Nootbaar Conference

Preliminary Perspectives on Tort Law, Christianity and Postmodernism.

I can almost hear my Torts colleagues in the legal academy whispering in response to the title to this article, especially from those who have had their fill of news about "Christians" who equate their faith with a set of conservative and even reactionary positions. "We certainly see the importance of discussing the nature of Tort law in a postmodern age, but "come on, what possible relevance a Christian perspective could bring to the discussion?" Is the judgment about whether particular laws or processes from the field of Torts are "good" or "just" really different, for Christians?

Of course, whether American Tort Law is "good" or "just" can be discussed using all the ethical tools common to secular moral philosophy. For example, is the law useful? Does it produce the best balance of good over bad results? Is it efficient, producing the best balance of deterrence of risky behavior while encouraging one to take the reasonable actions necessary to live a full and meaningful life? Is it just? Does it adequately protect the less resilient among us, (widow, orphan, oppressed, or the stranger in the community)? Does it unfairly redistribute wealth in a way that creates incentives for members of society to be lazy, or create dependencies, or engage in immature behaviors? Does it promote a just caring community?

Let's start by questioning what a Christian perspective might add to this moral, philosophical discussion, asking both whether many ideas in legal philosophy and Tort theory in particular, can enhance our understanding of the Christian faith, and whether a Christian perspective might, in turn, contributes also to a better understanding of where Tort law came from, and even where it might need correction. For

example, what insights are produced by examining how Tort law deals with private disputes if one considers Tort Law as dealing with an age old question long debated by Christian theologians, that is, with the problem of evil, or why bad things happen to good people? Or, what insights can be gained from asking what legal obligation should exist at common law to encourage or teach Christ-like agape. Or, how and when should one use law to obligate one to come to the aid of another in need.[1] Or, what insights can be gained about the relationship between justice and mercy, from examining how Tort law processes, between questions of law (for the court) and questions of fact (for the jury) decisions designed to settle disputes between individuals? What are the limits of common law adjudication, and how do these inform Christian concepts of mercy and forgiveness, and vice versa? Or, what are the advantages and limitations of using economic theories, "realism," or "pragmatism" to help resolve private disputes, and what assumptions do these theories make that may raise concerns for Christians? What starts to emerge is a clearer understanding of the common, non-rational, *foundationalist* beliefs that are, at times in sync with each other, and at other times in contradiction, or at least in competition with each other.

But before I elaborate on this thesis, I should briefly clarify what I mean by a Christian Perspective. The Christian faith has its roots in Judaism, which existed from about 2000 B.C. Since that time many Jewish and Christian thinkers have reflected carefully and deeply on the human situation.[2] Guided by their faith, they have developed rich and powerful ideas that are applicable to many different areas of life. In looking at the possibility of forming a Christian perspective on law, then, I seek to do the same. That is, I make a serious attempt to ask whether any ideas that might spring from a Christian faith commitment

[1] Consider for example what Jesus's teaching concerning the rich man and Lazurus has on the duty at common law one has to come to the aid of another.

[2] Some have observed (Geoffrey Hoare) that Jewish understanding of law was tied to identity. The Law given to Moses was God's prescription for a way of life, and so was evidence of God's love for the Jews. It was meant for the Jews, and so was tribal in nature. (Psalm 147:19-20). Jews were people of the Book, people of Law, and as a result it defined who they were. As ideas of God became less tied to a particular people, or less tribal, and understanding of God evolved into a Creator God, whose salvation was a gift, in the form of God's Son, Jesus, the understanding of the Law would also evolve.

can enrich our understanding of law, and whether the ideas of law can contribute to and enlarge our understanding of the Christian faith. Thus I attempt to orchestrate a three way conversation about 1) Law, (with a capital "L", or the philosophy of law) 2) a particular area of law, Tort law, and 3) the Christian faith. This order of discussion produces a Christian perspective from an unfamiliar angle, (one that follows the first 2) in the hope that such an examination will yield new insights. George Marsden calls such an endeavor *Christian-informed* scholarship, (George Marsden, The Outrageous Idea of Christian Scholarship (New York: Oxford University Press, 1997).

Before diving into existing theories of Law it is important to recognize the influence of Christianity in the formation of modern day legal philosophy. What does Christian-informed scholarship show about how postmodern legal theories have emerged from historical Christian roots? In some ways Christian theology is already infused into western ideas of law and part of the project should give renewed insight into that infusion. After all, many of the intellectual architects of law and politics were deeply committed Christians. Since the time of Thomas Aquinas (1225-1274), many Christians thought that law and religious thought belonged together. Natural law was the product of reason, written into the world created order by a Creator God who wanted his creation to know his will by the application of human minds to the study of a particular life problem.[3] The early Christian Church endeavored to set down the

[3] Nicholas Wolterstorff as done much of the work here in his two recent books, JUSTICE: RIGHTS AND WRONGS, (Princeton University Press, 2008, Princeton NJ) (where he argues that an inherent natural rights theory is found in both the Old Testament (Chapter 3) and the New Testament (Chapter 5)and JUSTICE IN LOVE, (20ll Eerdmans, Grand Rapids, MI). In JUSTICE IN LOVE, he does the Biblical exegesis of Romans to propose a Christian theology of Justice, or how the apostle Paul viewed how one lives faithfully toward God. (Id. at 249). He shows that to Paul, the gentiles have no excuse, even though they did not have the Torah, because right living is written on their hearts. Paul then may be said to hold to the view of natural law, that all humanity knows God's decrees because it is inscribed in their hearts by their conscience bearing witness to it. (Romans 2:14, and 2:25) Id. at 253.

Wolterstorff in Chapter 3, examines the gospel for the argument that Jesus was meant to do away with the law, and instead free humans from law by being its fulfillment. Wolterstorff shows that Jesus never denied the role for God's Law in authoritatively guiding behavior. (Jesus seems to argue at times for a utilitarian grounding in Law of the Sabbath ("The Sabbath was made for man, not man for the Sabbath" Mark 2:27) and a legitimate positivists role for man's law, ("Give to Caesar the things that are Caesars, and to God the things that are Gods," Mark 12:17), Jesus seems more interested in making the point that God requires righteousness, or fidelity, to God's law, written on the human heart. More important to Jesus than a rendition of whether Law's authority was ultimately natural reason or positivist was that the faithful would show no partiality to the wealthy or powerful. Also, part and parcel of Jesus concept of faithful living was to show mercy and forgive, especially to the lowly and afflicted. We will

law of the church, or the Canon law. The Canon law was to have divine origins, interpreted into being by human exercise of their God given natural reason.

