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Two Symposia: Judicial Responsibility and Christian Realism

Thomas C. Berg
University of St. Thomas School of Law, tcberg@stthomas.edu

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FOREWORD

TWO SYMPOSIA: JUDICIAL RESPONSIBILITY AND CHRISTIAN REALISM

THOMAS C. BERG*

This issue of the Law Journal contains two sets of articles, covering a pair of topics of great importance and current interest. The topics are quite different, and yet they have a significant point of contact between them.

1.

The first set of articles deals with how to interpret the U.S. Constitution: in particular whether the interpreter should examine only the Constitution's original meaning as opposed to considering other inputs such as precedent, traditions, or the contemporary understandings of concepts like equality or free speech found in the text. This debate persists not just among scholars and judges, but also in the general public, because the polar opposite of a court decision using proper methodology is one that is lawless, imposing the judge’s preference under cover of the Constitution. Nobody wants lawless decisions, even if people disagree on what the lawless decisions are.

The articles on constitutional interpretation revolve around the lecture On Not Being "Not an Originalist," delivered by Professor H. Jefferson Powell, one of the nation’s leading constitutional scholars. Professor Powell argues that originalist methodology has virtues, especially in comparison with Supreme Court decisions that have truly been lawless: "[O]riginalism is an elegant response to a genuine problem." But ultimately, he says, originalism is inadequate compared with a multi-factor approach that considers original meaning as “one among a much broader set of modalities of interpretation” including precedent, analogy, and moral and prudential con-
siderations.\textsuperscript{3} In his own words, therefore, he is "neither an originalist nor 'not an originalist,' and in my view you too should avoid being either."\textsuperscript{4}

While affirming that judges in constitutional cases should subject themselves to the authority of the text, Professor Powell argues that such discipline will come more from the traditional conventions of sound, responsible legal reasoning than from a "reductionistic" focus on historical meaning.\textsuperscript{5} The latter, he argues, will not eliminate "human waywardness and error," because "inept or manipulative arguments can be made about original meaning." Therefore,

[all] the pathologies anyone has ever seen in our original constitutional tradition . . . would assert themselves in the remade originalist world, amplified by loss of the tradition's common law concern with particularity, with justice in the individual case, and by loss of the traditional recognition that uncertainty and disagreement are unavoidable. . . . The tradition, with all its flaws, is grounded in the practicalities of responsible decision.\textsuperscript{6}

In his responsive article in this issue, Professor Powell recognizes the originalist critique that a notion of multi-factored "lawyer's craft" will not guide justices sufficiently to distinguish law from their personal preferences.\textsuperscript{7} But, he answers, a theory of interpretation cannot and should not be designed primarily to stop bad faith or lawlessness. Its point is "to enable the decision maker acting in good faith to do her job better, more in accord with the societal understanding of her office and its duties"—"somewhat as the scientific method is a description of how to do science rather than a (vain) attempt to stop dishonest experimenters from falsifying their data."\textsuperscript{8} This formulation may not give enough weight to the need to have a constitutional theory that, even if it cannot stop judicial lawlessness, at least can say clearly when it has happened.\textsuperscript{9} But even at the end of his response, Powell still reaffirms the importance of (courts) being modest.\textsuperscript{10}

In other words, Professor Powell seeks an account of constitutional adjudication that will recognize the limits on the Court's efficacy and com-

\begin{itemize}
  \item \textsuperscript{3} Id. at 273.
  \item \textsuperscript{4} Id. at 259.
  \item \textsuperscript{5} Id. at 280.
  \item \textsuperscript{6} Id. at 278.
  \item \textsuperscript{7} H. Jefferson Powell, Further Reflections on Not Being "Not an Originalist," 7 U. St. Thomas L.J. 288, 307 (2010) (originalism "sees in traditional legal reasoning an inadequately constraint on judicial willfulness").
  \item \textsuperscript{8} Id. at 308.
  \item \textsuperscript{9} Indeed, in earlier work Professor Powell appeared more skeptical whether a meaningful shared concept of lawyer's craft exists in today's polarized legal culture. See H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation 6-7 (1993).
  \item \textsuperscript{10} Powell, supra note 7, at 309 ("The law and the Court are limited in their efficacy and competence, and there is ample reason to fear that in recent years the Court has taken too little note of these limits.").
\end{itemize}
petence but also “acknowledge the real achievements of our constitutional tradition,” which “is for all its flaws a vital part of the ongoing American experiment in making governmental authority worthy of respect, and governmental power an instrument of human good.”

