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Teachings from Regent and Liberty
University Law Schools

by F. Allan Hanson

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**The Jurisprudence of the Christian Right:
Teachings from Regent and Liberty University Law Schools**

F. ALLAN HANSON*

F. ALLAN HANSON, PhD University of Chicago, AB Princeton University, is Professor of Anthropology at the University of Kansas. Among his previous publications on topics pertaining to the law are “Beyond the Skin Bag: On the Moral Responsibility of Extended Agencies,” *Ethics and Information Technology* 11:91-99, 2009; “From Key Numbers to Keywords: How Automation Has Transformed the Law,” *Law Library Journal* 94:563-600, 2002; “Suits for Wrongful Life, Counterfactuals, and the Nonexistence Problem,” *Southern California Interdisciplinary Law Journal* 5:1-24, 1996; and “Some Social Implications of Drug Testing,” *Kansas Law Review* 36:899-917, 1988. Warm thanks go to Martin Dickinson, Stephen Presser, Andrew Koppelman, Herbert Titus, Craig Stern, Brad Jacob, Scott Pryor, Steven Fitschen, Jeff Tuomala, and Susie and the late Roger Bern for interviews and hospitality.

Abstract

No issue is more hotly contested in the culture wars than the proper place of religion in public life. Right wing Christian lawyers are deeply engaged in the most divisive church-state controversies and issues confronting American society today, including abortion, same-sex marriage, prayer in the schools, vouchers for private schools, and religious displays in civic places. Do they aim to establish a theocracy? If by that one means that they want government to be controlled by the church, nothing could be further from the truth. But they do aspire for government (along with all other facets of life) to be predicated on the principles of Christianity. This essay aims to be a nonjudgmental description of the jurisprudence of the religious right as it is understood and taught in conservative Christian law schools, primarily those of Regent and Liberty Universities.

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No issue is more hotly contested in the culture wars than the proper place of religion in public life. On the one side are those who insist that religion is a purely private matter with no place in government. Drawn up against them are those who hold that government should adhere to religious principles and that certain religiously-grounded imperatives are so necessary to the

human condition that they should be binding on everyone. Prominent among the latter forces is the Christian right.

Right wing Christian lawyers are deeply engaged in the most divisive church-state controversies and issues confronting American society today, including abortion, same-sex marriage, prayer in the schools, vouchers for private schools, and religious displays in civic places. All sectors of the religious right have vocally expressed themselves on these issues, but the legal branch is especially interesting because it labors under certain constraints that do not apply to the others. Because its schools seek to train lawyers for successful practice and seek accreditation from the American Bar Association, they must develop and present their views in carefully reasoned ways that meet the standards for legitimate legal training. Because its lawyers aim to prevail in negotiation and litigation, they must frame their arguments in ways that are persuasive in the highly structured and decidedly secular atmosphere of the courts. Hence if one wishes to find the most sober and rational positions emanating from the religious right on the issues that rend society today, one can do no better than to look to its legal wing.

The constraints notwithstanding, the religious objective remains clearly in view. When Liberty University opened its law school in 2004, it was part of Chancellor Jerry Falwell's aim to infuse higher education with the message of Christianity. As one of many tools of his strategy of "saturation evangelism" ("using every available means to reach every available person at every available time"¹, Falwell's plan for the law school was to "train champions for Christ" who "would be on the Judeo-Christian side of every issue."² In an interview with the *Chicago Tribune* shortly before his death in May, 2007, Falwell stated that the trend to exclude God from public life "reinforced our belief that we needed to produce a generation of Christian attorneys

¹ www.purposedriven.com/en-US/Events/PurposeDrivenChurch/News_PDCCConference.htm, visited 3/21/06.

² Quoted in Tresa Baldas. "Law and Religion." *National Law Journal* (August 30 2004): 1.

who could, in fact, infiltrate the legal profession with a strong commitment to the Judeo-Christian ethic.”³ “We’ll be,” he said, “as far to the Right as Harvard is to the Left.”⁴

Barry W. Lynn, Executive Director of Americans United for Separation of Church and State, said of the founding of Liberty’s law school, “the goal of the school is to prepare people for a religious takeover of the government. That’s what [Falwell] wants and that’s what this is about.”⁵ That sounds like a theocracy. If by that one means that lawyers of the Christian right want government to be controlled by the church, nothing could be further from the truth. But if “religious takeover of the government” means that government (along with all other facets of life) should be predicated on the principles of religion, that is precisely what they want. Conservative Christian lawyers inculcate the larger picture and the rationale for it in their law schools, while they work toward realizing this vision in small increments in the courts. Several excellent studies trace the history of the conservative legal movement in general⁶ and the Christian right’s litigation in matters such as school prayer, religious displays in public places, and homosexual rights.⁷ The present article is focused on jurisprudence as it is taught in certain law schools associated with the Christian right.

Conservative Christian Legal Education

A great many church-affiliated universities have law schools: Notre Dame, Marquette, Southern Methodist, Baylor, Pepperdine, Brigham Young, Yeshiva, to name only a few.

³ Lisa Anderson, “Falwell Saw Law School as Tool to Alter Society.” *Chicago Tribune* (May 21, 2007).

⁴ Tim Stafford, “Redeeming law: in a cynical society suspicious of lawyers, Christian law schools are decidedly not.” *Christianity Today* (August 2008): 36.

⁵ Quoted in Baldas, “Law and Religion.”

⁶ Steven Michael Teles, *The Rise of the Conservative Legal Movement: the Battle for Control of the Law* (Princeton: Princeton University Press, 2008).

⁷ E.g. Kenneth M. Dolbeare and Philip E. Hammond, *The School Prayer Decisions from Court Policy to Local Practice* (Chicago: University of Chicago Press, 1971); Hans J. Hacker, *The Culture of Conservative Christian Litigation* (Lanham, MD: Rowman & Littlefield, 2005); Steven P. Brown, *Trumping Religion: the New Christian Right, the Free Speech Clause, and the Courts* (Tuscaloosa, University of Alabama Press, 2002).

Virtually all of them acknowledge their sectarian roots and offer courses on the relation between religion and law. The emphasis this receives varies among schools. In many of them, such courses are electives and the core curriculum is barely distinguishable from that in secular law schools. But as the culture wars heated up a handful of American law schools formed with the primary mandate to provide an expressly Christian legal education.⁸ Liberty University School of Law, located in Lynchburg, Virginia, has already been mentioned. Trinity Law School, located in Santa Ana, California, was formed in 1997, when the Simon Greenleaf School of Law (founded 1980) became part of Trinity International University. Regent University School of Law, in Virginia Beach, Virginia, is part of the university headed by evangelist Pat Robertson. It began in 1979 as O. W. Coburn School of Law, part of Tulsa's Oral Roberts University, and moved to Virginia Beach in 1986. Initially named CBN University College of Law and Government, it took its present name in 1990 when CBN (for Christian Broadcasting Network) University became Regent University. Two others are Roman Catholic law schools, Ave Maria and St. Thomas, located in Ann Arbor, Michigan and Minneapolis, Minnesota. They opened in 2000 and 2001 respectively.

