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Distinctively Christian Perspectives on Legal Thought?

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DISTINCTIVELY CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT?

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CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT. Edited by *Michael W. McConnell*, *Robert F. Cochran, Jr.*, and *Angela C. Carmella*. New Haven: Yale University Press. 2001. Pp. xxii, 518. Cloth, $50; paper, $26.95.

I. INTRODUCTION

The plural in the title of *Christian Perspectives on Legal Thought* immediately suggests one problem in reviewing this collection of essays: identifying unifying themes is difficult precisely because there *are* a variety of Christian perspectives represented here.[1] Christian perspectives include those of Anabaptists and their modern successors such as Mennonites (who regard law as simply irrelevant to their Christianity[2]), those of the nineteenth-century Catholic church (which was hostile to democracy and religious toleration), and those of the modern Catholic church (which endorses religious pluralism and the preferential option for the poor — among many others).[3] What, then,

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1. Indeed, the editors devote Part Two of the book to "Christian Traditions and the Law," drawing on H. Richard Niebuhr's distinctions among synthesists who seek to reconcile Christ and the (existing) law, conversionists who seek to transform the law through Christ, separatists who believe that Christ necessarily stands against the positive law of any state, and dualists who see Christ and the law in creative tension. Leslie Griffin quotes Niebuhr to this effect: "[I]t must be evident that neither extension nor refinement of study could bring us to the conclusive result that would enable us to say, 'This is the Christian answer.' " P. 199; *see also* p. 178 (essay by Teresa Stanton Collett) ("In considering the relation between orthodox Christianity and feminism, one is struck by the diversity of thought and emphasis within *each* of these 'communities of faith.' " (emphasis added)).

2. Editor Robert F. Cochran, Jr., pithily summarizes the position of the late Mennonite theologian John Howard Yoder: "[I]t is not the business of Christians to work out the ethical problems of Satan." P. 246.

3. The editors acknowledge this problem by, for example, pairing essays offering differing Christian perspectives on law-and-economics. Stephen M. Bainbridge offers an "apologia" to the effect that law-and-economics refrains from paying much attention to questions of distributive justice on the ground that achieving economic justice through deliberate legal intervention raises difficult technical and prudential questions and is less likely to achieve such justice than the operation of market mechanisms that maximize wealth, pp. 208-23, while George E. Garvey draws on Catholic social thought to argue that "maximizing the aggregate wealth of society is not a morally acceptable goal if it results in a grossly inequitable

might be *distinctive* about Christian perspectives, given their diversity?[4] We can approach this question in stages.[5] First, what — if anything — distinguishes *religious* perspectives on legal thought from secular ones? Second, within the class of religious perspectives, what distinguishes *Christian* perspectives from other religious perspectives?

I consider here some of the answers suggested by some of the essays in this collection.[6] First, several authors treat the perspective they derive from Christian belief as producing results that non-Christians and even nonbelievers should accept. Second, other authors treat their perspective on legal thought as Christian because they are Christians and feel (in a psychological sense, I think) that their perspectives arise organically from their Christian belief, but they do not explain the nature of that connection or why an outsider should think that there is any nonpsychological connection. Third, a handful of the authors do something — *argue* isn't precisely the right word, but perhaps *show* is — to make the connection between their Christian belief and their perspective on law apparent.[7]

My discussion is framed by something that puzzled me when I read the Introduction, a puzzlement that persisted pretty much throughout my reading the book.[8] The editors write, "The key question of this

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distribution of that wealth," p. 239, and that economic growth is good "if it is achieved in ways that respect human dignity and when the benefits are distributed in ways that are just." P. 240; *cf.* RAYMOND PLANT, POLITICS, THEOLOGY AND HISTORY 118 (2001) ("From a universalising systematic theology we might be able to ground a general Christian concern for social justice, but such a general grounding may completely underdetermine Christian political praxis.").

