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MISSION POSSIBLE: A PARADIGM FOR ANALYSIS OF CONTRACTUAL IMPOSSIBILITY AT REGENT UNIVERSITY

C. SCOTT PRYOR*

INTRODUCTION

The ways in which the members of the Association of the Religiously Affiliated Law Schools (ARALS)¹ seek to fulfill their missions will be as varied as the missions themselves.² Within each of these institutions there will likely be at least several approaches by which its mission can be fulfilled. And within

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¹ The Association of the Religiously Affiliated Law Schools (ARALS) had its genesis when Marquette Law School hosted the First Conference of Religiously Affiliated Law Schools in March of 1994. See Steven M. Barkan, *The First Conference of Religiously Affiliated Law Schools: An Overview*, 78 MARQ. L. REV. 247 (1995).

² The following selections from the mission statements of several ARALS member schools:

[St. John's University] commit[s itself] to academic excellence and the pursuit of wisdom which flows from free inquiry, religious values and human experience. We strive to preserve and enhance an atmosphere in which scholarly research, imaginative methodology, global awareness, and an enthusiastic quest for truth serve as the basis of a vital teaching-learning process and the development of lifelong learning.

About the University (visited Feb. 4, 2001) <<http://www.stjohns.edu/about/mission.html>>; *The Mission of Pepperdine University* (last modified Apr. 2, 1999) <<http://www.pepperdine.edu/misc/mission.htm>> ("Pepperdine is a Christian university committed to the highest standards of academic excellence and Christian values, where students are strengthened for lives of purpose, service, and leadership."); *Our Mission* (visited Feb. 4, 2001) <<http://www.nd.edu/%7endlaw/textversion/mission.html>> ("Notre Dame is a Catholic law school dedicated to the integration of reason and faith in the study of law and committed to developing Judeo-Christian principles within systems of jurisprudence."); see also Barkan, *supra* note 1, at 250-54 (summarizing presentations at the First Conference of Religiously Affiliated Law Schools by ten faculty members on their views of the missions of various religiously affiliated law schools).

each of these approaches, the particular faith communities and personal endowments of the individual members of the faculty of each institution will play a decisive role. While it is not likely that a single mode can be prescribed for one institution, each member of the faculty should undertake to define a means by which the mission of that school can be achieved and then apply it to the subjects he or she teaches.

The mission statement of the Regent University School of Law is nothing if not straightforward. The Law School's mission is to bring to bear the will of our Creator, Almighty God, upon legal education and the legal process. In particular, this mission includes:

1. The education and training of students to become excellent lawyers within the standards of the legal profession.
2. The grounding of students in biblical foundations of law, legal institutions, and processes of conflict resolution; recognition of questions of righteousness in the operation of law; and pursuit of true justice through professional legal service.
3. The nurturing and encouragement of students to become mature Christians who exercise the gifts of the Holy Spirit and display the fruit of the Holy Spirit in their personal and professional lives.
4. The nurturing and encouragement of other law students, practicing lawyers, judges, legislators, government officials, educators, and others to recognize and to seek the biblical foundations of law, legal institutions, and the processes of conflict resolution; to recognize questions of righteousness in the operation of the law; and to pursue true justice through professional legal service.³

This article will analyze the aspiration of the preamble, biblical integration, and the second of the four specific elements of the mission—theologically informed historical development of the foundations of the law.⁴

While its mission statement contains strong imperatives, the Law School has never prescribed a single means by which the

³ *Mission Statement* (visited Apr. 9, 2001) <<http://www.regent.edu/acad/schlaw/welcome/mission.html>>.

⁴ This limited focus should not be understood to reflect a de facto prioritization of the ambitions of the Law School. The other goals reflected in the mission statement are of equal value but will not be dealt with in this article.

faculty should implement it. Regent University has its own broader mission statement.⁵ As with the Law School, the University has never dictated a particular pedagogy. The lack of a unifying model for the integration of faith and learning concerned the Board of Trustees of the University. Thus, in 1996 the Academic Council⁶ of the University appointed the Faith and Learning Integration Committee (FLIC) to develop and promulgate models by which the distinctively Christian foundations of the University could be related to the content and manner of instruction.

Over the course of six months, the FLIC Committee surveyed the faculty of the University to determine how its members were implementing its mission. The results of this effort were collated and eventually published as the *FLIC Typology Report: The Report of the Typology Subcommittee* ("FLIC Report").⁷ The nine models of faith integration at the

⁵ The Vision and Mission Statement of Regent University is:

Regent University is a graduate institution that exists to bring glory to God the Father and His Son Jesus Christ through the work of the Holy Spirit. Our mission is to provide an exemplary education, from a biblical perspective, leading to graduate degrees for aspiring servant-leaders in pivotal professions, and to be a leading center of Christian thought and action.

Vision and Mission Statement of Regent University (visited Feb. 4, 2001) <<http://www.regent.edu/acad/detail.html>>. The integrity of Regent University as a Christian institution of higher learning rests in large part on its adherence to this Mission Statement and its underlying philosophy in word and deed.

⁶ The Academic Council exercises overall supervision of the academic affairs of Regent University. The Academic Council is composed of the provost, academic deans, dean of the university libraries and information services, director of the law library, associate deans, the registrar, the director of institutional effectiveness, the administrative assistant to the provost, and a representative from the Faculty Senate.

⁷ See Faith and Learning Integration Committee ("FLIC") Typology Report: The Report of the Typology Committee: Joseph N. Kickasola, Chairman, Mary Scarlato, and Cliff Kelly, to the FLIC, Ralph Miller, Chairman (on file with the author). For an online summary of the FLIC Report, see *Regent University's Nine Models of Faith Integration* (visited Feb. 6, 2001) <<http://www.regent.edu/admin/cids/faithmodel.htm>>. The FLIC Report concluded that all of the models of faith integration at the University fell into one or more of nine categories: (1) the Student-Directed Focus in which the students do any biblical integration; (2) the Spontaneous Focus, where biblical integration flows spontaneously from the instructor's personality and any medium of education; (3) the Devotional Focus—an approach to substantive integration initiated by the instructor's use of devotional time before class instruction begins; (4) the Textbook Focus, where integration is carried out through a Christian textbook or the Bible used as the textbook; (5) the Christian Professional Focus, where biblical integration is carried out by means of

University fell into two categories: (1) substantive integration of biblical teachings with the subject of the class, and (2) character development of the student. The *Regent University Law Review* has already published a summary and application of the character development category of the FLIC Report to the curriculum at the Law School.⁸

This article will not reiterate either the substance of the FLIC Report or the applications described in the already published law review article. It will instead focus on two open issues. Part I will consider the realization of the mission statement, taking into account the FLIC Report. It concludes that one of the models described in the FLIC Report—the Institutes Focus—is particularly appropriate to the common law subjects in the Law School curriculum, e.g., torts, property, and contracts, but requires some amplification to take into account all of the appropriate perspectives on these subjects.⁹

Part II will describe the additional refinements as a three-dimensional paradigm. This paradigm takes into account the primary authority of biblically generated teachings, while acknowledging the weight of the Catholic faith tradition as well as the perspectives of the current community of legal scholars. A multi-dimensional paradigm represents a balanced way to realize the goals of the mission statement. The faculty of the Law School will never achieve its stated mission unless they take seriously both the explicit assertions of Scripture and use the additional sources of authority that Scripture validates. Failure to grapple earnestly with Scripture amounts to a concession to the claims of modernity to human autonomy. Reticence to work within the traditions of the Christian church

the instructor's own analysis and writings; (6) the Experiential Focus in which the students perform spiritual exercises in class; (7) the Lexical Focus, where students engage in biblical integration through word studies using concordances; (8) the Institutes Focus in which biblical integration is conceived of as a systematic, prophetic use of authority, revelation, and crucial principles; and (9) the Moral Formation Focus, where the primary emphasis is on the cultivation of Christian virtue in the students. *See id.*

⁸ See Mary C. Scarlato & Lynne Marie Kohm, *Integrating Religion, Faith, and Morality in Traditional Law School Courses*, 11 REGENT UNIV. L. REV. 49 (1998-1999). This article emphasizes those models from the FLIC Report dealing with character formation rather than substantive biblical integration.

⁹ The paradigm described in this article should also be appropriate to other legal subjects, but the historically-rooted nature of the common law makes it easier to relate it to such subjects.

identifies the production of the faculty with personal subjectivity. And reluctance to come to grips with the manifold insights of modernity (and postmodernity) leads only to the backwaters of a legal fundamentalism.

Finally, Part III will initiate the application of the normative, traditional, and communal model described in Part II to a particular legal issue common to the first year of virtually all law school curricula—the doctrine of excuse on account of impossibility in the law of contracts.¹⁰ The initiation of the discussion of a multiperspectival approach to the legal doctrine of contractual impossibility will only touch on the resources to be considered in connection with this approach.

I. SCRIPTURES, TRADITION, AND THE LAW SCHOOL: AUTHORITY IN DIALOGUE

The aspirations in the mission statement pertaining to “bring[ing] to bear the will of our Creator, Almighty God, upon legal education and the legal profession” and “grounding . . . students in biblical foundations of law, legal institutions, and processes” presuppose two elements. The first of these implications obliges each faculty member to attempt to discern the will of God revealed both in the Scriptures¹¹ and the created order pertaining to the subject of investigation. The reference to “foundations” and “processes” suggests the second element: that implementation of the mission statement demands knowledge of how our forebears in the Christian tradition have discerned and implemented what they understand as God’s will with respect to those subjects.

A. *The Authority of Scripture: The First Voice in the Dialogue*

This article will not rehearse the long history of discussions within the Christian tradition about the nature and extent of biblical authority. The University was founded squarely within

¹⁰ This example of the application of the model discussed in Part II is intended as no more than the prolegomenon to a final work of scholarship on the doctrine of contractual impossibility. I simply hope it serves as a means of demonstrating how a faculty member can carry out the mission in a particular context without sacrificing biblical, historical, or analytic integrity.

¹¹ Although not explicitly set forth in the mission statement, the Law School mandates that the Christian Scriptures comprised in what are commonly referred to as the Old and New Testaments are the authoritative Word of God. See Statement of Faith ¶A, *infra* note 12.

the modern protestant evangelical tradition and the Statement of Faith to which the faculty must subscribe makes clear the priority of Scripture to the implementation of the mission statement.¹² Yet, the variety of Christian traditions represented among the faculty of the Law School¹³ suggests a variety of responses to the question of what it means to subscribe to the proposition that "the Holy Bible is the inspired, infallible and authoritative source of Christian doctrine and precept."¹⁴

While a variety of definitions of biblical authority may be consistent with the Statement of Faith, an individual member of

¹² The entirety of the Statement of Faith reads as follows:

A. That the Holy Bible is the inspired, infallible and authoritative source of Christian doctrine and precept.

B. That there is one God, eternally existent in three persons: Father, Son and Holy Spirit.

C. That man was created in the image of God but, as a result of sin, is lost and powerless to save himself.

D. That the only hope for man is to believe on [sic] the Lord Jesus Christ, the virgin-born Son of God, who died to take upon Himself the punishment for the sin of mankind, and who rose from the dead, so that by receiving Him as Savior and Lord, man is redeemed by His blood.

E. That Jesus Christ will personally return to earth in power and glory.

F. That the Holy Spirit indwells those who receive Christ for the purpose of enabling them to live righteous and holy lives.

G. That the Church is the Body of Christ and is comprised of all those who through belief in Christ have been spiritually regenerated by the indwelling Holy Spirit. The mission of the Church is worldwide evangelization and the nurturing and discipling of Christians.