This essay is a nonjudgmental description of the jurisprudence of the religious right from its own point of view, as it is understood and taught in conservative Christian law schools. The primary focus is on Regent and Liberty law schools. The study is based on published and unpublished literature,⁹ together with interviews that I conducted with Liberty and Regent faculty members. Although fundamentalist Christianity is thought by some to lack coherent

⁸ Stafford, "Redeeming Law," 34.

⁹ A particularly rich source is the *Journal of Christian Jurisprudence*. Between 1980 and 1990 eight volumes appeared, published initially by the O. W. Coburn School of Law at Oral Roberts University and then, when that law school moved to Virginia Beach, by CBN (later Regent) University School of Law.

rationality, I hope to demonstrate that their jurisprudence is thoroughly conceptualized and highly systematic.

The conservative Christian legal worldview

Throughout the year prior to the opening of Liberty law school, Dean Bruce Green recorded the steps toward its realization and his thoughts and hopes for it in an almost daily blog.¹⁰ On July 9, 2004 he reflected on how people think. “A plausibility structure,” he wrote, “is an *intellectual grid* through which reality is determined. . . . Ideas consistent with a person’s plausibility structure are immediately believed and things that contradict it are simply not believed” (Green’s emphasis). No less than anyone else, Green and other conservative Christian academic lawyers have a certain plausibility structure, or, to use another word for it, worldview. And, no less than for anyone else, it conditions what they do and do not believe.

The most fundamental propositions of that worldview are as follows. *Human beings are incapable of successfully ordering their lives unaided; they require divine guidance. God has ordained laws to provide that guidance. They are found in natural law (visible in God’s created order of the universe) and revelation (as found in the Bible). Legislators and jurists must make every effort to discover what God’s laws are, and to ensure that human laws reflect them.* These simple propositions, with a pedigree extending back at least to Thomas Aquinas, would, I think, be affirmed by virtually all lawyers of the Christian right. What follows is an examination of how those lawyers flesh them out.

In the first article of the first issue of the *Liberty University Law Review*, Green stresses that the founders of Liberty University School of Law had a vision of the law radically different from that prevailing in most American law schools. The latter is grounded in moral relativism,

¹⁰www.law.liberty.edu>about the law school>from the dean>dean’s blog archive, visited 3/21/06. The blog has since been removed from the website, but not before I downloaded the entire thing.

Green wrote.¹¹ It denies objective truth and conceptualizes law in terms of utilitarianism and the exercise of power. Liberty law school, in sharp contrast, is based on Christian faith and the Christian intellectual tradition, which holds that “truth, justice, human dignity, and other such universals have an independent objective existence.”¹² The goal of legal education at Liberty is to discover the absolute truths. This immediately puts conservative Christian lawyers with this sort of training in a different category from most other lawyers, who are more interested in seeking compromise and resolving differences than in determining which side is in the right.

The quest for absolutes, as Green says, is pursued within the Christian tradition. That is to say, the Christian faith is held to be the infallible and indispensable guide to truth. Green resolutely clings to indisputable orthodoxy, insisting that in the plausibility structure that will guide legal education at Liberty University, the Christian faith “may not be altered, diluted, syncretized, compromised or altogether cast aside. It either must be seen as wholly true, or manifestly false.”¹³ Moreover, if Christianity is absolutely true, then where other religions or worldviews differ from it, they are in error. Many evangelicals welcome people of other persuasions and tolerate their views to some extent, but ultimately the Christian way must prevail. Green makes no apologies: at Liberty law school, “while we respect the views of others, we believe the Christian worldview is superior to all others.”¹⁴

For the same reasons, accepted Christian dogma must prevail over the independent evaluation of basic issues by thoughtful individuals. Green’s vision for Liberty law school is that instruction will proceed in the light of orthodox Christian thought, as revealed in scripture and

¹¹Bruce W. Green, “Ends and means in legal education: the founding of Liberty University School of Law.” *Liberty University Law Review* 1 (2006): 2-3.

¹² *Ibid.*, 2.

¹³ Green blog, 7/9/04.

¹⁴ *Ibid.*, 3/17/06.

understood by the great thinkers over the centuries. “There is *no room* for untethered private judgment in the Christian intellectual tradition.”¹⁵

These ideas are by no means unique to Liberty. First year law students at Regent University are required to take “Christian Foundations of Law,” taught by Dean Jeffrey Brauch. In terms nearly identical to what Green said about the history of legal thinking, Brauch’s course aims to demonstrate that “for the first 800 years or so of the Anglo-American legal tradition, the dominant worldview was based on belief in objective truth and a ‘higher law’ by which human law could be shaped and evaluated. In the last 150 years or so, society has shifted from that view to a more relativistic one. We are skeptical of whether there is such a thing as truth. And we no longer look to transcendent standards to create or evaluate law.”¹⁶ For conservative Christian legal thinkers, this skepticism reflects a modern, humanistic worldview that Abraham Kuyper, a late nineteenth century Dutch jurist and politician of a strongly Calvinistic bent who is one of the heroes of the Christian legal right, said is rooted in the French Revolution, Hegelian pantheism, and Darwinian evolution. All three of these contributed to the cardinal error of elevating man and expelling God from the authorship of the universe and the source of all truth and knowledge.¹⁷

As at Liberty, Brauch’s Christian Foundations and other courses at Regent hold that the law should return to the earlier tradition of religiously grounded absolutism. To this end, much study is devoted to classical works such as Thomas Aquinas, Edward Coke, and William Blackstone’s *Commentaries on the Laws of England* (1765-1769). One of Blackstone’s foundational assumptions, resoundingly approved by the legal religious right, is that the law

¹⁵ Ibid., 8/2/04, Green’s emphasis.

¹⁶ Dean’s Newsletter, Issue 1, http://www.regent.edu/acad/schlaw/dean/docs/InBrief_Issue1.pdf, visited 3/17/09.