4. The diversity within the Christian tradition suggests that some of Stephen L. Carter's formulations are, at best, incautious. *See, e.g.*, p. 30 (referring to the "distorted Christianity of the Middle Ages" as "barely recognizable as Christian"); p. 34 (asserting that "some Western religions have *caved in* to the pressure to organize according to the meanings propounded by the state," following an acknowledgment that religious traditions change their understandings of their own content (emphasis added)).

5. A similar question arises in connection with Paul Beaumont, *Christian Perspectives on the Law: What Makes them Distinctive?*, *in* LAW AND RELIGION 529 (Richard O'Dair & Andrew Lewis eds., 2001). Despite its title, Beaumont's essay discusses the way in which Christians might distinctively argue for positions that non-Christians adopt for other reasons.

6. I do not discuss those essays that are primarily expositions of the views of Christian thinkers (other than the essays' authors) about law, primarily because I am in no position to say anything interesting about the views of, for example, the Dutch Calvinist Herman Dooyeweerd, as presented by David S. Caudill. Pp. 119-26. Nor do I discuss the extraordinary meditation by Thomas L. Shaffer on forgiveness, pp. 321-39, which invites a conversational dialogue rather than the desiccated written response or reaction of a book review.

7. In distinguishing between arguing and showing, I have in mind something like Wittgenstein's point that some words cannot be defined but their meaning can be shown. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 70-75 (G. E. M. Anscombe trans., 2d ed. rept. 1998) (1958).

8. One source of the puzzlement may be that the collection's essays are, so to speak, theologically thin. The essays written from within the Roman Catholic tradition advert to and rely on the Church's teachings as expressed in papal encyclicals and other church documents, but do little in the way of explaining the place such writings have in Roman Catholic theology. And, there is almost no reference to or reliance on the important development of

book may be, 'What does it mean in America today to say that Jesus, rather than Caesar, is Lord?' " (p. xx). It seems to me that that question, suitably adapted, will be a key one to an adherent of any religion that either makes no claims against whoever happens to hold secular power — a large class, I think — or to adherents of religions that assert their right to rule in a perfect world but acknowledge that they live in an imperfect one, governed by Caesar.[9] That is, the question that the editors think is the key one does not seem to me to raise questions that are distinctively Christian. I would have thought that, rather than "Jesus is Lord" (1 *Corinthians* 12:3), the proof-texts around which the essays would center would be "God so loved the world that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life." (*John* 3:16). I would have thought, that is, that a distinctively Christian perspective would derive from the combination of a belief in a fallen world, which some authors mention but which is shared by Jews among others, coupled with a belief in the possibility of redemption, which is also shared by Jews among others, as confirmed by Jesus's death and resurrection, which is what distinguishes Christianity from other religions that otherwise agree on fallen-ness and the possibility of redemption.[10] Yet, while fallen-ness and the possibility of redemption crop up in several essays, few seem to make Jesus's death and resurrection central to their authors' perspectives on legal thought. I conclude this Review with a brief speculation about why that might have occurred after discussing the three categories of essays I have described.

II. RELIGIOUS PERSPECTIVES COMPATIBLE WITH SECULAR PERSPECTIVES

The United States is a religiously pluralist culture dominated by Christianity. Given pluralism, it is understandable that some authors — and to some extent the editors — assimilate Christian perspectives

narrative theology in modern Protestantism. Stanley Hauerwas is mentioned occasionally, but his theological method is not, except in Shaffer's essay. P. 329.

9. David M. Smolin suggests a distinctively Christian approach to the question, though, in his observation that Christians are instructed to turn the other cheek and not to return evil for evil. P. 371.

