

Freedom of Religion in Communities of Legal Scholarship: A Christian Perspective

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Legal scholarship (as with a range of other disciplines) inextricably relates to its author's foundational beliefs (comprised of, for example, ontological and cosmological views, moral convictions, and the like). For the Christian legal scholar, therefore, the alignment of scholarship with a Christian world view is paramount. The relevance of this is bolstered by current challenges in liberal democracies regarding the marginalising of religion in many spaces within the public domain, not least at many of the public universities. To address such challenges, this article argues in support of Christian communities of legal scholarship against the background of substantively Christian theological approaches. Consequently, this article aims to advance not only the Christian legal scholar's right to freedom of religion in the activity of legal scholarship, but also Christian legal scholarship in general. The relevance of this for Christian scholars in disciplines other than those pertaining to legal scholarship is not excluded.

INTRODUCTION

Stephen Young, reflecting on his working relationship with the prominent legal scholar Harold Berman, refers to Berman's developing disenchantment with his faculty colleagues because of their disinterest in questions on the meaning and purpose of legal institutions and the source of justice.¹ Young also refers to the time when Berman confided in him that, after Berman had distributed a note amongst his colleagues in the faculty on the publication of his monograph titled *The Interaction of Law and Religion*, no congratulatory responses were forthcoming.² Berman's growing disenchantment because of his colleagues' apathy towards questions on meaning and purpose regarding legal education is symptomatic of the generally strict divide between church and state in academic circles in liberal democracies. Of interest is that, irrespective of this strict divide between church and state, there are numerous persons who identify as Christians and the halls of academia in such democracies are, in many instances, occupied by those ascribing to a religious belief.³ Robert Vischer, referring to the current context of legal practice in Western society, comments that the attorney's relationship with the client is comprised of a relationship with the law that is far distanced from a space where the conscience can flourish.⁴ Similarly, and as qualified in this article, many legal scholars who label themselves as Christian find themselves (knowingly or unknowingly) within such a disconnected space of legal scholarship where the conscience struggles to flourish. What is the Christian legal scholar to do who is caught up between an ethos in the work environment that

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¹ Stephen B Young, 'Founding the *Journal of Law and Religion*: A Reflection Forty Years On' (2023) 38(2) *Journal of Law and Religion* 183, 185.

² Ibid.

³ Steven D Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140(1) *University of Pennsylvania Law Review* 149, 175 ('The Rise and Fall of Religious Freedom').

⁴ Robert Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (Cambridge University Press, 2010) 269.

is not conducive to religious expressions (albeit being frequently subtle and indirect) and that of a conscience that seeks a convictional (in a religious sense) approach? Contemplating the dilemmas confronting the Christian scholar in liberal democracies where there is generally a disconnect between religious expressions and public spaces resting beyond the family and church, Steven Smith presents a range of questions, namely:

So, what is the Christian academic to do? Check his or her faith at the door upon entering the office or the classroom? Attempt to sneak disguised Christian truths into his or her scholarship, or to translate those truths (likely in diluted or distorted form) into some more acceptable academic vocabulary — Kantian, maybe, or Rawlsian, or Marxist? Openly present his or her religious perspectives, in defiance of academic conventions and expectations, and thereby risk marginalization or even denial of tenure? These also are difficult questions. How is the Christian academic to answer them?⁵

In a later publication, Smith responds: ‘Aren’t people of faith supposed to make a choice? To take a stand?’⁶ Surely, for the legal scholar, the option of taking a stand resonates with living up to one’s foundational convictions, and surely, a logical extension of this is to firstly, consult scholarship on what taking a stand for one’s faith in the exercise of scholarship should entail. With this in mind, this article aims to contribute to scholarship related to the advancement of the Christian scholar’s religious convictions by arguing in support of legal scholarship against the background of community (association) and which includes a substantive theological dimension.⁷ Before making a case for such advancement, it is important to set the scene by uncovering the challenges confronting the protection of freedom of religion. An awareness (or reminder) of such challenges also serves to bolster the importance of arguments in support of the promotion of community in legal scholarship pertaining to the Christian scholar, also against the background of an essential overlap with Christian theology.

THE MARGINALISING OF RELIGION

William Stuntz, in reviewing a book titled, *Christian Perspectives on Legal Theory*, responds with much respect for the book’s authors being Christian law professors who expressed joy in writing on law without feeling restricted by the former in order to mention the latter. In this regard, Stuntz states: ‘imagine telling women they must pretend they are men, or African Americans that they must think and talk white, when entering into conversations about politics or law’.⁸ In other words, community with those who share the same fundamental interests or ontology forms part of what it means to practise one’s religion freely, and the same therefore applies to the Christian legal scholar who practises his or her scholarship with likeminded legal

⁵ Steven D Smith, ‘One Step Enough’ (2020) 47(2) *Pepperdine Law Review* 549, 555 (‘One Step Enough’).