Regent University Faculty Application Form (visited Feb. 6, 2001) <<http://www.regent.edu/admin/prsnel/faculty/application.html>>. The lack of any reference to early creedal statements or later confessional standards of the Church should not go unnoticed. The University, like most modern evangelical Christian organizations, presumes either that the teachings of the Bible are so clear that substantial elaboration is unnecessary, or that consistency of interpretations of those teachings by the faculty is unimportant. See *infra* text accompanying notes 43–45.

¹³ Current members of the Law School faculty identify themselves with Christian denominations ranging from Baptist, to Episcopalian, to Presbyterian, to Roman Catholic, to independent non-denominational congregations.

¹⁴ For example, a Roman Catholic might suggest that Scriptural authority is correlative to the apostolic tradition entrusted to the Church: "Sacred Tradition and Sacred Scripture . . . are bound closely together and communicate one with the other'. . . Each of them makes present and fruitful in the Church the mystery of Christ" UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH 26 (1994). On the other hand, a contemporary evangelical in the charismatic tradition might claim that Scriptural authority is correlative to personal revelation: "[God] is ready to grant through His Spirit a spirit of revelation and wisdom . . . and also through revelation and prophecy to speak to His people." J. RODMAN WILLIAMS, RENEWAL THEOLOGY: SYSTEMATIC THEOLOGY FROM A CHARISMATIC PERSPECTIVE 44 (1996).

the faculty of the Law School should be able to articulate the definition he or she employs. This faculty member has adopted the following brief statement of scriptural authority under which to achieve the goals of the mission statement:

Holy Scripture, being God's own Word, written by men prepared and superintended by His Spirit, is of infallible divine authority in all matters upon which it touches: it is to be believed, as God's instruction, in all that it affirms; obeyed, as God's command, in all that it requires; embraced, as God's pledge, in all that it promises.¹⁵

Confession of a high degree of confidence in the authority of the Bible carries with it substantial benefits as well as certain dangers. The benefits of a touchstone of epistemic and moral authority in the current climate of ethical and legal relativism should be apparent. In fact, it is axiomatic that because all knowledge is interrelated, "unless there is comprehensive knowledge of all things somewhere there can be no knowledge anywhere."¹⁶ Since the collapse of the Christian-Aristotelian synthesis in the seventeenth century and the failure of the subsequent totality of rationalistic and empiricistic enterprises of the Enlightenment in the eighteenth century, both philosophers and ethicists have lost a firm foundation on which to ground their precepts.¹⁷ The existence of the authoritative

¹⁵ THE CHICAGO STATEMENT ON BIBLICAL INERRANCY (1978), *reprinted in* W. GRUEDEM, *SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE* 1204 (1994).

¹⁶ ROBERT L. REYMOND, *A NEW SYSTEMATIC THEOLOGY OF THE CHRISTIAN FAITH* 111 (1998). Interestingly, the view of knowledge as a web of multiple reciprocities finds its ablest exponent in the works of the well-known empiricist William Van Orman Quine. *See, e.g.*, W.V. QUINE, *THEORIES AND THINGS* (1981); W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (2d ed. 1978). For a lucid account of Quine's version of empiricism, see LYNN HAWKINS NELSON, *WHO KNOWS: FROM QUINE TO A FEMINIST EMPIRICISM* (1990).

¹⁷ The empirical ethicist faces the problem that "empiricism cannot justify any statements about ethical values. Statements about sensible facts do not imply anything about ethical goodness or badness, right or wrong, or obligation or prohibition." JOHN M. FRAME, *THE DOCTRINE OF THE KNOWLEDGE OF GOD* 118 (1987). The purely rationalistic ethicist ultimately fares no better. While there may be instances of a priori knowledge, e.g., the laws of logic, awareness of our own mental states, the existence of objective truth, etc., we can "deduce very little from such a priori ideas. . . . [W]e cannot deduce the whole fabric of human knowledge from them or even enough knowledge to constitute a meaningful philosophy." *Id.* at 113. Efforts simply to combine empiricism and rationalism beginning with Immanuel Kant evidence an incoherent dialectic and remain vulnerable to the weakness of each approach standing alone. The inward turn (such as the collective

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.¹⁸

The principal danger for one confessing biblical authority is a form of objectivism that asserts that "interpretation [of the Scriptures] . . . [is] a process of stripping away preconceptions and applying carefully conceived techniques, so that texts may make their own impression on us."¹⁹ Modern students of hermeneutics, whether biblical or legal, have demonstrated that the element of human subjectivity can never be separated from the process and results of interpretation.²⁰ Without recognition of the necessarily subjective element in interpretation, persons from across the theological spectrum frequently overestimate

historicism of Hegel or the individual subjectivism of Kierkegaard) cannot provide a firm foundation for objective truth or goodness. Nonetheless, resignation to subjectivism seems to have carried the day for most contemporary students of ethics or jurisprudence. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEOLOGY* 6-34 (Univ. of Notre Dame Press 1981) (discussing "emotivism").

¹⁸ In order to use the Scriptures to analyze the law, faculty members must realize that

[the Christian] recognizes that in the fact of Scripture itself he has a truly profound solution to man's need for an infinite reference point if knowledge is to become a reality. He understands that because there is comprehensive knowledge with God, real and true knowledge is possible for man, since God who knows all the data exhaustively in all their infinite relationships . . . is in the position to impart any portion of that true knowledge to man. The Christian believes that this is precisely what God did when he revealed himself to man propositionally.

REYMOND, *supra* note 16, at 115.

¹⁹ RICHARD L. PRATT, JR., *HE GAVE US STORIES: THE BIBLE STUDENT'S GUIDE TO INTERPRETING OLD TESTAMENT NARRATIVES* 29 (1993).

²⁰ See, e.g., Moisés Silva, *The Place of Historical Reconstruction in New Testament Criticism*, in *HERMENEUTICS, AUTHORITY, AND CANON* 105 (D.A. Carson & J. Woodbridge eds., 1986); Ian Crosby, *Words in Stone: Gadamer, Heidegger, and Originalism*, 76 *TEX. L. REV.* 849, 854 (1998) ("Interpretation is circular: we come to interpretation with a nonexplicit background understanding of what it is to be the kind of beings we are in the world . . . and this understanding sets our inquiry's terms and boundaries."); see generally HANS-GEORG GADAMER, *TRUTH AND METHOD* 353, 356-57 (2d ed. 1975).

To understand [the author's past situation] does not mean primarily to reason one's way back into the past, but to have a present involvement in what is said [because] texts do not ask to be understood as a living expression of the subjectivity of their writers. . . . What is fixed in writing has detached itself from the contingency of its origin and its author and made itself free for new relationships.

Id.

their ability to unveil the objective meaning of a text.²¹

The Statement of Faith demands that the Law School faculty give the Bible a principal place in their efforts to implement certain aspirations of the mission statement.²² Failure of the faculty to recognize their personal contributions to the results of biblical interpretation, however, can undermine other elements of the mission statement.²³

B. *The Authority of the Faculty: The Second Voice in the Dialogue*

1. Faculty as Individuals

Notwithstanding an appeal to Scripture as an objective voice of authority, modern evangelical Protestantism has tended toward overconfident objectivism in biblical interpretation.

[W]e sometimes hear people defend as ideal the notion that in reading the Scriptures we must first empty ourselves of all preconceptions and simply allow Scripture to write its message on our open and empty minds as on a clean slate. This is an impossible possibility—possible in the sense that some may try it, but impossible in the sense that no one can live up to it. For we can never escape ourselves, or divest ourselves of our convictions, or turn ourselves off.²⁴

Others have moved in the opposite direction into an excessive subjectivism. On the left are those associated with liberation theology and feminist or gay interpretations. Theologians such as Jose Croatto openly celebrate subjectivism in interpretation: “exegesis is eisegesis, and anybody who claims to be doing only the former is, wittingly or unwittingly, engaged

²¹ See PRATT, *supra* note 19, at 30.

²² “The mission of the School of Law is to bring to bear the will of our Creator, Almighty God, upon legal education and the legal profession. In particular, this mission includes . . . [t]he grounding of students in biblical foundations of law, legal institutions, and processes . . .” *Mission Statement* (visited Feb. 6, 2000) <<http://www.regent.edu/acad/schlaw/welcome/mission.html>>.

²³ In particular, “[t]he nurturing and encouragement of students to become mature Christians who exercise the gifts of the Holy Spirit and display the fruit of the Holy Spirit in their personal and professional lives.” *Id.* Uncritical assertions of simplistic biblical prescriptions can lead to either uncritical (and unprofessional) acceptance of those prescriptions or an instinctive rejection of them, neither of which is consistent with achieving the third element of the mission statement.

²⁴ GORDON J. SPYKMAN, REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS 121 (1992).

in ideological subterfuge.²⁵ On the right, few would acknowledge their subjectivistic tendencies, yet their failure to acknowledge the part they play in biblical interpretation simply masks their conclusions with a patina of objectivism.²⁶

The dangers of an uncritical objectivism on the one hand and blatant subjectivism on the other cannot be ignored if the Law School is to carry out its mission.²⁷ The authority-dialogue model offers a means by which to avoid these threats while maintaining the absolute authority of the Scriptures described above.²⁸ A dialogic model of interpretation is one where the relationship between the text and the reader can be described as a conversational give-and-take.²⁹ The reader of the text approaches with certain questions in mind.³⁰ The text answers those questions, but in turn, those answers shape the interpreter whose subsequent questions cannot help but take into account the results of the first series of inquiries.³¹

In order to avoid sheer prejudice, it is necessary to allow the

²⁵ J. SEVERINO CROATTO, *EXODUS: A HERMENEUTICS OF FREEDOM 2* (Salvator Attamasio, trans., 1981); see also ELIZABETH A. CASTELLI, *IMITATING PAUL: A DISCOURSE OF POWER 13* (1991) (describing the Apostle Paul's admonition that others should imitate him, 1 *Corinthians* 11:1, to be a political move by which he privileged himself and marginalized those who disagreed with him); J. SEVERINO CROATTO, *BIBLICAL HERMENEUTICS: TOWARD A THEORY OF READING AS THE PRODUCTION OF MEANING 70* (Orbis Books 1987) (1984) ("We must re-create the message of the Bible, not just 'update' it.")

²⁶ See, e.g., ROBERT L. DABNEY, *A DEFENCE OF VIRGINIA 92-198* (1867) (attempting to justify the African slave trade in America).

²⁷ In interpreting the Bible:

We must remember that, though the Bible is infallible, our own understanding of the Bible is not. Hence some practice of critical self-doubt . . . is in order. As long as this doubting characterizes ourselves, rather than doubting God or doubting the Bible as God's Word, we are acting in conformity with Christian standards.

VERN S. POYTHRESS, *SCIENCE AND HERMENEUTICS 123* (1988).

²⁸ See PRATT, *supra* note 19.

²⁹ See PRATT, *supra* note 19, at 32.

³⁰ "[W]e come [to the Bible] with our own expectations and questions that prepare us for meaningful dialogue." *Id.* "We approach Scripture with a certain sense of anticipation—expecting something." SPYKMAN, *supra* note 24, at 121.

³¹ The dialogic approach does not mean that truth is always beyond our grasp: This does not mean real knowledge is impossible. Rather, it means that real knowledge is close to impossible if we fail to recognize our own assumption, questions, interests, and biases; but if we recognize them and, in dialogue with the text seek to make allowances for them, we will be better able to avoid confusing our own world-views with those of the biblical writers.