¹⁷ Peter S. Heslam, *Creating a Christian Worldview: Abraham Kuyper's Lectures on Calvinism* (Grand Rapids, MI: Erdmans, 1998), 96-97.

reflects absolute truth, being grounded not in human conventions, but in God's design for creation. Some housekeeping-type laws, such as driving on the left or on the right, are promulgated by human communities for the useful purpose of harmonious coordination of activities. They bear an indifferent relation to the basic order of things, and they may and do vary among nations. But important laws, having to do with the relations of human beings with God, nature, property, and with each other, are ordained by God. Hence Blackstone held, and conservative Christian lawyers agree, that men do not make such laws; they discover them.¹⁸ Any human law that contradicts God's law is invalid.¹⁹ With reference to murder, for example, Blackstone went so far as to say: "Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine" (*Commentaries*, Introduction, Section 2)...a passage that sustains the religious right's conviction that the Supreme Court's legalization of abortion in *Roe v Wade* is bad law, or not law at all.²⁰

The opinion is widespread in Christian right law schools that the wise counsel of Blackstone and American authors such as Joseph Story (*Commentaries on the Constitution of the United States*, 1833) and James Kent (*Commentaries on American Law*, 1826) has been seriously disregarded in the last 130 years.²¹ Among those who steered the law on the wrong course were nineteenth and early twentieth century jurists such as Oliver Wendell Holmes and Christopher Columbus Langdell, Dean of Harvard law school from 1875 to 1895. Holmes had no use for

¹⁸ Herbert W. Titus, "God, Evolution, Legal Education and Law." *Journal of Christian Jurisprudence* 1 (1980): 18; Herbert W. Titus, *God, Man, and Law: The Biblical Principles*, 3 ed. (Oak Brook, IL: Institute in Basic Life Principles, 1994), 53. *God, Man and Law: The Biblical Principles*. 3 ed. Oak Brook, IL: Institute in Basic Life Principles, 1994.

¹⁹ Herbert W. Titus, "God's Revelation: Foundation for the Common Law." *Regent University Law Review* 4 (1994a): 3, 12-13; Roger Bern, "A Biblical Model for Analysis of Issues of Law and Public Policy." *Regent University Law Review* 6 (1995): 121-22.

²⁰ Titus, "God's Revelation," 10.

²¹ Russell Kirk, "The Christian Postulates of English and American Law." *Journal of Christian Jurisprudence* 1 (1980): 59-61.

notions of absolute truth.²² In his 1899 address “Law in Science and Science in Law” he advocated escaping dependency on those historical jurists whom Green, Brauch and other conservative Christian lawyers value so highly. Holmes wanted instead to redefine the law as a culturally variable and evolving system that should be both studied and applied scientifically. It was a theme prefigured in his speech at a Harvard Law School Association dinner in honor of Langdell’s retirement as Dean in 1895.²³

For his part, Langdell considered the library to the lawyer’s laboratory, where cases were collected that could be analyzed to ascertain the principles of the law, much as scientists analyze the results of laboratory experiments to determine the laws of nature.²⁴ Langdell designed Harvard’s curriculum around this “case method,” which was adopted as the standard curriculum for law schools throughout the country.²⁵ He fell under the spell of relativistic Darwinian evolution,²⁶ the tragic consequence of which was to wrench the law loose from its moorings in absolute truth and make it a self-contained system. But then, with nothing but fallible human observation and reason to anchor it, the law inevitably falls into error.²⁷

Langdell and Holmes represented only a partial departure from Blackstone, for they too may have thought that the law is out there, like laws of nature, waiting to be discovered. But they removed God from the equation, and insisted that legal principles are not eternal but evolve over time. This, argued Herbert Titus, Regent law school’s first Dean, opened a crack in the dam

²² Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt Brace, 1920): 304-305, 310-11.

²³ *Ibid.*, 138-40, 210-42.

²⁴ Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977): 42; Titus, *God, Man, and Law*, 4; Green blog 6/23/04. Gilmore, Grant. *The Ages of American Law*. (New Haven: Yale University Press, 1977), 42.

²⁵ Titus, *God, Man, and Law*, 6.

²⁶ Titus, “God, Evolution, Legal Education and Law.”

²⁷ Jessica J. Sage, "Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession." *Florida State University Law Review* 31 (2004): 747-48; Green blog 4/22/04, 5/25/04.

that eventually unleashed catastrophe.²⁸ It is folly to turn from God to man for knowledge and truth because God is perfect and all-knowing, while the human mind is fallible and has been clouded by Adam's fall.²⁹ As phrased by G. Aiken Taylor, editor of *The Presbyterian Journal*, "here the secularists and the Christians part company because Christians know something about man that the secularists simply cannot imagine: Man is inclined to evil as the sparks fly upward."³⁰ The upshot is the supremacy of science, not the supremacy of God, which leads to ideas such as that there is no right or wrong in matters like abortion or homosexuality.³¹

The consequences of human fallibility became disastrously manifest in the twentieth century when the independent existence of the law was thoroughly denied by the schools of legal realism (beginning in the 1920s and 1930s) and critical legal studies (from the 1980s). They promoted increasingly radical elaborations on the idea that the law is a human construction, made largely to protect and enhance the position of powerful economic and political interests.³² This eroded all objective foundations of the law and generated the relativist notion that the law is whatever people say it is.³³

Judicial activism is a particularly noxious outcome of this notion. Judges are among the people whose views of the law carry extra clout, and great harm is done when they presume to make the law as they see fit.³⁴ This is a seductive path, because on occasion decisive judicial action has been beneficial. Looking back on it, for example, the Supreme Court's outlawing of racial segregation in the public schools in *Brown v Board of Education* is generally considered to

²⁸ Titus, *God, Man, and Law*, 4-7.

²⁹ Louis W. Hensler III, "Misguided Christian Attempts to Serve God Using the Fear of Man." *Regent University Law Review* 17 (2004): 66; Green blog 1/22/04.

³⁰ G. Aiken Taylor, "The Christian and Secular Humanism." *Journal of Christian Jurisprudence* 3 (1982): 227.

³¹ *Ibid.*, 228-29.

³² John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument." *Duke Law Journal* 45 (1995).

³³ Roger Bern, "'Terms later' Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding." *Journal of Law and Policy* 12 (2004): 714, 642-43, 752-53, 796.

³⁴ *Ibid.*

have been a very good thing for American society. This emboldened courts to imagine that they could improve society in other ways. When Justice Blackmun wrote the decision in *Roe v Wade*, he sincerely thought he was moving the country in a civilized, enlightened direction, as had been the case with *Brown*. But, from the perspective of many Christians, *Roe* actually legitimated evil, as have decisions regarding sodomy and other sexual matters.³⁵ Similarly, when the Massachusetts Supreme Judicial Court authorized same-sex marriage in 2003 in *Goodridge v Department of Public Health*, attorney Brian Fahling of the conservative Center for Law and Policy said that the court's decision "removed all pretense that Massachusetts is a government of the people, by the people, and for the people; now, it is government by oligarchy...it is tyranny by another name."³⁶ The May 2008 decision by the California Supreme Court validating same-sex marriage was immediately held up to similar excoriation.

But, of course, judicial activism can cut in any direction. Depending on the proclivities of the judge, it can be used as much to further the cause of the Christian right as to thwart it. Yet my sense is that most thoughtful Christian right lawyers recognize a danger here, and insist that God's law should be secure from human intervention, regardless of the motivations involved.