⁶ *Ibid* 557.

⁷ *Ibid*. And here the caveat that in no manner should this imply the irrelevance of scholarly practices beyond that of community (or association), and that we should bear in mind Richard Niebuhr’s cautionary view that ‘[t]he conclusions at which we arrive individually in seeking to be Christians in our culture are relative in at least four ways. They depend on the partial, incomplete, fragmentary knowledge of the individual; they are relative to the measure of his faith and his unbelief; they are related to the historical position he occupies and to the duties of his station in society; they are concerned with the relative values of things’: Richard Niebuhr, *Christ and Culture* (Harper & Row, 1951) 234. These insights by Niebuhr should also be viewed as promoting ongoing debate and scholarship on the theme of ‘Christian scholarship’, something which this article also endeavours to do.

⁸ William J Stuntz, ‘Book Review: Christian Legal Theory’ (2003) 116(6) *Harvard Law Review* 1707, 1712.

(and other) scholars.⁹

Alasdair MacIntyre comments that

[m]an is in his actions and practice, as well as in his fictions, essentially a storytelling animal. He is not essentially, but becomes through his history, a teller of stories that aspire to truth. But the key question for men is not about their own authorship; I can only answer the question ‘What am I to do?’ if I can answer the prior question ‘Of what story or stories do I find myself a part?’¹⁰

George Marsden comments that ‘scholars, as is the case with everyone else, depend on communities, and therefore, if like-minded scholars do not form their own sub-communities, then they will be dependent entirely on already existing communities’.¹¹ Also, the family, church, and the sub-communities of Christian scholars, says Marsden, can play vital supporting roles bearing in mind the importance of communal worship, fellowship, intellectual camaraderie, as well as simple caring.¹² However, the associational dimension regarding the exercise of religious interests is plagued by numerous challenges.

Liberal democracies no longer find themselves within a context where, for example, the statesman, lawyer, and writer, Thomas More (1478–1535) lived; a time, says Steven Smith, in which every important event during one’s life was marked by ecclesiastical ritual, which included the sacraments (baptism, marriage, and the Mass).¹³ Smith observes that for Thomas More, it was Christianity that influenced the conscience, whilst for the fourth president of the United States, namely James Madison (1751–1836), it was the conscience that influenced Christianity,¹⁴ the latter understanding enjoying much popularity today. In the words of Smith,

Madison could affirm, ‘I must do what (I believe) God wants me to do’. But the emphasis is subtly shifting from an accent on ‘God’ to an accent on the ‘I’. ‘I must do what (I believe) *God* wants me to do’ is becoming ‘I must do what *I believe*

⁹ Although not part of the focus of this article, it suffices to mention the plethora of scholarship dealing with the importance and autonomy of associational structures within society. Also related to this is scholarship on major themes such as the principle of subsidiarity and the principle of sphere sovereignty. The principle of, for example, sphere sovereignty accentuates the attributes of a societal entity being of a solidary unitary character, as well as having a permanent authority structure; examples of which are faith communities, the family, a firm, social club, language association, and academic institutions. Each of these societal entities have a foundational function (purpose) unique to itself and no single sphere-sovereign societal entity should be subordinated to such a whole. See Danie Strauss, ‘A Philosophical Approach to Law and Religion: Background Considerations’ in Pieter Coertzen, M Christian Green, and Len Hansen (eds), *Law and Religion in Africa: The Quest for the Common Good in Pluralistic Societies* (African Sun Media, 2015) 379, 382–4.

¹⁰ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Gerald Duckworth, 1981) 216.

¹¹ George M Marsden, *The Outrageous Idea of Christian Scholarship* (Oxford University Press, 1997) 101.

¹² *Ibid* 107. Irrespective of the high level of relegation of religion to the private sphere, there is a large degree of authority and influence that remains in the broader Christian community; a fact that is rather uplifting. Thomas Bender states that: ‘The privatization of belief is not the same as its dissolution. Our private belief is not diminished by being disestablished. They are relocated and shorn of formal authority, but they are not isolated from public culture. As our daily experience reveals, private beliefs contribute to the making of a particular thinking self that offers an individual and distinctive contribution to the public discussion of scholarship’: Thomas Bender, ‘Putting Religion in Its Place’ (1994) 3(3) *CultureFront*, quoted in Marsden (n 11) 51.

¹³ Steven D Smith, *The Disintegration of the Conscience and the Decline of Modernity* (University of Notre Dame Press, 2023) 40–1, 121–2 (‘*The Disintegration of the Conscience*’).