The early theory of common law also drew on this same understanding of reason and the emergence of "just law" based on comparison of precedent and case, in an attempt to discover the right law for the particular situation. As late as the 19th century, in English common law included discussion of the equation of reason, Christianity, and just law as integrated in common law judicial decision-making. For example in the famous case of Bird v. Holbrook, where a young man seeking to impress a young woman climbed a wall into a gentleman's garden to fetch the women's pea fowl, only to have his leg blown off by a spring gun that had been set by the owner to protect his flowers. The English High Court held that the amount of force the homeowner used in the protection of his flowers violated the laws of Christianity, which had long informed the English common law. "There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England"[4]

Yet Christian theologians had early doubts about too easily claiming a strict correlation between human reason and God's law. During the time of the Reformation (1492) Luther and Calvin came to worry that human reason itself could be tainted by sin, and that claims of Law (might makes right) had to be subjected to other kinds of critique, principally of critiques from scripture, but also from submitting law and the magistrate to the examples and teaching of Christ. For Reformers, (joined by many Catholics) all of life had to be examined to make it subject to the "Lordship of Christ." What that would mean would depend on one's view of the nature of Christ's Kingship and its relationship to the second coming of

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return to this paradox in Jesus's teachings of both God's justice and righteousness, but also God's patience and kindness and longsuffering nature.

[4] Bird v. Holbrook 1828, See also, *R v Lilburne* (1649) - "The law of God is the law of England", *De Costa v De Paz* (1754) - "the Christian religion, which is a part of the law of the land… for the constitution and policy of this realm is founded thereon", *In Re Bedford Charity* (1819) - "Christianity is part of the law of England", *Cowan v Milbourn* (1867) - "There is abundant authority for saying that Christianity is part and parcel of the law of the land".

Christ. [See, Stephen J. Grabill, Rediscovering The Natural in Reformed Theological Ethics, and John Witte, Law and Protestantism, The Legal Teachings of the Lutheran Reformation, discussing natural law theories and the Reformation].

At its core Reformed Theology found guidance from Christ's summary of the law, which contained a three part understanding of the nature of humankind: that one must, *with heart, and strength and mind*, love God about all, and love neighbor as one loves one's self. Importantly, Christian theologians recognized that law could oppress, and justify enslavement to unjust regimes. Christians could rightly condemn the Law when the Law violated God's Law, found in scripture, the life and teachings of Christ, and implanted in the *heart* of each human, by the workings of the Spirit of God.

Of course, to say that Christian theologians were of one mind during the Reformation about the nature of law would be a gross over simplification. Recent Christian theologians would later articulate a view, drawn from early reformers, that the Gospel passages primarily preached kind of progressive optimism, that saw a liberation from the Law, or at least a more utilitarian view of law-- that law must serve human kind instead of enslaving human's to law. The Gospel of the law of love freed humans from the law, in order to enable humans the room to more fully love God and love each other. [5]

Others have detailed this history more pessimistically. Christian skepticism pointed to a human perversion of law to serve a particular ruler. Christian historians showed that the use of human reason justified law by equating authority of law in the authority of the King, whom God had place in a position power, and so whatever King ruled must be right. Law became of tool of social order and control by the powers to keep the people in their places. It is not my purpose to repeat that history here. The point is

[5] *But see*, Wolterstorff, Justice, Rights and Wrongs, (Princeton University Press, 2008, Princeton NJ) 96-129, who describes first Stanley Hauerwas's and then Anders Nygren's *dejustizing* of the New Testament, and then provides an excellent critique of such an approach, explaining how Justice and Love might be better integrated in consistent with the Gospel.

that much of the impetus for positivism was a desired to purge the law of sinful purposes by seeking to ground the theory of law in what it is that makes law, Law.

At least one legal philosopher, Hans Kelsen, (Jewish ancestry forces him to leave Vienna in 1933 for Geneva, and then to the US in 1940) argued that any critique had to examine any philosophical or legal theory for its *Grundnorm*, or fundamental norm.[6] If the starting point in one's philosophy was wrong, the whole project was likely to be wrong. And so Kelsen's student critiquer, Dutch philosopher and Christian theologian, Hermann Dooyeweerd,[7] examined different schools of philosophical thought for their fundamental norms. He argued that rather than trying to ground philosophy in philosophy itself, it was better to try to ground philosophy, Law, or any theory, in the Word of God. He argued that the problem with Plato was his lack of appreciation for the Creator God and God's Word, which existed from the beginning of time. This Word (Christ) not only survives the fall of human kind in Adam, but ultimately is the source and *Grundnorm* of all of life. He uses this critique to examine other modern philosophers, critiquing Kant, for example, for making human Reason his starting point, rather than starting with the Word of God. Despite the transcendent character of Kant's moral law, Dooyeweerd argued that Kant's starting point gave too much importance to the role of human reason.[8]

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[6] The theory of the Grundnorm is best known in its development in Kelsen's, Allgemeine Staatslehre, (translated and revised as The General Theory of Law and State, 1945)(where Kelsen distinguished between Austin's "command backed by sanction theory" of law). Herman Dooyeweerd, THE ROOTS OF WESTERN CULTURE, PAGAN, SECULAR, AND CHRISTIAN OPTIONS, Edited by Mark Vander Vennen and Bernard Zylstra. Translated by John Kraay. Toronto Wedge Publishing Foundation, 1979. See also, Herman Dooyeweerd, A NEW CRITIQUE OF THEORETICAL THOUGHT. 4 vols. Translated by David H. Freeman and William S. Young, Jordan Station, Ontario: Paideia Press. 1984.

[7] R D Henderson *Illuminating Law: TheConstruction of Herman Dooyeweerd's Philosophy 1918-1928* (Free University, Amsterdam 1994) 16-17, 51-87.

[8] Modern views of Law persist in seeing Law as the product of human reason, divinely implanted in humans, and yet also capable of being perverted by human power for human purposes. As opposed to Dooyeweed, some read Kant as helping to sort out different kinds of reason, both *a priori* and *a posteriori* reasoning. Others German philosopher of the time, like Schleirmacher, Fichte and Hegel, similarly can be critiqued for placing too much importance in man's shared religious experience, ability to reason, or autonomy.
Hegel gave rise to the importance of using history to examine the process of legal development and change. In Hegel's case he may be overly optimistic that lessons learned from History can be said to establish laws for human behavior, or meant to be viewed by future human decision makers as evidence of God's punishment or what God's will or law must be. Others see Hegel as committed to the idea that God is still active and operating in human history, and providing traces or evidences of God in that History that can convince the human heart of what is right

One contribution Christian jurisprudence might make is to continue Dooyeweerd's *Grundnorm* analysis of more modern legal theories, examining legal theory as it changed and developed from its natural law, and its *modern* and humanist roots, into positivist theories of law, and then into realism, and

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and just. The "Spirit" of God needs to be distinguished from what could be known from using reason. A Christian view of history is willing to examine the past for evidences or traces of God's will in the enfolding of God's creation. God's law could be seen in the process of human development. To Hegel, human cognition, however, was limited and so the development of law was time bound, and emerged as human history brought greater understanding of the depths of human depravity, and possibilities for transformation from God's forgiveness and law of love. [8]

In any event, the intellectual history of Law was greatly affected by war and conflict. Harold Berman would see in the history of revolutions the hand of God. Like Hegel, Berman would see evidence where human laws lost their legitimacy, where the legal powers got too far away from the needs and values of their subjects. In the English Revolution and its legal aftermath, one could see how too close a correlation between Law and Religion was judged to created unjust laws. English legislators would enact laws finally eschewing religion in anything but a ceremonial role in the exercise of power over the private lives of citizens. (War's or religious practices or doctrines were seen to be too costly to the pursuit of a pure unified practice of Law and Religion.)