10. Bill Stuntz pointed out to me that the essays also do not discuss in detail Jesus's position, historically important in the emergence of Christianity from Judaism and more generally important in the development of Christian perspectives on law, which was that the Mosaic law failed in producing good behavior because mere compliance with the law alone could not produce good people. E-mail from Bill Stuntz, Professor, Harvard Law School, to Mark Tushnet (Feb. 4, 2003) (on file with author). Obviously, a critique of the Mosaic law need not generalize into a critique of law as such, yet Jesus's critique of the Mosaic law was often generalized in that manner.

to religious ones more generally.[11] So, for example, the editors assert that "Christianity, along with other faiths, may be an antidote to th[e] great moral failing of our time," the domination of modern life by "selfish, shallow, materialistic, cruel, and nihilistic values."[12] And, indeed, some of the Christian perspectives presented here are compatible with wholly secular ones.

For example, Marci A. Hamilton attributes the Framers' design of the Constitution, and particularly their reliance on structural rather than substantive guarantees for liberty, to a Calvinist and Presbyterian tradition that coupled distrust of fallen human beings with optimism about the ability of structures to deter tyranny (p. 293). This "fundamental distrust of human motives, beliefs, and actions . . . counsels in favor of diligent surveillance of one's own and other's [sic] actions," and in favor as well of the "value of the law . . . to guide human behavior away from its propensity to do wrong" (p. 295). Hamilton connects this view to the educational backgrounds of important Framers such as James Madison and James Wilson (p. 294), and then explores the ways in which the view played itself out in the Constitutional Convention (pp. 296-304).

All this is fair enough, and historically illuminating. But, aside from the biographical points about the Framers, nothing in the *perspective* — a form of skepticism joined with a form of optimism — is distinctively Christian. Even secularists could hold similar views. A prime candidate for a secular view combining skepticism on the level of individuals with optimism on the social level is the view that sees people motivated by rational self-interest as understood by economists. Stephen M. Bainbridge's essay suggests the point. Bainbridge asks whether law-and-economics is a perspective a Christian can hold.[13] Bainbridge seeks to allay concern that the assumptions about human behavior animating law-and-economics are inconsistent with Christian views. Bainbridge brings Christian and secular perspectives into alignment by arguing that a Christian can believe that economic policy should be motivated solely by the goal of wealth maximization even though Christianity incorporates "other normative values" because those values are better expressed elsewhere and badly expressed in economic policy (pp. 212-13). He further argues that Christians can use rational-choice assumptions to analyze public policy even though rational-choice models seem to preclude appeal to "the Christian vir-

11. *See, e.g.*, p. 469 (essay on legal ethics by Joseph G. Allegretti) (asking, "What does God require of me, or you, or any Christian? Simply this: to do justice, love mercy, and walk humbly with our God." (citing *Micah* 6:8)).

12. P. xix ("To ignore Christian (and other religious) perspectives on law is like ignoring a life raft on an endangered vessel.").

13. Bainbridge explicitly refers to "the Calvinist principle of sphere sovereignty" in defending the limited state. Pp. 214-15.

tues" and seem to be inconsistent with the communitarian elements in Christian thought because such models do not hold themselves out as providing moral norms.[14]

Catherine M.A. Mc Cauliff's essay on contract law is perhaps even more dramatic in its insistence that general — and, to my mind, secular — principles are equally Christian principles. The essay focuses on Lord Mansfield and Lord Denning, who, according to Mc Cauliff, "applied timeless Christian values to particular legal problems," and, in Denning's case, "used explicitly Christian language" (p. 471). She describes two of Denning's opinions dealing with the law of constructive trusts. These opinions, she argues, were motivated by Denning's Christian beliefs and "reflect[] a Christian interpretation of natural law and the equity of the law."[15] She continues, "The fair person outside the natural-law tradition — indeed, outside the Christian tradition entirely — frequently reaches the same result as the Christian . . . but would not go beyond fairness to faith in explaining the morality of the decisions" (p. 481).