D.A. CARSON, *EXEGETICAL FALLACIES 104-05* (2d ed. 1996).

text or evidence to reshape one's pre-understanding. Unless this is done quite deliberately, there is the risk that one's starting point, instead of acting as a window to the evidence, will become a filter through which the text is always read—and distorted.³²

The nature of biblical authority acknowledged above, however, imparts a different weight to the results of dialogue with the Scriptures. If the words of one party to the dialogue are infallible and divine, then the answers of that party to the questions asked of it carry the same authority.³³ Nonetheless, even answers based on infallible and divine revelation remain human constructs that in turn are subject to critique and evaluation in light of the authoritative Scriptures.³⁴

This reciprocal relationship between the authoritative text and the questioner who returns to the text with a provisional answer can be described as a hermeneutical spiral.³⁵ The metaphor of a spiral (rather than a line) acknowledges the reality of an interpreter's pre-understanding in the analysis of a text. Yet the spiral (instead of a circle) also avoids the relativism of a purely subjective approach. The spiral recognizes both the starting point of objective truth in the revelation of God and the ability of those who were created in the image of God to begin to grasp that objective truth.

Finally, although not specifically addressed in the mission statement, a faculty member at the Law School should not

³² See G. Stanton, *Interpreting the New Testament Today*, in *EX ADDITU* 68 (1985).

³³ As the Westminster Confession of Faith puts it, the authority of the Bible extends not only to what it says, but also to those matters which "by good and necessary consequence may be deduced from Scripture." *THE WESTMINSTER CONFESSON OF FAITH*, ch. 1.6 (1647), reprinted in 3 PHILIP SCHAFF, *THE CREEDS OF CHRISTENDOM* 603 (1877).

³⁴ In interpreting the authoritative Scriptures:

The authority-dialogue model stands in contrast to both subjective and objective tendencies. In contrast to objectivism, it recognizes the constant influence of preconceptions on interpretation... In contrast to subjectivism, the authority-dialogue model recognizes the importance of having methods that allow us to hear [the Scriptures] speak authoritatively to our lives.

PRATT, *supra* note 19, at 33; see also *THE WESTMINSTER CONFESSON OF FAITH*, *supra* note 33, at 605–06.

³⁵ See CARSON, *supra* note 31, at 129; ANTHONY C. THISTELTON, *THE TWO HORIZONS, NEW TESTAMENT HERMENEUTICS AND PHILOSOPHICAL DESCRIPTION WITH SPECIAL REFERENCE TO HEIDEGGER, BULTMANN, GADAMER, AND NITTEGENSTEIN* 104 (1980); see also GRANT R. OSBORNE, *THE HERMENEUTICAL SPIRAL: A COMPREHENSIVE INTRODUCTION TO BIBLICAL INTERPRETATION* (1991).

ignore the role of the Holy Spirit in interpretation. Classical theological formulations describe two aspects of the work of the Spirit in interpretation: first, to convince us that the Scriptures are the revelation of God³⁶ and second, to progressively awaken our understanding of the significance of that revelation.³⁷ While a faculty member need not affirm that this facet of interpretation includes new revelatory material, the process of understanding authoritative revelation certainly includes subjective changes in the interpreter.³⁸

2. Faculty as Inheritors of a Tradition

The dialogue of a faculty member with the authoritative Scriptures does not occur in an historical vacuum: it is never "just me and my Bible."³⁹ Failure to recognize the place one

³⁶ See, e.g., THE WESTMINSTER CONFSSION OF FAITH, *supra* note 33, ch. 1.5, at 603 ("[O]ur full persuasion and assurance of the infallible truth, and divine authority thereof [i.e., holy Scripture], is from the inward work of the Holy Spirit, bearing witness by and with the Word in our hearts.").

³⁷ See *id.* ch. 1.6, at 603-04 ("[W]e acknowledge the inward illumination of the Spirit of God to be necessary for the saving understanding of such things as are revealed in the Word."); see also THE CHICAGO STATEMENT ON BIBLICAL INERRANCY, *supra* note 15, at 1204 ("The Holy Spirit, Scripture's divine Author, both authenticates it to us by His inward witness and opens our minds to understand its meaning.").

³⁸ "[T]he Spirit operates in our hearts and minds . . . to illumine and persuade us of the divine words and deeds." John M. Frame, *The Spirit and the Scriptures, in HERMENEUTICS, AUTHORITY, AND CANON*, *supra* note 20, at 230-31; see also F. Klooster, *The Role of the Holy Spirit in the Hermeneutic Process: The Relationship of the Spirit's Illumination to Biblical Interpretation, in HERMENEUTIC, INERRANCY, AND THE BIBLE* 464 (E. Radmacher & R. Preus eds., 1984) ("The unbeliever's preunderstanding must be fundamentally *redirected* by the regenerating power of the Holy Spirit. A believer's preunderstanding may require *reformation* (re-forming) within the regenerated heart through the Spirit's illumination."); see also 1 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, ch. 7, at 80 (McNeill ed., 1960) ("[T]he certainty [Scripture] deserves with us, it attains by the testimony of the Spirit.").

³⁹ It must be understood that when we seek to escape the bonds of tradition, we merely substitute one set of preconceptions for another. Indeed, what we do then is to substitute our own half-baked, ill-conceived preconceptions for the mature thought of godly teachers. To try to start totally afresh ("just me and my Bible"), as many cultists have tried to do, is an act of disobedience and pride. FRAME, *supra* note 17, at 304. In fact, perceiving oneself as a free agent in interpretation is a post-Enlightenment concept previously unknown in Church history. See Moisés Silva, *Has the Church Misread the Bible?*, in *FOUNDATIONS OF CONTEMPORARY INTERPRETATION* 72-74 (Moisés Silva ed., 1996).

occupies in the historic tradition of biblical interpretation⁴⁰ can lead to individualism and uncritical subjectivism just as easily as can the overconfident objectivism described above.⁴¹ The practice of biblical interpretation is hardly new. The Hebrew Scriptures disclose a canonical interaction with earlier texts.⁴² The additional Scriptures of the Christian faith are principally an interpretation and application of the life and words of Jesus in terms of the categories of the Hebrew Scriptures.⁴³ The practice of Christian interpretive dialogue has continued from the close of the apostolic era up to today. It is surely a serious omission for one engaged in dialogue with the Scriptures today to ignore the results of the previous 1900 years of questions and answers. The previous dialogue sets the boundaries of orthodoxy for the faculty of a Christian university.⁴⁴ A faculty member seeking to realize the mission of the Law School cannot ignore the results of the dialogue of the Church with the authoritative

⁴⁰ "Tradition," as defined by Richard Lints, "refer[s] to the entire collected expressions of biblical interpretation (written and unwritten) to which particular past communities have committed themselves and by which they have sought to transmit their faith to subsequent generations." RICHARD LINTS, *THE FABRIC OF THEOLOGY: A PROLEGOMENON TO EVANGELICAL THEOLOGY* 84 (1993).

⁴¹ For an excellent discussion of the impact that the triumph of individualism in America's political revolution had on the religious landscape from the 1790s through 1835, see NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989).

⁴² See WILLIAM C. PLACHER, *A HISTORY OF CHRISTIAN THEOLOGY: AN INTRODUCTION* 18–31 (1983) (providing an extended discussion of the theological dialog carried on by the deuteronomistic historians and the writing prophets with the prescriptions of the Mosaic covenantal regime). For two examples of this dialogue, see the explicit consideration of a text from *Jeremiah* 29:10 in the subsequent book of *Daniel* 9:2 and the implicit analysis and application of *Leviticus* 25:4 by the Chronicler in *2 Chronicles* 36:21.

⁴³ Current New Testament scholarship has largely rejected the view popularized in the nineteenth century that the Christian Scriptures simply represented another hellenized mystery religion. Nonetheless, only a few theologians have engaged in an evaluation of the New Testament writings from a thoroughgoing covenantal standpoint consonant with the perspective of the Hebrew Scriptures. See HERMAN RIDDERBOS, *THE COMING OF THE KINGDOM* (Raymond O. Zorn ed. & H. de Jongste trans., 1962) (providing an able exposition of this approach); HERMAN N. RIDDERBOS, *PAUL: AN OUTLINE OF HIS THEOLOGY* (1966).

⁴⁴ See, e.g., The Nicene Creed formally adopted by the Church at the Council of Chalcedon in 451, reprinted in 1 SCHAFF, *supra* note 33, at 27–29 (1877); see generally 1 KENNETH LATOURETTE, *A HISTORY OF CHRISTIANITY: BEGINNINGS TO 1500*, at 187 (1953) ("While Christianity was winning the professed allegiance of the overwhelming majority of the population of the Roman Empire and was being carried beyond the Roman borders, it was . . . seeking to define what Christians deemed the essential convictions of their faith.").

Scriptures represented in the early ecumenical creeds,⁴⁵ as well as the deliberative results of at least the first four principal ecumenical councils.⁴⁶

Notwithstanding the high level of authority represented in the creeds of the first 500 hundred years of the Church, a faculty member will find most contemporary legal questions are not answered in them. A faculty member will, however, find many modern legal questions addressed throughout the history of Christian theologizing.⁴⁷ Progressive realization of the aspirations of the mission statement therefore requires the faculty to address not only the relevant Scriptural witness but also the dialogue of his or her forebears in the faith.

3. Faculty as Present Community

As much as the faculty stands at the modern edge of an ongoing historical tradition of biblical interpretation, they are also part of a currently existing community of legal scholars.⁴⁸ This community includes those who share the aspirations of the mission statement and confess the truths of the Statement of Faith, as well as those who do not.⁴⁹ Conversely, those who do

⁴⁵ The so-called Ecumenical Creeds are generally deemed to include the Apostles' Creed, the Nicene Creed, and the Athanasian Creed. See 1 SCHAFF, *supra* note 33, at 12–42. Most churches in the Western tradition acknowledge the authority of these creeds. See generally 1 LATOURETTE, *supra* note 44, at 155–56, 303–04.

⁴⁶ Various Christian traditions debate the number and identity of the authoritative councils of the early Church. Most would assent to the conclusions reached at Nicea (325), Constantinople (381), Ephesus I (431), and Chalcedon (451). See 1 SCHAFF, *supra* note 33, at 43–45. Additional councils to which various Christian traditions accord authoritative status include Constantinople II (553), Constantinople III (680), and Nicea II (787). See *id.*; see generally 1 LATOURETTE, *supra* note 44, at 153–88, 284–86, 291–92.

⁴⁷ The practice of theology itself is the process of authority-dialogue:

There is, in fact, no important distinction to be made at all between *meaning* and *application*. . . . To find "meaning" is to ask a question of Scripture, to express a need, and to have that need met. To "apply" is to learn more of what is in the text, to see more of its potential, its powers, its wisdom.

FRAME, *supra* note 17, at 83.

⁴⁸ "It is important that we keep in mind the fact that the construction of a theological framework and the appropriation of a theological vision are properly tasks of the Christian community and not of isolated individuals." LINTS, *supra* note 40, at 286.