The aftermath of the French Revolution, similarly attempted a secularization of law and power in an attempt to free the French for the monarchial oppression resulting from too close a correlation between power and divine right of kings. (The Swiss confederation is another example of such secularization of the law.) The Russian revolution might be seen as a similar attempt to secularize law, and yet attempt to see law as a tool for building community through the power of the state. (More recently the fall of Soviet communism in a "counter revolution" might be seen as the result of the dangers of too secular of a state, without the cultural glue to hold the different groups together.)

An intellectual history of the 18th and 19thc produces a complex set of influences on society and law that is surprisingly difficult to sort out and critique from a Christian perspective. Modern philosophies born of the combination of Enlightenment and the Copernican revolution continued to support human Reason as the Grundnorm for Law, especially in light of the history of oppression and revolution tied to religious supported monarchal decrees. Religiously neutral, even secular, ideas of Law and governance were seen as preferable over a divine Creator based Grundnorm. Laws of nature took on new meaning when applied to biology, anatomy, astronomy, and physics. Evolution and Scientific Naturalism were viewed as supporting human reason as the seat of Law. Arguments from nature as revelatory, sought to exclude on nonempirical sources of knowledge. Law's effect on society needed to be measured for it oppressive impact on society. Unfortunately for the rationalists, the logic of their philosophies failed to adequately explain the source of Reason's authority. The authority of law based on empirics fails to be normative, since empiricism is nothing more that the measure of what is, or is ultimately mere random happenings, relative to a communities understanding of itself. Yet Christian theologians joined in support for examining history for evidence of right and just laws, and so a kind of partnership was formed between reason and faith, based on the idea that God must still be God, and must be working in the world, and must not have completely abandoned human kind to its sinfulness. It was out of this intellectual partnership, and most particularly, from the Scottish Enlightenment, that many of the common law theoretical underpinnings were developed to accommodate Christian theology and secular humanism.

I have written elsewhere about how the Scottish Enlightenment came to support the role of a common law jury, in making determinations about questions of fact. Embedded in the Scottish Enlightenment approach was optimism that juries could make just judgments about other humans based on their ability to make decisions and indeed, judge after the fact concerning a disputant's purpose, what disputants were thinking, whether the disputant was acting out of ill will or spite, or whether he or she was acting intentionally or negligently. Many of these assumptions still undergird today's common law of torts and more will be said about these concerning the role the jury plays in processing a common law tort case. They are based on beliefs that humans can know both one's failings and "right" behavior, by examining past conduct and making decisions both on what happened, it purposes and intent, but also all giving meaning or normative effect to what Law needed to be for the situation. But before we look at whether such beliefs comport with postmodern understanding of law, we need to briefly examine how modern enlightenment views of the nature of human decision making came to be replace by Post Modernism.

pragmatism. It has parallels with Christ's teaching/condemnation of Pharisaic use of law, which was overly technical and formulaic, often leading to oppressive and inhuman results.

Interestingly enough much of this Reformed critique of overly formal and rationalistic tendencies has been joined by Post Modernism. As a result there is strange resonance (or unholy partnership) with many Christian critiques of positivism, realism, economic theories of law, and pragmatism, with Post-Modernist critiques of the same. Both Christianity and Post Modernism point out the non-rational belief-based silent assumptions that exist at the ground of formalistic, positivist, secular theories of current legal jurisprudence.

Lawrence Cahoone, in his anthology, From Modernism to Postmodernism, dates the fall of "Modernity" to the reactions in culture and philosophy to post World War II, and the Holocaust, in particular. What was also clearly at work post WWI, was an understanding of how truly evil and irrational otherwise apparently rational nation states could become. As a result Post Modernists critiqued modern theories from five perspectives. Four of these are objects of its criticism and the fifth is its positive method. It critiques 1) presence or presentation (versus representation and construction), 2) origin (versus phenomena), 3) unity (versus plurality), and 4) transcendence of norms (versus immanence). It typically offers an analysis of phenomena through *constitutive otherness*.

Briefly, *presence* refers to the quality of immediate experience and to the objects thereby immediately "presented." Modernists (18thc Scottish Enlightenment) felt that perception or sensation or sense data could be a direct conduit to reality, and more reliable than mental contents subsequently modified. Post modernism questions and sometimes rejects this distinction. It denies that anything is "immediately present," hence independent of signs, language, interpretation, disagreement, etc. It is skeptical of ever drawing too much meaning from any set of data, even data derived from observation of "nature." (Do I know whether a person is lying from the manner in which he testifies, or that he

reminds me a person I know who I caught lying? Do scientists really know that the world is warming from taking measurements of global temperatures and shrinking icecaps and glaciers?)

While Christians join the Post Modernists regarding their critique of presence in all things human, or reason produced, or that something "true" emerges from empirical work, they still claim the presence of God, and the reality of an incarnate Christ, presently working in the world and in history. Christian claim belief in a God who is Creator, invisible, indescribable, unapproachable, incommensurable, and wholly other. Indeed at least one Christian phenomenologist describes a "supersaturated phenomenon" of a God without Being,[9] (therefore not present?) yet experienced in the phenomena of "gift" and "Love" and "sacrament." Joining with the Postmodernist in part, and then still arguing for a non-rational, indescribable, roll for faith in God and an incarnate Christ, presents an important difference in a Christian critique, that I will struggle to give meaning to in my critique of Tort Law.

Origin is the notion of the source of whatever is under consideration, the return to which is often considered the aim of all rational inquiry. Whether it be about ideas of God, or self, and modern philosophies of the self like existentialism, psycho-analysis, phenomenology, even those arising from Marxism; postmodernism, in the strict sense, denies any such possibility. (Again, there is a resonance between Christian theology and the ability to attribute any idea or thought with the mind of God, or even any act of will with a concept of the self. The Christian doctrine of Sin and Fall gives rise to a skepticism about human reason, that is often similar to postmodernist's skepticism of knowing God, or knowing the other, or even the self).

In virtually every kind of intellectual endeavor, (e.g. physics and astronomy) Postmodernism tries to show that what others have regarded as a *unity,* a single*,* integral existence or concept*,* is *plural.* Again, as to ideas of God, or self, postmodernists argue that there is no singular idea of God or self, but each is

[9] Jean-Luc Marion, GOD WITHOUT BEING, University of Chicago Press, Chicago, IL, 2012).

a multiplicity of forces or elements. (It would be more accurate to say that God has Persons, rather than a Person, and that the self has selves, rather than a self). Again, there is congruence between postmodernism and Christian doctrines of the Trinity, and with our human nature.