As Mc Cauliff points out, there is one Christian tradition according to which secular and religious perspectives on moral problems *should* converge. This is the natural-law tradition, which, as Angela C. Carmella puts it, "enabled the [Roman Catholic] church to converse with people of all faiths and of no faith, because the reasoned discourse offered by natural law was considered universal to all persons."[16] Using Augustine as a model, H. Jefferson Powell develops a criticism of modern liberal polities that leads him to conclude:

> [T]he Christian's loyalty to society and state is strictly limited and critical: all claims that cultural achievements or earthly politics are the modality of ultimate human fulfillment are excluded, and secular institutions must limit themselves to the penultimate resolution of issues involving "the things relevant to mortal life." But within those limits, and with respect to those goals, Christians *share their pagan fellow citizens' obligation to seek the common good*. . . . (p. 82; emphasis added)

The first part of this formulation invokes a religious — though not, I think, a distinctively Christian — view, while the second part aligns the believer with the nonbeliever. Of course, John Rawls provided a

14. P. 217; *see, e.g.*, p. 222 (asserting that the assumptions about human behavior made by law-and-economics "are largely congruent with the fallen state of man").

15. P. 481. Contrary to Mc Cauliff's claim, though, I do not find in the opinions any explicitly Christian language, unless she means that the explicit invocation of fairness is explicitly Christian. The signal "see" doesn't quite do the job, but in any event, see Eves v. Eves, 1 W.L.R. 1338 (C.A. 1975), and Tanner v. Tanner, 1 W.L.R. 1346 (C.A. 1975). For a similar suggestion that Christianity is distinctively concerned with justice, see p. xi (preface by Harold J. Berman) (giving an example that moves from a discussion of Christianity to a discussion of justice without indicating that the author believes that a transition has occurred).

16. P. 273. Gerard V. Bradley provides an expository essay on the natural-law tradition with particular emphasis on modern natural-law theory. Pp. 277-90.

secular version of the view that all people exercising their capacity to reason will converge on a set of principles to guide public policy.[17]

Non-Christians and secularists may be comforted by learning that this sort of convergence is possible, because it allows for alliances and "peace treaties" in the conduct of public life.[18] And, I believe, the editors are right in suggesting that the culture of modern America makes it important to educate (some) non-Christians and secularists in this way. They note that "[i]n recent years the most vocal proponents of Christian perspectives on law and politics have come from the religious right," leading "many in the American academy" to fear "that a Christian view of law will yield an authoritarian conservative regime" (p. xxi). The editors "offer two responses," one of which is that "this is an inaccurate caricature," referring to the range of positions — from conservative to progressive (on slavery's abolition, on the death penalty, on social justice, for example) — taken by evangelical Christians and the Roman Catholic church throughout U.S. history.[19] Yet, the very point of demonstrating the possibility of convergence is to show that there is nothing distinctively Christian about the matters as to which convergence occurs.[20]

III. CHRISTIANITY GENERATING PERSPECTIVES ON LAW

Another set of essays is related to the first. In the second group the author says, in effect: "I am a Christian, and here is my perspective on

17. Michael McConnell refers to this aspect of Rawls's work with an unexplained ambivalence. *See* pp. 17-18 ("To borrow a distinction from John Rawls without necessarily embracing his conception of it, early liberalism was a 'political' liberalism.").

18. Which was one of Rawls's basic points.

19. P. xxi. Their second response is "that it is unprincipled and undemocratic to exclude or marginalize fellow citizens on the *mere expectation* that they will vote the wrong way." *Id.* (emphasis added). This raises larger questions than the single sentence devoted to it by the editors can address, although some are touched on as well in Michael McConnell's essay, pp. 5-24, which succinctly restates his position on the relation between Christianity and liberalism, taking the latter as both a concept in political theory and a practice embedded in historical time.