⁴⁹ The Reformed tradition of Western Christianity describes the benefits rendered even by those who do not share a common faith commitment as "common grace." See, e.g., L. BERKHOF, SYSTEMATIC THEOLOGY 432–46 (4th ed. 11th prtng.

not subscribe to these propositions must acknowledge the significance of the historic acceptance of their truth throughout the course of the common law until well into the nineteenth century.⁵⁰ The relationship among these perspectives can be diagrammed as follows:

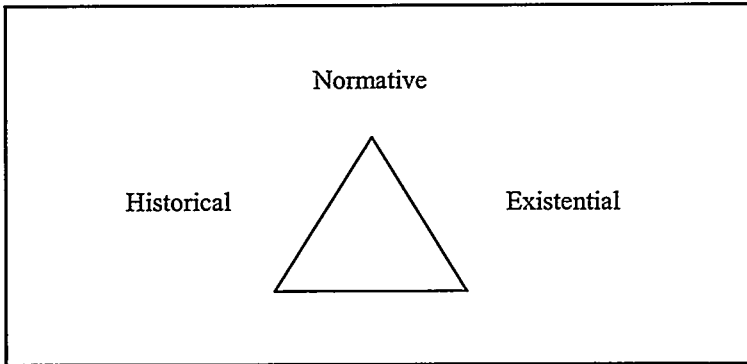


Figure 1: *The Perspectival Paradigm*

Thus, a faculty member at the Law School should seek to discover the normative “will of Almighty God” in the Scriptures in dialogue with the Scriptures, within an historical tradition, and as part of a present community. The faculty member who fails to consider any of these three perspectives runs the danger of absolutizing a particular construct and stunting further growth.

4. The FLIC Report

The aspects of the mission statement relevant to this article concern the goals of serious Scriptural integration and meaningful historical analysis. Several of the models identified in the FLIC Report relate in part to these objectives.⁵¹ None of

1969); CALVIN, *supra* note 38, at 769–70.

⁵⁰ Compare HAROLD JOSEPH BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* vi (1983) (“In the twentieth century . . . for the first time, religion has become largely a private affair, while law has become largely a matter of practical expediency. The connection between the religious metaphor and the legal metaphor has been broken.”), with NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* xii (1982) (“I soon realized that a student of English literature who does not know the Bible does not understand a good deal of what is going on in what he reads . . .”).

⁵¹ In particular, the Christian Professional Focus, the Lexical Focus, and the

these methods, however, clearly specifies a paradigm by which to account fully for the role of Christian tradition together with interpretation in community. The role these two perspectives play in the dialogue in which the faculty member engages with Scripture must be clearly articulated.

The Institutes Focus is most closely aligned with an historically informed dialogic perspective.⁵² The FLIC Report describes the implementation of the Institutes Focus by Professor Craig Stern in part as follows:

Regular prayerful study of the Holy Scriptures with an eye towards receiving truth for his [i.e., the faculty member's] ministry at Regent.

Study of legal materials as informed by biblical principles. When appropriate, referring to the Scriptures in the original languages, to traditional interpretations, to the *sensus fidelium*, etc.

Arriving at and applying appropriate pedagogy for leading students into participating in this integration.

In all these efforts, frequent consultation with colleagues has been invaluable.⁵³

This Institutes Focus identifies the three elements of the dialogic model described above: Scripture as primary authority, interpretation in light of tradition, and interpretation in community. Part II of this article will describe a model in which these three components are perspectively related. Nonetheless, even if these three perspectives are valid in the context of biblical interpretation, the question remains how they relate to legal teaching and scholarship at the Law School.

C. *Dialogue with the Law: Can We Answer Today's Questions While Ignoring the Past?*

While what has preceded in this discussion is appropriate to problems of theology narrowly understood, the question of its relevance to the law remains open. The perspectives of the normative, traditional, and existential must be reconsidered in the context of the common law.

Institutes Focus relate to these objectives. See *supra* note 7.

⁵² See *id.*

⁵³ Memorandum distributed at the Regent University faculty retreat (August 28, 1998) (on file with author).

1. The Authority of the Common Law

At one point in history, the common law itself came to have an authoritative voice.⁵⁴ The common law was not simply the object of study, it was the historically instantiated expression of a higher law.⁵⁵ While never equal to the Scriptures, for someone like William Blackstone, the long series of pronouncements of the English courts came to have a mystical, quasi-canonical status: “[the courts] are the depositaries of the laws; the living oracles [T]hese judicial decisions are the principal and most authoritative evidence . . . of the existence of such a custom as shall form a part of the common law.”⁵⁶ Not only were the common law courts “living oracles,” Blackstone asserted that even if no one could recall a reason for a particular common law rule, it was nonetheless the case “that whenever a standing rule of law . . . hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.”⁵⁷ If Blackstone represented the apotheosis of a vision of the common law as higher law, its virtually unquestionable authority was not to last many more years.

The numinous authority of the common law came under attack beginning with Blackstone’s student Jeremy Bentham in

⁵⁴ This point was probably in the mid-seventeenth century during and after the Puritan Revolution. See Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J. LAW & REL. 103, 115 (1986) (“The Puritan Revolution of 1640 to 1660 established the supremacy of the common law over its rivals.”); Harold J. Berman & Charles Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 450 (1996) (“In the seventeenth century, after Coke and his colleagues had challenged the prerogative courts and the king himself in the name of pre-Tudor precedents, the concept of the historical continuity of case law became a central element of the common-law tradition.”).

⁵⁵ JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW? READINGS ON THE INFLUENCE OF CHRISTIAN THOUGHT IN ANGLO-AMERICAN LAW* 1–68 (1999).

⁵⁶ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 69 (2d rev. ed., Chicago & Co. 1879).

⁵⁷ *Id.* at 70. As Daniel Boorstin describes it, “[f]or many of his judgments Blackstone depended on his intuitions of the ‘genius of the common law,’ and the ‘spirit of our constitution.’ . . . Genii and spirits were natural paraphernalia of the Mystery of Law.” DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE’S COMMENTARIES* 29 (1941). Later, Boorstin describes Blackstone’s view of law as follows: “The determinism which had made the legal system of any country, in God’s design, the product partly of climate and of the stage of social development, also made it the product of its innate ‘spirit’ or ‘genius.’” *Id.* at 57.

1776.⁵⁸ It appears that the very efforts of Blackstone to rationalize the common law undermined its imposing status.⁵⁹ The acid of Bentham's thoroughgoing rationalism eroded Blackstone's appeals to history and mystery as justifications for the authority of the common law.⁶⁰ Weakened by Bentham, it remained for the jurisprudence of John Austin to reorganize law on a positivistic and utilitarian basis.⁶¹ Left without its traditional means of support, autonomous instrumental human reason supplanted the common law as the standard of authority: the common law was commanding only when it was rational.⁶²

2. Faculty as Inheritors of a Legal Tradition and Members of a Legal Community

"Tradition," according to moral philosopher Alasdair MacIntyre, is "an historically extended, socially embodied argument . . . in part about the goods which constitute that tradition."⁶³ The goods of a tradition are a part of its practice, which MacIntyre defines as

⁵⁸ See JEREMY BENTHAM, *A Comment on the Commentaries and A Fragment on Government*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* (J.H. Burns and H.L.A. Hart eds., 1977).

⁵⁹ Part of the reason for Bentham's disdain for Blackstone's version of the science of the law may have been the different meaning that "science" had for the two thinkers. For Blackstone, "science" still retained its older sense of simply an organized body of knowledge. Bentham, by contrast, understood science in terms of the natural sciences with their empiricistic methods and truncated verification techniques. See generally Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999); see also RICHARD A. COSGROVE, *SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART* 56 (1996) ("Bentham accused Blackstone of linguistic imprecision because the Commentator used allusion and metaphor to portray the law, whereas Bentham asserted that only the language of science could succeed as an instrument of legal analysis.").

⁶⁰ See BOORSTIN, *supra* note 57, at 189-90.

⁶¹ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 193 (1954) ("Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.").

⁶² See BOORSTIN, *supra* note 57, at 190 ("Jeremy Bentham is the prototype of the critics of Blackstone . . . [He] demonstrated to his own and his disciples' satisfaction that the *Commentaries* were worthless because they were not clearly reasoned."); see also Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 *CAL. L. REV.* 779, 783 (1988) (discussing the post-Enlightenment efforts to ground ultimate legal authority in a source other than God).

⁶³ MACINTYRE, *supra* note 17, at 222; cf. LINTS, *supra* note 40, at 84.

any coherent and complex form of socially established cooperative human activity through which goods internal to that form of society are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.⁶⁴

The authority of tradition has been fundamental to the historical understanding of the common law.⁶⁵ Yet, a rationalistic or even utilitarian approach to the law cannot help but denigrate the significance of tradition.⁶⁶ Only that which can pass rational muster or lead to a better social result will satisfy a participant in the modern autonomous enterprise.⁶⁷ MacIntyre responds to the empty rationalism of modern ethical theorizing⁶⁸ by re-emphasizing teleology: there are "goods" to which humanity can aspire, goods that mark out the goal to which a legal system should be oriented.⁶⁹ MacIntyre does not, however, posit an *a priori* definition of this "good."⁷⁰ He instead anchors his version of the good in those virtues such as justice, courage,

⁶⁴ MACINTYRE, *supra* note 17, at 187; see also Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 594 (1985) ("A tradition, then, connotes not consensus, but dissensus and consensus. A tradition is constituted in part by an argument as to how that which is shared should be understood and socially embodied.")

⁶⁵ See Mortimer Sellers, *Republicanism, Liberalism, and the Law*, 86 KY. L.J. 1, 27 (1997-1998) ("[E]arly liberals embraced law as the proper line between liberty and license, and took judges or the common law tradition as the best source of authority, rather than any public deliberative process.")

⁶⁶ Following Blackstone and his enormous respect for tradition as its own ground of authority, the increasing influence of modernity can be discerned in Bentham and those who have come after him. Modernity in this sense can be distinguished from tradition "by the increasing affirmation that . . . understandings of reality . . . cannot be validated or redeemed by appeals to some authoritative expression or tradition or institution." FRANKLIN I. GAMWELL, *THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD* 3-4 (1990).

⁶⁷ "In other words, our understandings can be validated or redeemed only by appeal in some sense to human experience and reason as such." *Id.* at 4.

⁶⁸ See *supra* note 17 (summarizing MacIntyre's description of emotivism).

⁶⁹ See MACINTYRE, *supra* note 17, at 52 ("[T]he joint effect of the secular rejection of both Protestant and Catholic theology and the scientific and philosophical rejection of Aristotelianism was to eliminate any notion of man-as-he-could-be-if-he-realised-his-telos.")

⁷⁰ MacIntyre's reticence here is surprising given his description of himself as an "Augustinian Christian." See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 10 (1988).

and honesty that contribute to humanity's ongoing historical quest for the good, however it is viewed from within a particular tradition.⁷¹ The virtuous quest is not one directed to a particular goal so much as one that recognizes and sustains the belief that there is a good or a *telos* at all.⁷² This quest on an individual scale for MacIntyre includes participating in a variety of subsidiary practices (such as the law) in which the application of certain virtues contributes toward humanity's goal of identifying and achieving its ultimate good. And it is in the context of these practices that the distinction between internal and external goods, or to put it another way, between virtue and success, becomes apparent.

Internal goods are identifiable in two ways: first, they can be specified and achieved only by and within a particular practice, such as law. Second, unlike external goods, internal goods can only be obtained by genuine excellence involved in the practice itself. External goods, by contrast, are "externally and contingently attached . . . by the accidents of social circumstance."⁷³ External goods such as fame, income, status or prestige, though real, are not peculiar to a practice itself. There are ways other than successfully engaging in a practice like law by which to obtain external goods, but there is no way other than by the perfection of the practice to obtain internal goods. One may certainly engage in the activity of law for the sake of income or fame, but to do so is not to engage in the *practice* of law.⁷⁴

⁷¹ In MacIntyre's discussion of the "good," he noted that:

It is looking for a conception of *the* good which will enable us to order other goods, for a conception of *the* good which will enable us to extend our understanding of the purpose and content of the virtues, for a conception of *the* good which will enable us to understand the place of integrity and constancy in life, that we initially define the kind of life which is a quest for the good.