The denial of the *transcendence* of norms is crucial to postmodernism. Both Christians and Postmodernists argue that notions of truth, goodness, beauty, rationality, should not be judged independent of the processes they serve to govern. The meaning of Justice, then, should not be considered outside of the social relations that it serves to judge: that is, the idea was created at a certain time and place, to serve certain interests, and is dependent on a certain intellectual and social context. (The meaning of *Just* treatment of slaves, women, and or homosexuals should not be seen independent of its dependent intellectual and social context.)[10]

Post modernist's positive contribution, or its use of the idea of *constitutive otherness,* also has a certain resonance with Christian theology. What appears to cultural units—human beings, word, meanings, ideas, philosophical systems, social organizations—are maintained in the apparent unity only through an active process of exclusion, opposition and *hierarchization*. (One thinks of the Christ's teaching regarding the "kingdom of God", or warning to the Pharisees,[11] and their exclusion of the poor and

[10] Yet here is where postmodernist and Christianity might part ways. Christian doctrine of incarnation stands in contradiction with Postmodernist critique of transcendence.

[11] **Mark 7:1-23**

1 The Pharisees and some of the teachers of the law who had come from Jerusalem gathered around Jesus and
2 saw some of his disciples eating food with hands that were "unclean," that is, unwashed.
3 (The Pharisees and all the Jews do not eat unless they give their hands a ceremonial washing, holding to the tradition of the elders.
4 When they come from the marketplace they do not eat unless they wash. And they observe many other traditions, such as the washing of cups, pitchers and kettles.)
5 So the Pharisees and teachers of the law asked Jesus, "Why don't your disciples live according to the tradition of the elders instead of eating their food with 'unclean' hands?"
6 He replied, "Isaiah was right when he prophesied about you hypocrites; as it is written: " 'These people honor me with their lips, but their hearts are far from me.
7 They worship me in vain; their teachings are but rules taught by men.'
8 You have let go of the commands of God and are holding on to the traditions of men."

widow, or the crowd who brings an alleged adulterer for stoning. In each example Jesus seems to be teaching a method of examining the law, looking first at what is not in the text, or who has been left out, or what is at the margins, or how the ruler's definition of the holy works to exclude and dehumanize the poor, and oppressed. And so Jesus seems to be particularly concerned that human attempts to be "holy" don't result in excluding, oppressing, or otherwise denying common sinfulness, and therefore result in the law's being destructive of human relationships). Cahoone describes *constitutive otherness* as follows;

In examining social systems characterized by class or ethnic division, postmodernists will discover that the privileged groups must actively produce and maintain their position by representing or picturing themselves – in thought, in literature, in *law*, in art—as not having the properties ascribed to the under-privileged groups, and must represent those groups as lacking the properties of the privileged groups. In a philosophical system, a dualism like that between "reality" and "appearance" involves the construction of a kind of waste basket into which phenomena that the system does not want to sanctify

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9 And he said to them: "You have a fine way of setting aside the commands of God in order to observe your own traditions!
10 For Moses said, 'Honor your father and your mother,' and, 'Anyone who curses his father or mother must be put to death.'
11 But you say that if a man says to his father or mother: 'Whatever help you might otherwise have received from me is Corban' (that is, a gift devoted to God),
12 then you no longer let him do anything for his father or mother.
13 Thus you nullify the word of God by your tradition that you have handed down. And you do many things like that."
14 Again Jesus called the crowd to him and said, "Listen to me, everyone, and understand this.
15 Nothing outside a man can make him 'unclean' by going into him. Rather, it is what comes out of a man that makes him 'unclean.' "
17 After he had left the crowd and entered the house, his disciples asked him about this parable.
18 "Are you so dull?" he asked. "Don't you see that nothing that enters a man from the outside can make him 'unclean'?
19 For it doesn't go into his heart but into his stomach, and then out of his body." (In saying this, Jesus declared all foods "clean.")
20 He went on: "What comes out of a man is what makes him 'unclean.'
21 For from within, out of men's hearts, come evil thoughts, sexual immorality, theft, murder, adultery,
22 greed, malice, deceit, lewdness, envy, slander, arrogance and folly.
23 All these evils come from inside and make a man 'unclean.' "

with the privileged term "real" can be tossed (mere "appearances"). Only in this way can the pristine integrity of the idealized or privileged term be maintained.

Metaphorically, this can be expressed by saying that it is the margins that constitute the text. Apparent utilities are constituted by repressing their dependency on and relation to others. Consequently the informed analyst will attend to the apparently excluded or "marginalized" elements of any system or text…

Once we become aware of the constitutive otherness in the text, we see the text itself, despite its intentions, alerts us to the dependence of the privileged theme on the marginalized element. (p. 16-17).

One can see impact of the Post Modern critique in the work of 20thc legal philosophers. In Chapter 2 I will examine the work of these major figures to determine how well they stand up to the Postmodernist and Christian critique. In particular one can see it in critiques of Hans Kelsen, who struggled with a positivist theory of Law, by which he tried to bridge the philosophical divide between power and its efficacy. One can see the subsequent debates between H.L.A. Hart,[12] and Ronald Dworkin,[13] and then the attempted reconciliation proposed by Lon Fuller[14] as mirroring the Post Modern critiques of reason based theories of Law. What is of interest then to our examination of Tort Law is how these conversations between positivism, formalism, and natural law, led to the growth of realism, and pragmatism, and the use of economics to provide its theoretical "rational" foundation. Accordingly, the

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[12] H L A Hart's positivism. (paraphrased from Stanford Encyclopedia of Law with my comments)

[13] Dworkin's critique. (paraphrased from Stanford Encyclopedia of Law with my comments)

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For as to [1]: what the rule of law and not of men calls for is the institution of legal *system*, a *corpus iuris*, and so what a principle of morality (natural law) or *ius gentium* implies would be an appropriate rule of law is, nevertheless, not yet a part of our law—still less is a mere "policy" made law by being "prudent" or "efficient—unless its content, conceptualization and form are so shaped, whether in judicial or other juristic thinking or in judgment or legislation, as to *cohere* with the other parts (especially neighboring parts) of our law.

[14] Lon Fuller's Agapeism [Paraphrased from the Stanford Encyclopedia of Law)

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Post Modern critique, sheds light on the strengths and weaknesses of American Realism as a basis of its jurisprudence. What is revealed is the role that often unstated non rational beliefs play in providing the *Grundnorm* of a legal realist theory.[15]

What then might be the role of non-rational reasons or beliefs and their interplay on Law? If we define a belief as something held to be true (as philosophers often do), law clearly involves beliefs. Not every belief is a presupposition, however. Law would like its beliefs to be warranted, and the usual standard in law for warranting belief is the impact of the law on the society, whether it works, is followed, is just. The problem many legal philosophers have with some or all of the above beliefs is that they cannot be proven. So our question can be reformulated as follows: Can law be freed of all beliefs that cannot be warranted by proof of its effectiveness in producing justice? We are also concerned about a closely related question: Is there any legitimate warrant for legal belief other than empirical proof? In the next several paragraphs, I attempt to will show that jurisprudence includes many beliefs that cannot be warranted by proof but that legal scholars nevertheless regard them as sound.