Professor Robert Delahunty, in his reply to Powell, also seeks an account that grounds the Court’s legitimacy by identifying a real role it can play but also emphasizing its limits. Professor Delahunty’s answer emphasizes the legitimizing principle of democracy, which the Court can play a “vital, in fact indispensable, role” in reinforcing by “eliminating structural flaws in the democratic process” that the political branches will fail to confront. In other words, if the Court carries through the project of footnote four of Carolene Products, it will have a role that will recognize both its possibilities and its limits.

2.

The second set of articles in this issue stem from a November 2009 symposium on “Christian Realism in Public Life: Catholic and Protestant Perspectives,” sponsored by the University of St. Thomas’s Terrence J. Murphy Institute for Catholic Thought, Law, and Public Policy. The conference rested on the premises (1) that there is an important “impulse for Christian theology,” both Catholic and Protestant, “to be realistic—to be based in a clear-headed assessment of facts about God, human beings, and the world—... although the themes and the definitions of realism vary,” and (2) that “[a]n examination of ‘realism’ in religious and political thought is timely” today.

The term “Christian realism” is associated mostly with theologian Reinhold Niebuhr, who in the mid-20th-century set out an influential vision of Christian action for justice in the world that also acknowledged the depth of human sin and its barriers to idealist or perfectionist programs. For Niebuhr, a Christian account of human nature and politics meant that efforts

11. Id.

12. Robert J. Delahunty, Originalism and Legitimacy: A Reply to Professor Powell, 7 U. St. Thomas L.J. 281 (2010). Professor Delahunty is an Associate Professor at the University of St. Thomas School of Law.

13. Id. at 285, 287.

14. Delahunty only suggests this as a direction, but the Carolene Products project has been extensively mapped out in John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). Ely’s discussion probably needs to be tweaked, as Delahunty implies, with the complications introduced by analyses of the political process such as public choice theory. See Delahunty, supra note 12, at 286–87.


to achieve justice must be pursued even though they always contain elements of moral ambiguity and pose risks of abuse:

We will not regard the pressures and counter pressures, the tensions, the overt and the covert conflicts by which justice is achieved and maintained, as normative in an absolute sense; but neither will we ease our conscience by seeking to escape from involvement in them. We will know that we cannot purge ourselves of the sin and guilt in which we are involved by the moral ambiguities of politics without also disavowing responsibility for the creative possibilities of justice.\textsuperscript{17}

Niebuhr applied this approach to a host of moral-political issues over several decades. But he exercised the greatest influence during the early Cold War years, especially among anti-Communist liberals, by arguing that Americans must resist the evil of Soviet totalitarianism but also guard that in doing so they did not “ironically” take on the opponent’s vices, from relying excessively on military solutions to making arrogant claims of innocence to justify actions.\textsuperscript{18}

In the last decade, the new round of threats and challenges posed by radical Islamic terrorism made Christian realism seem relevant again, both as a spur to fight terrorism and as a critique of the Bush’s administration’s perceived excesses.\textsuperscript{19} More broadly, President Barack Obama, in an interview with columnist David Brooks, called Niebuhr “one of [his] favorite philosophers,” who taught “the compelling idea that there’s serious evil in the world, and hardship and pain,” “we should be humble and modest in our belief we can eliminate those things,” “[b]ut we shouldn’t use that as an excuse for cynicism and inaction. [Obama] take[s] away [from Niebuhr] the sense we have to make these efforts knowing they are hard, and not swinging from naive idealism to bitter realism.”\textsuperscript{20}

In this context, it seemed timely to reexamine Christian realism, but with a distinctive perspective drawn from the Murphy Institute’s mission to “explo[r]e the various interactions between law and Catholic thought on [a range of] topics,” “driven by a ‘vision of the human person and the world that is enlightened by the Gospel’ (Pope John Paul II, \textit{Ex Corde Eccle-}