If human efforts to make the law lead to mischief, and if God's law is out there waiting to be discovered, the question becomes how to do that. Conservative Christian jurists explain that the two ways to discover God's laws are by observing his handiwork in nature, and through revelation in scripture. It is possible to obtain a law degree from many American universities today without ever having heard of natural law. That may well be a result of pronouncements such as that by Holmes that "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors

³⁵ Interview with Professor Brad Jacob, Regent University School of Law, August 3, 2006.

³⁶ Quoted in Hacker, *The Culture of Conservative Christian Litigation*, 123, see also 38.

as something that must be accepted by all men everywhere.”³⁷ This statement exemplifies the relativist perspective that disturbs conservative Christian lawyers more than perhaps anything else about the current state of American law.

Not all contemporary proponents of the notion of natural law ground it in a divine source, although most do.³⁸ Of course, conservative Christians are firmly in that majority. Although it may be understood somewhat differently in Catholic schools such as Ave Maria than in the Protestant schools Regent and Liberty, natural law as something God-given is a central topic in first-year required Foundations of Law courses in these religiously-oriented schools. Most simply, natural law refers to how God in his creation organized things to be. It is “written on our hearts;” it is what we “cannot not know.”³⁹ The religious right’s opposition to same-sex marriage and its revulsion over homosexuality, for example, are often justified with the contention that only heterosexual relationships are sanctioned by natural law, as proved by the fact that only they can result in reproduction.⁴⁰

Our understanding of natural law comes from observation supplemented by reason. But many evangelicals agree with Blackstone that human faculties for observing and reasoning are imperfect because human judgment has been clouded by original sin.⁴¹ God’s revelation, as recorded in the Bible, clarifies aspects of natural law that human fallibility has distorted as well as other parts of God’s law that are not accessible to reason at all, such as Christ’s sacrifice and resurrection as a means of forgiving and overcoming sin, thus reconciling humanity to God.⁴² It

³⁷ Holmes, *Collected Legal Papers*, 312.

³⁸ Robert P. George, “Natural Law,” *American Journal of Jurisprudence* 52 (2007): 62-64.

³⁹ J. Budziszewski, *Written on the Heart: The Case for Natural Law* (Downers Grove, IL: InterVarsity Press, 1997); J. Budziszewski, *What We Can't Not Know: A Guide* (Dallas: Spence Publishing Company, 2003).

⁴⁰ Titus, “Gods Revelation,” 28-29; Budziszewski, *What We Can't Not Know*, 187-88, 205.

⁴¹ Hensler, “Misguided Christian Attempts to Serve God,” 66, Green blog 1/22/04.

⁴² Titus, *God, Man, and Law*, 5; Green blog 5/19/04.

is of course true that human fallibility can also lead to misinterpretation of scripture.⁴³ However, in an interview reflecting a Protestant perspective, Liberty law professor Roger Bern claimed that revelation is the more reliable guide than is reason alone, unchecked by any external standard. He explained that reasoning only from the law written on the heart—the natural law—is prone to error with respect to particular applications. When natural law says nothing about them, the natural law theorist must fall back on empiricism to determine the appropriate policy, just as do legal positivists. The scripture, on the other hand, presents revelation of principles that inform with respect to the particulars and thus is helpful in addressing issues of importance today, such as social security or public education, about which natural law is silent. (Examples of how Bern applies scripture to issues such as these may be found below.)

All this highlights the fundamental fact that conservative Christian and mainstream lawyers characterize authority differently. Many of the latter take an evolutionary view, imagining the Constitution and common law to have grown over history to accommodate changing human needs and conditions, in ways that are explicable by reason alone. Conservative Christian legal theorists rely instead on natural law and revelation, which are permanent and which, in the case of revelation, require faith. When laws change, it is because human understandings (often, misunderstandings) vary over time. But the law itself, as God-given, never changes.

This leads to a particular view of the Constitution, which they view as grounded in the Judeo-Christian religious tradition. In their eyes the Constitution is the expression of a covenant, struck between the people and between the states and akin to the covenants between God and the ancient Israelites. To change a covenant is an extremely grave matter, admissible only with the mutual consent of the parties to it. Certainly this is beyond the jurisdiction of the bench. Steven

⁴³ Perry, Michael J. "Liberal Democracy and Religious Morality." *DePaul Law Review* 48 (1998): 42-44.

Fitschen, president of the religiously conservative National Legal Foundation, wrote: “any judge or justice who makes up out of whole cloth a new fundamental right, or arrogates to himself authority of power not granted by the Constitution, certainly adds to our national covenant, and thus becomes a covenant breaker.”⁴⁴ The covenantal nature of the Constitution was upheld by Chief Justice Marshall in *Marbury v Madison*, who believed with Blackstone and today’s Christian right lawyers that humans do not make, but discover the law. He instituted judicial review as a means of assuring that laws enacted by the legislature do not contravene the pre-eminent covenant embodied in the Constitution, with judges being in the best position to determine that because of their experience and training.⁴⁵ Certainly Titus conceives of Marshall as having followed the literal meaning of the Constitution. It should be mentioned, however, that other conservative jurists such as Hugo Black, Antonin Scalia, Robert Bork and Robert P. George question whether judges are indeed more qualified to make such determinations than legislatures or anyone else.⁴⁶

The rationale behind this view of authority and the Constitution reveals how the basic propositions articulated at the outset of this essay converge to form a coherent whole. As a legacy of original sin, human beings are by nature sinful and unable to live together successfully without external guidance. It follows that they have no capacity to make good laws. God has given the law in order to guide humanity in the right path. That is the law that humans discover in nature and in Scripture. As in the Old Testament, God gives the law in the form of a covenant He establishes with humans. Any “law” that legislators pass or judges decree that departs from it breaks the covenant and is illegitimate. The Constitution embodies the covenant (or, at least,

⁴⁴ Steven W. Fitschen, "Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny." *Regent University Law Review* 10 (1998): 230.

⁴⁵ Titus, "Religious Freedom," 114-119.

⁴⁶ Robert P. George, "Colloquium: Natural Law, the Constitution, and the Theory and Practice of Judicial Review." *Fordham Law Review* 69 (2001): 2279-82.

parts of it) in the United States. It specifies the people and the states as covenanting parties. However, Robert J. Barth of Regent law school marshals evidence from contemporary documents and the worldview of Hamilton, Madison and the Founders in general to argue that the Constitution is fundamentally a biblical document that acknowledges the participation of God in the covenant.⁴⁷ In this way the sinful nature of humanity, God's authorship of the law, opposition to judicial activism but approval of judicial review, and the Constitution as a document embodying permanent truths (and thus, like the Bible itself, to be literally and therefore strictly interpreted) are all brought together in a coherent jurisprudential theory.