To begin, let's take a brief excursion from our topic to introduce the work of the Christian philosopher, Nicholas Wolterstorff, and attempt to apply his Christian perspectives of Justice and Love to the major theories imbedded in Tort law. We will then return in Chapters 2-5, and apply his ideas to particular issues in modern Tort law. Wolterstorff critiques the traditional form of foundationalism. (This is the approach to knowledge that we would encounter in the attached discussions of both Kelsen's and HLA Hart's formalism). Wolterstorff describes such an approach as follows:

Simply put, the goal of scientific endeavor, according to the *foundationalist*, is to form a body of theories from which all prejudice, bias, and unjustified conjecture has been eliminated. To attain this, we must

[15] In Chapter 2 I will use the Post Modern/Christian critique to better understand the failures of Kelsen, HLA Hart, Dworkin, Holmes and Posner. My hypothesis is that something like the following will be the net result of such an intellectual review

begin with a firm foundation of certitude and build the house of theory on it by methods of whose reliability we are equally certain.[16]

Wolterstorff points out that the *foundationalist* project has gradually collapsed in the past century. It first evolved into a weaker form, *probabilism*, by relaxing the rigid requirement of certitude. It then evolved into *falsificationism*, the idea that theories can never be known with certainty to be true, but some theories can with certainty be shown to be false. Today most scholars regard foundationalism as having completely collapsed. The principal reason for the collapse was the recognition that every theorist approaches the world with an extensive interdependent web of theoretical and non-theoretical beliefs. That is, the very process of weighing a theory requires beliefs about the entities within its scope, and these beliefs themselves are unable to meet the requirement of certitude that even falsificationism demands. (Wolterstorff, Reason Within the Bounds of Religion, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 28)

Wolterstorff distinguishes three types of beliefs that scientists bring to their work: data beliefs, data background beliefs, and control beliefs. By data beliefs, he means the minimal beliefs one must have about the object under study even to begin investigating it. For instance, suppose we are studying a certain impact of a tort law on use of car seats on injuries to children. Examples of data beliefs are "I exist," "the tort law impacts on parents' decisions to use car seats," and "the observations of data sets showing injuries to children occurring after the laws have been put into effect actually occurred." Data background beliefs depict those conditions needed for accepting as data what one observes. For instance, "no one here was trying to deceive me," and "the computer that recorded the data was

[16] For the Greeks, the firm foundation was intuitively apprehended principles analogous to the axioms of mathematics (plane geometry), and reliable method was deductive reasoning. Later empiricists extended this to include empirically obtained principles.

functioning properly and did not distort the record of occurrence of injuries to children following the enactment of car seat laws."

Control beliefs are a person's cognitive framework as to what constitutes acceptable theory. According to Wolterstorff they

> … include beliefs about the requisite logical or aesthetic structure of a theory, beliefs about the entities to whose existence a theory may correctly commit us, and the like. Control beliefs function in two ways. Because we hold them we are led to reject certain sorts of theories—some because they are inconsistent with those beliefs; others because, though consistent with our control beliefs, they do not comport well with those beliefs. On the other hand, control beliefs also lead us to devise theories. We want theories that are consistent with our control beliefs. Or, to put it more stringently, we want theories that comport as well as possible with those beliefs. (Wolterstorff, Reason Within the Bounds of Religion, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 67)

Thus the insistence on carefully crafted, rigorous arguments based on axioms and precise definitions, confidence in the reliability of logic, and the notion that law, properly understood, should include the story of the mistakes judges made and pursued. Judicial mistakes must be examined with care, as the cases themselves may omit the original motivation for judicial decisions. Often it is in these omissions that there is yet evidence of examples of control beliefs about how judicial decision making ought to be done. Even where the judges are using frameworks that are widely held by contemporary legal philosophers, they may yet be based on fundamental beliefs that are blind to the users, and may ignore conflicts with other fundamental beliefs.

It is inevitable then that there are beliefs about the nature of law, itself, imbedded in the work of legal philosophers. For example, Kelsen's positivism tries to overcome its illusive character by trying to imbed the authority of law in the law itself. Realists do the same by equating what is with what ought to be. Realism in Tort law, or the related theory of pragmatism, (as Holmes once said, "all of law is experience") is a nice match for the common law, as it submerges the question of the nature of law in a

kind of 18thc belief of common sense and optimism of one to know based on what one sees and hears. Realists and pragmatists are unclear whether law is either something discovered from reason, (adapted to new situations) or something that is born from principles of economics that are imbedded in human behavior. These theories vacillate about the foundation of or nature of law: that it is only a description of what is, and then again normative of changes in the legal doctrine and related to competing public policies of the need for compensation and the right incentive to take risk. Sometimes realism seems to promote a kind of optimism that what emerges from the combination of deep reflection on the law by judges, in combination with deep consideration by juries attempting to find facts, is a right rule, at least in historical context. When each theory of law is attacked by the others through the arguments of the paradoxes each needs to construct they hide behind their formalistic control beliefs, or make statements that their work is just attempting to describe what is, or what has been legislated, without making any normative claims.

In eschewing normative claims, they instead fall prey to admitting to creating illusory, time restricted, and, at best, fluid theories that lack essential features of due process-- that the person judged liable by the law has notice of the law in considering his actions, and therefor may be of limited usefulness. Note that formalism, (positivism and or realism or textualism) makes more claims about what law is not than what it is.[17]

The formalism imbedded in positivism, textualism, and realism, however, can't avoid a normative aspect—it explicates some very clear rules about how law is to be done. Take textualism, for example. It relies on very precise formulations of axioms and definitions, (consider the plain meaning of the text, but don't use the intent of the drafters, use only dictionary meanings as evidence of what the drafters intended, and where there are multiple definitions, assert that one was intended in the context of

[17] It would be interesting to survey law professors today on this point. Do they believe the concept of law produced by positivist or realist or textualist theorists is real, or merely illusory? Does it have any real impact on the behavior of individuals or constitute a real effect on how government and its citizens make decisions?

making meaning out of the rest of the text, whatever that might mean. Using these rules, the textualist carefully uses deductive reasoning, and no reference to anything outside of these axioms. Textualists theories thus include a very strong set of control beliefs. Realists rely more on the tools of sociology, economics, and psychology, and, in turn, "established public policy" or emerging public policy, and so the very boundaries of their control beliefs becomes more fluid and illusory. [18]

Note then that control beliefs may seem rather unlike a belief—it says more about what the law is not (it is not historical research for what the drafters intended), then what it is. However, formalism is also a normative theory-- it explicates some very clear rules about how law ought to be determined—precise formulation of axioms and definitions, careful deductive reasoning, and no reference to anything outside of law as defined. In some cases, then, it can include a very strong set of control beliefs.

According to this way of thinking, control beliefs are one way that beliefs enter law. A second related way is via axioms. Reasoning cannot take place in a vacuum. Although some legal scholars attempt to reduce the number of assumptions they make to a minimum and make those assumptions very explicit via axioms, the axioms are none-the-less attempts at "truth" statements about reality inferred by their intuitions.

Take for example axioms of textualism. The question is what to make of a Constitutional understanding of law that included a role for the judiciary, to "make law" at common law, under the specification of any statute in real situations and setting. This was the problem Kelsen was addressing in his Pure Theory of Law. Having derived the authority of local law from statutes, and local statutes from national laws, and national laws from Constitutions, then Kelsen needed to address the question of what gave the Constitution its authority? Once pressed with questions of legitimacy of the Constitution, or how a particular Constitution was made (whether derived from just or unjust processes) or under what

[18] Insights about the foundationalist beliefs about textualism may inform the Tort Law doctrine of negligence per se, which interprets statutes in the context of establishing common law obligations toward others.

circumstances, and then whether it contained delegations of law making to certain persons, for future rule making, Kelsen tried to place the authority of any law in the is, as opposed to the ought.