20. Raymond Plant suggests that the difficulty I identify in this section may be a version of a more general difficulty in developing what he calls a political theology:

> If the universal is stressed, then we are likely to end up with a form of political theology which is, as it were, deduced from some basic doctrine of God, creation and the human person which, in turn, is held to underpin rather generalised assertions about the nature of political values such as freedom, social justice, the common good and rights. These might be too vague and indeterminate to link into anything like the ways of life of particular societies, and will not provide rich enough moral ground for Christian political commitments. On the other hand, if the emphasis is placed upon particular communities and their ways of life, it will not be at all clear how these more fragmentary judgements about particular societies will relate to more general beliefs about the nature of God and, in particular, the coherence of God's will in terms of values and the implications of such beliefs for a more general theistic account of the nature of human politics, economics and community life.

PLANT, *supra* note 3, at 19.

law, which — as I experience it — arises from my Christian belief." Often the perspective is, once again, not distinctively Christian.

John Witte, Jr., and John Copeland Nagle provide two good examples. Early in his essay on the history of marriage law and its relation to Christianity, Witte observes that "convictions" drawn from religion "inform my work on the interaction of law and religion in Western history" (p. 409). These convictions, he writes, include "the assumption that God is both hidden and revealed in human laws and that human laws in turn both reflect and deflect divine values" (p. 409). On reading Witte's account of the interaction between marriage law and theological norms, I wondered whether a historian with different religious beliefs, or with none at all, would treat the material differently. It seems to me that Christianity figures in Witte's work as a motivation for his identification of topics, and perhaps as a source of insight into the material that would be more difficult for a non-Christian to gain.[21]

Nagle asserts that he seeks a "distinctively Christian message about environmental law" (p. 438). He lists his assumptions, such as these: God created the world, God's creation is good, God is the owner of all creation, God gave humans dominion over creation (pp. 438-42). He continues that his essay is an "attempt . . . to explain how one Christian — namely, me — tries to take the Christian teaching on creation and a Christian understanding of law and apply them to several current problems in environmental law" (p. 442). Nagle then identifies problems such as conflicts between people and creatures, such as mountain lions encroaching on suburbs (or suburbs encroaching on mountain lions), and the threat to endangered species. Nagle refers to the diversity of God's creation and the story of Noah's Ark as providing the basis for a "Christian duty to preserve endangered species."[22] He concludes that the best policy approach to the conflicts he identifies is a balancing approach, which is of course not distinctively Christian but which, Nagle says, "fits well with Christian teachings" (p. 451).

Of course I accept these authors' assertions of the connections between their Christian beliefs and their perspectives on the topics they write about, but I find in the essays little to suggest the nature of those connections. Timothy L. Hall's essay on the Baptist tradition comes much closer to showing how such connections arise, and discussing it can serve as a transition to my consideration of a third set of essays.

21. Witte's Christianity, that is, seems to me to serve as a guide to what philosophers of science call hypothesis selection or generation rather than as a guide to the identification of truth.

22. P. 444. I would note that the reference to Noah's Ark suggests that the duty to preserve species is not distinctively Christian. (I believe that there are parallel stories in other religious traditions as well.)

Most of Hall's essay is an exposition of the traditional Baptist position of strict separation, but Hall concludes with a few pages criticizing the interest of some modern Baptists in "us[ing] the law to impose moral and social norms consistent with their understanding of Christian teachings" (p. 349). Hall sympathetically locates the reason for this interest in the moral pluralism that "has challenged . . . confidence that democratic systems can find common cause around a set of fundamental moral principles," but finds the interest inconsistent with deeper Baptist traditions and "harmful to the cause of Christ."[23] The newer practice is harmful to that cause because it limits the ability of Baptists to make common cause with other Christians and with non-Christians, but perhaps more because "[t]he gospel of peace becomes associated with the sword," and there's one with an ensuing "stunted vision of Christian principles" such as nonretribution and sacrificial love (pp. 351-52). As Hall writes,

> The surge of enthusiasm for "Christian" values . . . entices followers of Christ to label as Christian values that are scarcely more than law-abidingness. There is nothing uniquely Christian, for example, in refraining from harming others — especially the innocent — or in being faithful to one's commitments, including one's marriage commitments. . . . The call of Christ is to something more than good citizenship, something more than stolid Republican conservativism. But the constant trumpeting of calls for "Christian values" seems to suggest otherwise. (p. 352)

Hall concludes, "The law does not need to be tethered to Christ, and the cause of Christ neither needs to be nor profits from being tethered to the law" (p. 352).