Applications of the worldview

To observe how these principles may be put into action, and to see how different the outcomes are from mainstream law, one can do no better than to consult Roger Bern's article "A Biblical Model for Analysis of Issues of Law and Public Policy," published in the *Regent University Law Review* for 1995. For Bern, who had taught at Regent and joined the faculty of Liberty Law School when it opened in 2004, the reason for being of human individuals and social institutions is to fulfill their duties to God. God gave the law to guide them in that endeavor. He writes that God allocated those duties among four distinct jurisdictions. Human individuals have a "stewardship-dominion" mandate stemming from God's gift of dominion over the earth. From this, "man has a duty to God to govern his own life and to steward all that he is and has in a way that glorifies God," and not to interfere with others' fulfillment of their stewardship-dominion duties.⁴⁸ The duties of the family, as the second jurisdiction, are to maintain the relationship God established between husband and wife, to discipline children, and

⁴⁷ Robert J. Barth, "Covenantal Nature of the United States Constitution." *Journal of Christian Jurisprudence* 6 (1987): 137-47.

⁴⁸ Bern, "Biblical Model," n. 84-85.

to teach them God's ways.⁴⁹ The third jurisdiction is the church, which has the duties to preach the gospel and to regulate disputes and other relations among its members.⁵⁰ Finally, "civil government is God's avenger on earth, with jurisdiction to punish evildoers..., prevent threatened harm, provide redress for harm caused, and to commend those who do well."⁵¹

The duties of the several institutions are to be kept strictly separate. "Clearly, the Church has been given authority to proclaim the gospel, *Matthew* 28:19-20, but it has not been appointed God's avenger to execute His wrath on those who do evil. Likewise, the Civil Government, which has been authorized as God's avenger against evildoers, *Romans* 13:1-4, has not been given authority to preach the gospel. The Family has been authorized to apply the rod of discipline, *Proverbs* 23:13-14, but has not been authorized to administer capital punishment."⁵² I quote this passage in its entirety because it speaks directly to the question of whether or not religious right lawyers seek a theocracy. If by theocracy one means a government subject to the church, the answer is clearly No. Church and state have their distinct jurisdictions, which must remain separate. This point was emphasized by several of the faculty members I interviewed at Regent and Liberty Universities as well as in published sources.⁵³ Nevertheless, it is clear that the place of religion in society—understood not only as the activity of the church but especially as God's prominence in all human affairs—should in their view be infinitely more pervasive than it is now.

And precisely this is where the conservative Christian viewpoint diverges most strikingly from mainstream law. Civil and criminal law are instruments of civil government. Therefore, if

⁴⁹ *Ibid.*, n. 87; A more extensive list of biblically-mandated duties of the family may be found in Rousas John Rushdoony, "An Historical and Biblical View of the Family, Church, State, and Education." *Journal of Christian Jurisprudence* 3 (1982).

⁵⁰ Bern, "Biblical Model," n. 88.

⁵¹ *Ibid.*, 123; see also Barth, "Covenantal Nature," 144.

⁵² Bern, "Biblical Model," n. 96.

⁵³ E.g., Kirk, "The Christian Postulates of English and American Law," 61-62.

and how the law applies to particular cases must always be determined in the context of the divinely mandated jurisdiction of civil government, which is limited to punishing evildoers, preventing threatened harm, providing redress for harms committed, and commending those who do well. In his “Biblical Model” article, Bern applies this standard to a number of situations to determine if they are properly the business of civil government and its law. In the case of contracts, for example, it is always a sin before God to renege on one’s promise. A separate question, however, is whether the promise-breaker is an evildoer. Only then does the breach fall within the jurisdiction of civil government. With a series of illustrations, Bern argues that one is an evildoer when breaking a promise interferes with another person’s stewardship-dominion duties to God. These have to do with using one’s talents and resources to the utmost. If, for example, one undertakes financial obligations on the expectation that the promise will be fulfilled, and is left in a worse position when it is breached, that interferes with that individual’s capacity to fulfill his or her stewardship-dominion duty to God. A suit forcing the promise-breaker to make good is within the civil government’s jurisdiction of punishing evildoers and providing redress for harm. If, on the other hand, the individual had made no commitments in expectation of the fulfillment of the promise, then that person, while unquestionably disappointed, is in no worse material position because of the broken promise. In that case the breach constitutes no interference with his or her stewardship-dominion duties to God. The promise-breaker is a sinner but not an evildoer, and therefore the breach does not fall within the jurisdiction of civil government and no legal action is justified.⁵⁴

⁵⁴ Bern, “Biblical Model,” 131-38. For another biblically based analysis of contracts, which lays greater weight than Bern on the form in which promises are made, see C. Scott Pryor, “Consideration in the common law of contracts: a biblical-theological critique.” *Regent University Law Review* 18 (2006): 1-51.

Primarily concerned as it is with evildoing, Regent professor Louis Hensler holds that civil government was not even part of God's original plan because, before the Fall, man was sinless and there was no need for it. "All human authority over other humans, as we understand such authority today, including civil government, is an evil made necessary by the fall of man from sinless perfection."⁵⁵ Human evildoing subsequent to the Fall certainly gives civil government plenty to do, but conservative Christian legal scholars express deep dissatisfaction with civil government as it exists today because they think it intrudes into many areas beyond its biblical mandate. One important example is public education. There should be no public schools at all, for education does not fall under the jurisdiction of civil government. It belongs to the family, which has the duty to train and discipline children, and to the church, which has the duty to teach the truth. Indeed, public education even places civil government in the position of evildoer, because its taxation for schools on people who have no children interferes with their stewardship-dominion duty to use their resources for the greater glory of God.⁵⁶

Again, it is not in the jurisdiction of civil government to support scholarship or the arts through agencies such as the National Endowment for the Humanities or the National Endowment for the Arts. One might claim that such institutions do fall within the civil government's mandate to commend those who do well. But there is no basis for governmental support of those who do well in the arts or scholarship and not those who do well in other productive activities from carpentry to investing in the stock market. And, as with public education, by taxing everyone to support the artistic and scholarly enterprises of a few, the civil government does evil by interfering with people's stewardship-dominion duties.⁵⁷ Nor is Social

⁵⁵ Hensler, "Misguided Christian Attempts to Serve God," 34.

⁵⁶ Herbert W. Titus, "Education, Caesar's or God's: a Constitutional Question of Jurisdiction." *Journal of Christian Jurisprudence* 3 (1982): 113, 179-80; Bern, "Biblical Model," 174-77.

⁵⁷ *Ibid.*, 178-79.