MACINTYRE, *supra* note 17, at 204.

⁷² Thus MacIntyre's emphasis is on narrative as both the primary representation of human life and the necessity of understanding one's life as part of a narrative: "[M]an is in his actions and practice, as well as in his fictions, essentially a story-telling animal. . . . 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 my self a part?'" *Id.* at 201.

⁷³ *Id.* at 188.

⁷⁴ One need not, and in fact, could not consistently with the mission statement, accept MacIntyre's radically historicistic version of the human *telos*. Yet to affirm the existence of an a priori goal (such as "true justice") toward which faculty at the Law School should strive is certainly consistent with the mission statement.

Although the exercise of virtues, such as justice, courage, and honesty will further the human quest, they may not produce a high standard of living.

MacIntyre's analysis of the relationship between a tradition, its practices, and their internal goods leads to three related sets of questions. First, what is the historical tradition within which a member of the faculty teaching a common law subject at the Law School is a part? What is the relationship between that tradition, its authority, and the authority of the Scriptures that the faculty also confesses? Next, what is the nature of the practice in which the faculty is to be engaged? And third, what are the internal goods of this tradition?

Some would assert that the common law itself is the answer to the first question. Unlike the canonical Scriptures, however, the content of the common law is not fixed. The authoritative "text" of customs recognized and enforced by the common law courts and the judicial interpretations of that customary history merge to become the common law.⁷⁵ The dialogic interpretation of the results of preceding common law adjudication by subsequent courts expresses the tradition of which both are components. There has been no common legal controversy comparable to the debate between the Roman Catholic Church and Protestants in general over the proper relationship between text and tradition.⁷⁶ For someone like Oliver Wendell Holmes

⁷⁵ See, e.g., HENRY MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (15th ed. 1894). In particular, Maine rejected the claims of predecessors such as Jeremy Bentham and John Austin that the only law was positive law: "Maine preferred a more spacious approach to the problem of what might be termed law . . . 'Opinion, beliefs, sentiments, superstitions, ideas of all kind—in short the historical culture in which sovereignty arose and functioned . . . [were also law]." COSGROVE, *supra* note 59, at 133–34 (footnote omitted).

⁷⁶ For descriptions of the historic differences between the Roman Catholic Church and Protestantism, compare *DECREE CONCERNING THE CANONICAL SCRIPTURES, THE CANONS AND DOGMATIC DECREES OF THE FOURTH SESSION OF THE COUNCIL OF TRENT*, reprinted in 2 SCHAFF, *supra* note 33, at 80 (The Christian faith rests on "truth and discipline . . . contained in the written books, and the unwritten traditions."), with *THE WESTMINSTER CONFSSION OF FAITH*, *supra* note 33, ch. 1.10, at 605–06 ("The Supreme Judge, by which all controversies of religion are to be determined . . . can be no other but the Holy Spirit speaking in the Scripture."). For the contemporary positions, compare *UNITED STATES CATHOLIC CONFERENCE*, *supra* note 14, at 24 ("[T]he Church, to whom the transmission and interpretation of Revelation is entrusted, 'does not derive her certainty about all revealed truths from the holy Scriptures alone. Both Scripture and Tradition must be accepted and honored with equal sentiments of devotion and reverence.'"), with

who rejects any claim that the common law represents a higher law, it is still the case that in the field of the common law, the text is tradition and *vice versa*.⁷⁷

Most would intuitively recognize the intimate connection between the common law as the results of cases and the common law as the tradition of applying legal rules derived from previous cases to current controversies.⁷⁸ Yet, since the late nineteenth century, many have questioned the identification of the common law with its tradition.⁷⁹ The "law and" movement beginning with sociological jurisprudence in the 1920s sought to ground the common law in something other than its own expression.⁸⁰ "The

THE CHICAGO STATEMENT ON BIBLICAL INNERANCY, *supra* note 15, at 1205 ("We deny that Church creeds, councils, or declarations have authority greater than or equal to the authority of the Bible.").

⁷⁷ See, e.g., O.W. HOLMES, JR., *THE COMMON LAW* (1881); O.W. HOLMES, JR., *THE PATH OF LAW* (1897); see also Berman & Reid, *supra* note 54, at 438 (tracing the roots of Holmes' historicism to fundamental changes in the method of English law in the late seventeenth and early-to-mid-eighteenth centuries). *But see* Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441 (1986) (arguing the priority of Holmes' positivism over his historicism).

⁷⁸ By combining these two concepts of common law, one reaches the conclusion that

[t]he central tenet of the common law is the principle of *stare decisis*: Points of law once decided in an appropriate case should not be reopened in other cases involving the same point in the same jurisdiction. . . . The principle of *stare decisis* supports the common law doctrine of precedent, which treats previously decided cases as authorities for the decision of later cases.

STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 25–26 (2d ed. 1995).

⁷⁹ Nonetheless, American jurisprudence never inflated its historical traditions to the level of an immanent consciousness in the Continental historical jurisprudence of Friedrich Karl von Savigny (1779-1861). See generally F. VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (A. Hayward trans., 1831).

⁸⁰ See, e.g., K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW & ITS STUDY* (3d ed. 1960) (assigning more credence to extra-legal considerations than sociological jurisprudence); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) (describing the common law tradition in terms of economic efficiency); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912) (advocating a self-described "sociological jurisprudence"). There has also been a critical response to the effort to ground the common law in something other than its own tradition. See, e.g., DENNIS PATTERSON, *LAW AND TRUTH* (1996) (describing legal practice as a linguistic ability and thus deflating concerns about grounding law in anything else); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (advocating a "neutral principles" approach to decision-making). Professor Stephen Feldman describes the impetus for these efforts as follows: "Whereas premodernists readily accepted God and nature as

emphasis on extralegal explanations for legal phenomena has echoed throughout the twentieth century from sociological jurisprudence at the beginning to American realism in the 1920s and 1930s and thence to the critical legal studies movement of the 1980s.⁸¹

The argument between the proponents of the self-justification of the common law and those who ground it in some other aspect of the created order seems insoluble.⁸² The mission statement of the Law School breaks the conundrum by reference to a transcendent order of truth—"the will of Almighty God." The authority of the common law is thus equivalent to tradition in theological interpretation: it is substantial and unavoidable, but not dispositive.⁸³ According to the mission statement and the Statement of Faith, God's law is the court of final authority, not the common law tradition, reason, nor any noun following "law and . . .".⁸⁴ Thus, the study of law, in the view of the

foundational sources for value and knowledge, modernists rejected religious, natural, and other traditional footings and thus searched for some alternative foundation or Archimedean point." Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1391 (1997).

⁸¹ COSGROVE, *supra* note 59, at 12.

⁸² The unabating efforts to resolve the issue between competing and mutually inconsistent justifications for the law have resulted in derisive criticism. See, e.g., Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997); Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997).

⁸³ This understanding of the relationship between the common law and the divine will appears to be consistent with that of the early students of the common law. See, e.g., BLACKSTONE, *supra* note 56, at 38–46 (describing the relationship between the law of nature and divine law, on the one hand, and positive law, including common law, on the other); see generally BOORSTIN, *supra* note 57, at 53–59 (discussing the means by which Blackstone related God's law to the common law).

⁸⁴ The mission statement reveals that it is rooted in the pre-modern. See Feldman, *supra* note 80, at 1389 ("A distinctive feature of premodernism was an abiding faith in nature or God as a stable and foundational source of meaning and value."). To be rooted in the premodern, however, does not mean a faculty member is not also part of the modern and postmodern communities. Some might question the basis on which a faculty member rooted in a premodern past with pretensions of divine hegemony on a legal issue should even be allowed a hearing in the public academic square. Two reasons consistent with the mission statement suggest themselves. First, the dialogic process described in Parts I and II of this article should temper a faculty member's assertions of absolute answers to each and every current legal issue—including contractual impossibility. Second, and more profound, the authoritative Scriptures to which the faculty member subscribes by adoption of the statement of faith provides the basis of common ground with those

mission statement, is a form of theology.⁸⁵

If the common law is the tradition of which the faculty of the Law School is a part, what should be their contribution to MacIntyre's second question: its practice? Criticism, analysis, and application stand out as the three perspectively related aspects of legal scholarship:⁸⁶ criticism in light of the will of Almighty God; analysis in terms of the historic tradition of which they are a part; and suggested applications to existing situations. These aspects of faculty scholarship can be diagrammed as follows:

in the modern and postmodern traditions: "[T]he non-Christian may have, and often does have a brilliant mind. It may act efficiently We may greatly admire such a mind for what, in spite of its basic principle and because of the fact that God has released its powers in his restraining grace, it has done." CORNELIUS VAN TIL, *THE DEFENSE OF THE FAITH* 298 (1st ed. 1955).

We must still acknowledge most in the modern and postmodern traditions are still "poised to interdict the operation of theological premises in the public square." Patrick McKinley Brennan, *Of Marriage and Monks, Community and Dialogue*, 48 *EMORY L.J.* 689, 718 (1999). Nonetheless, as Professor Brennan goes on to point out:

Dialogue . . . does not require (emergent) agreement What dialogue requires is questions and answers that interlocutors share and thus find comprehensible. Dialogue does not require answers to which everyone in the dialogue can agree. Dialogue starts and goes forward through shared questions and a willingness to live with incomplete and sometimes inconsistent answers

Id.

⁸⁵ "[I]t may be recognized that modern legal theory itself is secular theology, and that without theology we shall see very little into the nature of law . . ." Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 *GA. L. REV.* 1089, 1134 (1986). Characterization of law as a form of theology does not contradict the mission statement. The tradition of Christian theology has identified two primary forms of God's revelation to humanity: general (or natural) revelation and special revelation. Special revelation for many within the Protestant tradition is limited to the canonical Scriptures. See, e.g., *THE WESTMINSTER CONFSSION OF FAITH*, *supra* note 33, at 601-06. By contrast, general revelation "comes through observing nature, through seeing God's directing influence in history, and through an inner sense of God's existence and his laws that he has place inside every person." *GRUDEM*, *supra* note 15, at 122-23. Although general (or natural) revelation does not appear in propositional form it nonetheless reveals the same God as special revelation. Within its scope, it is as necessary, authoritative, sufficient, and perspicuous as biblical revelation. See *CORNELIUS VAN TIL, THE PROTESTANT DOCTRINE OF SCRIPTURE* 4-12 (1967). The study of natural revelation—from chemistry to jurisprudence—is thus theology.

⁸⁶ For a similar tripartite vision of the goal of legal analysis, see Berman, *supra* note 62, at 781 (observing the recent development of neo-thomistic criteria for "analyzing, interpreting, and applying" legal rules).

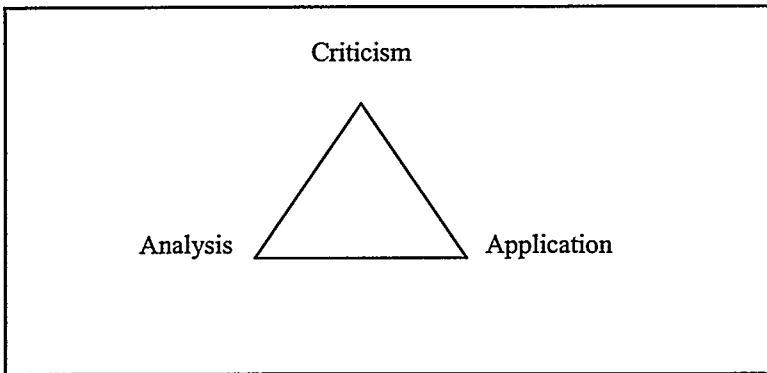


Figure 2: *Scholarship Paradigm*

The last of these perspectives on legal scholarship can take the form of suggested corrections to the way in which certain issues are currently addressed or possible approaches to newly developing states of affairs.