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\textsuperscript{17} \textit{Reinhold Niebuhr, 2 The Nature and Destiny of Man: Human Destiny} 284 (1943).
\textsuperscript{18} \textit{Reinhold Niebuhr, The Irony of American History} (1952).
\textsuperscript{19} \textit{See, e.g., Jean Bethke Elshtain, Just War against Terror} (2003) (arguing that Niebuhrian realism supports vigorous action against terrorism); \textit{Peter Beinart, The Good Fight: Why Liberals—And Only Liberals—Can Win the War on Terror and Make America Great Again} (2005) (arguing that Niebuhrian realism supports vigorous action but with more emphasis on economic development in Muslim nations and strengthening America domestically); \textit{Andrew J. Bacevich, The Limits of Power: The End of American Exceptionalism} (2008) (arguing that Niebuhrian realism shows American arrogance in prosecuting wars and seeking to transform Middle East).
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It turns out there are important similarities, although important differences too, between Niebuhrian realism and the rich tradition of Catholic social thought on human nature, politics, and law. Pope Benedict XVI himself has spoken at various times of a “Christian realism” that grounds both the legitimacy of and limits on war and also supports a sober, patient hope for Africans living in poverty. Although Benedict and Niebuhrians may use “Christian realism” to refer to different ideas, their emphases overlap in that both see real hope in the world coming only from a sober assessment that emphasizes humans’ sin as well as their God-given dignity and possibilities—the paradoxical nature that Pascal called “the wretchedness of a great lord, the wretchedness of a dispossessed king.”

Other papers from the Catholic-Protestant dialogue over “Christian realism” will appear in other venues, but the Law Journal is publishing three articles with direct implications for law and public policy. Professor Victor Romero proposes an approach to immigration policy that enunciates “hope” in the biblical commands to welcome the stranger, while confronting the need for “humility” in seeking to make progress in a Congress and nation inclined overall toward stricter enforcement of immigration restrictions. While cautioning against letting humility significantly limit hope, Professor Romero explores viable “immigrant-friendly alternatives focusing more on integration than enforcement,” “[f]rom reconfiguring the rhetoric of comprehensive immigration reform to mediating the role of states and localities.”


23. See John L. Allen, Jr., Faux out from Benedict’s comments on Islam; What’s next for Christian-Muslim relations?, NAT. CATH. REP., Sept. 22, 2006, http://nationalcatholicreporter.org/word/pdfw092206.htm (quoting then-Cardinal Ratzinger as saying, “The pope has not proposed [opposition to the Iraq war] as the doctrine of the Church, but as the appeal of a conscience illuminated by the faith. . . . This is a position of Christian realism which, without dogmatism, considers the facts of the situation, while focusing on the dignity of the human person as a value worthy of great respect.”); Interview of the Holy Father Benedict XVI During the Flight to Africa (Mar. 17, 2009), http://www.vatican.va/holy_father/benedict_xvi/speeches/2009/march/documents/hf_ben-xvi_spe_20090317_africa-interview_en.html (stating that “Christian realism” that “proclaims a God who became man, therefore a profoundly human God, a God who suffers, also, with us, gives meaning to our own suffering through a proclamation with a broader horizon, which has more future” than so-called “prosperity gospels”).


26. Id. at 312.
Professor Susan Stabile considers analogous questions in the context of abortion policy, where the Catholic commitment to the sanctity of life from conception to natural death confronts not only deep disagreement in a pluralistic society, but barriers erected by the Supreme Court in the form of constitutionalized rights to abortion. In exploring how an approach to abortion might be both faithfully Catholic and capable of realization under the conditions likely to prevail in America for some time, Professor Stabile analyzes a number of questions, such as whether Catholics can pursue strategies that aim to persuade people of abortion's immorality and encourage alternatives but not criminalize it. At various points, her analysis follows the moral theology categories of formal (or intentional) cooperation with evil (forbidden) and material cooperation (unintended assistance, which may be permitted for proportionate reasons). These categories themselves, one should note, are central components of the Catholic variety of "Christian realism," for as Professor Stabile notes, they "address the reality that it is impossible to avoid evil completely" and they aim "to help Catholics discern how to limit their involvement in evil" even as they pursue other goods. Ultimately, Professor Stabile finds some key questions difficult to answer—and, like Professor Romero, raises the possibility that a Christian's prime duty is to be prophetic rather than realistic—but concludes that "the goal of finding common ground" that might incrementally move society toward greater respect for unborn life "is important enough to justify seeing what a Catholic realist perspective might add."