Security a proper function of government. It does not commend those who do well; it coerces people to do well by contributing to a program for their support in retirement years. This detracts from their capacity to make their own provisions for retirement, which is part of their stewardship-dominion obligation. Furthermore, it infringes on the jurisdiction of the family, which is mandated to care for the aged by biblical passages to “honor thy father and thy mother.”⁵⁸

On the other hand, it is appropriate for civil government to exempt private charitable organizations from taxes. It would be impermissible for government to support such organizations with tax revenues, because that would force taxpayers who might not wish to support them to do so, thus interfering with their stewardship-dominion duties. But tax exemptions make it easier for private charitable organizations to do their good work. This falls within the government’s jurisdiction to commend those who do well.⁵⁹

One might imagine that Christian charity would counsel against capital punishment. On the contrary, many conservative Christian lawyers strongly support it as mandated by God. The key passage is in *Genesis* 9. It is part of the covenant that God established with Noah after the flood, wherein God directs Noah and his descendants to multiply and fill the earth and gives all plants and animals for their use. Then God says “Whoever sheds the blood of man, by man shall his blood be shed” (*Genesis* 9:6). God’s directive is clear and unmistakable: the penalty for murder is death. Blackstone went so far as to cite scripture to the effect that the death penalty is irrevocable and beyond any possibility of pardon (*Commentaries* Book 4, Chap. 14, 2).

Sexual matters are of great concern to conservative Christians today, and Bern discusses biblical mandates for dealing with them. The behaviors in question are adultery, premarital sex

⁵⁸ *Ibid.*, 181-82.

⁵⁹ *Ibid.*, 179-81.

(fornication), and homosexual relations (sodomy). In the Bible, God did not decree a governmental punishment for premarital sex. The matter was to be dealt with by the two families. Hence it does not fall within the jurisdiction of civil government today.⁶⁰ However, God did stipulate punishment for both adultery and homosexuality... death in both cases, as it happens. No one I encountered goes so far as to recommend capital punishment in these matters, but many consider them to be cases of evil-doing that fall under the jurisdiction of civil government as “God’s avenger.” Adultery is evil-doing because it threatens the institution of the family by damaging the relationship between adulterers and their spouses and by jeopardizing the family’s duty to teach and discipline children.⁶¹ Homosexuality is a different kind of evil-doing, the act itself being intrinsically detestable and evil because sexual organs are used in a way contrary to God’s created order.⁶² The Bible does specify that sodomy is an act between males.⁶³ This raises interesting questions, which Bern does not discuss, regarding what should be done about lesbian relations.

Conservative Christian jurists are not unanimous in all these convictions. Liberty faculty member Jeff Tuomala, for example, disagrees with the proposition that same sex marriage contradicts natural law because it cannot result in procreation. In an interview, he pointed out that the reproductive argument cannot be sustained because marriages between men and women too old to reproduce are entirely legitimate. He opposes homosexual relationships and same-sex marriage, but holds that the prohibition stems from revelation rather than natural law.⁶⁴ Regent professor Craig Stern has no doubt that *Genesis 9* provides a divine mandate for the death penalty, but finds justification for not executing many murderers in the “Cities of Refuge”

⁶⁰ Ibid., 185-86.

⁶¹ Ibid., 183-84.

⁶² Ibid., 185, 187.

⁶³ Ibid., 187.

⁶⁴ See also *ibid.*, 183-87 and Fitschen, “Impeaching Federal Judges,” 121-22.

passages in *Exodus*, *Numbers*, *Deuteronomy* and *Joshua*, which specify mitigating circumstances that recommend a punishment other than death.⁶⁵

Once one grasps their rules for reasoning, it is interesting to think through knotty situations for oneself. For example, should the civil government provide a fire department? The Liberty law faculty member with whom I raised this question is of the opinion that it should not, but there seems to be room for discussion. To be sure, it is not in government's jurisdiction to put out fires caused by property owners' negligence or by accident. Accidents are not evildoing and may even be acts of God, while negligence regarding one's own property falls under the individual's stewardship-dominion responsibilities and is no business of the state. On the other hand, however, the government's duty to prevent harm and provide redress from harm may justify its putting out fires caused intentionally or negligently by someone other than the property owner. That view might recommend that government provide fire departments and, because there is typically no time to conduct an investigation into the cause while a fire is raging, run the risk of occasionally extinguishing a fire that it should have let burn.

However such specifics are worked out, the upshot all of this is that while many Christian right lawyers favor capital punishment and more governmental suppression of homosexuality and adultery, in most areas they would drastically reverse what they see as excessive expansion of civil government. Craig Stern reinforces the view of Bern and others when he holds that the state's activities should be limited to issues of injury, property, and contracts. It should not have any role in education, science and the arts, social security, the regulation of drugs, or streets and highways.⁶⁶

⁶⁵ Craig A. Stern, "Torah and Murder: The Cities of Refuge and Anglo-American Law." *Valparaiso University Law Review* 35 (2001): 461-498.

⁶⁶ Personal communication. Stern thinks that streets and highways other than those necessary for proper governmental functions (such as police and military) should be built and managed by private enterprise, but

Faculty at Regent and Liberty law schools regularly incorporate these ideas in their teaching. The Regent law school's prevailing philosophy affirms that "God's law is the court of final authority, not the common law tradition, reason, nor any noun following 'law and ...'".⁶⁷ Regent requires faculty to integrate biblical principles into all courses, and nine techniques for doing so were presented and discussed in a late 1990s faculty retreat.⁶⁸ The faculty meets monthly to share ideas about this, new faculty members go through special training in it, it is a focus of annual student/faculty retreats, and the school sponsors a special ministry—The Institute for Christian Legal Studies—designed to help students incorporate Christian principles into their study and future practice of law.⁶⁹ Natural law, biblical revelation, and theorists who stress the divine grounding of the law such as Blackstone and Kuyper receive prominent attention in first year courses on the foundations of law. For Regent professor Scott Pryor "the existence of the authoritative Scriptures provides a faculty member, operating in light of the confession of the mission statement, with the necessary 'Archimedean point' from which to criticize, analyze, and apply elements of the law today."⁷⁰ Thus the focus on Judeo-Christian principles is carried through in courses on specific areas of the law. Courses in criminal law proceed from assumptions, discussed already, about the civil state as God's avenger. In teaching contracts, Pryor states that "a faculty member could seek first to justify the use of contracts as a form of social activity by reference to the promise-keeping character of the God revealed in the

acknowledges that our dependency on government for this has become so strong that it would take generations to wean us away from it. See also Craig A. Stern, "Biblical Limits on the Role of Civil Government." Paper presented before the Biblical Law Study Group, Annual Meeting of the Evangelical Theological Society, Washington, D.C., November 16, 2006.

⁶⁷ C. Scott Pryor, "Mission Possible: A Paradigm for Analysis of Contractual Impossibility At Regent University." *St. John's Law Review* 74 (2000): 713.