¹⁴ *Ibid* 126, 173.

(God wants me to do)'.¹⁵

This shifting of the emphasis from 'what God commands' to the autonomy and liberty of the individual would strengthen in the West over the 20th and into the 21st century.

Liberal democracies abound with a combination of challenges and critiques about the inclusion of religious practices in the public domain.¹⁶ Related to this is a popular attitude confirming what John Senior refers to as the failure to 'raise our eyes, minds and hearts up to the stars, to the reasons for things, and beyond'.¹⁷ Similarly, Robin Collingwood comments that

[o]urs is an age when people pride themselves on having abolished magic and pretend that they have no superstitions. But they have as many as ever ... So it is a special characteristic of modern European civilization that metaphysics is habitually frowned upon and the existence of absolute presuppositions denied.¹⁸

Compare this to, for example, the Medieval period where

men's single objective was the assurance of heaven and escape from hell. Life was an angry river into which men were cast. Demons were on every hand to drag them down. The only aim could be, with God's help, to reach the celestial shore. There was no time to consider whether the river might be made less dangerous by concerted effort, through the deflection of its torrents and the removal of its sharpest rocks. No-one thought that human efforts should be directed to making the lot of humanity progressively better by intelligent reforms in the light of advancing knowledge. The world was a place to escape from on the best terms possible.¹⁹

The context within which the West finds itself today is far removed from these convictions directed at God and the urgency in seeking inclusion in God's Kingdom (even pertaining to activities related to scholarship!). The non-religious ethos that permeates especially public spaces in liberal democracies, including the judiciary as well as schools and public universities, bolsters the relegation of the Christian religion to the background. The strangeness and circumspection with which explicitly Christian terminology is met with in especially prominent

¹⁵ Ibid 126–7.

¹⁶ This also relates to themes on the separation of rationality and religion, the fragmentation of law, the dominance of law as well as of *techne* over *telos*, and the removal of religion from public education. In this regard, see, eg, Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (Encounter Books, 2016); Patrick Deneen, *Why Liberalism Failed* (Yale University Press, 2018); Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books, 1993); George Grant, *Technology and Empire* (House of Anansi Press, 2018); Christopher R Dawson, *The Crisis of Western Education* (Catholic University of America Press, 2010). There are of course numerous other sources in this regard, also spanning various disciplines such as law, political theory, education, theology, and sociology.

¹⁷ John Senior, *The Death of Christian Culture* (IHS Press: 2008) 100, 126–7.

¹⁸ Robin Collingwood, *An Essay on Metaphysics* (Clarendon Press, 1940) 46. Collingwood adds '[i]n my own experience I have found that when natural scientists express hatred of "metaphysics", they are usually expressing this dislike of having their absolute presuppositions touched': at 44. Collingwood, referring to the present age, also comments that 'the very possibility of metaphysics is hardly admitted without a struggle, and when, even if its possibility is admitted, its importance as a *conditio sine qua non* of science and civilization is almost universally denied', 224.

¹⁹ James Robinson, *The Mind in the Making: The Relation of Intelligence to Social Reform* (Harper & Brothers, 1921) 137–8.

public spaces such as public universities, national as well as international media platforms, and political events, is everywhere.²⁰ Added to this is that, irrespective of proclamations of inclusivity and tolerance within a public university regarding research initiatives, projects, and related structures, it frequently comes to light that, on closer investigation, these initiatives, projects, and related structures exemplify a loyalty to schools of thought that may not be conducive to religious views. This explains Steven Smith's asking whether, if it is permissible for scholars to take for example, Lockean, Marxist, or Freudian approaches to their subjects, why should it not be permissible to take an unapologetically Christian approach?²¹ How outlandish would it appear to a diverse audience in today's public domain (including the public university) to proclaim, for example, that justice should be understood as demanding the worshipping of the true God,²² or that scholarship should be viewed as primarily glorifying God, or that the meaning of life should be primarily understood as entailing service to God? This also pertains to, simply put, the absence of references to God as well as the inclusion of theology in disciplines such as law in our public universities.²³

James White points to what he refers to as a peculiar division between academic and religious thought in that we, in the academic world, lean towards communicating in a manner that assumes an encompassing rationality.²⁴ This aligns with an underlying threat, as pointed out by Stephen Carter, that those whose morality overlaps with their religious beliefs are welcomed into public debate on condition that they speak the same language as everyone else;²⁵ the language of the so-called 'rational'.²⁶ It is no wonder that even theologians are tempted to transform a theological language into a language agreeable to everyone. Stanley Hauerwas comments that the more theologians seek to find the means to translate theological convictions into terms acceptable to the non-believer, the more they substantiate the view that theology has

²⁰ References to for example: God, God the Father, God the Son, God the Holy Spirit, The Trinity, Jesus Christ, the Holy Spirit, salvation, Saviour, the Bible, Scriptures, sacred, idolatry, sin, depravity, heaven, worship, the devil, demons, angels, the soul, righteousness, blasphemy, regeneration, holiness, the wrath of God, creation, the rising of the dead, Covenant, repentance, Ten Commandments or the Decalogue, prophet, rising from the dead, evil, ascension into Heaven, eternal damnation, redemption, hell, and eternal life.