Hall's approach emerges organically from his Christian commitments and its insistence on identifying something that makes a perspective distinctively Christian. Perhaps Hall can do this *because* of the content of his position.[24] He argues that Baptist pietism can make "[v]ery little" contribution to law, because that "theological perspective denies to law the mantle of either inherent divinity or diabolicalness" (p. 352). The other essays in this collection rarely if ever claim that law is inherently divine or diabolical. Yet, the more restrained the claims are, the more, that is, they recognize that the work of fallen human beings partakes of both divinity and fallen-ness, the less distinctively Christian the claims are.

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23. P. 350. Hall's invocation of what I call deeper traditions is of course something that someone operating within a tradition can do. But, outsiders note, as do the editors, the variation over time in the content of something that is nonetheless identifiably a single tradition.

24. Although in quoting these passages from Hall, I acknowledge that I am — and am intending to — endorse the separatist tradition Hall associates with traditional Baptism.

IV. CHRISTIAN BELIEF ORGANICALLY CONNECTED TO A PERSPECTIVE ON LAW

Stephen L. Carter and Teresa Stanton Collett both offer critiques of liberalism. Carter's summarizes the views he has presented in more detail elsewhere.[25] Carter's critique of liberalism is more from a generically religious point of view than from a distinctively Christian one. Collett's is different. The content is not all that different from Carter's, but the presentation — the pervasive Christianity — is. She begins with one of the book's few mentions of what I would have thought truly distinctive about Christian beliefs. Acknowledging diversity among Christians, Collett nonetheless points to the unity among Christians on the beliefs "that God created the universe in accordance with a divine plan, that people are estranged from God, and that God's plan included the life, death, and resurrection of Jesus Christ as the means of reconciling Creator and created" (p. 178). Collett's critique of liberalism takes the form of an exegesis of biblical texts from the Christian gospels as mediated through recent papal encyclicals.

Angela C. Carmella's presentation of the Catholic Church's social teachings is equally distinctively Christian even though the content of the social teachings itself is not. Like Collette, Carmella invokes Jesus's death and resurrection as central to her perspective on law: "Because the Word has become flesh, things of the earth can carry the mystery and power of God" (p. 257). From this, she argues, the Catholic Church has a "clear theological sense of immersion in the world and of movement toward its transformation through the promotion of human dignity" (p. 258). She emphasizes as well the recent expansion of the Church's discourse beyond the natural-law tradition to include thick doses of biblical language: "Both the Bible and the church's sacramental sense call on Christians to see Jesus in the despised, the poor, the weak, and the 'useless' " (p. 275).

Richard F. Duncan's essay demonstrates the same *kind* of organic connection between the author's Christianity and his perspective on law, albeit the *content* of the perspective is quite different. Duncan's central contention is that "Christians wander today in an America that has rejected our God — indeed, in an America that often seems to be waging war against our God" (p. 355). But, in ways resembling traditional pietists, Duncan recognizes that the law of Babylon "will typically reflect the morality and values of Babylon, not those of Jerusalem" (pp. 355-56). Duncan therefore suggests that Christians can do little more than adopt pragmatic responses to the law's threats, the

25. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (2000).

most important of which is "to reduce significantly the size of the state."[26]

In the pursuit of that pragmatic agenda, Duncan points to the housing-discrimination claim against Evelyn Smith, who refused to rent one of the four apartments she owned (in a building which she did not herself occupy) to an unmarried couple, citing her religious belief that sex outside of marriage is sinful and that renting the apartment to people who were likely to engage in such sex would implicate her in their sin and thus be sinful itself. The California Supreme Court held that her action violated the state's fair-housing laws, and that the Constitution did not require that the state give her a religiously based exemption from those laws.[27] The court argued that Smith's religious belief was not substantially burdened because she operated the apartments as a purely commercial activity, and could invest her money in an alternative that would not put her to a choice between complying with the law and complying with her religious conscience. Duncan construes this as a holding that "when people of faith choose to engage in commercial activities in California they waive their right to religious freedom. . . . The world has indeed turned upside down, and good has become evil and evil good" (pp. 367-68).

