates of internal consistency, principled universality, and utter impartiality. In effect, full autonomy again becomes (illiberally) a matter of obedience—obedience, however, not to God (traditional Christianity) nor to the democrat-

36. See Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 Harv. L. Rev. 1409 (1990). On Locke specifically, *see id.* at 1434 n. 134. McConnell's reference to Locke's belief in freedom of conscience in this volume should be read in light of McConnell's prior insights as well. For current doctrine, *see City of Boerne v. Flores,* 521 U.S. 507 (1997).

37. Locke, *supra* note 35, at 52. On the power and significance of this resistance, *see* Stephen Carter, Liberal Hegemony and Religious Resistance, *supra.*

38. See Hannah Arendt, *Lectures on Kant's Political Philosophy* (R. Beiner ed., 1982) (discussing especially the "Third Critique"). For perhaps the most systematic effort to construct liberal theory at least partly on Kantian assumptions, *see* John Rawls, *A Theory of Justice* (1978). For Rawls on the role of religion in the modern liberal state, *see* John Rawls, *Political Liberalism* (1993). For analysis of Rawls on religion and of recent critical commentary, *see* Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals,* 5 L. & S. Cal. Interdisc. L.J. 297 (1997).

39. See Walter Lowe, *Theology and Difference: The Wound of Reason* 104 (1993).

ic polity (Rousseau) nor even to one's own desires but only to the internal requirements of one's own reason. Kant thus solved a difficult problem of Christian ethics—Catholic thought bound God, as well as humans, to natural law, arguably in denial of divine freedom, whereas Protestant thought bound humans to divine commands with no guarantee that those commands were just or reasonable. In contrast to both, Kant described a conception of duty that seemed capable of summoning our accord without violating either God's freedom or ours.[40]

Kant himself, however, never assumed that people were perfectly self-sufficient moral reasoners. Humans were drawn by desire for the sake of their very survival, which depended on their (imperfect) capacity for consequential reasoning. Therefore the human condition was one of ambiguity, and what judgment required in the complex particularity of history might differ from the pure consistency required by individual ethical reasoning.[41] In fact, Kant's description of the divided human self is (illiberally) Augustinian, and by holding out the elusive possibility of the unity between duty and desire he might almost be describing a state of grace.[42] Notably, however, the conflict Kant identified between consequentialism and the protection of autonomy pervades modern legal thought, with no promise of graceful resolution in sight.

The early English theorists most identified with (liberally) defending either democracy or the rights of the individual were those least open to the claims of legal traditionalism. The Enlightenment's impatience with the quirky forms of the ancient common law is evident, for example, in both Locke and Harrington. Indeed, one of Blackstone's great goals was to reconcile common-law practice with the Lockean "logic" of natural rights.[43]

For purposes of American law, a primary influence in effecting that reconciliation was the earlier Richard Hooker, an Anglican theologian and legalist whose influence on early, largely Episcopalian, American legal culture tends to be overlooked. Hooker's (illiberal) purpose was to defend the Anglican church against the challenge of the English Puritans, who argued for greater separation. Even while defending the Anglican establishment, however, Hooker

40. See J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* 508–13 (1998), for the theological dilemma Kant thus solved.

41. See Lowe, *supra* note 39 and Arendt, *supra* note 38.

42. See Taylor, *supra* note 34, at 58.

43. Duncan Kennedy, *The Structure of Blackstone's Commentaries,* 28 Buffalo L. Rev. 209 (1979).

achieved a complex reconfiguration of traditional and modern ideas that has provided American constitutional liberalism with much of its force.[44] Hooker paid deference to the natural ethical and communal virtues of medieval Aristotelianism, but he then located the true basis of government in the liberal notion of consent—specifically, the consent given to government for the (Augustinian) purpose of containing sin. The emphasis he gave to consent predated Locke, who took the idea, in fact, directly from Hooker, turning it into an original contract.

By consent, however, Hooker did not mean direct, participatory democracy of the ecstatic Puritan variety that alarmed Hobbes; yet he also did not mean the one-time, fearful alienation of sovereignty Hobbes described. Instead, Hooker meant the more complex but still familiar notion of consent to authority as it is distributed among the institutions of the polity conceived as a corporate body, making possible the medieval but also modern constitutional idea of consent by "the people" as a whole, which is different from majoritarian rule at any particular time. Here Hooker not only echoes the medieval church but also foreshadows John Marshall on the legal meaning of the sovereign people who consent to limits even to their own consensual power.

The (medieval) foreshadowing of Marshall, and of modern liberalism, is even more apparent when Hooker links the consent of the people to law, which he describes (illiberally) as echoing the voice of the angels and representing the perfected and immortal side of the body politic.[45] Drawing on Protestant imagery of the two realms within the self (the redeemed and the still sinful) as they were replicated in the church, Hooker (liberally) separates, within the polity itself, the realm of law and the realm of politics more dramatically than ever had been done in the past.