Finally, Professor Richard Esenberg, explores, in the context of current debates over government regulation, "how Christian Realism might be informed by—and how it might inform—the Catholic principles of subsidiarity and solidarity." Two themes run through Professor Esenberg's article, which criticizes the recent large-scale federal interventions in the economy through the economic-stimulus and health-care bills. One theme is that although the Catholic concepts of solidarity and subsidiarity may seem in tension—the first making the common good a priority, the second setting a presumption against centralized efforts to promote that good—they can actually be resolved if the preference for subsidiary (smaller) institutions is seen not just as a means of preventing abuse by centralized power, but as an

27. Susan J. Stabile, An Effort to Articulate a Catholic Realist Approach to Abortion, 7 U. ST. THOMAS L.J. 340 (2010). Professor Stabile is the Robert and Marion Short Distinguished Chair in Law and Professor at the University of St. Thomas School of Law.
28. Id. at 346-47; see, e.g., id. at 356-59, 364-68 (applying such categories to reason that a faithful Catholic may support laws that restrict abortion but do not ban it when that is all that is possible, but may not support promoting access to contraceptives even if it will reduce abortions).
29. Id. at 346.
30. Id. at 368-69.
intrinsic value in itself, empowering individuals and small groups more directly "to participate in the definition and advancement of the common good." 32  Second, while realism does not counsel despair or subordinate moral claims to the logic of market economics, it does call for hard-headed recognition of facts: for example, "that centralized decision-making inevitably suffers from the inability of one decision maker to have enough knowledge to make superior decisions." 33

3.

This issue’s articles cover a wide set of topics from judicial power and constitutional interpretation to immigration, abortion, financial, and healthcare policy. Each topic raises its own distinct questions. Even more, the two sets of articles differ in category. In constitutional decision making, as Professor Powell emphasizes, officials act under the constraint of a textual authority, taking their justifications from the concepts or values embodied in the text rather than their "substantive views on what is wisest or best to do." 34 By contrast, the papers on Christian realism and various topics do make arguments of policy and principle: what are the wisest or best actions, whose enactment our legal structures permit but do not compel.

Still, the articles have a point of contact. It is general but important: the idea that law and policy must strike a proper balance between empowering human beings to realize their possibilities and controlling for their persistent tendency to impose on others or ignore others’ interests and perspectives. Professor Powell ultimately defends the tradition of common-law constitutional reasoning because it gives judges enough room to pursue and exposit constitutional ideals—reflecting confidence that they can do so responsibly—while also constraining them, as much as fallen humans can be constrained, by the norms of the lawyer’s craft. A Niebuhrian realist approaching the judicial role might think this places too much confidence in judges’ self-restraint and the impartiality of their reasoning. But the Niebuhrian would also have to give serious weight to Powell’s arguments that constitutional ideals can be meaningful and not just the imposition of personal preferences, and that originalism is no panacea for judges’ human willfulness.

In any event, we can and should assess all these matters—from the role of judges to the proper aims of policy—starting from an anthropology, an account of human nature, that recognizes, in Pascal’s words, both the great dignity of human beings and the wretched state they are in. How to weigh the two sides of that tension in each subject area is a matter for subject-specific argument. But to set forth the tension is among the main

32. Id. at 383.
33. Id. at 392.
34. Powell, supra note 7, at 292.
contributions of religious thought to law and public policy: a fitting theme for the Law Journal’s motto of “faith and justice” and the law school’s mission of “integrating faith and reason in the search for truth through a focus on morality and social justice.”