In the end, whether positivist (the law has authority because of the process under which it was made), or realist (the law has authority because it responds pragmatically in the best way it can to the exigencies of a particular situation) or textualist (positivist, in that legislative authority of the Constitution is the starting and ending of the law, and if it needs changing , the legislature should change it), each is dependent on axioms, or starting intuitions, which are psychological in origin. Axioms cannot be warranted by proof. They are presuppositions. Calling them arbitrary ("to rely on legislative intent is arbitrary", no, "to rely on dictionary definitions is arbitrary," no, "relying on sociology is arbitrary," no, "relying on one's understanding of history is arbitrary") simply avoids the important question of their origin. To simply label your opponents' axioms as arbitrary is reductionistic—solving a problem (that your axioms are arbitrary) simply by defining yours as nonarbitrary.

And, once these foundationalist beliefs are identified, what should the common law do with these beliefs? Once exposed are these beliefs delegitimized as somehow existing outside the law, or are they to be welcomed into a pluralistic discussion that provide room for the expression of these beliefs, and allows for a melding, compromising, and even competition of these beliefs as mostly worked out in the discussions jurors have during jury deliberations. In other words, should foundationalist beliefs be made irrelevant, or exposed as idolatrous, because they are either viewed as God given, and therefor presumed to spring from the mind of God, without ability to demonstrate that they are true. In presuming to come from God, are such beliefs a cover for making God into one's own image, or, even if earnestly held, too easily unconsciously used as a basis to exclude, discriminate against, or treat unfairly. If true of religious foundationalist beliefs, what does that mean if foundationalist beliefs are attributed instead as inherent in natural law, or a liberal society, or in the theory of law itself? Or, what if these beliefs are uncovered in theories of law to redress the rights of those oppressed. What foundationalist

beliefs are held by critical race theorist, feminist and others theories that seek to redress historical evidence of racism, sexism, or gender inequality? Should law provide room for such beliefs to redress such histories of discrimination, and then, how should the law deal with these beliefs once the discrimination is remedied, or if other groups show they too have been or are being subjected to discriminatory treatment.

In summary, the main point has been that the methodology of legal analysis requires significant beliefs that are not (and cannot) be warranted by proof. Furthermore, various legal theorists hold beliefs about the law that are similarly incapable of being warranted by proof. Legal theorists use axioms that function the same way as presuppositions do in other fields; calling them arbitrary simply avoids the important questions of their origins. The understanding of its nonrational basis opens "realism" to the "*constitutive otherness*s" critique, to examine what is at the margins of any opinion or legislative act, who is left out, and what hierarchical exclusion (of women, children, minorities) might be the law's silent affect. The postmodern critique joins the Christian critique and exposing the potential biasing effects of legal analysis that leaves out the *constitutive otherness* considerations hidden in the text, (including scripture).

The Purpose of Law

Many thinkers in modernity have been proponents of naturalism. In science, naturalism entails avoiding all supernatural explanations of phenomena, and instead, looking for explanations in terms of material laws of cause and effect. This perspective is quite different from the classical point of view. For example, in studying causation, Aristotle introduced both the notion of "efficient" cause—that which works some change—and the notion of "final" cause—the use of purpose for which a change is produced. Approaches that focus on final causes are called teleological. Thus psychological explanations that focus on human intentionality and seek to interpret human motivations are

teleological. Similarly a Marxist interpretation of economics is teleological in that it sees history as moving toward a goal—the formation of a classless society. In addition, some theological explanations of human existence are teleological in that they start from an understanding of God's purposes. However, in the naturalist framework, scientific explanations have not typically involved teleological elements—their domain has been replicable phenomena that are deterministic or probabilistic—and such explanations are presented as laws possessing predictive power. Thus physicists, biologists, experimental psychologists, and other empirical scientists have largely rejected teleological explanations.

Teleology has fared no better in law. It is almost impossible to find a recent discussion in the legal literature of the purpose of law, (other than in Jewish writing, that the purpose of the law was God's gift, in love, to the Jewish people) whether that purpose is defined theologically or not. However, as this preface has attempted to present a Christian perspective on law, some discussion of why God may have given us law is essential.

Any claim of knowledge about God's purpose cannot be justified deductively or inductively (unless God has sown the essential law in the hearts of his created beings). Christians, of course, may turn to scripture for help, but the Bible makes few direct statements about God's purpose for law. (God gave the Israelites a king to satisfy the demands of his people? God gave the 10 Commandments so that the people would know God? God sent Christ as the fulfillment of the law? Give to Caesar that which is Caesars? The Sabbath was made for man, not man for the Sabbath?) Thus, if we are to appeal to scripture, we must do so indirectly, and base our speculations regarding God's purposes for law from what God has revealed about his broader purposes. Again, Nicholas Wolterstorff work is very helpful here. He has given a particularly clear statement of God's overarching purposes for humanity using the Hebraic concept of *shalom*, usually translated into English as "peace."

The goal of human existence is that man should dwell at peace in all his relationships: with God, with himself, with his fellows, with nature, a peace which is not merely the absence of hostility, though certainly it is that, but a peace which at its highest is enjoyment. To dwell in shalom is to enjoy living before God, to enjoy living in nature, to enjoy living with one's fellows, to enjoy life with oneself. … In shalom there is delight. (Wolterstorff, Reason Within the Bounds of Religion, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 114).

He also writes about of the duties humans have whose fulfillment will yield this state of shalom.

Deep in the Christian tradition is the conviction that each of us is not to be the center of his own concerns but is rather to love and serve God with all his life, and in similar fashion, to love his neighbor as himself. One might add to these the conviction that each is also to be a responsible steward of the creation within which god has placed us. To love and serve God in all our ways, to love our neighbors as ourselves, and to be responsible stewards of nature—those are clearly proclaimed in the authoritative Scriptures of the Christian community as the fundamental obligations of mankind. (Wolterstorff, Reason Within the Bounds of Religion, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 112)

How does legal theory fit into this picture? First, those to whom God has given the capacity and interest to do law making, legal analysis, and legal scholarship, have the privilege and obligation to use those gifts to understand the law itself. Second, law has an enormous impact on human culture and our understanding of how power is exercised in and among its constituents. Meeting the requirement of love for neighbor and care for nature involves using the law toward those ends. This means choosing legal scholarship projects not exclusively out of a personal interest or convenience, but with a view toward the broader purposes of serving god and neighbor and caring for creation.[19] It also means that

[19] Briefly, then the capacity to do legal analysis and scholarship is one of the tools that God has given us to build shalom. To the extent that the law is part of God's creation, this involves not only understanding law, but also using it in our stewardship of nature, and in administering the many different dimensions of human culture capable of being described both sociologically and abstractly, but also normatively. Thus legal theory should be engaged in

theories based on beliefs in the law itself, or it formal rational structures are to be continually critiqued.[20]

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with joy, gratitude, and confidence that we are fulfilling God's purposes for us in doing it. However, we also need to keep in mind that we are accountable to God for how we use the capacity God has given us to do legal theorizing and make legal arguments.