²¹ Smith, 'One Step Enough' (n 5) 557. Stephen L Carter, 'The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law' (1990) 69 *Oregon Law Review* 471, 523 ('Lecture Two'). Carter similarly states that '[i]t is relatively easy for well-educated liberals to scoff at the idea that God's will is relevant to moral decisions in the liberal state, but the citizen who is religiously devout might ask why John Rawls' will ... or, for that matter, the will of the Supreme Court of the United States is more relevant to moral decisions than God's. Opinions abound and emanate from foundational beliefs whether religious or not. And so far, at least, I do not think that liberal theory has presented an adequate answer': Carter, 'Lecture Two' (n 21) 523. Also see Richard Neuhaus, 'A New Order of Religious Freedom' (1992) 60(3) *George Washington Law Review* 620, 621. According to Stephen L Carter, 'The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law' (1990) 69(3) *Oregon Law Review* 471, 480 ('Lecture One') 'no major liberal theorist dissents – that none of the fundamental principles of liberal reasoning can be justified without looking outside the principle itself'.

²² Smith, *The Disintegration of the Conscience* (n 13) 121.

²³ Something similar to what Jeremy Waldron says of his experiences as a scholar, namely, '[i]n the circles in which I move, it is not infrequently asserted that secular morality, secular ethics, secular conceptions of human rights, and secular jurisprudence can all get by perfectly well on their own without any input from religion ... They can do it all on their own by reading and rereading Aristotle, Immanuel Kant, Jeremy Bentham, and John Rawls, or by the logic of their own considered judgments and intuitions or those of their friends ...': Jeremy Waldron, 'The Injury Done by Christian Silence to Public Debate over America's Use of Torture' (2008) 2(1) *Journal of Law, Philosophy & Culture* 3–4.

²⁴ Smith, 'The Rise and Fall of Religious Freedom' (n 3) 173.

²⁵ Carter, 'Lecture One' (n 21) 492–3.

²⁶ *Ibid* 490.

little of importance to say in the area of ethics.²⁷ One can therefore understand the powerful influences on the Christian legal scholar at the public university to write and speak in a language that aims at being agreeable to everyone. This can especially be challenging in the areas of human rights; the relationship between law, religion, and the state, and stemming from this, scholarship on the advancement of the protection of religious rights and freedoms.

According to Stephen Carter, our theories of religious freedom are not theories about religion, but rather theories about the State and its needs, and where the judiciary typifies this partisanship. Although judges are called upon in the final instance, the fact is that they are affiliated to the State, so what matters most are the interests of the State.²⁸ This, according to Carter, is the problem pointed out also by the Critical Legal Studies scholars and the Legal Realists before them, namely that the judges ‘are not (despite what we tell our students) a *check on the state* – they are a *part of the state*’.²⁹ In this regard, says Carter, rights are understood as emanating from the State. This specifically relates to matters before courts that relate to freedom of religion. Carter states that if the religious freedom claimant loses, it is because the State’s interest is too strong — not because religion’s interest is too weak. Referring to the Alaska Supreme Court judgment of *Swanner v Anchorage Equal Rights Commission*,³⁰ Carter asks what a fair-minded court was to weigh (and against what else) in deciding whether the State’s interest in protecting unmarried couples from discrimination is sufficiently compelling to trump the religionist’s interest in following God’s ban on allowing fornication?³¹ The State leans on God when it suits the reigning non-religious ideology of the day. In this regard, Carter asks whether there really is ‘a defensible difference in motivation between the statements, “[o]ppression of black people is contrary to God’s will” and “[k]illing of foetuses is contrary to God’s will”’.³² With reproductive rights included in the ideologies dominating the public spaces of liberal democracies (for example, the public university and school), God will most certainly not be cited as the authority on the protection of reproductive rights, but most certainly regarding views against racism. All of these refer to the embeddedness of an ethos that is unfavourable towards the protection of religious interests in the public domain,³³ including the religious convictions of the Christian legal scholar. There is, in other words, an instrumental and rhetorical use of religion/religious terms when it suits the preferred argument and its omission when it does not.