Finally, what are the internal goods advanced by the practices of criticism, analysis, and application within the common law? The concept of internal goods within a social practice⁸⁷ distinct from external goods is barely tenable today. The difference between internal and external goods is closely related to an underlying distinction between acknowledging people as ends or merely as means. MacIntyre describes this distinction as follows:

To treat someone else as an end is to offer them what I take to be good reasons for acting in one way rather than another, but to leave it to them to evaluate those reasons. . . . It is to appeal to impersonal criteria of the validity of which each rational agent must be his or her own judge. By contrast, to treat someone else as a means is to seek to make him or her an instrument of my purposes by adducing whatever influences or considerations will in fact be effective in this or that occasion.⁸⁸

It is this distinction that has disappeared from practice within the common law tradition among many legal scholars today. Contemporary scholars, judges, and students seem disinclined to see an appeal to objective extra-personal criteria

⁸⁷ See *supra* text accompanying note 64 (defining the term practice).

⁸⁸ MACINTYRE, *supra* note 17, at 22–23.

as constitutive of the practice of the common law tradition.⁸⁹ The modern tendency sees practice within the common law tradition as an exercise of power, simply another means by which to implement various social policy goals. "After Holmes, the law was a tool for social engineering, and the bench and bar constituted the primary social engineers. This meant that the engineers, the lawyers, were important for their role in *shaping* the ends and in *directing* society toward them."⁹⁰

MacIntyre again points out that this modern managerial approach to the law cannot help but treat persons as means rather than ends because "[b]ureaucratic rationality is the rationality of matching ends to means economically and efficiently."⁹¹ The question of the particular "ends" to which the means are to be matched is one of values. And reason alone is of no help with respect to which values the modern inheritors of the common law tradition should implement because they passionately believe that conflicts between rival value claims cannot be rationally settled; values are simply chosen. If there is no transcendent referent against which our autonomously chosen values can be measured, then "no type of authority can appeal to rational criteria to vindicate itself except that type of bureaucratic authority that appeals precisely to its own *effectiveness*. And what this appeal reveals is that bureaucratic authority is nothing other than successful power."⁹²

⁸⁹ By way of contrast, for many previous centuries, the actors in the Western legal tradition were careful to ascribe their actions in relation to "a systematic, objective, verifiable body of knowledge, a meta-law by which the legal system itself may be analyzed and evaluated." Berman & Reid, *supra* note 54, at 441.

⁹⁰ Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUT. L.J. 143, 158–59 (1998) (emphasis added) (footnotes omitted). Schutt goes on to make the interesting claim that much lawyer professional dissatisfaction arises from their inherent instrumentalist view of their client, other parties, opposing counsel, and the courts: "[A]s twentieth-century lawyers struggled with their identities as professionals, the Holmesian solutions first destroyed lawyers' distinctiveness as professionals, and then hindered their personal fulfillment by robbing the work itself of any intrinsic worth." *Id.* at 180–81 (footnote omitted); see also Dennis W. Hiebert, *The McDonaldization of Protestant Organizations*, 29 CHRISTIAN SCHOLAR'S REV. 261 (1999) (discussing the effects of bureaucratic rationalization in other previously teleologically oriented practices such as Christian missions).

⁹¹ MACINTYRE, *supra* note 17, at 24.

⁹² *Id.* at 25 (emphasis added).

Law as the exercise of power in the service of the ends of whomever employs it is fundamentally inconsistent with the aspirations of the mission statement. The reference in the mission statement to the will of God undercuts an instrumentalist view of the law. There *are* criteria by which the ends of the faculty member of the Law School are to be judged.⁹³ A synopsis of those criteria—the internal goods of the common law tradition—can be found in the familiar words of the prophet Micah: “He has told you, O man, what is good; and what does the Lord require of you but to do justice, to love kindness, and to walk humbly with your God?”⁹⁴

II. A MULTIPERSPECTIVAL APPROACH TO THE LAW

Parts I.A and I.B of this article claimed that biblical interpretation is a dialogic activity that takes place from within three perspectives: the normative (the revelation of God), the historical (the Catholic tradition), and the existential (the present community within which the interpreter lives). Then, Part I.C suggested that this dialogic model could apply equally well to legal scholars implementing the mission of the Law School. This Part will further describe the biblical basis for a multiperspectival approach to continuing the common law tradition and will illustrate its paradigmatic form.

A. *The Biblical Basis*

The reply of the prophet Micah to the people’s response to God’s summons and complaint⁹⁵ quoted above already

⁹³ The existence of “ends” toward which the faculty should strive (and not merely standards by which they can be evaluated) is implicit in the forward-looking aspects of the mission statement. A teleological criterion is crucial to a full-orbed implementation of the mission: “[I]t makes possible productive moral discourse . . . [and] reinforces the dynamic, dialogic character of law as part of human existence.” Alexander, *supra* note 85, at 1113; see also THE WESTMINSTER SHORTER CATECHISM (1647), reprinted in 3 SCHAFF, *supra* note 33, at 676 (stressing the teleological emphasis in the first question and answer: “What is the chief end of man? Answer. Man’s chief end is to glorify God, and to enjoy him forever”).

⁹⁴ *Micah* 6:8.

⁹⁵ The first eight verses of the sixth chapter of the book of Micah follow the typical רִיב (rīb) format with a summons from the Lord to Israel, see *Micah* 6:1–2, God’s complaint against his people, see *Micah* 6:3–5, the people’s answer, see *Micah* 6:6–7, and the prophet’s rejoinder, see *Micah* 6:8. Sentencing is deferred to the end of the chapter, see *Micah* 6:13–16. See generally JUAN I. ALFARO, JUSTICE AND LOYALTY: MICAH 64–66 (1989).

exemplifies a multiperspectival approach. The range of the prophet's rejoinder is far reaching and may well extend to matters outside the limited modern jurisdiction of the law.⁹⁶ At the outset, it is clear that the term used for "justice" (מִשְׁפָּט, *mišpat*) expressly denotes matters of direct legal concern.⁹⁷ Yet, the prophet understood that *mišpat* required more than bare adherence to established legal standards; it also "implic[ed] a commitment and a responsibility for the defense of the poor and the powerless"⁹⁸ consistent with the law. Thus, reference to the normative perspective in connection with modern legal questions seems well established biblically. But the other elements of the prophet's reply are also relevant to justifying a multiperspectival approach to understanding the law and implementing the normative, historical, and existential aspects of the mission of the Law School.

The direction to love kindness (רַחֲמִים, *hesed*) brings the historical (covenantal) aspect of Jewish law into the foreground.⁹⁹ The Hebrew Scriptures do not understand *hesed* as a free-standing concept. Mercy or kindness¹⁰⁰ operated in an historical context that began with God's gracious covenanting with the people of Israel at Sinai,¹⁰¹ and continued through subsequent years until the time of the ministry of the prophet

⁹⁶ The range of human life over which the law has jurisdiction is another one of the goods over which debate in the common law tradition continues to range. For a restrictive view of law's empire, see Craig A. Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 CATH. U. L. REV. 801 (1999).

⁹⁷ "Although *mišpat* encompasses a variety of meanings, it has decided judicial connotations. What is most often the topic of concern is the process governing the settling of some dispute, whether between human parties or between God and the Israelites, or the actual verdict itself." 2 NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS 1142 (Willem A. VanGemeren ed., 1997) [hereinafter NIDOTTE].

⁹⁸ ALFARO, *supra* note 95, at 69.

⁹⁹ Professor Katherine Doob Sakenfeld convincingly argues that the Scriptural use of *hesed* must be understood in the context of the overarching concept of covenant. See generally KATHERINE DOOB SAKENFELD, *THE MEANING OF HESED IN THE HEBREW BIBLE* [sic]: A NEW INQUIRY (1978).

¹⁰⁰ *Hesed* is "notoriously difficult to translate." See generally KATHERINE DOOB SAKENFELD, *FAITHFULNESS IN ACTION: LOYALTY IN BIBLICAL PERSPECTIVE* 2-4 (1985).

¹⁰¹ Usage of the term *hesed* in the Hebrew Scriptures occurs prior to the record of the description of the initiation of the Sinaitic covenant in *Exodus* 20. Yet the bulk of its occurrences are found in later Scriptures, predominantly in the *Psalms*, and its covenantal relationship is well accepted. See generally SAKENFELD, *supra* note 99.

Micah and beyond.¹⁰² There was a Hebrew tradition of *hesed*, focusing primarily on God's dealings with his people, in which the prophet would have understood its historical development and application.¹⁰³ A few prophets, including Micah, extended the tradition of *hesed* when they applied it to the obligations of God's people to each other.¹⁰⁴ There is thus a biblical basis for employing the perspective of tradition (or history) when approaching contemporary legal issues.

The prophet also brings the existential perspective of the present-day community to bear with the reply that the people of Israel and Judah are "to walk humbly with your God" (עִם-אֱלֹהֶיךָ לֶכֶת הַצַּנִּיטְ לְכָח, *hasnea' leket 'im-'eloheyka*). The Hebrew root of the infinitive construct translated "walk" (הלך, *hllk*) is the word most frequently used in the Hebrew Scriptures to describe the act or process of living.¹⁰⁵ This phrase emphasizes the perspective of the current situation. It cannot, however, be collapsed into a species of "situational ethics."¹⁰⁶ Not only is the existential only one of the three correlative perspectives addressed by the prophet, other uses of *hllk* "refer to life lived in obedience or disobedience . . . with reference to covenant standards."¹⁰⁷ Encouragement of autonomous individual human potential alone is an insufficient basis upon which to justify a legal rule. Reference to the grounds and history of that potential must also be incorporated into a perspectival analysis of the law.

¹⁰² Micah's ministry generally took place in the middle of the eighth century B.C., prior to the fall of Samaria in 722 B.C. See generally R. DILLARD & T. LONGMAN, *AN INTRODUCTION TO THE OLD TESTAMENT* 398-99 (1994).

¹⁰³ See, e.g., *Psalm* 89:2[3], 28[29], 33[34].

¹⁰⁴ It has been observed that

hesed also comes to feature in statements of the moral and ethical demands that God lays upon Israel. The charge against the northern Israelites in Hos 4:1 is that there is no faithfulness or love in the land, while, according to 6:6, God puts a higher premium on *hesed* than on sacrifice. Similarly, to love loyalty in human affairs is part of the duty that God lays upon his people (Mic 6:8).

² NIDOTTE, *supra* note 97, at 213; see also Alexander, *supra* note 85, at 1131 ("The covenant tradition points to the existence of responsibility for our actions and stands as a call for the greatest degree of human responsibility in all relationships.").

¹⁰⁵ See 1 NIDOTTE, *supra* note 97, at 1032-33.

¹⁰⁶ JOSEPH FLETCHER, *SITUATION ETHICS: THE NEW MORALITY* 43 (1966) ("In our attempt to be situational . . . we can pin another label on our method. It is *relativistic*.").

¹⁰⁷ 1 NIDOTTE, *supra* note 97, at 1033.