⁶⁸ Scarlato, Mary C. and Lynne Marie Kohm. "Symposium on Religiously Affiliated Law Schools: Integrating Religion, Faith, and Morality in Traditional Law School Courses." *Regent University Law Review* 11 (1998): 50-51,

⁶⁹ Dean's newsletter, issue 1, and Dean's blog for February 12, 2008, <http://www.regent.edu/acad/schlaw/dean/>, visited 3/17/09/

⁷⁰ Pryor, "Mission Possible," 697-98.

Scriptures, and then move on to analyze the significance of humanity's creation in the image of God, the persistent use of the ancient Near Eastern practice of covenanting as the model of God's relationship with humanity, and the approbation of promise-keeping in the torah, poetry, and the Wisdom literature of the Hebrew Scriptures. The faculty member could then analyze the significance of those relatively rare occasions in which a biblical character receives tacit approval for breaching a promise and particularly those instances when God does not carry out a threatened judgment due to an intervening contingency operating as an implicit condition.”⁷¹

The “Biblical Model” article by Liberty professor Roger Bern, discussed above, contains reasoning applicable to a variety of courses, including contracts, antitrust, torts, and tax law.

While instruction at Regent and Liberty proceeds from a religious perspective, it does not neglect other views current in contemporary legal theory and practice. For example, proposed limitations on contracts stemming from notions of individual autonomy or feminist legal theory are carefully studied, even if they are ultimately refuted when they contravene scriptural authority.⁷² Nor need the religious emphasis result in a legal education that is inferior by the standards of mainstream law. 2007 Liberty law school graduates took the bar examination in sixteen states and achieved a passing rate of 89%. That places Liberty in the top 20% of all American Bar Association accredited law schools, an accomplishment that is all the more remarkable given that the class of 2007 was Liberty’s inaugural class.⁷³

An inconsistency?

A discrepancy may appear to exist between how conservative Christians teach the law and how they practice it. The academic side stresses natural law and divine revelation, and how aspects of the law both particular (the death penalty, contracts) and general (the over-reaching of

⁷¹ Ibid., 727.

⁷² Ibid., 728-29.

⁷³ <http://www.liberty.edu/academics/law/index.cfm?PID=15910>, visited 3/20/09).

civil government) should be understood in biblical terms. But when it comes to actual cases pertaining to religious activities in the schools, abortion, and homosexual issues, explicit reference to biblical principles is usually replaced by reliance on the Bill of Rights, the Equal Access Act, and other human constructions. This is of course understandable: Christian lawyers, as much as other attorneys, have the ethical responsibility to represent their clients to the best of their ability. This obligates them to play the game by the rules that govern the legal system as it actually exists. But ultimately it is no game for them. Their understanding, teaching and practice of the law is part of their Christian faith, which they hold with utmost seriousness and sincerity. The home page of Regent University law school's website prominently displays the motto "Law is more than a profession. It's a calling."⁷⁴ Writing as the law school Dean at Liberty, Bruce Green is in full agreement: "It is time... that orthodox Christians begin to see the study and practice of *law as a calling* no less a 'full-time ministry' than the traditional ministerial vocations."⁷⁵ How do they reconcile this calling with the tendency in their legal practice to fall silent about the divine underpinnings of the law?

This discrepancy may loom larger to an outside observer such as myself than to the participants. At least, when I posed this question in interviews with several Christian attorneys and faculty members, they identified several ways of bridging the gap. First of all, as practitioners they in fact do emphasize the divine underpinnings of the law in various circumstances. Briefs filed by Liberty professor Jeff Tuomala in connection with *Regina v Demers*, a Canadian case against a man who was convicted of illegally protesting at an abortion clinic in British Columbia, relied on biblical authority to argue that a fetus is a human being. Similarly, former Regent Dean Herbert Titus and others made explicitly biblical arguments in

⁷⁴ <http://www.regent.edu/acad/schlaw/>, visited 3/3/09.

⁷⁵ Green blog 10/02/03, his emphasis). Of course, many people consider law to be a calling whether or not they consider it to have religious significance. For Regent and Liberty Universities, it is expressly a calling to serve God.

support of Alabama Chief Justice Roy Moore's refusal to remove a 2.6 ton granite Ten Commandments monument from the rotunda of the state Judicial Building. Courts are seldom moved by explicitly biblical arguments (which is probably why they are not regularly used), but Tuomala, Titus and others do sometimes advance them.

It is also important to remember that lawyers do not spend all their time in courtrooms. Other venues allow Christian lawyers to apply their religious understanding of the law more openly. Regent professor Brad Jacob and Liberty professor Roger Bern point out that the predominant part of lawyers' activity is to discuss situations with their clients outside of court. In such settings they may pray with them and counsel them in biblical terms. Steven Fitschen of Regent University and President of the National Legal Foundation added that they also make religiously based arguments in testimony and in discussions with sympathetic legislators regarding proposed bills, as well as in amicus briefs pertaining to cases of interest to them.

Often the conflict does not come up at all. Titus reminds, as mentioned above, that a good deal of the law concerns matters about which Scripture is indifferent, such as speed limits and other rules pertaining to technologies that did not exist in biblical times. Or conflict is avoided because, according to Regent professor Scott Pryor, academic and practicing law operate at different levels of abstraction. As with legal theory generally, the former aims to understand and explain the foundations of the law while the latter works on the more pragmatic level of using the law to persuade. So long as what practicing attorneys say does not contradict biblical principles, he sees no problem with the fact that they often do not couch their arguments in explicitly biblical terms.

Finally, Professors Jacob, Stern, Fitschen, Titus and Tuomala all point out that a great deal of the law is consistent with the Bible, be it from the intention of Blackstone and other

historical legal thinkers to base the law on religion or from the general cultural heritage of Western civilization that informs the common law and was carried by the American Founders. They agree with Pryor that, when practicing lawyers argue on the basis of the Constitution and many statutes, they often are advancing positions consistent with biblical principles whether they make explicit reference to them or not. Tuomala likens it to the experience of the Apostle Paul in Athens (*Acts* 17). Noting their many altars, Paul commended the Athenians on being a religious people. Among them was an altar to an unknown god, and Paul said that his message was that of the unknown god that they had been worshipping all along. Likewise, while conservative Christian lawyers definitely see many particulars that need changing, they hold that, at bottom, our law is authored by God and we have got a fair bit of it pretty well right. Their special ministry is to make God's authorship more widely known.