The Christian legal scholar may find it very challenging to navigate within such tempestuous contexts, where the pull towards writing in a language conducive to public universities and the civil authorities (including the judiciary) may prove to be too strong to resist. The advancement of themes related to, for example, inclusivity, diversity, tolerance, accommodation, the rule of law, democracy, transformation, equality, and public interest, become ends in themselves and

²⁷ Stanley Hauerwas, *The State of the University: Academic Knowledges and the Knowledge of God* (Wiley-Blackwell, 2007) 69.

²⁸ Stephen L Carter, *God’s Name in Vain: The Wrongs and Rights of Religion in Politics* (Basic Books, 2000) 168.

²⁹ Stephen L Carter, ‘Religious Freedom as if Religion Matters: A Tribute to Justice Brennan’ (1999) 87(5) *California Law Review* 1059, 1066–7 (‘Religious Freedom as if Religion Matters’).

³⁰ *Swanner v Anchorage Equal Rights Commission*, 874 P 2d 274 (Alaska, 1994). The Court held that the State’s interest in preventing discrimination against unmarried heterosexual couples is sufficiently great to trump the objections of landlords who believe they are forbidden by God to permit ‘fornication’ on their property: Carter, ‘Religious Freedom as if Religion Matters’ (n 29) 1072.

³¹ Carter, ‘Religious Freedom as if Religion Matters’ (n 29) 1072.

³² Carter, ‘Lecture Two’ (n 21) 508.

³³ With due regard that not all Christians regard themselves as members of, to put it simply, the pro-life camp.

it is (directly or indirectly) expected from the legal scholar to remain within the ideals and expectations of a consensually orientated reasoning when practising legal scholarship. Implied in this is the exclusion of anything theological. Similarly, academic topics related to race, equality, gender, class, reproductive rights, and human dignity are viewed as separate from religion, missing the point that ideas on these emanate from foundational beliefs such as religious beliefs. A perusal of many of the law journals in liberal democracies points to a language in legal scholarship that excludes anything theological, and the same can be said regarding conference themes on law. Challenges that the Christian legal scholar may be confronted with from a belief or conscience point of view should not be underestimated. In this regard, and also against the background of the general challenges sketched earlier on, confronting the Christian legal scholar in a society where religion finds it difficult to flourish in the public sphere, the focus of this article moves to possibilities related to the interplay between legal scholarship, community, and Christian theology, in order to advance the Christian legal scholar's right to freedom of religion.

COMMUNITIES OF LEGAL SCHOLARSHIP AND CHRISTIAN THEOLOGY

This section approaches Christian legal scholarship from a community (or associational) angle based on a substantive overlap with theology. It is not disputed that there are many roads that lead to insights in this regard. In fact, it is argued that scholarship on these very matters should never be regarded as final; rather, it should be understood as being continuous. In what follows, there are some pointers to understand the community and substantive theological dimensions of Christian legal scholarship.

George Marsden comments that '[k]eeping within our intellectual horizons a being who is great enough to create us and the universe, after all, ought to change our perspectives on quite a number of things'³⁴ and 'if one puts the doctrine of a creator into the picture it will substantially change how one thinks about such issues as human rights and moral principles'.³⁵ So, to begin with, a true awareness of God and His magnitude is bound to change perspectives on many matters, and this awareness relates also to the desire to obey God.³⁶ This is also revealed in what Richard Niebuhr refers to as the virtue of love in Jesus' character, which is the virtue of the *love of God and of the neighbour in God*, not the virtue of the love of love.³⁷ In this regard, love, to be sure, is characterised by what Niebuhr refers to as 'a certain extremism in Jesus'. This extremism is one of devotion to the one God, uncompromised by love of any other absolute good. Therefore, says Niebuhr 'the love of God in Jesus' character and teaching is not only compatible with anger but can be a motive to it, as when he sees the Father's house made into a den of thieves'.³⁸ The Synoptic Gospels are clear on the understanding that Jesus emphasised faith in God and humility before Him much more than love.³⁹ Consequently, says

³⁴ Marsden (n 11) 4.

³⁵ Ibid 88.

³⁶ According to John Calvin, 'the principal requisite to understanding is piety and the earnest desire to obey God', John Calvin, *Commentaries on the Gospel according to John*, Ch 7 ¶ 17, tr William Pringle (1948) cited in William S Brewbaker III, 'Theory, Identity, Vocation: Three Models of Christian Legal Scholarship' (2009) 39(1) *Seton Hall Law Review* 17, 29.

³⁷ Niebuhr (n 7) 16.

³⁸ Ibid.