B. *The Perspectival Paradigm*

Knowledge of any relevant divine transcendent norms is necessary to carry out a faculty member's task of criticism, analysis, and application within the common law tradition. The various covenant arrangements by which God has related to the created order provide the normative structures in terms of which a legal scholar should seek to implement the mission of the Law School. The faculty member's understanding of those norms is subject to the qualifications described in Parts I.A and I.B of this article. Discernment of those norms nonetheless is one of the means consistent with the mission statement by which the internal goods of the common law can be advanced.

The faculty member can begin to comprehend those norms through three strands of biblical analysis: exegesis, biblical theology, and systematic theology. Exegetical theology focuses on the particular text(s) of Scripture.¹⁰⁸ The text under consideration may range from a single verse to a paragraph, book, or even the Scriptures in their entirety. What makes exegesis distinct is that the person undertaking it "must go through the text word by word or phrase by phrase, seeking the meaning of each sentence in its context."¹⁰⁹ Exegesis concentrates on the literary characteristics of the document and seeks to understand the text in light of the intention of the author and its meaning to the original audience.¹¹⁰

The term "biblical theology" may seem either pretentious or redundant. In fact, the term has a technical meaning: "that branch of theological inquiry concerned with tracing themes through the diverse sections of the Bible . . . and then with seeking the unifying themes that draw the Bible together."¹¹¹ Biblical theology is synchronic in that it seeks to discern Scriptural themes across the historical record of the

¹⁰⁸ Exegesis is a "critical interpretation of Scripture . . . that has adequate justification—lexical, grammatical, cultural, theological, historical, geographical, or other justification." CARSON, *supra* note 31, at 16.

¹⁰⁹ FRAME, *supra* note 17, at 206.

¹¹⁰ "Traditional exegesis viewed biblical interpretation as consisting of two major dimensions: the grammatical and the historical." SIDNEY GREIDANUS, *THE MODERN PREACHER AND THE ANCIENT TEXT: INTERPRETING AND PREACHING BIBLICAL LITERATURE* 49 (1988). Richard Pratt emphasizes the nature of Scripture as literature and exegeting in light of its contemporary rhetorical and literary standards. See PRATT, *supra* note 19, at 129–276.

¹¹¹ OSBORNE, *supra* note 35, at 263.

Scriptures.¹¹² It identifies elements of historical continuity as well as discontinuity over the witness of the canon. The results of exegetical theology are the building blocks of biblical theology.¹¹³ But the relationship between exegesis and biblical theology is not a one-way street. Not only is the product of exegesis the basic unit of biblical theology, but the historically identified scriptural themes also provide a context for exegesis. Biblical theology “provides the categories and overall scriptural unity behind one’s interpretation of individual passages, while exegesis provides the data collated into a biblical theology.”¹¹⁴

If exegetical theology focuses on the individual trees of the canon of Scripture, and if biblical theology focuses on growth from seedling to full-grown plant, then systematic theology¹¹⁵ (or dogmatics) focuses on the mature forest. The interpreter seeks to collate all the exegetical results with respect to a particular topic,¹¹⁶ and brings to bear a choice and arrangement of topics concerning the canonical data on a diachronic basis: “Biblical theology studies the individual themes behind the individual books and traditions within the Bible, seeking covering laws that integrate them into a holistic pattern. Systematic theology then contextualizes these into a logical and conceptual whole that reconstructs dogma for the modern period.”¹¹⁷

The topics employed, as well as their arrangement in systematic theology, are manifold.¹¹⁸ The strength of systematic

¹¹² See FRAME, *supra* note 17, at 207 (“Biblical theology studies the *history* of God’s dealings with creation. . . . It is sometimes called ‘the history of redemption’ . . .”).

¹¹³ See OSBORNE, *supra* note 35, at 265 (“The exegete studies the author’s meaning on the basis of literary considerations (grammar and thought-development) and historical background (socioeconomic), then the biblical theologian works with the results and compiles patterns of unity behind the individual statements.”).

¹¹⁴ *Id.*

¹¹⁵ In certain church traditions, the term “dogmatics” is substantially equivalent to systematic theology. See FRAME, *supra* note 17, at 311 (“*Dogmatics* is a synonym for *systematic theology*. In many contexts, the two terms are interchangeable.”).

¹¹⁶ “While exegetical theology focuses on specific passages and biblical theology focuses on the historical features of Scripture, systematic theology seeks to bring all the aspects of Scripture together, to synthesize them.” *Id.* at 212; see also GRUDEM, *supra* note 15, at 21 (“[S]ystematic theology involves collecting and understanding all the relevant passages in the Bible on various topics and then summarizing their teachings clearly so that we know what to believe about each topic.”).

¹¹⁷ OSBORNE, *supra* note 35, at 267.

¹¹⁸ Historically, with minor variations, reformed protestant scholastic

theology is its breadth and logical organization. It runs the danger, however, of de-historicizing developments within its identified set of topics over the course of the canon and ignoring those parts of the Scriptures that do not lend themselves to analytical reformulation, such as poetry and wisdom literature.¹¹⁹ A question concerning the justification of the legal doctrine of excuse on account of impossibility represents the type of issue for which systematic theology is well suited. After exegeting any relevant biblical texts and placing them in their respective redemptive-historical contexts, faculty members must derive a rule (or doctrine) in dialogue with this legal issue.¹²⁰

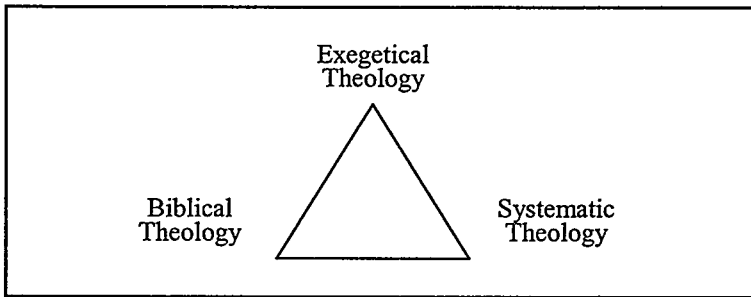


Figure 3: Theological Paradigm

Appropriation of the historic responses of the interpretive communities, both legal and theological, is the next step by which the ends of the common law tradition may be realized.

theologians have identified seven *loci* under which to arrange the data of Scripture: doctrine of God (theology proper), doctrine of man (theological anthropology), doctrine of Christ (christology), doctrine of the Holy Spirit (pneumatology), doctrine of redemption (soteriology), doctrine of the church (ecclesiology), and doctrine of the future (eschatology). See, e.g., BERKHOF, *supra* note 49; GRUDEM, *supra* note 15; 1 CHARLES HODGE, SYSTEMATIC THEOLOGY (1887); FRANCIS TURRETIN, INSTITUTES OF ELENCTIC THEOLOGY (James T. Dennison, Jr. ed. & George Musgrave Giger trans., 1992) (1696).

¹¹⁹ Compare the obvious emotional anguish described in *Psalms* 22:1[2] and 22:2[3] with the scholastic treatment of the same passage with respect to the doctrine of the covenant of redemption in BERKHOF, *supra* note 49, at 266–67 (“[T]here are passages in which the Messiah speaks of God as *His God*, thus using covenant language, namely, [*Psalms* 22:1, 22:2] . . .”).

¹²⁰ The frequently expressed prejudice against systematic or dogmatic theology is greatly misplaced: “Systematics is really a wide-open discipline. There are so many tasks waiting to be done, so many questions being asked today that have never been dealt with seriously by orthodox systematic theologians . . .” FRAME, *supra* note 17, at 213.

The authority of an interpreter's historical tradition is inescapable.¹²¹ But the use of tradition¹²² can also be justified on a normative basis. Not only do the Scriptures explicitly or implicitly justify certain beliefs, but they also "command[] us to use all diligence to discover the truth and to live by it."¹²³ The Hebrew Scriptures mandate the use of empirical data when rendering judicial decisions.¹²⁴ The Hebrew Scriptures also exemplify the use of non-canonical wisdom by their adaptation of portions of the Egyptian Instruction of Amenemopet into what became the canonical book of Proverbs.¹²⁵ The uniquely authoritative Scriptures, belief in which the faculty member is required to assent, thus warrant the use of the historical responses by his or her predecessors in the common law tradition.¹²⁶

The principal differences between the perspectives of the normative and the historical (or traditional) are their objects. The normative perspective focuses on the role of Scripture, whereas the historical perspective focuses on human culture; and the normative perspective focuses on law (imperative), whereas the historical perspective focuses on facts (indicative).¹²⁷ A secondary difference between the normative and traditional perspectives concerns their methods. The tools of elucidating the normative claims of Scripture were described above as exegesis, biblical theology, and systematic theology. The analytical tool of history¹²⁸ is the primary means of discerning what earlier

¹²¹ See *supra* text accompanying notes 24–35.

¹²² "Tradition" is only one aspect of historical knowledge, albeit one of the most important for the legal scholar. See *supra* note 39; *supra* text accompanying note 62. For other examples of normatively justified sources of knowledge, see *infra* note 132 and text accompanying notes 134–35.

¹²³ FRAME, *supra* note 17, at 128.

¹²⁴ See, e.g., *Deuteronomy* 17:6; 19:15. The New Testament Scriptures also justify the use of non-scriptural data in the process of applying canonical truth to particular states of affairs. See, e.g., 1 *John* 4:1; *Matthew* 18:16 (quoting *Deuteronomy* 19:15); 1 *Thessalonians* 5:21; 1 *Timothy* 5:19.

¹²⁵ The scholarly consensus has concluded that the "sayings of the wise," *Proverbs* 22:17–24:34, integrated the earlier Egyptian source into Proverbs. See, e.g., DILLARD & LONGMAN, *supra* note 102, at 240–41; D. KIDNER, *THE WISDOM OF PROVERBS, JOB, AND ECCLESIASTES* 44–45 (1985).

¹²⁶ See *supra* text accompanying note 84 (providing a general discussion of the concept of general (or natural) revelation).

¹²⁷ See generally FRAME, *supra* note 17, at 140.

¹²⁸ "History" is an ambiguous term. It can refer to events in the past as well as to a record or interpretation of the past. See R. NASH, *CHRISTIAN FAITH AND HISTORICAL UNDERSTANDING* 12–13 (1984).

students of the law or theology have said or done with respect to a particular issue.¹²⁹ History should be more than a simple chronicle of past events; it should aim to provide an intelligible narrative of the past that has meaning today.¹³⁰ In order for any sort of meaningful dialogue to occur, those who seek to criticize, analyze, and apply must know what has been said about a topic such as contractual impossibility so they can understand what our contemporary words and practices mean. The results of meaningful historical research also have a normative function because that perspective

rests on the premise that certain long term historical experiences of a people lead it in certain directions and, with respect to law that the past times through which the legal institutions of a people have developed *help to determine the standards* according to which its laws should be enacted and interpreted¹³¹

Much of the resources for the historian's work is made up of written records that can be used as a primary resource.¹³² To analyze the legal activities of societies where no written proceedings exist, the tools of cultural anthropology and archeology must be used.¹³³ Each of these three disciplines can

¹²⁹ See FRAME, *supra* note 17, at 302-05.

¹³⁰ "[History is] the attempt to reconstruct in a significant narrative the important events of the human past through a study of the relevant data available in the historian's own present experience." NASH, *supra* note 128, at 14; see also Berman, *supra* note 62, at 800 ("When we say 'history' we mean something more than chronology. We mean not merely change but patterns of change, implying direction in time, which in turn implies either purpose or fate.").