We cannot leave this discussion of the purposes of legal theorizing and legal scholarship without considering two pitfalls that often hinder the fulfillment of those purposes; one involves beliefs, the other values. Concerning beliefs, both twentieth-century formalism and realism (humanism) lead to the notion that law might eventually lead to certainty of pure law apart from God. Formalism aimed to separate law from all other forms of knowledge. [19] The perspective that the formal or the real is separate from all other knowledge or application is still predominate today. Thus Christian legal theorists face a continual tension of working with colleagues, many of whose basic beliefs about law and society affirm the autonomy of human political entities to which Christians cannot subscribe. Thus rather than separate pure legal theory from the rest of knowledge, a Christian approach should seek to embed it in a larger context and establish connections to other disciplines.

Concerning values, legal theorists tend to hold abstract knowledge in high regard; such a value is another characteristic of modernity. As we have seen, this perspective has roots in ancient Greece. However, more recently, it has been particularly expressed in the work of Immanuel Kant. According to Wolterstorff,

> On Kant's view, the superiority of certain forms of knowledge is to be located in the formal characteristics of that knowledge. It is completeness of explanation and systematic unity that are the great desiderata in knowledge. Characteristic of human nature is an impulse toward the pursuit of ever greater completeness of explanation, and ever greater systematic unity, in the body of the our collective knowledge. And this impulse, Kant obviously believes, is beneficent; the more complete and unified the body of knowledge, so far forth the better. (Wolterstorff, Reason Within the Bounds of Religion, 2d ed. (Grand Rapids, Eerdmans, 1984) p. 121).

Therefore, according to Kant's criteria, "pure legal theory" (or appeals to economic theory with its alleged values neutral approach, or to sociology that values the *is* over the *ought* because of the supposed ability to measure the *is* is considerably more valuable than much of what is done in other disciplines. The pure theorist (like Kelsen) who follows Kant, then, necessarily believes that his work is more valuable than other work. It is an easy step from here to believe that he is superior to scholars in other fields.

An understanding of God's purposes, however, provides little basis for Kant's perspective or the hubris that can easily form from it. Does such abstraction necessarily lead to greater joy, peace, or love for God or neighbor? Can it not equally well lead to arrogance and ingratitude: Indeed particulars often yield more understanding and delight than abstractions; can generalization and abstraction often confuse more than clarify? Thus a second tension Christian legal theorists face arises from working in a professional community whose values they do not share. By clearly affirming the law's greater purposes of service, love and stewardship, Christian legal theorists can maintain their own identity apart from the surrounding legal culture. That is, they can be "in the world, but not of it."

[20] Insofar as formalism means carefully clarifying one's axioms and rigorously deducing conclusions from them, it is non-problematic. However, formalism has other aspects that are problematic from a Christian perspective. As we suggested in the previous section, God has purposes for giving us the capacity to do legal hermeneutics and research and legal analysis and we are accountable for how we use it. Formalism (especially economic formalism) aims to sever the necessary connection between law and the rest of reality, (like history and psychology and other important relationships including family, obligations to our communities, work, and the body politic). To some extent this is done with good intentions, namely avoiding errors, (where racism, sexism, xenophobia, and thinking that would deny our common vulnerabilities, or the need for forgiveness might be needed). But this surgery has had some unhappy consequences—the formalists continue at times to resurrect bad law examples of legal analysis in support of arguments for new formalistic driven reforms? (e.g. Tea Party arguments in favor of health care, taxes, guns control), and other lay people have come to see law as irrelevant, at best, and tools of hierarchy at the worst. Ultimately the law is intended to enable us to serve God and other human beings. Formalism creates a climate in which questions about God and service are regarded as inappropriate—such questions cannot be addressed by the methods of formalism. But these questions are critically important.

Law, Empiricism, Paradox, and Compatibilism.

During the "age of reason" the eighteenth and nineteenth century—a group of artists and writers know as romantics objected that rationalism neglected important dimensions of the human personality—intuition , aesthetics, affection, and so forth. I agree, and suggest that the romantic objection applies to economics in general, not just to the historical movement called rationalism. The capacity to do statistical analysis of data is a marvelous gift of God and a powerful tool. However, one of the consequences of Christian presuppositions is a perspective that such capacity is a tool, not the tool. It is one gift of many.

The Christian jurisprude can explore it with joy and gratitude, while also looking to other modes of expression such as drama, poetry, and visual imagery as of equal value. In his letter to the Philippians, the apostle Paul writes, "Finally, brothers and sisters, whatever is true, whatever is noble, whatever if

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Second, formalism recognizes only one warrant for truth claims—e.g. formal proofs of economic efficiencies or impact on the economy. But for a Christian, logical deduction is not the only legitimate warrant for truth claims. Christians can be comfortable living with mystery surrounding the nature of law and society, how we come to understand it, and their connection to other non-legal realities. This does not preclude the desire to understand these mysteries more deeply, but it does free the Christian from the type of search for certainty apart from God that motivates foundationalism both within and outside the law.

Third, but not directly to the point of critiquing legal theory, formalism can affect law school curricula in unhappy ways. (I am thinking here of George Mason law school). The search for economic foundations for law can lead to a narrowing of the boundaries of the discipline of law, as legal educators typically see them. In these setting the boundaries of the discipline are drawn so as to include only questions that can be answered by economic methods. One implication of a Christian perspective is that these boundaries need to be drawn more widely so that questions about history, philosophy, and the like are regarded as central to the discipline's concerns and not marginalized as they may be in some economic driven formal settings. Of course, that is the point of the "law and" movements areas of legal research. Behavioral economics is an example of interesting attempt to integrate formalistic legal theories with non-deductionistic considerations. We should applaud these, while still being careful to critique silos of "law and .." where it may try to reduce all analysis of law to its particular formalistic structures. (Wants we measure the non-rational impact of human decision-making on the economic decision, what do we do with it? How should law react?) Most obviously law curricula should emphasize such connections at all levels and legal specialty journals should also encourage writers to include materials on the sources of their questions as well as pointers to possible applications. Again, Christian legal scholarship needs to be both appropriately skeptical of formalistic reasoning and conclusions and careful to keep its purpose consistent with the goal that one's work will ultimately honor God, care for God's creation, and serve others.

In any event, formalism as a methodology has considerable value. However, as a set of control beliefs, it has borne many undesirable fruits. The purposes articulated in the previous section provide a basis for a set of control beliefs for Christian legal scholars that are based on principles of stewardship, service, and the joy of discovery rather than on isolationism and rationalism.

right, whatever is pure, whatever is lovely, whatever is admirable—if anything is excellent or praiseworthy—think about such thing." Philippians 4:8. Economics can indeed be a part of fulfilling this advice, particularly in identifying aspects of what is true. However, Paul also is referring to dimensions of value, justice, genuineness, aesthetics, and praiseworthiness that in many ways transcend the economic and purity of any theory of law. A Christian legal scholar needs to be careful that in developing expertise in rational analysis, he or she recognizes the value of other matters.