³⁹ Ibid. Niebuhr further explains '[t]he tendency to describe Jesus wholly in terms of love is intimately connected with the disposition to identify God with love. Fatherhood is regarded as almost the sole attribute of God, so that when God is loved it is the principle of fatherhood that is loved': at 16–17. Niebuhr disagrees that Jesus practices and teaches a double love, namely, of the neighbour and of God, and says that Jesus' ethics focuses on 'God, the

Niebuhr, ‘if the nature of this virtue in Jesus is to be understood, some attention must be given to his theology’,⁴⁰ and therefore the Christian legal scholar has all the more reason to be interested in theology. Similarly, the awareness of God alluded to earlier is to be intertwined with an urgency in reading the Bible (as a whole) and relates to a category of Christians whom James Barr depicts as ‘a great central body of people in the churches who attribute a high status and authority to the Bible’ (albeit being, says Barr, a body of people also ‘suffering a considerable uncertainty about this’).⁴¹

Building on this is Michael Welker’s suggestion of an understanding of a Christian theology that can have an impact on law as being comprised of an academically embedded and controlled theology, pursued by well-educated professionals, a theology invigorated by the ethos, the pathos, and the agreed practices of truth-seeking communities.⁴² More specifically, this includes the search for rational, consistent, and scripturally bound theological insight and entails the gathering of the academy, the canon, and truth-seeking communities. This understanding should exclude a negative theology that claims the impossibility of knowing and speaking of God, and that we can only acknowledge God’s mysterious being; that God is unadorned transcendence.⁴³

According to Welker, a mere idea of God is insufficient in grounding theology and to present productive impulses to disciplines of the law. Rather, ‘God has to be conceived as a living eternal reality ...’⁴⁴ Although focusing on God’s spirit (or on God the Spirit), Christian theology also witnesses to the pre-Resurrection life of Jesus Christ, ‘which witnesses to the life-furthering diaconal, prophetic, and priestly powers here on earth — powers that are universally extended in the work of his Spirit after the Resurrection’.⁴⁵ Welker is of the view that God is interested in ‘righteousness being intended for humanity itself, and this bestowal should prompt humans in their own turn to be grateful to God and to practice justice and righteousness among themselves’.⁴⁶ However, adhering to an academically embedded and controlled theology is not an easy path to follow. Welker comments:

Father’ and the ‘infinite value of the human soul’. To do so, says Niebuhr, would be to forget ‘that the double commandment, whether originally stated or merely confirmed by Jesus, by no means places God and neighbour on a level, as if total devotion were due to each. It is only God who is to be loved with heart, soul, mind and strength ...’ According to Niebuhr, Jesus does not speak of worth apart from God; ‘The value of man, like the value of sparrow and flower, is his value to God ... Because worth is worth in relation to God, therefore Jesus finds sacredness in all creation, and not in humanity alone — though his disciples are to take special comfort from the fact that they are of more value to God than are the also valued birds’: at 17–18.

⁴⁰ Ibid 16.

⁴¹ James Barr, *The Bible in the Modern World* (SCM Press, 1973) 11. From the early 1960s onwards, says Barr, the intensely authoritative form of theology focusing on the centrality of revelation has considerably weakened: at 5. Barr adds that there is a lack of trust in the Bible as a whole and, included in this, a discreditation of ‘Hebrew thought’ (and, by implication, the Old Testament) as a guide to the coherence of the Bible: at 6. In the words of Barr (written already in 1973!): ‘The situation then is somewhat as follows. We have a great central body of people in the churches who attribute a high status and authority to the Bible, but who also suffer a considerable uncertainty about this, an uncertainty which has been increasing during the last ten or fifteen years, as the glow of the post-war biblical revival in theology has faded’: at 11.

⁴² Michael Welker, ‘What Could Christian Theology Offer to the Disciplines of the Law?’ (2017) 32(1) *Journal of Law and Religion* 46, 46. Welker’s topic is to be applauded for its express reference to ‘a Christian way of doing things’!

⁴³ Ibid 47.

⁴⁴ Ibid 48.

⁴⁵ Ibid 48–9.

⁴⁶ Ibid 49.

In the midst of a creation ... that despite certain features that do indeed attest to order and beauty is nonetheless incontrovertibly predatory, frail, and transient – in the midst of all this, extraordinary and remarkable counterforces are nonetheless at work: forces of compassion, mercy, and love; forces accompanying the search for truth and justice ... forces that direct us toward a life beyond the natural inclination for self-preservation. This whole package of insights does not only generate a theological realism, *it also invites an intimate partnership between religion and law, theological and legal thinking*, and their common radiation into everyday religious, legal, and moral orientation.⁴⁷

Also, associational activities regarding Christian legal scholarship should be viewed as an end in and of themselves; scholarship to be understood as a form of worship and as an integral part of the free exercise of religion. In this regard, there is the sharing of foundational convictions common to all the participants, hereby a bolstering of the activity of fellowship (*koinonia*) which is inherently theological.⁴⁸ Ultimately, there is the comfort that, in the words of Richard Niebuhr:

To make our decisions in faith is to make them in view of the fact that no single man or group or historical time is the church; but that there is a church of faith in which we do our partial, relative work and on which we count. It is to make them in view of the fact that Christ is risen from the dead, and is not only the head of the church but the redeemer of the world. It is to make them in view of the fact that the world of culture — man's achievement — exists within the world of grace — God's Kingdom.⁴⁹

How empowering these words by Niebuhr can be for the Christian legal scholar! The Christian legal scholar's contributions, even though partial and relative, belong to the church of faith and, in turn, exist within the world of grace which is God's Kingdom. Activities involving communities of Christian legal scholarship constitute theology in the sense of worship, praise, and glorification; a gathering of the faithful in intimate conversation with the Living Word. This, in turn, relates to activities that are in and of themselves an end; something ultimate, complete, and comforting; a free religious practice.

Zachary Calo observes that '[l]aw contains its own reason that transcends and ultimately judges the particularistic claims of theology'⁵⁰ and that secularism not only denotes 'the absence of religion, but is an ideology that furthers a normative account of the world'.⁵¹ Therefore, says Calo, what is required is the advancement of 'distinct and particularistic accounts of human rights that challenge the hegemony of the secular tradition'.⁵² This hegemony is accompanied by the understanding that law is an 'objective ontological reality', and it is this same problem, says Calo, that confronts human rights talk.⁵³ According to Calo, the cultivation of pluralism

⁴⁷ Ibid 51 (emphasis added).

⁴⁸ For example, Matthew 18:20 (KJV): 'For where two or three are gathered together in my name, there am I in the midst of them'.

⁴⁹ Niebuhr (n 7) 256.

⁵⁰ Zachary R Calo, 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85(2) *St John's Law Review* 495, 507.

⁵¹ Ibid 508-509.

⁵² Ibid 503.

⁵³ Ibid 517. This secular tradition emanating from the Enlightenment, says Calo, 'is but one' historically contingent tradition among many, not the tradition to end tradition': at 515.

regarding human rights should not only take place within law, but also ‘within our approach to the construction of legal meaning’.⁵⁴ What is required is a shift ‘of focus from the universal to the particular’, including religious traditions, as well as the replacement of a universal logic with a theological one. Implicated in this is an invitation to religious communities ‘to participate in discourse on human rights and human goods without starting from a secular premise’.⁵⁵

Calo is of the view that ‘the constructive development of religious legal theory’ must take as its point of departure ‘the captivity of legal theory to the secular norms of modernity, particularly the idea of law as grounded in an autonomous moral logic’.⁵⁶ All of this, says Calo, ‘entails a critical yet constructive engagement over the nature of the human person’ (as well as his or her freedom). It is also religious communities or traditions that hold unique views on the meaning of the human (and his or her freedom) that should be central ‘to contests over the meaning and content of human rights norms’.⁵⁷ Implicated in these views by Calo is support for the relevance of Christian scholars also interacting with one another on matters related to law, and doing so within a Christian theological context. But doing so should not carry the implication that the Christian legal scholar should refrain from participating in scholarly domains that include a diversity of belief-commitments.

The associational dimension of Christian legal scholarship against the background of a substantive theological base also goes deeper than the ‘individual-versus-state paradigm’ regarding the relationship between law and conscience. In this regard, Robert Vischer comments that although the moral authority employed by conscience is substantively personal, it is not self-contained.⁵⁸ If law is to represent our concern for conscience, says Vischer, then it also needs to signify concern for the associational aspect which represents shared moral commitments.⁵⁹ For religious believers, conscience is substantially a product of truth claims that stem from a tradition of faith,⁶⁰ also bearing in mind that normative conversations within communities do not take place primarily through law or politics.⁶¹ This means that the state must respect that part of the common good that is not defined by the collective will and that the state’s self-restraint in this regard promotes an understanding of the common good as something that materialises from the bottom up, instead of being imposed downwards onto society by the state.⁶² Vischer adds that

[b]y providing a collective voice to sentiments that likely would go unheard if left to be expressed by an individual standing alone, associations serve as a megaphone for members’ most deeply held beliefs and opinions, including, of course, the moral convictions that make up conscience.⁶³

⁵⁴ Ibid 504.

⁵⁵ Ibid 510.

⁵⁶ Ibid 516.

⁵⁷ Ibid 513.

⁵⁸ Vischer (n 4) 23, 78, 80–1.

⁵⁹ Ibid 71–2.

⁶⁰ Ibid 76.

⁶¹ Ibid 95.