¹³¹ Berman, *supra* note 62, at 795 (emphasis added). Professor Berman's high regard for history is not inconsistent with either the mission statement or the Statement of Faith if the faculty member takes seriously the Scriptural doctrine of providence. See, e.g., UNITED STATES CATHOLIC CONFERENCE, *supra* note 14, at 80 ("The witness of Scripture is unanimous that the solicitude of divine providence is *concrete and immediate*; God cares for all, from the least things to the great events of the world and its history. The sacred books powerfully affirm God's absolute sovereignty over the course of events."); THE WESTMINSTER CONFSSION OF FAITH, *supra* note 33, ch. 5.1, at 612 ("God the great Creator of all things doth uphold, direct, dispose, and govern all creatures, actions, and things . . .").

¹³² "Aside from direct knowledge of an event by an eyewitness, or a firsthand investigation on the scene through interviews, laboratory or fieldwork, or the study of relics, the shortest path to the facts is library research." JAKUES BARZUN & HENRY F. GRAFF, THE MODERN RESEARCHER 61-62 (4th ed. 1985).

¹³³ For an example of the usefulness of archeological studies in the law, see Diana M. Liverman, *Vulnerability and Adaptation to Drought in Mexico*, 39 NAT'L RESOURCES J. 99 (1999) (discussing forms of past and present responses to drought in northern Mexico); see also Native American Graves Protection and Repatriation

elucidate the responses of various human traditions to a contemporary legal issue. The relationship among these tools for the perspective of the historical can be diagrammed as follows:

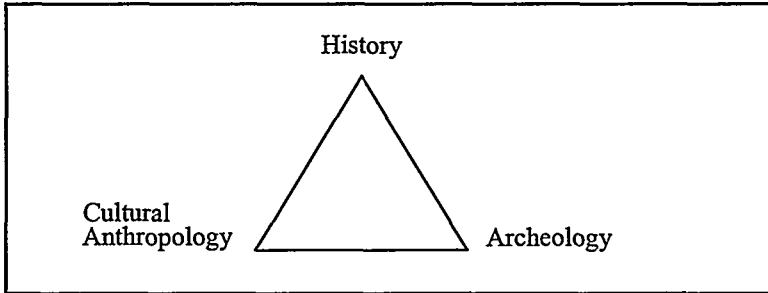


Figure 4: Historical Paradigm

The perspective of the current community (or existential perspective) is the third viewpoint from which a faculty member must consider contemporary legal issues. The faculty member must take into account the “felt needs” of the times and the current responses of the community of legal scholars (lawyers, academics, and judges) to those needs in their service of criticism, analysis, and application. The current community, however, represents more than what other legal scholars say about a legal issue. It includes the results of all forms of analysis, except the normative perspective of theology and the traditional perspective disclosed in history and its cognates. The tools of analyzing the current state of affairs include the various sciences, such as economics, psychology, and sociology,¹³⁴ as well

Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013 (1994)). The Native American Graves Protection and Repatriation Act is an example of legislation by which Congress attempted to resolve the conflict between the interests of archeology and anthropology on the one hand, and the current manifestation of the Native American historical tradition on the other. For an interesting recollection of the relationship of anthropology and the Uniform Commercial Code, see K. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (discussing the use of anthropological studies of the Cheyenne in the 1930s and subsequent utilization of arguably empirical studies of business practices in drafting Article 2 of the Uniform Commercial Code).

¹³⁴ The recently self-identified approach of socio-economics has attempted to bridge the gap between neoclassical law and economics and other social science perspectives on human behavior. See, e.g., Robert Ashford, *Socio-Economics: What is its Place in Law Practice?*, 1997 WIS. L. REV. 611 (offering an overview of socio-economics).

as philosophy, logic,¹³⁵ and language and literary studies.¹³⁶ The Scriptural references noted above in connection with the perspective of tradition¹³⁷ equally justify the use of data drawn from current studies by a faculty member seeking to fulfill the mission of the Law School. An approach to the existential perspective of the faculty's task can be diagrammed as follows:

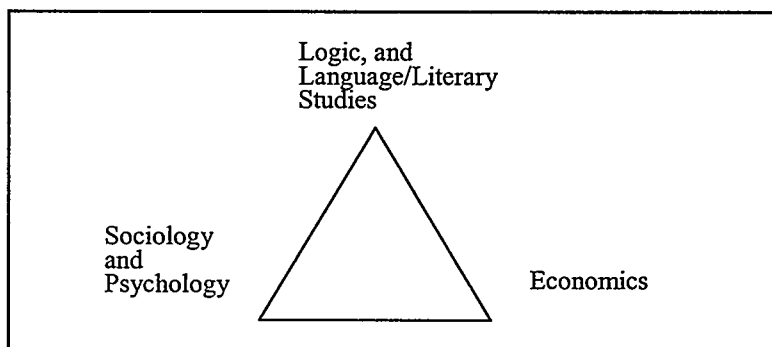


Figure 5: Existential Paradigm

¹³⁵ Some might question placing logic among the tools of existential rather than with the means of analysis of the normative. To do so would violate the statement of the nature and extent of biblical authority described earlier. See *supra* note 14. It is the Scriptures which justify logic, not vice versa:

Logic is a law of thought . . . but as such is subordinate to Scripture . . . It is Scripture that warrants our use of logic, not the other way around. . . . [L]ogic is in a position similar to linguistics and history—a discipline that . . . ought . . . to govern our thinking about Scripture but information that itself is subject to biblical criteria.

FRAME, *supra* note 17, at 243.

¹³⁶ See FRAME, *supra* note 17, at 215–318. Examples of the use of literary theory in analyzing the law are substantial. See, e.g., Jonathan Boyarin, *The Legacy of Lochner: Law, Literature, and the Resurrection of Contract*, 24 L. & SOC. INQUIRY 195 (1999) (providing an extended review essay covering three books dealing with late nineteenth century contract jurisprudence from the perspectives of traditional legal analysis, philosophy, and literature); Barbara A. Fure, *Contracts As Literature: A Hermeneutic Approach to the Implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements*, 31 DUQ. L. REV. 729 (1993) (arguing that judicial imposition of the doctrine of the duty of implied good faith is misguided and that courts should work harder to discover the parties' intent by using all relevant evidence, including that which is outside the "four corners" of the contract).

¹³⁷ See *supra* text accompanying notes 121–32.

III. CONTRACTUAL IMPOSSIBILITY: GLANCES AT THE PERSPECTIVES

Legal scholars would acknowledge the venerable history of the doctrine of impossibility as well as the existence of a modest current debate on the topic.¹³⁸ Some, however, even from within the Christian tradition, would question whether there are any non-trivial norms revealed in the Hebrew or Christian Scriptures relevant to contractual impossibility. If this point of view is correct, how can a faculty member at the Law School actually begin to implement the multiperspectival approach to legal analysis portrayed in Part II of this article?

The identification of normative standards relevant to contractual impossibility is not as bleak as might first appear. Operating consistently with the mission of the Law School, 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 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,¹³⁹ 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 promise¹⁴⁰ and particularly those instances when God does not carry out a threatened judgment due to an intervening contingency operating as an implicit condition.¹⁴¹

The traditional or historical perspective on contractual impossibility could start with the Roman law and progress through the medieval and early modern period.¹⁴² Attention

¹³⁸ See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 494-537 (4th ed. 1998); E. ALLAN FARNSWORTH, *CONTRACTS* 637-67 (3d ed. 1999); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 115-21 (5th ed. 1998); see also *infra* notes 144 and 150.

¹³⁹ See generally K.A. KITCHEN, *ANCIENT ORIENT AND OLD TESTAMENT* 90-102 (1966); MEREDITH G. KLINE, *BY OATH CONSIGNED* 13-38 (1968).

¹⁴⁰ See, e.g., 1 *Samuel* 25:9.

¹⁴¹ See, e.g., 1 *Kings* 21:17.

¹⁴² Talmudic and Islamic sources may also be helpful. See, e.g., Edward L. Glaeser & Jose Scheinkman, *Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 *J.L. & ECON.* 1, 23 (1998).

should be given to original archival research from a range of sources—theological, historical, and legal.¹⁴³ This historical perusal must not be an end for itself. Instead, it should form part of the intellectual collage by which the faculty member can contribute to the goods of the common law tradition: criticism, analysis, and application.¹⁴⁴

Finally, the insights of current neoclassical economic analyses of the law¹⁴⁵ and their more sociologically nuanced contemporaries¹⁴⁶ must be considered. The issue of contractual impossibility should be considered in light of the views of those who seek to justify contract law as either an exercise of individual autonomy¹⁴⁷ or as an extension of the right of property.¹⁴⁸ The broad relational approach to contract law¹⁴⁹ as well as the specific polyvalent approach to legal conundrums articulated by feminist legal scholars can also provide a fruitful platform of analysis.¹⁵⁰ No insight into the state of affairs

¹⁴³ This is certainly not to denigrate use of secondary sources. There are several excellent secondary sources that address the historical development of contract law in general and give some attention to impossibility in particular. *See, e.g.*, BERMAN, *supra* note 50; JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991); A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* (1975). Consideration of "archeological" resources such as records of judicial and non-judicial dispute resolution mechanisms from the earliest times available should also be considered.

¹⁴⁴ For an example of what an analysis of a doctrine similar to contractual impossibility from the historical perspective might look like, see Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663 (1998). For an analysis of the history of contractual impossibility in England, see John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 GEO. L.J. 1575 (1987).

¹⁴⁵ *See, e.g.*, Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311 (1982); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

¹⁴⁶ *See supra* text accompanying note 134.

¹⁴⁷ *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

¹⁴⁸ *See, e.g.*, RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984) (reviewing E. ALLAN FARNSWORTH, *CONTRACTS* (1982)).

¹⁴⁹ *See* IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

¹⁵⁰ *See, e.g.*, Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992) (criticizing the

denominated as contractual impossibility from the current community of legal scholars can be rejected out of hand.¹⁵¹ Conversely, no faculty member acting consistently with the mission statement can allow such a contemporary analysis of impossibility to trump any normative claims of the Scriptures on the topic.¹⁵²

CONCLUSION

The references in Part III of this article exemplify how a faculty member at the Law School could implement at least two of the aspirations of the mission statement. Through the FLIC Report, the University has outlined several approaches to the integration of the Christian faith and academic study. The Institutes Focus explicitly brings the Scriptures and tradition to bear on legal topics. This article seeks both to justify and describe a more detailed model by which this insight of the FLIC Report can be used to implement the mission statement. Of course, whether a multiperspectival approach to contractual impossibility will actually produce a result furthering that mission remains to be seen: "wisdom is justified by her children."¹⁵³ Nonetheless, the Scriptural and analytic bases argued above establish sufficient grounds to pursue this avenue.

single-minded classical law and economics approach from the vantage point of the virtue of considering an issue in terms of multiple, relational values).

¹⁵¹ For a comparable assertion in the narrower context of theology, see FRAME, *supra* note 17, at 314 ("[A]ll sciences help us to apply and therefore to interpret Scripture.").

¹⁵² See *supra* note 12 for the Statement of Faith required of all faculty members at the Law School; see also FRAME, *supra* note 17, at 316; *supra* text accompanying notes 14–17. "[I]f, after reflection, I determine that my original interpretation of Scripture [including Scriptural norms relating to contractual impossibility, if any] was correct and that still conflicts with the apparent results of [contemporary legal analysis], then I must follow Scripture." FRAME, *supra* note 17, at 316.

¹⁵³ *Matthew* 11:19.