Marie A. Failinger and Patrick R. Keifert suggest a somewhat different view of Smith's dilemma (and, perhaps, Duncan's as well). They provide a Lutheran perspective on the civil law, in which "law is the demand of God for preservation and re-creation of the world, expressed through such orders of creation as the family and the state" (p. 389). But, Failinger and Keifert write,

> No one can avoid the sins of the will: it is as likely (perhaps more likely) that one individual claiming in conscience to be exempt from positive law is driven by the sins of self-interest and self-delusion as it is that the majority's decision is so flawed; it is as likely that an oppressed minority will use power corruptly as will a self-satisfied majority. (p. 392)

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26. P. 356. Although Duncan does not spell the point out, I take the thought here to be that Christians can use the resources of *Babylonian* law in their effort to reduce the state's size (because of his acknowledgement that the law of Babylon will reflect Babylonian values).

27. P. 367. The case is *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996). The court assumed that Smith might be taken to have presented a "hybrid" claim under *Employment Division v. Smith*, 494 U.S. 872 (1990), but did not directly so hold. Instead, it said that the test applied to hybrid claims was the one embodied in the then-still applicable Religious Freedom Restoration Act. The court then found that application of the antidiscrimination law did not place a substantial burden on Smith's religious exercise because of the availability of alternative investment opportunities. Today, after *City of Boerne v. Flores*, 521 U.S. 507 (1997), the court's analysis would be cast directly as an analysis of a hybrid claim (or the court might reject the claim on the ground that it was not really a hybrid one). Litigation on a related question in the Ninth Circuit ended inconclusively. *See* Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000).

The Christian's dilemma, that is, is not simply that the Christian may perceive a conflict between the state's demands and the demands of conscience; it is equally that the Christian must wonder whether the conflict she perceives is a result of the world's fallen-ness or her own.[28]

This last dilemma suggests in turn why so few of the essays in this book seem (to me, at least) to present a perspective on legal thought that is at once distinctively Christian and organically connected to the author's Christianity. The editors and some contributors hint at, or refer to, the marginalization of Christians in the contemporary United States. Writing this Review in late December, and as a non-Christian, I find this view puzzling when stated without qualification. The necessary qualification, I think, is that contemporary U.S. culture may perhaps marginalize Christians whose perspectives — on legal thought, on culture, on literature, and so on down the list of possibilities — are distinctively Christian rather than generically religious or, even more, merely compatible with secular perspectives, and whose perspectives derive organically from their holder's Christianity. In today's United States, that is, there may not be enough potential authors with what I would identify as truly Christian perspectives on legal thought to fill out a collection of essays published with that title.[29]

28. Oliver Cromwell's exhortation to the General Assembly of the Church of Scotland, "I beseech you, in the bowels of Christ, think it possible you may be mistaken," *available at* http://www.digiserve.co.uk/quotations/search.cgi?type=Author&terms=Oliver%20Cromwell (website indexing Cromwell quotes) (last visited Apr. 14, 2003), seems relevant here.

29. I write this final sentence fully acknowledging that I am in no position to adjudicate what is a "truly" Christian perspective. I certainly do not mean to suggest that the essays' authors are not "true" Christians in any sense. My point is that I read the essays hoping to find perspectives that derived in some strongly presented way from the authors' understanding of Jesus's distinctive position in religious thought, and found relatively few of them. That is why I have included the modifying phrase "what I would identify as" in the sentence in the text.