⁶² Ibid 103. This understanding is of course accompanied by the caveat that such self-restraint cannot be absolute due to the common good necessitating a degree of social justice that only the state authority ensure.

⁶³ Ibid 134.

Specific examples of what associational activities related to Christian legal scholarship with a substantive theological angle should be are the following: Although there are a number of academic events such as conferences on law and religion that cater for a wide spectrum of religions and beliefs, the Christian legal scholar should pursue the advancement of academic events that exclusively cater for matters related to Christian theology and law. The same applies to the expansion of scholarly journals, magazines, and related electronic platforms that focus on the sharing of insights specifically pertaining to Christian theology and law (including efforts at contributing to already existing scholarly platforms that focus on Christian theology and law). Christian legal scholars should be both innovative in finding ways in which interaction between themselves and Christian communities, associations, and members of civil society can take place and here leverage could be gained through what is regarded by many institutions of higher learning as an integral facet to being an academic, namely that of scholarship of engagement. Although prone to be a challenging exercise, the establishment of team research initiatives as well as the creation of units or centres at public universities that specialise in ‘Christianity and law’ should also enjoy attention.

Scholarship resultant from these activities should include discussion on what an approach emphasising Christian theology itself should entail, also bearing in mind theology as related to significant themes such as philosophy, natural law, logic, and reasoning. As alluded to earlier, such discussion should be of a continuous nature. Scholarship on Christian approaches to legal scholarship also should be the focus, with the aim of, for example, critical analysis and advancement of existing thought on the topic. Then there is also the inter-disciplinary avenue, which, for example, allows for collaboration between those who are jurists by vocation and those who are either theologians, sociologists, or political scientists by vocation. Christian associational practices can also include discussion on ways in which the Christian legal scholar should deal with the various forms of limitation (or threats thereof) that the practising of his or her theologically inclined legal activities may attract. Participation of small numbers should not be avoided, and the mere realisation of association should be viewed as an end in itself.⁶⁴ This by no means should imply that communities of Christian legal scholarship with a strong theological component should exclude scholarship that aims to provide a more consensual approach also on major topics directed at, for example, socio-economic and humanitarian challenges.

It is also important that the Christian legal scholar be aware of attractive avenues leading to increased outputs and accompanying accolades, but which may result in an abandonment of her religious convictions in the process. William Brewbaker warns against the scholar’s tendency to ‘self-love’ reflected in the scholar’s focus on his or her individual reputation, also being constantly tempted to channel his or her work towards ends related to prosperity instead of loving God and others.⁶⁵ Practices related to legal scholarship within the Christian associational paradigm which includes the theological element can also assist in nurturing the Christian legal scholar’s awareness and consequent cautioning against such unwanted influences. These are but a few pointers towards understanding Christian community related to legal scholarship with a strong theological component. These pointers should also serve as a catalyst towards further unpacking and elaboration within practices of Christian community in legal scholarship.

⁶⁴ Here, for example, Matthew 18:20 (KJV) again comes to mind: see above n 48.

⁶⁵ Brewbaker (n 36) 58.

CONCLUSION

Christian views related to matters on political, moral, and legal issues (which includes the overlap of these with one another) find themselves inhabiting the same limited space with the impossibility of escape. The Christian legal scholar is caught in a maelstrom of foreignness and is highly likely to be nudged into conforming to the existing dominant narrative, which in turn can have dire implications for the Christian scholar's right to freedom of belief (and of the conscience). Nicholas Wolterstorff, referring to the 19th century English poet Gerard Manley Hopkins' introduction of the term 'inscape' into the English language, explains that

[w]hat Hopkins called the inscape of thing was its distinctiveness — the distinctiveness of a particular tree, for example, of a particular melody, of a particular ploughed field. He writes of the grief he felt when a tree in his garden was cut down and its inscape destroyed.⁶⁶

Similarly, this article seeks the protection of the inscape of the Christian legal scholar (and Christian scholars in other disciplines as well). In doing so, it is not the aim of this article to delve deeply and expansively into the terrain of specific theological (and philosophical) arguments on what the Christian's approach to legal scholarship should be, with due cognisance of the broad variety of views past, present, and future.⁶⁷ Having said this, this article argues that more be accomplished regarding legal scholarship from within the confines of community and a Christian theology, something that is in and of itself, qualified by a Christian theology.

⁶⁶ Nicholas Wolterstorff, 'John Witte, Jr's Contributions to the Study of Human Rights and Religious Freedom' in Rafael Domingo, Gary S Hauk, and Timothy P Jackson (eds), *Faith in Law, Law in Faith: Reflecting and Building on the Work of John Witte, Jr* (Brill, 2024) 52, 52.

⁶⁷ Brewbaker (n 36) 54.