In summary, then, we have here yet another way that a Christian might read the experience of law and various "law and" explanations differently than a secularist. She sees it in a much broader setting of God's purposes for human culture. This enables her to enjoy its capabilities but also to acknowledge its limitations. It also asks her to ask some questions not typically addressed (especially in the law and economics field) such as: what is the place of economic analysis in the broader context of human thought? What are its unique capabilities and contributions? What are the important human tasks to which it cannot contribute?

Yet, as helpful as economic analysis can be, it also leads to a clearer understanding of how convoluted naturalistic philosophies (those that are supposed to be derived from facts or realities) can be. Any consequentialist theory requires some non-consequentialist core belief and vis versa. The systems are based on paradoxical core beliefs. Whether in the hard sciences (e.g. mathematics -- Godel's theorm, or physics-ultimate paradox of subatomic particles-- like a wave or like a particle) or social sciences (e.g. human psychology is determined, or based on environment, or some combination, or that history is derived from facts or data, but also dependent on the researcher's point of view), there are fundamental uncertainties and even paradoxes in all disciplines. One could go on at length listing oddities from many disciplines; but in these remarks I will focus on a few in Christian theologies, itself.

Christians believe that Jesus in fully God and fully man, that God is all loving and all powerful, but evil exists in the world, that the scriptures say we are to work out our own salvation, but that it is God who is working in us. We see apparently conflicting descriptions of certain events or statements given in the gospels and epistles, such as the apparently conflicting statements concerning human freedom and determinism with respect to salvation. Many Calvinists opt for strong determinism, citing supporting scriptural passages such as,

So then He has mercy on whom He desires, and He hardens whom He desires. You will say to me then, "why does He still find fault? For who resists His will?" On the contrary, who are you O man, who answers back to God? The thing molded will not say to the molder, "Why did you make me like this," will it? Or does not the potter have a right over the clay, t make from the same lump one vessel for honorable use, and another for common use? What if god, although willing to demonstrate His wrath and to make His power known, endured with much patience vessels of wrath prepared for destruction? And He did so in order that He might make known the riches of His glory upon vessels of mercy, which He prepared beforehand for glory." Romans 9: 18-23.

It can be convincingly argued that any view short of this compromises the absolute sovereignty of God. On the other hand, many will tolerate no such view, citing supporting scriptural passages such as the following:

> First of all, then, I urge that entreaties and prayers, petitions and thanksgiving, be made on behalf of all men, for kings and all who are in authority, in order that we may lead a tranquil and quiet life in all godliness and dignity. This is good and acceptable in the sight of god our Savior, who desires all men to be saved and to come to the knowledge of the truth." 1 Timothy 2: 1-4.

They argue that it makes no sense for God to pre-assign people to eternal destinies if he "… desires all men to be saved…." Or, consider the passage, "Let the one who wishes take the water of life with cost."

Revelation 22:17. Again they argue that any sense of the normal meaning of an invitation intrinsic to this verse is mocked if indeed God pre-assigns people to their eternal destinies. It can also be convincingly argued that any view short of one that allows for human choice compromises the absolute justice and love of God.

How do we put this all together? Well there are many ways but we suggest that a strong case can be made here for a compatibilist view. This would be the approach that affirms both positions.[21] No matter what position we adopt, we are left with some tough questions; for the Calvinist, why did God choose person x and not person y, together with scriptural data supporting an Arminian view. For the Arminian, why did person x choose to believe and person y choose not to believe, again with scriptural data supporting a Calvinist view. For a compatibilist, how can free will and predestination both be true?

I am not arguing for an anti-rationalist point of view. That is, I do not mean to imply that the paradoxes about our faith are really contradictory, and that one should mindlessly affirm conflicting views, as obedient automata. But what I do want to suggest is this: Insofar as working our positions on various issues demands the interplay of logical ideas, perhaps the dichotomy between consistency and completeness applies there as well. In other words, (speaking metaphorically, of course) perhaps the incompleteness of formal theories of law, applies in some way to all areas that operate with a core of logical substrata. [Is this what Jean-Luc Marion is getting at when he attempts to describe God without Being, that God is always described in part, not in whole, that God is Love better captures God than a God with certain characteristics that are inevitably made into idols for the subjective purpose of the one describing].

In the working out of a Christian world and life view, of course we strive for consistency and completeness. However as we near one of these ideals, it appears at times we also near the opposite of

[21] If it works for mathematics, perhaps in can work in law. Considering the paradoxical statements mathematicians affirm about subatomic principles and mathematics, it seems this is not intellectual suicide.

the other. Does our Christian world and life view appear paradoxical? Perhaps it is because it needs reworking, and because it is somewhat inconsistent. Perhaps, on the other hand, we see paradoxical things in scriptures precisely because they give us a fairly complete picture of God. Perhaps to our finite and fallen minds a complete picture of God appears somewhat inconsistent. As Pascal wrote in his Pensees,

> What sort of freak, then, is man! How novel, how monstrous, how chaotic, how paradoxical, how prodigious! Judge of all things, feeble earthworm, repository of truth, sink of doubt and error, glory and refuse of the universe! … Know then, proud man, what a paradox you are to yourself. Be humble, impotent reason! Be silent feeble nature! … Listen to god. … Is it not as clear as day that man's condition is dual? The point is that if man had never been corrupted, he would, in his innocence, confidently enjoy both truth and felicity, and, if man had ever been anything but corrupt, he would have no idea either of truth or bliss. But unhappy as we are (and we should be less so if there were no element of greatness in our condition) we have an idea of happiness but we cannot attain it. We perceive an image of the truth and possess nothing but falsehood, being equally incapable of absolute ignorance and certain knowledge: so obvious is it that we once enjoyed a degree of perfection from which we have unhappily fallen.

This book is an attempt to do Christian informed scholarship concerning Tort Law. It will describe import issues in Tort law, and attempt to locate those issues in the context of Christian theology. It will then describe the current state of law, including the fluidity and its uncertainty, and then seek to uncover the hidden foundational beliefs that are in conflict in the law or legal process that attempts to resolve disputes where people are injured as a result of another's actions. Then it will examine select parts of scripture in the context of the whole of scripture, to see if there is any *Word* that points the way to any particular outcome. Alternatively it will to discover a deeper level of understanding of the paradoxes imbedded in the legal issue. It will try to engage, with a certain amount of epistemological humility in a dialogue with others. While it will strive for consistency and completeness, it will also try to be honest and admit where it is not consistent or complete, confessing where it lands somewhere in between—between consistency and completeness. It will argue that the jury system serves as a place

where Christian compatibilism can and should continue to function in resolving civil disputes, despite the paradox that it strives to be both consistent in a world that lacks capacity to ever be complete. In that regard it will remind the reader that many Christian thinkers have lived with and in that tension, striving to consistently do God's will, in a time when knowledge of God and God's will is never close to being complete . It will also draw a connection between compatibilism, pluralism and jury decision-making. On the other hand, Christians continually try to resolve this tension between consistency and completeness and I hope the ideas addressed in this book will contribute to that end.