In spite of Hooker's seeming emphasis on the perfection of law, he was no pure medievalist. He acknowledged the substantive morality of natural law, as reflecting on earth the reason that God ordains, but most actual laws he described as being of mere "probability," not necessity, and therefore not rooted in the substantive law of natural reason at all. Instead, reflecting the growing influence of common-law theorists in England, Hooker describes the real foundation of law as resting on the English people's consent, in history, to being governed as a corporation bound together by the long tradition of constitu-

44. See Elizabeth Mensch, *Images of Self and Images of Polity in the Aftermath of the Reformation,* 3 Graven Images 249 (1996), from which the following argument is taken.

45. Richard Hooker, Laws of Ecclesiastical Polity, *The Works of Mr. Richard Hooker* 285 (J. Keble ed., 7th ed. 1988; reprint 1970).

tionalism and customary common law. Hooker would carefully describe spheres of governance with boundaries as laid down not by natural reason but by the particularity of English custom and constitutional law—areas where the king's power was absolute, areas where Parliament must give consent, and also an area that, however so much it might be under the crown, was nevertheless reserved for the church and into which the king could not legally intrude.[46]

The language of a political consent to a corporate body that transcends historical time and popular will is markedly similar to language describing the church as a mystical body whose existence is outside time and place, or the crown as containing both a body natural and a perpetual, Christlike body politic. Such (illiberal) language was oddly necessary for (liberal) constitutionalism, which to the Framers seemed to represent a kind of political transubstantiation: a text written and politically ratified by one group of men in the particularity of historical time becomes the corporate act of a Sovereign People creating a body politic whose continuity—and legal authority—transcends the mortality of individual human beings.

Even after overtly religious vocabulary ("priests at the temple of justice," for example) dropped out of American legal rhetoric, belief in the liberal constitutional tradition provided jurists with a kind of secular liberal faith, a source of meaning and hope in an otherwise disenchanted age. Even now, when faith in the ideals of the Constitution seems muted, there is an odd similarity between the postmodern notion of law as a cultural practice with no "real" foundational referent except the practice itself, and the assumption that the church "makes real" the body of Christ in historical time solely through its own faithful practice.[47]

When the polity thus appropriates the forms of religion it learns some of its highest ideals. That has been the case with liberalism, and has been part of the long creative tension in centuries of church-state relations. Nevertheless, as Augustine insisted, Christian identity is not based in the polity, and Christian virtues are not identical to the habitual virtues of the Roman (or the liberal) state. However much liberalism appropriated the forms and values of Christianity, for example, law inevitably entails the exercise of coercive force; in spite

46. See Harold Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale,* 103 Yale L.J. 1651 (1994); W. Chargill Thomson, "The Philosopher of the Politic Society": Richard Hooker as a Political Thinker, *in Studies in Richard Hooker* 47 (W. Speed Hill ed. 1972); W. J. Torrance Kirby, *Richard Hooker's Doctrine of the Royal Supremacy* (1990).

47. See Pierre Schlag, *Hiding the Ball,* 71 N.Y.U. L. Rev. 1681, 1703–4 (1996).

of liberalism's claims to neutrality and process rationality, its foundational premise remains the premise of inevitable conflict that can be contained only by law's implicit threat of violence. In Robert Cover's stark phrase, "Legal interpretation takes place in a field of pain and death."[48]

By contrast, Christianity holds out the hope of a different community, one formed on a promise—the promise that the learned practice of forgiveness can replace coercion and that a life lived for God and the neighbor can replace a life lived in the egoistic, competitive pursuit of gain and privatized comfort. The realization of that promise entails a radical reorientation of the self, of a kind that simply lies outside the bounds of the liberal framework of rights. Necessarily, therefore, that promise exists in some disruptive tension with the liberal political order, which virtually by definition cannot be an exemplar of agape.[49]

In that sense, attempts to show that liberalism is fully consistent with Christianity are misguided, but so too are attempts to "Christianize" the liberal state. After the long history of religious warfare in Europe, Christianity cannot claim that it has solved the problem of politics. Rather, history seems to suggest that Christianity and the polity will inevitably exist in some tension with each other, not in a state of complete congruence. That tension can be creative, but only if churches have the courage to retain faith in their own distinct inflexible promise, in their own disruptive hope.

Even now, the liberal Enlightenment model of the autonomous self has lost much of its hold on current thinking, displaced by an antifoundational and largely Nietzschean postmodernism, and also by a global market that may be rapidly changing our conception of the liberal nation-state itself. In the face of those changes, Christianity still, as it has for centuries, stubbornly holds out a different story and a different hope—about the renunciation of power rather than its exercise, and about *caritas* rather than *cupiditas*. The challenge now faced by Christians, it would seem, is not how to influence the liberal state but how, simply, to stay stubborn.

48. Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

49. See Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 Fordham L. Rev. 1089 (1998). For others who emphasize continuing "difference" *see, e.g.*, Stanley Hauerwas, *After Christendom? How the Church is to Behave if Freedom, Justice, and a Christian Nation Are Bad Ideas* (1991); John Howard Yoder, *Politics of Jesus: Vicit Agnus Noster* (1972); John Milbank, *Theology and Social Theory: Beyond Secular Reason* (1990); Douglas John Hall, *The End of Christendom and the Future of Christianity* (1997) (the latter with an emphasis on being "in but not of the world" rather than on complete discontinuity, but sharing their emphasis on the break with the Constantinian order and set of assumptions).