In conclusion

The discrepancy between classroom pedagogy and courtroom practice appears greater, as I have said, to an outside observer than to conservative Christian lawyers themselves. Reflecting on this leads to one of the most important conclusions to be drawn from this study. The outsider may sense a significant discontinuity between the basically conventional way that they practice the law and the highly distinctive jurisprudence that, as we have seen, is taught in conservative Christian law schools such as Regent and Liberty. But what outsiders need to realize is that conservative Christian attorneys actually are applying that theologically driven jurisprudence in their practice, but they are applying it in ways that have some chance of success in the decidedly non-theological setting of the American legal system. Their efforts to promote parochial schools, religious gatherings and prayer in the public schools, creationism or intelligent design, and to thwart Darwinism, abortion, same-sex marriage and other legitimations of homosexual

relationships, are all designed to bring about, in realistic and realizable increments, a social and religious transformation in this country. In the aggregate, however, the ultimate transformation many of them hope to foster is nothing short of staggering. Government would be drastically reduced in size and function. There would be police, courts, prisons, and a military, but not much else. Most if not all activities of executive departments such as Commerce, Labor, Interior, Health and Human Services, Education, and Transportation would be terminated. There would be no public education, no Social Security, no Medicare or Medicaid, no unemployment compensation. The state would play no role in aid for the poor and disabled, support for the humanities, arts, and sciences (other than their military applications), regulation of the economy, parks and recreation programs, public libraries, water and sanitation facilities, dams and reservoirs, and possibly municipal fire departments. All of these would become the responsibilities of the family, the church, and the private economic sector. It might be legitimate for government to have a postal service (but only for communication within the government or between the government and the people, and not between citizens), to print money (but only for payment of taxes, fines, and salaries to government officials), and to build streets, highways and bridges (but only if primarily intended for government functions such as police and the military). Even here it would probably be preferable for civil government to rely on the private sector, sending its messages via UPS or Federal Express, using currencies printed by private banks and roads built by private enterprise.

Only when one considers the specific legislative and legal agenda in the context of the general jurisprudence taught in the law schools does the overall objective become clear. This is emphatically not to say that it is devious. There is no dark conspiracy here. They are completely open and ingenuous about their objectives. All one need do, as I have tried to do in this essay, is

to listen to what they say, attend to what they have written, and use what one has thereby learned to form an appreciation for what they aim to achieve.

Exactly what, then, is their larger objective? Not, as stated already, a theocracy which would place government in the hands of the church. The biblical mandate of a sharp jurisdictional separation between church and state forbids that. But the conservative Christian jurists do seek to erase any separation between *religion* and the state. Their objective is a radical transformation of current conditions to establish a pervasive theocracy consisting of a totally God-centered society that encompasses both church *and* state. No less than the church, civil government is an institution established by God and its agents should look to God's natural law and revelation for instruction in carrying out their duties. Everything—church, state, education, the economy, family, the individual—would be dedicated to the service and glorification of God. Who or what God is, and what constitutes his service and glorification, is defined by the conservative or fundamentalist variant of the Christian religious tradition. People would be free to follow other religions or no religion at all, because any effort to impose Christian beliefs would violate the deep-seated principle that true Christians must voluntarily accept Jesus as their lord and savior. But every effort would be made to encourage sinners to be reborn in Christ, and no standards or conventions that counter Christianity would be institutionalized in public life, due to majority acceptance of Christian principles as absolutely true. The law would implement biblical principles in every way, including maintenance of capital punishment and sanctions against adulterers, those who provide or have abortions, or who engage in homosexual behavior.

Legal realists would see nothing surprising in all this. In their eyes every legal philosophy strives to enhance the position of some particular constituency or special interest group, and everything we have been discussing here is part of a strategy to further the interests of

the Christian right. Outside observers may well accept this analysis, but conservative Christian jurists themselves would firmly reject it, for the relativism embedded in legal realism is anathema to them. Their bedrock conviction is that the law is no human construction designed to serve some human interest. As the mandate of God, it is absolutely and eternally true, an inextricable part of the created order itself.

The absolutist ethos of Christian right jurisprudence is crystallized in a hypothetical case in Roger Bern's "Biblical Model" essay. The question is whether the state can legitimately arrest someone who blocks the doorway to an abortion clinic, thereby preventing women who intend to have abortions from entering. Bern's answer is No, because by the arrest the state would be disallowing the protestor from intervening to prevent the evildoing of murdering innocent lives, which is something that God commands.⁷⁶ But the argument recognizes only one side of the abortion debate. Those on the other (pro-choice) side would object that the rights and interests of women who decide to have abortions are disregarded. But for Bern there simply is no legitimate other side, as is clear from the fact that his only reference to women contemplating abortion is mention of pro-life adherents who "may be called...to assist by providing loving care for women to facilitate their carrying their pregnancies to term."⁷⁷

This example addresses just one of issue among many, but it highlights how much conservative Christian jurisprudence is at odds with what I have called the mainstream. To specify just what the mainstream is, consider a passage written by attorney James M. Hirschhorn. There Hirschhorn takes exception to those who applauded the Archbishop of Newark for saying that an appearance by Supreme Court Justice Sandra Day O'Connor and Judge Maryanne Trump Barry, both of whom had ruled in favor of abortion rights, was "offensive and contrary to the

⁷⁶ Bern, "Biblical Model," 187-92.

⁷⁷ *Ibid.*, 192.

Catholic mission and identity of Seton Hall Law School.” Hirschhorn wrote that the American legal system:

recognizes that self-evident moral truths are few and far between, that rational disagreement is the foundation of progress, that one's adversary is generally an honorable person who may sometimes be right, and that liberty requires a mutual willingness to mind one's own business. The system functions because of the general acceptance that sensible men and women can accommodate their clashing interests in public through reasoned argument and compromise, leaving faith to the realm of private conscience, private persuasion and private conduct. The craving for indisputable orthodoxy in any form is its enemy...[A lawyer's] principal function is not to rid the world of someone's idea of sin, or to build the new Jerusalem in this life, but to resolve even the most bitter disputes peacefully through the legal and political process.⁷⁸

Most attorneys would probably accept this as a fair statement of the mainstream ideal of the American legal profession, while acknowledging, to be sure, the difficulty of applying the ideal to issues as polarized and volatile as abortion. But conservative Christian lawyers have a different agenda. They indeed are, as Falwell envisioned, “champions for Christ...on the Judeo-Christian side of every issue.”⁷⁹ They seek through their writing, teaching, negotiating and litigating to move society in this direction with all deliberate speed. There can be no question that they accept this vision whole-heartedly and with utmost sincerity, and feel called by God to dedicate themselves to its realization. They are convinced that it would conform to God's plan for human society, implement the highest standard of justice, redeem sinners, and set the course to true human fulfillment and salvation. But, of course, not everyone shares their conviction that conservative Christianity has a monopoly on absolute truth. Those with a different plausibility structure—be it another understanding of Judeo-Christian principles, some other religion, or what is called secular humanism—find their vision dogmatic and confining.

⁷⁸ James M. Hirschhorn, “Orthodoxy and the Law.” *New Jersey Law Journal*, May 24, 2004.

⁷⁹ As quoted near the beginning of this essay.